Interpretation and Domestic Law: The Prosecution of Rape at the International Criminal Tribunal for the former Yugoslavia

Daniel Peat*

In the late spring of 1992, the Secretary-General of the UN delivered a report to the Security Council that captured the attention of the international community. Yugoslavia – from which Croatia and Slovenia had declared independence less than a year before – had fallen into a pitched civil war fuelled by bitter ethnic tensions between Serb, Croat, and Muslim communities. Nestled in the centre of the former unified state, the nascent republic of Bosnia-Herzegovina became the scene of atrocities not seen since the Second World War. The gravity of such acts led to the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which was intended to facilitate the restoration of peace and stability by providing a forum in which those guilty of grave breaches of international humanitarian law could be brought to justice. However, faced with a vague statute and little precedent to draw upon, the judges of the ICTY were left with little choice but to innovate in order to adjudicate upon such crimes. One of the ways that they bridged the gap between vague rules and concrete application was by using domestic law to interpret international crimes and rules of procedure and evidence. Yet despite the frequency with which the Tribunal adopted this technique, it remains "the most varied and unexplained" use of any interpretive aid by the Tribunal. This article aims to address some of those unanswered questions.

* Associate Legal Officer, International Court of Justice. This article is based on a lecture that I delivered at Thompson Rivers University on 21 March 2016. I would especially like to thank Professors Lorne Neudorf and Robert Diab for their assistance in organizing my visit and for their hospitality throughout my stay. I would also like to thank Jennifer Cavenagh and Giulia Pinzauti for their comments on previous drafts of this article.

I. Introduction

In the late spring of 1992, the Secretary-General of the UN delivered a report to the Security Council that captured the attention of the international community. Yugoslavia – from which Croatia and Slovenia had declared independence less than a year before – had fallen into a pitched civil war fuelled by bitter ethnic tensions between Serb, Croat, and Muslim communities. Nestled in the centre of the former unified state, the nascent republic of Bosnia-Herzegovina became the scene of atrocities not seen since the Second World War.[1] The Serbs of Bosnia-Herzegovina, the Secretary-General reported, were making a "concerted effort … to create 'ethnically pure' regions" in the Republic,[2] employing tactics that "were as brutal as they were effective".[3] Reports on the situation documented the grim scene: the killing or displacement of 2.1

1. At the time of the reference on independence, the Bosnian population consisted of 43% Slavic Muslims, 31% Serbs and 17% Croats: Virginia Morris & Michael P Scharf, *An Insider's Guide to the International Criminal Tribunal for The Former Yugoslavia* (Ardsley, NY: Transnational Publishers, 1995) vol 1 at 19.
2. *Further Report of the Secretary-General pursuant to Security Council Resolution 749 (1992)*, UNSCOR, 1992, UN Doc S/23900 at para 5.
3. Morris & Scharf, *supra* note 1 at 22.

million Bosnians by the summer of 1993,[4] the systematic rape of women and girls, and the operation of 715 detention centres in which rape, torture, and execution was commonplace.[5]

The gravity of such acts led to the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or the "Tribunal"),[6] which came into existence on 25 May 1993.[7] It was hoped that the Tribunal would facilitate the restoration of peace and stability in the area, providing a forum in which those guilty of grave breaches of international humanitarian law could be brought to justice.[8] As the first international criminal tribunal to be established since the Nuremberg and Tokyo international military tribunals in the wake of the Second

4. *Ibid*.
5. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UNSCOR, 1994, UN Doc S/1994/674 at paras 216-53 [*Final Report pursuant to Res 780*].
6. See Theodor Meron, "Rape as a Crime under International Humanitarian Law" (1993) 87 American Journal of International Law 424.
7. *Resolution 827 (1993)*, SC Res 827, UNSCOR, 48th Sess, UN Doc S/Res/827 (1993) [*Resolution 827*]. On the appropriateness of establishing the *ad hoc* tribunals by Security Council resolution, as opposed to convention or resolution of the UN General Assembly, see Morris & Scharf, *supra* note 1 at 40-48; Mahmoud Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Ardsley, NY: Transnational Publishers, 1996) at 220; *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UNSCOR, 1993, UN Doc S/25704 at paras 19-29 [*Report pursuant to SC Res 808*]; Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (PhD Thesis, University of Leiden, 2006) [unpublished] at 43-49.
8. *Resolution 808 (1993)*, SC Res 808, UNSCOR, 1993, UN Doc S/RES/808; *Resolution 827*, *ibid*.

