International Courts and Legal Innovation: The Politics and Practices of Interpretation in International Criminal Law



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Abstract

In international criminal law (ICL), legal meaning has been developed substantially through the judgments of international courts. Compared to some of their prosecutorial decisions, however, the way in which international judges have interpreted legal provisions has remained relatively uncontested. This study uses practice theory as a particularly fruitful lens through which to study the politics of legal interpretation. It analyses the conditions under which the creation of a comparatively uncontested judicial space became possible as an interplay between political commitments and the professional assumptions of ICL experts. The study argues that international criminal courts – unlike hybrid courts – have been accorded a particularly high degree of interpretive authority through what will be called the 'practice of privileged precedent.' It traces how this interpretive practice has been shared across institutional settings within a broader interpretive community, including by government officials and civil society representatives. Through this research, this thesis emphasises the relevance of legal interpretation for IR's understanding of international law and international courts. Drawing on legal theory, it also addresses one of the key challenges of IR's practice turn: its capacity to account for the creative potential of international practices.

Methodologically, the thesis combines qualitative and quantitative forms of content analysis, elite interviews, and legal interpretive methods. It is based on an examination of over 100 judgments of international and hybrid criminal courts interpreting the crime of genocide and the law of war crimes, including judicial decisions delivered by the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). This analysis is supplemented by 28 elite interviews with judges and legal experts at international criminal courts, staff at civil society organisations, and government officials working for the British and German foreign offices.

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Chapter 1

Introduction

Among international lawyers, it is widely accepted that the substantive and procedural rules and principles of international criminal law (ICL) have been developed significantly by international courts and tribunals.[1] Indeed, as Antonio Cassese argued, "[i]t is mainly due to judicial decisions that ICL is progressing so rapidly."[2] Many of these developments have gone beyond minor legal technicalities. Instead, they include, for example, the interpretation of the elements of international crimes that delineate which behaviours may amount to genocide or war crimes.[3] Another area of substantial development has been the law on forms of liability, outlining under which circumstances an individual may be held responsible for these crimes. For example, the jurisprudential development of the law of command responsibility, which outlines the conditions under which military commanders may be held responsible for crimes committed by their subordinates, has been described as a "quiet earthquake."[4]

Despite the at times substantial character of these developments, they have long remained relatively uncontroversial and depoliticised. Instead, and at least among international lawyers, these developments are frequently portrayed in a comparatively favourable light. The judges in charge of this development often see these jurisprudential developments as one of their most important accomplishments, and as part of their legacy.[5] In the words of Erik Møse, former President of the International Criminal Tribunal for Rwanda (ICTR), as "an abundance of substantive and procedural law has emerged" at the court, "[c]reating [j]urisprudence" has been

[1] On judicial innovation at the *ad hoc* Tribunals specifically, see, for example, Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010).
[2] Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), p. 9.
[3] For an in-depth discussion of the jurisprudential development of these two crimes, see chapters three and four, pp. 74-132.
[4] Cryer, "The *Ad Hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy (Oxford: Oxford University Press, 2010).
[5] Nicola Palmer's research on the ICTR, conducted in 2008, first pointed to such a view. See Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: Oxford University Press, 2015), p. 61. Seven years later, it was also echoed in interviews conducted with judges at the ICTY, the ICC, and the SCSL for this project. Interviews with Judge F, Judge at the ICTR, 25 November 2015, phone interview; Judge B, Judge at the ICTY, 9 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames (highlighting also, however, especially the SCSL's outreach, victim protection, and training programmes).

an important achievement of the ICTR.[6] Consequently, the jurisprudential development of ICL is a popular topic for public lectures among international criminal judges,[7] indicating these judges themselves think it is a topic sufficiently uncontroversial and apolitical so as to not interfere with their judicial role. And while the academic legal debate was long dominated by the perception of the jurisprudential development of ICL as "progressive," emphasising a strong normative dimension, many of the textbooks and commentaries in ICL in large part read like a summary of case law.[8]

Such a comparatively uncontroversial development of legal content emerged in the context of two interrelated trends in world politics. The first of these trends has been a new prominence of international courts in international relations. During the post-Cold War era, the number of international courts and quasi-judicial mechanisms has risen from only a handful to about 100 worldwide.[9] In ICL alone, a complex institutional structure of different types of international and hybrid criminal courts emerged in the early 1990s with the creation of the *ad hoc* Tribunals, the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY). Several hybrid courts combining domestic and international legal elements followed, including the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). By 2015, the time during which most of the interviews for this project were conducted, the International Criminal Court (ICC) had begun to substitute this previous institutional structure, as the work of not only the SCSL, but also the *ad hoc* Tribunals gradually came to an end.[10]

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[6] Møse, "Main Achievements of the ICTR," *Journal of International Criminal Justice* 3, no. 4 (2005): pp. 934, 936.

[7] See, for example, Judge Liu Daqun, Judge at the ICTY, "Contribution of the United Nations ad hoc Tribunals to the Development of International Criminal Law," Peter Allan Memorial Lecture 2015, The University of Hong Kong, Faculty of Law, 1 April 2015; and Judge Chile Eboi-Osuji, Judge at the ICC, "Reading the Rome Statue as an Organic Instrument," lecture convened by Oxford Transitional Justice Research and Oxford's Public International Law Group, University of Oxford, All Souls College, 3 November 2016.

[8] In the words of Darcy and Powderly, for example, "[o]ne of the most significant and more tangible achievements of the *ad hoc* Tribunals has been their progressive development of the rules, scope, and content of substantive and procedural international criminal law." Darcy, "Introduction," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy (Oxford: Oxford University Press, 2010), pp. 1-2. For a particularly critical voice on this development, see Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), pp. 129-34. See also Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice," *Journal of International Criminal Justice* 11, no. 3 (2013). More critical scholarship has emerged recently. See, for example, Schwöbel, ed. *Critical Approaches to International Criminal Law: An Introduction* (Abingdon: Routledge, 2014).

[9] See Project on International Courts and Tribunals, *The International Judiciary in Context, Synopsis 2004*, www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (accessed 25 January 2017).

[10] The SCSL closed in 2013. Beginning in July 2012, the remaining functions of the *ad hoc* Tribunals were gradually transferred to the Mechanism for International Criminal Tribunals (MICT).

In addition to this institutional development, these new international courts have also created a growing body of case law that developed legal meaning in international law. Indeed, Armin von Bogdandy and Ingo Venzke recently diagnosed judicial law-making to be "omnipresent" within several subfields of international law, ranging from international investment law to international human rights law.[11] Beyond institutional changes to the structure of the international legal order, such a broader prevalence of substantive legal change through international jurisprudence also points to a further implication: That with the emergence of an increasing number of international courts, the process through which legal meaning is produced and developed in international law has also shifted.

For research in the disciplines of International Relations (IR) and International Law (IL), these two interrelated trends raise important questions regarding the embeddedness of these interpretive developments within the broader structure of global governance, and on how and why such a change in legal meaning through international jurisprudence has been possible. In a situation in which international judges assume that their jurisprudence constitutes an important part of a court's legacy, the question emerges as to how far these courts have indeed contributed to global governance more broadly by developing legal meaning beyond individual cases. After all, it may well be that, for example, their highly specialised and, for non-experts, relatively impenetrable jurisprudence on ICL has been of little relevance outside the courtroom.

Furthermore, such a widespread judicial development of legal meaning also raises important questions as to how to understand the relationship between international courts, states, and other international actors. Arguing that international courts have gained a comparatively high degree of autonomy *vis-à-vis* states, Karen Alter described how the creation of international courts has created a legal-political sphere in which political actors have to resort to legal arguments to convince international judges.[12] My project traces how in the case of ICL, such a legal space has been constructed at the intersection between legal expertise and political commitments. It argues that the relatively uncontroversial and authoritative character of judicial decisions is actively constructed and reconstituted through the interpretive practices

[11] Von Bogdandy and Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," in *International Judicial Lawmaking*, ed. Von Bogdandy and Venzke (Heidelberg: Springer, 2012), p. 5. See also, for example, Schill, "System-Building in Investment Treaty Arbitration and Lawmaking," ibid., ed. Von Bogdandy; Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," ibid.; Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights," ibid.

[12] This is what Alter has called "rhetorical politics." Alter, "Agents or Trustees? International Courts in Their Political Context," *European Journal of International Relations* 14, no. 1 (2008): p. 42.

not only of civil society organisations intent on promoting international justice, but also by governments seeking to shield international criminal justice from criticism by less supportive states.

The remainder of this introduction proceeds in four steps. The following section outlines the research questions and main arguments of the study. The chapter subsequently situates these arguments first within the broader IR and International Law (IL) literature, and then more specifically within IR's practice turn and recent work on interpretive communities. The chapter subsequently turns to a discussion of the methodology and research strategy of this project, and concludes with a chapter overview.

1.1. Research Question and Argument

The politics of legal interpretation can best be understood through the lens of communities of practice, and interpretive communities more specifically. As will be explained in-depth in chapter two, communitarian approaches drawing on these two interrelated concepts have become increasingly popular as part of the practice turn in International Relations (IR), as well as in legal research analysing international law's epistemic bases.[13] In this study, interpretive communities are conceptualised as epistemic groups sharing a common identity and area of expert knowledge, in this case legal expertise in the field of ICL.[14] Within such a community, epistemic knowledge is enacted and re-constituted through a set of interpretive practices that aim at determining legal content. In line with IR's recent practice turn, practice is therefore not understood as state practice in a legal sense, that is, as one of the core elements of customary law.[15] Instead, practices are conceptualised as "competent performances," or, in this case, interpretive actions that satisfy deeply ingrained standards of legal interpretation shared within a community of legal experts.[16] It is on the basis of these shared standards, or "background

[13] As just a selection of examples, see especially Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Abingdon: Routledge, 2005); Adler and Pouliot, *International Practices* (Cambridge: Cambridge University Press, 2011); Johnstone, *The Power of Deliberation: International Law, Politics and Organization* (Oxford: Oxford University Press, 2011); D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation* (Cheltenham: Edward Elgar, 2015).
[14] See similarly especially Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, pp. 22-24. On interpretive communities more specifically, see also, for example, Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, pp. 33-41. For a detailed discussion of how the terms interpretive communities and interpretive practices are conceptualised for the purposes of this study, see chapter two, pp. 48-61.
[15] I am grateful to Dapo Akande for discussions on this aspect of my earlier work.
[16] Adler and Pouliot, "International Practices: Introduction and Framework," in *International Practices*, ed. Adler and Pouliot (Cambridge: Cambridge University Press, 2011), p. 6.

knowledge," that interpretations suggested by members of this community are judged as valid or not, a process which can be researched empirically.[17]

Based on this approach, this project asks: *How has the meaning of legal rules and principles of ICL developed through the international practices of legal interpretation?* To answer this question, this research will focus on two subquestions:

1. *Through which interpretive practices has the meaning of the legal rules and principles of ICL developed?*
2. *What are the boundaries of the relevant community of practice? Have some groups within or outside of this community been empowered vis-à-vis others through the practices of legal interpretation in ICL? If so, how?*

As an important consequence of such an approach, this study goes beyond a state-centric focus analysing the way state officials engage with – or states delegate decision-making power to – international courts. Instead, it traces the boundaries of a broader interpretive community that includes not only judges and state officials, but also international court and civil society organisation staff, as well as legal scholars. To identify specific interpretive practices, this analysis is preceded by an examination of the judicial development of two legal provisions as in-depth case studies, namely the crime of genocide and the law of war crimes.

This research begins by drawing on legal theory to theorise how interpretive practices in ICL may lead to innovation in legal meaning. I argue that it is not change within interpretive practices themselves that leads to normative innovation, but the specific character of the shared assumptions on which these practices are based that allows for legal creativity. More specifically, I distinguish between three 'triggers' of legal flexibility, based on clusters of shared underlying assumptions on the character of legal provisions and the process of legal interpretation: (a) ambiguity in the phrasing of legal provisions; (b) a higher degree of legal flexibility provided by specific types of legal provisions; and (c) the potential for creativity that is rooted in the legal reasoning process itself. Within the interpretive practices of ICL, I suggest that these three 'triggers' allowed for innovation in legal meaning based on the re-enactment of shared background assumptions on, for example, how customary and treaty law should be interpreted. Legal theory – as well as the rules of interpretation in international law – are

[17] Ibid., p. 16. See also, for example, ibid., pp. 7-8; D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 22-27.

therefore understood as part of the practices of legal interpretation, and as an indication of the assumptions shared by international lawyers that underlie the interpretive practices of ICL.

In ICL, these three 'triggers' of legal flexibility were intensified by the specific character of the legal field, which provided judges with considerable latitude. As a first aspect, potential ambiguities resulting from imperfection in a legal provision's phrasing became particularly relevant when considering the comparative youth of the field, which resulted in a comparatively rudimentary legal framework. As the interviews conducted for this project reveal, the initial years after the *ad hoc* Tribunals were created in particular were thus seen as a time during which some of the most important case law developments took place.[18] But even the Rome Statute system, which is considerably more complex than the Statutes of the ICTR and the ICTY, was described as filled with gaps and inconsistencies by the judges and legal officers interpreting it on a daily basis.[19] As a judge at the SCSL recalled, with regard to some legal questions, "there was nothing to alter or to modify, there was nothing in international law."[20]

Regarding the distinction between different types of legal provisions, it is the non-codified nature of customary law, particularly prominent in the law of war crimes, that – through the additional interpretive step of identifying state practice and a corresponding conviction that this practice reflects legal principles (*opinio juris*) – provided considerable interpretive latitude. For example, in the *Galić* Appeals judgment, the ICTY held that a crime of terror against the civilian population existed in customary international law at the time the crime was committed and incurred individual criminal responsibility.[21] The majority reached this conclusion despite the pointed warning of Judge Schomburg that "[i]t would be detrimental … if our jurisprudence gave the appearance of inventing crimes."[22] Judge Schomburg's concerns, however, seem to have been unfounded, at least regarding the judgment's endorsement by the ICL expert community: during one of the interviews conducted 10 years after this judgment was rendered, one of the court's legal officers referred to the ICTY's definition of terror as a potentially

[18] Interviews with legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[19] Interviews with Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague; Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague; legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[20] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[21] See *Galić* Appeals Judgment, ICTY, paras. 86, 98.
[22] *Galić* Appeals Judgment, ICTY, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 21.

valuable contribution to the ongoing international debate on the definition of terrorism.[23] As a final point, the jurisprudential development of the crime of genocide illustrates that even a comparatively 'precise' treaty provision may undergo substantial interpretive development. Instead, international and hybrid criminal courts were provided with a relatively high degree of legal flexibility based on shared professional assumptions regarding, for example, the interpretive weight attributed to the negotiation documents (*travaux préparatoires*) of international treaties.

Instead of highlighting the routinized character of international practices, the interpretive practices of international law are thus depicted as a process of structured evaluation and innovation based on underlying assumptions on legal interpretation shared by a group of legal experts. Based on this theorisation of legal content change, the practice of *privileged precedent* is identified as key to the development of legal meaning through the interpretive practices of ICL. In this practice, legal practitioners routinely refer to interpretations suggested by a specific sub-set of authors within the interpretive community for authoritative interpretations of ICL. Within this context, the interpretations suggested by international criminal courts are accorded a particularly high level of interpretive authority. As the interviews show, the judges and legal officers working at these courts expected their jurisprudence would set an interpretive standard applicable beyond individual cases. For example, one of the legal officers at the ICTY even recommended that military lawyers should follow the court's jurisprudence to keep up-to-date with changing legal standards.[24] Interestingly, interviews conducted with legal staff at the German and British foreign office revealed that they would indeed follow the jurisprudence of these courts closely, not only to report on recent developments, but also when interpreting the meaning of international crimes or more generally as part of what they perceive to be their professional responsibility.[25]

This research differs substantially from a conventional legal, more doctrinal analysis of the sources of ICL and the role of precedents in international law. Instead of providing a formal account of the primary sources of international law based on Article 38(1) of the Statute of the

[23] Interview with Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague.
[24] Ibid.
[25] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer B, 12 February 2016. Similarly FCO officer C, 19 April 2016; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.

International Court of Justice (ICJ),[26] this study is based on an empirical analysis of the legal interpretations international lawyers referred to in practice. Indeed, such an approach allows for – and traces empirically – a divergence between formal rules of interpretation and how these rules were implemented in practice. For example, while I argue that international courts have been accorded a particularly high level of interpretive authority, judicial decisions only qualify as a "subsidiary means for the determination of rules of law" according to Article 38(1)(d) of the Statute of the ICJ. This research therefore adds to recent empirical analyses of citation patterns at international courts, and to calls for additional research that analyses legal validity empirically.[27]

In addition to examining the practices of legal interpretation through an empirical, instead of doctrinal lens, this study also broadens the scope of analysis to investigate how this jurisprudence was received by a broader ICL interpretive community beyond international courts. A more conventional analysis of the jurisprudence of international courts would typically only analyse the decisions of international courts themselves, not how these decisions were received outside of the strictly judicial context.[28] However, by broadening the scope of analysis beyond international courts, this research examines not only the content, but also the relevance of jurisprudential developments. Indeed, the more doctrinal analyses by international legal scholars themselves became part of the empirics researched in this study.

Based on this more empirical approach and broader scope, the practice of privileged precedent ultimately illustrates the hierarchical character of the interpretive process in ICL, which is constructed and re-enacted by a community of legal experts. Within ICL's interpretive community, it is international courts – unlike hybrid courts – that are referred to particularly often, and that are therefore extraordinarily well-placed to set new interpretive standards in the field. At the same time, the interviews conducted with judges and legal officers working for international criminal courts suggest that they are often hesitant to refer to the jurisprudence of

[26] According to a more doctrinal account, the sources of ICL are identical to the ones listed in Article 38(1) of the ICJ Statue. See Akande, "Sources of International Criminal Law," in *The Oxford Companion to International Criminal Justice*, ed. Cassese (Oxford: Oxford University Press, 2009), pp. 41, 43.
[27] See, for example, Voeten, "Borrowing and Nonborrowing among International Courts," *The Journal of Legal Studies* 39, no. 2 (2010); Lupu and Voeten, "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights," *British Journal of Political Science* 42, no. 2 (2012); Borda, "Appraisal-Based and Flexible Approaches to External Precedent in International Criminal Law," *Leiden Journal of International Law* 28, no. 3 (2015); v. H. Holtermann and Rask Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible," ibid., no. 2.
[28] See, for example, Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals*.

hybrid tribunals, which was perceived as less applicable and less nuanced.[29] In addition, citations to the *ad hoc* Tribunals are highly controversial at the ICC,[30] indicating change in the interpretive practices of ICL themselves over time (in this case with the establishment of the ICC). The ICC thus added another layer of hierarchy within the practice of privileged precedent. It remains unclear whether the same distinction was also reflected by the way in which lawyers working for the German and British foreign office engage with the case law of these courts. Nevertheless, the creation of a new legal officer position at the British embassy in The Hague after the Rome Statute entered into force suggests that the ICC as an institution, but also as an institution generating jurisprudence, has received more attention than the *ad hoc* Tribunals and the hybrid courts.[31]

Finally, this research also accentuates some of the conditions under which a relatively depoliticised judicial space in which these jurisprudential developments occurred has been constructed. In the case of the United Kingdom and Germany, their political commitment to supporting international criminal justice as a broader political project *vis-à-vis* more critical states entailed that government lawyers would be unlikely to actively contribute to the interpretive process. As an officer of the European Union's European External Action Service (EEAS**)** explained, reaffirming the ICC's jurisprudence constitutes part of the EEAS's diplomatic commitment to strengthen the court,[32] instead of criticising judicial decisions as part of the process of assessing an interpretation's legal validity. Similarly, especially in the initial years after the Rome Statute entered into force, rather than engaging with it critically, civil society representatives saw the dissemination of key elements of the ICC's jurisprudence as integral to their work.[33] More than 10 years later, staff at civil society organisations working on international justice typically focus on a specific sub-set of legal questions, such as the ICC's interpretations on reparations or the representation of victims,[34] which further limits their potential for contesting the court's jurisprudence.

[29] Interviews with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague (on the former point).
[30] Interviews with legal officer F, legal officer at the ICC, 5 December 2015, The Hague; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (referring to controversies especially during the ICC's initial years); legal officer D, legal officer at the ICC, 1 December 2015, The Hague (emphasising that the ICC does not necessarily follow the jurisprudence of the *ad hoc* Tribunals).
[31] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague (indicating that the position of a legal adviser at the British Embassy in The Hague was created when the ICC was established).
[32] Interview with EEAS officer, 27 January 2016.
[33] Interviews with NGO representative D, 10 December 2015; NGO representative C, 9 December 2015.
[34] Interviews with NGO representative B, 7 December 2015; NGO representative A, 4 December 2015.

As a consequence, international criminal courts and tribunals were provided with a comparatively high level of autonomy that allowed them to push for normative developments.[35] In this context, I also emphasise some of the conditions that made the construction of a legal space, wherein the interpretations of international courts have remained comparatively uncontroversial, possible. In particular, interviews with government representatives illustrate how the construction of such a relatively depoliticised legal space is in itself part of a diplomatic effort to shield international courts from criticism, which emphasises the political character of this process. As a consequence, this research also highlights the fragility of this depoliticised legal sphere, which remains dependent on the political commitment of government actors and civil society representatives. The following discussion outlines more in-depth how this argument resonates with recent research in IR and IL on international courts and legal interpretation, and with IR's practice turn and research on interpretive communities in particular.

1.2. Legal Interpretation, International Courts, and IR/IL Scholarship

Legal interpretation and the potential development of legal meaning outside of formal treaty amendments have not been central to rationalist scholarship on international law and international courts. In particular, much of IR's rationalist research agenda on international law has traditionally focused on the concept of compliance, and questions of whether, how and to which extent international law affects state behaviour.[36] Due to this emphasis on the influence of international law on state behaviour, the question of what it is that states are supposed to comply with is often of secondary relevance.[37] Instead, as Robert Howse and Ruti Teitel argued, such approaches "start with an assumed stable and agreed meaning to a rule, and

[35] I am grateful to Andrew Hurrell for his insightful comments that shaped my thinking on this section.

[36] This emphasis on state behaviour was also observed by Raustiala and Slaughter. See Raustiala and Slaughter, "International Law, International Relations and Compliance," in *Handbook of International Relations*, ed. Carlsnaes (London: Sage, 2002), p. 539. For an overview (and critique) of this literature, see Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law," *Michigan Journal of International Law* 19, no. 2 (1998); Raustiala and Slaughter, "International Law, International Relations and Compliance."; Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy* 1, no. 2 (2010); Brosig, "No Space for Constructivism? A Critical Appraisal of European Compliance Research," *Perspectives on European Politics and Society* 13, no. 4 (2012): (specifically on compliance research on European integration).

[37] As examples, see Guzman, "A Compliance-Based Theory of International Law," *California Law Review* 90, no. 6 (2002); Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), pp. 112-55 (focusing on domestic explanations of compliance with human rights treaties). For a more nuanced account that views the role of interpretation as a potential "self-adjusting mechanis[m]" responding to an alteration of states' interests, see Chayes and Chayes, "On Compliance," *International Organization* 47, no. 2 (1993): pp. 184-85. Koskenniemi similarly observed that there is nothing "distinctly legal in the interest of 'explaining compliance'. Instead, the relevant question always concerns *what there is to comply with in the first place*." Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," *International Relations* 26, no. 1 (2011): p. 17 (emphasis in original).

whether it is complied with or obeyed,"[38] thereby glossing over the role of interpretation and its potential to alter the meaning of international legal rules and principles.[39]

Principal-Agent (P-A) theory, on the other hand, is an important exception to this trend. P-A approaches generally acknowledge the possibility of the development of legal meaning by focusing more specifically on the role of international courts, often by using the term (judicial) "activism."[40] According to this view, international courts may attempt to expand their authority *vis-à-vis* states through an expansive interpretation of legal provisions.[41] While an insightful addition to the literature that accounts for the possibility of international judicial law-making, this perspective allows for less attention to more subtle and less controversial forms of legal developments that characterized the development of ICL. In particular, P-A theory establishes a stark dichotomy between international courts as either 'activist' agents that overstep their responsibilities, or as merely 'clarifying' legal provisions. This theoretical distinction, however, elides the possibility of subtler, but potentially significant developments of legal meaning by excluding them from its ambit of analysis.

One of the most fundamental assumptions of P-A theory is that both states, as principals, and international courts, as agents, are rational, strategic actors. While states delegate decision-making power to international courts to overcome the challenges of incomplete contracting and hence facilitate international cooperation,[42] international courts are conceptualized as equally pursuing their own rational interest by attempting to expand their authority.[43] While international courts are hence assumed to always seek to interpret the law as

[38] Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," p. 135. For a similar criticism specifically with regard to compliance research on European integration, see Brosig, "No Space for Constructivism? A Critical Appraisal of European Compliance Research," p. 401.
[39] See Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," pp. 128, 135.
[40] See, for example, Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," *International Organization* 52, no. 1 (1998): p. 150; Garrett, "The Politics of Legal Integration in the European Union," ibid. 49 (1995): p. 173.
[41] See, for example, Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," ibid. 52 (1998): p. 155; Garrett, "The Politics of Legal Integration in the European Union," ibid. 49 (1995): p. 173.
[42] See, for example, Pollack, "Delegation, Agency, and Agenda Setting in the European Community," ibid. 51 (1997): pp. 103-04; Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," ibid. 52 (1998): p. 156.
[43] See, for example, "The European Court of Justice, National Governments, and Legal Integration in the European Union," p. 155; Garrett, "The Politics of Legal Integration in the European Union," ibid. 49 (1995): p. 173. For a critical perspective, see Alter and Helfer, "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice," ibid. 64, no. 4 (2010): pp. 565-67.

expansively as possible, their innate judicial activism is curbed by the control mechanisms put in place by states.[44]

From this basic assumption, two different scenarios of the development of legal meaning through international courts emerge. On the one hand, international courts may, evaluating the likely reactions from states as too costly when compared to the potential benefits of an activist judicial decision, refrain from attempting to expand the scope of their authority.[45] In these instances, international courts are expected to dutifully apply general legal provisions to specific cases.[46] As part of this process, international courts may be confronted with a situation in which they have to "fill in the details of an incomplete contract."[47] After all, foreseeing every possible factual situation that may arise in the future is close to an impossible task when drafting the initial treaty, and is seen as a primary reason for why states delegate decision-making power to international courts in the first place.[48] In this first scenario, the development of legal meaning is thus by definition merely technical and inconsequential. It does not alter the general legal framework created by states.

As the alternative, international courts may attempt to expand their authority by adopting an activist approach to legal interpretation. In this scenario of agent "slack,"[49] dissatisfied states may decide to attempt to 'rein in' an activist court through various control mechanisms, including re-contracting. Alternatively, states might conclude that such action would be too costly to be worth pursuing, and ultimately implement the decision, or simply ignore the judgment.[50] Due to this theoretical set-up, the primary question that emerges, as Karen Alter observes, is whether and to which extent states are in fact able to "rein in"[51] activist international courts.[52] For the study of the development of legal meaning, however, this focus implicitly entails that judicial activism is not defined by the degree to which international courts develop the content of international law, but by the level of controversy that an international judgment generates among states. Indeed, P-A theory approaches usually, and often explicitly,

[44] See, for example, Garrett, "The Politics of Legal Integration in the European Union," ibid. 49, no. 1 (1995): p. 173.
[45] See ibid.
[46] See Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," *International Organization* 52 (1998): pp. 155-56.
[47] Pollack, "Delegation, Agency, and Agenda Setting in the European Community," ibid. 51 (1997): p. 104.
[48] See ibid., pp. 103-04; Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," *International Organization* 52 (1998): p. 156.
[49] Alter, "Agents or Trustees? International Courts in Their Political Context," p. 34.
[50] See Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," p. 154.
[51] Alter, "Agents or Trustees? International Courts in Their Political Context," p. 34.
[52] See ibid., p. 36.

select cases in which international judgments led to at least some controversy.[53] It therefore overlooks the possibility that international courts, and potentially other international actors, may have substantively altered the international legal framework without creating much controversy among states (or even among international lawyers). As a result, both the compliance literature and P-A theory underestimate the potential for interpretive innovation in legal content through more 'silent,' as comparatively uncontroversial, jurisprudential developments.

In her important contribution, Karen Alter has challenged P-A accounts by conceptualising international courts as "trustees," instead of as "agents." According to Alter, international courts as "trustees" have a comparatively high level of autonomy as they are able to draw on their own legal expertise as an alternative source of authority that is different in character from the decision-making authority delegated to them by states.[54] As a consequence, international courts – as well as states and other actors interacting with them – are required to resort to what Alter calls "rhetorical and legitimacy politics," which requires them to justify their decisions as following accepted legal interpretive standards.[55] The current project is similar to Alter's conceptualisation in that it also depicts international courts as having a relatively high degree of autonomy that is, at least partly, rooted in interpretive standards shared by an expert community. Unlike Alter's distinction between "agents" and "trustees," however, it emphasises especially the importance of 'silent' interpretive developments,[56] and highlights how the process through which these developments are evaluated as controversial or not is in itself political. The study therefore demonstrates how a comparatively uncontroversial judicial space is constructed through an interplay between political commitments and professional legal standards, instead of resulting mainly from the character of international courts.

Due to its broader focus on tracing the boundaries of a community of practice interpreting ICL, this project also adds to recent work investigating the role of a broader audience of international courts beyond member states. Alter recently emphasised how "compliance partners," that is, state employees including judges and ministry representatives, as well as broader "compliance

[53] See Garrett, Kelemen, and Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union," p. 151.
[54] See Alter, "Agents or Trustees? International Courts in Their Political Context," p. 39.
[55] Ibid., p. 47.
[56] To further support her argument, Alter intentionally discussed cases that generated a relatively high level of controversy, ibid., pp. 48-54. But see Alter and Helfer, "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice," p. 566 (clarifying that "ICs can expand international law without ruling against governments").

constituencies" encompassing non-state actors such as civil society groups, promote compliance with the decisions of international courts.[57] Alter, Laurence Helfer, and Mikael Rask Madsen built on this analysis to distinguish between different audiences of an international court's authority, including those beyond government actors, such as legal experts and civil society actors, and even the general public.[58] Contrary to these approaches, however, this project does not examine the extent to which these actors follow international judgments and support compliance with them.[59] Instead, it analyses the ways in which this broader set of actors participates in the interpretive practices of ICL.

Within the discipline of International Law (IL), the study also draws on legal scholarship analysing the development of ICL.[60] In its analysis of the judicial development of the law of war crimes and the crime of genocide, the project traces how and in which ways international and hybrid criminal courts altered legal meaning. At first sight, it is therefore similar to a legal doctrinal analysis of the development of international case law in ICL. However, it differs from such a doctrinal account in two significant ways. First, this research combines an analysis of the development of legal meaning as expressed in international judgments with elite interviews with, among others, judges and legal officers working at these courts. Based on this combination, the project seeks to identify subjective legal meaning as interpreted by international courts in their judgments, as well as shared assumptions as to the interpretive standards underlying the interpretive practices of ICL. Second, legal academics are considered to form part of an interpretive community of ICL, so that more doctrinal legal scholarship is itself treated as an expression of legal meaning.[61] As a consequence, legal commentaries interpreting the Genocide Convention, for instance, and academic publications by international judges or legal experts more generally are treated as part of the project's empirical analysis.

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[57] See Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014), pp. 53, 63.

[58] See Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016): pp. 10-11. Specifically on ICL, see also Vinjamuri, "The International Criminal Court and the Paradox of Authority," ibid.; Levi, Hagan, and Dezalay, "International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law," ibid.

[59] See Alter, *The New Terrain of International Law: Courts, Politics, Rights*, p. 53; Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts," p. 6.

[60] See, for example, Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals*; Webb, *International Judicial Integration and Fragmentation* (Oxford: Oxford University Press, 2013); Van Schaack, "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals," *Georgetown Law Journal* 97, no. 1 (2008).

[61] See similarly v. H. Holtermann and Rask Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible," p. 221 (arguing that "legal doctrinal scholars are believers in law themselvs and thus objects of empirical enquiry").

Finally, the study also addresses more conceptual work in the discipline of IL on legal interpretation, interpretive authority, and international judicial law-making.[62] This project is particularly close to a subset of recent work in IL that is less interested in examining formal rules and standards on legal interpretation, but instead analyses how legal interpretation is enacted in practice. As a key contribution, Jakob v. H. Holtermann and Mikael Rask Madsen have recently proposed what they called a "European New Legal Realism," in which they combined legal theoretical arguments with a Bourdieusian approach to call for research examining legal validity from an empirical perspective.[63] As they explain, such research would analyse empirically who "the main proponents and producers [of international law are], not what institutionally or otherwise formally are assumed [to be] the main producers."[64]

This study's analysis of the way in which interpretations suggested by different groups within an ICL interpretive community are accorded varying levels of interpretive authority dovetails this approach. For example, this study traces empirically how international legal actors refer to previous interpretations in the practice of privileged precedent, and how such an account differs from a formal, doctrinal treatment of precedents in international law. Due to its focus on international and hybrid criminal courts, it similarly responds to Gleider Hernández's recent call for additional research on the practical – instead of formal or theoretical – authority of the international judiciary in the process of international legal interpretation.[65] And finally, Ingo Venzke's recent work on what he calls "semantic authority" also falls into the category of IL research to which this study contributes. Defining "semantic authority" as the ability of actors to develop legal meaning and "establish its communications as authoritative reference points in legal discourse," Venzke's approach is bolstered by his combination of conceptual considerations with an in-depth empirical analysis of legal interpretation.[66] This project complements this focus by using the recent practice turn in IR and the concept of interpretive

[62] See, for example, Von Bogdandy and Venzke, *International Judicial Lawmaking* (Heidelberg: Springer, 2012); "The Spell of Precedents: Lawmaking by International Courts and Tribunals," in *The Oxford Handbook of International Adjudication*, ed. Romano, Alter, and Avgeron (Oxford: Oxford University Press, 2013); Boyle and Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), pp. 263-312; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012); Bianchi, Peat, and Windsor, eds., *Interpretation in International Law* (Oxford: Oxford University Press, 2015).
[63] v. H. Holtermann and Rask Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible," p. 212.
[64] Ibid., p. 226.
[65] See Hernández, "Interpretive Authority and the International Judiciary," in *Interpretation in International Law*, ed. Bianchi, Peat, and Windsor (Oxford: Oxford University Press, 2015), pp. 166, 168, 175.
[66] Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 63.

communities to examine how a relatively uncontroversial judicial space has been constructed in ICL at the intersection between political commitments and legal expertise.

1.3. IR's Practice Turn and Legal Interpretation

Applying the insights of IR's practice turn, combined with recent legal research on interpretive communities, to the development of legal meaning in ICL promises to be particularly fruitful. While a key aspect of legal research on international law,[67] legal interpretation remains underemphasised and undertheorized in IR.[68] Instead, as Jens Meierhenrich explained, in (mainstream) IR research on international law, the "everyday products of international law," such as jurisprudential developments, are only rarely addressed.[69] Indeed, the everyday reality of international lawyers – and thereby the individuals that construct and maintain the international legal order – seems to be largely absent from IR research.[70] As Iver Neumann points out, limited knowledge exists about the everyday practices of international diplomacy.[71] From the perspective of IR, the same conclusion can be reached regarding our knowledge of the specific practices that structure the day-to-day reality of international lawyers.

Due to its conceptualisation of practices as "competent performances,"[72] practice theory allows for both a theoretical focus on – as well as an empirical analysis of – the often tacit professional assumptions shared by international lawyers shaping the more technical, legal interpretive process leading to legal content change. In particular, such a framework takes into account what Martti Koskenniemi calls international law's "craft-likeness, its being above all a

[67] See, for example, Bianchi, Peat, and Windsor, *Interpretation in International Law*; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*.
[68] See similarly Dunoff and Pollack, who lamented this oversight as late as in 2013. See Dunoff and Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Dunoff and Pollack (Cambridge: Cambridge University Press, 2013), p. 632.
[69] Meierhenrich, "The Practice of International Law: A Theoretical Analysis," *Law and Contemporary Problems* 76, no. 3 (2014): p. 6.
[70] For a similar critique, see Dunoff and Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next," p. 649; Meierhenrich, "The Practice of International Law: A Theoretical Analysis," p. 9. See also Slaughter, "International Law and International Relations Theory: Twenty Years Later," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Dunoff and Pollack (Cambridge: Cambridge University Press, 2013), pp. 618-25. Interestingly, Andrew Hurrell similarly noted as early as 1993, in an assessment of the theoretical contribution of regime theorists in IR, that their "quest for rigour . . . has led to far too wholesale a dismissal of the need to understand both the specific character and the technical features of the international legal system." Hurrell, "International Society and the Study of Regimes: A Reflective Approach," in *Regime Theory and International Relations*, ed. Rittberger and Mayer (Oxford: Clarendon Press, 1993), p. 72.
[71] See Neumann, *At Home with the Diplomats: Inside a European Foreign Ministry* (Ithaca: Cornell University Press, 2012), p. 3. See also Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy* (Cambridge: Cambridge University Press, 2016), p. 272.
[72] Adler and Pouliot, "International Practices: Introduction and Framework," p. 6.

practice,"[73] and thus the day-to-day work of international law. An understanding of the *development* of ICL as a set of international practices, in particular, is therefore likely to provide important additional insights. It allows for a focus on 'silent,' but potentially wide-spread developments of legal meaning. After all, as Friedrich Kratochwil points out, "one of the most important sources of change . . . is the *practice of the actors* themselves and its concomitant process of interstitial law-making in the international arena."[74] Through this element of fluidity, research on interpretive practices therefore also has the potential to contribute in its own right to IR's practice turn. More specifically, this examination of legal interpretive practices offers analytical purchase upon one of IR practice turn's main challenges, namely its difficulty with conceptualising change, rather than routine and continuity.[75]

It is therefore unsurprising that, as I will outline in-depth in chapter two, the concept of interpretive communities has received more and more attention by legal scholars in recent years.[76] Within the discipline of IR, however, only a few attempts have been made to apply IR's practice turn to the study of international law.[77] The 2013 special issue of *Law and Contemporary Problems* on the practices of the ICC provided an important step towards the development of a practice-focused view of ICL and international law more generally; at the same time, it emphasised that this research agenda is only just emerging.[78] In addition to this special issue, a second notable exception has been the work of Jutta Brunnée and Stephen Toope.[79] Their interactional account of international law emphasises that a sense of legal obligation is constantly reconstituted through practice, an interactive process without which international law turns into nothing more than a "dead letter."[80] Specifically with regard to legal interpretation, Brunnée and Toope acknowledge that the practice of treaty signatories may

[73] Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," p. 19.
[74] Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), p. 61 (emphasis in original).
[75] For such a criticism, see, for example, Bueger and Gadinger, "The Play of International Practice," *International Studies Quarterly* 59, no. 3 (2015): pp. 454-56; Schindler and Wille, "Change in and through Practice: Pierre Bourdieu, Vincent Pouliot, and the End of the Cold War," *International Theory* 7, no. 2 (2015): pp. 331-32; Duvall and Chowdhury, "Practices of Theory," in *International Practices*, ed. Adler and Pouliot (Cambridge: Cambridge University Press, 2011), pp. 347-51.
[76] See chapter two, pp. 53-54.
[77] Similarly, Meierhenrich observed as late as in 2013 that "the IL landscape [has so far been] rather barren of practice-oriented analyses." Meierhenrich, "The Practice of International Law: A Theoretical Analysis," p. 59.
[78] See especially ibid.
[79] See Brunnée and Toope, "Interactional International Law and the Practice of Legality," in *International Practices*, ed. Adler and Pouliot (Cambridge: Cambridge University Press, 2011); *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).
[80] "Interactional International Law and the Practice of Legality," p. 118. See generally ibid., pp. 115-16.

change a treaty's interpretation,[81] thereby allowing for the possibility of interpretive developments through international practices.

Brunnée and Toope's account is a particularly important contribution in their attempt to differentiate between legal and other norms.[82] In their conceptualisation of international law as practice, however, their approach is vulnerable to the same criticism as that of legal positivism's view of international law as "positive morality" as backed by authority. Their account glosses over the possibility that theoretical and normative considerations as to what law *should* be like may differ from whether rules are treated as law in practice.[83] Brunnée and Toope's conceptualisation of legal obligation is based on the work of legal theorist Lon Fuller, and is therefore dependent on rule of law requirements such as promulgation, a ban on retroactivity, and clarity to specify the notoriously vague concept of legal obligation.[84] It does not, however, identify specific legal practices, or the shared professional assumptions underlying them, through empirical research.

Finally, for this project that is interested in the development of legal meaning through interpretation, recent work on normative contestation and "meaning-in-use" has the potential to provide valuable insights.[85] In particular, despite attempts to clearly distinguish between constructivist theory and work on international practices,[86] IR's practice turn shares with constructivism its interest in intersubjective meaning. Antje Wiener, for example, explicitly casts her own research on normative contestation, which emphasises cultural diversity and sees differences in "normative baggage" as influencing how norms are understood and implemented, as an attempt to account for normative flexibility.[87] But while Wiener seems to

[81] See ibid., p. 109.
[82] See ibid., p. 108. *Legitimacy and Legality in International Law: An Interactional Account*, pp. 20-55. See also Finnemore, "Are Legal Norms Distinctive?," *NYU Journal of International Law & Politics* 32, no. 3 (2000).
[83] For a classic legal realist view of international law as "positive international morality," see Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995), Lecture VI, p. 284.
[84] See Brunnée and Toope, "Interactional International Law and the Practice of Legality," pp. 113-15.
[85] See especially Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014); "Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations," *Review of International Studies* 35 (2009); "Contested Meanings of Norms: A Research Framework," *Comparative European Politics* 5 (2007). See also Welsh, "Norm Contestation and the Responsibility to Protect," *Global Responsibility to Protect* 5, no. 4 (2013).
[86] See Pouliot, "The Logic of Practicality: A Theory of Practice of Security Communities," *International Organization* 62, no. 2 (2008): pp. 262-65; Hopf, "The Logic of Habit in International Relations," *European Journal of International Relations* 16 (2010): p. 540; Meierhenrich, "The Practice of International Law: A Theoretical Analysis," pp. 67-71. But see Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," *International Studies Quaterly* 51, no. 2 (2007): p. 372 (outlining how practices may be analysed as part of a constructivist methodology).
[87] See Wiener, *A Theory of Contestation*, pp. 26-28, 39-43.

understand normative meaning to be in constant flux,[88] this study emphasises how the potential for legal flexibility is curbed by the need for legal interpretations to be seen as legally valid within an interpretive community.[89] To bolster this conceptualisation, the project substantiates this process empirically.

1.4. Research Strategy and Methodology

This study is interdisciplinary in that it combines insights from the disciplines of IR, IL, and legal theory. Following several calls for cooperation,[90] interdisciplinary research that bridges the disciplines of IR and IL has become more and more common in recent years.[91] Interdisciplinarity, however, has not always been perceived as an improvement.[92] Koskenniemi, for example, voiced doubts on the very idea of interdisciplinary research, based on the observation that especially recent collaborations between IL and IR scholars have mainly been conducted in IR theory terms, with the implicit assumption that the language of international law ultimately had to be translated into the (mostly positivist and often rationalist) terms of mainstream IR debates.[93] Jan Klabbers similarly criticised what he called the "selling out" of international lawyers in interdisciplinary research.[94]

While this may be an insightful criticism of some types of research collaborations, this project is nevertheless based on the assumption that an engagement with work from both disciplines has the potential of providing crucial insights.[95] Indeed, an analysis of the more technical aspects of legal interpretation will be key for gaining a better understanding of the development of legal meaning in ICL. In addition to this more conventional interpretation of

[88] Specifically, Wiener argues that norms change every time they are applied to a specific situation. See "Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations," p. 176. In Wiener's words, "if norms evolve interactively, as most constructivists will agree, then any process of contestation will reflect a specific re/enacting of the normative 'structure of meaning-in-use.' It will therefore be constitutive towards norm change." Ibid.
[89] See similarly Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, p. 36.
[90] As classic examples, see Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers," *Yale Journal of International Law* 14 (1989); Slaughter, Tulumello, and Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92, no. 3 (1998).
[91] As a recent example, see Dunoff and Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).
[92] I am grateful for discussions during the workshop on "Practices of International Law: Contesting Norms, Negotiating Ambiguity," organised by the Cluster of Excellence "Formation of Normative Orders" from 3 to 4 July 2015, Frankfurt, which informed my thinking on this aspect.
[93] See Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," pp. 14-18.
[94] Klabbers, "The Relative Autonomy of International Law and the Forgotten Politics of Interdisciplinarity," *Journal of International Law & International Relations* 1(2005): p. 41.
[95] Klabbers actually agrees on this point. See ibid., p. 45.

interdisciplinary research, and as mentioned above, writings of legal scholars will also play another, secondary role in this work. As legal academics are seen as forming part of the community of practice interpreting ICL, more doctrinal legal scholarship on ICL will constitute part of the interpretive practices analysed in this study. The following sections elaborate on the methodology and case selection used for this research.

1.4.1. Methodology

The approach applied in this project aims to contribute to an understanding of international practices and the interpretive practices of ICL in particular, as opposed to identifying causal relations or testing hypotheses.[96] It is postpositivist and interpretivist in character.[97] As its main focus, this study seeks to identify and analyse individual interpretive practices of ICL and the actors involved in them. The project therefore aims, in Pouliot's words, to "inductively recover the patterned ways of doing things that structure social sites of interest."[98] The project in large part follows Pouliot's "sobjectivism" as a research strategy, which seeks to both identify subjective meanings and "objectify" these meanings,[99] that is, "to inquire into what something means not for a specific agent but in a larger context of intersubjectivity."[100] Influenced by grounded theory, hermeneutics, and path dependency, Pouliot suggests combining three elements that together seek to both identify subjective meanings and "objectify" these meanings in context: induction, interpretation, and historicisation.[101] According to this framework, subjective meanings are determined through induction, set in context through interpretation, and finally analysed as amendable to change over time as an additional strategy to "objectify" subjective meanings.[102]

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[96] See Hollis and Smith, *Explaining and Understanding International Relations* (Oxford: Clarendon Press, 1990), pp. 45-91.

[97] Instead of assuming that there is a 'world out there' that can be studied by objective researchers that are able to determine whether a specific theory corresponds with reality, the project follows authors such as Pouliot and Fierke, who advocated for constructivist research that sees its ontology as closely connected to its epistemology. Consequently, the project sees knowledge, and with it IR research, as socially constructed and intersubjective, with researchers assessing each other's work on the basis of common understandings of conducting research shared among a community of academics. See Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," pp. 361-64; 378-79; Friedrichs and Kratochwil, "On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology," *International Organization* 63, no. 4 (2009): pp. 704-06; Fierke, "World or Worlds? The Analysis of Content and Discourse," *Qualitative Methods* 2, no. 1 (2004): p. 36 (in the context of the distinction between discourse analysis and content analysis).

[98] Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 272.

[99] See "'Sobjectivism': Toward a Constructivist Methodology," pp. 364-68.

[100] Ibid., p. 366.

[101] See ibid., pp. 364-74.

[102] See ibid., pp. 364-68.

As a result, this approach allows for a focus on both agency and structure as shaping social practices.[103] Indeed, based on the idea that a focus on social practices provides a way of moving beyond the agent-structure debate,[104] the research questions for this project have been designed to combine an analysis of practices and the shared understandings on which they are based, with a focus on the actors that enact these practices. In Adler and Pouliot's words, "agency and structure jointly constitute and enable practices:"[105] While social practices are developed and reconstituted by actors, the common assumptions that these actors share as part of a community of practice structures the way in which these practices are enacted.[106] To account for this complexity, this study not only identifies several of the interpretive practices of ICL and analyses how these practices have led to the development of legal meaning, but also asks which actors have formed part of the interpretive community, constituting and re-enacting these practices. As Adler and Pouliot emphasise, as "practice is suspended between agency and structure . . . change in practice has no other origin than the accomplishment of practice: practice is both *explanans* and *explanandum*."[107] For the purposes of this project, however, the practices of legal interpretation in the field of ICL will mostly be treated as *explanans* driving the development of legal meaning, and thus legal innovation.

To study the interpretive practices of ICL more specifically, the study builds on Iver Neumann's view of practices and discourse as closely intertwined, as speech acts themselves constitute social practices,[108] and assuming that "social life can only play itself out in discourse."[109] Even though it is thus not necessary (or at times even possible) for actors to verbalise the deeply ingrained expectations that structure their practices,[110] verbalised statements form part of the practices of international actors. In this project, the judgments and motions of international courts, publications and speeches by judges, government officials, staff working for international courts and NGOs, and legal academics constitute the discourse analysed as part of the interpretive practices of ICL. The project will focus on the time period from 1993 until early 2016, as the creation of the ICTY in May 1993 is usually seen by legal

[103] See ibid., p. 367; Adler and Pouliot, "International Practices: Introduction and Framework," p. 15.
[104] See "International Practices: Introduction and Framework," p. 15; Meierhenrich, "The Practice of International Law: A Theoretical Analysis," p. 12; Wendt, "The Agent-Structure Problem in International Relations Theory," *International Organization* 41, no. 3 (1987).
[105] Adler and Pouliot, "International Practices: Introduction and Framework," p. 15.
[106] For a more detailed discussion, see ibid.
[107] Ibid., p. 18.
[108] See Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy," *Millenium* 31, no. 3 (2002): p. 628.
[109] Ibid. See also Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," p. 363.
[110] On the contrary, Pouliot argues that "practical knowledge is tacit, inarticulate, and automatic." "The Logic of Practicality: A Theory of Practice of Security Communities," p. 270.

academics and practitioners as a turning point within the development of ICL.[111] The last interview for this study was conducted in April 2016.

Combining this approach with Pouliot's focus on induction, interpretation, and historicisation, the project applies a number of different methods.[112] In particular, it uses a combination of semi-structured and unstructured qualitative elite interviews, discourse analysis, and interpretive legal methods. To determine subjective meanings at the induction stage, an analysis of judgments, academic writings, publications, and speeches will be corroborated by interviews conducted with judges and legal officers working for international and hybrid criminal courts, staff at NGOs, and governments. These elite interviews have been conducted to deepen an understanding of subjective meanings held by these individuals and to reveal more informal channels of interaction. Snowballing has been used as a method to identify and contact potential interviewees.

For this study, I conducted a total of 28 elite interviews between November 2015 and April 2016. Among these were eight interviews with former or current judges at international and hybrid criminal courts, nine interviews with former or current legal officers working for these courts, six interviews with NGO staff, four interviews with representatives of the British and German foreign office, and one with a representative of the European Union's European External Action Service (EEAS).[113] I chose to interview not only judges, but also legal officers working at Chambers, as they are often deeply involved in the judgment drafting process at international and hybrid criminal courts. At the ICC and the *ad hoc* Tribunals, a first draft of the judgment is usually prepared by these legal officers following the guidelines set out by the judges, who would then revise this draft in a second step.[114] Legal officers also compile legal analyses on specific legal questions for consideration by the judges.[115] Interviewing solely judges would therefore have provided only a partial insight into the judicial interpretive

[111] See, for example, Jallow, "The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law," in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Clark and Kaufman (London: Hurst, 2008), p. 261; Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," *The American Journal of International Law* 100, no. 3 (2006) (comparing the *ad hoc* Tribunals with the post-war Nuremberg and Tokyo trials). See also UN Security Council Resolution 827 (1993), UN Doc. S/RES/827, 25 May 1993, p. 2 (creating the ICTY).

[112] On the methods suggested by Pouliot, see Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," pp. 368-74.

[113] Annex A includes a list of all interviews used for this project, as well as for a note on anonymization. See Annex A, pp. 231-32.

[114] See Webb, *International Judicial Integration and Fragmentation*, pp. 193-94.

[115] Interview with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.

practices of ICL. Judges and legal officers interviewed for this project were selected to achieve a roughly equal distribution at least across the ICC, the ICTR, and the ICTY.

At the induction stage, the aim is to determine meaning as it is created and re-constituted by practitioners themselves.[116] For this reason, interpretive legal methods were used to analyse the way in which legal meaning has developed through international jurisprudence, given that these methods are used by legal practitioners themselves. Interpretive legal methods thereby usually include the identification and interpretation of cases that are particularly representative of a newly emerging or already established trend in the case law.[117] Given the large number of judgments, however, it proved difficult to determine how exactly the meaning of specific legal provisions had developed. To be able to better account for the development of legal meaning over time, judgments were therefore first coded in NVivo 10 in a qualitative analysis aimed at identifying which aspects of specific legal provisions judges repeatedly referred to. In an approach inspired by grounded theory, coding categories were developed and defined on the basis of the documents analysed as part of a cyclical process of data collection and theory development ("open coding").[118] These categories were used to determine which aspects of a legal provision judges discussed in their decisions, how these elaborations may have included a development in the meaning of these provisions, and which documents (and actors) judges referred to as their sources. To give an example, for the crime of genocide, codes included the five underlying crimes (such as "killing" and "causing serious bodily or mental harm"), as well as other aspects that were frequently discussed, such as "determining intent," or "protected groups." Such an approach allowed not only for an identification of the legal aspects that judges focused on most, but also for a more systematic and comprehensive analysis of how far these specific aspects were endorsed as part of the applicable law in subsequent judgments across different courts.

At first sight, this analysis of the interpretive development of the crime of genocide and the law of war crimes might resemble a doctrinal legal approach. However, to examine how legal meaning develops within an ICL interpretive community, it differed from such an approach in three main ways. Firstly, instead of providing my own view on the interpretation of these

[116] See Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," p. 368.
[117] See Hall and Wright, "Systematic Content Analysis of Judicial Opinions," *California Law Review* 96, no. 1 (2008): pp. 64, 66.
[118] See Böhm, "Theoretical Coding: Text Analysis in Grounded Theory," in *A Companion to Qualitative Reserach*, ed. Flick, von Kardorff, and Steinke (London: Sage, 2004), pp. 375-76; Webley, "Qualitative Approaches to Empirical Legal Research," in *The Oxford Handbook of Empirical Legal Research*, ed. Cane and Kritzer (Oxford: Oxford University Press, 2010), pp. 943-45.

provisions, the study seeks to trace subjective meaning as expressed, endorsed, and potentially rejected within an interpretive community. It is part of the academic contribution of a doctrinal analysis to identify cases that represent a new trend in the case law based on the scholar's own assessment. In contrast, by using NVivo to systematise the development of legal meaning through international judgments, this project's analysis maps which interpretive developments were upheld and repeated as part of the applicable law within the subsequent jurisprudence. As an additional step, however, the analysis then included an assessment of whether these developments expanded or limited the scope of a court's jurisdiction to provide a better sense of the character and relevance of these interpretive amendments. Secondly, while a doctrinal legal approach would typically focus on case law, this project examines interpretations suggested by a broader range of actors that form part of an ICL interpretive community. In its analysis of the development of the crime of genocide and the law of war crimes, it therefore also includes treaty commentaries and negotiation documents as expressions of legal meaning. Finally, this project's analysis is enriched by insights gained through elite interviews. This combination allows for an additional perspective to identify subjective meanings, as well as the shared professional standards and argumentative techniques shaping – and reconstituted through – the interpretive practices of ICL.

For this study, it is therefore not sufficient to reconstruct subjective meaning, in this case the way in which members of an interpretive community understand legal content. Instead, it is a further aim of this project to retrace some of the unspoken, taken-for-granted professional assumptions on which this construction of legal meaning is based.[119] This additional methodological step is mainly aimed at providing a better understanding of the potential for legal innovation in the interpretive practices of ICL. Specifically, discourse analysis has been used to understand subjective meanings as articulated in interviews and judgments in their (intersubjective) context. The specific form of discourse analysis used here is informed by the second step of Neta Crawford's "informal argument analysis," which aims at "find[ing] the topoi (starting point) of the arguments actors used to uphold or change practices and the background of preexisting beliefs that interlocutors presupposed in making their arguments."[120]

[119] See similarly Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 277.

[120] Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002), pp. 120-1. Note that there is a difference between the term *topoi* as understood by, for example, Kratochwil, who draws on Aristotle, and the idea of background knowledge as used in the practice literature. While Adler and Pouliot define the term "background knowledge" loosely as a set of "intersubjective expectations and dispositions" shared within a community of practice, the concept of topoi has a stronger emphasis on sets of "commonplaces" that may form "catalogues." Adler and

In the context of an analysis of international practices, this step similarly seeks to identify common assumptions shared by a community of practice as articulated (usually implicitly) through discourse. An example of such shared professional assumptions discussed in this project are common perceptions on how legal practitioners should refer to a treaties' negotiation documents that are reflected in the interpretive practices of these practitioners.

Some practices, however, may be less verbalised, so at times this form of discourse analysis has been supplemented with an analysis of social practices as a set of actions.[121] Non-verbalised, or at least less textual, practices have been relevant within this project especially when they were related to the daily routines of individual actors and the extent to which they engage with international judgments within such a routine, or on the types of sources interpreters regard as relevant for their legal analysis. To trace the boundaries of an ICL expert community, this study has also focused on how different actors working on ICL interact with each other in practice. To research these practices, participant observation, a classic methodological approach in practice theory,[122] would only have been of limited use. This is partly because of the typically confidential nature of international diplomacy and judicial deliberations.[123] Recent studies on international diplomatic practices have therefore tended to rely on qualitative interviews with practitioners.[124] But another type of problem arises due to the specific character of the practices analysed in this study: after all, conducting legal research is not a practice that is particularly observable. Finally, the project focuses on interpretive practices that involve a multitude of actors, ranging from legal academics and different international courts, to NGOs and governments. In this context, ethnographic research would have been less insightful, as it could not have reasonably been extended beyond an in-depth analysis of one or two of these actors. The project therefore instead used in-depth qualitative

Pouliot, "International Practices: Introduction and Framework," p. 16. See also Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, p. 41.

[121] See Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," p. 372.

[122] Similarly, Meierhenrich recommends gaining insights into the day-to-day practices of international law by, for example, working as interns or clerks at institutions involved in the maintenance and reconstitution of these practices. Meierhenrich, "The Practice of International Law: A Theoretical Analysis," pp. 71-72.

[123] See similarly Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 276. On the difficulties of conducting ethnographic research in IR, see also "'Sobjectivism': Toward a Constructivist Methodology," p. 369; Brown, "The 'Practice Turn', Phronesis and Classical Realism: Towards a Phronetic International Political Theory?," *Millennium* 40, no. 3 (2012): p. 455.

[124] See Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, pp. 276-77; Adler-Nissen and Pouliot, "Power in Practice: Negotiating the International Intervention in Libya," *European Journal of International Relations* 20, no. 4 (2014): pp. 896-97; Pouliot, *International Security in Practice: The Politics of NATO-Russia Diplomacy* (Cambridge: Cambridge University Press, 2010), p. 95. But see Neumann, *At Home with the Diplomats: Inside a European Foreign Ministry.*

elite interviewing to indirectly research these practices, as well as to gain additional knowledge about the shared professional standards and interpretive techniques underlying them.

Based on an inductive approach aimed to "understand the insider meanings that agents attribute to their reality," interview questions have intentionally been kept comparatively broad.[125] Interviews typically included in-depth discussions of the main tasks and responsibilities of individual interviewees, of their daily routines, and whether and in which situations they would consult international jurisprudence as part of their work. An additional set of questions asked which other actors working on ICL interviewees would be in regular contact with, and explored the character and purpose of these meetings. For interviews with legal judges and legal officers working at international and hybrid criminal courts, the discussion also examined which sources practitioners would find most relevant in their legal analysis, especially in cases in which a court's statutory provisions remained unclear. As a final aspect, interviews also asked judges and legal officers at Chambers for an assessment of whether – and if so, how – individual judgments, or the jurisprudence of the court they worked for more generally, developed ICL.

Instead of relying on participant observation as a main methodological approach, the analysis was nevertheless informed by the experience of conducting an internship at Chambers at the ICTR in Arusha from October to December 2011. This internship has provided me with the opportunity to acquire what Neumann called "cultural competence," that is, the ability to understand the spoken (or written) word in the context of the non-verbalised shared assumptions and understandings that it is embedded in.[126] Given that not all practices may be verbalised, the experience of assisting with the drafting of a judgment at the ICTR has been key to enhancing my understanding of the unspoken assumptions underlying the interpretive practices of the court. Among other insights, it provided me with a better understanding of which interpretations are likely to be deemed legally valid within the community of practice interpreting ICL. In addition, my internship at the ICTR informed my understanding of the way in which different types of legal sources are referred to in international judgments.

To supplement this approach, in chapter five, quantitative content analysis has been used to add to an analysis of which interpretations international judges refer to in their jurisprudence. For this analysis, I used NVivo 10 to code and subsequently count references to other legal

[125] Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 276.
[126] See Neumann, "Discourse Analysis," in *Qualitative Methods in International Relations: A Pluralist Guide*, ed. Klotz and Prakash (New York: Palgrave, 2008), pp. 63-65. I am grateful to Gianna Schlichte for her insightful comments on this aspect.

documents included as footnotes in international judgments. Based on the previous qualitative analysis, this quantitative analysis focused on references used within the sections of international Judgments interpreting the law of war crimes. It consequently included 92 judgments delivered by the ICTY, the ICTR, the ICC, the SCSL, and the ECCC.[127] The interpretive sources cited included a range of different types, such as international case law produced by different international and hybrid criminal courts, but also international treaties, domestic court decisions, and military manuals. The resulting dataset therefore consisted of 8,466 citations referring to over 60 types of interpretive sources.[128] Within this project, however, this quantitative analysis only serves the limited purpose of providing some initial insights on which types of interpretations these courts refer to in their interpretation of the law of war crimes. But nevertheless, it may well be that judges and legal officers at international and hybrid criminal courts refer to a range of interpretations in their legal analysis, but only explicitly cite a select number. In addition, reference patterns may differ across legal provisions. Consequently, this quantitative data only supplements the analysis in chapter five, which mainly relies on insights gained through elite interviews with judges and legal officers.

To "objectify" subjective meaning further, the interpretive practices of ICL were finally situated within a historical context. Time is especially relevant for what chapter five identifies as the practice of privileged precedent, in which legal practitioners rely on a specific sub-set of previous interpretations to support their legal views.[129] Indeed, while an analysis of international practices is often confined to snapshots,[130] time plays a particularly important role in the interpretive practices of international law, as a backward-looking perspective that roots legal meaning in 'existing law' is key to justifying legal interpretations as valid. But methodologically, this project also examines how interpretive practices themselves change over time as an additional tool for identifying international practices in their intersubjective context. In other words, this project not only aims at mapping how the meaning of specific legal provisions has developed from the perspective of legal practitioners, but also how the practices generating this meaning may have developed over time. However, it would have been beyond the scope of this study – and arguably also more generally unfeasible – to compile a

[127] For a full list of all judgments and a more in-depth discussion of the applied coding strategy, see Annex B, pp. 233-39.
[128] For a full list of the types of interpretive sources coded, see Annex B, pp. 238-39.
[129] I am grateful to Andrew Hurrell for his insightful comments on this aspect. For a discussion of the practice of privileged precedent, see chapter five, pp. 133-39.
[130] See explicitly Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 281.

complete overview of all possible developments. Instead, the study has been confined to outlining some of these changes. In this context, a particular emphasis has been the question of whether the interpretive practices of ICL have changed in the context of amendments to the institutional structure of ICL after a number of hybrid courts and the ICC were established and began to render their first decisions. In particular, the project examines how the creation of the ICC has added a further level of hierarchy to the interpretive practices of ICL.

1.4.2. Case Selection

The project focuses on a single case study, namely the interpretive practices of ICL. The decision to concentrate on this case developed from an interest in the relatively uncontested development of ICL, which, compared with other legal subfields in which jurisprudential developments have been met with 'backlash,'[131] itself constitutes a puzzle. ICL is often seen as a very specific branch of international law, especially due to the (at least in the early 1990s) 'skeletal' structure of legal provisions, and due to its focus on the criminal responsibility of individuals instead of, in line with a traditional model of international courts, disputes between states. The highly normative character of ICL and the imperative to 'achieve justice' also sets the field apart,[132] together with the disappointment and criticism that these normative expectations have generated in recent years.[133] The specificity of this legal subfield hence restricts the ("contingent")[134] generalisability of the empirical findings. However, given the often-lamented fragmentation of international law,[135] with each subfield developing its own legal structure and expertise, every case study would only be able to consider one piece of the puzzle. Despite this limitation, Alexander George and Andrew Bennett argue that case studies help researchers appreciate the complexity of the problem studied and therefore aid in

[131] See, for example, Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?," in *Legalization and World Politics*, ed. Goldstein, et al. (Cambridge, MA: MIT Press, 2001); Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79, no. 1 (2016).
[132] I am grateful to the participants of the International Law and International Relations reading group at Oxford for drawing my attention to this particular aspect.
[133] See Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, pp. 129-34; Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice."
[134] Price and Reus-Smit, *"Dangerous Liaisons? Critical International Theory and Constructivism," European Journal of International Relations* 4, no. 3 (1998): p. 273. Pouliot also argues that for constructivist research, the aim of arriving at more "contingent" generalisations is more appropriate. See Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," p. 379. See similarly Klotz and Lynch, *Strategies for Research in Constructivist International Relations* (London: Sharpe, 2007), pp. 20-21.
[135] See Koskenniemi and Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15, no. 3 (2002).

developing new theories.[136] In the conclusion chapter, I will further explore which aspects of the argument may be transferable to other legal subfields and international judicial institutions.

Within the scope of this study, it will not be possible to identify every practice that forms part of the development of ICL, or to explore the specific contribution of every group within the relevant community of practice in-depth. Instead, this study will be more exploratory in character. As Pouliot observed, "[t]here is no way one may claim to brush an exhaustive portrait, from a practice perspective."[137] Legal interpretation in ICL simply consists of too many practices, ranging from the way in which legal officers at Chambers file documents to how member states voice their views at the ICC's working groups. This project can therefore only offer a partial account of the development of legal meaning through the interpretive practices of ICL, and of the actors enacting and reconstructing these practices. Given this complexity, I have opted to focus on a subset of cases to gain greater depth, instead of reaching only a thin analysis of a larger part of the ICL expert community and the practices of its members.

In its analysis of the development of legal meaning in ICL, the study focuses on two legal provisions, namely the development of the crime of genocide and the law of war crimes. These two provisions serve as illustrations for how the meaning of legal rules and principles in ICL developed through international adjudication, and the degree of legal flexibility international and hybrid criminal courts had in their interpretation of ICL. They have been selected as two provisions that are most different with regard to their scope and form, to provide an overview of different ways in which legal meaning developed in ICL that is as comprehensive and conceptually insightful as possible.[138] While it is widely accepted that the law on war crimes has been developed substantially through international jurisprudence,[139] the definition of genocide has been perceived as having remained remarkably stable and exceptionally unaffected by particularly expansive or 'activist' interpretations of international courts.[140] Furthermore, not only the scope, but also the form that the development of legal meaning took

[136] See George and Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: MIT Press, 2005), pp. 45-46.
[137] Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy*, p. 277.
[138] This case selection is not based on positivist case selection method of "most-different cases" with regard to their independent variable. See, for example, Gerring, *Case Study Research: Principles and Practices* (Cambridge: Cambridge University Press, 2007), pp. 139-44. Instead, it more seeks to provide a within-case comparison that seeks to illustrate the breadth of different forms of the development of legal meaning in ICL.
[139] See, for example, Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy and Powderly (Oxford: Oxford University Press, 2010), p. 107.
[140] See, for example, Schabas, "Judicial Activism and the Crime of Genocide," ibid., pp. 63-64.

in both cases differed considerably. On the one hand, the development of war crimes through international jurisprudence has to a large extent rested on the acknowledgment of international courts and tribunals that specific crimes form part of international customary law, and on a development of the meaning of international customary rules and principles.[141] On the other hand, the development of the crime of genocide has revolved around the interpretation of an underlying treaty provision, and namely the definition of genocide included in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).

Both legal provisions are similar, however, in that they focus on developments of the elements of international crimes as the aspect of ICL that is least related to the jurisprudential functions of international courts. This similarity serves as the basis for a comparison. In addition, these two legal provisions constitute 'hard cases' for the idea of 'silent changes' in the judicial development of ICL. Both are legal provisions for which the potential political implications of interpretive developments are particularly visible, and that can be expected to generate a relatively high level of interest among other actors, and especially among states. After all, the development of the scope and content of international crimes through international and hybrid criminal courts at least has the potential of leading to a shift in which type of military conduct will be criminalised in the future. Rationalist approaches may therefore expect international courts to be particularly hesitant to develop this type of legal provision, or, alternatively, that states would be particularly likely to criticise such developments as overly expansive.

The analysis of international jurisprudence on the crime of genocide and the law of war crimes will be based on international judgments delivered by the ICC, the two *ad hoc* Tribunals (the ICTR and ICTY), and two hybrid tribunals, namely the ECCC and the SCSL. Where relevant to the interpretation of the crime of genocide and the law of war crimes, this analysis was also supplemented with a discussion of judgments delivered by the ICJ, even though the primary focus of this project is on international and hybrid criminal courts. The analysis includes all available final judgments delivered by these international and hybrid courts interpreting the crime of genocide and the law of war crimes as part of a discussion of the applicable law and of a judgment's legal findings. Specifically, I examined 52 judgments interpreting the crime of genocide, and 92 judgments analysing the law of war crimes.[142] Due to this larger number of judgments interpreting the law of war crimes, the quantitative analysis described above focused on this legal provision specifically. In addition, given the prominence of non-codified

[141] See Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," ibid., pp. 106-28.
[142] See Annex B for a list of cases that were included in the analysis, pp. 233-36.

customary law in the law of war crimes, an analysis of the types of interpretive sources international courts referred to in their interpretation of the law of war crimes was expected to be particularly interesting.

Within the scope of this study, it will also not be feasible to analyse in-depth all groups that form part of the community of practice involved in the interpretive practices of ICL. Instead, the analysis will proceed in two steps. First, based on the case studies of the crime of genocide and the law of war crimes, I will identify which groups – such as legal academics and semi-political expert bodies – have been referred to in the judgments delivered by international courts interpreting the elements of these two crimes. In the second part of the project, this analysis will be expanded by an analysis of the interpretive practices of staff at civil society organisations, legal academics, and government representatives. Such an expansion seeks to enrich the findings that are confined to an analysis of the judgments of international and hybrid courts, and moves beyond the narrower focus on war crimes and the crime of genocide. It asks whether and how individuals working for other international bodies have been involved in the interpretive practices of ICL more generally, and thereby traces the boundaries of the relevant community of practice. After all, one should expect civil society groups, for example, which have played a major role for example during the negotiations of the Rome Statute, to be invested in the interpretive practices of ICL. A similar conclusion can be reached for states as the actors that are most likely to be affected by a shift in which behaviour will be criminalised at the international level.

With regard to government representatives, the project focuses on staff working for the German and the British foreign office.[143] These two states have been selected as their foreign office representatives are comparatively visible actors within the ICL expert community,[144] so that they merited an in-depth case study. Both states maintain permanent representations in The Hague, and both foreign offices employ a small number of staff that work on ICL and international courts, not only in The Hague, but also in New York and – respectively – in London and Berlin.[145] For an exploratory study that seeks to trace the boundaries of an ICL

[143] I am grateful to Andrew Hurrell for his insightful comments on this project's case selection.
[144] For example, both the UK and Germany were listed as two of the states one of the civil society representatives interviewed for this project had most contact with. Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[145] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer B, 12 February 2016; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016. See also Auswärtiges Amt, "Organisationsplan des Auswärtigen Amts," Stand 03.03.2015, available online: http://www.auswaertiges-

expert community and how exactly these actors are involved in the interpretive practices of ICL, the relative prominence of the representatives of both states therefore promised to be particularly insightful.

The fact that both states have been highly supportive of the international criminal justice project and hold relatively powerful positions within the international system also makes these two case studies particularly interesting. Both states have shown an active interest in the field of ICL, are members of the ICC, and have acted as donors for international and hybrid courts in the field of ICL.[146] A power-focused account of international courts and ICL would therefore assume that the behaviour of courts such as the ICC largely reflects the interests of influential member states, such as Germany and the United Kingdom. Consequently, such a view would expect these states to not be particularly interested in the development of legal meaning in ICL. After all, as Allison Danner and Erik Voeten argue, these states probably never anticipated that they themselves would fall under the jurisdiction of these courts.[147] Contrary to such an expectation, however, the ICC is currently conducting a preliminary examination into the situation in Iraq concerning potential crimes committed by British nationals.[148] As an alternative to the suggestion of relatively disinterested powerful member states, another, competing assumption would be that these states are indeed keenly interested in interpretive developments shifting which type of military conduct is criminalised under ICL. A focus on Germany and the United Kingdom therefore has the potential of generating new empirical and theoretical knowledge on the relationship between international courts and powerful states, and

amt.de/cae/servlet/contentblob/373560/publicationFile/218592/Organisationsplan.pdf (accessed 25 January 2017).

[146] According to the German Federal Ministry for Economic Cooperation and Development, the German government has spent €17 million so far on support for the ECCC. See Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, Kambodscha, Situation und Zusammenarbeit, Sonderthema Rote-Khmer-Tribunal, available online, http://www.bmz.de/de/was_wir_machen/laender_regionen/asien/kambodscha/zusammenarbeit/index.html (accessed 25 January 2017). Similarly, the British Embassy Phnom Penh claimed in February 2014 that the British government has spent more than £6 million on support for the ECCC. See British Embassy Phnom Penh, Press Release, "FCO Minister announced new funding for ECCC," 6 February 2014, available online, https://www.gov.uk/government/world-location-news/fco-minister-announced-new-funding-for-eccc (accessed 25 January 2017).

[147] See Danner and Voeten, "Who Is Running the International Criminal Justice System?," in *Who Governs the Globe?*, ed. Avant, Finnemore, and Sell (Cambridge: Cambridge University Press, 2010), p. 70. See similarly Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (2001): p. 683 (arguing that "establishing tribunals was certainly not seen as threatening or compromising to great power interests").

[148] See ICC, Preliminary Examination Iraq/UK, available online at https://www.icc-cpi.int/iraq (accessed 25 January 2017); ICC, Report on Preliminary Examination Activities (2015), 12 November 2015, pp. 7-10.

on how government officials interact with international courts (and with the legal meaning they produce) at the intersection between political interest and legal expertise.

Against this backdrop, there are also several differences between these two cases that make a focus on the United Kingdom and Germany particularly interesting. As arguably the most important difference for this project, the interactions of both countries with the international legal order seems to follow different patterns.[149] To begin with, such a difference is in part rooted in the domestic legal systems of both countries, with the United Kingdom falling into a common law, and Germany into the civil law tradition. While in the context of international law, such a difference should probably not be overemphasised,[150] it may entail that domestically trained government lawyers engage in different ways in the interpretive practices of ICL. As an example, common law practitioners are more likely to be accustomed to the concept of uncodified customary law, as well as to a comparatively prominent role of judges in shaping legal content and a more formalised concept of precedent. Similarly, one of the judges at the ICTY interviewed for this project suggested that common law judges are likely to be more familiar with the potential for developing law through judicial interpretation.[151] A comparison between the United Kingdom and Germany therefore promises to produce new insights into the relevance of these differences in domestic legal backgrounds for the everyday interactions of government officials with international law.

But there are also further structural elements that make a comparison between Germany and the United Kingdom particularly insightful. Legal professionals generally assume a comparatively prominent position in the German administrative and diplomatic system.[152] It can therefore be expected that arguments rooted in legal expertise might be more persuasive to German government officials. At the same time, post-World War II Germany has been hesitant to actively engage in military operations, an approach which makes it less vulnerable to potential legal proceedings in ICL. In comparison, and as mentioned above, the ICC is currently carrying out a preliminary investigation into crimes that may potentially have been committed

[149] I am grateful to Andrew Hurrell for his insightful comments on this aspect.
[150] For example interview with Judge D, Judge at the ICTY, 18 December 2015, The Hague (arguing that differences between domestic legal systems were gradually aligned during the continued work of the ICTY); Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (arguing that despite often important differences, a more homogenous approach emerged during the later stages of the ICTY and the ICTR); Judge C, Judge at the ICTR, 15 December 2015, phone interview.
[151] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[152] See, for example, Koenig and Schneider, "Diplomaten zwischen Sozialisation und Kalkulation: Bestimmungsfaktoren des Berufserfolgs im Auswärtigen Dienst," *Politische Vierteljahresschrift* 51, no. 2 (2010): p. 302 (estimating that 68 % of all German diplomats hired between 1950 and 1973 held a first degree in law).

by British nationals in Iraq. This circumstance may potentially have, in turn, heightened the interest of British government officials in legal developments in ICL. Finally, it should be noted that Germany and the United Kingdom assumed slightly different positions within the Rome negotiations of the ICC Statute. Such a difference arguably in part reflected such structural differences, as well as the slightly different position of both states within the international system, as the United Kingdom shared several positions with the other permanent members of the UN Security Council.[153] As a consequence, an in-depth analysis of both cases is likely to produce new insights into the relevance of these factors in shaping the micro-level, everyday interactions of government officials with the international legal order, and more specifically in their involvement in the interpretive practices of ICL.

In the future, it would be valuable to expand this analysis by including the practices of a larger number of states, and especially states whose nationals have been convicted of genocide, war crimes, or crimes against humanity by international courts between 1993 and 2016. While such research could draw on a rich secondary literature,[154] it is beyond the scope of this study to include such an analysis that would necessarily have to focus more on the specific context of individual states and cases. Kenya might be a particularly interesting case study, given that Kenyan officials had been comparatively active in the ICL expert community in recent years,[155] especially in the context of the ICC's cases against the siting Kenyan President and Vice-President, Uhuru Muigai Kenyatta and William Samoei Ruto. Also, Kenya's proposal of a specific interpretation of Rule 68 of the Rules of Procedure and Evidence at the ICC's 2015 Assembly of States Parties (ASP), for example, was arguably presented as legal in character.[156] Nevertheless, for a study that constitutes a first attempt at mapping the ICL interpretive community and at crystallising individual interpretive practices inductively, this case would

[153] See, for example, Benedetti and Washburn, "Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance* 5, no. 1 (1999): p. 31.
[154] See, for example, Spoerri and Freyberg-Inan, "From Prosecution to Persecution: Perceptions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Serbian Domestic Politics," *Journal of International Relations and Development* 11, no. 4 (2008). See also, for example, Palmer's recent work on different "layers" of transitional justice processes. See Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda.* Much of the literature that would be relevant for such a study comes out of the so-called 'peace v. justice' debate in the transitional justice literature. See, for example, Elster, "Justice, Truth, Peace," in *Transitional Justice,* ed. Williams, Nagy, and Elster (New York: New York University Press, 2012).
[155] Kenya was consequently mentioned as one of the countries a representative of the Coalition for the ICC had been in contact with frequently, even though this situation changed markedly in recent years. Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[156] See Assembly of States Parties, List of Supplementary Items Requested for Inclusion in the Agenda of the Fourteenth Session of the Assembly: Addendum, Annex III, Submission Made By Kenya on 3 November 2015 for the Inclusion of Two Supplementary Items in the Agenda of the Fourteenth Session of the Assembly, ICC-ASP Doc. ICC-ASP/14/35/Add.2, 6 November 2015.

have been too specific and complex. However, the conclusion chapter will situate the two cases selected in this study, Germany and the United Kingdom, within a broader range of countries. In particular, it will consider recent developments, including the decisions of Burundi, South Africa, and Gambia to withdraw from the ICC.

Turning to the practices of staff working for civil society organisations, this study focuses on the main organisations active in the field of ICL as identified by practitioners, namely government officials and staff working for international courts. Also regarding NGOs, I again concentrated on comparatively active and visible groups and individuals within the ICL expert community to gain greater analytical depth in my analysis. Within the relatively complex network of civil society actors with an interest in ICL,[157] the study concentrated on groups that practitioners themselves identified as forming part of an ICL expert community as a way of determining subjective meanings instead of investigating a pre-defined set of actors.[158] By doing so, the project examines how far the boundaries of this community of practice may cut across international actors, and which types of groups might be excluded from the process. As I will explain in more depth below, most of the civil society representatives that I interviewed for this study worked for large, international NGOs that maintained a presence in The Hague.

Having discussed the methodological approach and case selection rationale of this project, one final aspect remains to be considered: as the study incorporates insights from legal theory, it may be asked how transferable approaches developed in the domestic legal context are to the international level. Mainstream IR theory traditionally distinguishes sharply between domestic 'order' and international 'anarchy' as different levels of analysis,[159] which in combination with legal positivism results in the well-known criticism of international law as not being proper law.[160] As Kratochwil suggests, however, this distinction may gloss over crucial similarities between domestic and international legal systems.[161] In particular, the practices of legal

[157] For a first overview, and specifically with regard to the civil society actors involved in the negotiations of the Rome Statute, see, for example, Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," *Global Civil Society Yearbook* (2002): pp. 140-47.
[158] See Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," pp. 364-65.
[159] This is a common critique made especially by scholars associated with the English School. See, for example, Hurrell and Macdonald, "Ethics and Norms in International Relations," in *Handbook of International Relations*, ed. Carlsnaes, Risse, and Simmons (London: Sage, 2013), pp. 58-59.
[160] According to Austin, international law is therefore nothing more than "positive international morality." See Austin, *The Province of Jurisprudence Determined*, Lecture VI, p. 284.
[161] See Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, p. 2. Sandholtz and Stone Sweet even go as far as to claim that, given the diversity of domestic systems and different parts of the international legal system, distinguishing between both would be futile. See Sandholtz and Stone Sweet, "Law, Politics, and International Governance," in *The Politics of International Law*, ed. Reus-Smit (Cambridge: Cambridge University Press, 2004), p. 269.

experts, trained in domestic legal systems, often blur the lines between domestic and international law. This is not to argue that there are no differences between domestic legal systems and international law. For the purposes of this project, which considers the professional assumptions shared by legal experts shaping the interpretive practices of ICL, the important point is nevertheless that judges and lawyers are arguably unlikely to leave their training, expectations, and experience gained in a domestic legal system behind when beginning to practice ICL. In addition, legal theory specifically will mostly be referred to when distinguishing between three 'triggers' of legal flexibility, such as the distinction between different types of legal provisions. For these types of insights, however, the structural difference between domestic and international law is either irrelevant, or the argument has been adapted accordingly, for instance when discussing the interpretation of customary provisions in international law.

1.5. Chapter Overview

Chapter two develops the theoretical framework of this study. It concentrates on the question of how the interpretive practices of ICL may lead to innovation in legal meaning. As its conceptual basis, the chapter explains how legal meaning is developed and reconstituted by an interpretive community of ICL experts, and how membership of such a community may be traced. Drawing on legal theory, the chapter then distinguishes between three reasons for legal flexibility, namely potential ambiguities within the phrasing of specific rules, the character of specific types of legal provisions, and the structure of the legal reasoning process. It presents this distinction as rooted in different conceptualisations of international law, and proposes to step beyond legal positivism in order to gain an understanding of legal innovation through interpretation. Based on this discussion, the chapter introduces the practice of privileged precedent as an interpretive practice that, by stabilising innovative developments, is key to an understanding of change in legal content through interpretation.

Chapter three analyses the development of the crime of genocide through the judgments of international and hybrid criminal courts, while chapter four focuses on the development of legal meaning on the law of war crimes. Both chapters predominantly rely on a qualitative, computer-assisted analysis of international judgments. While it is beyond the scope of this study to map the development of ICL more comprehensively, this analysis of both legal provisions will be embedded within a brief discussion of the broader development of ICL through international jurisprudence. As a result, chapters three and four focus more narrowly on the practices of international adjudication as a set of *organisational* practices, instead of

more broadly on the interpretation of ICL as international practices involving different international actors. The chapter therefore concentrates on how the meaning of the crime of genocide and the law of war crimes were developed through the judicial interpretive practices of international courts. Based on this analysis, both chapters identify specific interpretive techniques and professional standards underlying the interpretive practices of ICL, such as the preliminary role attributed to treaty negotiation documents within the interpretive process. The chapter argues that these underlying standards, combined with the comparatively nascent character of ICL, provided international and hybrid criminal courts with a particularly high degree of legal flexibility.

Chapter five combines an analysis of the interpretive practices of ICL, as illustrated by international jurisprudence on the crime of genocide and the law of war crimes, with a focus on the actors enacting these practices. It thereby adds an institutional dimension to the previous discussion of international judgments as textual international practices. Still focusing on the interpretive practices of international and hybrid criminal courts, the chapter argues that the practice of privileged precedent has provided international criminal courts with a particularly high degree of interpretive authority. It thereby highlights elements of hierarchy in the interpretive practices of ICL. By doing so, the chapter also emphasises differences between a formal legal view of interpretation and the role of precedents, and the way in which international law is enacted in practice. As a final step, the chapter draws on the perceptions of judges and legal officers at Chambers on the broader relevance of international jurisprudence in ICL to begin to situate the practices of international adjudication in the broader context of an ICL interpretive community. Consequently, chapter five serves as a bridge between chapters three and four on the development of legal meaning through the interpretive practices of international courts, and a broader discussion of the community of practice engaged in the interpretive practices of ICL in chapter six. While the chapter mainly draws on elite interviews, this analysis is supplemented by the preliminary insights gained through a quantitative content analysis of the references used in judicial interpretations of the law of war crimes.

Chapter six explores the boundaries of the broader community of practice involved in the interpretive practices of ICL, and how these interpretive practices are aligned with a more heterogenous ICL expert community. Largely based on elite interviews, the chapter explores how the more strictly judicial practices of international and hybrid criminal courts relate to other interpretive practices in the field of ICL, and which actors are involved in them. It demonstrates how the interpretive practices of ICL not only cut across institutional contexts,

but also intersect with the political commitment of other actors to construct and reconstitute a comparatively depoliticised judicial sphere. A key element for this analysis is a distinction between two groups of actors: on the one hand, some actors, such as legal academics and international judges, actively propose their own interpretations, and publicly evaluate the legal validity of existing legal views. However, the chapter explains how a second group of actors, including government officials and civil society representatives, confine themselves to engaging in the interpretive practices of ICL for internal purposes only, or to mainly disseminate legal views proposed by international and hybrid criminal courts.

Finally, the conclusion addresses the main implications of this study for an understanding of legal interpretation in international relations, the autonomy and legitimacy of international courts, and sketches out avenues of further research. Furthermore, it considers some of the most recent developments in ICL (including the decisions of Burundi, South Africa, and Gambia to withdraw from the ICC) and explores the question of whether such a comparatively depoliticised and protected judicial sphere is currently deteriorating. The chapter concludes by examining how far the argument proposed in this study may be applicable to other international judicial contexts and interpretive communities.

Chapter 2

Interpretive Communities and the Development of Legal Meaning

While practice theory is becoming an increasingly prominent approach in IR, many of its applications to international politics have emphasised routinized behaviour – and thereby continuity – instead of innovation. Indeed, its difficulty with understanding change has emerged as one of the core conceptual challenges of IR's practice turn. To understand the practices of interpretation in ICL, however, it is crucial to account for the ways in which the legal interpretive process allows judges and lawyers to develop legal content. After all, innovation and creativity have been among the most striking characteristics of the field. Using the concept of interpretive communities, this chapter conceptualises interpretive practices in international law as a process of structured evaluation grounded in epistemic assumptions on legal interpretation. It draws on legal theory to show how these professional assumptions shared by legal experts allow for legal flexibility. This chapter therefore serves as a basis for the subsequent empirical discussion, which identifies specific shared understandings about the interpretive legal process that – in turn – provided international courts with the ability to push for interpretive developments.

The chapter begins by introducing several key concepts. First, it discusses the practices of legal interpretation, and how they relate to competing terms such as judicial law-making and judicial activism. The chapter then contrasts the concepts of communities of practice, epistemic communities, and interpretive communities, and outlines how interpretive communities are conceptualised in this study. It subsequently turns to a discussion of the practice turn in IR and its often-observed difficulties with conceptualising innovation, creativity, and change instead of routine and repetition. To respond to this conceptual challenge, the chapter then draws on legal theory to distinguish between three 'triggers' of innovation within the interpretive practices of international law. As a final step, the chapter presents the practice of privileged precedent as a crucial interpretive practice through which interpretive legal content change becomes stabilised within the interpretive process.

2.1. The Practices of Legal Interpretation: Definitions and Concepts

To begin with, this section provides a short overview of the concept of international practices, and the interpretive practices of international law in particular. While they do not focus on interpretive practices specifically, Emanuel Adler and Vincent Pouliot's conceptualisation of international practices has become central to IR's take on practice theory. According to Adler and Pouliot, "[p]ractices are competent performances," that is, actions that are seen as satisfying deeply ingrained, but often not verbalised standards.[1] Practices are thus learned within, and enacted and judged as competent by, a community of practice consisting of individuals who share the same ingrained standards, or "background knowledge."[2] The concept of practice as used in IR's practice turn therefore differs substantially from state practice as an element of international customary law.[3]

This study more narrowly focuses on the international practices of legal interpretation through which normative meaning in ICL develops. In this context, interpretive practices are therefore understood to consist of (mostly textual) practices that offer a specific perspective on the content of legal provisions in ICL, either in abstract or as applied to specific cases. They are based on shared professional assumptions (or what Adler and Pouliot call "background knowledge")[4] on how international law should be interpreted, and which argumentative techniques might be used to arrive at an interpretation that can be upheld as legally valid. Interpretive practices may offer an interpretation on a legal provision understood to constitute a source of ICL (including treaties, international custom, and general principles of law).[5] Alternatively (and arguably more frequently), interpretive practices assess, or draw on, another interpretation of a legal provision of ICL, such as a judgment by an international court or an academic critique of, for example, recent developments in the law of forms of liability.[6] At

[1] Adler and Pouliot, "International Practices: Introduction and Framework," p. 6.
[2] Ibid., pp. 16-17.
[3] See, for example, Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), pp. 7-8.
[4] Adler and Pouliot, "International Practices: Introduction and Framework," p. 16.
[5] See Article 38 (1) of the ICJ Statute. Due to its character as a subfield of international law, the sources of ICL are usually seen as consisting of the same sources listed in Article 38(1) of the ICJ Statute. See, for example, Akande, "Sources of International Criminal Law," pp. 41, 43.
[6] Note that, given that the sources doctrine itself can be understood as constituting part of the shared understandings legal interpreters rely on, the distinction between these two types of interpretive practices is blurry at best. For a discussion of the sources of international law as part of the foundational doctrines of international law that are not only constituted by international lawyers in practice, but that also constitute a community of international lawyers, see d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 2, 61-110.

times, interpretive practices may also include negotiation practices, as, for example, drafting a resolution or even a new treaty usually includes an assessment of the existing law.[7]

Consequently, interpretive practices in international law consist of a wider set of practices that are enacted by a relatively large group of international actors. These interpretive practices include negotiation practices enacted by government officials (as well as, potentially, staff at international organisations and civil society organisations), judicial interpretive practices offering a legal interpretation in a particular case as part of an international court's motions, decisions, and judgments, as well as the reporting practices that will be discussed in chapter six, through which government officials internally assess the content and implications of the latest judgments delivered by international courts.[8] What these different interpretive practices have in common, however, is that they are based on, and re-enact, shared understandings of what constitutes a valid legal argument.

Interpretive practices may lead to the development of legal meaning either through the negotiation of a new resolution or treaty, or – more frequently – if an interpretation offered on the meaning of a legal provision of ICL develops legal content. In the latter case, these developments may include the creation of what is generally referred to as legal doctrine,[9] which, should they be perceived as authoritative, will come to constitute the most recent standard in the interpretation of a specific legal question. As will be argued in more depth in chapter six, however, for such a legal interpretation to be seen as authoritative (and not only as valid), it is a prerequisite that it is shared with other legal experts.[10] In other words, given the pivotal role that the process of assessing a legal interpretation as valid plays within the practices of legal interpretation, an interpretation that is only shared among a small sub-group of experts may not gain the wider traction necessary to constitute a development in legal meaning. Receipt and recognition of a legal interpretation by a wider audience is therefore necessary to lead to a broader development in legal meaning that becomes generally accepted among legal experts.[11]

[7] See similarly Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, pp. 41-44 (outlining the negotiation of treaties as one of the tasks fulfilled by an interpretive community).
[8] See chapter six, pp. 165-68.
[9] D'Aspremont, for example, defines "foundational doctrines," drawing on German law principles, as "a coherent set of propositions articulated around rules and case-law which are produced by discourses involving both practice and legal scholarship." D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 28.
[10] See chapter six, pp. 173-74.
[11] For a more general discussion of this process, see Adler and Pouliot, "International Practices: Introduction and Framework," pp. 7-8. See also d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 22-27.

This study specifically focuses on the role international courts play in providing such an authoritative interpretation. In particular, it concentrates on the development of case law, and thereby on judicial interpretive practices and how the legal developments these courts suggest are perceived within and outside of a wider expert community focusing on ICL. These judicial interpretations, however – as all interpretations suggested by international lawyers – must be assessed as valid within an expert community. Opening up the initial focus on judicial practices to include an analysis of the interpretive practices of a broader interpretive community is therefore crucial for an assessment of the broader relevance of these jurisprudential developments. Consequently, the project investigates empirically the extent to which international courts are accorded interpretive authority.

Especially in the legal literature, the development of legal content through the judicial practices of international courts is often described by using alternative terms, such as international judicial law-making,[12] judicial creativity,[13] or judicial activism.[14] The term judicial activism, however, will not be used here. Within the literature, it seems that this term is often used in tandem with a rejection of the content of a specific judicial decision, and an (unfavourable) assessment of the legitimacy of a specific judgment or line of reasoning.[15] For a project that seeks to trace empirically how and to what extent international judicial decision in ICL are accorded legitimacy and interpretive authority, the term 'judicial activism' is therefore less insightful. Nevertheless, it should be noted that the development of legal content through the interpretive practices of international courts allows for judicial creativity, and may at times lead to judicial law-making.

The development of legal content – or the potential for change – discussed here is typically gradual, as for example legal tests and doctrine more generally are added to what is perceived to be the most recent standard of interpretation regarding a specific legal question or provision.[16] As Ian Johnstone observes, "[n]ormative evolution tends to succeed best when old rules are extended incrementally rather than torn down and replaced; interpretive communities

[12] See Von Bogdandy and Venzke, *International Judicial Lawmaking*.
[13] See, for example, Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals*.
[14] See, for example, Malarino, "Judicial Activism, Punitivism and Supranationalism: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," *International Criminal Law Review* 12, no. 4 (2012).
[15] Roosevelt raises this criticism with regard to the debate on judicial activism at the US Supreme Court. See Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006), pp. 11-15.
[16] I am grateful to Janina Dill and Dapo Akande for their valuable comments on this aspect.

set the parameters of discourse within which that incremental normative process occurs."[17] And as discussed in more depth below, this change should not be assumed to be linear, radical, or uncontested either. At the same time, this is not to suggest that these developments are generally inconsequential. After all, such gradual change may lead to a more substantial transformation. These interpretive practices are conceptualised as enacted – and evaluated as valid or not – within a community of practice, or interpretive community more specifically, a conceptual element that this chapter now turns to.

2.2. Communities of Practice, Epistemic Communities, and Interpretive Communities

The concept of communities of practice – or interpretive communities – has become increasingly popular within both IL as well as IR scholarship. As briefly indicated above, in IR, communities of practice constitute one of the conceptual cornerstones of IR's practice turn, and is based on the earlier work of Etienne Wenger.[18] According to Adler and Pouliot, drawing on Wenger, a community of practice "is a configuration of a domain of knowledge that constitutes like-mindedness" or a "sense of joint enterprise."[19] Communities of practice are the epistemic groups in which practices are established and re-enacted, practices which are based on frequently tacit intersubjective understandings that shape which interactions and assumption are perceived as possible and reasonable ("background knowledge").[20] Communities of practice therefore form the social environment in which practices are learned by new members entering the community, and in which practices are constituted, re-enacted, and developed.[21] They may centre around a particular profession, such as diplomats or international lawyers, in which case practical knowledge becomes professional knowledge requiring a degree of "skill and judgment" (or what Kratochwil calls "the 'craft' dimension of practice").[22]

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[17] Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, p. 50.
[18] See Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge: Cambridge University Press, 1998).
[19] Adler and Pouliot, "International Practices," *International Theory* 3, no. 1 (2011): p. 18. See also Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, p. 15; Wenger, *Communities of Practice: Learning, Meaning, and Identity*, pp. 72-85.
[20] See Adler and Pouliot, "International Practices: Introduction and Framework," p. 16.
[21] See ibid., p. 17; Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, p. 20.
[22] Kratochwil, "Making Sense of 'International Practices'," in *International Practices*, ed. Adler and Pouliot (Cambridge: Cambridge University Press, 2011), p. 41. Note, however, that Kratochwil points out that, in turn, "[w]hile certainly some professionals are engaged in practical activities, not all are. It would be odd to say that someone practices engineering, even if she has an office, like a doctor or a lawyer, and acquired her status through certifications." Ibid.

In the discipline of IR, the concept of communities of practice also resonates with earlier work especially on epistemic communities.[23] According to Peter Haas, an epistemic community is a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge."[24] This strand of research typically argued that, in the context of uncertainty, epistemic communities providing expertise may be able to shape state interests and contribute to policy coordination internationally.[25] For Adler, who used the concept of epistemic communities in his earlier work,[26] epistemic communities are a specific sub-group of the broader concept of communities of practice.[27]

How exactly epistemic communities and communities of practice may conceptually differ, however, is at times difficult to say. In his earlier work, and explicitly diverging from Wenger's approach,[28] Adler argued that communities of practice, as opposed to epistemic communities, do not necessarily include a process of assessing knowledge.[29] In his more recent work with Pouliot, in contrast, this conceptual distinction again seems to have narrowed, as they emphasised how practices are constantly evaluated as "competent" or not.[30] Another attempt to distinguish between both concepts has been made by Jean d'Aspremont, who observed that the notion of communities of practice is less static, as, at least in his earlier work, Adler emphasised that its membership can change constantly and its shared sense of purpose is continuously re-constituted.[31] In addition – and different from communities of practice – the context in which the concept of epistemic communities has been used typically seems to emphasise (natural or social) scientific communities and technical knowledge.[32]

[23] See especially Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46, no. 1 (1992).
[24] Ibid., p. 3.
[25] See ibid., pp. 3-4, 12-16.
[26] See Adler and Haas, "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program," ibid.
[27] See Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, pp. 16-17.
[28] See ibid., chapter one, fn. 123.
[29] See ibid., p. 17.
[30] See Adler and Pouliot, "International Practices: Introduction and Framework," pp. 7-8.
[31] See d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 17. See also Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, p. 15. See also, in comparison, Haas, "Introduction: Epistemic Communities and International Policy Coordination," pp. 19-20.
[32] See "Introduction: Epistemic Communities and International Policy Coordination," pp. 16-20. While Haas explicitly mentions that the term is not, at least conceptually, confined to natural scientists, this only seems to broaden the definition of what counts as scientific knowledge. See ibid., p. 3, fn. 4.

While both concepts, epistemic communities and communities of practice, have resonated with IL scholarship,[33] the term 'interpretive communities' has been used most frequently by legal scholars. Already in 1978, Oscar Schachter famously discussed what he referred to as the "invisible college of international lawyers."[34] In his seminal article, Schachter described a professional community of international lawyers, consisting of not only government lawyers, but also legal scholars, who together take over legislative functions at the international level by, for example, drafting resolutions and developing customary provisions.[35] This early concept of an "invisible college," however, remained conceptually relatively thin, and shed little light on how to understand specific dynamics taking place within such a group of international lawyers. Developed in the context of literary theory by Stanley Fish,[36] the concept of interpretive communities became popular in legal scholarship especially after the exchange between Fish and Owen Fiss.[37] It was subsequently introduced to research on global governance especially through Johnstone's work.[38] In IL, interpretive communities has become an increasingly prevalent way of approaching, among others, the role of legal academics, the fragmentation of international law, and the ways in which international lawyers construct international doctrine and legal arguments.[39]

Compared with communities of practices, the term 'interpretive communities' is more specific and focuses on interpretation as a particular type of engagement (or practice, using practice theory's terminology). Based on the idea that international lawyers share common views and

[33] See, for example, Hernández, "The Responsibility of the International Legal Academic: Situating the Grammarian within the 'Invisible College'," in *International Law as a Profession*, ed. Nollkaemper, et al. (Cambridge: Cambridge University Press, 2016, forthcoming), pp. 5-6; D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 16-18; Noortmann, "The International Law Association and Non-State Actors: Professional Network, Public Interest Group or Epistemic Community?," in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, ed. d'Aspremont (Abingdon: Routledge).
[34] Schachter, "The Invisible College of International Lawyers," *Northwestern University Law Review* 72, no. 2 (1978).
[35] See ibid., pp. 217, 223.
[36] See Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980), pp. 14-15.
[37] See Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34, no. 4 (1982); Fish, "Fish V. Fiss," *Stanford Law Review* 36, no. 6 (1984).
[38] See especially Johnstone, "The Power of Interpretive Communities," in *Power in Global Governance*, ed. Barnett and Duvall (Cambridge: Cambridge University Press, 2005). See also "Security Council Deliberations: The Power of the Better Argument," *European Journal of International Law* 14, no. 3 (2003); *The Power of Deliberation: International Law, Politics and Organization*, pp. 33-54. See also already "Treaty Interpretation: The Authority of Interpretive Communities," *Michigan Journal of International Law* 12, no. 2 (1991).
[39] See, for example, Hernández, "The Responsibility of the International Legal Academic: Situating the Grammarian within the 'Invisible College'"; Waibel, "Interpretive Communities in International Law," in *Interpretation in International Law*, ed. Bianchi, Peat, and Windsor (Oxford: Oxford University Press, 2015), pp. 154-60; D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*.

professional understandings of how international law should be interpreted, within this strand of scholarship, legal interpretations suggested at the international plane are conceptualised as being judged as valid or not by a community of international lawyers.[40] In other words, the concept of interpretive communities provides a specific response to Venzke's recent call for answers to the question of what makes legal arguments valid,[41] as legal validity is understood to denote a social reality,[42] which can be researched empirically. In legal theory, the concept is therefore closely related to what Holtermann and Madsen have recently presented as European New Legal Realism, in which they call for empirical research on legal validity.[43]

While the concept of interpretive communities has become increasingly popular in international legal research, slight differences exist in the way in which it has been used by different authors. In his recent contribution, d'Aspremont emphasised especially the confrontational character of the process through which the validity of legal interpretations is judged within such an interpretive community, turning international law into "a perpetual site of competition for persuasiveness in legal argumentation."[44] On the other hand, Johnstone suggested that interpretive communities are likely to be centred around international organisations, as it is within their institutional framework that a large proportion of treaties are negotiated and resolutions are drafted.[45] Most importantly for this study, he also emphasised how interpretive communities may exert productive power, and how actors such as the ICJ or the UN Secretary General may push for normative developments.[46] Johnstone then explained that a broader interpretive community may influence this development of normative content, especially as it is this broader community that assesses the validity of these new developments.[47]

Building on these insights, this project uses the concept of interpretive communities to analyse how a specific type of community of practice develops legal meaning in ICL through interpretation. Considering the slight differences in the way in which the concept of interpretive

[40] See especially d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 18, 22; Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, pp. 33-41.
[41] See Venzke, "Editorial: What Makes for a Valid Legal Argument?," *Leiden Journal of International Law* 27, no. 4 (2014): p. 816.
[42] See d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 22.
[43] See v. H. Holtermann and Rask Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible," pp. 212-13.
[44] D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 24.
[45] See Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, p. 43.
[46] See ibid., pp. 48-50; "The Power of Interpretive Communities," p. 185.
[47] See *The Power of Deliberation: International Law, Politics and Organization*, p. 50.

communities has been used in legal scholarship, as well as conceptual differences between interpretive communities and communities of practice, the following sections provide a more in-depth overview of how the term interpretive communities is used in this study. This discussion focuses on five aspects in particular: (a) shared professional assumptions on legal interpretation; (b) membership; (c) the relationship between different communities; (d) legal indeterminacy; and (e) the possibility of normative innovation.

2.2.1. Shared Professional Assumptions on Legal Interpretation

To begin with, international practices – and interpretive practices in international law more specifically – are based on shared professional assumptions, or what Adler and Pouliot have called "background knowledge."[48] According to Adler and Pouliot, background knowledge comprises the frequently tacit, intersubjective understandings that shape which interactions and assumptions are perceived as possible and reasonable.[49] In the practices of interpretation in international law specifically, such background knowledge consists of shared professional understandings of how, for example, legal arguments should be made, which sources should be referred to, and which rules of interpretation may apply in international law. Based on the shared expectation that, for example, like cases should be treated alike, previous interpretations proposed by international bodies and individuals may shape future avenues for the development of legal meaning, provided they are accorded interpretive authority. Through this process, some interpretations become less convincing than others, while these newly introduced interpretive aspects also open up new possibilities.

As d'Aspremont explains, being socialised into the discipline of international law therefore entails that practitioners encounter and absorb, for example, common legal concepts and doctrines.[50] Through this process, (international) lawyers therefore develop what one of the legal officers interviewed for this project referred to as a "judicially trained gut feeling," an intuition for which legal arguments are likely to be perceived as legally valid.[51] Such an emphasis on shared understandings, however, does not deny the possibility that legal arguments may remain contested.[52] Neither does this suggest that it would be feasible to

[48] Adler and Pouliot, "International Practices: Introduction and Framework," p. 16.
[49] See "International Practices," pp. 17-18.
[50] See d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, pp. 10-11.
[51] Interview with legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[52] See similarly Adler and Bernstein, "Knowledge in Power: The Epistemic Construction of Global Governance," in *Power in Global Governance*, ed. Barnett and Duvall (Cambridge: Cambridge University Press, 2005), p. 296.

provide a precise inventory of all professional understandings shared within most – or even only parts – of the international legal profession.[53] Instead, to analyse how legal meaning may develop through interpretation, this study draws on legal theory to highlight how such common assumptions provide legal practitioners with interpretive flexibility.

2.2.2. Membership

Second, interpretive communities in international law are typically conceptualised as consisting of a variety of different actors, as opposed to a community that is confined to a specific institutional context. According to Johnstone, for example, interpretive communities in international law broadly consist of judges and diplomats, staff working at international organisations, governments, and non-governmental organisations, as well as academics and practicing lawyers.[54] Similarly, also the interpretive development of ICL consists of a set of social practices that involve more than one type of actor. While international judges pronounce their interpretation of legal provisions in their decisions, in the field of ICL, they routinely refer to the writings of academics and opinions and findings of international expert bodies, such as the International Law Commission (ILC) and different UN Sub-Commissions.[55] And with states arguably often being reluctant to publicly comment on the content of individual judgments,[56] it has largely fallen to civil society organisations to critique and comment on specific cases.[57] Following Meierhenrich's distinction between organisational and international

[53] See d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 12. D'Aspremont, however, provides the arguably most comprehensive overview of what he calls "foundational doctrines" and "argumentative techniques" to date. See ibid.

[54] See Johnstone, "The Power of Interpretive Communities," p. 191.

[55] See, for example, *Krstić* Trial Judgment, ICTY, fns. 1197, 1243 (citing the ILC Draft Code of Crimes and a report of the UN Sub-Commission on Prevention of Discrimination and Prosecution of Minorities); or *Kayishema* Trial Judgment, ICTR, fns. 41, 45 (citing the ILC Draft Code of Crimes and a report of the Sub-Commission on Genocide).

[56] Instead, comments by the German and British foreign offices have been confined to welcoming the *delivery* (instead of the content) of a judgment. For example, in January 2009, the Representative for Human Rights of the German Foreign Office (*Menschenrechtsbeauftragter*), Günter Nooke, welcomed the commencement of the Lubanga case at the ICC. See German Federal Foreign Office, Press Release, 26 January 2009, "Menschenrechtsbeauftragter Nooke begrüßt Prozessauftakt gegen Thomas Lubanga vor dem Internationalen Strafgerichtshof," available online, http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2009/090126-Nooke-Lubanga.html (accessed 25 January 2017). See *similarly* Foreign & Commonwealth Office, Press Release, 7 August 2014, "Foreign Office Minister Welcomes Delivery of ECCC Judgment," available online, https://www.gov.uk/government/news/foreign-office-minister-welcomes-delivery-of-eccc-judgment (accessed 7 August 2015).

[57] Consequently, as Halley has convincingly argued, more or less loosely connected groups of lawyers have been able to influence the content of the legal rules and principles of ICL, in this case lawyers and civil society groups focusing on women's rights. See Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," *Michigan Journal of International Law* 30, no. 1 (2008). See also, for example, Amnesty International UK, Press Release, 26 October 2009, "Karadžic Trial Must Bring Justice for Victims of Bosnia War, Says Amnesty," available online http://www.amnesty.org.uk/press-releases/karad%C5%BEic-trial-must-bring-justice-victims-bosnia-war-says-amnesty (accessed 25 January

practices, the interpretive development of ICL can therefore better be understood as a set of *international* practices involving an interpretive community that spans across different international actors, instead of a mere *organisational* practice confined to a particular institutional setting.[58]

One way of conceptualising the structure of interpretive communities has been offered by Johnstone, who distinguishes between three circles that, together, constitute interpretive communities. More specifically, according to this distinction, an inner circle consists mostly of government officials and staff at international organisations who create, negotiate, and implement legal provisions. An outer circle is then constituted by the broader community involved in the interpretive process, who are perceived to have expert knowledge in the area of international law. This outer circle includes diplomats and staff at international organisations, but also scholars and other legal experts. Finally, a third circle situates this expert group within a broader community of professionals that do not necessarily have legal training, but for whom these interpretive questions may nevertheless be important, such as staff working for civil society organisations and the media.[59]

While this distinction between different circles is based on the level of expertise and the functions different individuals fulfil within interpretive communities, defining the specific boundaries of such a community empirically is far from a simple process, especially as practitioners may constantly leave and enter.[60] But also conceptually, tracing a community's outer boundaries raises important questions about how to identify its membership, answers to which have differed so far. Adler, for example, argued in his earlier work that members of a community of practice would need to share knowledge and a sense of identity.[61] In contrast,

2017). Human Rights Watch even complied a comprehensive digest of ICTR and ICTY case law. See Human Rights Watch, Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, 2004.

[58] For this distinction between international and organisational practices, see Meierhenrich, "The Practice of International Law: A Theoretical Analysis," p. 53, calling for more in-depth research on organisational practices. Meierhenrich defines international practices as "a practice that is not primarily enacted inside one bureaucratic entity, but rather on the stage of the international system as a whole, with a multitude of international agents playing a role – from individuals to NGOs to states to international organizations." Ibid., p. 66.

[59] See Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, pp. 41-42. See also "The Power of Interpretive Communities," pp. 190-91 (distinguishing between an outer and inner circle only). And see Adler's distinction between three circles of communities of practice more generally, Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, pp. 24-25.

[60] This point is also emphasised by Waibel, who stresses the evolving character of interpretive communities' membership. See Waibel, "Interpretive Communities in International Law," p. 152.

[61] See Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, p. 24.

Pouliot suggested that the boundaries of such a community could be traced by identifying a shared practice.[62] And Trine Villumsen Berling traced the extent to which contacts between different groups existed in the field of European security to analyse changes in the community's membership after the end of the Cold War.[63]

The study will combine the insights of these different perspectives to empirically trace the boundaries of the community of practice interpreting ICL. To begin with, I will provide first insights into which actors interact in which institutional contexts by analysing which groups individuals are in contact with. Consequently, and as indicated above, interviewees have been selected based on recommendations of members of the community engaging with ICL, who were asked to identify individuals they are in regular contact with.[64] However, as chapter six outlines, I will distinguish between two different communities of practice based on a diverging, albeit partly overlapping, sense of identity. I will then trace how these two communities map on to the interpretive practices of ICL. This analysis points to a potential mismatch between the interpretive community of ICL and the expert community surrounding it, and investigates how such a discrepancy might influence the distribution of productive power among and beyond these communities.[65]

Closely connected to the boundaries of the community of practice interpreting ICL are the (perceived) boundaries between the political and the legal as enacted through the practices of ICL. The distinction between politics and law is hence not seen as a given, but as constituted through practices enacted by a community of legal practitioners. As a breadth of research – ranging from legal realism to research on judicial appointments and decision-making at international and domestic courts – has emphasised, law and politics are closely intertwined.[66] Nevertheless, it is the very idea of the independence of courts from politics that not only serves as their legitimation, but also brings with it the notion that law and politics belong to different

[62] See Pouliot, *International Security in Practice: The Politics of NATO-Russia Diplomacy*, pp. 5, 38-44.
[63] See Villumsen Berling, "Bourdieu, International Relations, and European Security," *Theory and Society* 41, no. 5 (2012): p. 466.
[64] See chapter one, p. 43.
[65] See chapter six, pp. 154-63.
[66] See, for example, Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002); Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization* 61, no. 4 (2007). For an overview of legal realism, see Leiter, "Legal Realism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Patterson (Oxford: Blackwell Publishing, 2005). With regard to international law and international politics specifically, see Reus-Smit, "The Politics of International Law," in *The Politics of International Law*, ed. Reus-Smit (Cambridge: Cambridge University Press, 2004), p. 14.

fields that follow different logics.[67] As Anne-Marie Slaughter (Burley) and Walter Mattli observed, in the case of the European Court of Justice (ECJ), law with its distinct logic and methodology "function[ed] both as mask and shield" to de-politicise judicial decision-making and ultimately to facilitate the expansion of decision-making power by the court.[68] This is not to suggest that should judicial decision-making have become de-politicised in this way, politics and law need to be treated analytically as separate realms in which judges, for example, are free from political influence and considerations. Instead, it suggests that if a question comes to be *perceived* by practitioners more as legal – as indicated by the fact that it is discussed by a community of experts and in accordance with shared professional standards – such a shift may have empowered this community of legal practitioners *vis-à-vis* other international actors.

As a final aspect, I will therefore investigate which of these groups has been involved in which way in the interpretive practices developing ICL, and whether some groups have been empowered *vis-à-vis* others. Following Michael Barnett and Raymond Duvall's distinction between different forms of power, the study therefore concentrates on power as productive power, or, even more specifically, interpretive power understood as a form of productive power. According to Barnett and Duvall, productive power is "the socially diffuse production of subjectivity in systems of meaning and signification."[69] And more specifically, interpretive power in this context is understood as the ability to shape legal meaning as part of the practices of the development of international law within a community of practice that assesses this development as valid.

2.2.3. The Relationship between Communities

Third, interpretive communities – as well as, according to Adler, communities of practice more broadly – may overlap and cut across different institutional settings.[70] As explained above, interpretive communities in international law may include judges, legal scholars, government

[67] For a more extensive discussion of the historical development of the idea of a separation of politics and law in IR research and legal theory, see Kratochwil, "How Do Norms Matter?," in *The Role of Law in International Politics*, ed. Byers (Oxford: Oxford University Press, 2000), 35-45.
[68] Burley Slaughter and Mattli, "Europe before the Court: A Political Theory of Legal Integration," *International Organization* 47, no. 1 (1993): p. 72.
[69] Barnett and Duvall, "Power in Global Governance," in *Power in Global Governance*, ed. Barnett and Duvall (Cambridge: Cambridge University Press, 2005), p. 3. See also Johnstone's discussion, based on Barnett and Duvall, of legal discourse as "productive power," defined as the ability to "shap[e] the conditions or terms of interaction." Johnstone, "The Power of Interpretive Communities," ibid., pp. 185, 202-04. See also Neumann's stronger emphasis on the relationship between discourse and practices, defining "conceptual power" as "the kind of power that determines its field of discourse by establishing new practices or maintaining already established ones." Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy," p. 636.
[70] See Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, pp. 24-25.

officials, and staff working for international organisations and civil society groups. But as Adler observes, each of these individuals may also be part of more than one community.[71] Regarding international law more specifically, due to its institutional and substantive fragmentation into different subfields, distinct but overlapping interpretive communities have emerged, ranging from the law of the sea to ICL.[72] While focusing on the interpretation of ICL as a substantive field, I will distinguish between two separate, but largely overlapping communities: an ICL expert community and an international justice community.

2.2.4. Legal Indeterminacy

Fourth, as mentioned above, the study subscribes to a sociological view of legal validity. In this sense, legal indeterminacy – either conceptualised as 'gaps' in the law or as the idea that the phrasing of a text does not necessarily constrain its interpretation – is therefore seen as limited by a community of practice that needs to endorse such interpretations as valid. Indeed, as Johnstone observes, "[t]he idea of interpretive communities runs counter to the view that meaning is radically indeterminate."[73] This is not to suggest, however, that there is no room for flexibility, contesting legal opinions, and change in legal interpretation. However, it means that while, for example, a general agreement on rules of legal interpretation in international law may lead to competing legal views (and at times open new interpretive avenues as much as constraining them), there are some interpretations that will be perceived as violating these rules and therefore as falling outside of what is perceived as a valid interpretation. This process, called "social validation" by d'Aspremont, is similar to the continuous assessment of a practice as "competent" or not in Adler and Pouliot's framework.[74]

As chapters five and six of this project emphasise empirically, however, to participate in this discursive validation process, it is necessary for this interpretation to be both publicly voiced and heard within the broader community. In addition, the study traces empirically how interpretations suggested by some groups within the interpretive community might not only be evaluated as competent and valid, but may be accorded sufficient interpretive authority to be

[71] See ibid, p. 24.
[72] See similarly Waibel, "Interpretive Communities in International Law," pp. 154-55. See generally also Koskenniemi and Leino, "Fragmentation of International Law? Postmodern Anxieties." More in-depth on the substantial as opposed to the institutional fragmentation of international law, see, for example, Andenas and Bjorge, "Introduction: From Fragmentation to Convergence in International Law," in *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, ed. Andenas and Bjorge (Cambridge: Cambridge University Press, 2015), pp. 4-7.
[73] Johnstone, *The Power of Deliberation: International Law, Politics and Organization*, p. 36.
[74] D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Argumentation*, p. 22; Adler and Pouliot, "International Practices: Introduction and Framework," pp. 7-8.

perceived as a new standard of legal interpretation that other members in the interpretive community will rely on. The project therefore emphasises elements of hierarchy within the process of legal interpretation. In particular, it traces the level of interpretive weight international courts – specifically international criminal courts as opposed to hybrid courts – are accorded, and how this interpretive weight may translate into productive power both within and outside of the relevant community of practice interpreting ICL.

2.2.5. The Possibility of Normative Innovation

Finally, and as the flipside to this discussion on the (social) boundaries of legal indeterminacy, the study emphasises the possibility of normative innovation. More specifically, it will be argued that some interpretations, suggested by groups within an interpretive community that are accorded a particularly high level of interpretive authority, may not only be endorsed as valid, but also be accepted as a new interpretive standard. Indeed, through this process, these new interpretations may at times become so deeply rooted within the legal discourse that they can effectively be understood as a law-creating process, with international judicial law-making being the most visible example. But similar processes have also been observed, at the very extreme, with regard to the role international legal scholars may play within the legal discursive process.[75] As the chapter discusses in greater depth in the following sections, this study argues that the possibility of change in legal meaning is rooted in shared background assumptions about the character of international law and legal interpretation. In other words, while not every interpretation may come to be perceived as valid within an interpretive community, interpretations that are endorsed and might even be considered as authoritative may regularly constitute developments in normative content.

2.3. Interpretive Practices, IR's Practice Turn, and the Possibility of Change

Based on this conceptual framework, the project attempts to address one of the core conceptual challenges of IR's practice turn: to theorise normative change within the practices of legal interpretation. Specifically, I will draw on legal theory as an indication for some of the shared professional assumptions underlying the interpretive practices of international law that allow practitioners to develop legal meaning. The potential for innovation in interpretive practices is

[75] As one of the most forceful examples for such an argument, see Tushnet, "Academics as Law-Makers?," *University of Queensland Law Journal* 29, no. 1 (2010). Specifically with regard to ICL, see, for example, Bantekas, "Reflections on Some Sources and Method of International Criminal and Humanitarian Law," *International Criminal Law Review* 6, no. 1 (2006): p. 129. But see, for example, d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011), p. 210.

therefore not theorised as primarily rooted in the way in which these practices themselves change over time. Instead, I will focus on how shared epistemic knowledge on the legal interpretive process provides legal experts with the opportunity to creatively develop legal content in practice. In this context, I will identify three 'triggers' of legal flexibility that form part of the professional assumptions shared within a community of practice interpreting ICL. Before doing so, however, the following section provides a brief overview of practice theory in IR and its treatment of change and innovation.

Work on international practices has often stressed how practices are enacted and maintained through routine. As a result, several authors have recently criticised the way in which these approaches theorised the potential for change and innovation through practice.[76] In his work on the practices of international law, for example, Meierhenrich argues that "a substantial portion of everyday lawyering rests on habitual, routinized, ritualistic, repetitive, or mundane behavior."[77] And Ted Hopf even criticises work on international practices as giving too much attention to the potential for change, as in his view, change can only occur once the ingrained influence of habits has been circumvented.[78]

Adler and Pouliot's influential work also seems to include a relatively thin conception of change.[79] After all, if practices are rooted in shared understandings, or "background knowledge" – which in turn is learned and enacted through practices – it is difficult to see how exactly this process may lead to change.[80] Potential answers provided by Adler and Pouliot include the suggestion to focus on the performative element of practices, as meaning has to be constantly reconstituted and hence cannot be stable, or the suggestion that interacting practices may lead to innovation.[81] Possibly due to the challenges of generating insights applicable across different practices, these suggestions may only provide a first step to understanding how exactly meaning might develop in one direction or another, and when and why such a development would begin in the first place.

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[76] See Bueger and Gadinger, "The Play of International Practice," pp. 455-56; Schindler and Wille, "Change in and through Practice: Pierre Bourdieu, Vincent Pouliot, and the End of the Cold War," pp. 331-32; Duvall and Chowdhury, "Practices of Theory," pp. 346-51. Specifically regarding the potential of Bourdieusian approaches to understand change in international politics, see also Villumsen Berling, "Bourdieu, International Relations, and European Security," pp. 451, 455.

[77] Meierhenrich, "The Practice of International Law: A Theoretical Analysis," p. 51.

[78] See Hopf, "The Logic of Habit in International Relations," pp. 540, 544. Hopf consequently distinguishes between a logic of practice and a logic of habit. See ibid., pp. 544-47.

[79] See Adler and Pouliot, "International Practices: Introduction and Framework," pp. 16-21.

[80] See ibid., pp. 6, 8, 16; Pouliot, "The Logic of Practicality: A Theory of Practice of Security Communities," p. 270.

[81] See Adler and Pouliot, "International Practices: Introduction and Framework," pp. 16-21.