World War,[9] the ICTY was faced with a statute that contained "not much more than the skeletons of crimes" within its jurisdiction,[10] as well as procedural rules that had scant precedent to draw on.[11] By establishing an international tribunal "on the basis of a laconic statute, a brief preparatory report and a few pages of debates, the Security Council left the judges with little choice but to innovate".[12]

In an attempt to bridge the gap between vague rules and concrete application, the Tribunal had frequent recourse to domestic law in the interpretation of its *Statute* and *Rules of Procedure and Evidence* ("*RPE*").[13] This article examines one such use – the Tribunal's use of domestic law to interpret the crime of rape in the cases of *Furundžija* and *Kunarac* – demonstrating the indelible effect that this reasoning has had on the jurisprudence of the *ad hoc* tribunals and on international criminal law more generally.

This article is divided into three Parts following the Introduction.

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9. The International Military Tribunal at Nuremberg was established in August 1945 by virtue of a conventional agreement, *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (The London Agreement)*, 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945). The International Military Tribunal for the Far East, on the other hand, was established by military order in January 1946: *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 19 January 1946, 4 Bevans 20.
10. Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005) at 5.
11. *Prosecutor v Dusko Tadic*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) at para 20.
12. William A Schabas, "Interpreting the Statutes of the Ad Hoc Tribunals" in Lal Chand Vohrah et al, eds, *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) 847 at 848.
13. "Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25594 (1993) at para 11. Interestingly, in the process of the drafting of the Report of the Secretary-General on the ICTY, Canada suggested explicitly that reference could be made to appropriate national law, if necessary, for interpretive purposes.

In Part II, the historical and legal background of the ICTY is described. Part III details the use of domestic law by the trial and appeals chambers of the ICTY to interpret the crime of rape in the cases of *Furundžija* and *Kunarac,* highlighting the importance of these judgments to contemporary international criminal law. Part IV asks whether the main principled argument against the Tribunal's judgments – based on the principle of legality – has any purchase, before questioning the validity of methodological critiques that have been levelled at the Tribunal. It concludes by suggesting that domestic law was used as the interpretative aid of last resort, which allowed the Tribunal to adjudicate upon crimes within its subject-matter jurisdiction in the absence of all other relevant material.

The jurisprudence of the ICTY provides a rich repository of instances in which domestic law has been invoked to interpret international crimes or rules of procedure.[14] Yet despite the frequency with which the Tribunal adopted this technique, it remains "the most varied and unexplained" use of any interpretive aid by the Tribunal.[15] This article aims to address some of those unanswered questions.

II. A Brief History of the ICTY

In the wake of the Secretary-General's Report regarding the situation in the former Yugoslavia, the Security Council formed a Commission of Experts tasked with investigating potential grave breaches of

14. *Prosecutor v Dusko Tadic*, *supra* note 11 at paras 38-42, 47-48, 60-71; *Prosecutor v Kupreskic*, IT-95-16-A, Appeals Chamber Judgment (23 October 2001) at paras 34-41 (when reliance on visual identification of the perpetrator is unsafe (art 21)); *Prosecutor v Limaj et al*, IT-03-66-T, Trial Chamber Judgment (30 November 2005) at para 17 (when reliance on visual identification of the perpetrator is unsafe (art 21)); *Prosecutor v Naletilic*, IT-98-34-A, Appeals Chamber Judgment (3 May 2006) at n 465 (the extent to which defendants have a right to confront witnesses under art 21(4)(e)); *Prosecutor v Strugar*, IT-01-42-A, Appeals Chamber Judgment (17 July 2008) at paras 52-54 (on the requirement to be fit to stand trial "implicit in Articles 20 and 21 of the Statute").

15. Lena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2014) at 65.

international humanitarian law.[16] The Commission documented and collated information relevant to the purported breaches which ultimately totalled over 65,000 pages.[17] The Interim Report of the Commission also noted the possibility of establishing an international tribunal, adding to an increasing number of voices that had made similar recommendations in late 1992 and early 1993.[18] On the same day that the Commission's Interim Report was released, the Conference on Security and Co-operation in Europe circulated a report examining the possibility of establishing an international tribunal at a meeting of the UN Human Rights Commission in Geneva,[19] with France and Italy making their own