One way of thinking about such a difficulty with accounting for innovation and change might be that routine and repetition indeed seems to be at the core of the way in which practice has often been conceptualised in IR. As Adler and Pouliot explain, practices are distinct from mere behaviour or action in that they constitute "patterned actions that are embedded in particular organized contexts … and are socially developed through learning and training."[82] In other words, if there was no pattern, nothing that could be learned through repetition, practices would be reduced to unstructured behaviour – and therefore become conceptually irrelevant. It is this focus on repetition and routine, based on common, learned assumptions or "background knowledge," that provides the concept of practices with its structural – instead of merely agential – dimension.[83] Consequently, in Adler and Pouliot's words, the potential for change becomes limited to the "wiggle room" within this continuous process of repetition.[84]

Within a large portion of work commonly associated with IR's practice turn, repetition and routine thus necessarily seem to be part of the conceptual framework, even though, as Christian Bueger and Frank Gadinger point out, approaches may differ substantially on how much 'wiggle room' actors may have within this process.[85] In the end, while repetition seems to be a necessary aspect of practice theory's core conceptual framework, a focus on change and the potential for innovation is not necessarily required. As Bueger and Gadinger observe, one result of these conceptual commitments seems to be that how much change and innovation is possible has become one of the main aspects on which practice theorists disagree.[86] And in Hopf's work, this tension even seems to have translated into a distinction between practice and habit as two separate logics.[87]

A second result of this theoretical focus seems to be that, in order to account for the unstructured side of practices and the potential for change, it becomes necessary to take an additional conceptual step.[88] An example of such an additional step has been the way in which Pierre Bourdieu's concept of hysteresis (a situation in which dispositions fail to match a changing field) has found its way into IR research.[89] The concept of hysteresis was used, for

[82] Adler and Pouliot, "International Practices," p. 5.
[83] See Adler and Pouliot, "International Practices: Introduction and Framework," pp. 8, 15.
[84] Ibid., p. 7.
[85] See Bueger and Gadinger, "The Play of International Practice," pp. 455-56.
[86] See ibid., p. 455.
[87] See Hopf, "The Logic of Habit in International Relations," pp. 544-47.
[88] See similarly Schindler and Wille, "Change in and through Practice: Pierre Bourdieu, Vincent Pouliot, and the End of the Cold War," p. 337 (on the concept of hysteresis).
[89] See, for example, ibid., pp. 336-38. According to Bourdieu, "the hysteresis of *habitus* is doubtless one explanation of the structural lag between opportunities and the dispositions to grasp them." Bourdieu, *The Logic of Practice* (Stanford: Stanford University Press, 1990), p. 59 (emphasis in original). More generally on the

example, by Pouliot to conceptualise the instability of – and power struggles within – the practices of the NATO-Russia Council.[90] However, within IR's practice turn, several authors have recently added to (and questioned) this conceptualisation of change in and through practice, identifying different forms of change.[91] In a contribution that is most relevant to this study, Sebastian Schindler and Tobias Wille moved beyond Bourdieu's theory of practice to challenge Pouliot's interpretation of his own empirical account to explain change within the practices of the NATO-Russia Council. Instead of relying on the concept of hysteresis, they argue that the potential for change arose because it was contested among actors how the past should be interpreted in practice.[92] In other words, while the concept of practices relies on the notion of repetition, Schindler and Wille pointed out that at any moment in time, competing interpretations of the past may exist.

For the purposes of this project, Schindler and Wille have therefore taken the conceptually crucial step of specifying how exactly change may be situated within practices themselves, instead of conceptualising change as rooted in an external event.[93] In the interpretive practices of international law, the potential for innovation in legal meaning can similarly best be understood as rooted in these interpretive practices themselves, and specifically in the underlying professional assumptions on which these practices are based. For example, Kratochwil has recently emphasised the creative potential of the practices of legal interpretation,[94] concluding that, "[a]fter all, the 'practical' might not be the habitual."[95] Based on the work of the 'Chicago School,' he argued that the possibility of innovation emerges when rules are applied to factual situations that are frequently ambiguous, thereby allowing for

potential for instability and change in Bourdieu's framework, see, for example, Schäfer, *Die Instabilität Der Praxis: Reproduktion Und Transformation Des Sozialen in Der Praxistheorie* (Weilerswist: Velbrück Wissenschaft, 2013), pp. 63-120.

[90] See Pouliot, *International Security in Practice: The Politics of NATO-Russia Diplomacy*, pp. 44-50.

[91] Trine Villumsen Berling, for example, recently added to this (Bourdieusian) framework by developing the concept of "doxic battles" as a way of thinking about the changing character of European security as rooted in the strategic use of capital by actors in a field in which its most fundamental parameters (doxa) became contested after the end of the Cold War. See Villumsen Berling, "Bourdieu, International Relations, and European Security," pp. 455-56, 468-69.

[92] See Schindler and Wille, "Change in and through Practice: Pierre Bourdieu, Vincent Pouliot, and the End of the Cold War," pp. 331-39, 345-54.

[93] See ibid., pp. 338, 346.

[94] See Kratochwil, "Making Sense of 'International Practices'," p. 41. See also Kratochwil's earlier work already depicting legal reasoning as practical reasoning. See Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, pp. 34-44, 212-248.

[95] Kratochwil, "Making Sense of 'International Practices'," p. 41. See similarly Hopf, "The Logic of Habit in International Relations," pp. 544-47. As mentioned above, Hopf distinguishes between a logic of practice and a logic of habit. See ibid.

"interstitial changes" that may lead to far-reaching transformations over time.[96] In other words, the application of rules to actual situations is far from a straight-forward process, and frequently allows for discretion, for example with regard to how to interpret two conflicting rules. The following discussion builds on this point by drawing on legal theory to distinguish between three 'triggers' of legal flexibility that form part of the professional understandings structuring the interpretive practices of international law.

2.4. Three 'Triggers' of Legal Flexibility

Within legal theory, the question of legal flexibility, and especially the amount of discretion that judges have when deciding cases, is a central point of discussion. For the purposes of this study, the following sections will focus on the insights that can be gained from these debates specifically on judicial flexibility, even though most of these aspects equally apply to legal interpretation more generally, and regardless of the institutional role of the interpreter and the legal status of the interpretive product. Based on these discussions, such a potential for legal flexibility is conceptualised as constituting part of the professional assumptions underlying the practices of legal interpretation. In this framework, the potential for change in legal meaning is therefore situated in the specific form such shared assumptions take in the practices of legal interpretation, resulting in the development of legal content. In other words, change is theorised as change within the meaning of legal provisions, instead of change within interpretive practices themselves. This development of legal meaning, however, is nevertheless rooted in practice, or, more specifically, in the shared assumptions on which legal interpretive practices rest.

In legal theory, judicial flexibility is at the heart of the long-standing and surprisingly sticky debate between formalism and legal realism.[97] Most importantly, legal realists challenged the supposition that a rule's phrasing constrains a judge's interpretation.[98] Given that this fundamental critique formed the basis of much subsequent work (such as most notably critical legal studies scholarship),[99] formalism seems to have degraded into an almost entirely fictional

[96] See Kratochwil, "Making Sense of 'International Practices'," p. 50.
[97] See Solum, "The Positive Foundations of Formalism: False Necessity and American Legal Realism," *Harvard Law Review* 127, no. 8 (2014): p. 2495. Solum identifies traces of debates between formalism and legal realism in contemporary political science approaches explaining judicial behaviour. See ibid.
[98] For a general overview of legal realism, see, for example, Leiter, "Legal Realism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Patterson (Oxford: Blackwell Publishing, 2005).
[99] For an overview, see Binder, "Critical Legal Studies," ibid.

position within the debate that is only ever debunked, but never defended.[100] Indeed, Ronald Dworkin calls a conception of adjudication as a technical (rather than a creative or productive) process the layman's version of the "plain-fact view" of law: the assumption that "there is law in the books decisive of every issue that might come before a judge."[101] Instead of discussing whether judges are bound to technically enforce legal provisions or not, the more important questions – and the cause of real disagreement in legal theory – concentrate on inquiries into the nature and limits of judicial flexibility.

More conceptual approaches to judicial flexibility fall into one of three categories that differ with regard to the reasons for why judges may have substantial latitude when making their decisions: potential ambiguities within the phrasing of specific rules; the character of specific types of legal provisions; and the structure of legal reasoning and judicial decision-making itself. I call them the three 'triggers' of legal flexibility. These 'triggers' should not be understood to be mutually exclusive, but rather complementary to each other. Additionally, these three types rely on different conceptions of law, which, in turn, leads to differences in how judicial flexibility – and thereby the potential for creativity and innovation in the practices of international law – is conceptualised and how extensive it is estimated to be. More specifically, conceptions that see judicial flexibility as mostly confined to the first 'trigger', ambiguity within the phrasing of specific rules – or what is often referred to as 'gaps' in the law – can be understood as rooted in legal positivism. Once a legal positivist conceptualisation of international law is left behind, however, the remaining two 'triggers' emphasise alternative – and complementary – ways of conceptualising judicial flexibility.

To begin with the first 'trigger,' most common among international lawyers is the view that judges are, at least to a certain extent, constrained in their legal interpretation, and that a judge's discretion is instead grounded in the intentional or unintentional ambiguity contained in the phrasing of a specific legal provision. According to this common narrative, judges are occasionally confronted with legal provisions that do not provide them with a clear answer.[102] These ambiguities might be the result of imperfection, as they may, for example, arise from

[100] This point has already been observed by Dworkin in 1977, even though the debate does not seem to have changed much in this regard since. See Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), pp. 15-16. See also Weinrib, "Legal Formalism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Patterson (Oxford: Blackwell Publishing, 2005), p. 332. In Weinrib's words, "[r]umor has it that legal formalism is dead." Ibid.

[101] Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998), pp. 6, 8.

[102] According to Raz, "[t]here is a gap in the law when a legal question has no complete answer." Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), p. 70.

unforeseen factual circumstances that have not been considered by the legislature when drafting a particular statute. As another example, imperfection may also result from conflicting legal rules. In any legal system, instances may arise in which more than one legal rule is applicable, and it might be the case that those rules stipulate conflicting legal conclusions. Joseph Raz hence concluded that "gaps" in the law also exist when no rule is provided that regulates how to resolve such a conflict.[103]

In the context of the increasing complexity of international law, the absence of legal provisions that regulate such conflicts might be particularly prevalent within the international legal system. Consequently, for example Vaughan Lowe argued that it may be this creation of new "interstitial norms" resolving such norm conflicts by judges that will constitute one of the most important developments in international law in the future.[104] But as an alternative, legal provisions may also be ambiguous by design. In international law specifically, Kenneth Abbott and Duncan Snidal, for example, have argued that due to the complexity of the required negotiation process, states frequently decide to leave legal provisions vague.[105] As judges (usually) cannot refer the question back to the legislature, they nevertheless have to make a decision, thereby "filling" the "gap" with their legal interpretation.[106] Within contemporary international law, both intentional and unintentional ambiguity in the phrasing of legal provisions therefore play a prominent role in accounting for legal flexibility.

An understanding of legal flexibility as confined to instances in which the phrasing of a specific provision has remained unclear, however, does not account for important alternative accounts of how legal interpretation may develop legal content. Indeed, such a view is rooted in legal positivism, which, especially through the sources doctrine, still plays a prominent role in international law.[107] As Hernández points out, to think of legal flexibility as merely 'clarifying'

[103] See ibid., pp. 74-75.
[104] See Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Byers (Oxford: Oxford University Press, 2000), pp. 212-19.
[105] See Abbott and Snidal, "Hard and Soft Law in International Governance," International Organization 54, no. 3 (2000): p. 433.
[106] In this context, Raz, for example, argues that the use of judicial discretion to complete "gaps" in the law, in combination with the doctrine of precedent, may often amount to judicial law-making. See Raz, *The Authority of Law: Essays on Law and Morality*, p. 96.
[107] This is what legal positivists would discuss as "gaps" in the law. As Gardner points out, however, nothing in the underlying premise of legal positivism excludes the possibility that judge-made law might be part of the applicable law. See Gardner, "Legal Positivism: 5 1/2 Myths," *American Journal of Jurisprudence* 46(2001): pp. 211-14.

the meaning of faulty provisions, however, "is a distinctive feature of the orthodox positive view, which presumes there to exist some 'correct' or 'proper' interpretive process."[108]

Instead of confining judicial latitude to situations in which the legislature intentionally or unintentionally left specific legal provisions vague – and contrary to legal positivism – certain types of legal provisions also provide judges with a particularly high degree of leeway *due to their character*. If seen from this perspective, it does not matter how carefully legal provisions are drafted, as some types of laws will always provide judges with more flexibility than others. In particular, a common way of distinguishing between different types of legal provisions is to contrast legal rules with legal standards. According to Dworkin, rules and principles "differ in the character of the direction they give."[109] As he explains, while a rule is either applicable or not depending on whether the necessary conditions are fulfilled, principles instead give reasons that might guide the decision in one direction or another. Principles hence have to be taken into account by judges, but unlike rules, they allow for more than a choice between the applicability and non-applicability of a certain legal conclusion.[110]

A distinction between different types of legal provisions, with some allowing for more latitude than others, can thus be conceptualised as a second 'trigger' of legal flexibility. In international law, especially the (conventional legal positivist) distinction between different sources of international law – namely international treaties, customary provisions, and general principles of law as listed in Article 38 (1) of the ICJ Statute – comes to mind. However, with Dworkin, it can also be argued that customary provisions differ substantially from international treaties in the direction they provide, especially due to their non-codified character. Chapters three and four below will discuss this aspect in more depth by outlining the differences between the ways in which international and hybrid criminal courts have interpreted the crime of genocide (as codified in the Genocide Convention) as opposed to the law of war crimes (which, in important respects, is rooted in customary law).

While certain types of legal provisions that form a fundamental part of every legal system hence provide more leeway for judges than others, one can even go further and argue that it is the structure of the judicial reasoning process itself that generally allows for considerable

[108] Hernández, "Interpretive Authority and the International Judiciary," p. 177.
[109] Dworkin, *Taking Rights Seriously*, p. 24.
[110] See ibid., pp. 24-25. Note that there is some overlap between these two reasons of judicial flexibility. As Dworkin points out, in cases in which a legal rule includes, for example, the term "reasonable," this rule comes to act as a principle, hence providing judges with discretion. See ibid., p. 28. Raz, on the other hand, uses legal rules that include a reasonableness standard as an example of instances in which the legislature intentionally left "gaps" for judges to fill. See Raz, *The Authority of Law: Essays on Law and Morality*, p. 194.

latitude. As various writings on analogical reasoning and the role of precedents have emphasised when discussing adjudication in common law systems, answering the question of whether two cases are similar, similar enough, and similar in the legally important respect is a far from technical task, but provides judges with a considerable degree of leeway.[111] And as Raz argues, legal indeterminacy is inevitable, not only because on a linguistic level, every text lacks clarity to a certain extent, but also because this text needs to be applied to social facts that themselves are frequently inconclusive.[112] After all, it is judges who, when considering the admissibility of evidence, decide which parts of reality may be included in the narrative presented before a court, and how much legal weight is conferred to them. As Kratochwil put it, "even explicitly formulated rules can do little until they are applied to concrete situations."[113]

This emphasis is not to suggest, however, that the potential for legal innovation and development is without limits. Especially in international law, the tension between legal rules and principles as indeterminate on the one hand, and as stabilising international affairs on the other is an almost classic paradox. After all, potential attempts by human rights NGOs to convince states to sign international human rights treaties are rooted in the expectation that this would bind them to stable, agreed-upon standards in the future.[114] Similarly, the myth of judges as merely applying rules to specific cases, instead of using discretion or even making law, plays a crucial role in legitimising judicial decisions.[115] As explained above, the potential for creativity in the practices of legal interpretation is curbed by the need for new interpretations to be assessed as valid within the respective interpretive community. Such an assessment process may therefore be understood as continuously re-negotiating the outer limits of which interpretations may be presented as valid interpretations in practice. At the same time, new interpretations may develop legal meaning if they come to be perceived as authoritative within an interpretive community through what will be called the practice of privileged precedent.

[111] For an overview of key themes of this debate, see Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010), pp. 48-58. See also White, "Analogical Reasoning," in *A Companion to Philosophy of Law and Legal Theory*, ed. Patterson (Oxford: Blackwell Publishing, 2005), pp. 584-86.
[112] See Raz, *The Authority of Law: Essays on Law and Morality*, p. 73.
[113] Kratochwil, "How Do Norms Matter?," p. 40.
[114] On the potential link between the number of NGOs that may exert pressure and the willingness of states to join human rights treaties, see Hathaway, "Why Do Countries Commit to Human Rights Treaties?," *Journal of Conflict Resolution* 51, no. 4 (2007): pp. 596, 609-11.
[115] See also Hernández, "Interpretive Authority and the International Judiciary," p. 181.

2.5. The Practice of Privileged Precedent

The practice of privileged precedent has been pivotal to the interpretive practices of ICL and the way in which legal meaning developed in the field. While I will develop this aspect more in-depth in chapter five,[116] the following sections provide a brief overview of how this practice resonates with the broader theoretical framework of this study. The practice of privileged precedent is the practice of referring to previous interpretations offered by a specific sub-set of groups within the interpretive community as authoritative. Characterising these previous interpretations as 'privileged' emphasises elements of hierarchy within this practice, and how some groups within an interpretive community are accorded more interpretive weight than others. In addition, the practice of privileged precedent therefore also adds an element of stability to the interpretive process, even though, again, it does not preclude the possibility that legal meaning may remain contested. Indeed, the extent to which legal meaning remains contested, and which interpretations offered by which actors come to be treated as authoritative, are empirical questions that this study will return to in chapters five and six.

Due to such a hierarchical element, the practice is therefore similar to the principle of *stare decisis* in common law domestic legal system, rendering decisions by higher courts binding for lower courts.[117] At the international level, however, precedents are not formally binding, so that, for example, the ICJ does not have to follow its own previous interpretations in subsequent cases.[118] Despite this formal rule, in practice, international courts such as the ICJ frequently refer to their own decisions.[119] At the same time, these decisions are usually also treated as authoritative by scholars and practitioners more broadly.[120] As Johnstone showed, even in the non-judicial setting of the UN Security Council, diplomats negotiating resolutions have been aware that their legal justification of a particular behaviour will set an informal, but nevertheless potentially influential precedent that will later be referred to by the legal interpretive community.[121] As a consequence, interpretations that are referred to as authoritative within the practice of privileged precedent can be judicial decisions, but are not necessarily confined to interpretations offered by judges.

[116] See chapter five, pp. 133-39.
[117] As a result, Hathaway, for example, conceptualised legal developments as path dependent. See Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System," *Iowa Law Review* 86, no. 2 (2001).
[118] See Shaw, *International Law*, pp. 109-10. See also Articles 38(1)(d) and 59 of the Statute of the ICJ.
[119] See Shaw, *International Law*, p. 110.
[120] See ibid.
[121] See Johnstone, "The Power of Interpretive Communities," pp. 198-99.

As chapters five and six demonstrate, in the context of ICL, the decisions of international courts have been accorded a particularly high level of interpretive weight within the community of practice interpreting ICL. These courts thereby assumed a privileged role in the interpretive process by being able to open some avenues for future interpretive developments while also closing others. This practice of treating the decisions of international courts as authoritative, however, has not been accorded equally to all international or semi-international judicial bodies. Interestingly, hybrid courts – which, after all, applied largely the same legal provisions,[122] often drew on the same pool of international personnel, and were often established through a similar procedure[123] – have not been accorded the same interpretive weight. Through the practice of privileged precedent, international courts are therefore not only generally provided with a particularly important role in interpreting legal provisions, but some international courts are also privileged over others.

In this context, a conceptually particularly interesting aspect is the relationship between the practice of privileged precedent and the innovative element within the interpretive development of ICL. After all, precedents have often been seen as a way of stabilising meaning, and have been analysed through the lens of path dependency theory in the domestic, common law context.[124] The innovative and creative element through which meaning is developed – instead of merely re-constituted – is rooted in the fragmented institutional structure of ICL. Such a structure provides for the possibility of including ideas from other groups within the community of practice into international judgments (such as the writings of legal academics). In addition, it should be noted that precedents may not merely be seen as closing off interpretive avenues, but also as rendering some new interpretations more convincing than others.

Focusing on the practice of privileged precedent, however, not only highlights elements of hierarchy within the interpretive process, but also how this hierarchy translates into power. In their study of practices at the World Bank, for example, Sending and Neumann argue that the practice of equal treatment in accordance with pre-existing rules, even though based on the demands of states, empowered the World Bank by allowing its staff to decide on how to

[122] See Articles 2-4 of the SCSL Statute and Articles 4-6 of the Law on the Establishment of the ECCC. But see Article 2 of the STL Statute.
[123] The most notable aspect in this context is the involvement of the UN in the negotiation process that led to the establishment of the SCSL and the ECCC. On the negotiation process of the ECCC, see Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," in *International Criminal Law*, ed. Bassiouni (Leiden: Martinus Nijhoff, 2008).
[124] See, for example, Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System."

interpret these rules, thereby drawing the line between what was perceived as political and what as 'merely' administrative.[125] Similarly, in ICL, power may have shifted from government officials to lawyers, judges, and legal academics,[126] as questions on the development of ICL came to be perceived as legal instead of political. Adding to recent research on the role of legal expertise in the discipline of IL,[127] I will argue that the practice of privileged precedent in ICL has especially empowered the *ad hoc* Tribunals *vis-à-vis* other international actors (namely hybrid courts, NGOs, and even states) to shape the development of legal meaning in ICL, often leaving other actors to merely react to, and work with and around, jurisprudential developments.[128] The project thereby subscribes to an alternative view of both power (seen as interpretive, or more broadly productive power) and order, given that a focus on international practices challenges conventional conceptions of order that revolve around "Hobbesian terms (imposition), or . . . the 'internalization' of norms whereby 'society' results simply from the coincidence of 'ideas' held by individuals."[129]

Nevertheless, it may be that such a shift in productive power was more or less inconsequential, if jurisprudential developments by international courts were more often than not ignored by other international actors. As Sending and Neumann argued in the context of the World Bank, while international practices may provide international organisations, having more technical expertise *vis-à-vis* states, with what they call "productive power," this does not necessarily entail that this type of power is as pivotal to the practices of states as it is to the practices of international organisations.[130] Chapter six therefore traces empirically the extent to which the practice of privileged precedent, providing the *ad hoc* Tribunals with interpretive power, has

[125] See Sending and Neumann, "Banking on Power: How Some Practices in an International Organisation Anchor Others," in *International Practices*, ed. Adler (Cambridge: Cambridge University Press, 2011), pp. 247-49.
[126] Such a shift has been suggested by Howse and Teitel. See Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," p. 130.
[127] See Leander and Aalberts, "Introduction: The Co-Constitution of Legal Expertise and International Security," *Leiden Journal of International Law* 26, no. 4 (2013). See also Kennedy, "Challenging Expert Rule: The Politics of Global Governance," *Sydney Law Review* 27, no. 5 (2005).
[128] Similarly, Alter has argued that in what she called "interpretive politics," judges, and not states, are "in a privileged position (at least once a case is in court) because they ultimately decide the case and there is a heavy presumption that their decision is legally authoritative." Alter, "Agents or Trustees? International Courts in Their Political Context," p. 47.
[129] Kratochwil, "Making Sense of 'International Practices'," in *International Practices*, ed. Adler and Pouliot (Cambridge: Cambridge University Press, 2011), p. 38.
[130] Sending and Neumann define "productive power" as the ability to "measur[e], categoriz[e], and quantif[y] the world." Sending and Neumann, "Banking on Power: How Some Practices in an International Organisation Anchor Others," ibid., p. 251. See generally ibid.

been relevant to the interpretive practices of other actors in the field of ICL, including civil society and state representatives.

Based on this framework, the subsequent chapters turn to an analysis of the interpretive development of the crime of genocide and the law of war crimes through the jurisprudence of international and hybrid criminal courts.

Chapter 3

The Development of the Crime of Genocide

The crime of genocide is usually cited as an example of a legal provision in ICL in which legal meaning has largely remained stable. William Schabas argued that while "international criminal judges were broadening and expanding the scope of war crimes and crimes against humanity, they were also holding to a rather strict and narrow construction of the crime of genocide."[1] At first sight, this relative legal stability seems to be in line with the importance state representatives attribute to the question whether wide-spread human rights violations and atrocities are defined as a genocide. For instance, the initial reluctance of the Clinton administration to label the mass killings in 1994 in Rwanda as a genocide has been well-documented.[2] However, a more systematic empirical analysis of the development of legal meaning through international case law reveals that international criminal courts altered the content of the crime notably. Indeed, about half of these jurisprudential developments concurrently expanded the scope of the provision. Most of these interpretive alterations were endorsed in subsequent international jurisprudence and especially across different international criminal courts, thereby setting new legal standards at least within the judicial interpretive practices of ICL.

In addition of this analysis of subjective meaning, the following two chapters also identify some of the underlying professional assumptions on the legal interpretive process that allowed for the development of legal meaning through adjudication. Within an analysis of the interpretive development of the law of war crimes, chapter four emphasises how the prevalence of a specific type of legal provisions – namely customary law – as well as shared underlying assumptions on how to interpret international custom allowed for a relatively high degree of flexibility in legal meaning. But in addition, also legal meaning of relatively 'precise' provisions in which customary law played a less dominant role – such as the crime of genocide examined in this chapter – has been altered notably through international jurisprudence. An

* Note that the analysis of the development of the crime of genocide presented in this chapter in part draws on an article manuscript that is currently being prepared for publication. See Stappert, "Compliance and the Practices of Legal Interpretation in International Criminal Law," *article manuscript*.

[1] Schabas, "Judicial Activism and the Crime of Genocide," p. 64.

[2] For a recent empirical account, see, for example, Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics, and Pragmatics* (Oxford: Oxford University Press, 2016), pp. 160-65.

analysis of the crime of genocide therefore highlights that it is also the structure of the interpretive process itself that attributes international courts with the potential for legal creativity and innovation.

The following two chapters on the crime of genocide and the law of war crimes mainly rely on a computer-assisted qualitative analysis of international jurisprudence. Based on this methodological approach, these chapters trace empirically how legal meaning on a specific legal aspect developed over time across the case law of different international and hybrid criminal courts. This approach is further able to show how far judgments referred to specific previous interpretations, such as earlier judgments, as part of the applicable law. In the case of the crime of genocide, this analysis is contrasted with legal views on the content and scope of the crime expressed by legal academics and state representatives around the time the Genocide Convention was drafted. Finally, both chapters are also supplemented by insights gained from elite interviews conducted with judges and legal officers working at international and hybrid criminal courts on their interpretive practices.

In their analysis of the crime of genocide and the law of war crimes, the following two chapters distinguish between additive developments and qualitative developments. Additive developments occur when new categories are added to a legal provision, be it through official treaty amendments or through judicial doctrine. Qualitative developments, on the other hand, entail that the meaning of already existing categories is redefined, thereby altering which types of cases fulfil its requirements. Additive developments are more clearly detectable both for a traditional legal analysis, but even more visibly also for the qualitative, computer-assisted analysis conducted for this study. Unlike qualitative legal developments, additive developments require that another legal element is discussed that exceeds the legal aspects specifically enumerated in the legal text. Within the jurisprudence on the law of war crimes, additive developments have been relatively frequent due to the dominant role customary law assumed within this legal subfield. Within international jurisprudence on the crime of genocide, however, interpretive developments have been mostly qualitative. Therefore, even in legal subfields characterised by a comparatively high level of codification, interpretive practices nevertheless routinely allowed for legal innovation, even though the development of legal content may be more structured as revolving around already existing treaty categories.

The remainder of this chapter proceeds in three steps. To situate the subsequent analysis of the crime of genocide and the law of war crimes within the broader judicial development of ICL,

the chapter begins with a brief outline of the development of the field. It then concentrates on the crime of genocide and examines the ways in which legal meaning has been altered through additive and qualitative developments. The chapter ends with some concluding remarks on the significance of different triggers of legal flexibility in the judicial development of the crime of genocide.

3.1. The Development of ICL Through International Jurisprudence

At the time the ICTY was established, the UN Secretary General had tasked the court to rely on "existing international humanitarian law," and to refrain from judicial law-making.[3] Specifically with regard to international customary law, which is more elusive in character, the Secretary General specified that "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."[4] In the practice of these courts, however, such a distinction was difficult to maintain. As Patricia Wald, former judge at the ICTY, argued, judges at both international and domestic higher courts "recognize early on that whatever the compulsory assurances they gave when appointed that they would only apply the law and not create it, drawing that line is not so simple in practice,"[5] a view that was echoed by three of the judges interviewed for this project.[6] One of the judges at the ICTY pointed out that existing legal provisions often lacked specificity, and that some legal aspects were not even mentioned.[7] According to a judge at the SCSL, in some cases, "there was nothing to alter or to modify, there was nothing in international law."[8]

Consequently, international judges were provided with a particularly high degree of legal flexibility by the specific character and relative youth of the field of ICL.[9] As Judge Wald explained, by the time the *ad hoc* Tribunals were established, the legal rules and principles of ICL were unsystematic and often uncodified, so that the tribunals had to rely on a "loose collection of treaties, treatises, and national precedents that make up 'customary law', without

[3] Secretary General, Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 28.
[4] Ibid. (emphasis in original).
[5] Wald, "Note from the Bench," in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane (Oxford: Oxford University Press, 2010), p. xxxvii.
[6] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview (especially with regard to the *ad hoc* Tribunals' early years); Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames. But interview with Judge D, Judge at the ICTY, 18 December 2015, The Hague (arguing that this quote does not reflect their experience).
[7] Interview with Judge B, Judge at the ICTY, 9 December 2015, The Hague.
[8] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[9] I am grateful to Mikael Rask Madsen for his insightful comments on earlier parts of my work that shaped my thinking on this aspect.

ancestry except for the Nuremberg and Tokyo post-Second World War tribunals."[10] This relatively rudimentary character of ICL intensified the three triggers outlined in chapter two, and especially the legal flexibility international and hybrid criminal courts were provided with when relying on customary legal provisions.

As a result, the development of legal meaning in ICL through the decisions of international courts has generally been described as extensive.[11] International courts altered the content of both the procedural and substantive legal rules and principles of ICL. These legal developments ranged from forms of liability and the applicable rules of procedure to the interpretation of the elements of international crimes.[12] Commentators usually referred to the strikingly 'skeletal' character of the field at the time the ICTY and the ICTR were established in 1993 and 1994, respectively, to account for the rapid development of the field.[13] In particular, while both Tribunals could only draw on the post-World War II Nuremberg and Tokyo Trials as existing case law, the legal provisions of their Statutes were lamented to provide only rudimentary guidance at best.[14] International courts were thus seen as having to specify treaty provisions, determine the existence of customary law, and generally develop what might be called legal doctrine, thereby filling legal provisions with, for example, 'tests' and 'criteria' to facilitate their application.[15]

This high degree of legal flexibility is also reflected by the perceptions of judges and legal officers working for international and hybrid criminal courts. Several of the judges and legal officers interviewed indicated that they were repeatedly confronted with legal questions for which the law had remained unclear.[16] This legal flexibility was particularly pronounced during the initial phase of the work of international and hybrid criminal courts: in the view of these legal practitioners, significant legal developments occurred during the first years following the establishment of the *ad hoc* Tribunals, such as the decision to use Joint Criminal

[10] Wald, "Note from the Bench," p. xxxv.
[11] See, for example, Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War," *Vanderbilt Law Review* 59, no. 1 (2006): p. 3.
[12] See Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals*.
[13] See, for example, Cassese, *International Criminal Law*, pp. 4-6, 9-10.
[14] See Wald, "Note from the Bench," p. xxxv; Cassese, *International Criminal Law*, p. 4; Darcy, "Introduction," p. 2.
[15] See Cassese, *International Criminal Law*, p. 9.
[16] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; Judge F, Judge at the ICTR, 25 November 2015, phone interview; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; Judge D, Judge at the ICTY, 18 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames.

Enterprise as a form of liability.[17] As a legal officer at the ICTR claimed, "[i]n the early days, . . . it was a whole development of a whole new system."[18]

While this potential for legal innovation was more muted during the later stages of the work of these courts, this is not to suggest that the potential for further judicial developments was entirely precluded during this later phase. By the time the interviews for this project were conducted more than 20 years after the establishment of the ICTY and the ICTR, new legal issues continued to arise.[19] Such new legal questions are often settled at the Appeals level, and frequently concern procedural aspects.[20] And even though the Rome Statute is considerably more elaborate than the Statutes of the *ad hoc* Tribunals, the creation of the ICC did not seem to have entailed a decrease in the potential for judicial creativity. Instead, legal officers and judges lamented that also the Rome Statute, the ICC's Rules of Evidence and Procedure, and the Elements of Crimes are filled with gaps and contradictions as well,[21] with an ICC judge indicating that the potential for judicial creativity exists especially with regard to procedural law.[22] The ICC is consequently still required, in the words of one legal officer, to "travel a lot of uncharted territor[y]."[23]

Consequently, judges repeatedly saw themselves confronted with legal questions that had remained relatively unclear in the respective court's legal framework. It therefore seems only logical that more than half of judges and legal officers interviewed for this project stated that several of the judgments delivered by these courts developed legal meaning in some way.[24] But as indicated in the introduction, such a development was perceived as more than a side-product

[17] Interviews with legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.
[18] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague.
[19] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[20] Interviews with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague (on the former point); Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague (observing that a large number of legal developments that occurred after 2005 concerned procedural questions).
[21] Interviews with Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague; Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague; legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[22] Interview with Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague.
[23] Legal officer F, legal officer at the ICC, interview conducted on 5 December 2015, The Hague.
[24] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; legal officer I, legal officer at the ICTR, 15 December 2015, The Hague; Judge F, Judge at the ICTR, 25 November 2015, phone interview; legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; Judge D, Judge at the ICTY, 18 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames.

of the interpretive process: indeed, several of the judges and lawyers indicated that they perceived the development of ICL through jurisprudence as one of the most important achievements of the ICTY, the ICTR and the ICC.[25] The potential for legal flexibility was therefore perceived as such a common occurrence within the interpretive process that its outcome, in the form of the development of case law, ultimately even served as a justification for the continued relevance of the work of these courts beyond individual cases.

3.2. Interpreting the Crime of Genocide

In the context of such a substantial and continuous development of legal meaning in ICL, the crime of genocide at first sight seems to have remained strikingly untouched. According to common perceptions, and much non-legal work using a political science or sociological perspective, genocide is a comparatively clear concept. Genocide is usually associated with large-scale killings that amount to the at least attempted destruction of a human group,[26] hence constituting a particular "type of mass murder."[27] This focus is perhaps unsurprising considering the historical context in which the term developed: genocide is frequently associated with the Holocaust as "the ultimate instance of the more general concept of genocide."[28]

Unlike this common perception, the legal definition of genocide is more complex. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), adopted by the United Nations General Assembly in 1948,[29] defines the crime of genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) Killing members of the group;

[25] Interviews with Judge F, Judge at the ICTR, 25 November 2015, phone interview; Judge B, Judge at the ICTY, 9 December 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague. See also Nicola Palmer's observations on this regard, based on interviews with judges and lawyers working at the ICTR in 2008, Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda*, p. 61.
[26] See, for example, Harff, *Genocide and Human Rights: International Legal and Political Issues* (Denver: Graduate School of International Studies, University of Denver, 1984), p. 3 (associating genocide with "large-scale slaughters").
[27] Horowitz, *Taking Lives: Genocide and State Power* (New Brunswick: Transaction Books, 1980), p. xiii. In his classic work, Horowitz defines genocide as "a structural and systematic destruction of innocent people by a state bureaucratic apparatus." Ibid., p. 7.
[28] Harff, *Genocide and Human Rights: International Legal and Political Issues*, p. 11.
[29] See UN General Assembly, Prevention and Punishment of the Crime of Genocide, UN Doc. GA Res 260 (III), 9 December 1948.

b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

According to the legal definition of genocide, killing members of a particular groups is therefore one out of five underlying crimes that may constitute genocide, alongside crimes such as causing serious bodily or mental harm or imposing measures intended to prevent births within the group. Furthermore, the prohibition of genocide does not broadly apply to any human group, but specifically enumerates national, ethnical, racial, and religious groups as the groups protected by the Genocide Convention. Finally, unlike large-scale murder, it requires genocidal intent, that is, that the perpetrator sought not only to commit one of the underlying acts, but that this crime was committed with the "intent to destroy, in whole or in part," a protected group "as such."[30]

Despite the more complex character of the legal definition, the crime of genocide is typically assessed as clearer and more stable than other international crimes, including war crimes. From a legal perspective, the definition of genocide is usually perceived as one of the areas of ICL that has been least susceptible to interpretive developments.[31] The exact same definition of genocide used by the Genocide Convention in 1948 was included *verbatim* into subsequent legal instruments, such as the ICTY, ICTR, and the Rome Statute, as well as the ECCC Law.[32] Indeed, this very stability has been the reason for repeated criticism,[33] especially with regard to the question of whether the crime of genocide should be expanded to protect social and political groups as well.[34]

In addition, it has become to be generally accepted that the prohibition of genocide has emerged as a customary provision of international law. The crime of genocide was first codified in the

[30] Article 2 of the Genocide Convention.
[31] See, for example, Schabas, "Judicial Activism and the Crime of Genocide," p. 64.
[32] See Article 4 (2) of the ICTY Statute; Article 2 (2) of the ICTR Statute; Article 6 of the Rome Statute of the ICC; Article 4 of the ECCC Law.
[33] See, for example, Luban, "Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report," *Chicago Journal of International Law* 7, no. 1 (2006). Luban already argued in this 2006 article that "[i]t is high time to revisit and revise the definition of genocide, to bring it into line with its moral reality." Ibid., p. 319.
[34] See, for example, Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010). During the negotiations of the Rome Statute, the question of whether the crime of genocide should be extended to include political and social groups was considered, but quickly rejected in the context of a "strong reluctance among States to tamper with the definition of the crime." Von Hebel, "Crimes within the Jurisdiction of the Court," in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Lee (The Hague: Kluwer Law International, 1999), p. 89.

1948 Genocide Convention, and later included *verbatim* in the Statutes of the *ad hoc* Tribunals. But in addition to these treaty provisions, the ICJ determined in its 1951 Advisory Opinion that the prohibition of genocide had also emerged as a rule of customary international law,[35] decoupling legal obligation – and ultimately criminal responsibility – from the question of whether states had become signatories of the Genocide Convention. However, given that the definition of genocide was included in a relatively elaborate form in the Statutes of the *ad hoc* Tribunals, the customary status of the prohibition of genocide only played a comparatively minor role in the interpretation of the crime of genocide by these courts.[36]

While it is generally claimed that legal meaning in ICL developed significantly through the adjudication of international and hybrid criminal courts, the crime of genocide is conventionally seen as the area within this field that has been least affected by interpretive developments. In addition, the prohibition of genocide is also relatively precise, at least when compared to many of the other provisions included in the Statutes of international and hybrid criminal courts. For example, compared to the statutory provisions on war crimes, the prohibition of genocide includes relatively elaborate application (*chapeau*) requirements, and the list of underlying crimes included in the definition was interpreted to be exhaustive.[37] Moreover, while many of the relatively skeletal legal provisions of the *ad hoc* Tribunals' Statutes were specified significantly in the Rome Statute,[38] the definition of genocide remained unchanged.

As this study's empirical analysis of international jurisprudence interpreting the crime of genocide reveals, however, even this aspect of ICL has been altered notably through adjudication. Most of these developments altered the meaning of aspects of the crime of genocide as incorporated in the Statutes of international and hybrid criminal courts. When

[35] See *Reservations to the Genocide Convention*, Advisory Opinion, ICJ, p. 12. This assessment was later repeated by the *ad hoc* Tribunals. See *Akayesu* Trial Judgment, ICTR, para. 495; *Kayishema* Trial Judgment, ICTR, para. 88; *Rutaganda* Trial Judgment, ICTR, para. 45; *Jelisić* Trial Judgment, ICTY, para. 60; *Musema* Trial Judgment, ICTR, para. 151; Krstić Trial Judgment, ICTY, para. 541; *Stakić* Trial Judgment, ICTY, para. 500; *Brđanin* Trial Judgment, ICTY, para. 680; *Blagojević* Trial Judgment, ICTY, para. 639; *Karadžić* Trial Judgment, ICTY, para. 539.

[36] For example, the early judgments of the ICTR mentioned that the prohibition of genocide was part of international customary law, but did not explore this aspect further. See *Akayesu* Trial Judgment, ICTR, para. 495; *Kayishema* Trial Judgment, ICTR, para. 88; *Rutaganda* Trial Judgment, ICTR, para. 45; *Musema* Trial Judgment, ICTR, para. 151. The question of whether the prohibition had become part of customary law was arguably more important in determining a court's jurisdiction, which was largely uncontroversial for both *ad hoc* Tribunals, instead of for the interpretation of the crime itself.

[37] See chapter four, pp. 109-10.

[38] As a result, Nicole Deitelhoff, for example, generally diagnosed that the ICC's rules are characterised by a relatively high level of precision. See Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case," *International Organization* 63, no. 1 (2009): p. 40.

taken together, these interpretive judicial developments expanded the scope of the prohibition of genocide by broadening the set of cases that can be construed as falling under the crime. Nevertheless, within the broader legal discussion today, most of these aspects are hardly disputed, such as the claim that acts of sexual violence and rape may fall under the crime of genocide if they are committed with genocidal intent. For example, when acting as a party before the ICJ, Serbia and Montenegro (the Respondent) did not even challenge this interpretation.[39] Consequently, at least within the judicial context, many of these interpretive developments seem to have set a new legal standard within the interpretive practices of ICL.

The subsequent analysis primarily focuses on the ICTY and the ICTR as the courts that have delivered the largest number of judgments interpreting the crime of genocide. In addition, this chapter also considers the jurisprudence of the ICJ, and especially its 2007 *Bosnia Genocide* judgment. The following sections first outline potential additive developments, arguing, however, that these suggestions have ultimately not been endorsed as legally valid by international courts. The chapter will subsequently turn to an analysis of qualitative developments that, taken together, substantially expanded the scope of the crime of genocide.

As part of this analysis, this chapter gives special attention to the negotiation documents of the Genocide Convention and early treaty commentaries to trace how legal meaning has developed over time. Compared to the development of the law of war crimes, the negotiation documents of the Genocide Convention are particularly insightful in this regard as the definition of genocide was included *verbatim* into the Statutes of international and hybrid criminal courts. However, these documents are often incomplete indications of the intentions of states, as it frequently remains unclear how far the interpretation of one state representative voiced during the negotiations was shared widely among delegates.[40] Consequently, as a means of treaty interpretation under Article 32 of the Vienna Convention of the Law of Treaties, the *travaux préparatoires* are usually not understood to be determinative within the interpretive practices of international law.[41] Within this chapter, reference to the Genocide Convention's negotiation documents therefore does not fulfil the purpose of inquiring whether courts 'correctly' interpreted ICL in a formal doctrinal sense. Instead, these documents are used as part of an empirical analysis that seeks to trace how legal meaning was shared, reconstituted, and

[39] *Bosnia Genocide* Judgment, ICJ, para. 299.
[40] See similarly, for example, Shaw, *International Law*, p. 634 (describing negotiation documents as potentially "confused or inconclusive"). I am grateful to Dapo Akande for his insightful comments on this aspect of my work.
[41] Specifically on ICL, see Akande, "Sources of International Criminal Law," p. 45.

developed among legal experts over time. For the same reason, this chapter also analyses early commentaries of the Genocide Convention published in the years immediately after the Convention entered into force, and examines how far interpretations suggested by some courts were endorsed, followed, or rejected in subsequent judgments.

3.3. Additive Developments

Likely the best example of an (arguably only attempted) additive development are efforts to expand the crime of genocide to protect groups beyond the groups explicitly listed in the Genocide Convention. The crimes committed in, for example, Cambodia seemed to some authors as so heinous that they should constitute genocide as "the crime of crimes."[42] In Cambodia, the Khmer Rouge are estimated to have been responsible for the death of more than a million people between April 1975 and January 1979.[43] Hence, the question of whether the prohibition of genocide should include social and political groups has been one of the most controversial elements of the crime of genocide.[44] This controversy can be traced back to some of the earliest commentaries on the Genocide Convention, such as Nehemiah Robinson's commentary published in 1960, and Pieter Drost's 1959 extensive work on the Genocide Convention and its negotiation process.[45] Despite efforts by the United States, in particular, to extend the protection of the Convention to include political and economic groups during the drafting process of the Genocide Convention, the inclusion of political groups suggested in the initial draft by the UN Secretariat was dropped over the course of the negotiations.[46] Similarly, in its *Akayesu* judgment, the first judgment delivered by the ICTR, the Trial Chamber explicitly rejected the idea of extending the list of protected groups to include political or economic

[42] See, for example, Jason, "Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide," *New England Law Review* 35, no. 2 (2001); but see Schabas, "Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?," ibid.
[43] See, for example, Ratner, "The United Nations Group of Experts for Cambodia," *American Journal of International Law* 95, no. 4 (1999): p. 948.
[44] The same observation is made by Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals," p. 581. For an in-depth contemporary contribution to this debate, see Nersessian, *Genocide and Political Groups*.
[45] See Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, vol. 2 (Leyden: Sythoff, 1959), pp. 123-24; Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960), p. 59.
[46] See UN Doc GA Res 96(I), reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden: Martinus Nijhoff, 2009), p. 34. See also UN Doc E/573, reprinted in ibid., pp. 302-30, 303; UN Doc E/AC.25/12, reprinted in ibid., pp. 1161-6, 1162; and finally the decision to exclude political groups, UN Doc A/C.6/SR.128, reprinted in ibid., pp. 1864-70, 1870. See also ibid., pp. 1867-8 (remarks by the US delegate); and UN Doc A/C.6/214, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, p. 1968.

groups,[47] a decision that was confirmed by the subsequent jurisprudence of both *ad hoc* Tribunals.[48]

While the ICTR refrained from including political and economic groups, the *Akayesu* Trial Chambers proposed an additive interpretation concerning the groups protected by the prohibition of genocide. This suggestion, however, was ultimately not endorsed by subsequent international jurisprudence. In particular, in *Akayesu*, the ICTR Trial Chamber sought to extend the list of groups protected by the prohibition of genocide by questioning whether the list was exhaustive. In its *dicta*, the Trial Chamber suggested to distinguish between "stable" and "mobile" groups. According to the Trial Chamber, while members of "mobile" groups are free to decide to be (and cease to be) members of the group, membership in "stable" groups is "determined by birth" and hence "normally not challengeable by its members."[49] The Trial Chamber proceeded to argue that the drafters of the Genocide Convention intended to only protect "stable", but not "mobile" groups,[50] concluding that also "stable and permanent" groups not explicitly listed may nevertheless be protected by the prohibition of genocide.[51] Instead of redefining which kind of groups are covered by the terms national, ethnical, racial and religious group, the Trial Chamber sought to include a new type of group, that is, "stable and permanent" groups that are not explicitly enumerated in the Genocide Convention, thereby applying an additive approach.

As the qualitative analysis conducted for this study clearly shows, this interpretive development suggested by the *Akayesu* Trial Chamber did not lead to a more widely-shared amendment of legal content. Instead, this interpretation was subsequently not endorsed by other international courts, or even by the ICTR's own jurisprudence. While the interpretation that the Genocide Convention was intended by its drafters to be limited to "stable" groups was repeated by some

[47] Using the distinction between "stable" and "mobile" groups, the Trial Chamber argued that political and economic groups fell under the category of "mobile" groups not protected by the Genocide Convention. See *Akayesu* Trial Judgment, ICTR, para. 511.
[48] See *Rutaganda* Trial Judgment, ICTR, para. 56; *Jelisić* Trial Judgment, ICTY, para. 69; *Musema* Trial Judgment, ICTR, para. 162.
[49] *Akayesu* Trial Judgment, ICTR, para. 511.
[50] See ibid.
[51] See ibid., paras. 516, 701. In the words of the *Akayesu* Trial Chamber, "the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group." Ibid., para. 516.

subsequent ICTR decisions and one ICTY judgment,[52] none of the Chambers ultimately convicted an accused of genocide committed against a "stable," but not explicitly enumerated group.[53] Instead, a more systematic analysis of subsequent jurisprudence reveals that the identification of "stable" groups as a way of understanding the type of group protected by the Genocide Convention was hardly ever mentioned again by the ICTY or the ICTR more than a few years after the Trial judgment in *Akayesu* was delivered. Furthermore, the ICJ refrained from even referring to the distinction between "stable" and "mobile" groups.[54] In the academic literature, this interpretation was consequently cited as an example of a failed attempt at judicial activism.[55]

3.4. Qualitative Developments

Unlike additive developments, qualitative developments do not add new aspects, but redefine the meaning of already existing legal categories. Such qualitative developments have been particularly prevalent within the empirical analysis of the judicial development of the crime of genocide. Some of these interpretive alterations broadened the scope of the prohibition of the crime, while others can be better understood as limiting its application.

The following sections will first discuss three qualitative developments that extended the provision's scope, and then examine alterations that confined or maintained its application. On the one hand, international criminal courts expanded the crime of genocide by the following: they (a) altered the meaning of bodily and mental harm, forcibly transferring children, and preventing births within a group; (b) redefined the requisite threshold requirement for the intent to destroy a group "in part"; and (c) strengthened the view that genocide could be committed in a limited geographic area. On the other hand, these courts also limited or at least maintained the scope of the definition of genocide with regard to the following four aspects: (d) how to determine a protected group; regarding the interrelated concepts of (e) "cultural genocide" and (f) "ethnic cleansing"; and (g) how to determine a protected group.

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[52] See *Rutaganda*, Trial Judgment, ICTR, para. 56; *Musema* Trial Judgment, ICTR, para. 162. See also *Jelisić* Trial Judgment, ICTY, para. 69. Webb argues that that in *Jelisić*, the ICTY Trial Chamber "has found that the customary international law on genocide has not developed to include groups beyond the four listed in Article II of the Convention," which, however, might be a too extensive interpretation of the judgment which still emphasises that the Convention seeks to protect stable groups. See Webb, *International Judicial Integration and Fragmentation*, p. 36.

[53] Instead, the *Akayesu* Trial Chamber rather ambiguously argued that "[i]n the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as 'ethnic' in official classifications," leading the Trial Chamber to conclude that "the Tutsi did indeed constitute a stable and permanent group." *Akayesu* Trial Judgment, ICTR, para. 702.

[54] See *Bosnia Genocide* judgment, ICJ, paras. 191-201.

[55] See Schabas, "Judicial Activism and the Crime of Genocide," p. 78-79.

3.4.1. Expanding the Meaning of the Underlying Crimes

During the negotiations of the Genocide Convention, one of the main concerns raised was that the definition of genocide might be phrased in overly vague terms. In particular, in the comments accompanying its early draft, the Secretariat urged that the Genocide Convention should include a "careful definition" that would prevent the crime from being expanded into the fields of the laws of war, self-determination, the protection of minorities, and human rights.[56] The Secretariat added that a broad phrasing of the definition, with "too many accessory reservations and implications whose significance was not always easy to discern at first sight," would make states more hesitant to ratify the Convention.[57] Accordingly, states ultimately opted for including a list of underlying crimes into the definition that enumerates specific ways in which genocide can be committed, thereby rejecting more general versions of the definition which, in Drost's words, "would lend [themselves] easily to divergent interpretations."[58]

The drafters of the Genocide Convention ultimately opted in favour of including a list of underlying acts: (a) killing; (b) causing serious bodily or mental harm; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction; (d) measures intended to prevent births; and (e) forcibly transferring children of the group. Especially the meaning of bodily or mental harm, measures intended to prevent births, and forcibly transferring children has been broadened by the jurisprudence of international criminal courts, an interpretive development which expanded the scope of the prohibition of genocide.

To begin with, the concept of causing serious mental, in addition to bodily harm was introduced at a comparatively late stage within the negotiation process. The second draft of the Genocide Convention, prepared by the *Ad Hoc* Committee, was still limited to "impairing the physical integrity" of members of a protected group. [59] As Drost emphasised in his early commentary, the idea of serious mental harm was subsequently proposed by a delegate in relation with the use of narcotics, and ultimately included in the final draft on the basis of an amendment

[56] UN Doc E/447, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 209-81, 223-24.
[57] Ibid., p. 223.
[58] Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, p. 80. A similar interpretation of the negotiation process is suggested by Robinson. See Robinson, *The Genocide Convention: A Commentary*, p. 58. For example, a French proposal suggesting a general version of the definition of genocide that did not include specific underlying crimes was not included in the final version of the Genocide Convention. See UN Doc A/C.6/211, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1964-67, 1964. Compare this version with the definition adopted by the Sixth Committee that included a list of underlying crimes, A/C.6/256, reprinted in ibid., pp. 1997-8, 1997.
[59] UN Doc E/AC.25/12, reprinted in ibid., pp. 1161-6, 1162.

proposed by China and India that similarly situated the idea of mental harm in the context of narcotics.[60] Referring to the application of narcotics as an example of serious mental harm, however, indicates a comparatively limited conception of which kind of mental harm is covered by the Genocide Convention. In particular, it suggests that the resulting harm would be rooted in a physical cause that resulted in serious mental harm. Indeed, in his 1960 commentary of the Genocide Convention, Robinson concludes that concerns that the underlying crime of causing serious mental harm might be expanded unduly in the future were unfounded: in his view, a careful historical study of the negotiation process "would have made it absolutely clear that 'mental harm,' within the meaning of the Convention, can be caused only by the use of narcotics."[61]

In its first judgment, however, the ICTR Trial Chamber in *Akayesu* outlined a very different understanding of the underlying crime of causing serious mental harm. According to the *Akayesu* Trial Chamber, the serious bodily or mental harm inflicted on members of the protected group does not need to be "permanent and irremediable."[62] It may cover acts of torture (both in physical and mental terms), inhumane or degrading treatment, and persecution.[63] In its subsequent application of this definition, the *Akayesu* Trial Chamber famously held that acts of sexual violence, mutilations, and rape constituted serious bodily or mental harm,[64] as well as detainment and interrogations accompanied by beatings and death threats.[65] It concluded that rape and sexual violence "even [constitute] one of the worst ways of [inflicting] harm on the victim as he or she suffers both bodily and mental harm."[66] The empirical analysis conducted for this project emphasises how this interpretation was repeated in subsequent judgments both by the ICTR and the ICTY,[67] with the Trial Chamber in

[60] Unfortunately, these proposals were not included in Abtahi and Webb's edited volume, so that further archival research is required here. For the purposes of the present draft of this chapter, see Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, pp. 40-41, 81, citing UN Doc A/C.6/232 and UN Doc A/C.6/42. See also UN Doc A/C.6/SR.69, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1354-62, 1356. See also UN Doc A/C.6/SR.81, reprinted in ibid., pp. 1473-86, 1475-1480.
[61] Robinson, *The Genocide Convention: A Commentary*, p. ix.
[62] *Akayesu* Trial Judgment, ICTR, para. 502.
[63] See ibid., para. 504.
[64] See ibid., paras. 706-7.
[65] See ibid., paras. 711-2.
[66] Ibid., para. 731.
[67] See *Kayishema* Trial Judgment, ICTR, para. 108; *Rutaganda* Trial Judgment, ICTR, para. 50; *Musema* Trial Judgment, paras. 156, 907-8, 933; *Semanza* Trial Judgment, ICTR, para. 322; *Stakić* Trial Judgment, ICTY, para. 516; *Kajelijeli* Trial Judgment, ICTR, para. 815; *Kamuhanda* Trial Judgment, ICTR, para. 634; *Ntagerura* Trial Judgment, ICTR, para. 664; G*acumbtsi* Trial Judgment, ICTR, para. 291; *Brđanin* Trial Judgment, ICTY, para. 690; *Blagojević* Trial Judgment, ICTY, paras. 645-6; *Muhimana* Trial Judgment, para. 502; *Muvunyi* Trial Judgment, ICTR, para. 487; *Krajišnik* Trial Judgment, para. 859; *Seromba* Trial Judgment, ICTR, para. 317; *Seromba* Appeals Judgment, ICTR, para. 46; *Bagosora* Trial Judgment, ICTR, para. 2117; *Kalimanzira* Trial

Kayishema and *Semanza* adding that the mental harm needs to amount to "more than minor or temporary impairment of mental faculties."[68] During the ICJ *Bosnia Genocide* case, the Respondent, Serbia and Montenegro, did not even dispute that rape may constitute one of the underlying crimes.[69] The ICJ, however, nevertheless took the opportunity to confirm that the crime of rape may amount to genocide if carried out with genocidal intent, citing the jurisprudence of the ICTR and the ICTY to support its interpretation.[70] In *Croatia v. Serbia*, the ICJ added the further caveat that such harm must be inflicted in furtherance to the destruction of a protected group.[71] In its 2016 judgment in *Karadžić*, however, the ICTY Trial Chamber explicitly disagreed with such an added requirement.[72]

While the ICTR therefore included rape and acts of physical and psychological torture into the definition of "serious bodily or mental harm," the ICTY expanded the term to add the forced displacement and killings that occurred in Srebrenica and Žepa.[73] While the *Akayesu* Trial Chamber had already mentioned acts of deportation and persecution as potentially inflicting serious bodily or mental harm,[74] this aspect was more fully developed by the ICTY.[75] In *Blagojević*, and later in *Popović* and *Tolimir*, the ICTY acknowledged that the forced displacement of the women, children, and elderly of Srebrenica (and Žepa)[76] caused them to

Judgment, ICTR, para. 159; *Renzaho* Trial Judgment, ICTR, para. 762; *Popović* Trial Judgment, ICTY, paras. 811-2; *Ntawukulilyayo* Trial Judgment, ICTR, para. 452; *Kanyarukiga* Trial Judgment, ICTR, para. 637; *Gatete* Trial Judgment, ICTR, para. 584; *Ndindiliyimana* Trial Judgment, ICTR, para. 2075; *Nyiramashuko* Trial Judgment, ICTR, para. 5731; *Ndahimana* Trial Judgment, ICTR, para. 805; *Karemera* Trial Judgment, ICTR, para. 1609; *Nzabonimana* Trial Judgment, ICTR, para. 1703; *Nizeyimana* Trial Judgment, ICTR, para. 1493; *Tolimir* Trial Judgment, ICTY, para. 73; *Tolimir* Appeals Judgment, ICTY, para. 203; *Karadžić* Trial Judgment, ICTY, para. 543.

[68] *Semanza* Trial Judgment, ICTR, para. 321, citing *Kayishema* Trial Judgment, ICTR, para. 110 (which re-states the view of the Prosecution). Subsequently, *see also Kamuhanda* Trial Judgment, ICTR, para. 634; *Ntagerura* Trial Judgment, ICTR, para. 664; *Blagojević* Trial Judgment, ICTY, para. 645; *Seromba* Trial Judgment, ICTR, para. 317; *Seromba* Appeals Judgment, ICTR, para. 46; *Bagosora* Trial Judgment, ICTR, para. 2117; *Kalimanzira* Trial Judgment, ICTR, para. 159; *Renzaho* Trial Judgment, ICTR, para. 762; *Ntawukulilyayo* Trial Judgment, ICTR, para. 452; *Kanyarukiga* Trial Judgment, ICTR, para. 637; *Gatete* Trial Judgment, ICTR, para. 584; *Ndindiliyimana* Trial Judgment, ICTR, para. 2075; *Nyiramashuko* Trial Judgment, ICTR, para. 5731; *Nzabonimana* Trial Judgment, ICTR, para. 1703; *Nizeyimana* Trial Judgment, ICTR, para. 1493; *Tolimir* Appeals Judgment, ICTY, para. 201.

[69] See *Bosnia Genocide* Judgment, ICJ, para. 299.

[70] See ibid., paras. 300-3. The ICJ ultimately found, however, that the evidence failed to establish that the rapes and mistreatments considered were carried out with genocidal intent. See ibid., para. 319. See also *Croatia v. Serbia* Judgment, ICJ, para. 158.

[71] See *Croatia v. Serbia* Judgment, ICJ, para. 157. See also *Seromba* Appeals Judgment, ICTR, para. 46; *Tolimir* Appeals Judgment, ICTY, para. 203.

[72] *Karadžić* Trial Judgment, ICTY, para. 544.

[73] See *Tolimir* Trial Judgment, ICTR, para. 758.

[74] See *Akayesu* Trial Judgment, ICTR, para. 503, citing the *Eichmann* case before the District Court of Jerusalem.

[75] See *Blagojević* Trial Judgment, ICTY, paras. 647-54; *Tolimir* Trial Judgment, ICTY, paras. 753-9.

[76] See *Tolimir* Trial Judgment, ICTY, para. 758. Specifically for the situation in Žepa, however, this finding was overturned on Appeals due to a lack of evidence. See *Tolimir* Appeals Judgment, paras. 213-9.

suffer serious mental harm, as well as their separation from their family and friends and the continuing uncertainty of not having been able to locate the bodies of missing family members and friends.[77] It furthermore held that the mental anguish suffered by the men brought to the execution sites before they were killed, and of those who survived hidden underneath the bodies, constituted severe mental harm.[78]

As a consequence of these judicial developments, it appears that the meaning of the prohibition of genocide was altered by international jurisprudence, thereby expanding the scope of the crime. While the drafters of the Genocide Convention envisioned a narrow conception of mental harm caused by narcotics, legal meaning has developed to include acts of rape, sexual violence and torture, such as interrogations accompanied by severe[79] beatings and death threats, if these crimes are carried out with genocidal intent.

In addition to the interpretive development of the underlying crime of "causing serious bodily or mental harm," also the meaning of crime of "imposing measures intended to prevent births within the group" was altered through international jurisprudence. During the negotiations of the Genocide Convention, an early draft prepared by the Secretariat included a list of three specific ways in which births may be restricted under the meaning of the Convention: through "(a) sterilization and/or compulsory abortion; or (b) segregation of the sexes; or (c) obstacles to marriage."[80] There is no indication that the drafters of the Genocide Convention discussed any other way of interpreting measures intended to prevent births,[81] which can be taken as a reflection of how they understood the content of the underlying crime at the time.

In *Akayesu*, the ICTR Trial Chamber repeated these three measures of preventing births within a protected group.[82] In addition, in parallel to its interpretation of inflicting serious bodily or mental harm to include acts of sexual violence, mutilations and rape, it expanded the scope of

[77] See *Blagojević* Trial Judgment, ICTY, paras. 650-4; *Popović* Trial Judgment, ICTY, paras. 846-7; *Tolimir* Trial Judgment, ICTY, paras. 756-9; *Tolimir* Appeals Judgment, ICTY, paras. 208-12. But see the most recent, narrower interpretation of the ICJ, arguing that harm would need to have furthered the destruction of a protected group. See *Croatia v. Serbia* Judgment, ICJ, para. 160.
[78] See *Blagojević* Trial Judgment, ICTY, paras. 647-9; *Popović* Trial Judgment, ICTY, paras. 844-5; *Tolimir* Trial Judgment, ICTY, paras. 753-5; *Tolimir* Appeals Judgment, ICTY, paras. 206-7.
[79] In *Ntagerura*, the ICTR Trial Chamber held that the mistreatment of six victims was not severe enough to constitute serious bodily or mental harm, as two of the victims subsequently still had the strength to escape by using force. See *Ntagerura* Trial Judgment, ICTR, para. 692.
[80] Draft Article II (2), UN Doc E/447, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 209-81, 215.
[81] Indeed, during the negotiation proceedings, it was even controversial if segregation of the sexes and prevention of marriages should fall within the scope of the prohibition of genocide. See A/C.6/SR.69, reprinted in ibid., pp. 1354-62, 1358 (comments made by the Mexican delegate).
[82] See *Akayesu* Trial Judgment, ICTR, para. 507.

the underlying crime of preventing births. In particular, the *Akayesu* Trial Chamber added that measures designed to prevent births could consist of acts of sexual mutilation, or of instances in which, "[i]n patriarchal societies," a woman is raped and "deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group," or in which a person refuses to procreate due to the trauma caused, for example, by a rape.[83] In the latter context, the *Akayesu* Trial Chamber emphasised that "measures intended to prevent births within the group may be physical, but can also be mental."[84] A qualitative analysis of international case law highlights how this interpretation was repeated by several ICTR Trial Chambers.[85] But in its *Popović* and *Tolimir* judgments, also the ICTY Trial Chamber, citing the ICTR, agreed that acts intended to prevent births may, in addition to the types of acts discussed during the negotiation of the Genocide Convention, consist of sexual mutilation and "may be physical or mental" in character.[86]

Especially when compared to the way in which states understood measures intended to restrict births during the negotiations of the Genocide Convention, this interpretation seems to have developed legal meaning of the crime of genocide. At this point, however, it is unclear whether this interpretation will endure within the interpretive practices of international and hybrid courts, especially given that no individual has yet been convicted on the basis of an expanded interpretation of acts intended to restrict procreation within a protected group. The ICTR only elaborated on subparagraph (d) in its *dicta*, so that this interpretive development has been inconsequential for the conviction of the accused. The ICTY Trial Chamber, in turn, decided in *Popović* and *Tolimir* that the evidentiary basis of both cases does not support the conclusion that the forcible transfer of the Bosnian Muslim communities of Srebrenica and Žepa had been a "measure intended to prevent births within the group,"[87] even though this view seemed to have been more dependent on the interpretation of the specific intent held by the accused rather than of the types of acts that can be construed as birth-restricting measures. The ICJ similarly considered this aspect of the Genocide Convention in its *Bosnia Genocide* judgment, but found

[83] Ibid., paras. 507-8.
[84] Ibid., para. 508.
[85] See *Kayishema* Trial Judgment, ICTR, para. 117; *Rutaganda* Trial Judgment, ICTR, para. 52; *Musema* Trial Judgment, ICTR, para. 158.
[86] *Tolimir* Trial Judgment, ICTY, para. 743; *Popović* Trial Judgment, ICTY, para. 818.
[87] *Popović* Trial Judgment, ICTY, para. 854; *Tolimir* Trial Judgment, ICTY, para. 767. Indeed, before reaching this conclusion, the Trial Chamber in *Popović* argued that it "cannot find that it is objectively probable that such conditions would lead to the destruction of the group." *Popović* Trial Judgment, ICTY, para. 854.

insufficient evidence to support the conclusion that acts intended to restrict births within the Bosnian Muslim group had been committed.[88]

As a final aspect, the ICTR also expanded the meaning of subparagraph (e) of the Genocide Convention, the underlying crime of "forcibly transferring children of the group to another group." Such enforced transfer was one of the measures included in the early draft prepared by the Secretariat as an act intended to destroy the "specific characteristics" of a protected group.[89] While this underlying crime was removed from the draft during the discussion on the concept of "cultural genocide,"[90] it was re-introduced based on the argument that the forced transfer of children had not only cultural, but also biological and physical consequences.[91] As a result, the underlying crime of forcibly transferring children was ultimately included in the final draft.[92]

In its *Akayesu* Trial Judgment, the ICTR added that it is not only the aim of subparagraph (e) to "sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another."[93] Similar to its interpretation of birth-restricting acts, the *Akayesu* Trial Chamber included this interpretation in its *dicta*, and no individual was ever convicted on this basis. As this study's qualitative analysis of international jurisprudence showed, however, this interpretation of the underlying crime of forcibly transferring children was nevertheless repeated in the ICTR's subsequent jurisprudence in its discussion of the current state of the applicable law.[94] As a result, the ICTR's interpretation, while arguably skeletal and unclear, seems to suggest that not only cases in which the removal of children from one group and their transfer to another was physically forced, but also cases in which the traumatic experiences of parents and/or children

[88] See *Bosnia Genocide* Judgment, ICJ, paras. 355-61. See also *Croatia v. Serbia* Judgment, ICJ, paras. 164-6 (explicitly confirming such an interpretation).
[89] Draft Article II (3)(a), UN Doc E/447, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 209-81, 215.
[90] See the section on "Rejecting the Concept of 'Cultural Genocide,'" chapter three, pp. 97-99.
[91] See UN Doc A/C.6/SR.82, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1487-99, 1498. For the Greek proposal re-introducing this aspect, see UN Doc A/C.6/242, cited in A/C.6/SR.81, reprinted in ibid., pp. 1473-86, 1475. As this document is not included in Abtahi and Webb's edited volume, further archival research will be necessary. A draft proposed by the United States, discussed at the same time, also included the forcible transfer of children as an underlying crime. See UN Doc E/623, reprinted in ibid., pp. 529-71, 558, cited in UN Doc A/C.6/SR.82, reprinted in ibid., pp. 1487-99, 1493. For the argument that the forcible transfer of children had not only cultural, but also biological and physical consequences, see remarks made by delegates from Greece, the United States and Uruguay, ibid., pp. 1495-6.
[92] See Article II (e) of the Genocide Convention.
[93] *Akayesu* Trial Judgment, ICTR, para. 509.
[94] See *Kayishema* Trial Judgment, ICTR, para. 118; *Rutaganda* Trial Judgment, ICTR, para. 53; *Musema* Trial Judgment, ICTR, para. 159.

would lead to their removal would fall within the scope of the prohibition of genocide, as long as these acts were committed with genocidal intent.

3.4.2. Towards a Qualitative Threshold

In addition to expanding the meaning of the underlying crimes of causing bodily and mental harm, forcibly transferring children, and preventing births within a group, international criminal courts also redefined the requisite threshold requirement for the intent to destroy a group "in part." International courts and legal scholars today commonly distinguish between a quantitative and a qualitative approach or "methods" of intending to destroy a group "in part."[95] With regard to a quantitative threshold, the International Law Commission (ILC) stated that the intent to at least destroy a "substantial part" of the group was necessary for genocide to be committed.[96] With regard to a qualitative requirement, the *Kayishema* Trial Chamber cited a 1985 report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities as identifying the intent to destroy a particularly important part of a group, such as its leadership, as an alternative way of destroying a group in part.[97]

In *Kayishema*, the ICTR Trial Chamber then cited this 1985 report and the ILC commentary to conclude that the intention to destroy a "considerable number of individuals" would be necessary.[98] Only a few months later, the ICTY Trial Chamber in *Jelisić* confirmed that the term "in whole or in part" requires the intent to destroy "at least a *substantial* part of the group."[99] It interpreted the word "substantial" in this context to mean either the intention to destroy "a very large number of the members of the group" or "a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group of such," such as targeting a group's leadership.[100] The *Jelisić* Trial Chamber therefore explicitly distinguished between a qualitative and a quantitative approach.[101] As traced by this study's empirical analysis of international case law, this distinction was repeated by several

[95] See *Bosnia Genocide* Judgment, ICJ, para. 200; *Jelisić* Trial Judgment, ICTY, paras. 81-2; *Krstić* Trial Judgment, ICTY, para. 587; *Krstić* Appeals Judgment, ICTY, para. 12; *Krajišnik* Trial Judgment, ICTY, para. 853. See also Webb, *International Judicial Integration and Fragmentation*, pp. 47-48.
[96] International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind With Commentaries, 48th session, Yearbook of the International Law Commission, 1996, vol. II, Part Two, Article 17, para. 8.
[97] See UN Doc E/CN.4/Sub.2/1985, para. 29, cited in *Kayishema* Trial Judgment, ICTR, para. 96, and in Webb, *International Judicial Integration and Fragmentation*, p. 48. The document itself, however, is unfortunately not available at the moment.
[98] *Kayishema* Trial Judgment, ICTR, paras. 96-7.
[99] *Jelisić* Trial Judgment, ICTY, para. 82.
[100] Ibid.
[101] See ibid., paras. 81-2.

ICTY judgments, and by the ICJ.[102] The ICJ added with regard to the "qualitative" approach that it "cannot stand alone," but that quantitative considerations on the actual size of the part of the group that was targeted need to be taken into account as well.[103]

However, as Philippa Webb points out, the drafting documents "do not reveal that the drafters considered, let alone accepted, a qualitative approach."[104] Instead, she suggested that the concept originated in the 1985 report.[105] By referring to this report to interpret the meaning of the intent to destroy a protected group "in part," the *ad hoc* Tribunals and the ICJ therefore again broadened the legal rule. Even though the idea of a qualitative approach did not originate in the judicial decisions of the *ad hoc* Tribunals or the ICJ, but in the 1985 report, international jurisprudence served to consolidate a new interpretation of the prohibition of genocide as a 'correct' and legally valid interpretation on which a decision on the guilt of the accused could be based. It thereby contributed to broadening the meaning of the legal provision further.

Consequently, the idea of selecting individual members due to their position within a protected group entails that a new set of cases falls under the prohibition of genocide. For example in 2012, the ICTY Trial Chamber in *Tolimir* convicted the accused of genocide based on the finding that, while forcibly transferring the population of the municipality of Žepa, the murder of three men (the Mayor and two military leaders) indicated genocidal intent, as they had been targeted due to the destructive effect their death would have on the remaining community.[106] Based on a lack of evidence for this finding, the holding was overturned on Appeals in 2015.[107] The Appeals Chamber, however, confirmed the Trial Chamber's use of a qualitative approach.[108] However, a situation in which a population is forcibly displaced, and this displacement is accompanied by the murder of a small number of important officials in this community would arguably not have fallen under the meaning of the term "in part" that was dominant among legal experts at the time the Genocide Convention was drafted.

[102] See *Bosnia Genocide* Judgment, ICJ, para. 200; *Croatia v. Serbia* Judgment, ICJ, para. 142; *Krstić* Trial Judgment, ICTY, para. 587; *Krstić* Appeals Judgment, ICTY, para. 12; *Krajišnik* Trial Judgment, ICTY, para. 853; *Karadžić* Trial Judgment, ICTY, para. 555.
[103] *Bosnia Genocide* Judgment, ICJ, para. 200.
[104] Webb, *International Judicial Integration and Fragmentation*, p. 48. See also UN Doc A/C.6/SR.73, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1378-90.
[105] See Webb, *International Judicial Integration and Fragmentation*, p. 48. See also UN Doc A/C.6/SR.73, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1378-90.
[106] See *Tolimir* Trial Judgment, ICTY, para. 782.
[107] See *Tolimir* Appeals Judgment, ICTY, paras. 266-270.
[108] Specifically, the Appeals Chamber found "no legal error in the Trial Chamber's statement that the selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent." *Tolomir* Appeals Judgment, ICTY, para. 263.

3.4.3. Acknowledging that Genocide can be Limited to a Specific Geographic Area

As a third development expanding the scope of the prohibition of genocide, international criminal courts and tribunals strengthened the view that genocide could be committed in a limited geographic area. The restriction to a specific geographical area is an aspect that is closely linked to the specific factual situation in the former Yugoslavia, and to the crimes committed in Srebrenica and Žepa in particular. As a result, this aspect has been mostly discussed by the ICTY and the ICJ. The ICTR Trial Chamber also convicted Jean-Paul Akayesu of genocide for crimes committed in the Taba commune, even though the question of whether genocide can be committed in a limited geographical area was not explicitly problematized in the judgment.[109] The *Akayesu* judgment was later interpreted by the ICTY as indicating an agreement between both *ad hoc* Tribunals.[110]

In *Jelisić*, the ICTY Trial Chamber argued that "international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone,"[111] a view that was confirmed in *Krstić*.[112] Unlike the *Jelisić* decision, in *Krstić*, the ICTY Trial Chamber emphasised that perpetrators "must view the part of the group," potentially a part located in a specific geographical area, "as a distinct entity which must be eliminated as such" and not "an accumulation of isolated individuals" within this distinct part.[113] As this study's qualitative analysis showed, this interpretation was repeated in subsequent ICTY judgments.[114] Two years later, in 2003, the ICTY Trial Chamber in *Stakić* also accepted the view that the targeted group may be limited to a specific geographic area, but only did so "with some hesitancy," warning that "this approach might distort the definition of genocide if it is not applied with caution."[115] The ICJ referred to this hesitancy as exhibited by the *Stakić* Trial Chamber,[116] but proceeded to endorse the interpretation suggested in the *Krstić* Trial Judgment.[117]

[109] See *Akayesu* Trial Judgment, ICTR, para. 704.
[110] See *Stakić* Trial Judgment, ICTY, para. 523. This view has been suggested within the legal academic debate as well, see Webb, *International Judicial Integration and Fragmentation*, p. 49.
[111] *Jelisić* Trial Judgment, ICTY, para. 83.
[112] See *Krstić* Trial Judgment, ICTY, paras. 585-90.
[113] Ibid., para. 590.
[114] See *Brđanin* Trial Judgment, ICTY, para. 700.
[115] *Stakić* Trial Judgment, ICTY, para. 523.
[116] See *Bosnia Genocide* Judgment, ICJ, para. 199.
[117] See ibid., para. 201.

The question of whether genocide could be committed in a restricted geographical area was not explicitly discussed by the drafters during the negotiations of the Genocide Convention.[118] The text of the Genocide Convention, however, does not exclude this interpretation. After all, it requires that the perpetrator would need to have the intent to destroy a protected group in whole or *in part*, thereby allowing for the interpretation that this "part" might be defined in geographical terms. Consequently, such an interpretation was already suggested by early commentaries of the Convention.[119]

As a result, the question of whether the meaning of this aspect of the crime of genocide developed through international jurisprudence poses some difficulties. Within the academic literature, it is usually not listed as one of the areas in which legal meaning was developed by international courts (unlike, for example, the *Akayesu* judgment).[120] However, for example Webb defines the *Krstić* judgment with regard to this particular aspect as "an important milestone in defining and developing the meaning of 'in whole or in part.'"[121] In addition, the very hesitancy exhibited by the *Stakić* Trial Chamber, and repeated by the ICJ, indicates that these courts themselves understood this particular interpretation to be comparatively broad. As further indication of this hesitancy, Webb observes that the geographic interpretation has never been applied by the ICTY or the ICJ without additional reference to the number of individuals killed and their function within the community (quantitative and qualitative approach).[122]

It can therefore be concluded that the ICTY and the ICJ themselves perceived the question of whether genocide might be committed within a limited geographic area as at least controversial. As a consequence, the ICTY (and arguably the ICTR) may not have established a new legal interpretation, but strengthened a particular way of interpreting the prohibition of

[118] See UN Doc A/C.6/SR.73, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1378-90. When discussing their proposal to include the possibility that genocide may be committed with the intent to destroy a group in part, the Norwegian representative only clarified that this amendment aimed at emphasising "that it was not necessary to kill all the members of a group in order to commit genocide." Ibid., p. 1383. The text of the Norwegian proposal, UN Doc A/C.6/228, is not included in Abtahi and Webb's edited volume, but is cited by Drost. See Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, p. 84.
[119] See Robinson, *The Genocide Convention: A Commentary*, p. 63; Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, p. 85.
[120] See Schabas, "Judicial Activism and the Crime of Genocide," pp. 70-74; Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals," pp. 579, 595-97.
[121] Webb, *International Judicial Integration and Fragmentation*, p. 49.
[122] See ibid.

genocide within the interpretive legal discourse that had already been voiced in the legal literature.

3.4.4. Rejecting the So-Called Negative Approach

While the previous sections argued that international criminal courts expanded the meaning of the crime of genocide, these courts also limited or shifted the scope the prohibition with regard to the four aspects this chapter now turns to. To begin with, international jurisprudence limited the meaning of the prohibition of genocide when rejecting the so-called negative approach to determining a protected group. In their jurisprudence, international courts and tribunals had to decide whether they would follow a so-called "positive approach." According to this "positive approach," a perpetrator would need to target a victim *because she belonged* to a specific group. Alternatively, it could also be argued that the prohibition of genocide also seeks to prevent cases in which a victim was targeted *because she did not belong* to a specific group, such as the group with which the perpetrators identify themselves ("negative approach").[123]

The Commission of Experts for the Former Yugoslavia indicated in 1992 that the "negative approach" would be a reasonable interpretation of the Genocide Convention, arguing that "it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity."[124] Consequently, the ICTY Trial Chamber in *Jelisić* argued in its *dicta* that the "negative approach" would be within the scope of the crime of genocide.[125] The ICTY Trial Chamber in *Stakić,* however, explicitly disagreed.[126] It argued that it was necessary to identify the different groups that were targeted separately, instead of treating them as one group that was only distinguishable because its members did not belong to the group of the perpetrator.[127] The view expressed in *Stakić* was subsequently upheld on Appeals and can be traced across several ICTY judgments, and ultimately also to the 2007 *Bosnia Genocide* decision of the ICJ.[128]

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[123] *See Jelisić* Trial Judgment, ICTY, para. 71.
[124] UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674/Add.2, 27 May 1994, para. 96.
[125] See *Jelisić* Trial Judgment, ICTY, para. 71.
[126] See *Stakić* Trial Judgment, ICTY, para. 512. Indeed, the *Stakić* Trial Chamber stated that it "does not agree with the 'negative approach' taken by the Trial Chamber in *Jelisić*," citing paragraph 71 of the *Jelisić* Trial Judgment at length. Ibid.
[127] See ibid.
[128] See *Stakić* Appeals Judgment, ICTY, paras. 16-28; *Brđanin* Trial Judgment, ICTY, paras. 685-6; *Popović* Trial Judgment, ICTY, para. 809; *Tolimir* Trial Judgment, para. 735; *Bosnia Genocide* Judgment, ICJ, paras. 191-6. Webb, interestingly, uses this legal aspect to emphasise the role of the ICJ in "crystallizing" the law by "providing authoritative interpretations" that "need not require . . . a formal appellate or advisory jurisdiction." Webb, *International Judicial Integration and Fragmentation*, p. 37. However, it might equally be argued that

Following a "negative approach" to the determination of groups protected by the prohibition of genocide arguably would have expanded the meaning of the legal rule. If it had been followed, the Prosecution would not have had to identify a specific group that was targeted, but could subsume all victims – regardless of which group they belonged to – under the protected group. The ICTY and the ICJ, however, decided not to apply this approach, thereby limiting the scope of the prohibition of genocide in this respect.

3.4.5. Rejecting the Concept of "Cultural Genocide"

The discussion on "cultural genocide" concerns the question of whether the crime of genocide is confined to physical and biological destruction, or whether instances of destroying the cultural identity, social structure, or distinct characteristics of a group also fulfil the elements of the crime. A relatively clear decision on this question is reflected in the *travaux préparatoires* of the Genocide Convention. The first draft proposed by the Secretariat in 1947 distinguished between three types of acts: (1) acts "[c]ausing the death of members of a group or injuring their health or physical integrity"; (2) "[r]estricting births"; and (3) "[d]estoying the specific characteristics of the group."[129] In their comments, the Secretariat clarified that these three types of acts correspond with Raphael Lemkins' early distinction between "physical," "biological," and "cultural" genocide.[130] As a result, physical genocide can be understood as consisting of acts that resulted in the death or serious injury to the physical integrity of members of a protected group.[131] Biological genocide was meant to cover birth restrictions within a protected group, such as sterilizations.[132] The concept of cultural genocide, however, was understood to include acts intended to destroy "the specific characteristics of a group," such as forcibly transferring children from the protected group to another group, or destroying a group's religious sites, books written in the group's language, or historical institutions.[133]

The concept of "cultural genocide," however, was heavily debated during the subsequent proceedings.[134] Delegates argued that "cultural genocide" was more closely related to the

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this authoritative role was played by the ICTY *Stakić* Appeals Chamber, which the ICJ cites, and that this interpretation was merely confirmed by the ICJ, which even added that both courts had based their decision on "essentially … the same reasons." *Bosnia Genocide* Judgment, ICJ, para. 195.

[129] Draft Article II, UN Doc E/447, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 209-81, 215.

[130] See ibid., p. 224.

[131] See draft Article II (1), ibid., p. 215.

[132] See draft Article II (2)(a), ibid.

[133] See draft Article II (3)(a), (d), (e), ibid.

[134] For a concise summary of the discussion of state representatives on this particular aspect, see Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, pp. 23, 313-33, 58-60. The Chairman even had to remind the Venezuelan delegation to adhere to the time limit with regard to their

protection of minorities,[135] and criticised that the concept lacked clarity.[136] Ultimately, the negotiating parties decided to remove the concept of cultural genocide from the draft of the Genocide Convention.[137] The final draft does not include any mention of the concept of "cultural genocide," apart from the underlying crime of forcibly transferring children from the protected group to another group.[138]

Legal scholars, however, have since disagreed as to whether the intentional destruction of a group's identity, apart from the forcible transfer of children, is or should be covered by the prohibition of genocide – even though Schabas notes that today, "among international lawmakers this is a dead issue."[139] The ILC, citing the *travaux préperatoires* of the Genocide Convention, confirmed in 1996 that the crime of genocide was confined to the physical or biological destruction of the group.[140] Nevertheless, the European Court of Human Rights (ECtHR) decided in 2007 that a German judgment, which based its conviction of a Bosnian national of genocide for acts committed in Bosnia in 1992 on the concept of "cultural genocide," did not violate Article 7(1) of the European Convention on Human Rights.[141] Instead, the ECtHR argued that the question of whether the prohibition of genocide was limited to the physical or biological destruction of a group was sufficiently controversial "at the material time"[142] (that is, when the crime was committed in 1992), to justify the view that

elaborate defence of including the concept of "cultural genocide." See UN Doc A/C.6/SR.83, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1499-519, 1506.

[135] This concern was raised by the Swedish delegation, and repeated by delegates from Brazil, Denmark, the Netherlands and Belgium. See ibid., pp. 1506-8, 1513-6.

[136] In fact, the Danish delegate "was astonished that the *Ad Hoc* Committee should have submitted so vague a text as a basis for discussion." Ibid., p. 1508. See also comments made by the representative of the Netherlands, see ibid., p. 1514.

[137] See ibid., p. 1518. This decision was affirmed during the final debate at General Assembly, in which an amendment proposed by the Soviet Union to include the concept of cultural genocide was rejected. See UN Doc A/PV.179, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 2063-85, 2079-80.

[138] See chapter three, pp. 91-92. See Article II of the Genocide Convention. The resulting hybrid character of the definition of genocide used in the Genocide Convention is also noted by Schabas, who notes that the "list of punishable acts . . . comprises physical, biological, and cultural destruction." Schabas, "Judicial Activism and the Crime of Genocide," p. 74. See also Robinson, *The Genocide Convention: A Commentary*, p. 64.

[139] Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), p. 188.

[140] See International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind With Commentaries, 48th session, Yearbook of the International Law Commission, 1996, vol. II, Part Two, Article 17, para. 12.

[141] See *Jorgić v. Germany*, ECtHR, para. 116. The relevant section of Article 7(1) of the European Convention on Human Rights stipulates that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." Germany had included the prohibition of genocide into the German Criminal Code after it became a signatory of the Genocide Convention in 1954. The German judgments were therefore based on an interpretation of Article 220a of the German Criminal Code, which Jorgić argued was irreconcilable with international and German law. See *Jorgić v. Germany*, ECtHR, paras. 3, 35.

[142] Ibid., para. 112.

including the concept of "cultural genocide" had not been an overly broad interpretation that could have been foreseen by the applicant.[143]

In 2003, however, the ICTR decided to reject the concept of "cultural genocide," an interpretation that was repeated in its subsequent jurisprudence as the most current interpretation of the applicable law.[144] While the ICTR dismissed the concept of "cultural genocide" from the outset, the position of the ICTY was at least initially less clear. At first, a partially dissenting opinion by Judge Shahabuddeen at the Appeals level and two subsequent ICTY Trial Judgments suggested that in their view, genocide was not confined to physical or biological destruction.[145] As Schabas highlights, however, the ICTY Appeals Chamber, including Judge Shahabuddeen, ultimately (and implicitly) rejected the interpretation brought forward in Judge Shahabuddeen's partial dissent.[146] The ICJ followed this interpretation.[147]

Given the clear decision that was taken during the negotiation process of the Genocide Convention not to include the concept of "cultural genocide," the controversy that followed within the academic debate and international jurisprudence specifically emphasises the leeway that international judges have when interpreting international provisions, and the high degree of flexibility in legal provisions. Ultimately, however, international courts and tribunals rejected the concept of "cultural genocide," which limited the meaning of the prohibition of genocide. However, as the following section argues, this limitation ultimately bears little significance, as instances of "ethnic cleansing," which formed part of the cases most heatedly discussed under the heading of "cultural genocide," may nevertheless fall under an expanded definition of the underlying crimes of causing serious bodily and mental harm.

[143] See ibid., paras. 103-16. The ECtHR argued that the later jurisprudence of the ICTY rejecting the concept of cultural genocide was immaterial for the case at hand, as these ICTY judgments "were delivered subsequent to the commission of [the] offences." Ibid., para. 112.
[144] See *Semanza* Trial Judgment, ICTR, para. 315; *Kajelijeli* Trial Judgment, ICTR, para. 808; *Kamuhanda* Trial Judgment, ICTR, para. 627; *Kalimanzira* Trial Judgment, ICTR, para 730.
[145] See *Krstić* Appeals Judgment, ICTY, Partial Dissenting Opinion of Judge Shahabuddeen, paras. 45-54. Judge Shahabuddeen clarified that he did not propose the "recognition of cultural genocide." Ibid., para. 53. Instead, he argued that while "the listed (or initial) acts must indeed take a physical or biological form, . . . the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character." Ibid., para. 48. See also *Blagojević* Trial Judgment, ICTY, paras. 659-66; *Krajišnik* Trial Judgment, ICTY, para. 854.
[146] See Schabas, "Judicial Activism and the Crime of Genocide," p. 77. For a concise overview of the ICTY's jurisprudence on the concept of "cultural genocide," see ibid., pp. 74-77. See also *Blagojević* Appeals Judgment, ICTY, para. 123; *Popović* Trial Judgment, ICTY, para. 822.
[147] See *Bosnia Genocide* Judgment, ICJ, para. 344.

3.4.6. The Relationship between "Ethnic Cleansing" and Genocide

Closely related to the concept of "cultural genocide" is the question of whether "ethnic cleansing" may constitute genocide. "Ethnic cleansing" has been defined by the ICJ, citing the Commission of Experts Interim Report, as "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."[148] However, as Schabas points out, acts that are covered by the newly emerged concept of "ethnic cleansing" were not seen as falling under the prohibition of genocide during the negotiations of the Genocide Convention.[149] Indeed, a Syrian proposal based on the view that "any measures directed towards forcing members of a group to leave their homes should be regarded as constituting genocide" was ultimately rejected as not falling within the scope of the crime.[150] Instead, as Drost concluded in his early commentary, "mass displacement of people does not constitute the crime with which the Convention is concerned unless it is attended by circumstances leading to the death of the displaced population in whole or in part."[151]

The situation in Bosnia and Herzegovina in the early 1990s was repeatedly described as "ethnic cleansing" in UN Security Council and General Assembly resolutions.[152] Especially Article 2(c) of the Genocide Convention (on "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part") opened up the possibility to include "ethnic cleansing" within the meaning of the prohibition of genocide. Article 2(c) is usually understood to include measures that lead to a "slow death"[153] of a group's members, such as the lack of proper housing, food, and medicine.[154]

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[148] *Bosnia Genocide* Judgment, ICJ, para. 190, citing the Commission of Experts Interim Report, UN Doc S/35374, para. 55 (note that the interim report itself is not available online).
[149] See Schabas, "Judicial Activism and the Crime of Genocide," p. 75.
[150] UN Doc A/C.6/SR.82, reprinted in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires*, pp. 1487-99, 1490. For the objections raised and the ultimate decision to reject the Syrian proposal, see ibid., pp. 1490-2. Unfortunately, the text of the amendment, UN Doc A/C.6/234, is not included in Abtahi and Webb's edited volume.
[151] Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 2, p. 10.
[152] This development has also been noted by the ICJ. See *Bosnia Genocide* Judgment, ICJ, para. 190, citing General Assembly Resolution 47/121; Security Council Resolution 787 (1992), para. 2; and Annex IV to the Final Report of the UN Commission of Experts. See UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674/Add.2, 27 May 1994; UN General Assembly, The Situation in Bosnia and Herzegovina, UN Doc. A/RES/47/121, 18 December 1992; UN Security Council, Resolution 787 (1992), UN Doc. S/RES/787, 16 November 1992.
[153] *Kayishema* Trial Judgment, ICTR, para. 115.
[154] See *Akayesu* Trial Judgment, ICTR, paras. 505-6; *Kayishema* Trial Judgment, para. 115; *Musema* Trial Judgment, ICTR, para. 157; *Stakić* Trial Judgment, ICTY, paras. 517-8.

In *Krstić*, the ICTY Trial Chamber acknowledged that a genocidal policy and a policy of committing "ethnic cleansing" are indeed similar.[155] But, as the Appeals Chamber clarified, instead of acknowledging a policy of "ethnic cleansing" as genocide by referring to the resulting eradication of a group's culture, the *Krstić* Trial Chamber understood a policy of forcible displacement of the women, children and elderly of Srebrenica as "an additional means by which to ensure the physical destruction" of part of the targeted group, as it "[eliminated] even the residual possibility that the Muslim community in the area could reconstitute itself."[156] However, the Appeals Chamber found that while Radislav Krstić intended forcible transfer, he had no genocidal intent.[157] The ICTY Trial Chamber subsequently confirmed that "[i]t does not suffice to deport a group or a part of a group" to commit genocide.[158] Instead, the forcible transfer of a population may fall under the definition of genocide only if it leads to the physical or biological destruction of a group, a result that the Trial Chamber saw as particularly likely in cases in which the group could not reconstitute itself.[159] The ICJ followed this reasoning by arguing that, while neither the intent nor the act of "ethnically cleansing" a specific geographic area in itself constitutes genocide, these acts may amount to genocide if they are accompanied by an intent to destroy the group and are carried out by the use of one of the underlying crimes of genocide (such as killing or causing serious bodily or mental harm).[160]

As a result, the ICTY and the ICJ clearly distinguished between a policy of "ethnic cleansing" and genocide, even though they recognised that both policies might be interlinked. They thereby rejected the earlier, broad interpretation brought forward by the UN General Assembly, which had defined "ethnic cleansing" as a "form of genocide."[161] It might therefore be concluded that the ICTY and the ICJ limited the meaning of the prohibition of genocide by excluding "ethnic cleansing" from its scope.

However, if read alongside the development within the meaning of causing serious bodily and mental harm as discussed above, a different picture emerges. As mentioned previously,[162] the ICTY held that the forced displacement of the women, children, and elderly of Srebrenica (and

[155] See *Krstić* Trial Judgment, ICTY, para. 562.
[156] *Krstić* Appeals Judgment, ICTY, para. 31. See also ibid., paras. 5, 24-5.
[157] See ibid., para. 133.
[158] *Stakić* Trial Judgment, ICTY, para. 519.
[159] See *Blagojević* Trial Judgment, ICTY, paras. 665-6.
[160] See *Bosnia Genocide* Judgment, ICJ, para. 190; *Croatia v. Serbia* Judgment, ICJ, paras. 162-3.
[161] UN General Assembly, The Situation in Bosnia and Herzegovina, UN Doc. A/RES/47/121, 18 December 1992.
[162] See chapter three, pp. 88-89.

Žepa),[163] caused serious mental harm.[164] While "displacement alone" cannot amount to genocide, it can nevertheless be carried out in a way that reveals an intent to cause serious mental or bodily harm, or to inflict conditions calculated to lead to the destruction of the protected group. While the ICTY and the ICJ therefore seemingly confined the meaning of the prohibition of genocide by distinguishing between "ethnic cleansing" and genocide, the actual effect this caveat has on the provision's scope might be limited.

3.4.7. Moving from an Objective to a Combined Objective-Subjective Approach

Finally, international courts and tribunals developed the meaning of the prohibition of genocide with regard to the question of how to identify the four enumerated groups. In the case of the crime of genocide, international criminal courts amended their interpretation of how to identify a protected group by moving towards an approach that includes not only objective, but also subjective criteria. The ICTR Trial Chamber in *Rutaganda* summarized the main problem underlying this shift by emphasising that "the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof."[165] Given the lack of objective criteria to identify a protected group, the *Rutaganda* Trial Chamber acknowledged the need to rely on subjective criteria, namely the identification of the victim with the group and the perpetrator's perception of the victim as being a member of the group.[166] Consequently, the Trial Chamber emphasised the importance of the "particular political, social and cultural context"[167] in each individual case. In the end, the important distinguishing criterion is that the perpetrator identified the victim as belonging to one of the protected groups.[168] As this project's qualitative analysis revealed, this view was echoed by several subsequent ICTR and ICTY judgments, arguing that a decision would need to combine both subjective and objective criteria.[169] In its

[163] See *Tolimir* Trial Judgment, ICTY, para. 758. But see *Tolimir* Appeals Judgment, ICTY, paras. 213-9 (reversing the Trial Chamber's finding on the situation in Žepa).
[164] *Blagojević* Trial Judgment, ICTY, paras. 650-4; *Popović* Trial Judgment, paras. 846-7; *Tolimir* Trial Judgment, ICTY, paras. 756-7; *Tolimir* Appeals Judgment, ICTY, paras. 208-12; *Karadžić* Trial Judgment, ICTY, para. 545.
[165] *Rutaganda* Trial Judgment, ICTR, para. 55.
[166] See ibid.
[167] Ibid.
[168] See ibid.
[169] *Jelisić* Trial Judgment, ICTY, para. 70; *Musema* Trial Judgment, ICTR, para. 161; *Krstić* Trial Judgment, ICTY, para. 557; *Kajelijeli* Trial Judgment, ICTR, para. 811; *Kamuhanda* Trial Judgment, ICTR, para. 630; *Gacumbtsi* Trial Judgment, ICTR, para. 254; *Brđanin* Trial Judgment, ICTY, paras. 683-4; *Blagojević* Trial Judgment, ICTY, para. 667; *Seromba* Trial Judgment, ICTR, para. 319; *Tolimir* Trial Judgment, ICTY, para. 735. This reasoning was explicitly applied in *Ndindabahizi*, when the ICTR Trial Chamber concluded that a victim of both German and Rwandese descent was targeted because he was perceived to be at least partly Tutsi. See *Ndindabahizi* Trial Judgment, ICTR, paras. 467-9.

2007 judgment, the ICJ explicitly mentioned that this question did not merit any further discussion as both parties agreed on the need to consider both objective and subjective criteria.[170]

By now, the ICTR, ICTY, and the ICJ seem to agree on a mixed objective-subjective approach to determining whether a specific group is protected by the Genocide Convention. As Guglielmo Verdirame points out, however, this interpretation differs from older precedents set by the ICJ and, even earlier, the Permanent Court of International Justice, which relied on objective criteria.[171] In its *Bosnia Genocide* decision of 2007, the ICJ simply observed that "[t]he Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach."[172] Using an implicit reference to the jurisprudence of the ICTR and the ICTY, combined with an emphasis on the undisputed character of this question in the case at hand, the ICJ thereby ultimately relieved itself of the need to consider its own earlier judgments that may be relevant to this question, and thereby justified its endorsement of a shift in the legal interpretation of how to determine which groups are protected by the Genocide Convention.

3.5. Legal Flexibility and the Crime of Genocide

This analysis of the judicial development of the crime of genocide allows for several conclusions. Arguably as its most important aspect, this chapter demonstrated that even the crime of genocide – which had been selected as a case study because it is generally seen as having experienced relatively little interpretive change – developed notably through international jurisprudence. Within this overall development, the chapter also highlighted that about half of these jurisprudential alterations expanded the scope of the legal provision. In line with the perceptions of legal officers and judges working at international and hybrid criminal courts, many of these judicial developments occurred during the early years after the *ad hoc* Tribunals were established. At the ICTR, several of the judicial innovations outlined in this chapter were initiated by the court's judgment in *Akayesu*, the first judgment the ICTR delivered in September 1998. And the judicial contributions of the ICTY revolved around the first judgments at the court interpreting the crime of genocide, namely its decision in the *Jelisić* and *Kristić* cases.

[170] See *Bosnia Genocide* Judgment, ICJ, para. 191.
[171] See Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals," 593-94.
[172] *Bosnia Genocide* Judgment, ICJ, para. 191.

This concentration of judicial creativity on the early years after the establishment of the *ad hoc* Tribunals emphasises the relative youth of the field of ICL, and the particularly high degree of legal flexibility these tribunals were accorded as the first international courts interpreting international crimes after the Nuremberg and Tokyo trials. As traced by the empirical analysis conducted for this study, however, some developments also occurred within the later stages of the work of the *ad hoc* Tribunals. In 2003, two years after the *Jelisić* Trial judgment, the Trial Chamber in *Stakić* explicitly disagreed with the court's previous jurisprudence on how to identify a protected group, which opened a new line of jurisprudential reasoning.[173] The initially comparatively rudimentary character of the legal framework of ICL therefore seemed to have shaped the judicial development of ICL by amplifying the potential (or need) for legal innovation during the court's early years. However, this conclusion does not preclude the possibility that further developments occurred after this initial phase within the courts' lifetime terminated.

As a second aspect, this chapter demonstrated that even a comparatively 'precise' legal provision – at least when compared to the war crimes provisions included in the court Statutes – developed notably through interpretation. This development, however, followed a specific structure: The interpretive amendments outlined in this chapter were mainly qualitative developments, as an additive development suggested in *Akayesu* was subsequently not endorsed by the ICTR itself or by other international and hybrid criminal courts. This distribution suggests that judicial interpretation of the crime of genocide more revolved around the specific phrasing of a codified legal provision which, in this case, was included *verbatim* from the Genocide Convention into the Statutes of international and hybrid criminal courts. Arguably as a consequence, the legal interpretive process was structured around the legal terms and categories included in the provision, such as the question what it means to destroy a protected group "in part." Nevertheless, this conclusion does not imply that legal meaning regarding the crime of genocide remained stable over time – as the chapter has shown, legal content of the crime of genocide was altered with regard to several different aspects. Instead, it suggests that in this case, change in legal meaning through interpretive practices was structured around the provision's linguistic elements and legal categories.

At the same time, the potential for legal flexibility in the interpretation of the crime of genocide was arguably also exacerbated by the age of the provision. The Genocide Convention was

[173] See chapter three, pp. 96. See also *Stakić* Trial Judgment, ICTY, para. 512.

drafted almost 70 years ago, and in response to the Holocaust as a specific historical situation. In the context of the Rwandan genocide, the situation in the former Yugoslavia, but also in Cambodia, new factual situations arose that – arguably unforeseen by the Convention's drafters – posed a set of new legal questions, such as the relationship between genocide and ethnic cleansing. Some of these legal questions were controversial for decades among legal experts (such as the question of whether genocide can be limited to a specific geographic area). In this case, international jurisprudence strengthened a specific interpretation that was already discussed within a broader interpretive community that includes, among others, legal academics. Consequently, this chapter also emphasised how the interpretive practices of international courts are situated within – and may draw on – a broader interpretive community, an aspect that chapters five and six will return to.

Finally, the chapter has noted several cases in which international courts developed legal meaning as compared to the interpretations proposed by the drafters of the Genocide Convention. From a legal doctrinal standpoint, a treaties' *travaux préparatoires* are not necessarily determinative for its interpretation, especially if, as in ICL, reliance on the negotiation documents would be detrimental for the accused.[174] As an additional caveat, it may be unclear how far the opinions voiced by individual delegates were indicative of a view that was shared more broadly among the drafters.[175] Different from such a doctrinal perspective, however, the chapter aimed to trace empirically how far some of the legal views expressed by legal experts (including both state delegates and legal commentators) around the time the Convention was drafted conflicted with interpretations that were later favoured by international courts. From a point of view that focuses on the epistemic construction of knowledge, these early commentaries and negotiation documents indicate that views on how to competently interpret the prohibition of genocide have shifted over time. For example, the chapter detailed how, in his 1960 commentary of the Genocide Convention, Robinson rejected an interpretation of "serious mental harm" beyond the specific context of the use of narcotics as unsupported by the negotiation documents. In its *Akayesu* judgment, however, the ICTR subscribed precisely to such a broader interpretation when including, for example, acts of torture and inhumane or degrading treatment.[176]

[174] See Akande, "Sources of International Criminal Law," p. 45.
[175] See generally Shaw, *International Law*, pp. 634-35. Using the concept of interpretive communities, see similarly Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," p. 403. I am grateful to Dapo Akande for his comments on this aspect.
[176] See chapter three, p. 87. See also *Akayesu* Trial Judgment, ICTR, paras. 706-12.

In this context, it should be noted that it has not been the purpose of this chapter to ask whether this interpretation has indeed been a legally valid or normatively desirable expansion of the meaning of the prohibition of genocide; it may well be that the *Akayesu* judgment, for example, has correctly, in moral and in legal terms, adapted the meaning of "serious bodily and mental harm" to reflect changing conceptions of mental illness and the gravity of the crime of rape.[177] Therefore, this interpretation taken by the ICTR may very well be in line with what has – and should be – seen as a 'correct' legal interpretation within an ICL interpretive community. Furthermore, it is arguably an accepted professional standard among legal practitioners that negotiation documents are not a source in themselves, but may only provide additional insights for the interpretation of international treaty provisions that interpreters are not required to follow.[178] Indeed, when justifying their interpretation of genocide as potentially limited to a specific geographic area, both the *Jelisić* and the *Krstić* Trial Chambers referred to the 1960 Robinson commentary as their oldest source – in addition to subsequent General Assembly resolutions, international and domestic court orders and decisions, and "the object and goal of the Convention and the subsequent interpretation thereof" – but not to the Convention's *travaux préparatoires*.[179]

From a legal doctrinal perspective, there might therefore be very good reasons not to rely on negotiation documents, including their potential ambiguity. As an interpretive technique and a legal standard shared among legal practitioners, however, the way in which legal experts refer to the *travaux préparatoires* provides for legal flexibility. Therefore, this interpretive standard is an example of the ways in which the structure of the legal reasoning process itself, as shaped by shared assumptions of legal experts, provides for additional legal flexibility, in this case in the way in which legal practitioners refer to the negotiation documents of international treaties. Consequently, such a legal interpretive standard also limits the extent to which states may control which interpretations international courts may develop after a treaty has entered into force.

[177] In *Musema*, the ICTR Trial Chamber, for example, emphasised the gravity of the crime of rape arguing that one of the victims, "who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that 'what they did to her is worse than death.'" *Musema* Trial Judgment, ICTR, para. 933.
[178] See Shaw, *International Law*, pp. 3-29, 634-35.
[179] See *Jelisić* Trial Judgment, ICTY, para. 83; *Krstić* Trial Judgment, ICTY, paras. 585, 587-9.

Chapter 4

The Development of the Law of War Crimes

Unlike the crime of genocide, the law of war crimes is seen as an area of ICL in which legal meaning was altered substantially through the jurisprudence of international and hybrid criminal courts. For example, Shane Darcy estimated that it has been the law of war crimes "where the *ad hoc* Tribunals have made their most significant and far-reaching contribution to the development of international criminal law."[1] He even suggested that this jurisprudence, as well as the at times novel statutory provisions of both courts, led to the "reinvention of war crimes."[2] This chapter traces how the legal meaning of the law of war crimes developed through international adjudication, and answers the question of why such a striking development has been possible. Specifically, it highlights how the prevalence of a particular type of provision, namely customary law, provided international and hybrid criminal courts with a comparatively high level of legal flexibility.

Treaty law had also overlapped with international custom in the case of the crime of genocide. For the relatively rapid judicial development of the law of war crimes, however, the comparatively prominent role of customary law has been crucial. As the arguably most noticeable aspect, the ICTY Appeals Chamber held in one of its earliest decisions, the *Tadić Jurisdiction Decision*, that the list of crimes included in Article 3 of the Statute was open-ended, and that therefore other crimes under customary and treaty law could fall within the court's jurisdiction.[3] As a consequence, the ICTY charged several individuals with war crimes not explicitly listed in the ICTY Statute, but that instead formed part of customary law. Determining the existence and content of international customary provisions has therefore become an important interpretive technique through which judges were able to develop legal meaning in ICL. Due to the nature of the conflict and the crimes that were committed, it has consequently been especially the ICTY that amended the crime's legal content.

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[1] Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," p. 107.
[2] Ibid., pp. 106; 110-11. See similarly Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War," pp. 2-3.
[3] See *Tadić Jurisdiction Decision,* Appeals Chamber, ICTY, para. 87. This decision was endorsed by the ICTY's subsequent jurisprudence. See, for example, *Delalić* Trial Judgment, ICTY, para. 278; *Furundžija* Trial Judgment, ICTY, para. 133.

To analyse the role of customary law in the interpretive practices of ICL further, this chapter begins with a brief overview of the statutory provisions on the law of war crimes included in the Statutes of the *ad hoc* Tribunals, the ICC, the SCSL, and the ECCC. Similar to the previous chapter on the crime of genocide, it then outlines the main additive and qualitative developments in the judicial interpretation of war crimes. The chapter concludes with an examination of the role of customary law in the interpretive practices of ICL. Like the previous discussion of the crime of genocide, the chapter relies on a computer-assisted qualitative analysis of international jurisprudence interpreting the law of war crimes.

4.1. The Statutory Legal Framework

The provisions on war crimes differ across the Statutes of different international and hybrid criminal courts. This divergence in large part reflects differences in the types of armed conflicts these courts focus on, combined with the crucial distinction in international humanitarian law between international and internal armed conflicts. Legal rules regulating wartime conduct were historically only applicable to international armed conflicts, that is, armed conflicts between states.[4] Consequently, the four Geneva Conventions of 1949 also mainly concentrate on international – instead of internal – armed conflicts. Article 3 included in each of the four Geneva Conventions (Common Article 3), as well as the 1977 Additional Protocol II to the Geneva Conventions, constitute two of the main exceptions to this general focus. Nevertheless, the legal regime regulating wartime conduct for internal conflict long remained less developed than international humanitarian law applicable to international armed conflicts. Common Article 3 of the Geneva Conventions applicable to internal conflicts has thus been understood as a "minimum protection" regime.[5]

Due to this distinction between international and internal armed conflicts in international humanitarian law, different types of provisions were included in the Statutes of the ICTR and the ICTY. The Rwandan conflict was largely seen as internal in character, so that Article 4 of the ICTR Statute grants the court jurisdiction over violations of Common Article 3 and Additional Protocol II.[6] Article 4 then adds a list of specific violations, including murder and cruel treatment, acts of terrorism, and outrages upon personal dignity including rape. This list

[4] See, for example, the 1899 and 1907 Hague Conventions. See also David, "Internal (Non-International) Armed Conflict," in *The Oxford Handbook of International Law in Armed Conflict*, ed. Clapham, Gaeta, and Haeck (Oxford: Oxford University Press, 2014), p. 353.
[5] *Akayesu* Appeals Judgment, ICTR, para. 443. See also *Nicaragua* Judgment, ICJ, para. 218.
[6] See, for example, UN Security Council, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), UN Doc. S/1994/1125, 4 October 1994, para. 91.

of crimes largely follows the violations included in Common Article 3 of the Geneva Conventions, even though the ICTR Statute also incorporates pillage and further specifications of some of the violations enumerated in Common Article 3. For example, contrary to the 1949 Geneva Conventions, the ICTR Statute explicitly mentions rape as an outrage upon personal dignity.

Compared to the conflict in Rwanda, it was less clear how to categorise the situation in the former Yugoslavia at the time the ICTY was established.[7] The court later held that it had the authority to make such a decision itself based on the evidence before it.[8] The ICTY Statute consequently includes two articles on war crimes, one focusing on grave breaches of the Geneva Conventions (Article 2), and one more generally on "violations of the laws or customs of war" (Article 3). Each of the Geneva Conventions includes provisions detailing specific "grave breaches," which state parties are required to prosecute.[9] Article 2 of the ICTY includes these grave breaches into the jurisdiction of the ICTY, and provides a list of eight crimes, including wilful killing and torture. The ICTY has held that Article 2 is only applicable to international armed conflicts.[10]

Article 3 of the ICTY Statute, in turn, provides the court with jurisdiction over "violations of the laws or customs of war." The drafters again included a list of specific crimes, such as the use of weapons intended to generate unnecessary suffering and the crime of plunder. However, in the case of Article 3, the ICTY concluded that this list was "merely illustrative," so that also additional serious violations of international humanitarian law could be prosecuted under this article.[11] Indeed, according to the ICTY, Article 3 acts as "a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[12] In addition, the ICTY held that Article 3 was applicable to both international and internal armed conflicts.[13] It has been this article, together with the

[7] See UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674/Add.2, 27 May 1994, paras. 43-44.
[8] See *Tadić* Trial Judgment, ICTY, para. 583. While the Appeals Chamber disagreed with the way in which the Trial Chamber had characterised the armed conflict, it reaffirmed that the court had the authority to take such a decision. See *Tadić* Appeals Judgment, ICTY, paras. 86-87, 145.
[9] See Articles 51, 51, 130, and 147 of the four Geneva Conventions. See also *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 79.
[10] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 84; see also, for example, *Tadić* Trial Judgment, ICTY, paras. 559, 202; *Kordić* Trial Judgment, ICTY, para. 65.
[11] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 87, 90, 94.
[12] *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 91.
[13] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 89. See also, for example, *Delalić* Trial Judgment, ICTY, paras. 298, 314; *Furundžija* Trial Judgment, ICTY, para. 132; *Blaškić* Trial Judgment, ICTY, para. 161; *Delalić* Appeals Judgment, paras. 132, 133.

ICTY's jurisprudence interpreting the list of crimes as non-exhaustive, that provided the court with a comparatively high degree of legal flexibility, as it largely relied on customary law in its interpretation of those additional war crimes not explicitly enumerated in Article 3.

Moreover, also the provisions on war crimes included in the Statute of the SCSL and the Law on the Establishment of the ECCC (ECCC Law) reflect the specific character of the armed conflict in the context of which the crimes before both courts occurred. Article 3 of the SCSL Statute providing the court with jurisdiction over violations of Common Article 3 and Additional Protocol II is almost identical with Article 4 of the ICTR Statute. Notably, it includes the same list of war crimes that are enumerated in the ICTR Statute. In addition, Article 4 of the SCSL Statute includes three additional war crimes under the heading of "other serious violations of international humanitarian law." These additional violations include the use of child soldiers and intentional attacks against humanitarian and peacekeeping personnel and property. Article 6 of the ECCC Law, in turn, almost v*erbatim* repeats the framing of Article 2 of the ICTY Statute on grave breaches of the Geneva Conventions applicable in international armed conflicts.[14]

Finally, the Rome Statute of the ICC includes a comparatively elaborate legal framework outlining the court's jurisdiction on war crimes, which arguably extends the provisions included in the ICTR, ICTY, and SCSL Statute.[15] Indeed, Article 8(2) of the Rome Statute has been described as developing for the first time a systematic and comprehensive definition of war crimes.[16] It includes all types of war crimes discussed so far: grave breaches of the Geneva Conventions (Article 8(2)(a)), serious violations of the laws and customs of war applicable in both internal and international armed conflicts (Articles 8(2)(b) and 8(2)(e)), and serious violations of Common Article 3 and of Additional Protocol II (Article 8(2)(c)). The Rome Statute thereby in large part incorporates the statutory provisions of previous international and hybrid criminal courts. For example, with regard to grave breaches of the Geneva Conventions, the list of war crimes included in Article 2 of the ICTY Statute is almost word-for-word repeated in Article 8(2)(a) of the Rome Statute. Furthermore, the three war crimes listed as "other serious violations of international humanitarian law" under Article 4 of the SCSL Statute, for example, have been incorporated into Article 8(2)(e) of the Rome Statute.

[14] See also *Kaing* Trial Judgment, ECCC, para. 403.
[15] Note that the ECCC Law was only promulgated in 2001, and therefore subsequent to the negotiation of the Rome Statute of the ICC.
[16] See Bothe, "War Crimes," in *The Rome Statute of the International Criminal Court*, ed. Cassese, Gaeta, and Jones (Oxford: Oxford University Press, 2002), p. 381.

Court	Article	Type of war crime
ICTR	Article 4	Violations of Common Article 3 and of Additional Protocol II
ICTY	Article 2	Grave breaches of the Geneva Conventions
	Article 3	Violations of the laws or customs of war
SCSL	Article 3	Violations of Common Article 3 and of Additional Protocol II
	Article 4	Other serious violations of international humanitarian law
ECCC	Article 6	Grave breaches of the Geneva Conventions
ICC	Article 8(2)(a)	Grave breaches of the Geneva Conventions
	Article 8(2)(b)	Other serious violations of the laws or customs applicable in international armed conflict
	Article 8(2)(c)	Serious violations of Common Article 3
	Article 8(2)(e)	Other serious violations of the laws and customs applicable in armed conflicts not of an international character

Figure 1: Statutory Framework of International and Hybrid Criminal Courts on the Law of War Crimes

The following sections analyse how, based on this statutory framework, international criminal courts and tribunals have developed legal meaning on the law of war crimes.

4.2. Additive Developments

Compared to the jurisprudential development of the crime of genocide that largely consisted of qualitative developments, additive developments have been more prominent in the judicial interpretation of the law of war crimes. Instead of qualitatively shaping the meaning of already existing aspects and categories of a court's statutory provisions, these developments added new tests and categories not mentioned in the Statute to a legal provision's interpretation. Within international jurisprudence on the law of war crimes, international and hybrid criminal courts have, as a first aspect, created a number of tests to determine which situations different types of war crimes detailed in their Statutes apply to. A second cluster of additive developments has centred around the judicial interpretation of war crimes not explicitly listed in the ICTY Statute. The newly developed judicial tests detailing different application requirements constituted one of the first jurisprudential developments at the ICTY, and largely emerged within the first trial before the court in the case against Duško Tadić. The list of war crimes not explicitly listed within the ICTY Statute, in turn, was extended gradually through the court's jurisprudence, and also after the initial phase within the court's lifetime had come to an end.

4.2.1. Application Requirements

The jurisprudential tests on the application requirements for different types of war crimes revolved around the grave breaches regime on the one hand, and around violations under Article 3 of the ICTY Statute on the other. To begin with the ICTY's jurisprudence on the application requirements for grave breaches of the Geneva Conventions, at first sight, it is relatively restrictive. As briefly mentioned above, the ICTY Appeals Chamber held that the

grave breaches provision included in Article 2 of the Statute is not applicable to crimes committed in internal armed conflicts.[17] By reaching this conclusion, the Appeals Chamber overturned an earlier decision by the Trial Chamber that had held that Article 2 of the Statute could be extended to include crimes committed in internal armed conflicts as well.[18] Instead, the Appeals Chamber based its diverging decision not only on an analysis of the Geneva Conventions and a Report of the Secretary-General as part of the negotiation documents of the ICTY Statute, but also on an analysis of state practice and *opinio juris* (the grave breaches provisions are regarded as forming part of international customary law).[19] This focus is the first out of several indications of the dominant role of international custom in the interpretation of the law of war crimes.

Based on this initial decision, the ICTY developed a specific test for the applicability of the grave breaches provision. In particular, it established the dual requirement that, for offences under Article 2 of the ICTY Statute, (a) the armed conflict in question needs to be international, and (b) that the crimes would need to have been committed against persons or property that fell under the protection of the Geneva Conventions.[20] This test came to be firmly rooted in the jurisprudence of the ICTY: As this study's qualitative analysis showed, it was routinely referred to when interpreting Article 2 of the Statute.[21] The test was subsequently also applied by the ECCC when interpreting Article 6 of the ECCC Law providing the court with jurisdiction over grave breaches of the Geneva Conventions.[22] And the two elements of this jurisprudential test were also included within the ICC's Elements of Crimes as distinct interpretive steps for grave breaches of the Geneva Conventions under Article 8(2)(a) of the Rome Statute.[23] Within the judicial interpretive practices of ICL, a discussion of this test was therefore established as an interpretive step that formed part of what has come to be perceived as a valid interpretation of ICL.

[17] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 84.
[18] See *Tadić Jurisdiction Decision*, Trial Chamber, ICTY, paras. 50-53; *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. para. 80-81.
[19] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 80-83. See also *Tadić* Trial Judgment, ICTY, para. 577 (explicitly on the customary character of the grave breaches regime).
[20] See *Tadić* Appeals Judgment, ICTY, para. 80.
[21] See, for example, *Delalić* Trial Judgment, ICTY, para. 201; *Blaškić* Trial Judgment, ICTY, para. 74; *Kordić* Trial Judgment, ICTY, para. 65; *Simić* Trial Judgment, ICTY, para. 106. See similarly *Naletilić* Trial Judgment, ICTY, para. 106; *Brđanin* Trial Judgment, ICTY, para. 121; *Prlić* Trial Judgment, ICTY, para. 83.
[22] See *Kaing* Trial Judgment, ECCC, para. 409.
[23] See, for example, Article 8(2)(a)(i)(2) and Article 8(2)(a)(i)(4) of the Elements of Crimes.

At first sight, this test could be understood as limiting the jurisdiction international and hybrid criminal courts have over grave breaches of the Geneva Conventions, especially as it excluded crimes committed in internal armed conflicts. Nonetheless, as Darcy observed, the ICTY combined this limitation with a relatively expansive interpretation of which individuals qualify for the protection of the Geneva Conventions, as well as of the degree of control required over troops operating abroad that would be necessary to establish the existence of an international armed conflict.[24] Regarding the latter aspect, the ICTY famously departed from the jurisprudence of the ICJ in its interpretation of under which conditions the actions of troops operating within one state can be attributed to another state. In its *Nicaragua* judgment, the ICJ had developed the so-called "effective control" test, which established a relatively high threshold for state responsibility for such actions. Specifically, the ICJ held that merely financing or training such groups – or even involvement in their strategic and military decisions-making – was not enough to render these acts attributable to an outside state.[25] Instead, it would be necessary that this state "had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." [26]

The ICTY, in contrast, decided not to follow the ICJ's previous jurisprudence and instead developed what has come to be known as the "overall control" test.[27] The test required that, while financing and providing military equipment was not sufficient to establish control, the state in question had to be involved in the military and strategic planning of such a group. If this requirement was fulfilled, it would not be necessary to establish whether state actors also directly ordered the commission of war crimes.[28] As a consequence, the ICTY included a larger universe of cases into the definition of an international armed conflict than the ICJ's jurisprudence suggested. Indeed, the ICTY Trial Chamber had initially acquitted Tadić for crimes that fell under Article 2 of the ICTY Statute, and which were committed after the Yugoslav People's Army ("JNA") troops had withdrawn from Bosnia and Herzegovina in May 1992.[29] Partly based on the newly-established overall control test, however, the Appeals Chamber reversed this decision and convicted Tadić for grave breaches of the Geneva Convention committed after 1992.[30] While the ICJ has most recently reaffirmed its use of the

[24] See Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," pp. 113, 115.
[25] See *Nicaragua* Judgment, ICJ, para. 115.
[26] *Nicaragua* Judgment, ICJ, para. 115.
[27] See *Tadić* Appeals Judgment, ICTY, paras. 115-137.
[28] See *Tadić* Appeals Judgment, ICTY, paras. 131, 145.
[29] See *Tadić* Trial Judgment, ICTY, paras. 607-608.
[30] See *Tadić* Appeals Judgment, ICTY, paras. 170-171.

"effective control" test,[31] the ICC seems to have also followed the "overall control" test in one of its earliest decisions.[32]

As Darcy observed, in addition to introducing a relatively low threshold for determining state control over an armed group, the ICTY also developed legal meaning for which individuals qualify as protected persons in a similarly expansive way.[33] According to Article 4 of Geneva Convention IV, individuals protected by the Convention are those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals." In the complex situation in the former Yugoslavia, however, and considering that armed troops operating in one country might be under the "overall control" of another state, such a requirement posed the potential to become comparatively restrictive and to exclude some groups from the protection of the Geneva Convention. Based on an interpretation of the Convention's purpose, the ICTY consequently decided to construe the nationality requirement broadly. It argued that support for one side of an international armed conflict may be based on ethnicity, instead of nationality.[34] The court therefore concluded that even in a case in which the accused had the same nationality as the victims of grave breaches of the Geneva Conventions, Article 2 of the ICTY was still applicable.[35] This interpretation was confirmed by the court's subsequent jurisprudence.[36] While the ICTY therefore narrowed the scope of Article 2 by confining its application to international armed conflicts, it nevertheless broadened the application of the grave breaches provisions through a more expansive interpretation of its "protected persons" requirement and the use of the "overall control" test.

Beyond the grave breaches provisions, the ICTY developed a set of application requirements for Article 3 of the ICTY Statute, which – as this study's qualitative analysis shows – also found a wider echo among other international and hybrid criminal courts. As mentioned above, the ICTY held that Article 3 also applies to crimes committed in internal armed conflicts, and characterised the list of crimes included in Article 3 as open-ended.[37] It subsequently held that

[31] See *Bosnia Genocide* Judgment, ICJ, paras. 396-407. See also Cassese's response to the Bosnia Genocide judgment, Cassese, "The *Nicaragua and Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia," *European Journal of International Law* 18, no. 4 (2007).
[32] See *Lubanga Confirmation of Charges Decision,* Pre-Trial Chamber, ICC, paras. 209-211. See also *Lubanga* Trial Judgment, para. 541.
[33] See Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," pp. 113, 115.
[34] See *Tadić* Appeals Judgment, ICTY, para. 166.
[35] See *Tadić* Appeals Judgment, ICTY, para. 167.
[36] See *Blaškić* Trial Judgment, ICTY, paras. 125-126, 133.
[37] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 87, 89-90, 94. See also, for example, *Delalić* Trial Judgment, ICTY, paras. 298, 314; *Furundžija* Trial Judgment, ICTY, para. 132; *Blaškić* Trial Judgment, ICTY, para. 161; *Delalić* Appeals Judgment, paras. 132, 133.

also violations of Common Article 3 of the Geneva Convention, for example, were – due to its customary status – captured by Article 3 of the ICTY Statute.[38] However, in addition to internal armed conflicts, Article 3 of the Statute was equally held to apply to crimes committed in international armed conflicts as well.[39]

In addition to extending Article 3 of the ICTY Statute to internal armed conflicts, the court also established a set of general application requirements for crimes to be prosecuted under this statutory provision. In its *Jurisdiction Decision* in the *Tadić* case, the ICTY Appeals Chamber famously held that Article 3 applies under the following four conditions (so-called *Tadić* conditions):

> (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met …; (iii) the violation must be 'serious' ….; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[40]

Should these jurisdictional conditions be satisfied, the ICTY held that three additional application requirements need to be fulfilled as well for violations of both Articles 2 and 3: (a) the existence of an armed conflict (irrespective of its character); (b) a "nexus" between the crime and the armed conflict; and (c) the victim did not directly participate in the armed conflict at the time the offence was committed.[41] These application requirements are aimed to distinguish war crimes from acts of violence that are unrelated to the armed conflict in question, or that occur in situations that cannot be characterised as an armed conflict in the first place, such as "unorganized and short-lived insurrections."[42]

In this context, both the requirement for the existence of an armed conflict and the so-called "nexus requirement" have been interpreted in a relatively broad way. Most generally, the ICTY decided that "an armed conflict exists whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a

[38] See *Delalić* Trial Judgment, ICTY, para. 316; *Blaškić* Trial Judgment, ICTY, para. 166. On the customary status of Common Article 3 of the Geneva Conventions, see also *Akayesu* Trial Judgment, ICTR, para. 608.
[39] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 89; *Furundžija* Trial Judgment, ICTY, para. 132; *Blaškić* Trial Judgment, ICTY, para. 161.
[40] *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 94.
[41] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 66-70. See also, for example, *Tadić* Trial Judgment, ICTY, paras. 572-573, 614; *Delalić* Trial Judgment, ICTY, paras. 182-185, 193-194.
[42] *Tadić* Trial Judgment, ICTY, para. 562. See also, for example, *Akayesu* Trial Judgment, ICTR, para. 620; *Delalić* Trial Judgment, ICTY, para. 18; *Fofana* Trial Judgment, SCSL, para. 124.

State."[43] As the ICTY clarified in *Limaj*, "some degree of organisation" will be sufficient to reach such a threshold.[44] International humanitarian law was held to be applicable until the emergence of a peace agreement, instead of until the end of military confrontations.[45] It was also determined to apply to all of the state's territory,[46] and was therefore unrelated to the question of "whether or not actual combat takes place."[47] Regarding the "nexus requirement," the ICTY held that it would suffice if "the alleged crimes were closely related to the hostilities,"[48] and that there would need to be an "obvious link" between the offences and the armed conflict.[49] It was not, however, seen as necessary that the crimes occurred as a result of – or "in actual furtherance" of – a particular military strategy or policy focusing on the conduct of hostilities.[50]

In the case of the ICTY, these requirements were again first outlined in the *Jurisdiction Decision* in *Tadić*,[51] and were developed into a three-tier test in the subsequent jurisprudence that routinely referred to such an interpretation of both Articles 3 and 2.[52] As the analysis conducted for this study traced, this test was incorporated into the legal interpretation of other international and hybrid criminal courts. Citing ICTY jurisprudence, the ICTR included this three-tier test into its reasoning on violations of Common Article 3 and Additional Protocol II.[53] Furthermore, the SCSL applied this same test in its jurisprudence on Article 3 of the SCSL

[43] *Tadić Jurisdiction Decision*, ICTY Appeals Chamber, para. 70. See also, for example, *Akayesu* Trial Judgment, ICTR, para. 619; *Delalić* Trial Judgment, ICTY, para. 183; *Fofana* Trial Judgment, SCSL, para. 124.
[44] *Limaj* Trial Judgment, ICTY, para. 89; See also *Mrkšić* Trial Judgment, ICTY, para. 407.
[45] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 70. See also, for example, *Akayesu* Trial Judgment, ICTR, para. 619; *Delalić* Trial Judgment, ICTY, para. 183; *Fofana* Trial Judgment, SCSL, para. 128.
[46] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 68. See also, for example, *Delalić* Trial Judgment, ICTY, para. 183; *Aleksovski* Trial Judgment, ICTY, para. 43.
[47] *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 70.
[48] *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 70. See also, for example, *Delalić* Trial Judgment, ICTY, para. 193; *Rutaganda* Trial Judgment, ICTR, para. 104; *Sesay* Trial Judgment, SCSL, para. 100; *Kaing* Trial Judgment, ECCC, para. 416. See also similarly *Katanga* Trial Judgment, ICC, para. 1176.
[49] *Delalić* Trial Judgment, ICTY, para. 193. See also, for example, *Kayishema* Trial Judgment, ICTR, para. 186.
[50] *Tadić* Trial Judgment, ICTY, para. 573. See also, for example, *Delalić* Trial Judgment, ICTY, para. 193; *Sesay* Trial Judgment, SCSL, para. 100; *Kaing* Trial Judgment, ECCC, para. 416.
[51] *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, paras. 66-70.
[52] See, for example, *Tadić* Trial Judgment, ICTY, paras. 572-573, 614; *Delalić* Trial Judgment, ICTY, paras. 182-185, 193-194; *Blaškić* Trial Judgment, ICTY, para. 65; *Kordić* Trial Judgment, ICTY, para. 65; *Krstić* Trial Judgment, ICTY, para. 480; *Milutinović* Trial Judgment, ICTY, para. 124; *Lukić* Trial Judgment, ICTY, para. 868; *Popović* Trial Judgment, ICTY, para. 739; *Dordević* Trial Judgment, ICTY, para. 1521; *Gotovin*a Trial Judgment, ICTY, para. 1673; *Haradinaj* Trial Judgment (retrial), ICTY, para. 391; *Tolimir* Trial Judgment, ICTY, para. 682; *Stanišić and Župlijanin* Trial Judgment, ICTY, para. 31; *Prlić* Trial Judgment, ICTY, paras. 83, 141; *Stanišić and Simatović* Trial Judgment, ICTY, para. 952.
[53] See *Kayishema* Trial Judgment, ICTR, paras. 169-190; *Rutaganda* Trial Judgment, ICTR, para. 104; *Musema* Trial Judgment, ICTR, paras. 259-260; *Kamuhanda* Trial Judgment, ICTR, paras. 721, 730, 733; *Bagosora* Trial Judgment, ICTR, para. 2229; *Renzaho* Trial Judgment, ICTR, para. 796; *Setako* Trial Judgment, ICTR, para. 484; *Ndindiliyimana* Trial Judgment, ICTR, para. 2129; *Nyiramashuhuko* Trial Judgment, ICTR, para. 6147; *Karemera* Trial Judgment, ICTR, para. 1694; *Nizeyimana* Trial Judgment, ICTR, para. 1569.

Statute on violations of Common Article 3 and Additional Protocol II. It consequently referred to both *ad hoc* Tribunals when outlining that "[t]he jurisprudence has identified three *chapeau* (or general) requirements for violations against international humanitarian law."[54] Finally, the ECCC used this test when discussing the application of Article 6 of the ECCC Law on grave breaches of the Geneva Conventions.[55]

International and hybrid criminal courts therefore established a set of tests and application requirements for different types of war crimes, which constituted part of the additive developments proposed by these courts. In their jurisprudence, these tests became so dominant that these requirements formed a large part of every discussion of the law of war crimes. As this project's qualitative analysis clearly showed, the so-called *Tadić* conditions and the "nexus requirement," for example, subsequently became so deeply ingrained in the jurisprudence of these courts that they were referred to in almost every judgment interpreting the law of war crimes. At first sight, these requirements seem to limit the scope of these courts' jurisdiction. However, legal scholars have cast doubt on how strictly international and hybrid criminal courts have interpreted these application conditions, such as the requirement that a violation of international humanitarian law needs to incur individual criminal responsibility.[56] It should also be noted that by establishing these requirements, the ICTY firmly anchored the view in its jurisprudence that the court could indeed refer to war crimes not enumerated in Article 3 of the ICTY Statute, as long as they fulfilled the so-called *Tadić* conditions. The establishment of these application requirement can therefore better be understood as providing the basis for further expansive developments.

4.2.2. Additional Crimes under Article 3 of the ICTY Statute

In addition to these application requirements, the ICTY held that several crimes not explicitly enumerated in its Statute fell within the scope of Article 3 as "violations of the laws or customs of war." Some of these additional, unenumerated crimes constituted violations of Common Article 3 of the Geneva Conventions, which consequently overlapped with the underlying crimes listed in Article 4 of the ICTR Statute. Crimes for which such an overlap existed

[54] *Taylor* Trial Judgment, SCSL, para. 562 (emphasis in original). See also generally *Fofana* Trial Judgment, SCSL, paras. 122-137; *Sesay* Trial Judgment, SCSL, paras. 93-105; *Taylor* Trial Judgment, SCSL, paras. 562-568.
[55] See *Kaing* Trial Judgment, ECCC, para. 410.
[56] See, for example, Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," pp. 122-23.

included the crimes of murder,[57] cruel treatment and torture,[58] and outrages upon personal dignity including rape.[59] The ICTY decided that these crimes constituted war crimes under Article 3 of the ICTY Statute based on the finding that Common Article 3 of the Geneva Convention had reached customary status.[60] But the ICTY also prosecuted war crimes under Article 3 of the ICTY that were not mentioned in Common Article 3. These additional crimes included the crime of inflicting terror upon civilians ("crime of terror"),[61] using prisoners of war and civilians to perform unlawful labour,[62] unlawful attacks against civilians,[63] and the crime of enslavement.[64] Each of these additional war crimes was held to form part of international customary law.[65]

As none of these crimes were explicitly enumerated as "violations of the laws or customs of war" in Article 3 of the ICTY Statute, the court's jurisprudence on all of these war crimes constituted additive developments that expanded its jurisdiction. Most importantly for the focus of this chapter, these additive developments were justified with the argument that these unenumerated war crimes formed part of international customary law, an interpretation that provided the court with jurisdiction over these crimes. In addition to expanding its jurisdiction, the ICTY also specified which elements these crimes consisted of (*actus reus* and *mens rea*) as a further way of developing legal meaning. In cases in which these crimes overlapped with the underlying crimes explicitly listed in the Statutes of other international and hybrid criminal

[57] See especially *Delalić* Trial Judgment, ICTY, paras. 420-439. See also Article 4(a) of the ICTR Statute.
[58] See especially *Tadić* Trial Judgment, ICTY, paras. 722-726 (cruel treatment); *Delalić* Trial Judgment, ICTY, paras. 440-558 (cruel treatment and torture). See also Article 4(a) of the ICTR Statute.
[59] See especially *Furundžija* Trial Judgment, ICTY, paras. 165-186 (rape); *Aleksovski* Trial Judgment, ICTY, paras. 48-57; *Aleksovski* Appeals Judgment, ICTY, paras. 18-28 (outrages upon personal dignity). See also Article (e) of the ICTR Statute.
[60] See especially *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 98; *Tadić* Trial Judgment, ICTY, para. 611. See also *Nicaragua* Judgment, ICJ, para. 218.
[61] *Galić* Trial Judgment, ICTY, para. 65. More generally, see also *Galić* Trial Judgment, ICTY, paras. 63-66; 86-138; *Milosević* Trial Judgment, ICTY, paras. 873-888; *Milosević* Appeals Judgment, ICTY, paras. 30-61; *Prlić* Trial Judgment, ICTY, paras. 195-197; *Karadžić* Trial Judgment, ICTY, paras. 458-466.
[62] See *Naletilić* Trial Judgment, ICTY, paras. 250-261; *Prlić* Trial Judgment, ICTY, paras. 151-164.
[63] See especially *Blaškić* Trial Judgment, ICTY, para. 180; *Kordić* Trial Judgment, ICTY, paras. 326-328; *Galić* Trial Judgment, ICTY, paras. 12-62; *Kordić* Appeals Judgment, ICTY, paras. 40-68; *Strugar* Trial Judgment, ICTY, paras. 277-283; *Galić* Appeals Judgment, ICTY, paras. 121-140; *Martić* Trial Judgment, ICTY, paras. 66-72; *Milosević* Trial Judgment, ICTY, paras. 940-953; *Strugar* Appeals Judgment, ICTY, paras. 264-276; *Perisić* Trial Judgment, ICTY, paras. 89-101; *Prlić* Trial Judgment, ICTY, paras. 183-193; *Karadžić* Trial Judgment, ICTY, paras. 449-457.
[64] See *Krnojelac* Trial Judgment, ICTY, paras. 350-360.
[65] See *Galić* Appeals Judgment, ICTY, para. 86; *Milosević* Trial Judgment, ICTY, para. 874; *Prlić* Trial Judgment, ICTY, para. 195; *Karadžić* Trial Judgment, para. 458 (crime of terror); *Naletilić* Trial Judgment, ICTY, para. 250; *Prlić* Trial Judgment, ICTY, para. 152 (unlawful labour); *Galić* Trial Judgment, ICTY, para. 19; *Kordić* Appeals Judgment, ICTY, paras. 41-42; *Strugar* Trial Judgment, ICTY, para. 220; *Milosević* Trial Judgment, ICTY, para. 941; *Perisić* Trial Judgment, ICTY, para. 77; *Prlić* Trial Judgment, ICTY, para. 185 (unlawful attacks against civilians); *Krnojelac* Trial Judgment, ICTY, para. 353 (enslavement).

courts, these legal developments were subsequently also routinely endorsed in the jurisprudence of other courts.

The ICTY's development of legal meaning on the content of these crimes therefore also had a wider trajectory that went beyond expanding its own jurisdiction. This broader interpretive influence has especially occurred for violations of Common Article 3, including murder and cruel treatment, as war crimes. These crimes were equally adjudicated by the ICTR under Article 4 of the ICTR Statute, and by the SCSL according to Article 3 of the SCSL Statute. For example, the SCSL drew heavily on ICTY jurisprudence when interpreting the crimes of taking hostages and acts of terrorism as serious violations of Common Article 3 and of Additional Protocol II to the Geneva Conventions under Articles 3(c) and 3(d) of the SCSL Statute.[66] In these instances, additive developments at the ICTY arguably intersected with qualitative developments elaborating on the statutory provisions of other international and hybrid criminal courts.

The ICTY's jurisprudence on these additional, unenumerated war crimes – as well as their reception by other international and hybrid criminal courts – has been extensive. For this reason, it would be beyond the scope of this project to map every development of legal meaning through international jurisprudence regarding all of these war crimes. The following section therefore discusses one of these war crimes in-depth, namely the crime of terror, as an example of such a development of legal meaning. As this study's qualitative analysis of international jurisprudence emphasised, in addition to the crimes of inflicting cruel treatment and torture,[67] outrages upon personal dignity including rape,[68] and unlawful attacks on civilians,[69] the crime of terror has been among the war crimes that generated the most comprehensive body of case law, spanning – in this case – both the ICTY and the SCSL.[70] In addition, its inclusion into the

[66] See *Sesay* Trial Judgment, SCSL, paras. 238-240; *Sesay* Appeals Judgment, SCSL, paras. 550, 575-586 (taking hostages); *Fofana* Trial Judgment, SCSL, paras. 169-175; *Fofana* Appeals Judgment, SCSL, paras. 344-358; *Sesay* Trial Judgment, SCSL, paras. 113-121; *Sesay* Appeals Judgment, SCSL, para. 889; *Taylor* Trial Judgment, SCSL, paras. 403-407 (crime of terror).
[67] See especially *Tadić* Trial Judgment, ICTY, paras. 722-726 (cruel treatment); *Delalić* Trial Judgment, ICTY, paras. 440-558 (cruel treatment and torture). See also *Fofana* Trial Judgment, SCSL, paras. 155-156; *Taylor* Trial Judgment, SCSL, para. 434 (cruel treatment).
[68] See especially *Furundžija* Trial Judgment, ICTY, paras. 165-186 (rape); *Aleksovski* Trial Judgment, ICTY, paras. 48-57; *Aleksovski* Appeals Judgment, ICTY, paras. 18-28 (outrages upon personal dignity). See also, for example, *Bagosora* Trial Judgment, ICTR, para. 2250; *Renzaho* Trial Judgment, ICTR, para. 809 (outrages upon personal dignity); *Sesay* Trial Judgment, SCSL, paras. 174-175; *Taylor* Trial Judgment, SCSL, para. 431-432 (outrages upon personal dignity).
[69] See especially *Kordić* Trial Judgment, ICTY, paras. 326-328; *Naletilić* Trial Judgment, ICTY, paras. 578-579; *Galić* Trial Judgment, ICTY, paras. 12-62; *Kordić* Appeals Judgment, ICTY, paras. 40-67.
[70] This assessment is based on an analysis of how much space international and hybrid criminal courts devoted to a discussion of the legal elements of these crimes and their legal status in their judgments.

jurisdiction of the ICTY has remained particularly controversial among academics and legal practitioners, a circumstance that makes case law on the crime of terror particularly interesting for this project.

The crime of terror against the civilian population as an additional, unenumerated war crime under Article 3 of the ICTY Statute was considered for the first time in the case against Stanislav Galić. In this case, the indictment alleged that Galić had "conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population."[71] The Trial Chamber in *Galić* initially held that, based on Article 51 of Additional Protocol I to the Geneva Conventions, the crime of terror had been part of the applicable treaty law at the time, and that it incurred individual criminal responsibility.[72] The Appeals Chamber, however, reversed this reasoning and decided that the crime of terror was customary in character.[73]

In addition to this initial disagreement surrounding its customary character, the question of whether the crime of terror entailed individual criminal responsibility has been highly controversial among both international judges and legal academics.[74] In his dissenting opinion, ICTY Appeals Judge Wolfgang Schomburg voiced his doubts on whether the crime of terror, while part of international custom, incurred individual criminal responsibility: In his view, there was insufficient evidence of existing state practice in this regard.[75] In this context, Judge Schomburg even warned that

> [i]t would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place.[76]

In the subsequent case against Dragomir Milošević again adjudicating the crime of terror, one of the judges, Judge Liu Daqun, agreed with Judge Schomburg's view in his dissenting opinion.[77] Instead, Daqun suggested that Milošević's conviction for the crime of terror should

[71] *Galić* Indictment, ICTY, Count 1 ("Infliction of Terror").
[72] See *Galić* Trial Judgment, ICTY, paras. 94-97, 130.
[73] See *Galić* Appeals Judgment, ICTY, paras. 86-90.
[74] For such a criticism from an academic perspective, see, for example, Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," pp. 122-26.
[75] See *Galić* Appeals Judgment, ICTY, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7-15.
[76] Ibid., para. 21.
[77] See *Milošević* Appeals Judgment, ICTY, Partially Dissenting Opinion of Judge Liu Daqun, paras. 1-13.

have been substituted with a conviction for unlawful attacks against civilians.[78] However, in both cases, the majority held that the crime of terror not only constituted part of international custom at the time the offences were committed, but that it was also penalised under existing international law, and that it therefore fulfilled all four *Tadić* conditions and fell under Article 3 of the ICTY Statute.[79] As the qualitative analysis conducted for this study shows, this view has been repeated not only in the ICTY's subsequent case law, but also in the jurisprudence of the SCSL.[80]

But these courts not only held that the crime of terror formed part of international custom and was penalised, but also developed legal meaning regarding the elements of the crime. Indeed, only little guidance existed on how to interpret the content of the crime of terror apart from the Additional Protocols, leading Judge Daqun to criticise that the Appeals Chamber had not sufficiently elaborated on the elements of the crime as to satisfy the principle of specificity.[81] Based on Article 51(2) of the Additional Protocol I, the *Galić* Trial Chamber defined the crime of terror as "[a]cts of violence directed against the civilian population," in which the "offender wilfully made the civilian population … the object of those acts of violence" with the "primary purpose of spreading terror among the civilian population."[82] This definition was subsequently endorsed in the jurisprudence of the ICTY and the SCSL.[83] The ICTY added that to satisfy the elements of the crime, it was not necessary that such terror was in fact inflicted – the intent to inflict such terror, defined as "extreme fear", would be sufficient.[84] The crime could consist of both threat of attacks or attacks themselves, and the purpose to inflict terror did not need to have been the only reason for committing these acts.[85] In *Milošević*, the Appeals Chamber added that it was also not required that these attacks resulted in "death or serious injury to body

[78] Ibid., para. 13.
[79] See *Galić* Appeals Judgment, ICTY, paras. 86, 98; *Milošević* Appeals Judgment, ICTY, para. 30.
[80] See *Karadžić* Trial Judgment, ICTY, para. 458; *Fofana* Trial Judgment, SCSL, para. 169; *Sesay* Trial Judgment, SCSL, para. 112; *Sesay* Appeals Judgment, SCSL, para. 889.
[81] See *Milošević* Appeals Judgment, ICTY, Partially Dissenting Opinion of Judge Liu Daqun, paras. 14, 17.
[82] *Galić* Trial Judgment, ICTY, para. 133.
[83] See *Galić* Appeals Judgment, ICTY, para. 100; *Milošević* Trial Judgment, ICTY, para. 875; *Milošević* Appeals Judgment, ICTY, para. 31; *Fofana* Trial Judgment, SCSL, para. 170; *Fofana* Appeals Judgment, SCSL, para. 350; *Sesay* Trial Judgment, SCSL, para. 112; *Taylor* Trial Judgment, SCSL, para. 403.
[84] *Galić* Trial Judgment, ICTY, para. 137. See also ibid., para. 134; *Galić* Appeals Judgment, ICTY, paras. 103-104; *Milošević* Trial Judgment, ICTY, para. 880, 883-888; *Milošević* Appeals Judgment, ICTY, para. 35; *Karadžić* Trial Judgment, ICTY, para. 461; *Fofana* Trial Judgment, SCSL, para. 174; *Fofana* Appeals Judgment, SCSL, para. 352; *Sesay* Trial Judgment, para. 117; *Taylor* Trial Judgment, SCSL, para. 407.
[85] See *Galić* Appeals Judgment, ICTY, paras. 102, 104; *Milošević* Trial Judgment, ICTY, paras. 877, 879; *Milošević* Appeals Judgment, ICTY, paras. 32, 37; *Karadžić* Trial Judgment, ICTY, para. 465; *Fofana* Trial Judgment, SCSL, para. 172; *Fofana* Appeals Judgment, SCSL, para. 351; *Sesay* Trial Judgment, SCSL, para. 121; *Taylor* Trial Judgment, SCSL, para. 405.

or health," as long as they inflicted "grave consequences" for the victims.[86] And the SCSL held that these acts of violence may include any type of act capable of spreading terror, regardless of whether the act itself was criminalised under international law. In the *Fofana* case, the SCSL Appeals Chamber therefore concluded that "acts of burning," even though they in themselves do not satisfy the elements of the war crime of pillage, may nevertheless constitute such violent acts capable of inflicting terror upon the civilian population.[87]

4.3. Qualitative Developments

As a result, and compared to the development of the crime of genocide through international jurisprudence, additive developments have been comparatively frequent within international case law interpreting the law of war crimes. But in addition to these additive developments, the law of war crimes has also experienced several qualitative jurisprudential developments. These typically included amendments to the way in which the elements of war crimes specifically listed in the Statutes of international and hybrid criminal courts were interpreted. And many of these developments occurred as the war crimes explicitly included in the statutory provisions of these courts had only rarely – and often not at all – been adjudicated by other international courts before. Similar to most of the jurisprudential developments of the crime of genocide, these qualitative developments of the law of war crimes often elaborated on specific aspects of the crime's definition. And as in the case of the crime of genocide, at times, these developments revolved around an interpretation of underlying treaty provisions, even if these treaty provisions were not explicitly incorporated into the respective court's Statute.

Qualitative jurisprudential developments of the law of war crimes elaborated on the meaning of war crimes listed as grave breaches of the Geneva Conventions, as serious violations of Common Article 3 and Additional Protocol II, and as what has been termed "other serious violations" of the legal provisions applicable to international and internal armed conflict.[88] As indicated above, due to the similarities between court Statutes, such developments in legal meaning often occurred across international and hybrid criminal courts. Through this process, almost every single war crime listed in the Statutes of especially the ICTR, the ICTY, and the SCSL has been elaborated upon through jurisprudence, with some overlap with the more limited jurisprudence of the ECCC and the ICC.

[86] *Milošević* Appeals Judgment, ICTY, para. 33; *Karadžić* Trial Judgment, ICTY, para. 461.
[87] *Fofana* Appeals Judgment, SCSL, para. 359. See also *Sesay* Trial Judgment, SCSL, para. 115.
[88] Article 4 of the SCSL Statute; Articles 8(2)(b) and 8(2)(e) of the Rome Statute of the ICC.

In the underlying qualitative analysis for this chapter, each of these specifications has been coded individually across international judgments.[89] Elaborating on all of these developments in-depth, however, would be beyond the scope of this chapter. After all, the Statutes of the ICTR, the ICTY, and the SCSL enumerate 23 different war crimes, even after repetitions of similar crimes across Statutes are taken into account. The following discussion therefore analyses one example of each of these three, partly overlapping types of war crimes: (a) unlawful confinement of civilians as a grave breach of the Geneva Conventions; (b) pillage/plunder as a serious violation Common Article 3 and Additional Protocol II; and (c) conscripting, enlisting, and using child soldiers as a further serious violation of international humanitarian law. These crimes have been selected because the qualitative analysis showed that they generated comparatively extensive international jurisprudence, and because these crimes were included in different court Statutes, which allows for an examination of how legal meaning developed across institutional contexts.

To begin with, like the jurisprudential development of the crime of genocide, the way in which international courts developed legal meaning on the crime of unlawful confinement of civilians as a grave breach of the Geneva Conventions revolved around underlying treaty provisions, in this case of provisions that were not explicitly included in the Statute. The war crime of unlawful confinement of civilians as part of the grave breaches regime is enumerated in Article 2(g) of the ICTY Statute and in Article 6 of the ECCC Law. It is listed as a grave breach in Article 147 of Geneva Convention IV. In its interpretation of the crime, the ICTY has relied especially on Articles 5, 42, and 43 of Geneva Convention IV when deciding that civilians are detained unlawfully if there are no "reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary."[90] Citing ICTY jurisprudence, this view was repeated by the ECCC.[91] As an alternative, the ICTY held that also a detention that fulfils this requirement may be rendered unlawful if the procedures outlined in Article 43 – which includes the possibility of appeal – are not followed, or if the detainee is not "treated with humanity" according to Article 5 of Geneva Convention IV.[92]

[89] For a complete list of coding categories, see Annex B, pp. 236-38.
[90] *Delalić* Appeals Judgment, ICTY, para. 322 and Article 42 of Geneva Convention IV. See also *Delalić* Trial Judgment, ICTY, para. 583; *Kordić* Trial Judgment, ICTY, para. 291; *Kordić* Appeals Judgment, ICTY, para. 69; *Prlić* Trial Judgment, ICTY, para. 133.
[91] See *Kaing* Trial Judgment, ECCC, para. 465.
[92] See *Delalić* Trial Judgment, ICTY, paras. 570, 579, 583; *Delalić* Appeals Judgment, ICTY, paras. 320-321; *Kordić* Trial Judgment, ICTY, para. 291; *Kordić* Appeals Judgment, ICTY, paras. 70-1. See also *Kaing* Trial Judgment, ECCC, para. 465.

In its jurisprudence, the ICTY added several smaller interpretive elements to these stipulations outlined in the Geneva Conventions that further developed the elements of the crime. In its *Delalić* ("Čelibići") Trial judgment, the ICTY held that the requirement that detention would be absolutely necessary in the meaning of Article 42 of Geneva Convention IV if there is a well-founded reason to believe that this individual "may seriously prejudice [the state's] security by means such as sabotage or espionage."[93] Conversely, reasons such as nationality or support for another state would be insufficient.[94] It more specifically stated that "[t]he fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures," an interpretation that was repeated in the subsequent jurisprudence of the court.[95] The ICTY further clarified that collective measures could never fulfil the requirements of lawful detention of civilians.[96] The interpretive development of the crime of unlawful detention therefore revolved around the underlying treaty provisions of the Geneva Conventions, even though they were not explicitly included in the ICTY Statute or the ECCC Law.

Secondly, the war crime of "plunder of public or private property" is included as a "violation of the laws or customs of war" under Article 3 into the ICTY Statute, and the war crime of "pillage" as a violation of Common Article 3 and of Additional Protocol II into Article 4 of the ICTR Statute and Article 3 of the SCSL Statute. Furthermore, the crime of "pillaging a town or place" is included as a "serious violation of the laws and customs" applicable to both internal and international armed conflicts under Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Rome Statute of the ICC. Noting these differences in phrasing, the ICTY held in its first judgment adjudicating the crime that plunder consisted of "all forms of unlawful appropriation of property in armed conflict" penalised under international law, a definition that was broad enough to be seen as incorporating conduct typically characterised as "pillage."[97] The court confirmed that the crime of plunder may affect both private and public property.[98] This

[93] *Delalić* Trial Judgment, ICTY, para. 576.
[94] See ibid., paras. 567, 571, 577; *Prlić* Trial Judgment, ICTY, para. 133.
[95] *Delalić* Trial Judgment, ICTY, para. 577; *Kordić* Trial Judgment, ICTY, para. 284; *Prlić* Trial Judgment, ICTY, para. 133.
[96] See *Delalić* Trial Judgment, ICTY, para. 583; *Kordić* Trial Judgment, ICTY, para. 289.
[97] *Delalić* Trial Judgment, ICTY, para. 591. See also *Blaškić* Trial Judgment, ICTY, para. 184; *Kordić* Trial Judgment, ICTY, para. 352; *Hadžihasanović* Trial Judgment, ICTY, para. 49; *Martić* Trial Judgment, ICTY, para. 101. See also *Fofana* Trial Judgment, SCSL, para. 158; *Sesay* Trial Judgment, SCSL, para. 205; *Bemba* Trial Judgment, ICC, para. 114.
[98] See *Delalić* Trial Judgment, ICTY, para. 590; *Jelisić* Trial Judgment, ICTY, para. 48; *Blaškić* Trial Judgment, ICTY, para. 184; *Naletilić* Trial Judgment, ICTY, para. 612; *Hadžihasanović* Trial Judgment, ICTY, para. 49; *Martić* Trial Judgment, ICTY, para. 101; *Gotovina* Trial Judgment, ICTY, para. 1777; *Prlić* Trial Judgment, ICTY, para. 180.

interpretation was subsequently also applied to the crime of pillage by the SCSL and the ICC, even though – unlike the ICTY Statute – such a specification was not included in either the SCSL or the Rome Statute.[99]

International jurisprudence on the overlapping war crimes of pillage and plunder has been relatively expansive. As one of the most prominent examples, the ICTY held that the crime of plunder extends not only to organised acts of unlawful appropriation, but also to "looting committed by individual soldiers for their private gain."[100] This interpretation was endorsed by the subsequent jurisprudence of not only the ICTY, but also the SCSL and the ICC.[101] Indeed, the ICTY decided that the property appropriated would not need to be overly significant, but only of "sufficient monetary value" to lead to "grave consequences for the victim."[102] According to the *chapeau* requirements of Article 3 of the ICTY Statute, however, the offense would nevertheless need to be serious.[103] The ICTY further clarified that such a violation may be serious not only because of the (monetary) consequences for individual victims, but also if property is taken from enough people to render the conduct a serious violation.[104] This study's qualitative analysis traced how this view was again followed by the SCSL and the ICC.[105] However, in a more limiting interpretation, the SCSL also held that destroying property, for example by burning it, would not fall under the scope of the crime of pillage.[106]

Finally, international and hybrid criminal courts also developed the elements of the crime of conscripting, enlisting, or using child soldiers. The crime is explicitly included in the SCSL Statute and the Rome Statute of the ICC as "other serious violations of international humanitarian law" beyond the crimes listed as serious violations of Common Article 3 and

[99] See *Fofana* Trial Judgment, SCSL, para. 159; *Taylor* Trial Judgment, SCSL, para. 452; *Katanga* Trial Judgment, ICC, para. 904; *Bemba* Trial Judgment, ICC, para. 115.
[100] *Delalić* Trial Judgment, ICTY, para. 590. See also *Jelisić* Trial Judgment, ICTY, para. 48; *Blaškić* Trial Judgment, ICTY, para. 184; *Kordić* Trial Judgment, para. 352; *Hadžihasanović* Trial Judgment, ICTY, para. 49; *Gotovina* Trial Judgment, ICTY, para. 17778. See similarly also *Katanga* Trial Judgment, ICC para. 905.
[101] See *Jelisić* Trial Judgment, ICTY, para. 48; *Blaškić* Trial Judgment, ICTY, para. 184; *Kordić* Trial Judgment, para. 352; *Hadžihasanović* Trial Judgment, ICTY, para. 49; *Gotovina* Trial Judgment, ICTY, para. 17778. See also *Fofana* Trial Judgment, SCSL, para. 160; *Sesay* Trial Judgment, para. 208; *Taylor* Trial Judgment, SCSL, para. 452; *Katanga* Trial Judgment, ICC para. 905; *Bemba* Trial Judgment, ICC, para. 117.
[102] *Delalić* Trial Judgment, ICTY, para. 1154. See also *Kordić* Trial Judgment, ICTY, para. 352; *Naletilić* Trial Judgment, ICTY, para. 612; *Hadžihasanović* Trial Judgment, ICTY, para. 49; *Martić* Trial Judgment, ICTY, para. 103; *Prlić* Trial Judgment, ICTY, para. 181; *Fofana* Trial Judgment, SCSL, para. 161; *Sesay* Trial Judgment, SCSL, para. 208.
[103] See *Naletilić* Trial Judgment, ICTY, para. 612.
[104] See ibid., para. 614; *Martić* Trial Judgment, ICTY, para. 103; *Gotovina* Trial Judgment, ICTY, para. 1672.
[105] See *Fofana* Trial Judgment, SCSL, para. 162; *Sesay* Trial Judgment, SCSL, para. 210; *Katanga* Trial Judgment, ICC, para. 909.
[106] See *Fofana* Appeals Judgment, SCSL, paras. 389-409; *Sesay* Trial Judgment, SCSL, para. 212.

Additional Protocol II.[107] Article 4(c) of the SCSL Statute defines the crime as "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities," a definition that was included *verbatim* in the ICC's Rome Statute.[108] In one of its early decisions, the SCSL held that the crime of recruiting child soldiers had reached customary status and entailed individual criminal responsibility, and hence existed at the time the alleged offences were committed.[109] This interpretation was subsequently endorsed by the SCSL, and also applied to using and conscripting child soldiers.[110]

In addition to holding that the crime of recruiting child soldiers had formed part of international custom, both the SCSL's and the ICC's interpretation of the elements of the crime expanded its applicability as well. The SCSL distinguished between conscripting and enlisting as two forms of recruitment that both entailed criminal liability.[111] In *Brima* ("AFRC case"), the SCSL held that enlistment constituted a voluntary form of recruitment, and that the circumstance that a child under 15 joined the armed forces voluntarily therefore cannot be used as a defence.[112] Conscripting child soldiers, in turn, was understood by the SCSL as enforced recruitment, a definition that includes both drafting children as soldiers and abductions.[113] However, the SCSL also highlighted that the distinction between voluntary and enforced recruitment was often blurry, especially in a situation in which human rights abuses are wide-spread.[114] Citing SCSL jurisprudence, the ICC added that the question of consent may be taken into account at the sentencing stage, but confirmed that it may not constitute a defence.[115]

The crime of using child soldiers "to participate actively in hostilities" was interpreted broadly by the SCSL and the ICC.[116] Citing the Rome Statute's negotiation documents, the SCSL held that the term "to participate actively in hostilities" not only encompassed participation in active combat, but also participation in military conduct that is closely connected with such active

[107] See Article 4(c) of the SCSL Statute; Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the ICC.
[108] See Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the ICC.
[109] *Norman Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Appeals Chamber, SCSL, paras. 17-53.
[110] See *Fofana* Trial Judgment, SCSL, paras. 183-197; *Brima* Appeals Judgment, SCSL, paras. 293-296; *Fofana* Appeals Judgment, SCSL, para. 139; *Sesay* Trial Judgment, SCSL, para. 183.
[111] See *Fofana* Appeals Judgment, SCSL, para. 139.
[112] See *Brima* Trial Judgment, SCSL, para. 735. See also *Fofana* Appeals Judgment, SCSL, para. 140; *Sesay* Trial Judgment, SCSL, para. 185; *Taylor* Trial Judgment, SCSL, para. 442 See also *Lubanga* Trial Judgment, ICC, paras. 607-8. See slightly differently *Fofana* Trial Judgment, SCSL, para. 192 (arguing that enlistment could be conducted both on a voluntary basis or based on the use of force).
[113] See *Brima* Trial Judgment, SCSL, para. 734; *Sesay* Trial Judgment, SCSL, para. 186. See also *Lubanga* Trial Judgment, ICC, paras. 607-8; *Taylor* Trial Judgment, SCSL, para. 442.
[114] See *Fofana* Trial Judgment, SCSL, para. 192 (still on enlistment); *Sesay* Trial Judgment, SCSL, para. 187.
[115] See *Lubanga* Trial Judgment, ICC, paras. 610-618.
[116] Article 4(c) of the SCSL Statute; Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the ICC.

combat activities, including guarding checkpoints or acting as spies or couriers.[117] As the SCSL Trial Chamber clarified in *Brima*, "[a]n armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation."[118] Relying on the same negotiation documents and again citing SCSL jurisprudence, this line of reasoning was subsequently also adopted by the ICC in the case against Thomas Lubanga Dyilo.[119] In the *Lubanga* Trial judgment, the ICC also added that all of these forms of active participation had in common that "the child concerned is, at the very least, a potential target."[120] While this interpretation might consequently require the Prosecutor to provide evidence that the child in question had indeed been a potential target, this potentially limiting interpretation was overruled on Appeals, with the ICC holding that no such evidence was necessary.[121] It should also be noted that, as the Defence pointed out on Appeals in the *Lubanga* case, given that "active" and "direct" participation are terms used interchangeably in Common Article 3 of the Geneva Convention, active participation in the context of using child soldiers should similarly be confined to direct participation in hostilities (and therefore to participation in active combat). However, the ICC Appeals Chamber held that Common Article 3 and Article 8(2)(e)(vii) of the Rome Statute fulfilled different purposes, so that the terminology of Common Article 3 developed to distinguish civilians from combatants was not applicable to the crime of using child soldiers.[122] As a result, international and hybrid criminal courts also expanded legal meaning on the crime of conscripting, enlisting or using child soldiers.

4.4. Customary Law and Legal Flexibility

At the time the ICTY was created, the Secretary General had tasked it to rely on customary provisions of international humanitarian law that "beyond any doubt" constitute international custom.[123] This requirement had been deemed as particularly crucial to satisfy the *nullum crimen sine lege* principle, necessitating that every crime that is prosecuted needs to have been criminalised by the time it was committed.[124] In the jurisprudence of international and hybrid

[117] See *Fofana* Trial Judgment, SCSL, para. 193. See also *Sesay* Trial Judgment, SCSL, para. 188; *Taylor* Trial Judgment, SCSL, para. 444.
[118] *Brima* Trial Judgment, SCSL, para. 737.
[119] See *Lubanga* Trial Judgment, ICC, paras. 621-626; *Katanga* Trial Judgment, ICC, para. 1045; *Lubanga* Appeals Judgment, ICC, paras. 323-328, 261.
[120] *Lubanga* Trial Judgment, ICC, para. 627. See also *Katanga* Trial Judgment, ICC, para. 1045.
[121] See *Lubanga* Appeals Judgment, ICC, paras. 329-340.
[122] See ibid., paras. 323-328.
[123] See Secretary General, Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993, para. 34.
[124] See similarly ibid. See also, for example, Article 22 of the ICC Statute.

criminal courts, however, the very determination of whether a specific provision constituted part of international custom frequently provided international judges with substantial legal flexibility. As the arguably most visible example, the ICTY relied on international custom to prosecute war crimes not explicitly enumerated in the court's Statute. Consequently, in the judicial development of the law of war crimes, it has been the prominence of customary law as a specific type of legal provision that allowed for legal innovation.

By relying on customary provisions, judicial interpretation of the law of war crimes followed a different structure than international jurisprudence on the crime of genocide. As previously discussed, in the case of the crime of genocide, judicial innovation had mainly consisted of qualitative developments revolving around elements of an underlying treaty provision. In the case of the development of the law of war crimes, this study's qualitative analysis revealed that additive developments supplementing the courts' statutory provisions with further aspects and legal tests had been more prevalent. To allow for and justify such additive developments, international courts relied on international customary law as a legal framework that existed outside of the court's own Statute. Through these interpretive developments, international courts were again able to broaden the scope of their jurisdiction notably.

Compared to the crime of genocide, the frequency of these arguably more extensive additive developments was at least in part rooted in the fact that the statutory provisions pertaining to war crimes were not based on one single underlying treaty provision, but instead referred to several international treaties and customary legal provisions. In addition, the relatively rudimentary character of the *chapeau* elements of these provisions arguably furthered the relevance of alternative legal rules and principles – and especially international customary law – in its interpretation. Due to an interplay of both of these factors, and similar to the development of the crime of genocide, many of these interpretive developments occurred in the early years after the ICTY was established. As a by now famous example, the 1995 *Jurisdiction Decision* of the ICTY Appeals Chamber in *Tadić*, the first case before the court, has been particularly formative. However, several other developments occurred also in later stages of the court's work. For example, the ICTY Appeals Chamber delivered its judgment in *Galić* interpreting the crime of terror against the civilian population more than ten years later, in 2006.

Indeed, some of the judges and legal officers interviewed for this project recognised this potential for creativity inherent in the interpretation of international custom by international

criminal courts. A judge at the SCSL, for example, described how the court relied on international custom to establish whether the conscription of child soldiers was prohibited in international law.[125] And Judge Howard Morrison, judge at the ICTY and the ICC, explicitly described international custom as "an amorphous creature" requiring "a slow but creative process."[126] In this context, a legal officer at the ICTR explained that

> although technically if you say it is customary international law, then it is not technically developing it, but it's … a nice way of pushing the development a little bit … It is sort of codifying and explicitly stating … looking for a bunch of principles all over the place, bringing them all together, doing a thorough analysis of it and then stating it.[127]

As this statement emphasises, the legal flexibility provided by customary rules is therefore especially rooted in the non-codified character of this specific type of legal provision.[128] As a result, international criminal courts often have to take an additional step when interpreting international custom by establishing whether these legal provisions exist in customary law in the first place. Such a determination may then be used as a starting point in the future. An example is the decision of the SCSL to hold that a prohibition of using, enlisting, or conscripting child soldiers exists in international customary law.[129] As the SCSL judge cited above observed, "it is from that very moment" in which this decision was delivered that this offence "was accepted by the … United Nations and the states, and that [it] was created."[130] Indeed, it has been observed (at times critically) that, if a specific line of reasoning is endorsed by international criminal courts, this jurisprudence may itself become part of international customary law.[131] Such an interpretive practice was explicitly confirmed by Judge Morrison, who explained that

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[125] Interview with Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames.
[126] Judge Howard Morrison, Judge at the ICTY and the ICC, interview conducted on 16 December 2015, The Hague.
[127] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague.
[128] See also similarly Powderly, "Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy and Powderly (Oxford: Oxford University Press, 2010), p. 26.
[129] See *Norman Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Appeals Chamber, SCSL, paras. 17-53. See also *Fofana* Trial Judgment, SCSL, paras. 183-197; *Brima* Appeals Judgment, SCSL, paras. 293-296; *Fofana* Appeals Judgment, SCSL, para. 139; *Sesay* Trial Judgment, SCSL, para. 183.
[130] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[131] See especially Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," *European Journal of International Law* 21, no. 1 (2010): pp. 175, 184-86. Based on an analysis of international jurisprudence on crimes against humanity, see also Van den Herik, "Using Custom to Reconceptualize Crimes against Humanity," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy and Powderly (Oxford: Oxford University Press, 2010), pp. 101-02.

> [j]udgments often start off as decisions based upon statutory interpretation. If that decision is followed often enough and over a lengthy period so as to be endorsed in a number of cases, it grows into the realm of customary law. I [think] that this body of certain law is a judicial achievement.[132]

Determining whether a legal provision has emerged as part of international customary law traditionally involves a discussion of the existence of state practice and *opinio juris* as an indication that states believe that a provision is part of international law and that they follow it in practice.[133] And as the ICTY held in the *Tadić Jurisdiction Decision*, to prosecute an individual for an international crime that is part of international customary law, the court would need to determine not only that a crime existed at the time the offence was committed, but also that it incurred individual criminal responsibility.[134] While these interpretive steps therefore provide international criminal courts with legal flexibility, the specific way in which these courts have used international custom in their jurisprudence has been subject to frequent criticism by legal academics. These criticisms have included the suggestions that the *ad hoc* Tribunals have been inconsistent, that they gave too much weight to either state practice or *opinio juris* in their analysis, or that, given the *nullum crimen sine lege* principle, reliance on uncodified international customary provisions to determine specific elements of international crimes was generally inadequate.[135] Indeed, some legal scholars – in line with Judge Schomburg's concerns referred to above – warned that such an expansive approach may undermine the legitimacy of international criminal courts and their jurisprudence.[136]

As these concerns illustrate, within the interpretive practices of ICL, discussions on the correct interpretive technique to determine the existence of customary rules intersect with shared assumptions on the appropriate role of judicial decision-making and legal interpretation in international law. Indeed, it can be concluded that another professional assumption shared by legal experts concerns the idea that international courts should not overstep their

[132] Judge Howard Morrison, Judge at the ICTY and the ICC, interview conducted on 16 December 2015, The Hague.
[133] See, for example, Shaw, *International Law*, pp. 7-10. But see Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," p. 175.
[134] See *Tadić Jurisdiction Decision*, Appeals Chamber, ICTY, para. 94.
[135] See, for example, Van den Herik, "Using Custom to Reconceptualize Crimes against Humanity," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy and Powderly (Oxford: Oxford University Press, 2010), p. 100 (specifically on crimes against humanity); Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," ibid., p. 126; Powderly, "Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?," ibid., pp. 26-28; Bantekas, "Reflections on Some Sources and Method of International Criminal and Humanitarian Law," p. 121.
[136] See Powderly, "Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?," in *Judicial Creativity at the International Criminal Tribunals*, ed. Darcy and Powderly (Oxford: Oxford University Press, 2010), p. 32; Darcy, "The Reinvention of War Crimes by the International Criminal Tribunals," ibid., pp. 122-23.

responsibilities by failing to ground their interpretations in existing international law (even though it is certainly a matter of debate within an ICL expert community which interpretations exactly qualify as such an act). By 2015, some of the judges and legal officers also voiced caution when discussing the innovative potential of customary provisions. The legal officer cited above, for example, pointed out that when interpreting international custom as "a nice way of pushing the development a little bit," there was nevertheless "a real conservatism to not to go too far," especially as in a young legal subfield, international courts were particularly vulnerable "to criticism of … making up the law."[137] At the same time, two of the judges interviewed for this project mentioned that they were aware of the often intense academic interest their judgments were generating.[138] In the words of one legal officer, they were thus "treading carefully, thoughtfully," especially when relying on international customary law.[139] Indeed, the concern that international criminal courts might overstep their responsibility *vis-à-vis* the legislative functions of states seems to be a core aspect of scholarly debates and criticisms on how international courts should interpret customary international humanitarian law.

This is not to suggest that international and hybrid criminal courts indeed overstepped their responsibilities when interpreting international customary law. Compared to a more doctrinally-focused legal analysis, it has not been the purpose of this discussion to make such an assessment. Instead, this analysis sought to highlight some of the underlying interpretive standards shared by legal experts, and the potential for legal flexibility these standards entail. The interviews with judges and legal officers demonstrated that these legal practitioners themselves recognised the potential for innovation in interpreting international customary law. At the same time, they showed an awareness of the underlying concern that too much legal creativity might open up their work to criticism and may ultimately undermine their legitimacy. The following chapters map how far such a jurisprudential development of legal meaning has indeed been perceived as a legitimacy concern outside of the comparatively restricted academic discussion on the interpretation of international custom, and trace how far such interpretive

[137] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague. Similarly also interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (referring to an inherently conservative character of law that limits the potential for developing legal meaning).
[138] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague.
[139] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague.

developments have been treated as valid and even authoritative by other members of the interpretive community.

Chapter 5

The Practice of Privileged Precedent

As the previous two chapters have demonstrated, international courts developed legal meaning considerably, not only with regard to the law of war crimes, but also the crime of genocide. This development of legal content has been rooted in the relatively rudimentary character of the legal framework of ICL and the prevalence of international custom in particular. In the case of ICL, these factors provided international courts with a particularly high degree of legal latitude. This potential for creativity, however, is curbed by the need for such an interpretation to be assessed as valid within a broader community of practice. In this context, the interpretations proposed by some groups within this community might come to be seen as particularly authoritative, thereby stabilising legal meaning. In Koskenniemi's words, "the debate ends – if it ends at all – with a legally competent institution providing an authoritative view on the matter."[1] The following two chapters, chapters five and six, examine empirically which members of the interpretive community are perceived as able to give such an authoritative interpretation. In particular, it has been international courts – instead of, for example, hybrid courts – that have been accorded a particularly high degree of interpretive authority in ICL through the practice of privileged precedent.

The following chapter begins by introducing the practice of privileged precedent. It then demonstrates how the way in which international judges refer to previous interpretations provides international courts, as opposed to hybrid courts, with a particularly high level of interpretive authority. The chapter concludes by outlining how, in the view of judges and legal officers, these judicial interpretations should be treated as authoritative also outside of the judicial context of international courts. This conclusion will therefore serve as a bridge to chapter six, which examines the extent to which this expectation held by judges and legal officers at international courts is reflected in the practices of other members within the interpretive community of ICL.

Unlike a formal outline of the sources of international law, the analysis of the reference practices of international and hybrid criminal courts – and subsequently of the ICL interpretive

[1] Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," p. 17.

community more generally – presented in this chapter constitutes an empirical analysis of interpretive authority. The chapter therefore outlines the types of documents and publications that judges and legal officers working at these courts see as most relevant to their legal analyses and as potentially persuasive (even though they might, in the end, decide to disagree). To do so, the chapter mainly relies on interviews with judges and legal officers on their interpretive practices. To supplement the analysis of these interviews, the chapter also draws on a quantitative analysis of the references used by international and hybrid criminal courts in their interpretation of the law of war crimes, thereby extending the preceding discussion in chapter four.

5.1. The Practice of Privileged Precedent

Within the interpretive process, the practice of privileged precedent denotes how members of the interpretive community refer to interpretations offered by other groups within this community in their day-to-day legal analyses. Through this practice, some interpretations are accorded a particularly high level of interpretive weight, as members of the interpretive community refer to them as authoritative interpretations of international law. Beyond being assessed as valid, these authoritative interpretations consequently come to be treated as a new interpretive standard. As interpretations suggested by individuals working within a specific institutional context, namely international courts, are accorded a particularly high level of interpretive authority, this analysis of the practice of privileged precedent also highlights the institutional dimension of the interpretive process in ICL.

In this context, interpretive authority is reflected by the extent to which interpretations suggested by a specific group are treated as relevant and convincing.[2] Interpretive authority is therefore conceptualised as being re-constituted and maintained through the practices of legal interpretation, and especially through the way in which individual interpreters refer to not only formal sources of international law, but also interpretations suggested by other members of the interpretive community. Christopher McCrudden has called these interpretations and legal documents "sources of authority," a concept that extends beyond a formal sources doctrine.[3]

[2] Note that this conceptualisation diverges slightly from Johnstone's view of interpretive authority. While this conceptualisation emphasises how different members of the interpretive community are accorded different levels of interpretive authority, Johnstone seems to more focus on the interpretive authority of interpretive communities in international law as such. See Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," p. 372.

[3] McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights," *Oxford Journal of Legal Studies* 20, no. 4 (2000): p. 502.

Instead, this concept also considers how judges rely on, among others, treaty negotiation or legal academics suggesting a specific interpretation of legal provisions.

From the perspective of the individual interpreter, interpretive authority is therefore closely linked to justification, concretised in the citations used to support a specific legal view. Such a justification function is, in turn, dependent on the ability of the interpreter to assess how far reliance on specific types of previous interpretations will be seen as convincing within a broader interpretive community. But in addition, the concept of interpretive authority emphasises the extent to which some interpretations may acquire what Gleider Hernández has called a "*centrifugal* normative force," as they come to be seen as convincing within a broader interpretive community, or even as setting a new standard.[4] As a consequence, interpretive authority is seen as distinct from, but related to, the legitimacy of individual judgments or courts. It should be noted at this point that this empirical analysis does not aim to answer the question whether according specific groups a high level of interpretive authority is indeed normatively desirable and appropriate.[5]

The practice of privileged precedent, in turn, adds an element of both stability and hierarchy to the interpretive practices of international law: On the one hand, as some groups within the interpretive community are accorded a particularly high level of interpretive authority, these groups are more likely to shape legal meaning within the interpretive community. On the other hand, by repeatedly referring to these interpretations as authoritative, some interpretations are provided with a greater trajectory than others in an interpretive context that allows for legal flexibility. Subscribing to such a conceptualisation of interpretive authority does not imply that one cannot take seriously that the legal reasoning process itself provides judges with a high level of latitude in deciding, for example, which analogies to draw on and which cases to treat alike. Instead, the point here is that the way in which interpreters rely on the interpretations of others is a process that can be analysed empirically as a series of patterned actions through which underlying assumptions on relative interpretive authority are re-enacted.

Indeed, in this context, it can even be argued that the practice of privileged precedent not only stabilises, but also develops legal meaning, as it privileges the voices of some actors over others. The practice of privileged precedent therefore highlights how legal meaning develops because some interpretations become more dominant and widely cited than others. This

[4] Hernández, "Interpretive Authority and the International Judiciary," p. 166.
[5] See generally also Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts," pp. 6-7 (who similarly distinguish between the authority and legitimacy of international courts).

dimension is an aspect that usually remains implicit in the domestic legal systems, in which precedents are often seen as stabilising legal meaning.[6] In the domestic context, it is usually the Appeals Chamber whose voice is privileged, as lower courts are required to follow its jurisprudence as part of a hierarchy of courts that is relatively uncontroversial. At the international level, however – and especially in the context of the fragmented institutional structure of ICL in which there is no clear, formal hierarchy between international courts – it becomes more pronounced that legal meaning is developed as the interpretations brought forward by one group within an interpretive community are chosen over another.

Focusing on the practice of privileged precedent is therefore distinct from a doctrinal legal analysis of the sources that determine international legal content (sources doctrine). According to such a formal legal view, Article 38(1) of the ICJ Statute provides an overview of the sources of international law, namely international treaties, international custom, and general principles of law. In the absence of any more specific provisions that specifically apply to international and hybrid criminal courts, this outline generally also applies to ICL.[7] Specifically with regard to the ICC, however, Article 21 of the Rome Statute adds to this general list that the ICC should first apply its own statutory provisions, including the Elements of Crimes and the Rules of Procedure and Evidence, before turning to international treaties and principles of international law. As a final step, the ICC might then refer to general principles of law based on a survey of national jurisdictions.[8]

Unlike assumed by such a formal view of the sources of ICL, legal interpretation in practice often follows a different set of patterns. As a particularly noticeable example, international courts repeatedly referred to judicial decisions. Within the judgments interpreting the law of war crimes analysed in chapter four, for example, more than half of the citations used (5,533 out of a total of 8,466) were to the judgments and decisions of international courts and tribunals. Stewart Manley identified a similar pattern in his recent analysis of the ICC's use of citations in the Uganda and the Central African Republic. He found that references to persuasive cases amounted to between 71 and 91 percent of the court's citations.[9] Consequently, especially the later judgments of the *ad hoc* Tribunals in large part read like a summary of their growing case

[6] For an account emphasising the stabilising effect of precedents, see, for example, Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System."
[7] See Akande, "Sources of International Criminal Law," pp. 41, 43.
[8] See Article 21 (1)(c) of the Rome Statute.
[9] See Manley, "Referencing Patterns at the International Criminal Court," *European Journal of International Law* 27, no. 1 (2016): pp. 207-08.

law, with references almost exclusively citing their own previous decisions. And the ICC has not only frequently referred to its own jurisprudence, but also to the judicial decisions of other international courts and to academic sources.[10] This trend to invoke authoritative judgments is notable in light of the fact that according to Article 38(1)(d) of the ICJ Statute, court decisions and scholarly writings only constitute "subsidiary means for the determination of rules of law." Article 21 of the Rome Statute does not even refer to the decisions of other international courts as part of the applicable law (or, more precisely, as relevant to the determination of international law), and only indicates that the ICC "may" rely on *its own* previous decisions.[11]

In practice, international judges therefore frequently refer to the decisions of international courts – as well as to their own previous judgments – when interpreting ICL. Such an analysis is not only at odds with a formal legal view on the sources of ICL, but also differs from a more formal perspective on the role of precedents in international law. From such a formal perspective, precedents are not formally binding at the international level, so that, for example, the ICJ is not bound to follow its own previous interpretations in subsequent cases.[12] And one of the ICTY Trial Chambers stated that it did not see itself bound by previous legal interpretations of other ICTY or ICTR Trial Chambers.[13] Only decisions of the joint ICTY/ICTR Appeals Chambers are seen as binding for the Trial Chambers of both tribunals,[14] which therefore constitutes the only exception of the general rule that international courts are not bound by pervious judicial decisions. Consequently, judges and legal staff working at international criminal courts have stressed that they do not see themselves as formally bound to follow the previous judicial decisions of other international or hybrid courts in their interpretation of ICL.[15]

As a result, an analysis of how international court judgments have been provided with a particularly high level of interpretive authority in practice is distinct from the concept of

[10] For a more in-depth analysis of the use of academic publications by international criminal courts and tribunals, see Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law," *article manuscript, under review* (2016).
[11] See *Lubanga* Trial Judgment, ICC, para. 603.
[12] See Shaw, *International Law*, pp. 109-10. See also Article 38(1)(d) and Article 59 of the Statute of the ICJ. Similarly, the ICTY argued that "generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries." See *Kupreškić* Trial Judgment, ICTY, para. 540.
[13] See *Delalić* Trial Judgment, ICTY, para. 228; see also *Aleksovski* Appeals Judgment, ICTY, para. 114.
[14] See *Kupreškić* Trial Judgment, ICTY, para. 540; *Aleksovski* Appeals Judgment, ICTY, para. 113. See also Akande, "Sources of International Criminal Law," p. 53.
[15] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague. See also *Delalić* Trial Judgment, ICTY, para. 230.

precedent in a formal sense, as well as from a formal legal perspective on the sources of international (criminal) law. Instead, such a formal perspective can be better understood as forming part of the professional assumptions that the practice of privileged precedent is based on. After all, such a formal outline of precedents and the sources of ICL is not always deemed helpful by legal practitioners when interpreting ICL: judges and legal officers repeatedly saw themselves as confronted with situations in which the legal provisions they were supposed to interpret did not provide an answer to a given legal question.[16] Indeed, it is one of the aims of this project to trace empirically how formal legal rules of interpretation, including the sources doctrine, differ from the way they are enacted in practice.

To identify which interpretations members of the interpretive community rely on in practice, one possibility is to examine interpretations as textual practices. One may therefore analyse which sources are explicitly cited in, for example, the judgments of international courts. In the practice of judicial interpretation, references to legal documents arguably serve a dual purpose: they are used as both a control and a legitimisation. As Bruce Lincoln argues, in academic scholarship, the use of footnotes serves as a control, as it allows other researchers to critique the assumptions and findings on which a researcher's work is based.[17] Similarly, in judicial decisions, citations allow other members of the interpretive community to trace which legal sources judges have based their conclusions on and how they interpreted these sources.

At the same time, citations in judicial decisions also serve a legitimising function; they are supposed to convince the reader that the judge reached a correct legal (instead of political) decision. McCrudden, for example, argues that references to "sources of authority" are a way for judges to justify and de-politicise their conclusions, as judges "establish the relative autonomy of . . . law through the sources of authority and style of judgment."[18] Especially in a situation in which judicial decisions are likely to be highly controversial both within the diplomatic community as well as among affected communities and NGO representatives, citations to established sources of legal authority add legitimacy to the decision and serve the function of convincing the reader that the decision has been based on legal instead of political grounds. Indeed, it may be this backward-looking argumentative technique that, by rooting its

[16] See chapter three, pp. 76-79.
[17] See Linclon, *Theorizing Myth: Narrative, Ideology, and Scholarship* (Chicago: University of Chicago Press, 1999), p. 208. I am grateful to Adam Freeman Sampson for his comments on this aspect.
[18] McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights," p. 502 (specifically on human rights law). Note that McCrudden uses the term "sources of authority" in a broader sense, including analogical reasoning and legal traditions.

own view of international law in legal sources and their previous interpretations, is key to convincing other members of the interpretive community that this interpretation is valid and based on legal, instead of political reasons.

However, an analysis of the citations included in international judgments may only provide a first, preliminary indication of how previous interpretations are used in practice. In particular, it may be the case that some types of interpretations are regularly referred to, but not formally cited. Therefore, as an interpretive product, the citations used in international judgments may only provide insights on part of the judicial practices interpreting ICL. In addition, such an analysis does not capture how judges and legal officers at international courts assess the relevance of their own judgments, or the extent to which other actors treat international judgments as an authoritative interpretation of ICL. While chapter six returns to this aspect, the remainder of this chapter analyses which arguments proposed by which authors were seen as particularly relevant and convincing by judges and legal officers at international and hybrid criminal courts. In addition to examining which sources are cited in the respective courts' judgments in their interpretation of the law of war crimes, this chapter therefore mainly draws on interviews discussing which types of documents, sources, and legal views these practitioners consult when interpreting ICL, and how they assess their respective relevance.

5.2. The Interpretive Authority of International Courts

In most general terms, judges – as well as the legal officers supporting their work – use a variety of sources and legal documents in their interpretation of ICL. As the quantitative analysis conducted for this project reveals, international criminal courts and tribunals referred to international treaties, such as the Geneva Conventions, their own Statutes and Rules of Procedure, but also to military manuals, UN Security Council Resolutions, and negotiation documents for relevant international treaties in their jurisprudence on the law of war crimes.[19] When asked which kinds of sources they would typically consult when interpreting ICL, and especially with regard to more difficult legal questions, judges and legal officers mentioned a wide range of different types of legal documents, including international jurisprudence, domestic jurisprudence and legislation, but also academic publications.[20]

[19] For a complete list of codes, see Annex B, pp. 238-39.
[20] For example interviews with legal officer C, legal officer at the ICC, 27 November 2015, The Hague; legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague.

Among this broader selection of different types of legal documents, however, in their interpretive practices, the first reference point for judges and international lawyers beyond the court's Statute and Rules of Procedure would usually be the jurisprudence of their own court.[21] As a legal officer at the ICC explained, "the first place we go to … very frequently can be the ICC."[22] And at the Appeals Chamber, which is shared by the ICTY and the ICTR, judges and legal officers would equally first refer to their own previous jurisprudence (which, in these instances, includes jurisprudence from both *ad hoc* Tribunals).[23] At the Trial level, however, the tendency is more to look to the ICTR and ICTY's respective own jurisprudence. This preference was seen as a result of a situation in which the Trial Chambers are more focused on the facts of the case, so that cases from the same Tribunal are often more insightful.[24] As a consequence, a judge at the ICTR indicated that, after consulting the Statute and the Rules of Procedure, the ICTR's case law would be the first reference point, followed by the jurisprudence of the ICTY.[25] And a legal officer at the ICTR noted that, before cross-referencing each other's jurisprudence, they would first need to take differences in the Tribunals' Statutes into account.[26] At the same time, however, such a distinction between the two *ad hoc* Tribunals should also not be overestimated. When discussing which types of sources they would usually refer to, other judges and legal officers working for the *ad hoc* Tribunals would loosely group ICTR and ICTY jurisprudence together.[27] According to a legal officer at the ICTR, both Tribunals would generally rely on each other's case law.[28]

Consequently, after consulting – and when interpreting – the court's statutory framework, the previous case law of their own court was usually the first reference point in the interpretive practices of judges and legal officers working for the ICC and the *ad hoc* Tribunals. Such an interpretive practice, however, only developed over time as the *ad hoc* Tribunals produced more and more jurisprudence. As one of the judges at the ICTR pointed out, in their early

[21] Interviews with Judge C, Judge at the ICTR, 15 December 2015, phone interview; legal officer D, legal officer at the ICC, 1 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague. But interview with Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames, for a slightly different outline that emphasises especially the relevance of domestic law.
[22] Legal officer D, legal officer at the ICC, interview conducted on 1 December 2015, The Hague.
[23] Interview with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[24] Ibid.
[25] Interview with Judge C, Judge at the ICTR, 15 December 2015, phone interview.
[26] Interview with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[27] Interviews with Judge F, Judge at the ICTR, 25 November 2015, phone interview; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; legal officer I, legal officer at the ICTR, 15 December 2015, The Hague.
[28] Interview with legal officer I, legal officer at the ICTR, 15 December 2015, The Hague.

decisions, both *ad hoc* Tribunals tended to refer to the Nuremberg and Tokyo trials, as well as to domestic law. With the Tribunals' growing own jurisprudence, they were subsequently able to rely on ICTR and ICTY case law.[29] In the words of Thomas Wayde Pittman, former Acting Head of Chambers at the ICTY, "now the Tribunal is mature enough that it looks to its own."[30] Even though the ICC has only delivered a small number of final judgments so far, its jurisprudence has grown over the past decade especially with regard to procedural questions, allowing the ICC's legal practitioners to refer to their own previous case law.[31]

In their interpretive practices, judges and legal officers therefore exhibit a tendency that was described by a legal officer at the ICTR as "reasonably conservative," as judges would usually rely heavily on their own previous jurisprudence.[32] In the words of this legal officer, judges generally "don't go out looking to raise issues … If an issue is dealt with adequately in the existing case law, people are on average very happy to follow it."[33] Even at the ICC, where judges are not formally required to follow their own jurisprudence, reference to the ICC's own case law is often the first point of departure for legal officers and judges.[34] According to the ICTY's jurisprudence, decisions of the Appeals Chamber are binding on the Trial Chamber.[35] One of the legal officers at the ICTY consequently confirmed that they would see themselves as "pretty bound to ICTY jurisprudence."[36] One of the ICTY judges emphasised that even in situations in which they themselves might have decided a case differently, they are likely to follow pervious jurisprudence regardless, especially given that the defendant could have reasonably expected that the court would reach a similar conclusion as it had done in the past.[37]

What is more, this judge did not only emphasise the general tendency to follow previous jurisprudence. Instead, in their view, past jurisprudence would indeed *become* law, [38] just as in domestic (common law) systems. At least when considering their own case law, judges and legal officers therefore accord previous decisions at the same court with a particularly high

[29] Interview with Judge F, Judge at the ICTR, 25 November 2015, phone interview.
[30] Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, interview conducted on 3 December 2015, The Hague.
[31] Interview with legal officer D, legal officer at the ICC, 1 December 2015, The Hague.
[32] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague.
[33] Ibid. Similarly, interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[34] See Article 21(2) of the ICC Statute, indicating that the court "may" refer to its own jurisprudence. Also interviews with legal officer D, legal officer at the ICC, 1 December 2015, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague.
[35] See *Kupreškić* Trial Judgment, ICTY, para. 540; *Aleksovski* Appeals Judgment, ICTY, para. 113.
[36] Legal officer G, legal officer at the ICTY, interview conducted on 10 December 2015, The Hague.
[37] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[38] Ibid.

level of interpretive weight, to the extent that prior jurisprudence comes to be treated as the new state of the law. As another judge at the ICTY explained, while civil law judges at the domestic level might not necessarily be particularly interested in the decisions of higher courts, ICL is a common law system, in which the decisions of international courts may indeed determine the content of legal rules and principles.[39]

The practice of treating previous jurisprudence of the same court not only as highly relevant, but as *the law*, seems to be rooted in several underlying assumptions. To begin with, the need for coherence across cases is closely linked to the view that it would disadvantage the defendant if a court was to unexpectedly diverge from its previous jurisprudence.[40] Consequently, as a judge at the ICTY explained, in their view, it was one of the main functions of their role as a judge to coherently develop law.[41] Such a perspective implicitly resonates with the rule of law requirement of internal coherence.[42] Underlying this statement is the idea that each of these courts develops a (coherent) body of case law, with each judgment adding to such an evolving – and coherent – jurisprudence.[43]

At the same time, it is interesting to note that judges and legal officers at both the *ad hoc* Tribunals and the ICC developed such a strong sense of relying on previous jurisprudence, a tendency which is much more rooted in the common law, instead of the civil law tradition. Additional light might be shed on this question by a legal officer at the ICTR, who, when discussing the role of international courts in interpreting international custom, argued that

> [i]n a new field … you're open to criticism of … making up the law … If you want this field to be taken seriously … you do need to be wary of suddenly saying everything is the law … This is not human rights activism, ultimately … these are serious criminal trials with people whose lives [are] at stake. So this isn't the sphere for being activists. It is a sphere for treading carefully, thoughtfully.[44]

[39] Interview with Judge D, Judge at the ICTY, 18 December 2015, The Hague.
[40] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[41] Interview with Judge B, Judge at the ICTY, 9 December 2015, The Hague.
[42] Drawing on Fuller, Brunnée and Toope consequently incorporated the requirement for legal provisions not to contradict each other into their interactional account of international law. See Brunnée and Toope, "Interactional International Law and the Practice of Legality," p. 114. Indeed, Hernández more critically argues that "the pursuit of coherence – a political project – [can be seen as] also part of the shared ethos of international lawyers." Hernández, "The Responsibility of the International Legal Academic: Situating the Grammarian within the 'Invisible College'," p. 9.
[43] Interview with Judge D, Judge at the ICTY, 18 December 2015, The Hague. Also interviews with Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames; Judge B, Judge at the ICTY, 9 December 2015, The Hague (arguing that it is one of the main responsibilities of judges to coherently develop legal provisions).
[44] Legal officer E, legal officer at the ICTR, interview conducted on 5 December 2015, The Hague.

In this context, Judge Morrison voiced a similar uneasiness when explaining that he disagreed with applying the concept of law-making to courts. In his view, courts interpret and develop legal provision, but they do not create law anew: "[i]t's just the word 'make,' it's … as if you were producing from scratch, like some sort of alchemy, which we are not. We are refining the product."[45] Similarly, another judge explicitly rejected the term 'change' as a too far-reaching description for what should, in their view, better be described as jurisprudential developments.[46]

In addition to being rooted in considerations for the rights of the defendant and the rule of law requirement of internal coherence, these statements also point to one further aspect: the notion that such a conservative interpretive practice counteracts not only the potential charge of legal uncertainty, but also of judicial activism in a newly developing legal field. This is not to assume that judges intentionally use previous jurisprudence to shield their decisions from criticisms. Neither is it the aim of this discussion to ask whether this is a normatively desirable – or legally 'correct' – strategy (which it may well be), or to deny that in some cases, judges might decide to diverge from a court's previous case law.[47] Instead, these statements point to some of the underlying assumptions on the role of international courts that are held by legal practitioners, in this case the idea that international courts do not – and should not – change law through jurisprudence. Such a shared professional assumption, in turn, may form part of the professional standards that underlie the way in which they refer to their previous decisions in practice, and exacerbate a tendency to treat previous jurisprudence as an authoritative legal standard.

5.3. Beyond Self-References

Having discussed the degree of interpretive authority that the *ad hoc* Tribunals and the ICC accord their own previous jurisprudence through what has been called the practice of privileged precedent, the question emerges whether this practice also extends beyond self-references. In

[45] Judge Howard Morrison, Judge at the ICTY and the ICC, interview conducted on 16 December 2015, The Hague.
[46] Interview with Judge B, Judge at the ICTY, 9 December 2015, The Hague.
[47] This possibility was also discussed by legal officer E, who, however, nevertheless maintained the view that ICTY judges generally follow previous jurisprudence. Interview with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague. In addition, for example legal officer H mentioned that previous jurisprudence would often only to a certain extent be helpful, as would seldom addressing the exact same legal question. Interview with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague. At the same time, however, one of the ICTR judges emphasised how, in their legal analysis for one of the ICTR's previous cases, they would mainly draw on the previous jurisprudence of the *ad hoc* Tribunals. Interview with Judge F, Judge at the ICTR, 25 November 2015, phone interview.

other words, to which extent are the interpretations suggested not only in their own jurisprudence, but also by other international and hybrid criminal courts treated as authoritative within the interpretive practices of judges and legal officers?

Over the last ten years in particular, the institutional framework of international criminal justice has been altered repeatedly, with a variety of hybrid, in addition to international, courts producing case law interpreting international crimes. While the ICC begun to render its first judgments in 2012,[48] the UN Mechanism for International Criminal Tribunals (MICT) was established in in 2010 to continue some of the key functions of the *ad hoc* Tribunals once they completed their work.[49] Accordingly, the ICTR closed at the end of 2015, and the ICTY is expected to deliver its last Trial judgment in November 2017.[50] Similarly, the SCSL closed in 2013. The work of the ECCC, however, is still ongoing. Arguably less noticed has been the work of the Special Panels for Serious Crimes in in East Timor (SPSC) between 2000 and 2005. Finally, the Special Tribunal for Lebanon (STL) was established in 2007 after an attack killing, among other victims, former Lebanese Prime Minister Rafiq Hariri.

In the context of such an institutionally fragmented structure, how far have judges and legal officers treated the interpretations of other courts as authoritative in their interpretive practices? As a first indication, a judge at the SCSL suggested that all of these different courts would indeed build on each other: "each and every international court had developed some step, and so you build on the step that has been developed already … So everyone takes one thing to develop it further for all."[51] Several legal scholars and practitioners have similarly emphasised the need for coherence in the way in which legal provisions are interpreted, both in ICL and with regard to international law more generally.[52] Such a view of legal interpretation suggests that legal officers and judges at the ICC, the *ad hoc* Tribunals, and hybrid courts such as the SCSL and ECCC would engage with each other's jurisprudence to avoid that such an institutional fragmentation would lead to a substantial fragmentation in the way in which ICL is interpreted.

In the interviews conducted for this project, judges and legal officers at the *ad hoc* Tribunals and the ICC voiced similar views. In particular, a judge at the ICTR explicitly stated that the

[48] See *Lubanga* Trial Judgment, ICC.
[49] See UN Security Council, Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010.
[50] See ICTY, The Cases, Cases at Trial, available online, http://www.icty.org/en/action/cases/4 (accessed 25 January 2017).
[51] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[52] See, for example, Webb, *International Judicial Integration and Fragmentation*, pp. 4-9; Andenas and Bjorge, "Introduction: From Fragmentation to Convergence in International Law," pp. 4-7.

debate on the fragmentation of international law "can be avoided to some extent by a policy where you try to reconcile the various international systems."[53] And Judge Morrison, for example, suggested that the ICC should refer to ICTY jurisprudence, as it would not only hinder an efficient judicial process to not take the tribunal's judicial decisions into account, but would also lead to legal uncertainty.[54] Instead, judges at both international and hybrid criminal courts perceived the field to be developing as a whole, with courts building on each other's legal interpretations.[55] In this context, the SCSL judge quoted above suggested that some courts may develop distinct specialities, with, for example, the ICTR focusing on the crime of genocide and the law on sexual violence in armed conflict, the ICTY on the law of war crimes, and the SCSL on the use of child soldiers.[56] And similarly, two of the legal officers interviewed for this project mentioned that they would attempt to actively follow the jurisprudence of other international, hybrid, as well as domestic courts.[57]

From a formal legal standpoint, no particular hierarchy exists that distinguishes between the relevance of different international and hybrid courts, a view that was confirmed by a legal officer at the ICC.[58] After all, Article 38(1)(d) of the ICJ Statute only generically refers to "judicial decisions" as "subsidiary means for the determination of rules of law." And even beyond international case law, the interviews at first sight seem to suggest that there is no particular hierarchy with regard to the types of legal interpretations judges and legal officers refer to when looking beyond a court's Statute and its own jurisprudence. As a legal officer at the ICTY put it, "we're blessed at this Tribunal that we're able to just look at everything."[59] To a certain extent, which sources specific judges would use most often is to a certain degree a question of personal preference.[60] One legal officer, for example, mentioned that it was often

[53] Judge C, Judge at the ICTR, interview conducted on 15 December 2015, phone interview.
[54] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[55] Interviews with Judge D, Judge at the ICTY, 18 December 2015, The Hague; Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames.
[56] Interviews with Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames. Similarly Judge F, Judge at the ICTR, 25 November 2015, phone interview (discussing the distinct focus of the ICTR and the ICTY respectively).
[57] Interviews with legal officer G, legal officer at the ICTY, 10 December 2015, The Hague (on the ICTR, the ICC, and the SCSL); Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague (on the War Crimes Chamber of the State Court of Bosnia and Herzegovina).
[58] Interview with legal officer D, legal officer at the ICC, 1 December 2015, The Hague.
[59] Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, interview conducted on 3 December 2015, The Hague.
[60] Interview with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.

particularly interesting to consult the drafting history of specific treaties,[61] while another indicated that they would refer to the *travaux préparatoires* only "if you are really stuck."[62]

With regard to international jurisprudence, judges and legal officers would explicitly mention not only the decisions of the ICC, the *ad hoc* Tribunals, and hybrid courts as potentially relevant, but also the case law of the Nuremberg and Tokyo tribunals, as well as of especially the European Court of Human Rights (ECtHR).[63] At the same time, several judges and legal officers added in this context that none of these decisions from other international and hybrid courts were binding, but may only be persuasive.[64] However, within their discussion of sources other than the court's Statute and Rules of Procedure and its own jurisprudence, especially the case law of the ICTY, the ICTR, and the ICC featured prominently, and were often the first type to be mentioned.[65] Moreover, when asked about outside sources, about half of the judges and legal officers at the *ad hoc* Tribunals mentioned the Rome Statute and the ICC's jurisprudence first, even though often with the caveat that the ICC's case law has only just started to emerge.[66]

[61] Interview with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.
[62] Legal officer F, legal officer at the ICC, interview conducted on 5 December 2015, The Hague.
[63] Interviews with Judge F, Judge at the ICTR, 25 November 2015, phone interview; Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague; Judge C, Judge at the ICTR, 15 December 2015, phone interview; Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[64] Interviews with Judge B, Judge at the ICTY, 9 December 2015, The Hague; legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; legal officer D, legal officer at the ICC, 1 December 2015, The Hague (regarding the jurisprudence of the *ad hoc* Tribunals); Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer F, legal officer at the ICC, 5 December 2015, The Hague; Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague (with regard to the ECtHR and the UN Human Rights Regime).
[65] Interviews with legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; legal officer D, legal officer at the ICC, 1 December 2015, The Hague (emphasising, however, that the ICC might not necessarily follow the jurisprudence of the *ad hoc* Tribunals); legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague; Judge F, Judge at the ICTR, 25 November 2015, phone interview. But interviews with Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague (mentioning a broad variety of different sources, including domestic judgments and the jurisprudence of the ECtHR); Judge C, Judge at the ICTR, 15 December 2015, phone interview (highlighting the jurisprudence of the ECtHR instead); Judge E, Judge at the SCSL, 6 February 2016, Kingston Upon Thames (emphasising the Nuremberg and Tokyo trials, as well as the jurisprudence of hybrid courts).
[66] Interviews with legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague (specifically on case law). But interviews with Judge C, Judge at the ICTR, 15 December 2015, phone interview (highlighting the jurisprudence of the ECtHR); Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague (mentioning a broad variety of different sources, including domestic judgments and the jurisprudence of the ECtHR).

Consequently, even beyond self-references, the decisions of the ICC and the *ad hoc* Tribunals were generally accorded a relatively high degree of legal authority within the interpretive practices of judges and legal officers. The establishment of the ICC, however, seems to potentially have added a new level of hierarchy to such an interpretive practice, indicating that, with a shifting institutional framework, also the practice of privileged precedent has developed over time. As mentioned above, judges and legal officers at the *ad hoc* Tribunals would frequently refer to an emerging ICC jurisprudence, often as the first outside source that was discussed in this context. Among the ICC's judges as well as its legal officers, however, it is a matter of debate as to how far the ICC should refer to the case law of the *ad hoc* Tribunals. While some judges and legal officers see the jurisprudence of the *ad hoc* Tribunals as highly valuable,[67] the relevance of ICTY and ICTR jurisprudence has been subject to debate in the initial years of the ICC.[68] Especially due to their at times divergent statutory provisions, the *ad hoc* Tribunals' case law is not always seen as applicable.[69] At the same time, legal officers at the ICC also emphasised that the ICC does not necessarily follow the jurisprudence of the *ad hoc* Tribunals.[70] One legal officer at the ICC even described a tendency of some practitioners to seek to distinguish the ICC's jurisprudence from the work of the *ad hoc* Tribunals.[71]

At the same time, however, at least a certain degree of reliance on the jurisprudence of the *ad hoc* Tribunals seems to be rooted in the fact that several of the judges and legal officers at the ICC have previously worked at the *ad hoc* Tribunals. As a legal officer at the ICC explained,

> [it is also due to the court's] physical location, you tend to have more people at the ICC who formerly worked in the ICTY, for instance. So that's just in their head … [it's also about] where people came from, … what they are used to talking about, how they were trained …it bleeds into what they quote.[72]

Another ICC legal officer suggested that the influence of the *ad hoc* Tribunal's jurisprudence will even be more tangible in the future, once the ICC begins to focus more specifically on material instead of procedural law, and on the interpretation of, for example, the law of war

[67] Interviews with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague.
[68] Interviews with legal officer F, legal officer at the ICC, 5 December 2015, The Hague; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[69] Interview with Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague.
[70] Interviews with legal officer D, legal officer at the ICC, 1 December 2015, The Hague; legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[71] Interview with legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[72] Legal officer D, legal officer at the ICC, interview conducted on 1 December 2015, The Hague. Similarly, interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (on the potential for an exchange of legal views with regard to judges moving between international criminal courts).

crimes.[73] Consequently, it remains to be seen how the ICC's interpretive practice will develop in the future, especially after the ICTY delivers its last judgments and more of its former employees seek to transfer to the ICC. However, even despite this more complex and evolving relationship between ICC and ICTY/ICTR jurisprudence, the case law of the *ad hoc* Tribunals is usually treated with a noticeably higher degree of authority than the judicial decisions of hybrid criminal courts, an aspect that the following section will turn to.

5.4. The Interpretive Authority of Hybrid Courts

Compared with the judgments and decisions of the ICC and the *ad hoc* Tribunals in the interpretive practices of these courts, the case law of hybrid courts seems to have been accorded less interpretive authority. In most general terms, some of the legal officers and judges interviewed for this project generally seem to prefer legal sources generated by international bodies for their legal analysis, instead of domestic sources. One of the legal officers at the ICTR, for example, indicated that their "first reflex is always international tribunals."[74] Similarly, an ICTR judge argued that they generally prefer international sources.[75]

What is more, however, several of the legal officers interviewed for this project even voiced a certain reluctance when discussing the jurisprudence of hybrid courts, indicating that they generally perceived the case law of hybrid courts as not necessarily relevant or insightful for their own legal work. Such a hesitancy also seems to have been reflected in the way judicial decisions by hybrid courts were cited in the judgments of the *ad hoc* Tribunals and the ICC interpreting the law of war crimes. Among a total of 5,533 references by the ICTY, the ICTR and the ICC on the law of war crimes to international and domestic courts, only 1,047 were references to judgments and decisions from a court other than the one that rendered the decision.[76] Amongst these 1,047 references, a mere 30 citations referred to hybrid courts.[77]

However, such an analysis should be treated with caution: after all, it could be objected that such a citation pattern was merely issue-specific and a result of the fact that the ICTY focused on war crimes in its jurisprudence. After all, judges and legal officers at the international criminal courts confirmed that in principle, they would refer to the jurisprudence of the SCSL

[73] Interview with legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[74] Legal officer H, legal officer at the ICTR, interview conducted on 26 January 2016, The Hague.
[75] Interview with Judge C, Judge at the ICTR, 15 December 2015, phone interview.
[76] These 1,047 references included 294 references to other international and hybrid courts by the ICTY, 90 references by the ICTR, 388 references by the SCSL, 118 references by the ECCC, and 157 references by the ICC.
[77] More specifically, the ICTY referred to a SCSL five times, the ICC to SCSL 19 times, and the ECCC to the SCSL three times. The ICTR did not refer to the SCSL. The SCSL, however, referred to the STL three times.

and the ECCC. This would particularly be the case if there was a specific issue that the hybrid courts had adjudicated and that would be highly relevant for the case at hand.[78] Moreover, as outlined in chapter four, the ICC had indeed relied on the jurisprudence of the SCSL when interpreting the war crime of conscripting, enlisting, or using child soldiers.[79] In addition, as a legal officer at the ICC explained, in their view, there was no specific (formal) hierarchy as to which case law international criminal courts would look to beyond their own previous decisions.[80]

Nevertheless, the interviews with judges and legal officers at the *ad hoc* Tribunals and the ICC demonstrated that, beyond a general acknowledgement of their potential relevance, these practitioners would be hesitant to refer to the case law of hybrid courts in their interpretive practice – for example when drafting judgments or legal briefs – also beyond the interpretation of the elements of war crimes.[81] This hesitancy was rooted in two interlinked factors. On the one hand, there generally seems to be less awareness of the jurisprudence of hybrid tribunals. When asked more specifically about the relevance of the case law of the hybrid tribunals for their work, two legal officers indicated that they were in fact not particularly familiar with the Statutes and legal framework of hybrid courts such as the SCSL.[82] Such a lack of familiarity, however, suggests that interpretations suggested by hybrid courts have not usually been taken into account by these legal officers in the way in which they interpreted ICL in practice.

Doubts were also raised concerning the relevance and quality of the reasoning of hybrid courts.[83] Even though two legal officers had suggested that they were not very familiar with the statutory framework of the SCSL, at least at a general level, the SCSL was mentioned as the hybrid court that might potentially be most relevant to the work of international criminal courts.[84] With regard to the ECCC, it was pointed out that the court pursued a different

[78] Interviews with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; legal officer D, legal officer at the ICC, 1 December 2015, The Hague (confirming that they might refer to the jurisprudence of hybrid courts); Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague (confirming that they may at times refer to the jurisprudence of hybrid courts); Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[79] See chapter four, pp. 125-27.
[80] Interview with legal officer D, legal officer at the ICC, 1 December 2015, The Hague.
[81] Legal officer F, for example, stated that "we rarely look to – and by rarely, I mean, almost not at all – to the ECCC, for instance, because they just do a thing that's vastly different from ours." Legal officer F, legal officer at the ICC, interview conducted on 5 December 2015, The Hague.
[82] Interviews with legal officer D, legal officer at the ICC, 1 December 2015, The Hague; legal officer G, legal officer at the ICTY, 10 December 2015, The Hague.
[83] Generally for example interview with legal officer F, legal officer at the ICC, 5 December 2015, The Hague.
[84] Interviews with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.

interpretation than the *ad hoc* Tribunals especially of the concept of Joint Criminal Enterprise,[85] making its case law less applicable. The work of the STL was seen as even less relevant,[86] especially due to its focus on Lebanese law.[87] Importantly, however, concerns were also expressed about the quality of the hybrid courts' reasoning, with their reasoning style being described as at times less developed.[88] One legal officer even mentioned that they would be hesitant to rely on the case law of hybrid courts in their legal research, even if their jurisprudence was generally relevant and even in cases in which hybrid courts applied the same legal provisions. This legal officer suggested that, because hybrid courts apply both international and national law, international judges would find their interpretations less persuasive, even if only unconsciously so.[89] As a result, in situations in which they had "a memo to write with research, my first reference would not be a hybrid court."[90]

Both factors – a lesser degree of familiarity with the legal framework of hybrid courts and concerns regarding the quality and relevance of their jurisprudence – are likely to be interlinked: after all, the perception that the case law of hybrid courts was less applicable to the work of international criminal courts potentially reinforced a tendency of investing less time in researching it. Consequently, both factors seem to contribute to an assumption underlying the interpretive practices at the *ad hoc* Tribunals and the ICC that the case law of hybrid courts is only of little relevance. This assumption, while arguably in tension with a general commitment to interpretive coherence in ICL, seems to have resulted in interpretive practices through which hybrid courts are attributed with a lower degree of interpretive weight. In this context, it is noticeable that such a distinction between international and hybrid courts was not reflected by the way in which hybrid courts have interpreted ICL. Both the SCSL and the ECCC heavily cited the jurisprudence of the *ad hoc* Tribunals when defining war crimes besides decisions and judgments of the ICC.[91] According to a judge at the SCSL, the court contributed in the

[85] Interview with Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague.
[86] Interviews with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[87] Interviews with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.
[88] Interview with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[89] Interview with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.
[90] Ibid.
[91] The SCSL referred to the judgments of the *ad hoc* Tribunals and the decisions and judgments of the ICC in more than a third of the coded citations (374 out of 959 citations), while the ECCC referred to these sources in more than half of the coded citations (112 out of 185 citations in the *Kaing* Trial Judgment).

same way to the development of ICL, "[b]ecause we had . . . the same practice and the same way of working as … the ICC."[92]

As a consequence, while international jurisprudence is frequently referred to in the judgments of international and hybrid criminal courts, the practice of privileged precedent seems to include several levels of hierarchy even within the more specifically jurisprudential interpretive practices at international and hybrid criminal courts. Firstly, legal interpretations developed by hybrid courts are less frequently referred to by international criminal courts and tribunals, privileging interpretations suggested by international, as opposed to hybrid, courts. Secondly, there seems to be a tendency at the ICC to not necessarily follow the jurisprudence of the *ad hoc* Tribunals, which potentially creates a third level of hierarchy in the practices of legal interpretation developing ICL.

5.5. Beyond the Judicial Context

Unlike the case law of hybrid courts, judges and legal officers working for the ICC and the *ad hoc* Tribunals therefore treat the judgments of international jurisprudence as particularly relevant and authoritative. Based on this analysis, the question emerges whether the practice of privileged precedent favouring the interpretations of international criminal courts is confined to the judicial realm, or whether it is shared by the interpretive community in ICL more broadly. In other words, is it only international and hybrid courts that provide interpretations suggested by international criminal courts with a particularly high degree of interpretive authority? Or are judicial decisions generally regarded as authoritative among legal practitioners, regardless of the institutional context in which they operate and including, for example, government lawyers?

At least in their own perception, international judges and legal officers working for the ICC and the *ad hoc* Tribunals see themselves as playing a highly important role in the interpretive practices of ICL even beyond the specific court for which they work. Indeed, as mentioned above, several judges argued that the development of jurisprudence formed part of their court's legacy and could be understood as one of their most important accomplishments.[93] This framing, in turn, suggests that, in order to be seen as a legacy, these developments would need to remain relevant even once the work of the *ad hoc* Tribunals as temporary courts has come to an end. Judges and legal officers therefore saw the strictly judicial interpretive practices of

[92] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[93] See chapter one, p. 9.

ICL as having a broader importance beyond the limited context of individual cases. Thomas Wayde Pittman, then-acting Head of Chambers at the ICTY, consequently argued that

> I think the armed forces of every state should have at least one lawyer looking at the Tribunals' jurisprudence, because otherwise, a generation from now, they are going to find that there is a common view of what command responsibility is and they are not going to have been following that.[94]

This seems to suggest that at least in the perception of judges and legal officers, the judicial practices of international courts do not only develop ICL significantly. In addition, they are also of importance in shaping legal meaning that is relevant beyond the group of individuals working for international courts. Indeed, it is expected that state officials follow the jurisprudence of international courts to be able to adjust their military strategies to a developing legal landscape, which – in turn – would provide international courts with a considerable degree of productive power. From this, the question follows how far this expectation is matched by the practices of other groups, and how far these other groups form part of a community of practice developing ICL through their interpretations.

In this context, the preceding analysis of the relative interpretive authority of hybrid courts may provide a first, partial answer. At least with regard to their assessment of their own role in developing legal meaning, and the broader relevance of these developments, there does not seem to be much difference between the way in which judges at international and at hybrid courts assess their work. In particular, a judge at the SCSL reiterated that also the SCSL significantly developed ICL. This judge saw the development of jurisprudence as an important contribution of the SCSL, alongside the SCSL's outreach programme, its victims protection programme, and its police training programme, which were described as the "real" legacies of the SCSL.[95] This SCSL judge depicted the jurisprudence of different international criminal and hybrid courts as building onto each other, mentioning that the ICC has already relied on the SCSL's jurisprudence on child soldiers and predicting that the ICC will rely on the SCLS's jurisprudence on immunity in the *Gbagbo* case.[96] These statements suggest that at least in the perception of this SCSL judge, the SCSL played the same role in the interpretive practices of ICL as the *ad hoc* Tribunal and the ICC.

[94] Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, interview conducted on 3 December 2015, The Hague.
[95] Judge E, Judge at the SCSL, interview conducted on 6 February 2016, Kingston Upon Thames.
[96] Ibid.

However, as I have argued above, legal officers at the ICTY, the ICTR, and the ICC were hesitant to rely on the jurisprudence of hybrid tribunals, indicating that they are not particularly familiar with it and that the hybrid character of the tribunals applying both domestic and international law renders their case law less relevant.[97] Indeed, one of the legal officers would even be hesitant to rely on the jurisprudence of hybrid courts in their legal analysis based on the view that judges might not find it very persuasive.[98] The self-perception of the judge at the SCSL only seems to partially correspond with the interpretive practices of international criminal courts, which would at best cautiously refer to the SCSL's jurisprudence. Based on this analysis, the question remains how far a similar mismatch between self-perception and the interpretive practices of other actors emerged regarding the judicial practices of international criminal courts, an aspect that the following chapter turns to.

[97] Interviews with legal officer F, legal officer at the ICC, 5 December 2015, The Hague; legal officer D, legal officer at the ICC, 1 December 2015, The Hague; legal officer G, legal officer at the ICTY, 10 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.
[98] Interview with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.

Chapter 6

The Boundaries of the Community of Practice

As this chapter demonstrates, the practice of privileged precedent providing especially international courts with a high degree of legal authority was indeed shared more widely across the ICL interpretive community. Consequently, the expectation of the ICTY legal officer cited in the previous chapter, and recommending that states should follow the jurisprudence of the *ad hoc* Tribunals to keep up-to-date with changing legal standards, was reflected by the engagement of British and German government lawyers with – and expectations of – international criminal jurisprudence. In this chapter, I will therefore explore more in-depth whether, and to which extent, the practice of privileged precedent was shared among a wider interpretive community, trace the boundaries of this community, and ask to which extent the potential prevalence of the practice of privileged precedent entailed a shift in interpretive power. Through this analysis, the chapter will demonstrate how a mixture of the underlying professional assumptions on the authority of judicial decisions shared by legal practitioners, a diverging focus on interpretive content across two overlapping communities of practice, as well as the political commitments of supportive states and civil society organisations aided the creation of a relatively depoliticised judicial space in ICL. As a result of this interplay between legal expertise and political commitments, international criminal courts and tribunals were attributed a particularly high level of interpretive authority that allowed them to develop legal meaning in ICL.

The chapter begins by distinguishing between two overlapping communities of practice. The first of these communities focuses on ICL from a more legal perspective, consisting of lawyers working for international courts, governments, legal academics, and (to some extent) lawyers working for civil society organisations. This community overlaps, particularly in the case of civil society representatives based in The Hague, with a second and broader international justice community that holds a slightly different, and at times conflicting, sense of purpose and identity. Based on this analysis, the chapter then continues to outline the extent to which assumptions about the relevance of judicial interpretations underlying the practice of privileged precedent are shared by government lawyers and legal academics, but not necessarily by civil society representatives working on ICL. Examining the interpretive practices of government

officials and staff at civil society organisations in turn, it also accentuates how the interplay between both communities, as well as between legal professional assumptions and political commitments, contributed to the construction of a comparatively depoliticised judicial space. The chapter concludes by discussing the role that legal scholars played in this process.

6.1. Communities of Practice in ICL

The group of practitioners working with ICL on a daily basis is structured into two communities of practice, both of which are engaged in the interpretive practices of ICL. One of these communities is centred around an ICL expert community, which is in large part located at international courts and tribunals. The other community revolves around civil society groups and concentrates on international justice more broadly. Both communities are in close contact with each other and can best be understood as overlapping, especially as they both cut across different institutional settings and extend beyond the judicial and the civil society context. However, based on a different sense of purpose and identity, practitioners within both communities have a slightly diverging substantial focus when interpreting ICL.

The character of both communities as cutting across institutional contexts has arguably contributed to providing international courts with a relatively high degree of autonomy. In particular, especially legal officers working for the British and German foreign offices have shared the practice of privileged precedent through which international courts are provided with a particularly high level of interpretive authority. But what is more, the slightly diverging sense of purpose between an ICL expert community and an international justice community has also aided this process. On the one hand, due to the political commitments of supportive states, government officials have largely abstained from engaging in the interpretive practices of ICL, so that the task of evaluating judicial interpretations as valid has often fallen to civil society actors. However, due to their slightly different sense of purpose, civil society representatives usually concentrate on a specific subset of legal questions, which ultimately increased the ability of international courts to propose interpretations that often remained unchallenged. The function of evaluating judicial developments as valid has therefore mostly fallen to legal scholars. Due to shared normative commitments and overlapping career paths, however, more practice-oriented legal scholars have – at least until recently – often refrained from engaging in a more far-reaching critique of the international criminal justice project.

To trace the boundaries of these two overlapping communities, I will consider how far different individuals working on ICL have shared a sense of identity and purpose. This approach will be

supplemented by an analysis of the extent to which these practitioners have been in contact with each other. Insights on these contacts between practitioners therefore not only help assessing the density of these communities, but also contribute to an analysis of the degree to which the two communities interact with one another.

As a first observation, it is striking that the group of practitioners engaging with ICL on a daily basis is relatively small and dense, and typically centred around full-time professionals working in The Hague. One of the ICC judges described a relatively small community engaging with ICL.[1] Indeed, according to this judge, it is common to constantly meet the same people and read the same names due to the relatively small size of this community.[2] In the words of an ICTY judge, "it's a small world, everybody knows everybody else."[3]

In addition to a relatively small size, this community is characterised by a relatively high level of face-to-face interaction that cuts across different institutional settings. To begin with, the community includes judges and legal officers working at the international and hybrid criminal courts based in The Hague, namely the ICC, the ICTY, the ICTY/ICTR Appeals Chamber, the Special Tribunal for Lebanon (STL), and previously the SCSL (for the case against Charles Taylor).[4] After delivering its final Appeals judgment in the *Taylor* case in September 2013, the SCSL was replaced by the Residual Special Court for Sierra Leone (RSCSL), which is equally based in The Hague.[5] It is common for legal officers based in The Hague to move between these courts over the course of their professional careers.[6] But in addition, several of the legal officers interviewed for this project had also previously worked for the ICTR in Arusha and the ECCC in Phnom Penh.[7] Accordingly, the ICC judge cited above also explicitly included staff working at the ECCC, for example, as part of such a comparatively small ICL expert community.[8]

[1] Interview with Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague. Similarly Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague.
[2] Ibid. Similarly, interview with legal officer A, legal officer at the ICC, 24 November 2015, The Hague.
[3] Judge Howard Morrison, Judge at the ICTY and the ICC, interview conducted on 16 December 2015, The Hague.
[4] On the decision to move the case of Charles Taylor to The Hague, see *Taylor Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceeding*, Appeals Chamber, SCSL.
[5] See *Taylor* Appeals Judgment, SCSL.
[6] Interviews with legal officer E, legal officer at the ICTR, 5 December 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; legal officer D, legal officer at the ICC, 1 December 2015, The Hague.
[7] Interviews with legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; legal officer F, legal officer at the ICC, 5 December 2015, The Hague; legal officer I, legal officer at the ICTR, 15 December 2015, The Hague.
[8] Interview with Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague.

It should be noted that, by the time the interviews for this project were conducted in late 2015, this ICL expert community had begun to focus increasingly on the ICC. The ICTR closed in 2015, and the work of the ICTY was about to come to an end. The RSCSL, on the other hand, only employs a very limited number of staff. Finally, the STL, the ECCC, and the Residual Mechanism for the International Criminal Tribunals (MICT) are unlikely to absorb most of the staff that previously worked for the *ad hoc* Tribunals. As a result of this changing institutional landscape, Sergey Vasiliev estimated by 2015 that "ICL is likely to become a career dead end for many."[9] Consequently, this more court-centred part of a community of ICL experts is currently in the process of shrinking significantly, while also gravitating towards the ICC wherever possible. In the words of a legal officer at the ICC, "with the ICTY soon to be gone, it's gonna be … lonely out there."[10]

This sub-group of court employees – and especially legal staff and judges based in The Hague – is in regular contact with several other groups of actors, including state representatives, civil society actors, and legal scholars working on ICL and international justice. To begin with, judges and legal staff at courts based in The Hague frequently engage with embassy employees focusing on ICL and international courts, especially in the case of the ICC. These meetings take place either informally or through more institutionalised settings, such as, in the case of the ICC, the Assembly of States Parties (ASP) or The Hague Working Group,[11] and involve especially members of the Presidency and the Registry as part of the institutionalised governance process of the ICC.[12] In addition, the ICC itself regularly hosts more informal meetings to allow state representatives and representatives of the ICC to exchange views.[13] Legal staff working for Chambers (Judicial Divisions), in turn, as well as judges who do not hold a more institutionalised role,[14] are more removed from this community, and often choose not to engage in these outside interactions.[15]

[9] Vasiliev, "Editorial: On Trajectories and Destinations of International Criminal Law Scholarship," *Leiden Journal of International Law* 28, no. 4 (2015): p. 705.
[10] Legal officer F, legal officer at the ICC, interview conducted on 5 December 2015, The Hague.
[11] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[12] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[13] Interviews AA officers A&B, members of the legal section at the German Embassy, 1 February 2016; legal officer A, legal officer at the ICC, 24 November 2015, The Hague.
[14] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[15] Interviews with legal officer F, legal officer at the ICC, 5 December 2015, The Hague; legal officer C, legal officer at the ICC, 27 November 2015, The Hague (both indicating that they do not have any contact with NGOs outside of the ICC's institutionalised procedures); Alix Vuillemin Grendel, Senior Legal Officer, Coalition for

At the same time, NGO representatives are often included in these meetings, and at times host meetings themselves, for example to allow civil society representatives and members of the ICC's Office of the Prosecutor (OTP) to meet.[16] Additionally, civil society actors play a more formal and institutionalised role at the ASP (they may make oral statements and host side-events), and are often in regular contact with state representatives.[17] Consequently, a German foreign office representative explicitly included NGO representatives focusing on international justice as part of one The Hague-based community.[18]

Furthermore, several of the legal scholars specialising in ICL can also be understood as forming part of this community, especially those who pursue more practice-oriented scholarship.[19] In fact, it is often difficult to distinguish between the two groups, as several judges have an academic background, while legal officers often pursue an academic career based on their practical experience.[20] At the same time, state and NGO representatives, as well as judges, often attend academic conferences or give lectures at universities,[21] which provides another forum to meet face-to-face. These interactions between legal scholars and practitioners frequently take place in The Hague, or at conferences at Dutch universities that are within easy reach.[22] Beyond face-to-face meetings, many of these discussions have increasingly moved

the ICC, 18 April 2016, phone interview (on this distinctiveness of the judiciary from a civil society perspective).

[16] Interview with NGO representative A, 4 December 2015; NGO representative B, 7 December 2015.

[17] See Rule 93(c) of the Rules of Procedure of the Assembly of States Parties. Also interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague (indicating that he is in regular contact with NGOs); AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.

[18] AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.

[19] See Mégret, "International Criminal Justice: A Critical Research Agenda," in *Critical Approaches to International Criminal Law: An Introduction*, ed. Schwöbel (Abingdon: Routledge, 2014), p. 18; Christensen, "Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field," *iCourts Working Paper Series* 14(2014): pp. 18-25. See also Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law."

[20] See Terris, Cesare, and Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford: Oxford University Press, 2007), p. 20. See also Danner and Voeten, "Who Is Running the International Criminal Justice System?," pp. 53-64. Also interview with legal officer D, legal officer at the ICC, 1 December 2015, The Hague.

[21] Interviews with legal officer I, legal officer at the ICTR, 15 December 2015, The Hague; Judge B, Judge at the ICTY, 9 December 2015, The Hague; Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.

[22] Interviews with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview (mentioning conferences in The Hague); Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview (on academic conferences in The Hague); Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague (indicating that he is planning to attend a conference at another university in The Netherlands soon).

online, with a number of specialised blogs following and commenting on recent developments in ICL.[23]

In addition to legal academics, NGO representatives based in The Hague also have relatively easy access to other members of a broader ICL expert community. Within this broader community, however, by 2015, many of these NGOs focus their efforts on the ICC as the first permanent international criminal court,[24] at times as a legacy of having been involved in the negotiations of the Rome Statute.[25] Representatives of these civil society organisations indicated that they are in regular contact with not only ICC court officials, but also with each other and with representatives of a subset of states that are state parties of the ICC.[26] As one NGO representative explained with regard to government officials working on the ICC, "I have access to them all the time."[27] NGO representatives would at times even receive decisions informally from ICC staff members before they were officially released.[28]

Beyond this relatively small and dense group of practitioners in The Hague, however, accessing these meetings is more difficult especially for NGOs based outside of The Hague and with more limited financial resources, as well as for government officials of states that do not have embassies in The Hague.[29] Indeed, the civil society representatives interviewed for this study, which were as much as possible identified on the basis of recommendations from other interviewees as individuals they are regularly in contact with, mostly worked for large, international NGOs with a presence in The Hague. Contact to civil society actors based in situation countries in large part seems to be channelled through these international NGOs. Civil society representatives coming from outside would then often use the contacts already established by staff working for these international NGOs and participate in meetings set up by them.[30]

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[23] See also Vasiliev, "Editorial: On Trajectories and Destinations of International Criminal Law Scholarship," pp. 706-07. Also interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (referring to these online discussions).
[24] Interview with NGO representative B, 7 December 2015.
[25] Interview with NGO representative A, 4 December 2015.
[26] Interviews with NGO representative D, 10 December 2015; Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative A, 4 December 2015; NGO representative B, 7 December 2015.
[27] NGO representative A, interview conducted on 4 December 2015.
[28] Interview with NGO representative C, 9 December 2015.
[29] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview (indicating that she only has contact with government officials that have a representation in The Hague); NGO representative C, 9 December 2015.
[30] Interview with NGO representative A, 4 December 2015; Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview (specifically on the latter point).

At the same time, however – and as with legal scholars – face-to-face meetings only form part of the interactions that these civil society representatives may have with Hague-based ICL practitioners.[31] Especially through the increasing use of social media by court officials and Hague-based NGOs, as well as specialised blogs maintained by civil society actors, online communication has developed into a lively alternative enabling the exchange of ideas and perspectives. The Coalition for the ICC, one of the most influential civil society organisations focusing on international justice, seeks to bridge this local-international divide by itself being an umbrella organisation made up of both local and international NGOs.[32] Even for civil society organisations with a more conventional organisational structure, regular contact with individuals and groups interested in international justice beyond The Hague is perceived as an important part of their work. Indeed, frequent interaction with civil society organisations especially in situation countries, as well as affected communities, is seen as vital for the work of large international NGOs working on international justice and the ICC.[33]

While especially online communications therefore regularly extend beyond The Hague, Hague-based civil society representatives focusing on international justice are in particularly close contact with each other.[34] As one of the NGO representatives interviewed for this project explained, "I talk to them every day."[35] This community of civil society practitioners, however, is not only particularly dense, it also has a diverging – and at times potentially conflicting – sense of purpose and identity than a more law-focused, ICL expert community. When outlining the community involved in ICL, for example, the ICC judge mentioned above in fact explicitly excluded civil society representatives, as they – unlike lawyers focusing on legal questions – would pursue a political agenda.[36] And at times, the underlying purpose of both communities can be in tension. For example, Judge Piotr Hofmański explained that, in his view, the ICC is primarily a criminal court, instead of a mechanism that should seek to achieve political goals, including political stability in situation countries. Instead, in his view, it is the role of the court

[31] I am grateful to Nicole De Silva for her insightful comments on this section.
[32] See http://www.coalitionfortheicc.org/about-coalition-0 (accessed 25 January 2017).
[33] Interviews with NGO representative C, 9 December 2015; NGO representative B, 7 December 2015; Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative A, 4 December 2015. See also more generally Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," *Human Rights Quarterly* 31, no. 2 (2009): pp. 509-12.
[34] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative D, 10 December 2015.
[35] NGO representative A, interview conducted on 4 December 2015.
[36] Interview with Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague.

to decide on the criminal responsibility of the accused regardless of the political consequences of the decision.[37]

Different from such a more legal sense of purpose, this research emphasised how civil society representatives would typically concentrate on the representation of victims and communication with affected communities.[38] Indeed, they may even criticise the ICC for focusing too narrowly on legal issues without a sufficient understanding of – or focus on – the context in which these crimes occurred.[39] In contrast to such a more narrow legal view, Hague-based NGO representatives in fact consider it part of their role to facilitate access of other civil society actors especially from situation countries to the ICC.[40] These civil society representatives thereby aim to strengthen the voice of individuals affected by the crimes before the court within the discussions surrounding the ICC – a voice that, in the words of one NGO representative, is "so often lacking."[41] In their everyday work, much of the communication of Hague-based civil society representatives would then be with each other, and focus on coordinating strategies they pursue together *vis-à-vis* the ICC.[42] Such close interaction can be traced back to the negotiations of the Rome Statute, and the pivotal role the Coalition for the ICC assumed in coordinating civil society perspectives.[43] By 2015, as one civil society representative explained, "[we] can kind of lean on each other" to follow recent developments that cover different areas of expertise.[44] Such a practice not only emphasises how closely these civil society representatives work together. It also situates this group of civil society actors in opposition to ICC officials, which they together seek to convince of the merit of their positions. Consequently, this practice of coordinating strategies again emphasises how the priorities of these civil society staff members, as well as an underlying sense of purpose, differs from an ICL expert community that is characterised by a more strictly legal focus and professional identity.

Due to this different sense of purpose, one can distinguish between two distinct, but overlapping communities. One of these communities focuses on international justice more

[37] Interview with Judge Piotr Hofmański, Judge at the ICC, 27 November 2015, The Hague.
[38] Interview with NGO representative A, 4 December 2015.
[39] Interview with NGO representative D, 10 December 2015.
[40] Interview NGO representative A, 4 December 2015. Similarly, interview with Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview (especially with regard to member organisations of the Coalition for the ICC).
[41] NGO representative A, interview conducted on 4 December 2015.
[42] Interviews with NGO representative D, 10 December 2015; NGO representative A, 4 December 2015.
[43] See, for example, Benedetti and Washburn, "Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," pp. 21-23.
[44] NGO representative B, interview conducted on 7 December 2015.

generally, which is deeply rooted in the broader human rights movement.[45] On the other hand, a more specialised – and more distinctively legal – community of ICL experts is more invested in the idea of pursuing international justice through criminal trials. Both of these communities arguably share a common domain of knowledge surrounding the practice, policies, and decisions of international judicial institutions enforcing ICL. Such a shared domain of knowledge, however, does not seem to have hindered the development of two separate communities. The two communities are distinct even despite contacts and interactions that regularly connect practitioners, and regardless of regular interactions between ICC court officials and civil society staff based in The Hague. However, these two communities also often overlap, for example in the case of a legal officer working for a civil society organisation, who may share professional assumptions rooted in both communities.

[45] At the Rome conference, a large variety of NGOs was present, ranging from organisations focusing on women's rights to faith-based groups. However, human rights groups were particularly prominent, as most large international human rights groups attended the conference and assumed a leadership role among civil society representatives. See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," pp. 140-44. See also Benedetti and Washburn, "Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," p. 22.

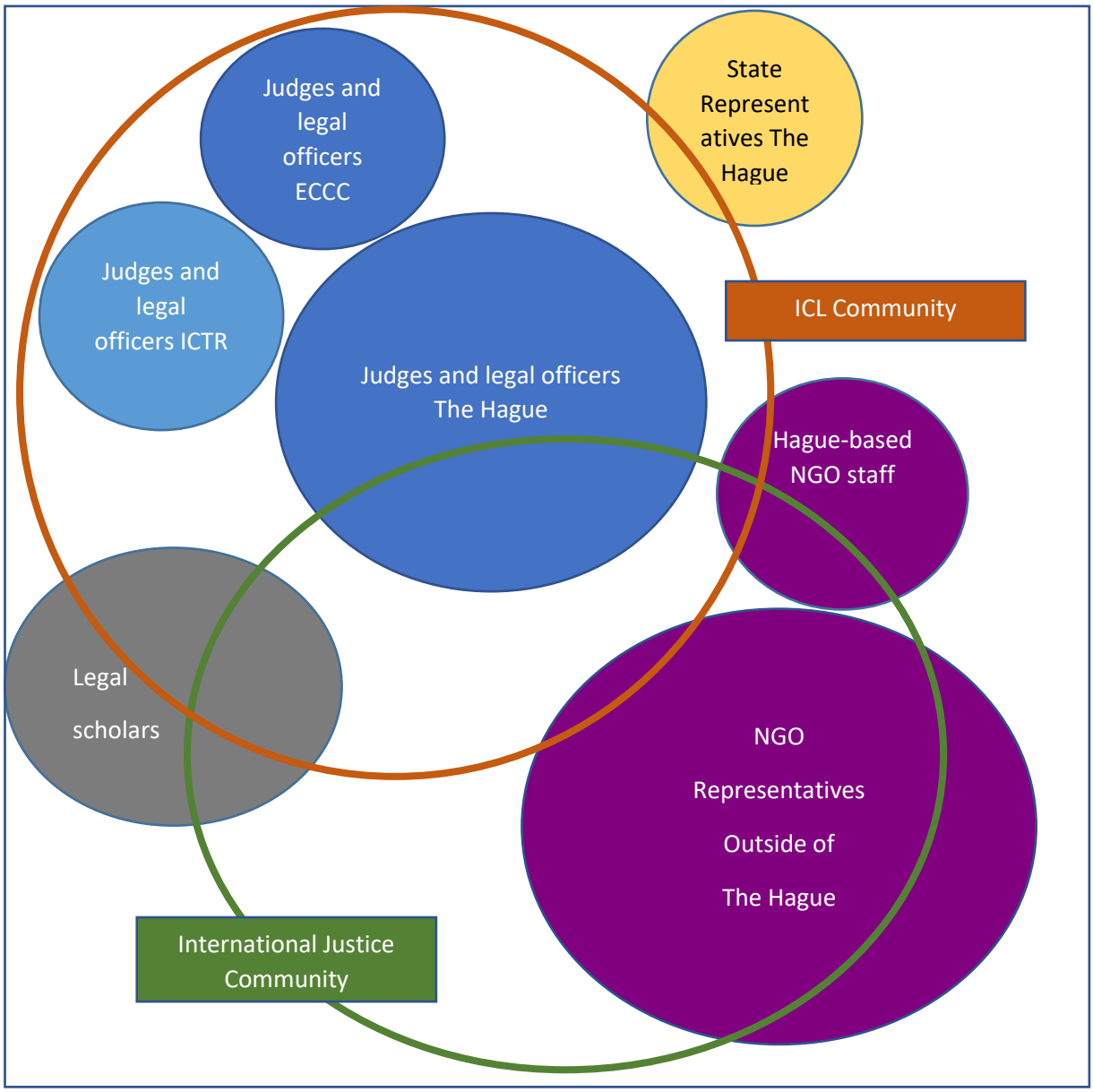


Figure 2: Communities of Practice in the Field of International Criminal Law

But how exactly do these two overlapping communities map on to the interpretive practices through which legal meaning in ICL is developed?[46] The following discussion offers a more in-depth exploration of the roles played by different groups of actors in the interpretive practices of ICL. It focuses particularly on how a broader interpretive community engages with the jurisprudence of international and hybrid criminal courts. I will explore to what extent the practice of privileged precedent providing international courts with a particularly high degree of interpretive authority has been shared by a broader interpretive community beyond international courts. It should be noted at this point that domestic judges adjudicating cases of war crimes, crimes against humanity, and genocide could also be understood to form part of

[46] I am grateful to Andrew Hurrell for his comments on this aspect.

the interpretive practices of ICL,[47] especially if they refer to the judicial decisions of international and hybrid criminal courts in their judgments. However, given that these judges would only very rarely interpret ICL, and therefore cannot be seen as forming part of an ICL expert community, they will not be included in the subsequent analysis.

6.2. The Interpretive Practices of State Representatives

Practitioners interpreting ICL at the German foreign office (Auswärtiges Amt, AA) and at the British Foreign and Commonwealth Office (FCO) are mainly based within the legal sections of both ministries. Both ministries employ a small number of legal staff specifically working on international courts based in New York, and in London and Berlin respectively.[48] In addition, part of the legal teams at The Hague embassies of both countries also specifically focus on the international courts with seats in The Hague, among them the ICC and the ICTY. At the British embassy, one legal adviser focuses on The Hague-based international courts and tribunals, with about 80 percent of the work for this position concentrating on the ICC in 2015.[49] At the German Embassy in The Hague, in turn, three of the legal officers follow the developments at the local international courts and tribunals as part of their work, with two of these officers in large part focusing on international criminal justice more specifically.[50]

Such an institutionalised emphasis on international criminal justice and international courts within the organisational structure of both embassies is comparatively pronounced, especially considering that only about half of the ICC's state parties have embassies in The Hague in the first place.[51] Potentially as a consequence, these specialised government representatives in The Hague are also comparatively visible within the community of practice working on international criminal justice. For example, when asked with which state representatives they engage most, both the United Kingdom and Germany were among the first states to be

[47] See, for example, Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," pp. 198-203 (focusing on domestic legislation).
[48] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer B, 12 February 2016; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016. See also Auswärtiges Amt, "Organisationsplan des Auswärtigen Amts," Stand 03.03.2015, available online, http://www.auswaertiges-amt.de/cae/servlet/contentblob/373560/publicationFile/218592/Organisationsplan.pdf (accessed 25 January 2017).
[49] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer C, 19 April 2016.
[50] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[51] For a list of embassies in The Hague, see https://www.government.nl/topics/embassies-consulates-and-other-representations/contents. For a list of states parties to the Rome Statute of the ICC, see https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (both accessed 25 January 2017). Similarly interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.

mentioned by an NGO representative, partly because both embassies in The Hague employ staff that specifically focuses on the ICC.[52] And at the same time, these government officials seem to share a common sense of identity with a broader ICL expert community, for example when explicitly including civil society representatives as part of a wider The Hague community.[53]

Within the interpretive practices of ICL, government officials participate in both an active and a more passive way. On the one hand, they may actively propose their own interpretations, for example as part of more formal treaty negotiations that need to be grounded in international law. Especially with regard to the ICC, these more active interpretive practices assume a more institutionalised form, as state representatives may propose amendments to the court's legal framework as part of the ICC's working groups and at the annual ASP. On the other hand, government officials also interpret ICL for internal assessments with regard to specific legal questions that become relevant to the political work of foreign ministries. In addition, they engage especially with the jurisprudence of international courts through institutionalised internal reporting practices. However, these practices are characterised as more passive, since state representatives would typically refrain from making their own view on judicial decisions public. As a consequence, internal reporting practices, and legal views voiced as part of these practices, do not typically become part of the interpretive process through which legal interpretations are evaluated as valid by a community of legal experts.

The more active participation of state representatives within the interpretive practices of ICL is arguably more visible. As their probably most widely known interpretive practices, state representatives assume a crucial role in the negotiation of the legal framework of newly established courts, thereby shaping the legal provisions that may consequently be developed through, for example, jurisprudential interpretation. As mentioned in chapter two, interpretive practices are here understood broadly, and include interpretations offered on legal provisions that are perceived as a source of ICL.[54] Consequently, they may at times extend to negotiation and drafting of international treaties, which in ICL typically concern the statutory basis and legal framework of international and hybrid criminal courts. During the negotiations of the Rome Statute of the ICC, for example, it was (unsurprisingly) mainly government officials who

[52] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[53] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[54] See chapter two, pp. 48-49.

negotiated the court's legal and institutional framework, in addition to the exceptional role played by civil society actors.[55]

At the ICC, state representatives also continued to assume a more active role in shaping the court's legal framework even after its main statutory provisions had been established. As part of a procedure based on Article 51 of the Rome Statute, state representatives continue to be involved in negotiating potential amendments to the Rules of Procedure and Evidence (as well as to the court's institutional framework more generally) as part of the Working Groups of the Bureau of the ASP. These sub-groups focus on, among others, complementarity, governance, and reparations.[56] Representatives of the German and British foreign offices regularly attend meetings of these (sub-)groups, which take place in The Hague as well as in New York (as part the New York and The Hague Working Group).[57] Within these meetings, both member states and the Prosecutor are allowed to suggest amendments according to the ICC's formal rules (Article 51 (2)(a) and (c) of the Rome Statute). In practice, however, members of both the British and German foreign offices indicated that states would usually follow the prerogative of the court and discuss amendments proposed by the judges.[58]

In addition to these more active and visible roles in the interpretive practices of ICL, German and British government representatives also engage in these practices in a more passive way. To begin with, foreign office staff working for the legal section may offer their own interpretations of ICL when asked to answer a specific legal question by the foreign office's policy officers, for example on the legal definition of a specific international crime.[59] To answer such a question, these legal officers would, among other legal documents, refer to the jurisprudence of international criminal courts and tribunals to determine the state of ICL.[60] Beyond answering specific legal questions, they also generally consider it to be part of their professional responsibility to keep up-to-date with the relevant jurisprudence of international and hybrid courts.[61]

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[55] See, for example, Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden: Martinus Nijhoff, 2014), pp. 57-86.
[56] See ICC ASP, Working Groups, https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/Pages/default.aspx (accessed 25 January 2017).
[57] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague. Also interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016 (regarding the meetings of the ASP more generally in both New York and The Hague).
[58] Interviews with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016; Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[59] Interviews with FCO officer B, 12 February 2016; FCO officer C, 19 April 2016.
[60] Interview with FCO officer C, 19 April 2016.
[61] Interview with FCO officer B, 12 February 2016. Similarly interview with EEAS officer, 27 January 2016.

In addition to these more general interpretive practices, government representatives also engage more specifically with international jurisprudence as part of their internal reporting practices. As part of these reporting practices, they follow and comment on judgments and important decisions of international and hybrid criminal courts once they are delivered. Foreign office personnel focusing on international courts, typically based in The Hague, would therefore regularly write reports on new developments at these courts.[62] These reports are written mainly for the attention of the FCO in London and the AA in Berlin respectively, but also for foreign office representatives based in the countries that these court cases are concerned with.[63] Such reports focus on specific international judgments, or at times even on important stages within the case development process.[64] Unlike the more *ad hoc* interpretive practices that usually respond to specific questions asked by policy staff, these reporting practices form part of an institutionalised bureaucratic routine.

But how exactly and why do these government officials report on the jurisprudence of international and hybrid criminal courts? The main purpose of these reports, according to interviews with German and British foreign office representatives, is to provide the FCO and the AA (in London and Berlin respectively) with additional information that goes beyond court press statements.[65] Within the German foreign office, these reports usually include the main findings of the decision, how to situate the decision within the context of the overall development of the case or the situation, and an outline of the next steps within the procedure.[66] Such reports may also contain an analysis of how different actors might respond to it.[67] At the FCO, not only final judgments, but at times also smaller decisions that are nevertheless potentially politically significant are reported on, especially in instances in which a case has reached an important stage within its development or when a decision raises legal or technical questions that are significant from a policy perspective.[68] Furthermore, reports may also be

[62] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[63] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[64] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[65] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[66] Ibid.
[67] Ibid. As a consequence, these reports are prepared for the attention not only of the foreign office in Berlin, but also for the German embassies in situation countries. Ibid., and similarly also interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer B, 12 February 2016.
[68] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.

required if court decisions are likely to impact on the UK's bilateral relations or the political situation within a particular country.[69] Specifically regarding international courts relevant in the field of ICL, FCO officers based in The Hague report on cases delivered by the ICC, the ICJ, the STL, and the ICTY. In addition, FCO officers based in London work on the ICTR, the ECCC, the SCSL, as well as the STL.[70] Similarly, staff at the German embassy in The Hague follows the ICC, the STL, the ICTY, and the ICJ.[71]

The scope of these reporting practices, however, is often limited and usually does not allow for in-depth analysis of all relevant legal developments. Reports on the development of specific cases and ultimately on final judgments are often both written and read under considerable time-constraints. Therefore, they usually do not include a lot of legal detail, also because they are aimed at informing recipients of the main developments in a relatively short amount of time.[72] Furthermore, an in-depth legal analysis is often not possible due to competing responsibilities and the need not to delay the report's submission.[73] As a representative of the FCO explained, an analysis of the development of specific legal questions would not be a main priority in these reports unless they entail broader policy implications, also because reports are written with the respective audience within the foreign office in mind.[74]

Nevertheless, instead of simply informing policy officers of the outcome of a case, staff at both the German and the British foreign offices would sometimes include a more detailed analysis of major legal interpretive developments into their reports.[75] For example, one of the representatives of the FCO mentioned that the question of how aiding and abetting as a form of liability was interpreted in the *Stanišić* Appeals judgment of the ICTY delivered in December 2015 was reported on.[76] In this particular case, the ICTY's interpretation of aiding and abetting as a mode of liability was, among other reasons, seen to be of importance in the context of recent criticism surrounding the ICTY's previous jurisprudence and allegations against the court's President, Judge Meron (voiced in a leaked letter by one of the judges, Judge Harhoff), given that these criticisms had the potential of undermining the credibility of the

[69] Ibid.
[70] Ibid.; and interviews with FCO officer B, 12 February 2016; FCO officer C, 19 April 2016.
[71] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[72] Ibid.
[73] Ibid.
[74] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[75] Ibid.; and interview AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[76] See *Stanišić and Simatović* Appeals Judgment, ICTY. Also interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.

court.[77] In addition, however, reports may also more generally examine how far a particular judgment developed ICL. More specifically, these reports might discuss the extent to which a court reaffirms its previous jurisprudence with regard to core legal principles,[78] as well as explicitly whether a judgment developed ICL or constituted judicial activism.[79]

Notably, the need to report on these developments was even based on the perception that the jurisprudence of international courts influences the development of – and sometimes creates – legal standards.[80] According to a representative of the German foreign office, these reports analyse whether an international court confirmed its previous jurisprudence partly because the jurisprudence of these courts may contribute to the development of legal meaning in international law.[81] In this context, the ICTY's jurisprudence on the law on command responsibility was mentioned as an example of the way in which international courts may contribute to the development of legal standards.[82] Interestingly, this assessment mirrored the statement of a legal officer at the ICTY discussed above, who suggested that states should actively follow the tribunal's jurisprudence on this aspect to keep up-to-date with changes in the law of command responsibility. [83]

Legal officers at the British foreign office seem to share such a view of international jurisprudence as shaping legal meaning. A representative of the British foreign office even suggested that legal officers working for the British Ministry of Defence would be interested in following developments at these courts that may broaden international humanitarian law, even if these developments were not immediately relevant for any operations the United Kingdom is currently engaged in.[84] And specifically with regard to the forms of international criminal liability, this FCO official concluded that "I think legal and policy colleagues would

[77] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague. The leaked letter was first reported on by a Danish news website in June 2013, see http://www.bt.dk/udland/english-version-murderers-are-being-allowed-to-go-free (accessed online 25 January 2017).
[78] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[79] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[80] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[81] Ibid.
[82] Ibid.
[83] Interview with Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague.
[84] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague. However, it should be noted that additional interviews would need to be conducted to confirm whether legal officers working for the British Ministry of Defence in fact follow international jurisprudence. Within the scope of this analysis, however, this statement revealed the underlying assumption of the FCO representative that the development of ICL through jurisprudence may be of significant practical relevance for the UK government due to its "legal and policy implications." Ibid.

be interested to know how the Court has interpreted the criminal law on aiding and abetting because of the legal and policy implications of the ruling."[85]

For the purposes of this project, the way in which foreign office staff describe their interpretive practices in ICL – and their reporting practices on the jurisprudence of international criminal courts and tribunals in particular – allows for two main insights. First, it highlights that these staff members generally regard the jurisprudence of international criminal courts as relevant to their work, since they regularly write reports on them or more generally assume that it is part of their role as a legal officer to follow recent jurisprudential developments. At least to a certain degree, the judicial interpretive practices of international courts are therefore indeed relevant to the practices of states. This research therefore contradicts the expectation that, while judges perceive their own jurisprudence as an important legacy, their interpretation of ICL is of little importance outside of the specific institutional setting of international courts.

Second, the previous discussion indicates that, at least in the case of the United Kingdom and Germany, these government lawyers indeed engaged in the practice of privileged precedent, as they referred to the interpretations of international courts as potentially setting a new legal standard. Specifically, these government lawyers would refer to the jurisprudence of international criminal courts to identify what the current, most up-to-date interpretation of the applicable law might be in the first place. Just as legal officers and judges suggested that jurisprudence may at times *become* international law, government lawyers assumed that international courts may contribute to setting legal standards. In other words, government lawyers perceived the interpretations of international crimes suggested by international courts not only as relevant and usually valid, but also as a reflection of the current state of the law.

As a result, the practice of privileged precedent providing international criminal courts and tribunals with a particularly high degree of interpretive authority has indeed been relevant to the interpretive practices of government officials as well. Legal officers working for the German and the British embassies in The Hague not only frequently engage with court officials and civil society representatives focusing on international justice and share a sense of community. In addition, they also engage with the judgments of international criminal courts based on the shared underlying assumption that, indeed, the interpretations suggested by

[85] Ibid.

international criminal courts and tribunals constitute an authoritative expression of the current state of ICL.

From these insights it can be concluded that interpretive power in ICL, understood as the potential to shape legal meaning, has shifted to international courts. Foreign office legal officers even expect international courts to develop ICL: Both German and British embassy officials explained that they would report on the jurisprudence of these courts partly to analyse whether they developed international law through their jurisprudence.[86] At the same time, they also expect such jurisprudential developments to become important for future government decisions, as they accept that the interpretations proposed by these courts might indeed turn into a new legal standard states will be subject to in the future. This aspect is particularly underlined by the statement of an FCO officer who estimated that international jurisprudence on international humanitarian law was not only relevant to the foreign office, but potentially also to the ministry of defence.[87]

The interviews conducted for this project, however, only provide preliminary insights on the extent to which hybrid courts – as opposed to international criminal courts – have been attributed interpretive authority through the interpretive practices of government officials. As a first indication, both German and British foreign office representatives based in The Hague stated that they would report on important developments at the STL (as well as at the ICTY and the ICC),[88] which suggests that following the jurisprudence of hybrid tribunals would generally constitute part of their work. In addition, FCO officers based in London would follow the cases of the ICTR, the ECCC, and previously the SCSL.[89] At the same time, however, at least by 2015, there was a clear emphasis on the work of the ICC within the portfolio of the legal officers working on international courts both at the German and British embassy in The Hague.[90]

[86] Interviews with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016; Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[87] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[88] Interviews with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016; Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[89] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer C, 19 April 2016.
[90] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague. Similarly, even though arguably less pronounced, AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.

Based on the limited number of interviews conducted for this study, it therefore remains unclear whether this focus on the ICC merely reflects a changing institutional landscape, with more reporting having taken place on hybrid courts previously. In this context, however, it should be noted that for example the position of a legal officer at the British embassy in The Hague focusing on international courts was only established after – and presumably because of – the entry into force of the Rome Statute.[91] This institutional development may suggest that less attention has been given to the jurisprudence of the *ad hoc* Tribunals and hybrid courts before this position was established. However, additional interviews would need to be conducted to illuminate further whether these reporting practices have changed over time, and to what extent, for example, legal officers working for the British and German embassies in Tanzania, Rwanda, Sierra Leone, and Cambodia have reported on the jurisprudence of the ICTR, the SCSL, and the ECCC.

As a final aspect, even though the practice of privileged precedent was indeed shared by German and British government lawyers, this in and of itself does not entail that interpretive practices are as important to the practices of states as they are, for example, to the practices of international courts. In other words, while specialised government lawyers might assume that changing legal standards shaped by international jurisprudence would guide governmental decisions in the future, they might simply be wrong. After all, within both foreign offices, questions related to international criminal justice are in large part situated in the legal directorate, and reports on judgments and decisions are written by trained lawyers.[92] Therefore, the assumption that it is important to keep up-to-date with international jurisprudence on ICL as an expression of a potentially shifting legal standard may not necessarily be shared by policy officers in both foreign services who are, together with embassies in situation countries and other legal officers, the main recipients of these reports.[93] These policy officers are typically based in London or Berlin, and usually not part of the two overlapping expert communities focusing on ICL. While interpretive power might therefore be important to the practices of the legal directorate, there is no guarantee that policy officers will indeed follow the advice of their legal colleagues. From the interviews conducted for this project, it also remains unclear

[91] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[92] Interviews with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[93] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016. Similarly Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague; FCO officer B, 12 February 2016.

whether legal officers working for the Ministry of Defence in fact follow the jurisprudence of international criminal courts and tribunals as their FCO colleague suggested.

6.3. Government Officials and the Construction of a Legal Space

While it is therefore beyond the scope of this study to assess whether and to what extent interpretive practices have been shared more widely within the German and British foreign offices, the practice of privileged precedent was indeed shared by government lawyers at the German and British foreign ministries. It informed both the interpretive and reporting practices of government lawyers. This is evident in the way these officials treated international jurisprudence within both practices, which assumed that these judicial decisions may set new legal standards in ICL. Professional assumptions suggesting that international courts may – and are even expected to – develop legal meaning therefore aided in the construction of a relatively depoliticised judicial space in ICL: After all, if government lawyers already expect international courts to develop legal meaning, they are arguably less likely to challenge such developments as invalid.

In ICL, these professional assumptions intersected with a set of political commitments, which together depoliticised judicial decision-making even further. To explore this point further, it is important to keep in mind that within interpretive communities, the potential role of individual groups or members within it depends on whether their interpretation is evaluated as valid by other members. Crucially, to be able to challenge the development of legal meaning within a community of practice, such an assessment would then need to be voiced publicly within such a community. As part of an interpretive community developing ICL, however, it seems that German and British government lawyers do not play such a role: Apart from the more formalised setting of treaty negotiations and the ICC's working groups, these government lawyers typically assume a passive role in the interpretive practices of ICL by refraining from making their own interpretations public. And neither foreign office publicly comments on the jurisprudence of one of these courts, let alone engages in any form of public criticism of specific decisions.[94]

[94] Instead, for example the German Foreign Office would only publicly comment on the election of a German judge or in support of the ICC at the opening of proceedings in particular cases, but not on the content of the ICC's jurisprudence. See AA, "Außenminister Steinmeier zur Wahl eines deutschen Richters am Internationalen Strafgerichtshof," Press Release, 12 December 2014, available online, http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2014/141212-ISTGH.html; see also AA, „Staatsministerin Böhmer begrüßt Eröffnung des Verfahrens beim IStGH wegen der Zerstörung von UNESCO-Weltkulturerbe in Mali, Press Release, 22 August 2016, http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2016/160822_StM_B_Zerstoerung_Kulturerbe_Mali.html (both

To unravel the reasons for such a stance further, a statement made by an officer of the European External Action Service (EEAS) provides additional insights. According to this EEAS officer, it would be part of the EEAS's diplomatic efforts with regard to the ICC to support the court by taking up its decisions to the extent of even reaffirming its jurisprudence.[95] As explained above, Germany and the United Kingdom have been selected as case studies because they share similar political commitments with regard to international criminal justice: Both states put an (even institutionalised) emphasis on international criminal justice in their everyday diplomatic interactions of their embassies in The Hague, and both states are generally supportive of international criminal justice as a diplomatic project. Indeed, according to the same EEAS officer, the EU member states that follow developments at the ICC most closely include the United Kingdom, France, and Germany, and disagreements (with the potential exception of budgetary questions) between EU member states regarding their strategy towards the ICC are rare.[96]

In the context of such a generally supportive approach, German and British foreign office representatives saw themselves in the role of promoting international criminal courts *vis-à-vis* more sceptical actors, both domestically and internationally. According to a German foreign office representative, the responsibilities of the German embassy in The Hague also includes facilitating meetings between judges and staff members at international courts and members of the German Bundestag, State Secretaries (*Staatssekretäre*), and other staff at German ministries, in order to strengthen the acceptance of international courts in Germany.[97] And specifically with regard to the international level, an FCO officer explained that they saw themselves in the position of having to convince states that are more sceptical of international criminal justice to support initiatives in this regard. Crucially, this officer added that a perception of a lack of independence or fairness of international criminal courts would hinder such diplomatic efforts.[98] Consequently, when outlining for example their interaction with ICC court officials, both German and British legal officers were careful not to undermine – or be perceived to be undermining – the independence of the court. As a representative of the German

accessed 25 January 2017). See similarly FCO, "FCO Minister welcomes new ICC rules on attendance in person," Press Release, 28 November 2013, available online, https://www.gov.uk/government/news/fco-minister-welcomes-new-icc-rules-on-attendance-in-person (accessed 25 January 2017), commenting on the outcome of the 2013 ASP.

[95] Interview with EEAS officer, 27 January 2016.

[96] Ibid.

[97] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.

[98] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.

foreign office stated, even in their discussions with the ICC on budgetary or management questions, they are aware of the risk of being seen as undermining the prosecutorial or judicial independence of the court.[99] And as an FCO officer explained, "obviously, I wouldn't dream of going speaking to a judge about a case he or she was working on."[100] Instead, it would be important to be able to draw on an in-depth understanding of judicial and prosecutorial independence in their everyday work.[101]

As a result of this political commitment, the potential for criticism of jurisprudential developments is generally comparatively limited. Instead, states that are generally supportive of the international criminal justice project see the need to defend courts such as the ICC *vis-à-vis* other, more sceptical states. It is part of this diplomatic effort to not be perceived as interfering with the independence of these courts, which could potentially undermine the court's legitimacy. For the interpretive practices of ICL, however, this in turn implies that legal developments suggested by these courts will routinely remain unchallenged and even be promoted, at least by supportive states.

In addition to this general political commitment that limits critical engagement, it should also be kept in mind that the very possibility for criticism only presents itself in cases in which an expansive interpretation is actually noted as potentially problematic in the first place. As mentioned above, government lawyers generally share the expectation that the development of legal meaning by international courts forms part of the way in which legal standards evolve. But as an additional aspect, it bears repeating that internal reports on jurisprudential developments are written under considerable time-pressure, and that they are usually comparatively short and do not engage with much legal detail. Even though compared with other states, the German and British foreign ministry spend a relatively high degree of personnel resources on international courts in ICL, they often do not have the capacity to conduct an in-depth critical assessment of current jurisprudential developments. It is therefore at least conceivable that potentially problematic developments might not even be noticed by government lawyers, both because of underlying professional assumptions and due to time-constraints.

[99] Interview with AA officers A&B, members of the legal section at the German Embassy, 1 February 2016.
[100] Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, interview conducted on 18 December 2015, The Hague.
[101] Ibid.

Even in cases in which foreign ministry lawyers were to raise such concerns internally, these ministries would nevertheless be unlikely to voice their criticism publicly to avoid undermining the work of international courts. As a consequence, however, potential criticisms of new interpretations of ICL proposed by international courts are unlikely to become part of the interpretive practices of ICL that are communicated to – and therefore shared and assessed by – the ICL expert community more broadly. Taken together, at least in cases in which states are generally supportive of ICL, this political commitment – in combination with a perception of having to justify the international criminal justice project against more critical states – therefore seems to provide international and hybrid criminal courts with a particularly high degree of autonomy, which arguably heightened their ability to push for normative developments.

6.4. Civil Society Representatives and the Practice of Privileged Precedent

Arguably as a legacy of their prominent involvement in the negotiations of the Rome Statute and due to its character as a permanent institution, most civil society representatives that are in close contact with other ICL actors in The Hague focus on the ICC.[102] Among these civil society groups, the Coalition for the ICC has assumed a pivotal role. The Coalition was created as an umbrella organisation in February 1995 during the negotiations in Rome to coordinate the advocacy efforts of civil society actors and to share information, and it became the main NGO contact for state and UN representatives during the negotiations.[103] Its membership initially consisted of NGOs from Europe and the United States, but subsequently expanded to a large number of national NGOs from other regions as well.[104] According to the Coalition for the ICC, its membership to date consists of 2,500 organisations.[105] While members of the Coalition for the ICC, some large international human rights NGOs also have their own dedicated programmes and staff working on international justice, in some cases as a continuation of their participation in the Rome negotiations.[106] In addition, some issue-specific NGOs based in The Hague also have an interest in international justice. For example, Kirsten Meersschaert, speaking for the Coalition for the ICC, explained how the Coalition maintains

[102] Interviews with NGO representative B, 7 December 2015; NGO representative A, 4 December 2015.
[103] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 146.
[104] See ibid, pp. 144-45.
[105] See Coalition for the ICC, Voices of Global Civil Society, available online http://www.coalitionfortheicc.org/node/847 (accessed 25 January 2017).
[106] Interview with NGO representative A, 4 December 2015.

contacts with, for example, environmental groups in The Hague that are interested in the potential relevance of the ICC to their work.[107]

Like government officials, civil society representatives working on international justice also participate in the interpretive practices of ICL both in a more active and a more passive way. As a first starting point, civil society actors have played an especially active role in the negotiations of the Rome Statute. Indeed, their involvement was so substantial that it has been described as "almost unprecedented in international treaty negotiations," and similar in character only to the negotiations of the Landmines Ban Treaty.[108] When drafting the ICC's legal framework, NGO lobbying had been successful on a number of issues, for example on strengthening the role and protection of witnesses.[109] Consequently, civil society representatives actively engaged in interpretive practices during the negotiation process by presenting their own interpretations of how the new Rome Statute system should be constructed, and how it may build on existing legal provisions. Subsequent to the negotiations of the Rome Statute, NGO representatives have also attended the negotiations at the 2010 ICC Review Conference in Kampala.[110] In 2015, civil society representatives were involved in plans to set up new special and hybrid tribunals in the coming years, including to potentially investigate the situations in Syria and the Central Africa Republic.[111]

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[107] Interview with Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview.

[108] Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 137. See also similarly Fanny Benedetti and John Washburn, who argued that "[t]he NGO coalition … set a new standard and precedent for NGO effectiveness [at the Rome negotiations]." Benedetti and Washburn, "Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," p. 33. On the influence of civil society actors lobbying for the Landmines Ban Treaty, as well as their involvement in the subsequent treaty negotiations, see, for example, Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines," *International Organization* 52, no. 3 (1998).

[109] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 147. See also van Boven, "The Position of the Victim in the Statute of the International Criminal Court," in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, ed. von Hebel, Lammers, and Schukking (The Hague: T.M.C. Asser Press), pp. 83-84.

[110] However, regarding the ICC's potential jurisdiction over the crime of aggression, NGO representatives were divided in their position, contributing to a comparatively complicated negotiation process. See Van Schaack, "Negotiating at the Interface of Power and Law: The Crime of Aggression," *Columbia Journal of Transnational Law* 49, no. 3 (2011): pp. 513-15.

[111] Interviews with NGO representative B, 7 December 2015; NGO representative A, 4 December 2015; Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview (on the relevance of such initiatives for the CICC's work). See also, for example, Julian Borger, "Call for Special Tribunal to Investigate War Crimes and Mass Atrocities," The Guardian, 17 March 2015, available online, https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria (accessed 25 January 2017); see also Neil Sammonds, "Baby Steps on the Long Road to Justice for Atrocities in Syria," amnesty international, news, 11 April 2016, available online, https://www.amnesty.org/en/latest/news/2016/04/baby-steps-on-the-long-road-to-justice-for-atrocities-in-syria/ (accessed 25 January 2017).

But civil society representatives have also been engaged in the interpretive practices of ICL in a more active and institutionalised way that went beyond treaty negotiations. NGOs have represented victims before the ICC and provided the Office of the Prosecutor with information on crimes within the court's jurisdiction during the Preliminary Examination stage through so-called Article 15 Communications.[112] Civil society representatives have also offered their views on ongoing proceedings in amicus curiae briefs.[113] According to a NGO representative, filing an amicus brief is currently the only option for civil society actors to attempt to impact the jurisprudence of the ICC.[114] At the same time, this NGO representative mentioned that they would be interested in exploring the option of a filing procedure that was slightly less formal than an amicus brief, especially as judges may at times be provided with an incomplete account of the context of a case if they have to rely on the filings of the parties.[115]

Apart from this more active and partly institutionalised role, civil society representatives only play a limited role in the interpretive practices of ICL. At least in the years immediately after the establishment of the ICC, their focus instead seemed to have been on the promotion and dissemination of the jurisprudence of the ICC and knowledge about the ICC more generally. As one NGO representative stated with regard to a project seeking to increase knowledge of different proceedings worldwide in the area of international justice, "our main focus has been summaries of the proceedings."[116] In their publications and public communications, NGOs have consequently focused on promoting the jurisprudence of international courts, for example by publishing a collection of the jurisprudence of the ICTY.[117] In addition, blogs and newsletters have been used to disseminate information about the proceedings and decisions of the ICC and other proceedings on international crimes before international, hybrid, and domestic courts. Importantly, however, this strategy typically did not include comments or analysis that went beyond a mere summary of the decisions, and that would have offered a separate interpretation of ICL.[118] The audience that NGOs attempted to reach with these materials were either a specialised expert community based in The Hague or international

[112] Interview with NGO representative A, 4 December 2015.
[113] See, for example, *Furundžija* Trial Judgment, ICTY, para. 35 (referring to an amicus curiae brief filed by a group of scholars and civil society actors).
[114] Interview with NGO representative B, 7 December 2015.
[115] Ibid.
[116] NGO representative D, interview conducted on 10 December 2015.
[117] See Human Rights Watch, Genocide, War Crimes and Crimes Against Humanity. A Topical Digest of the Case Law of the International Tribunal for the Former Yugoslavia, 2006.
[118] Interview with NGO representative D, 10 December 2015.

lawyers more generally.[119] In addition, especially in recent years, attempts were made to reach affected communities in situation countries.[120] However, as one NGO representative pointed out, the people who are interested in international jurisprudence in ICL are typically based in The Hague, while dissemination of judicial decisions to situation countries often remains insufficient.[121]

Instead of offering their own interpretations of ICL, NGO representatives seek to disseminate and explain the jurisprudence of especially the ICC across different audiences, often with the aim to raise awareness in order to strengthen the work of the court.[122] In particular, they would provide information about the court's decisions to other civil society actors, often in situation countries, as well as to the general public and individuals with a particular interest or expertise in international justice.[123] Such a facilitating role is especially assumed by larger umbrella organisations that include other civil society groups as its members, such as the Coalition for the ICC.[124] The decision to assume such a role can be understood in the context of earlier civil society criticism that the ICC is often disconnected from victims.[125] Similarly, a representative of the Coalition for the ICC stated that they would follow recent developments at the court to "ensure the objective that justice in the end is made visible and tangible for the victims and affected communities."[126] Before 2015, additional efforts were made to disseminate information about the decisions of other international and hybrid courts, including the ICTY, the ECCC, and the SCSL.[127] However, this coverage seemed to have been less systematic than current efforts of civil society representatives to disseminate information about the proceedings before the ICC. By the time the interviews for this project were conducted, civil society

[119] Ibid. Also interview with NGO representative C, 9 December 2015 (indicating that a dissemination of judicial decisions to situation countries still often remains insufficient).
[120] Interview with NGO representative C, 9 December 2015.
[121] Ibid.
[122] Interviews with Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview (on the former point); NGO representative B, 7 December 2015 (specifically regarding the early years of the ICC); NGO representative C, 9 December 2015.
[123] Interviews with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative A, 4 December 2015; NGO representative C, 9 December 2015; Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview.
[124] Specifically on the Coalition for the ICC, interview with Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview.
[125] See Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," pp. 509-12.
[126] Kirsten Meersschaert, Director of Programs, Coalition for the ICC, interview conducted on 1 March 2016, phone interview.
[127] Interviews with NGO representative D, 10 December 2015; NGO representative C, 9 December 2015. See also, for example, Human Rights Watch, Genocide, War Crimes and Crimes Against Humanity. A Topical Digest of the Case Law of the International Tribunal for the Former Yugoslavia, 2006.

representatives indicated that, with the work of the *ad hoc* Tribunals coming to an end, the decisions of the ICTY and the ICTR would only rarely be relevant to their work.[128]

In addition to merely disseminating information, NGOs at times attempt to 'translate' it to make the decisions and jurisprudence and their consequences more accessible to individuals who are not trained lawyers and the broader public more generally,[129] especially in situation countries.[130] As a variation of such translation efforts, civil society actors also engage with the ICC's jurisprudence to be able to comment on and oppose conflicting views in the ICC's media coverage. For example, a representative of the Coalition for the ICC described how the situation after the charges in the *Ruto and Sang* case before the ICC were vacated as

> a good example of misrepresentation in the media. Some media outlets reported that there was a 'mistrial', others reported that the cases were 'dropped'. Some were saying that Ruto and Sang had been acquitted. What we at the Coalition then do is correct the misinformation and make sure the facts are out there, also by providing [an] explanation of the legal terms and decisions.[131]

In addition to these efforts to explain and disseminate the decisions of especially the ICC, a civil society representative also indicated that they might follow jurisprudential developments that pose new legal questions.[132] One factor that made such jurisprudential developments interesting to civil society representatives is their potential relevance for future advocacy efforts. Several NGO representatives indicated that part of their engagement with the ICC's jurisprudence and policy decisions is in preparation of their subsequent advocacy strategy *vis-à-vis* different bodies within the court.[133] For example, NGO representatives would rely on the jurisprudence of the court to strengthen their own communications with the Office of the Prosecutor.[134] At least within the institutional setting of the ICC, this idea of having to adjust their own strategies based on ongoing jurisprudence seems to indicate that civil society

[128] Interviews with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative A, 4 December 2015.
[129] Interview with NGO representative B, 7 December 2015 (specifically with regard to the early years of the court). According to Kirsten Meersschaert, "we try to translate [decisions] into every-day, digestible, easily understandable language for our members and the broader general public." Kirsten Meersschaert, Director of Programs, Coalition for the ICC, interview conducted on 1 March 2016, phone interview.
[130] Interview with NGO representative C, 9 December 2015 (on making this information accessible).
[131] Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, interview conducted on 18 April 2016, phone interview. See also *Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, Trial Chamber, ICC.
[132] Interview with NGO representative C, 9 December 2015.
[133] Interviews with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview; NGO representative A, 4 December 2015; Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview.
[134] Interview with NGO representative A, 4 December 2015.

representatives share the assumption that, at least with regard to the ICC, legal meaning is shaped through its jurisprudence. Perhaps unsurprisingly for a community of practice that is more rooted in the human rights movement than in a legal community, however, such an interest seemed to revolve more around the aim of strengthening their own negotiating position *vis-à-vis* the court, rather than a pronounced interest in potentially changing legal standards.

What is more, one NGO representative even criticised that too much of an emphasis was placed on the jurisprudence of the ICC and on relatively specialised legal questions. In their words, if "you talk to people in Chambers … [and] there is a lot of talk of the jurisprudence, of the legal principles, but are these courts only about legal principles?"[135] Indeed, in their view, too little consideration was given to how the decisions taken by the court would affect, for example, the communities in which crimes had happened and their opportunities to participate in the judicial process.[136] Similarly, another NGO representative argued that while smaller ICC decisions may have an impact in The Hague, it was more doubtful whether these decisions will be of importance for discussions on accountability in situation countries.[137] Therefore, while judges and legal officers emphasise the importance of the development of jurisprudence as a legacy of international and hybrid courts and the need for awareness of it, this sense of importance is perceived more sceptically at least by parts of the NGO community focusing on international justice.

As a final aspect, these civil society representatives also seemed to generally be less interested in the jurisprudence of other international and hybrid criminal courts beyond the ICC. At the time the interviews for this project were conducted, the ICTR had already concluded its work, and the ICTY was still in the process of delivering its final judgments. An exception was made for potential lessons that the ICC may learn from the experience of these courts, as well as of the SCSL and the STL. Potential lessons that were mentioned, however, especially concerned administrative aspects – such as victim protection guidelines or their outreach programmes – instead of the jurisprudential legacy of these courts.[138]

[135] NGO representative D, interview conducted on 10 December 2015.
[136] Ibid.
[137] Interview with NGO representative C, 9 December 2015.
[138] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.

6.5. Civil Society Representatives and the Construction of a Judicial Space

Whereas civil society representative therefore did not focus on judicial decisions as developing legal standards, the way in which they engaged with the jurisprudence of international criminal courts and tribunals nevertheless contributed to the construction of a relatively depoliticised judicial space. While civil society actors disseminate and explain their jurisprudence, like German and British government lawyers, they would usually refrain from adding their own assessment. Such a hesitancy to offer their own interpretations of ICL seems to be at least partly rooted in the explicit commitment of some NGOs to remain neutral in their engagement with the ICC,[139] and to avoid being perceived as undermining the independence of the court.[140] Instead, as one NGO representative stated, they attempted to situate themselves as "a critical friend of the court."[141] For example, this NGO representative stated that even in cases where they did not agree with the interpretation offered by the court, they "probably won't contradict the judges in any kind of … public way."[142]

Such a hesitancy to criticise the ICC – and especially its jurisprudence – is particularly pronounced in the case of the Coalition for the ICC. This stance is partly a consequence of its organisational structure that includes a wide variety of NGOs that may have contradicting views on specific issues. Consequently, the Coalition for the ICC decided not to assume any particular position during the early stages of the negotiation process of the Rome Conference, apart from lobbying for the establishment of the ICC as a common basis.[143] In addition to avoiding discord among its members, however, according to one of its representatives, it also aims for the ICC to not "necessarily see the Coalition as inherently adversarial, because we don't take a position on certain issues that are more political."[144] Indeed, it was seen as crucial for its success that the Coalition for the ICC continued to be "respected as a player at the table, hopefully of equal value," and that the perspective of civil society actors that "are always seen [as] … almost fringe groups" is perceived as "an opinion provided in good faith with the greater objective [of] international justice and accountability."[145] As a result, this hesitancy to

[139] Interview with Kirsten Meersschaert, Director of Programs, Coalition for the ICC, 1 March 2016, phone interview.
[140] For example, interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[141] NGO representative A, interview conducted on 4 December 2015.
[142] Ibid.
[143] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 146.
[144] Kirsten Meersschaert, Director of Programs, Coalition for the ICC, interview conducted on 1 March 2016, phone interview.
[145] Ibid.

comment on ongoing proceeding at least partly seems to reflect some dependence of civil society representatives on the ICC to grant them access.

While partially depending on the court to provide them with access, NGO representatives often find themselves in the situation that they "advocate really on behalf of the court, a lot of the time, towards states."[146] In this sense, too, civil society actors assume a similar position to government officials of supportive states. And as with government officials promoting international criminal courts *vis-à-vis* more critical states, the NGO's commitment to emphasise a court's judicial independence can be understood as part of such supportive efforts. Indeed, as Leslie Vinjamuri argued, the idea of the independence of international criminal justice from international politics is a key element on which the ICC's authority among civil society actors is based.[147] Consequently, one civil society representative suggested that the development of jurisprudence becomes "a factor that affects our strategies," instead of being "something that … is susceptible to, or should be susceptible to" outside influence and lobbying.[148] Instead, this NGO representative explained that such efforts should be confined to formal mechanisms, such as amicus briefs.[149] And when discussing their relationship with the ICC's judiciary in general, a representative of the Coalition for the ICC emphasised that being careful to preserve the independence of the ICC's judiciary is "a baseline in our work."[150] Even with regard to the submission of potential amicus curiae briefs, which is an established procedure outlined in the Rome Statute, one NGO representative mentioned that civil society organisations writing these briefs would need to strike a "delicate balance," because "you want to influence or you think there is expertise that could be brought to the court, but at the same time you [want to] respect the independence [of the court]."[151] As a result, one NGO representative even described the situation as "iron[ic]" given that, even though the ICC's jurisprudence is "foundational," "we are not trying to influence [it]."[152]

[146] NGO representative A, interview conducted on 4 December 2015. Similarly with regard to their engagement with affected communities, Marlies Glasius observed that civil society actors can at times be in "an awkward position," especially as they have attempted to bridge the divide between these communities and the court and to supplement the ICC's often skeletal outreach programme. See Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," p. 511.
[147] See Vinjamuri, "The International Criminal Court and the Paradox of Authority," p. 277.
[148] NGO representative B, interview conducted on 7 December 2015.
[149] Ibid.
[150] Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, interview conducted on 18 April 2016, phone interview.
[151] NGO representative D, interview conducted on 10 December 2015.
[152] NGO representative B, interview conducted on 7 December 2015 (this NGO representative clarified that they are not attempting to influence jurisprudence though lobbying, but instead might use formal mechanisms, such as amicus briefs, even though they have rarely made use of this option so far).

At least in their public communications and in their self-representation in the interviews conducted for this study, civil society actors therefore seemed hesitant to offer their own interpretation of ICL. In the end, this decision reflects a position that aims at de-politicising the practices of judicial interpretation. As the representative of the Coalition for the ICC cited above explained regarding their relationship with the judiciary more generally,

> The relationship we have with the judiciary is different to the relationship we have with other ICC officials or state officials. The ICC Judges (as is the Prosecutor) are fully independent. We are particularly mindful to make sure that this principle of independence, both real and perceived, is strongly upheld. This independence is a baseline in our work. This is all the more important now at a time where the work of the Court is being increasingly politicised by its opponents.[153]

In the interviews conducted for this project, civil society actors consequently took great care to emphasise how their engagement with judges differed from the interactions with other parts of the ICC.[154]

This is not to suggest that civil society actors have remained uncritical of ICC as an institution. Especially the decisions of the Office of the Prosecutor have attracted substantial criticism by civil society groups.[155] However, with regard to the way in which international and hybrid criminal courts developed legal meaning, similarly to supportive states such as Germany and the United Kingdom refraining from voicing their own positions, civil society representatives have not assumed a more critical role. In addition to the stance taken by supportive states, the generally uncritical position of civil society actors toward the ICC's jurisprudence has contributed to the construction of a comparatively depoliticised judicial space.

This outcome was further aided by the time-constraints that civil society representatives working on international justice regularly face, and their focus on a specific set of issues within the court's work. When engaging with the judicial decisions of the ICC even as a way of strengthening their negotiation position *vis-à-vis* the court, civil society representatives face similar challenges to government officials: Several NGO representatives in The Hague stated that they would like to follow the ICC's jurisprudence more closely, but that they often do not

[153] Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, interview conducted on 18 April 2016, phone interview.
[154] Interviews with NGO representative B, 7 December 2015; Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[155] See Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," p. 497.

have the time to do so due to limited resources.[156] Instead, they may only be able to "follow the main trends."[157] And as one NGO representative explained, this has become a particularly pressing problem given that, while the number of situations under investigations increased since the establishment of the ICC, the budget available for NGOs focusing on international justice has remained the same or has even decreased.[158] Only a NGO representative working for the Coalition for the ICC stated that they have the capacity to follow all decisions and judgments published by the ICC.[159] Even this NGO representative, however, indicated that they would particularly focus on subject areas important for the work of the Coalition for the ICC and the majority of its more human-rights focused members, such as victim's rights, fair trial rights, and the rights of defendants.[160] Within these subject areas, NGO staff members in The Hague working on the ICC rely on each other, trusting that important jurisprudential developments would be problematised by different NGOs in a "very informal division of labour" depending on their distinctive interests and mandates.[161] As a result, even civil society representatives based in The Hague that specifically focus on the ICC do not usually have the time to follow all of the decisions produced by the court.

More recently, however, civil society's uncritical stance toward the ICC's jurisprudence might have begun to shift. Especially in the early years of the ICC, according to one NGO representative, civil society actors would see an additional benefit in making ICL jurisprudence available to a broader public without commenting on it, but mainly to contribute to a better understanding and awareness of these decisions.[162] However, some civil society representatives have moved beyond providing mere summaries of the ICC's decisions more recently, and added their own commentaries as well.[163] These commentaries have, for example, provided additional background on the cases or analysed a particular question across cases.[164] At the same time, according to Kirsten Meersschaert, the Coalition for the ICC specifically would attempt to remain a "neutral arbiter of information," even if some individuals themselves may

[156] Interviews with NGO representative D, 10 December 2015; NGO representative A, 4 December 2015; NGO representative B, 7 December 2015 (with regard to developments at the ASP).
[157] NGO representative D, interview conducted on 10 December 2015.
[158] Interviews with NGO representative A, 4 December 2015; NGO representative B, 7 December 2015.
[159] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview.
[160] Interview with Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, 18 April 2016, phone interview. Similarly interviews with NGO representative A, 4 December 2015; NGO representative B, 7 December 2015.
[161] Interview with NGO representative B, 7 December 2015.
[162] Ibid.
[163] Interview with NGO representative D, 10 December 2015.
[164] Ibid.

disagree with the decision.[165] The Coalition for the ICC would nevertheless publish critiques voiced by their civil society members, as long as these criticisms were clearly made under the name of that particular NGO. Such criticism, for example, pertained to the sentencing decision delivered in the *Lubanga* judgment, for which the sentence was criticised as too short.[166] Nevertheless, the Coalition for the ICC has at times even itself publicly criticised the ICC. However, these criticisms would usually focus on strategies and policies, instead of on judgments and decisions, especially given that it is one of the Coalition for the ICC's guiding principles not to position itself with regard to specific cases.[167] Even though civil society organisations would therefore criticise the outcome of particular cases or different policy decisions taken by, for example, the Office of the Prosecutor, they would not typically involve themselves in any in-depth discussion of how to interpret specific legal rules and principles of ICL or publicly criticise interpretations of specific provisions offered by the judges.

6.6. Legal Academics and the Practices of Interpretation in ICL

In addition to government officials and civil society representatives, a number of academics working on ICL also form part of either or both overlapping communities of practice. Interestingly, the ICC judge who excluded civil society representatives from an ICL expert community as pursuing a political agenda explicitly included academics focusing on ICL in that same community.[168] As mentioned above, judges, legal officers, and state and civil society representatives engage with academics at conferences and workshops that are regularly organised in The Hague and at universities in the vicinity.[169] Such a practice of exchanging ideas across institutional contexts at academic conferences can be traced back to the Rome negotiations and their preparation.[170] In recent years, such an exchange of ideas between academia and ICL practitioners has also increasingly taken place online through specialised blogs and websites. Through both types of interaction, face-to-face and online, the views of academics can become relatively influential. As a representative of the Coalition for the ICC observed,

[165] Kirsten Meersschaert, Director of Programs, Coalition for the ICC, interview conducted on 1 March 2016, phone interview.
[166] Ibid.
[167] Ibid.
[168] Interview with Judge Cuno Tarfusser, Judge at the ICC, 26 November 2015, The Hague. See also chapter six, p. 160.
[169] See chapter six, p. 158.
[170] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 150.

> The work of academics has a real influence on the reality of the Court by fuelling the discussions on how to improve the system. Blogs are being written by a number of academics and really can influence the discussion, and in a good way. To give you another example, many conferences on ICC-related issue[s] are organised or attended by academics in The Hague. These are important platforms for discussion that ICC judges, ICC officials, ICC staff and others attend.[171]

Such close interaction is intensified by the fact that the boundaries between academia and legal practice are often blurred, with individuals regularly moving between or combining both career paths.[172] Individuals with an extensive academic background already assumed key leadership roles during the negotiations of the ICC Statute at Rome. Legal academics were engaged by some countries, including Germany, as part of their delegations.[173] And as a particularly notable example, Cherif Bassiouni, an influential expert on ICL and President of the International Human Rights Law Institute at DePaul University, assumed key institutional roles during the negotiation process, including as Vice-Chair of the UN General Assembly's Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).[174] Indeed, individuals combining academic with civil society and, at times, even government roles was not an unusual practice during the ICC negotiations.[175] More generally, several of the lawyers (including academics) who had supported the establishment of international criminal courts and tribunals subsequently moved to take key positions within these institutions.[176] Partly as a consequence, several of the judges who have worked at these courts have an academic background.[177] At the same time, judges and legal officers at the *ad hoc* Tribunals and the ICC at times publish academic articles discussing legal questions in ICL,[178] and several

[171] Alix Vuillemin Grendel, Senior Legal Officer, Coalition for the ICC, interview conducted on 18 April 2016, phone interview.
[172] For an in-depth analysis, see Christensen, "Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field," pp. 18-25. See also Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law," pp. 8-9.
[173] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," p. 151.
[174] See Benedetti and Washburn, "Drafting the International Criminal Court: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," pp. 9-10.
[175] See Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court," pp. 144-45.
[176] See Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," *Annual Review of Political Science* 7 (2004): p. 348.
[177] According to a 2007 study, about a third of all international judges have an academic background (i.e., held tenured or associate – instead of, for example, visiting or adjunct – academic posts in the past). See Terris, Cesare, and Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, p. 20. Such a percentage seems to be lower at international criminal courts and tribunals. See Danner and Voeten, "Who Is Running the International Criminal Justice System?," pp. 53-64. See also Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law," p. 8.
[178] Interviews with Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague; legal officer E, legal officer at the ICTR, 5 December 2015, The Hague.

of the individuals who gained practical experience at these courts have later built on these insights when pursuing an academic legal career.[179] As a consequence, Leslie Vinjamuri and Jack Snyder observed how the direction and content of ICL and transitional justice scholarship has been shaped by a closely-knit relationship between international criminal courts and tribunals and academia.[180]

Scholarship on transitional and international criminal justice typically combines approaches from a variety of disciplines, including sociology, law, psychology, and political science, and IR. Some of this scholarship has resonated with a focus of civil society representatives on victim representation and affected communities, such as approaches that explore the impact of different types of mechanisms, including trials, on reconciliation processes.[181] In addition, scholars engaging with international and hybrid criminal courts from a more legal perspective have formed a distinct subgroup within this broader academic research field. This is the type of scholarship that allowed for a particularly high degree of overlap between academic work and practical experience at international and hybrid criminal courts, as it allowed individuals holding either (or both) types of positions to draw on the same body of knowledge, namely legal expertise. It is consequently the ICL expert community that is centred around international and hybrid criminal courts that encompasses a particularly high number of academics.

The scholarship produced by these more practice-oriented individuals is arguably distinct from the more critical approaches that have also been increasingly popular among legal academics working on ICL.[182] Frédéric Mégret has called this type of practice-oriented scholarship "accompaniment criticism": scholarship that may critically engage with the way in which the international criminal justice project is implemented, but that does not challenge the project as such.[183] Similarly, Vinjamuri and Snyder have described a "legalist approach" employed especially by scholars moving between academia and practice, which is based on the assumption of the (normative) importance of international criminal justice, and which favours

[179] Interview with legal officer D, legal officer at the ICC, 1 December 2015, The Hague. Similarly legal officer A, legal officer at the ICC, 24 November 2015, The Hague.
[180] See Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," pp. 346, 359. Note that Vinjamuri and Snyder mostly focus on political science approaches, even though they also include publications from neighbouring disciplines, such as law. See ibid., p. 346.
[181] This part of the literature is what Vinjamuri and Snyder call an "emotional psychology approach." See ibid., pp. 357-59.
[182] See, for example, Schwöbel, *Critical Approaches to International Criminal Law: An Introduction*.
[183] Mégret, "International Criminal Justice: A Critical Research Agenda," p. 18.

criminal trials over other accountability mechanisms, such as truth commissions.[184] These commitments therefore resonate strongly with the sense of purpose shared by an ICL expert community outlined above, indicating that this community in fact extends to this group of legal scholars.

This group of more practice-oriented legal scholars has played a comparatively prominent role within the interpretive practices of ICL. The dual role that some scholars played during the Rome negotiations has already been noted above. However, even prior to these negotiations, and also to the establishment of the *ad hoc* Tribunals, it was mainly legal scholars that interpreted the meaning and content of international crimes, and who explored the potential for creating a permanent criminal court.[185] Academic writing has also been among the sources judges and legal officers at international and hybrid criminal courts regularly refer to in their legal analysis. Indeed, within international jurisprudence on the law of war crimes, academic publications were third among the eight most frequently cited sources, following only references to international case law and international treaties and declarations.[186]

These more practice-oriented legal scholars that form part of the ICL expert community also engage in the practice of privileged precedent. After the creation of international and hybrid criminal courts starting in the early 1990s, a growing body of scholarship analysed the development of ICL through international jurisprudence.[187] And most of the core textbooks on ICL today heavily draw on the jurisprudence of especially the *ad hoc* Tribunals.[188] The underlying assumption for much of this scholarship, as well as for the format of these textbooks, is that it is essential for (new generations of) legal scholars to engage with the jurisprudence of these international criminal courts, and that these developments are relevant beyond individual courts and cases.[189] It should also be noted that within this particular subfield of ICL scholarship, the distinction between scholars and practitioners becomes particularly blurry, as it is often judges and legal officers who publish academic articles analysing

[184] See Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," pp. 346-52.
[185] See Christensen, "Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field," pp. 8-18.
[186] See Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law," pp. 12-13.
[187] See, for example, Darcy and Powderly, *Judicial Creativity at the International Criminal Tribunals*. See also, for example, Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War"; Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia," *Max Planck Yearbook of United Nations Law* 2 (1998).
[188] See, for example, Cassese, *International Criminal Law*.
[189] See similarly Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," p. 350 (discussing a "legalist approach").

international jurisprudence that they may have worked on themselves. Indeed, as a judge at the ICTY explained, they even encouraged a legal officer working on a particularly difficult issue for one of the cases before the court to later publish their legal research as an academic article.[190]

At least until recently, such scholarship analysing international jurisprudence has largely been supportive of international criminal courts, leading to a further depoliticization of a judicial space. Vinjamuri and Snyder observed that the shape such scholarship took was not only influenced by the significant interlinkages between academia and practice, but also by their shared normative commitments, such as a general preference for criminal trials.[191] Similarly, when analysing the development of international jurisprudence, this development was repeatedly heralded as "progressive."[192] Consequently, Vinjamuri most recently argued that legal scholars have thus formed part of a network of supportive "justice entrepreneurs," which allowed the ICC to assume legal authority beyond an audience of state parties and situation countries.[193]

This is not to suggest, however, that these legal scholars were entirely uncritical of the judicial decisions of international criminal courts and tribunals. In fact, they were the group of individuals within the ICL interpretive community most likely to criticise specific judgments or a specific line of reasoning, or even to voice doubts about whether such a judgment or legal interpretation constituted judicial activism.[194] Unlike especially government officials, it has therefore been mainly legal scholars who assumed the function within the interpretive process of evaluating jurisprudence as legally valid. However, as Frédéric Mégret observed, this type of scholarship would nevertheless often be based on the assumption that criticisms should be aimed at improving the judicial and interpretive process, and not constitute a fundamental critique of international judicial decision-making.[195]

[190] Interview with Judge D, Judge at the ICTY, 18 December 2015, The Hague.
[191] See Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice," p. 359.
[192] See, for example, Darcy, "Introduction," pp. 1-2. For a critical voice on this development, see Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, pp. 129-34.
[193] Vinjamuri, "The International Criminal Court and the Paradox of Authority," p. 279.
[194] See, for example, the critical academic debate on the ICTY's jurisprudence on the crime of terror or the use of customary law by the *ad hoc* Tribunals discussed in chapter four, pp. 120-22, 130.
[195] See Mégret, "International Criminal Justice: A Critical Research Agenda," p. 18.

Chapter 7

Conclusions

Legal meaning in ICL has been altered substantially through interpretation, also outside of formal treaty amendments. This thesis has shown that it was especially international courts that have shaped the meaning of the rules and principles of ICL through their jurisprudence. The potential for innovation in legal meaning has been theorised as rooted in shared professional assumptions on how international law should be interpreted, and how much room for creativity those interpreting international legal provisions may have within the process. In this context, I drew on legal theory to distinguish between three different, but overlapping 'triggers' of flexibility in legal interpretation, namely potential ambiguities as a result of imperfection in the phrasing of legal provisions, the character of specific types of legal provisions, and the structure of the legal reasoning process itself. Within the judicial development of the law of war crimes, it has been especially the repeated reliance of international and hybrid criminal courts on customary law as a particular type of legal provision that allowed for legal flexibility. But as the analysis of the development of the crime of genocide showed, even legal meaning of this relatively 'precise' and treaty-centred provision was altered notably. In this case, I argued that this potential for legal flexibility was at least partly rooted in shared assumptions on how much interpretive weight should be attributed to the negotiation documents of international treaties.

This analysis addressed one of the key conceptual challenges of IR's practice turn: its difficulty of accounting for creativity and change, instead of routine and stability. By analysing how professional assumptions on legal interpretation allowed for legal flexibility, I emphasised how also routinised interpretive practices may lead to legal content change. This research thereby resonates with Schindler and Wille's conceptualisation of change in international practices, which emphasised how the potential for innovation is inherent in the way in which practices are enacted and reconstituted, in their case due to disagreements on what it is that is repeated.[1] But instead of thinking about change within the international practices of legal interpretation themselves, this research demonstrated how, based on

[1] See Schindler and Wille, "Change in and through Practice: Pierre Bourdieu, Vincent Pouliot, and the End of the Cold War," pp. 331-39, 345-54.

professional assumptions shared among international lawyers that allowed for legal flexibility, the interpretive content reconstituted by these practices may develop, instead of the way in which they are enacted.

To understand how this potential for legal flexibility is filled, interpretive practices need to be seen as intertwined with the institutional context in which they are embedded. Specifically, the practice of privileged precedent has been pivotal within the interpretive practices of ICL. This practice emphasised how interpretations proposed by specific groups within this community – namely international courts – are more likely to be perceived as a reflection of the latest interpretive standard in ICL than others. As a consequence, the relatively high level of legal flexibility accorded to international courts in ICL was thus matched with a comparatively high level of interpretive authority, which places courts in a prominent position to shape legal meaning in ICL. But it is not the judicial character of these international courts in itself that accounts for this highly influential role within the interpretive process. As this research showed empirically, especially hybrid tribunals, including the SCSL and the ECCC, have not been accorded the same degree of interpretive authority as the *ad hoc* Tribunals or the ICC. This research therefore challenges a formal legal view suggesting that all international and hybrid courts have the same authority and influence due to their substantive focus and character as judicial institutions. Instead, it emphasised how interpretive authority is constructed and maintained by an expert community of international lawyers.

Through this analysis, I also traced the boundaries of the community of practice interpreting ICL, and how a comparatively depoliticised judicial space surrounding the judicial decisions of international criminal courts has been established.[2] The involvement of government actors in the construction of such a judicial space prevented them from voicing their own legal opinion within the interpretive process, with the consequence of turning government officials into passive observers of the at times substantial interpretive developments proposed by international criminal courts. Civil society representatives, in turn, typically focus on specific legal questions such as victim representation, which makes it less likely that they would actively contest international jurisprudence in ICL more generally. Consequently, international and hybrid criminal courts were able to develop legal meaning in ICL relatively autonomously. This research therefore resonates with Alter's view of

[2] I am grateful to Andrew Hurrell for his insightful comments on this aspect.

international courts as comparatively autonomous "trustees" that are required – and in turn require states – to justify their views as in line with accepted standards of legal interpretation.[3] But different from Alter's account, I have outlined some of the conditions required for the construction of such a relatively uncontroversial legal space. In the case of both state representatives and civil society officials, this study showed how interpretive practices intersect with – and are dependent on – political commitments, in this case the aim to strengthen international criminal courts. Due to this dependence, however, I also emphasised that such a comparatively depoliticised legal sphere has the potential to deteriorate over time. Based on this analysis, the following discussion will outline some of the broader implications of this work.

7.1. The Relevance of Legal Interpretation

Taken together, this research has provided an important account of how and under which conditions international courts were able to significantly develop legal meaning in ICL. It therefore contributes to recent research in the discipline of IL that has emphasised the prevalence of international judicial law-making and the role of interpretation in generating legal meaning.[4] At the same time, however, unlike more doctrinal approaches, I explored the relevance of judicial interpretation empirically to add to IR's understanding of the role of international courts and its conceptualisation of international law. While a focal point for academic debates in IL, in IR, legal interpretation remains undertheorized and empirically underresearched.[5] As arguably one of its most important implications, the study has therefore emphasised the relevance of research on the development of legal meaning through case law for an understanding of the role of international law in world politics, instead of an area that is best left to the expertise of international lawyers.

The study thereby responded to calls for additional IR research that considers the role of legal interpretation both from within the literature on international criminal justice and international law more generally.[6] Danner and Voeten, for example, argued that additional emphasis should be given to the creation of international law through jurisprudence in ICL,

[3] See Alter, "Agents or Trustees? International Courts in Their Political Context," p. 47.
[4] See, for example, Von Bogdandy and Venzke, *International Judicial Lawmaking*; Boyle and Chinkin, *The Making of International Law*, pp. 263-312.
[5] See similarly Dunoff and Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next," pp. 632, 637.
[6] See Danner and Voeten, "Who Is Running the International Criminal Justice System?," p. 71; Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," p. 135; Dunoff and Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next," p. 637.

as the jurisprudential development of legal provisions such as the definition of genocide might have an unforeseen impact on states in the long term.[7] Indeed, one way of thinking about substantial jurisprudential developments would be, as Danner and Voeten emphasised, to argue that such developments became possible as powerful states supporting international criminal justice did not envision to ever be subject to the jurisdiction of these courts themselves.[8] That there is at least the possibility that this expectation might not necessarily be fulfilled is illustrated by the ICC's preliminary examination of the situation in Iraq and potential crimes committed by UK nationals that, to this date, is still ongoing.[9] Even though it is unclear at this point whether an investigation will be opened in this case, it at least hints at the potential that nationals of one of the powerful supporters of the international criminal justice project might be prosecuted in the future. As a consequence, an awareness of potential future implications of the jurisprudence of international courts seems, at least to a certain extent, to be reflected in the statement of one of the FCO officers interviewed for this project. He indicated that legal staff at both the FCO and the British Ministry of Defence would be interested in the jurisprudence of international criminal courts, and especially in any interpretations that may broaden the applicability of international humanitarian law.[10]

By theorising legal interpretation as a set of international practices, this research also proposes an alternative epistemic (instead of rationalist and legal positivist) conceptualisation of international law and its effects. More specifically, I suggested a view of the effects of international law that focuses on a broader community of practice that may involve, but is not confined to, state officials, and that emphasises the importance of professional assumptions shared within this expert community. Much rationalist work that uses compliance as a way of analysing the relevance of international law in world politics underestimates the extent to which legal meaning might develop through interpretation after, for example, formal treaty negotiations are concluded.[11] In Koskenniemi's words, "*what there is to comply with in the first place*" is not part of this literature's ontology that mostly treats the normative content of the legal rules and principles that states are supposed to

[7] See Danner and Voeten, "Who Is Running the International Criminal Justice System?," p. 71.
[8] See ibid., p. 70. See also Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," pp. 682-83.
[9] See ICC, Preliminary Examination Iraq/UK, available online at https://www.icc-cpi.int/iraq (accessed 25 January 2017); ICC, Report on Preliminary Examination Activities (2015), 12 November 2015, pp. 7-10.
[10] Interview with Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague.
[11] For a more in-depth discussion, see Stappert, "Compliance and the Practices of Legal Interpretation in International Criminal Law," pp. 5-6.

comply with as stable.[12] This study is therefore also a response to Howse and Teitel's recent call for additional research "beyond compliance" that asks which developments occur once legal provisions are formally created, and that focuses on legal interpretation "as the manner in which international law creates effects in the world."[13] Similarly, it resonates with Brunnée and Toope's alternative account of compliance that goes beyond a view of international law that is rooted in legal positivism and rationalist approaches.[14]

Such an emphasis on the role of legal interpretation, combined with an epistemic conceptualisation of international law, leads to several important implications for an understanding of the following aspects: (a) the autonomy of international courts; (b) judicial law-making and the legitimacy of international courts; (c) the importance of precision when theorising international law; and (d) the broader political context in which international judges develop legal content. The remainder of this chapter will discuss each of these aspects in turn.

7.2. The Autonomy of International Courts to Develop Legal Meaning

Due to an absence of critical voices that might challenge their interpretations within the relevant communities of practice, international criminal courts have been able to gain a relatively high level of autonomy in their capacity to develop legal meaning. Indeed, while the ICC continued to rely on powerful states for support *vis-à-vis* more critical voices, it was this very support which – paradoxically – increased its autonomy when developing legal content through jurisprudence. More specifically, such a lack of critical engagement with the judgments of these courts by supportive states has been rooted in their political commitment to shield these courts against potential challenges by more critical states. And especially in relation to the jurisprudence of the *ad hoc* Tribunals and during the initial years after the Rome Statute came into force, the work of civil society organisations was also often confined to promoting the jurisprudence of these courts, instead of critically engaging with it.

These insights bear several important implications for an understanding of the autonomy of international courts. In Principal-Agent (P-A) theory, judicial activism is identified by

[12] Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," p. 17 (emphasis in original). See also Howse and Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," p. 135.
[13] "Beyond Compliance: Rethinking Why International Law Really Matters," p. 135.
[14] Brunnée and Toope, however, mainly focus on the relationship between compliance and obligation. See Brunnée and Toope, *Legitimacy and Legality in International Law: An Interactional Account*, pp. 88-125.

asking to what extent legal developments led to controversy among states, thereby glossing over the possibility that international courts may substantially develop legal provisions – and thereby wield high levels of interpretive power – without states criticising these developments as judicial activism.[15] Focusing on what I called 'silent' legal developments instead, the boundaries of what is perceived as judicial activism were theorised – and empirically analysed – as drawn by an epistemic community interpreting ICL, which may perceive substantial developments in legal meaning as uncontroversial and justified. By relying on states' challenges to legal interpretations as a way of thinking about judicial activism, P-A theory consequently underestimates the autonomy some international courts may have had to develop legal meaning without triggering much debate in the first place. This research therefore adds to Karen Alter's argument that, contrary to what conventional P-A approaches would expect, international courts are able to assume a relatively high level of autonomy – as "trustees," instead of as "agents."[16]

More specifically, what P-A theorists would conceptualise as monitoring mechanisms – that is, mechanisms that would alert states to instances of judicial activism and consequently trigger controversy among states – are relatively weak in ICL. Mathew McCubbins and Thomas Schwartz distinguished between two monitoring mechanisms, which Mark Pollack subsequently applied to European Community institutions such as the ECJ: "police-patrol oversight" requiring active monitoring by states themselves, and "fire-alarm oversight," a decentralised oversight system in which other actors, such as civil society groups, would alert states to potentially problematic decisions of the agent.[17] In the case of the development of ICL through international jurisprudence, one might object that both mechanisms indeed seem to be in place: While NGOs follow, at least to a certain extent, the jurisprudence of international courts, both the British and the German foreign ministry have internal reporting procedures in place that review judicial decisions. However, in the case of the jurisprudence of international criminal courts, these monitoring mechanisms seem to have been relatively ineffective. Due to a slightly different focus between the ICL expert community and the international justice community, in combination with their political commitment to support the work of these courts and promote their jurisprudence, civil society organisations are

[15] See chapter one, pp. 18-20.
[16] Alter, "Agents or Trustees? International Courts in Their Political Context."
[17] McCubbins and Schwartz, "Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms," in *Congress: Structure and Policy*, ed. McCubbins and Sullivan (Cambridge: Cambridge University Press), p. 427. See also Pollack, "Delegation, Agency, and Agenda Setting in the European Community," pp. 110-12.

relatively unlikely to challenge jurisprudential developments that fall outside their specific focus on issues such as victim participation. Besides, the considerable time-constraints legal officers at the German and British foreign ministries face when analysing these judgments in their reports, together with their general political commitment to support international criminal justice, also turned the active monitoring mechanisms of these states comparatively ineffective. As a consequence, even potentially controversial judicial developments might not be identified as such in the first place, but instead remain 'silent.'

The weakness of such oversight mechanisms in ICL thus questions how insightful it might be in this case to conceptualise the relationship between international courts and states as principals seeking to control their agents. Indeed, to better understand the implications of delegation to international courts, attention needs to be given to the micro-level practices of international law and legal interpretation.[18] At this point, however, it remains open to question whether this situation might currently be changing, and whether such a change would again strengthen the explanatory power of P-A approaches in ICL. At least until recently, compared with some of the more politicised aspects of international criminal courts (including the question of the immunity of heads of states and controversies regarding investigation and case selection), the development of legal meaning on the content of international crimes themselves seems to have remained relatively uncontroversial. However, this situation may have begun to change over the past few years. In 2013, considerable debate on the interpretation of aiding and abetting as a mode of liability followed the publication of a leaked letter by ICTY Judge Harhoff, suggesting that the interpretation previously taken by the ICTY Appeals Chamber reflected the political interests of the United States.[19] And especially the most recent developments at the court, namely press reports on the decisions of Burundi, South Africa, and Gambia to withdraw from the ICC, at least seem to have the potential of entailing noticeable consequences for the court.[20]

[18] I am grateful to Anette Stimmer for her insightful comments on this aspect.
[19] See chapter six, pp. 168-9.
[20] Note, however, that since this announcement, former Gambian President Yahya Jammeh has gone into exile. See "Yahya Jammeh Leaves the Gambia After 22 years of Rule," The Guardian, 21 January 2017, available online at https://www.theguardian.com/world/2017/jan/21/anxious-gambians-await-former-president-yahya-jammeh-departure (accessed 25 January 2017). See also "Burundi Politicians Back International Criminal Court Withdrawal," The Guardian, 12 October 2016, available online at https://www.theguardian.com/world/2016/oct/12/burundi-politicians-back-international-criminal-court-icc-withdrawal; "South Africa to quit International Criminal Court," The Guardian, 21 October 2016, available online at https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-

At this point, it remains an open question whether these recent developments will in fact function as an effective control mechanism that might curb the autonomy of the ICC. One possible scenario might therefore be that the specific constellation that allowed for a particularly high degree of autonomy for international criminal courts might be coming to a close. As an alternative view, however, following Alter's argument on international courts as "trustees," even this new development and an increasing politicisation of the process of judicial interpretation might still leave the court's autonomy relatively unaffected.[21] Indeed, as Alter explains, the decision of states to withdraw from a court might be their response to a situation in which control mechanisms have been ineffective.[22] In other words, while there might be more instances in the future in which the interpretations proposed by international criminal courts are challenged by states, this might simply entail that 'silent' changes become more visible, and not necessarily that states will in fact limit the court's autonomy based on these discussions.

7.3. The Legitimacy of International Courts and Judge-Made Law

Even though international courts have been able to significantly develop legal meaning in ICL, it is striking that legitimacy concerns have not been raised by the individuals interviewed for this project. After all, in the academic literature, an increasing prevalence of international judicial law-making has raised concerns on the legitimacy – and potential democratic deficit – of judge-made law and, in turn, of both international courts and global governance more broadly.[23] Von Bogdandy and Venzke, for example, argued that international courts are not subject to the same review processes as in the domestic context, in which the legislature may react relatively quickly to new jurisprudential developments and, if necessary, overturn them by passing new legislation.[24] In their view, at the international level, it is more politically costly and difficult for member states to agree upon an amendment of a court's legal framework. As a result, international courts are more detached from the political, democratic discourse within member states at the international

document-shows; "The Gambia joins African Queue to Leave ICC," BBC News, 26 October 2016, available online at http://www.bbc.co.uk/news/world-africa-37771592 (all accessed on 25 January 2017).
[21] See Alter, "Agents or Trustees? International Courts in Their Political Context."
[22] See ibid., p. 36.
[23] But see, for example, Glasius, "Do International Criminal Courts Require Democratic Legitimacy?," *European Journal of International Law* 3, no. 1 (2012).
[24] See Von Bogdandy and Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," pp. 20-23.

level, requiring these courts to take additional steps to bridge such a gap.[25] One may add to this discussion that even at the domestic level, also the flipside of this interplay between the judiciary and the legislature – namely the judicial review function of courts to overturn legislative acts as unconstitutional – has been criticised on the grounds that wide-ranging decisions on rights should be made by an elected legislature that is accountable to its constituency, and not by a small group of appointed judges.[26]

Despite these considerations, the prevalence of judge-made law in ICL did not seem to have been perceived as a legitimacy concern by practitioners. Following a well-known distinction between normative and sociological approaches to legitimacy,[27] this research therefore shed additional empirical light on the question of how far specific decisions of international institutions, in this case the development of ICL through the judgments of international courts, were perceived as legitimate by different actors. While these insights are broadly relevant to the more conceptual discussions on legitimacy in global governance outlined above, it therefore more directly contributes to research that investigates the legitimacy of international institutions and their decisions empirically.

The observation that legitimacy concerns challenging the development of ICL through jurisprudence were not raised during the interviews, however, should not be taken as indicating that the work of these courts – and especially of the ICC – has remained uncontroversial and was generally perceived as legitimate. One of the civil society representatives interviewed for this study, for example, explained that they disagreed with some of the decisions taken by these courts, such as the ICC's recent decision on how individuals may apply to participate in proceedings as victims.[28] However, these criticisms were directed at the content of specific decisions, not at the underlying premise that these decisions would set a precedent that develops ICL. In other words, the criticisms that were voiced did not concern the question of how far the creation of judge-made law – or judicial activism – may undermine a court's legitimacy. Indeed – and perhaps unsurprisingly so for a community that is very much linked to the human rights movement – questions of

[25] Ibid., pp. 4-5, 24. See also *In Wessen Namen? International Gerichte in Zeiten Globalen Regierens* (Berlin: Suhrkamp, 2014), pp. 30-34.
[26] See most notably Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): especially pp. 1391-92.
[27] See most recently Bexell, "Global Governance, Legitimacy and (De)Legitimation," *Globalizations* 11, no. 3 (2014): p. 291. For a critical perspective on such a dichotomy, see Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?," *Review of International Studies* 31, no. S1 (2005): p. 29.
[28] Interview with NGO representative D, 10 December 2015.

sovereignty as well as the democratic legitimacy of judicial decisions did not seem to play much of a role for discussions within the two overlapping communities of practice analysed here.[29]

At the same time, however, as mentioned above, Burundi, South Africa, and Gambia have most recently declared their decision to withdraw from the ICC. While at this point, it remains unclear what implications this development will have for the court, it illustrates a perceived lack of legitimacy: especially in the case of Gambia, Information Minister Sheriff Bojang was quoted as explicitly referring to criticisms of the court as biased against Africans when explaining Gambia's decision.[30] Amidst long-standing criticisms voiced in the context of the African Union,[31] these most recent developments emphasise the need to distinguish between what have been called different legitimacy "audiences" that may hold diverging views on the legitimacy of a particular international institution.[32] In this context, tracing the boundaries of different communities of practice may be one way of theorising – and empirically researching – these different legitimacy audiences.

At the same time, this research also foreshadows the potential benefits of distinguishing between different types of legitimacy that might be relevant across a variety of different legitimacy audiences. Within the two overlapping communities of practice described here, what Andrew Hurrell identified as legitimacy based on "specialised and specialist knowledge" arguably played a particularly significant role.[33] Outside these communities of practice, however, other types of legitimacy might have been much more important, as, for example, articulated in recent debates on the ICC and the criticism that the court is biased. Consequently, further research could shed additional light on different forms of legitimacy

[29] I am grateful for Nicole de Silva and Yuna Han for their insights and discussions on this aspect.
[30] See "The Gambia joins African Queue to Leave ICC," BBC News, 26 October 2016, available online at http://www.bbc.co.uk/news/world-africa-37771592 (accessed 25 January 2017). Note, however, that since this announcement, former Gambian President Yahya Jammeh has gone into exile. See "Yahya Jammeh Leaves the Gambia After 22 years of Rule," The Guardian, 21 January 2017, available online at https://www.theguardian.com/world/2017/jan/21/anxious-gambians-await-former-president-yahya-jammeh-departure (accessed 25 January 2017).
[31] For an in-depth discussion, see, for example, Obel Hansen, "Africa and the International Criminal Court," in *Handbook of Africa's International Relations*, ed. Murithi (Abingdon: Routledge, 2013), pp. 173-75; Mills, "'Bashir Is Dividing Us': Africa and the International Criminal Court," *Human Rights Quarterly* 34, no. 2 (2012).
[32] Bexell, "Global Governance, Legitimacy and (De)Legitimation," p. 291. See also Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?," p. 24. Marlies Glasius seems to implicitly distinguish between different legitimacy audiences, and namely between states and civil society organisations. See Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," p. 519.
[33] Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?," p. 22.

and legitimacy audiences addressed by international courts in their attempts to justify their decisions, and how legitimacy is created and sustained epistemically. Especially in the context of the fragmented character of international law, questions on how different legitimacy audiences and communities of practices overlap – or are in tension with each other – might develop into a particularly insightful research agenda.[34]

As a final aspect, the question remains whether this research has any implications for research on the independence of international courts. After all, it demonstrated how legal meaning was developed within a community of practice that includes not only judges and legal officers working for international courts, but that also cuts across institutional contexts and attributes an influential role to, for example, legal academics. In this context, however, it should be noted that the mere existence of a broader community of practice involved in the practices of the interpretation of ICL does not necessarily challenge the independence of international criminal courts. To give just one example, I have argued that legal academics might shape the development of legal meaning, among others by suggesting their interpretations of legal provisions that may then, in turn, be relied upon by international judges and therefore ultimately become part of the jurisprudence of international courts.[35] However, when discussing the relevance of scholarly writings for the development of jurisprudence, several of the judges and legal officers interviewed for this project either explicitly or implicitly suggested that academic writings are just one type of source they would consult,[36] and that they would indeed at times disagree with their interpretations.[37] Similarly, both German and British government officials interviewed for this project emphasised that it was of utmost importance for their engagement with these courts to respect the boundaries of judicial independence.[38]

Interestingly, these interviews indicated that, instead of challenging the legitimacy of the jurisprudence created by international courts, more supportive states seemed to be hesitant to criticise these developments (at least publicly) *because* such a challenge might undermine

[34] See Koskenniemi and Leino, "Fragmentation of International Law? Postmodern Anxieties." See also Bexell, "Global Governance, Legitimacy and (De)Legitimation," pp. 296-97.
[35] See also Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings in International Criminal Law."
[36] For example interviews with legal officer C, legal officer at the ICC, 27 November 2015, The Hague; legal officer H, legal officer at the ICTR, 26 January 2016, The Hague; Thomas Wayde Pittman, former Acting Head of Chambers, ICTY, 3 December 2015, The Hague.
[37] Interview with Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague. Similarly legal officer H, legal officer at the ICTR, 26 January 2016, The Hague.
[38] Interview Shehzad Charania, former Legal Adviser at the British Embassy in The Hague, 18 December 2015, The Hague. Similarly interview with AA officers A&B, 1 February 2016.

a court's legitimacy, given that the court might come to be perceived as less independent as a consequence. However, the ways in which these legitimacy concerns therefore intersect with the politics of delegation – and how political commitments of supportive states may be intertwined with the practices of legal interpretation – is an aspect that has remained comparatively underexplored in IR research.

7.4. Legal Interpretation and the Importance of Precision

By distinguishing between three 'triggers' of legal flexibility, I have also presented an alternative conceptualisation of international law and the potential for legal flexibility.[39] Specifically, this study theorised legal flexibility as not only confined to (intentional or unintentional) ambiguity within the phrasing of specific legal rules. Instead, legal latitude may also result from the character of different types of legal provisions – and customary law in particular – and the structure of the legal reasoning process itself. This latter type of flexibility, in turn, was seen as rooted in the specific interpretive techniques and professional assumptions that legal experts share, such as the way in which they refer to the negotiation documents of an international treaty.

Through this alternative account, I sought to go beyond legal positivism and the idea that interpretation (and adjudication) merely serves a clarifying function. Instead, this study showed how legal meaning was altered and produced epistemically in ICL, and how these legal developments bear a broader relevance even beyond the specific institutional context of international criminal courts. In turn, this conceptualisation of international law and legal interpretation has important implications for an understanding of the ability of states to shape how legal meaning is generated and developed internationally. First, it challenges the view that legal indeterminacy results from imprecision in the phrasing of legal rules as the result of incomplete contracting.[40] And second, this research emphasised that judicial flexibility forms an integral part of the adjudication process that is not necessarily controllable by states, but that bears significant weight within a broader expert community interpreting ICL.

This research therefore adds further doubt to the question of to what extent precision, in the way the concept has been used by rationalist scholars, may be a useful way of thinking about international law and its effects.[41] Jeffrey Legro, for example, argued that more specific

[39] I am grateful to Anette Stimmer for her insightful comments on this section.
[40] See Abbott and Snidal, "Hard and Soft Law in International Governance," p. 433.
[41] For a similar critique, see, for example, Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, pp. 32-34.

norms, understood as containing better-defined "guidelines for restraint," are more likely to be respected by states.[42] And precision, defined as "rules" that "unambiguously define the conduct they require, authorize, or proscribe," famously plays a pivotal role in the influential legalisation approach as one of the concept's dimensions (alongside obligation and delegation).[43] Indeed, when arguing that more imprecise rules lead to a higher level of delegation of authority to, for example, international courts, Kenneth Abbott et al. refer to the Rome Statute negotiations to illustrate how the United States sought to limit the level of authority delegated to the ICC by pressing for the inclusion of a more sophisticated outline of international crimes.[44]

This view, however, stands in stark contrast with the still prevailing perception among judges and legal officers at the ICC emphasising that they were frequently confronted with novel legal questions to which the ICC's legal framework did not provide a clear answer, especially in – but not confined to – the court's procedural law.[45] And as chapter three demonstrated, the crime of genocide as a legal provision that, while drafted carefully, has been developed significantly through judicial interpretation especially due to the relative age of the provision. Indeed, the type of legal flexibility discussed by the legalisation approach (as a lack of precision) only seems to form part of what I have described as the first 'trigger' of legal flexibility: While a focus on potential ambiguities reflects, at least to a certain extent, the idea that the phrasing of legal provisions shapes which interpretations will come to be seen as valid within an expert community, this argument does not entail that more 'precise' – or elaborate – legal frameworks necessarily curb legal flexibility. After all, all attempts to draft a legal provision as elaborately as possible do not account for what has been called unintended flexibility in this study, that is, the idea that opportunities for legal flexibility may occur as new situations arise over time, situations which the legislature drafting the provision had not been able to anticipate.

But also beyond questions of intentional or unintentional ambiguity within the phrasing of legal provisions, the study drew on legal theory to point to the limits of thinking about legal flexibility as 'gaps' in the law that need to be clarified. In particular, such a view does not

[42] Legro, "Which Norms Matter? Revisiting the 'Failure' of Internationalism," *International Organization* 51, no. 1 (1997): p. 34. See also ibid., p. 35.
[43] Abbott et al., "The Concept of Legalization," ibid. 54, no. 3 (2000): p. 401.
[44] See ibid., p. 415.
[45] Interviews with legal officer F, legal officer at the ICC, 5 December 2015, The Hague; Judge Howard Morrison, Judge at the ICTY and the ICC, 16 December 2015, The Hague (discussing the work of the ICC).

distinguish between different types of legal provisions that allow for diverging levels of legal flexibility, as exemplified by the distinction between legal rules and standards. Applied to international law – and as especially chapter four on the development of the law of war crimes illustrated – the character of especially customary law provisions arguably provides international judges with a particularly high level of legal discretion. This second 'trigger,' in other words, reinforced Martha Finnemore and Stephen Toope's criticism of the legalisation approach as focusing almost exclusively on treaty law, instead of international custom.[46]

Finally, I have also highlighted a third way of thinking about legal flexibility, that is, legal flexibility as rooted in the structure of legal reasoning itself. Consequently, this way of thinking about legal flexibility – and ultimately judicial discretion – applies to all types of legal provisions, regardless of treaty or customary law, and regardless of how 'precise' their phrasing might have been. Indeed, as Kratochwil explains, "what a term 'means' cannot be decided by simply looking at 'reality' … Instead, we have to relate these terms to the standards and practices in the various professions."[47] Even in situations in which a legal provision is phrased in a comparatively elaborate way, there is nevertheless room for legal flexibility not only due to the indeterminacy of the linguistic terms and concepts used, but also due to the factual indeterminacy that requires interpretation to identify which parts of reality – and whose reality – are deemed to be relevant for the specific case at hand.

7.5. Interpretive Power and the (De-)Construction of a Judicial Sphere

As a final set of implications, this research has also added new insights on which groups within the community of practice interpreting ICL have been accorded a particularly high degree of interpretive power. As a first aspect, it emphasised elements of hierarchy within the ICL interpretive community. In particular, the *ad hoc* Tribunals and the ICC have been more influential in shaping legal meaning in ICL than the ECCC and the SCSL, not only because of the number of judgments they delivered, but also due to the practices of how their interpretations were received within the interpretive community and by other international criminal courts and tribunals in particular. As one of its implications, these elements of hierarchy, distinguishing especially international from hybrid courts, challenge Anne-Marie Slaughter's influential account of an increasingly connected global judiciary.

[46] See Finnemore and Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization* 55, no. 3 (2001): pp. 746-47.
[47] Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, p. 33.

According to Slaughter, international and national judges have begun to establish a "system" that is "better described as a community of courts than as a centralized hierarchy" through increased levels of face-to-face meetings and cross-citations.[48] Contrary to this approach, my research showed how even within the relatively confined sphere of the international judiciary in ICL, judges working for some courts are better situated to influence legal meaning than others. And regarding more specifically legal scholarship, such an internal hierarchy also sheds doubt on recent contributions to the fragmentation debate in the discipline of IL arguing that an increase in judicial cross-citations between international courts may mitigate the effects of the fragmentation of international law on its substantive coherence.[49]

But this research also opens up a broader research project focusing on which groups become influential within communities of practice interpreting international law and why. Within the international judiciary, this aspect is mostly discussed under the headings of potential bias and judicial independence, and questions of whether, for example, judges are more likely to decide in favour of their own states.[50] However, an analysis of the community of practice interpreting international law more broadly – and as a community that stretches beyond the confines of the international judiciary – leads to questions on how interpretive power is distributed across institutional contexts, and which groups have been able to gain interpretive power within a particular institutional context and why. As just one aspect, I have argued that in ICL, legal academics have played an important role in shaping legal meaning. As a consequence, important new insights could be gained by comparing this analysis to other subfields of international law, such as international human rights law or the law of the sea.

At the same time, further research could shed additional light on which groups have been particularly influential within each of these institutional contexts. For example, in what she referred to as "norm entrepreneurialism" in ICL, Elies van Sliedregt has recently used the

[48] Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), p. 68. With regard to ICL specifically, see also Turner, "Transnational Networks and Internationl Criminal Justice," *Michigan Law Review* 105, no. 5 (2007): pp. 1015-17. Turner notices that in ICL, judicial dialogue can be "quite unidirectional," but then continues to provide reasons for why such a development is unproblematic normatively, instead of investigating this question empirically. Ibid., p. 1016.

[49] See Andenas and Bjorge, "Introduction: From Fragmentation to Convergence in International Law," pp. 4-7.

[50] See, for example, Danner and Voeten, "Who Is Running the International Criminal Justice System?," pp. 64-69; Mackenzie and Sands, "International Courts and Tribunals and the Independence of the International Judge," *Harvard International Law Journal* 44, no. 1 (2003).

example of German lawyers pushing for the incorporation of German law theories into forms of criminal responsibility in ICL to emphasise how some individuals within the broader group of legal academics may become particularly influential.[51] Therefore, while several important contributions have recently emphasised the role of a broader audience of international courts that includes civil society organisations, legal scholars, and bar associations in the construction of the authority of international courts such as the ICC,[52] important research remains to be done on which groups within this broader community, in addition to international courts, might have been able to gain interpretive power and why.

To elucidate the distribution of interpretive power across different groups within and outside the interpretive community, additional research could explore a broader set of cases, and consider especially the engagement of government officials beyond the United Kingdom and Germany with the interpretive community of ICL. The two case studies on the interpretive practices of German and British government officials suggested that the ways in which government lawyers engage with jurisprudence is shaped by both political commitments regarding the international criminal justice project, as well as the extent to which these lawyers share and re-enact professional assumptions on the interpretive process in practice, including on the interpretive authority of international courts. As a particularly fruitful research agenda, further studies investigating a broader set of cases could examine the extent to which changing political commitments may alter internal reporting practices, or whether a relatively rigid bureaucratic structure may allow these practices to persist.[53] The United States, which, due to the complexity of the case, has not been examined in this study, might be a particularly insightful case in this regard. Especially due to a substantial change of policy towards the ICC at the end of the Bush administration,[54] such research could trace the extent to which interpretive practices within the US Department of State – as well as the engagement of US government lawyers with the ICL interpretive community more generally – have changed over time.

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[51] See Van Sliedregt, "Editorial: International Criminal Law: Over-Studied and Underachieving?," *Leiden Journal of International Law* 29, no. 1 (2016): p. 3.
[52] See Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016): pp. 10-11; Vinjamuri, "The International Criminal Court and the Paradox of Authority," ibid.: p. 279; Alter, *The New Terrain of International Law: Courts, Politics, Rights*, pp. 53, 63.
[53] I am grateful to Andrew Hurrell for his thoughts on this particular aspect.
[54] See, for example, Groenleer, "The United States, the European Union, and the International Criminal Court: Similar Values, Different Interests?," *International Journal of Constitutional Law* 13, no. 4 (2016): pp. 929-30, 31-32.

In addition, further research could explore more generally how state representatives that are more removed from the interpretive community of ICL engage with the jurisprudence of international criminal courts. More specially, such research could examine interpretive practices of government lawyers working for states that do not maintain a diplomatic presence in The Hague. In the context of the ICC, such a study would concentrate on the annual meetings of the ASP to explore the extent to which and how these government lawyers may interact with a The-Hague-based interpretive ICL community, and ask whether, alternatively, they may form part of the boundaries of such a community that is less densely structured, and which does not necessarily involve regular face-to-face meetings. As a result of such a more limited engagement with the ICL interpretive community, however, it is expected that these government lawyers would be less likely to accord the decisions of international criminal courts with a particularly high level of interpretive authority.

This type of research also opens up a more critical research agenda exploring processes of exclusion from, and inclusion into, the interpretive practices of ICL shaping how interpretive power is distributed. In particular, states without the financial resources to maintain a permanent presence in The Hague are less able to shape the more institutionalised interpretive process, for example through participation in the ASP's standing working groups. And indeed, by being more removed from the ICL interpretive community, they might also be less able to challenge the construction of a comparatively depoliticised judicial space by supportive states and civil society groups. Consequently, such research could explore how less supportive states might resist the comparatively high level of interpretive authority international criminal courts were provided with, and seek to challenge the construction of such a more depoliticised judicial space.

In this context, one might expect state representatives to either engage with the ICL interpretive community to increase their own influence within it, or to challenge the community from outside.[55] Kenya's 2015 initiative to propose a specific interpretation of Rule 68 of the Rules of Procedure and Evidence at the ASP might be understood as an attempt to shape legal meaning while still using the institutional framework of the ASP to propose such an interpretation. At the same time, as the interpretation suggested by Kenya favoured Kenyan Vice-President William Samoei Ruto in the then ongoing case against him, Kenya's proposal was harshly criticised especially by civil society representatives as an

[55] I am grateful to Nicole De Silva for her insightful comments on this aspect.

attempt to undermine the independence of the court.[56] While still using the ASP's institutional framework, Kenya's proposal might thus be seen as a challenge to the construction of a more depoliticised judicial sphere. The recent decisions of Burundi, South Africa, and Gambia to withdraw from the ICC then went a step further, and in themselves seem to declare the irrelevance of the interpretive practices of an expert ICL community to the practices of these states.

As a final aspect, this research emphasised how the boundaries of a more depoliticised judicial sphere are constructed through practice, and how this process in itself is political.[57] This work, in turn, outlines a potential broader research project on the conditions under which such dividing lines between a more political and a more legal sphere are constructed, and the circumstances under which they might deteriorate. In her work on international courts as "trustees," for example, Alter describes the creation of a legal sphere characterised by what she calls "rhetorical and legitimacy politics" in which actors attempt to convince judges using legal, instead of political arguments, or else seek to depict the interpretation proposed by international courts as contradicting professional legal standards.[58] Theorising international judges as part of an interpretive community validating their interpretations resonates closely with this view. However, instead of seeing the existence of such a legal sphere as determined by the delegation of decision-making power to a specific type of institution, namely international courts,[59] further research could explore how such a comparatively depoliticised legal sphere is constructed and maintained in practice after this initial delegation process, and under which conditions it might be challenged.

Comparative studies across different international courts might be particularly insightful here. While a particularly dominant characteristic of ICL, a substantial development of legal meaning through jurisprudence has been observed in a variety of legal subfields.[60] Especially the jurisprudence of the European Court of Human Rights, for example, has

[56] See, for example, amnesty international, "Kenya: State Parties Run Dangerously Close to Interfering with the ICC's Independence," 27 November 2015, available online at https://www.amnesty.org/en/latest/news/2015/11/kenya-state-parties-run-dangerously-close-to-interfering-with-the-iccs-independence/ (accessed 25 January 2017).

[57] I am grateful to Andrew Hurrell for his insightful comments that shaped my thinking on the remainder of this section.

[58] Alter, "Agents or Trustees? International Courts in Their Political Context," pp. 42-43, 47.

[59] See ibid., pp. 38-41, 44-48.

[60] See, for example, Schill, "System-Building in Investment Treaty Arbitration and Lawmaking."; Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," ibid.; Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights," ibid.

arguably become more politicised in recent years: As Michael O'Boyle, Deputy Registrar of the ECtHR observed, the "Court has never, in its 50-year history, been subject to such a barrage of hostile criticism" as in 2011 in the United Kingdom in the context of the controversy on prisoners' voting rights.[61] In the United Kingdom, such criticism culminated in very prominent calls to withdraw from the court that were voiced by, for example, former Home Secretary (and current Prime Minister) Theresa May.[62] Consequently, a comparative analysis could highlight how the boundaries between what is perceived as a technical legal, instead of political question by government lawyers may have shifted over time, and how this process may affect what Alter has called "rhetorical politics."[63] Especially in the context of the most recent developments at the ICC, including Kenya's proposed interpretation of Rule 68, it remains an open question whether – and with which consequences – such boundaries might be in the process of being re-drawn at the moment.

While this project has focused on ICL, this research may therefore generate important insights beyond the confines of this specific legal subfield.[64] Von Bogdandy and Venzke, for example, have described international judicial law-making as "omnipresent" across different branches of international law.[65] Apart from ICL, international courts and tribunals have substantially changed legal provisions in subfields as diverse as international investment law and international human rights law, suggesting that international judicial law-making has become an intrinsic characteristic of the contemporary international legal system.[66] Such research therefore suggests that further, and potentially comparative inquiries into the epistemic basis of judicial interpretation, and the conditions under which such developments have been possible, would be highly insightful also beyond the subfield of ICL.

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[61] O'Boyle, "The Future of the European Court of Human Rights," *German Law Journal* 12, no. 10 (2011): p. 1862. See also *Hirst v. The United Kingdom (No. 2)*, ECtHR App. No. 74025/01, 6 October 2005; Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," pp. 170-71.

[62] See, for example, Anushka Asthana and Rowena Mason, "UK must leave European Convention on Human Rights, Says Theresa May," The Guardian, 25 April 2016, available online, http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum (accessed 25 January 2017).

[63] Alter, "Agents or Trustees? International Courts in Their Political Context," p. 42.

[64] I am grateful to Nicole De Silva for her comments on this aspect.

[65] Von Bogdandy and Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," p. 5.

[66] See, for example, Schill, "System-Building in Investment Treaty Arbitration and Lawmaking," ibid., ed. Von Bogdandy; Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," ibid.; Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights," ibid.

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8.2. Cited Cases and Decisions

8.2.1. International Criminal Tribunal for the Former Yugoslavia (ICTY)

Aleksovski Trial & Appeals Judgment

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Krnojelac Trial Judgment

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Limaj Trial Judgment

Prosecutor v. Limaj, Bala, and Musliu, Trial Chamber Judgment, Case No. IT-03-66-T, 30 November 2005.

Lukić Trial Judgment

Prosecutor v. Lukić and Lukić, Trial Chamber Judgment, Case No. IT-98-32/1-T, 20 July 2009.

Martić Trial Judgment

Prosecutor v. Martić, Trial Chamber Judgment, Case No. IT-95-11-T, 12 June 2007.

Milošević Trial & Appeals Judgment

Prosecutor v. Milošević, Trial Chamber Judgment, Case No. IT-98-29/1-T, 12 December 2007.

Prosecutor v. Milošević, Appeals Chamber Judgment, Case No. IT-98-29/1-A, 12 November 2009.

Milutinović Trial Judgment

Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić, Trial Chamber Judgment, Case No. IT-05-87-T, 26 February 2009.

Mrkšić Trial Judgment

Prosecutor v. Mrkšić, Radić, and Šljivančanin, Trial Chamber Judgment, Case No. IT-95-13/1-T, 27 September 2007.

Naletilić Trial Judgment

Prosecutor v. Naletilić and Martinović, Trial Chamber Judgment, Case No. IT-98-34-T, 31 March 2003.

Popović Trial Judgment

Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero and Pandurević, Trial Chamber Judgment, Case No. IT-05-88-T, 10 June 2010.

Prlić Trial Judgment

Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić, Pušić, Trial Chamber Judgment, Case No. IT-04-74-T, 29 May 2013.

Simić Trial Judgment

Prosecutor v. Simić, Tadić, and Zarić, Trial Chamber Judgment, Case No. IT-95-9-T, 17 October 2003.

Stakić Trial & Appeals Judgment

Prosecutor v. Stakić, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003.

Prosecutor v. Stakić, Appeals Chamber Judgment, Case No. IT-97-24-A, 22 March 2006.

Stanišić and Simatović Trial & Appeals Judgment

Prosecutor v. Stanišić and Simatović, Trial Chamber Judgment, Case No. IT-03-69-T, 30 May 2013.

Prosecutor v. Stanišić and Simatović, Appeals Chamber Judgment, Case No. IT-03-69-A, 9 December 2015.

Stanišić and Župljanin Trial Judgment

Prosecutor v. Stanišić and Župljanin, Trial Chamber Judgment, Case No. IT-08-91-T, 27 March 2013.

Tadić Trial & Appeals Judgment

Prosecutor v. Tadić, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997.

Prosecutor v. Tadić, Appeals Chamber Judgment, Case No. IT-94-1-A, 15 July 1999.

Prosecutor v. Tadić, Decision on the Defence Motion on Jurisdiction, Trial Chamber, Case No. IT-94-1, 10 August 1995.

Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1, 2 October 1995.

Tolimir Trial & Appeals Judgment

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Prosecutor v. Tolimir, Appeals Chamber Judgment, Case No. IT-05-88/2-A, 8 April 2015.

8.2.2. International Criminal Tribunal for Rwanda (ICTR)

Akayesu Trial & Appeals Judgment

Prosecutor v. Akayesu, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998.

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Bagosora Trial Judgment

Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Trial Chamber Judgment, Case No. ICTR-98-41-T, 18 December 2008.

Gacumbtsi Trial Judgment

Prosecutor v. Gacumbtsi, Trial Chamber Judgment, Case No. ICTR-2001-64-T, 17 June 2004.

Gatete Trial Judgment

Prosecutor v. Gatete, Trial Chamber Judgment, Case No. ICTR-2000-61-T, 31 March 2011.

Kajelijeli Trial Judgment

Prosecutor v. Kajelijeli, Trial Chamber Judgment, Case No. ICTR-98-44A-T, 1 December 2003.

Kalimanzira Trial Judgment

Prosecutor v. Kalimanzira, Trial Chamber Judgment, Case No. ICTR-05-88-T, 22 June 2009.

Kamuhanda Trial Judgment

Prosecutor v. Kamuhanda, Trial Chamber Judgment, Case No. ICTR-95-54A-T, 22 January 2004.

Kanyarukiga Trial Judgment

Prosecutor v. Kanyarukiga, Trial Chamber Judgment, Case No. ICTR-2002-78-T, 1 November 2010.

Karemera Trial Judgment

Prosecutor v. Karemera and Ngirumpatse, Trial Chamber Judgment, Case No. ICTR-98-44-T, 2 February 2012.

Kayishema Trial Judgment

Prosecutor v. Kayishema and Ruzindana, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999.

Muhimana Trial Judgment

Prosecutor v. Muhimana, Trial Chamber Judgment, Case No. ICTR-95-1B-T, 28 April 2005.

Musema Trial Judgment

Prosecutor v. Musema, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000.

Muvunyi Trial Judgment

Prosecutor v. Muvunyi, Trial Chamber Judgment, Case No. ICTR-2000-55A-T, 12 September 2006.

Ndahimana Trial Judgment

Prosecutor v. Ndahimana, Trial Chamber Judgment, Case No. ICTR-01-68-T, 30 December 2011.

Ndindabahizi Trial Judgment

Prosecutor v. Ndindabahizi, Trial Chamber Judgment, Case No. ICTR-2001-71-I, 15 July 2004.

Ndindiliyimana Trial Judgment

Prosecutor v. Ndindiliyimana, Bizimungu, Nzuwonemeye and Sagahutu, Trial Chamber Judgment, Case No. ICTR-00-56-T, 17 May 2011.

Nizeyimana Trial Judgment

Prosecutor v. Nizeyimana, Trial Chamber Judgment, Case No. ICTR-2000-55C-T, 19 June 2012.

Ntagerura Trial Judgment

Prosecutor v. Ntagerura, Bagambiki and Imanishimwe, Trial Chamber Judgment, Case No. ICTR-99-46-T, 25 February 2004.

Ntawukulilyayo Trial Judgment

Prosecutor v. Ntawukulilyayo, Trial Chamber Judgment, Case No. ICTR-05-82-T, 3 August 2010.

Nyiramasuhuko Trial Judgment

Prosecutor v. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje, Trial Chamber Judgment, Case No. ICTR-98-42-T, 24 June 2011.

Nzabonimana Trial Judgment

Prosecutor v. Nzabonimana, Trial Chamber Judgment, Case No. ICTR-98-44D-T, 31 May 2012.

<u>*Renzaho* Trial Judgment</u>

Prosecutor v. Renzaho, Trial Chamber Judgment, Case No. ICTR-97-31-T, 14 July 2009.

<u>*Rutaganda* Trial Judgment</u>

Prosecutor v. Rutaganda, Trial Chamber Judgment, Case No. ICTR-96-3-T, 6 December 1999.

<u>*Semanza* Trial Judgment</u>

Prosecutor v. Semanza, Trial Chamber Judgment, Case No. ICTR-97-20-T, 15 May 2003.

<u>*Seromba* Trial & Appeals Judgment</u>

Prosecutor v. Seromba, Trial Chamber Judgment, Case No. ICTR-2001-66-I, 13 December 2006.

Prosecutor v. Seromba, Appeals Chamber Judgment, Case No. ICTR-2001-66-A, 12 March 2008.

<u>*Setako* Trial Judgment</u>

Prosecutor v. Setako, Trial Chamber Judgment, Case No. ICTR-04-81-T, 25 February 2010.

8.2.3. International Criminal Court (ICC)

<u>*Bemba* Trial Judgment</u>

Prosecutor v. Bemba Gombo, Trial Chamber Judgment, Case No. ICC-01/05-01/08, 21 March 2016.

<u>*Katanga* Trial Judgment</u>

Prosecutor v. Katanga, Trial Chamber Judgment, Case No. ICC-01/04-01/07, 7 March 2014.

<u>*Lubanga* Trial & Appeals Judgment</u>

Prosecutor v. Lubanga Dyilo, Trial Chamber Judgment, Case No. ICC-01/04-01/06, 14 March 2012.

Prosecutor v. Lubanga Dyilo, Appeals Chamber Judgment, Case No. ICC-01/04-01/06 A 5, 1 December 2014.

Prosecutor v. Lubanga Dyilo, Decision on the Confirmation of Charges, Pre-Trial Chamber, Case No. ICC-01/04-01/06, 29 January 2007.

Ruto and Sang Decision

Prosecutor v. Ruto and Sang, Decision on Defence Applications for Judgments of Acquittal, Trial Chamber, Case No. ICC-01/09-01/11, 5 April 2016.

8.2.4. Special Court for Sierra Leone (SCSL)

Brima Trial & Appeals Judgment

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Prosecutor v. Brima, Kamara, and Kanu, Appeals Chamber Judgment, Case No. SCSL-2004-16-A, 22 February 2008.

Fofana Trial & Appeals Judgment

Prosecutor v. Fofana and Kondewa, Trial Chamber Judgment, Case No. SCSL-04-14-T, 2 August 2007.

Prosecutor v. Fofana and Kondewa, Appeals Chamber Judgment, Case No. SCSL-04-14-A, 28 May 2008.

Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 31 May 2004.

Sesay Trial & Appeals Judgment

Prosecutor v. Sesay, Kallon, and Gbao, Trial Chamber Judgment, Case No. SCSL-04-15-T, 2 March 2009.

Prosecutor v. Sesay, Kallon, and Gbao, Appeals Chamber Judgment, Case No. SCSL-04-15-A, 26 October 2009.

Taylor Trial Judgment

Prosecutor v. Taylor, Trial Chamber Judgment, Case No. SCSL-03-01-T, 18 May 2012.

Prosecutor v. Charles Taylor, Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceeding, Appeals Chamber, Case No. SCSL-2003-01-PT, 12 March 2007.

8.2.5. Extraordinary Chambers in the Courts of Cambodia (ECCC)

Kaing Trial Judgment

Prosecutor v. Kaing alias Duch, Trial Chamber Judgment, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010.

8.2.6. International Court of Justice (ICJ)

Bosnia Genocide Judgment

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

Croatia v. Serbia Judgment

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Reservations to the Genocide Convention Advisory Opinion

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8.2.7. European Court of Human Rights (ECtHR)

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Annex A: List of Interviews

For this project, 28 elite interviews have been conducted with former and current judges and legal officers (Chambers) at the ICTY, the ICTR, and the SCSL, as well as with NGO staff and representatives of the German and British foreign offices (for a full list, see below). Five additional interviews have only been referred to for background information. All interview notes are on file with author.

Note on anonymization: At the beginning of each interview, interviewees were presented with the choice of either having the interview anonymised or attributed to them by name. Consequently, synonyms have been used for interviewees who preferred to not have the interview attributed to them. However, due to the relatively small and dense character of the community researched in this study, two additional steps have been taken to ensure anonymization. First, while both current and former judges and legal officers, NGO representatives, and foreign office staff have been interviewed, such a distinction between current and former representatives was not included in the references. For the same reason, the place at which interviews with NGO representatives and government officials were conducted has been omitted.

Name/Synonym	**Position**	**Date**	**Place**
NGO representative A	NGO representative	04/12/2015	-
NGO representative B	NGO representative	07/12/2015	-
NGO representative C	NGO representative	09/12/2015	-
NGO representative D	NGO representative	10/12/2015	-
Kirsten Meersschaert	Director of Programs, Coalition for the ICC/International Coalition for the Responsibility to Protect	01/03/2016	Phone interview
Alix Vuillemin Grendel	Senior Legal Officer, Coalition for the ICC (The Hague)	18/04/2016	Phone interview
AA officers A & B	Members of the Legal Section at the German Embassy	01/02/2016	-
Shehzad Charania	Former Legal Adviser at the British Embassy in The Hague	18/12/2015	The Hague
FCO officer B	FCO officer	12/02/2016	-
FCO officer C	FCO legal adviser	19/04/2016	-
EEAS officer	EEAS officer	27/01/2016	-
Judge B	Judge, ICTY	09/12/2015	The Hague
Judge C	Judge, ICTR	15/12/2015	Phone interview
Judge D	Judge, ICTY	18/12/2015	The Hague

Judge E	Judge, SCSL	06/02/2016	Kingston Upon Thames
Judge F	Judge, ICTR	25/11/2015	Phone interview
Judge Piotr Hofmański	Judge, ICC	27/11/2015	The Hague
Judge Cuno Tarfusser	Judge, ICC	26/11/2015	The Hague
Judge Howard Morrison	Judge, ICTY/ICC	16/12/2015	The Hague
Legal officer A	Legal officer, ICC	24/11/2015	The Hague
Legal officer C	Legal officer, ICC	27/11/2015	The Hague
Legal officer D	Legal officer, ICC	01/12/2015	The Hague
Legal officer E	Legal officer, ICTR	05/12/2015	The Hague
Legal officer F	Legal officer, ICC	05/12/2015	The Hague
Legal officer G	Legal officer, ICTY	10/12/2015	The Hague
Legal officer H	Legal officer, ICTR	26/01/2016	The Hague
Legal officer I	Legal officer, ICTR	15/12/2015	The Hague
Thomas Wayde Pittman	Former Acting Head of Chambers, ICTY	03/12/2015	The Hague

Figure 4: List of Interviews Conducted for this Study

Annex B: Analysed Cases and Code Selection

The coding strategy used in this project proceeded in two steps: For the study's qualitative analysis, I first identified the sections within all judgments rendered by the ICTY, the ICTR, the ICC, the SCSL, and the ECCC that interpreted the crime of genocide and the law of war crimes. The analysis also included one relevant ECtHR judgment, and four ICJ judgments and advisory opinions. For the quantitative analysis, I subsequently coded all references included in the sections of these judgments interpreting the law of war crimes. The following discussion explains how codes were selected, and provides a full list of all judgments and coding categories used in the analysis.

10.1. Qualitative Analysis

To trace how legal meaning developed over time across judgments, I began by coding any discussion of the law of war crimes and the crime of genocide, as opposed to a discussion of the facts. Such a discussion of legal provisions was usually included in these judgments under the heading "applicable law." However, it was at times difficult to distinguish between a discussion of the applicable law and a discussion of the facts of the case. In these instances, the decision of whether a section was coded or not was based on the overall focus of the section in question, and whether it more served to discuss legal provisions or the facts of the case. Should such an assessment nevertheless remain difficult, I included the section into the analysis. I also did not code any discussion of the applicable forms of liability, such as aiding and abetting, as these discussions were beyond the scope of this study's focus on the law of war crimes and the crime of genocide. Finally, I did not include a summary of the arguments of the parties into the sections coded for this project, as they reflected the legal views of the Defence and the Prosecution, but not of the judges.

Within these sections, I first analysed about 10 judgments for the law on war crimes and the crime of genocide respectively to develop my coding categories. Based on this initial analysis, I adjusted the coding categories developed so far across these initial 10 judgments. I then used these categories for my subsequent analysis of all remaining judgments. Coding categories focused on the legal aspects that were repeatedly mentioned within judicial discussions of the crime of genocide and the law of crimes, often under a distinct heading. As they served the purpose of structuring the analysis, coding categories were left comparatively broad to allow for potential developments over time. In cases of overlap, some sections have been coded as falling under more than one coding category.

	Name	**Type**	**Date**	**Court**
1.	*Reservations to the Genocide Convention*	Advisory Opinion	28/05/1951	ICJ
2.	*Application of the Genocide Convention*	Preliminary Objections	11/07/1996	ICJ
3.	*Akayesu*	Trial	02/09/1998	ICTR
4.	*Kayishema*	Trial	21/05/1999	ICTR
5.	*Rutaganda*	Trial	06/12/1999	ICTR
6.	*Jelisic*	Trial	14/12/1999	ICTY
7.	*Musema*	Trial	27/01/2000	ICTR
8.	*Kayishema*	Appeals	01/06/2001	ICTR
9.	*Jelisic*	Appeals	05/07/2001	ICTY

10.	*Krstic*	Trial	02/08/2001	ICTY
11.	*Ntakirutimana*	Trial	12/02/2003	ICTR
12.	*Rutaganda*	Appeals	26/05/2003	ICTR
13.	*Stakic*	Trial	31/07/2003	ICTY
14.	*Kajelijeli*	Trial	01/12/2003	ICTR
15.	*Nahimana*	Trial	03/12/2003	ICTR
16.	*Kamuhanda*	Trial	22/01/2004	ICTR
17.	*Ntagerura*	Trial	25/02/2004	ICTR
18.	*Krstic*	Appeals	19/04/2004	ICTY
19.	*Gacumbtsi*	Trial	17/06/2004	ICTR
20.	*Niyitegeka*	Appeals	09/07/2004	ICTR
21.	*Ndindabahizi*	Trial	15/07/2004	ICTR
22.	*Brdanin*	Trial	01/09/2004	ICTY
23.	*Ntakirutimana*	Appeals	13/12/2004	ICTR
24.	*Blagojevic*	Trial	17/01/2005	ICTY
25.	*Muhimana*	Trial	28/04/2005	ICTR
26.	*Semanza*	Appeals	20/05/2005	ICTR
27.	*Kamuhanda*	Appeals	19/09/2005	ICTR
28.	*Simba*	Trial	13/12/2005	ICTR
29.	*Stakic*	Appeals	22/03/2006	ICTY
30.	*Gacumbtsi*	Appeals	07/07/2006	ICTR
31.	*Mpambara*	Trial	11/09/2006	ICTR
32.	*Muvunyi*	Trial	12/09/2006	ICTR
33.	*Krajisnik*	Trial	27/09/2006	ICTY
34.	*Seromba*	Trial	13/12/2006	ICTR
35.	*Bosnia Genocide*	Final Judgment	26/02/2007	ICJ
36.	*Jorgic v. Germany*	Final Judgment	12/07/2007	ECtHR
37.	*Simba*	Appeals	27/11/2007	ICTR
38.	*Nahimana*	Appeals	28/11/2007	ICTR
39.	*Karera*	Trial	07/12/2007	ICTR
40.	*Seromba*	Appeals	12/03/2008	ICTR
41.	*Nchamihigo*	Trial	12/11/2008	ICTR
42.	*Bikindi*	Trial	02/12/2008	ICTR
43.	*Bagosora*	Trial	18/12/2008	ICTR
44.	*Zigiranyirazo*	Trial	18/12/2008	ICTR
45.	*Rukundo*	Trial	27/02/2009	ICTR
46.	*Kalimanzira*	Trial	22/06/2009	ICTR
47.	*Renzaho*	Trial	14/07/2009	ICTR
48.	*Nsengimana*	Trial	17/11/2009	ICTR
49.	*Popovic*	Appeals	30/01/2015	ICTY
50.	*Croatia v. Serbia*	Final Judgment	03/02/2015	ICJ
51.	*Tolimir*	Appeals	08/04/2015	ICTY
52.	*Karadzic*	Trial	24/03/2016	ICTY

Figure 4: List of All Judgments Interpreting the Crime of Genocide Included in the Analysis

Note that the following judgments were not available at the time this analysis was conducted, and were therefore not considered (crime of genocide): *Niyitegeka* Trial Judgment, 16/05/2003, ICTR; *Bagilishema* Trial Judgment, 07/06/2001, ICTR.

	Name	**Trial/Appeals**	**Date**	**Court**
1.	*Tadic*	Trial	07/05/1997	ICTY
2.	*Akayesu*	Trial	02/09/1998	ICTR
3.	*Delalic*	Trial	16/11/1998	ICTY
4.	*Furundzija*	Trial	10/12/1998	ICTY
5.	*Kayishema*	Trial	21/05/1999	ICTR
6.	*Aleksovski*	Trial	25/06/1999	ICTY
7.	*Tadic*	Appeals	15/07/1999	ICTY
8.	*Rutaganda*	Trial	06/12/1999	ICTR
9.	*Jelisic*	Trial	14/12/1999	ICTR
10.	*Kupreskic*	Trial	14/01/2000	ICTY
11.	*Musema*	Trial	27/01/2000	ICTR
12.	*Blaskic*	Trial	03/03/2000	ICTY
13.	*Aleksovski*	Appeals	24/03/2000	ICTY
14.	*Delalic*	Appeals	20/02/2001	ICTY
15.	*Kunarac*	Trial	22/02/2001	ICTY
16.	*Kordic*	Trial	26/02/2001	ICTY
17.	*Akayesu*	Appeals	01/06/2001	ICTR
18.	*Krstic*	Trial	02/08/2001	ICTY
19.	*Kvocka*	Trial	02/11/2001	ICTY
20.	*Krnojelac*	Trial	15/03/2002	ICTY
21.	*Kunarac*	Appeals	12/06/2002	ICTY
22.	*Vasiljevic*	Trial	29/11/2002	ICTY
23.	*Ntakirutimana*	Trial	21/02/2003	ICTR
24.	*Naletilic*	Trial	31/03/2003	ICTY
25.	*Semanza*	Trial	15/05/2003	ICTR
26.	*Rutaganda*	Appeals	26/05/2003	ICTR
27.	*Stakic*	Trial	31/07/2003	ICTY
28.	*Simic*	Trial	17/10/2003	ICTY
29.	*Galic*	Trial	05/12/2003	ICTY
30.	*Kamuhanda*	Trial	22/01/2004	ICTR
31.	*Ntagerura*	Trial	25/02/2004	ICTR
32.	*Brdanin*	Trial	01/09/2004	ICTY
33.	*Kordic*	Appeals	17/12/2004	ICTY
34.	*Blagojevic*	Trial	17/01/2005	ICTY
35.	*Strugar*	Trial	31/01/2005	ICTY
36.	*Kvocka*	Appeals	28/02/2005	ICTY
37.	*Halilovic*	Trial	16/11/2005	ICTY
38.	*Limaj*	Trial	30/11/2005	ICTY
39.	*Hadzihasanovic*	Trial	15/03/2006	ICTY
40.	*Stakic*	Appeals	22/03/2006	ICTY
41.	*Naletilic*	Appeals	03/05/2006	ICTY
42.	*Oric*	Trial	30/06/2006	ICTY
43.	*Krajisnik*	Trial	27/09/2006	ICTY
44.	*Galic*	Appeals	30/11/2006	ICTY
45.	*Brdanin*	Appeals	03/04/2007	ICTY
46.	*Martic*	Trial	12/06/2007	ICTY
47.	*Fofana*	Trial	02/08/2007	SCSL
48.	*Mrksic*	Trial	27/09/2007	ICTY
49.	*Milosevic*	Trial	12/12/2007	ICTY
50.	*Brima*	Appeals	22/02/2008	SCSL
51.	*Haradinaj*	Trial	03/04/2008	ICTY
52.	*Fofana*	Appeals	28/05/2008	SCSL
53.	*Boskoski*	Trial	10/07/2008	ICTY
54.	*Strugar*	Appeals	17/07/2008	ICTY

55.	*Delic*	Trial	15/09/2008	ICTY
56.	*Bagosora*	Trial	18/12/2008	ICTR
57.	*Milutinovic*	Trial	26/02/2009	ICTY
58.	*Sesay*	Trial	02/03/2009	SCSL
59.	*Renzaho*	Trial	14/07/2009	ICTR
60.	*Lukic*	Trial	20/07/2009	ICTY
61.	*Sesay*	Appeals	26/10/2009	SCSL
62.	*Milosevic*	Appeals	12/11/2009	ICTY
63.	*Setako*	Trial	25/02/2010	ICTR
64.	*Boskoski*	Appeals	19/05/2010	ICTY
65.	*Popovic*	Trial	10/06/2010	ICTY
66.	*Kaing*	Trial	26/07/2010	ECCC
67.	*Dordevic*	Trial	23/02/2011	ICTY
68.	*Gotovina*	Trial	15/04/2011	ICTY
69.	*Ndindiliyimana*	Trial	17/05/2011	ICTR
70.	*Nyiramashuhuko*	Trial	24/06/2011	ICTR
71.	*Perisic*	Trial	06/09/2011	ICTY
72.	*Setako*	Appeals	28/09/2011	ICTR
73.	*Bagosora*	Appeals	14/12/2011	ICTR
74.	*Karemera*	Trial	02/02/2012	ICTR
75.	*Lubanga*	Trial	14/03/2012	ICC
76.	*Taylor*	Trial	18/05/2012	SCSL
77.	*Nizeyimana*	Trial	19/06/2012	ICTY
78.	*Haradinaj (retrial)*	Trial	29/11/2012	ICTY
79.	*Tolimir*	Trial	12/12/2012	ICTY
80.	*Stanisic and Zupljanin*	Trial	27/03/2013	ICTY
81.	*Prlic*	Trial	29/05/2013	ICTY
82.	*Stanisic and Simatovic*	Trial	30/05/2013	ICTY
83.	*Dordevic*	Appeals	27/01/2014	ICTY
84.	*Ndindiliyimana*	Appeals	11/02/2014	ICTR
85.	*Katanga*	Trial	07/03/2014	ICC
86.	*Karemera*	Appeals	29/09/2014	ICTR
87.	*Lubanga*	Appeals	01/12/2014	ICC
88.	*Popovic*	Appeals	30/01/2015	ICTY
89.	*Nyiramashuko*	Appeals	14/12/2015	ICTR
90.	*Bemba*	Trial	21/03/2016	ICC
91.	*Karadzic*	Trial	42/03/2016	ICTY
92.	*Seselj*	Trial	31/03/2016	ICTY

Figure 5: List of All Judgments Interpreting the Law of War Crimes Included in the Analysis

Note that the following judgments were not available at the time this analysis was conducted, and were therefore not considered (law of war crimes): *Bagilishema* Trial Judgment, 07/06/2001, ICTR; *Niyitegeka* Trial Judgment, 16/05/2003, ICTR; *Zigiranyirazo* Trial Judgment, 08/12/2008, ICTR; and *Brima* Trial Judgment, 20/06/2007, SCSL.

1. **Actus reus**
   - causing serious bodily or mental harm
   - conditions calculated to bring physical destruction
   - forcible transfer
   - general actus reus, e.g. ethnic cleansing, cultural genocide
   - killing
   - preventing birth
2. **Specific intent**
   - definition specific intent
   - determining intent

- discriminatory intent
- individual victim
- intent to destroy group in whole or in part as such
  - destruction group as such
  - in whole or in part, e.g. geographical scope
  - individual perpetrator
  - plan to destroy
- motive
- premeditation
- protected groups

3. Statute

- definition genocide
- legal status definition genocide
- origin definition genocide

Figure 6: List of All Coding Categories Developed for the Crime of Genocide

1. Common Article 3 and Additional Protocol II

- AP II_general application
- CA3 APII_acts of terrorism
- CA3_APII_collective punishments
- CA3_APII_cruel treatment, torture, mutilation, and corporal punishment
- CA3_APII_inhumane treatment
- CA3_APII_murder
- CA3_APII_outrages upon personal dignity, humiliating and degrading treatment, rape, enforced prostitution, indecent assault
- CA3_APII_pillage
- CA3_APII_sentences and execution without judgment
- CA3_APII_taking of hostages
- CA3_APII_threats of prohibited acts
- CA3_APII_general application

2. General application requirements

- Character of the armed conflict_int'l v. internal
- Existence of an armed conflict
- General considerations armed conflict
- Nexus between acts and an armed conflict
- Protected persons
- Protected property

3. Grave breaches of the Geneva Conventions

- Gb_compelling a POW or civilian to serve in the forces of a hostile power
- Gb_depriving a POW or civilian of the rights of fair and regular trial
- Gb_extensive destruction and appropriation of property
- Gb_general application
- Gb_taking civilians as hostages
- Gb_torture and inhumane treatment, including biological experiments
- Gb_unlawfl deportation or confinement of a civilian
- Gb_wilful killing and murder

4. Other serious violations of IHL

- Osv_attacks against civilians
- Osv_attacks against humanitarian assistance and peacekeeping mission personell
- Osv_conscripting or enlisting children under the age of 15 years
- Osv_general application

5. Violations of the laws and customs of war

- L&c_attack of undefended towns
- L&c_cruel treatment and torture
- L&c_enslavement

- L&c_general application
- L&c_inflicting terror upon civilians
- L&c_outrages upon personal dignity including rape
- L&c_plunder
- L&c_principle of discrimination
- L&c_prohibition of reprisals
- L&c_seizure or destruction of cultural or educational institutions
- L&c_taking of hostages
- L&c_unlawful labour
- L&c_violence to life and persons
- L&c_wanton destruction of cities
- L&c_weapons calculated to cause unnecessary suffering
- L&c_wilful killing and murder

Figure 7: List of All Coding Categories Developed for the Law of War Crimes

10.2. Quantitative Analysis

The quantitative analysis of the interpretive sources cited built on this initial qualitative analysis, as it only considered sections that were previously identified as interpreting the law of war crimes. Coding categories were again developed on the basis of an initial sample of six judgments. Within the sections of these judgments interpreting the law of war crimes, I coded every source cited in the judgment's footnotes, distinguishing between, for example, citations to military manuals and to ICTY Appeals judgments. If one source – such as one specific judgment – was cited repeatedly, each of these repetitions was coded separately. In cases in which one citation indirectly referred to another, the source that was cited indirectly was only coded if it contained a separate citation, such as when explicitly referring to a specific paragraph. For example, for the reference 'Trial Judgment A, para. 43, referring to Appeals Judgment B, para. 90,' both citations would be coded individually. Based on this analysis, I developed a dataset containing over 50 different kinds of interpretive sources.

1. **Academic sources**
   - Academic source_domestic law
   - Academic source_international law
   - Dictionary
   - Domestic law commentary
   - Treaty commentary
2. **Case-related documents**
   - Application victim representation
   - Decision same case
   - Evidence
   - Indictment of case at hand
   - Prosecution_defence documents
   - Trial judgment same case
3. **Domestic legal systems**
   - Domestic court judgment
   - Domestic law
   - Domestic military tribunal
   - Military manual
   - Other domestic documents
4. **International courts and tribunals**
   - Amicus curiae brief
   - Dissenting opinion ICJ, ICTR, ICTY, SCSL
   - ECtHR judgment

- IACHR judgment
- ICC Appeals judgment
- ICC decision
- ICC Trial judgment
- ICJ Advisory Opinion
- ICJ or PCIL judgment
- ICTR Appeals judgment
- ICTR decision
- ICTR Trial judgment
- ICTY Appeals judgment
- ICTY decision
- ICTY Trial judgment
- Indictments of other cases
- Nuremberg judgments
- Other court documents
- SCSL Appeals judgment
- SCSL decision
- SCSL indictment
- SCSL Trial judgment
- STL decision
- Tokyo trials judgement
- Trial hearing documents

5. **International treaties and declarations**
    - Ad hoc tribunal statute
    - International declaration
    - International treaty
    - Nuremberg law
    - Own court statute and rules
    - Rome statute and rules
    - SCSL Statute
    - Unilateral statement
6. **Other international bodies**
    - Claims commissions
    - EU law document
    - European Commission on HRs documents
    - European Committee on the Prevention of Torture documents
    - ICRC publication
    - ILC document
    - Inter-American Commission on HRs report
    - League of Nations
    - Other international bodies
7. **Travaux**
    - ICC negotiation documents
    - Treaty negotiation documents
8. **UN**
    - Other UN documents
    - UN expert report
    - UN GA Resolution
    - UN SC Resolution
    - UN SG report
    - UN treaty body documents

Figure 8: List of All Coding Categories Identifying Specific Interpretive Sources