16. *Resolution 780 (1992)*, SC Res 780, UNSCOR, 1992, UN Doc S/RES/780. The Commission of Experts was formed, *inter alia*, on the recommendation of the newly appointed Special Rapporteur for the Human Rights Commission: *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of the Commission Resolution 1992/S-1/1*, UNSCOR, 1992, Annex, UN Doc S/24516 at para 70.
17. *Final Report pursuant to Res 780*, *supra* note 5 at para 20.
18. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UNSCOR, 1993, Annex I, UN Doc S/25274 at para 74. "The Commission was led to discuss the idea of the establishment of an ad hoc international tribunal … The Commission observes that such a decision would be consistent with the direction of its work"; See also *Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of the Commission Resolution 1992/S-1/1 and Economic and Social Council decision 1992/305* annexed to *The situation of human rights in the territory of the former Yugoslavia – Note by the Secretary-General*, UNSCOR, 1992, UN Doc A/47/666 at para 140; *Report of the Secretary-General on the Activities of the International Conference on the former Yugoslavia*, UNSCOR, 1993, UN Doc S/25221 at para 9.
19. Morris & Scharf, vol 2, *supra* note 1 at 211-310.

proposals for an international tribunal shortly thereafter.[20]

As the impetus for the creation of an international tribunal amongst UN member states and civil society mounted, the Security Council passed Resolution 808 on 22 February 1993, which provided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia", as well as formally requesting the Secretary-General of the UN to submit a report on "all aspects of this matter, including specific proposals [regarding the Tribunal]". Taking into account suggestions from member states, the Report of the Secretary-General proposed a statute for an *ad hoc* tribunal in May 1993, which was unanimously approved by the Security Council in Resolution 827 (1993).[21] The ICTY was created as a subsidiary body of the Security Council under the authority vested in the Security Council by Chapter VII of the *UN Charter*.[22]

Of particular importance is paragraph 29 of the Report of the Secretary-General, which stated that:

> [i]t should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international

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20. "Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25266 (1993); "Letter Dated 18 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25300 (1993). In the following four months, a further 13 proposals for an international tribunal were circulated by states, international organizations and non-governmental organizations; for a full list including reproductions of the proposals, see Morris & Scharf, vol 2, *ibid* at 209-480.

21. *Report pursuant to SC Res 808*, *supra* note 7; *Resolution 827*, *supra* note 7.

22. *Report Pursuant to SC Res 808*, *ibid* at para 28 [emphasis added]. By determining that this situation [the conflict in the former Yugoslavia] continues to *constitute a threat to international peace and security*, the Security Council framed the situation so that it came within its primary responsibility under art 24(1) of the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) and enabled measures to be taken under Chapter VII; *Resolution 827*, *ibid*.

> humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[23]

The applicable law of the Tribunal was hence that which was "beyond any doubt part of customary law".[24] Such an approach was necessary, in the view of the Report, to accord with the principle of *nullum crimen sine lege*[25] – also referred to by some commentators as the "principle of legality" – whereby actions cannot be criminalised unless a clear and specific criminal prohibition existed at the time of the alleged violation.[26] The Report recommended that the Tribunal have subject-matter jurisdiction over grave breaches of the *Geneva Conventions* of 1949 which constituted "the core of customary international law applicable in international armed conflicts";[27] violations of the law or customs of war, as reflected in the 1907 *Hague Convention (IV)* and annexed regulations;[28] genocide, as codified in the 1948 *Genocide Convention*;[29] and crimes against humanity, encompassing murder, torture, and rape.[30] Jurisdiction over these matters was enshrined in Articles 2 to 5 of the *Statute of the International Criminal Tribunal of the former Yugoslavia* ("*Statute of the ICTY*"). In the *Statute*

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23. *Report pursuant to SC Res 808*, *ibid*. See also *Prosecutor v Hadžihasanović*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003) at para 55. Matters of personal, territorial, temporal and concurrent jurisdiction are not pertinent for the subject matter of this article, and will not be outlined here. For more information, see Morris & Scharf, *supra* note 1 at 89-136.
24. *Report pursuant to SC Res 808*, *ibid* at para 34.
25. *Ibid*. The limitation of the law applicable by the Tribunal to customary law was "so that the problem of adherence of some but not all States to specific conventions does not arise"; the Secretary-General did, however, consider that "some of the major conventional humanitarian law has become part of customary international law" at paras 33-35.
26. See Antonio Cassese et al, *Cassese's International Criminal Law*, 3d (Oxford: Oxford University Press, 2013) at 22 *et seq*.
27. *Report pursuant to SC Res 808, supra* note 7 at para 37.
28. *Ibid* at paras 41-44.
29. *Ibid* at paras 45-46.
30. *Ibid* at paras 47-49.

of the ICTY, domestic law is only mentioned explicitly in relation to sentencing and is only applicable insofar as it constitutes "general practice regarding prison sentences in the courts of the former Yugoslavia".[31]

Aside from contextualising the cases that will be examined in the following pages, this brief detour into the history of the ICTY demonstrates one important point. The subject-matter jurisdiction of the ICTY was based on what the Secretary-General considered to be extant and partially codified rules of customary international law.[32] These rules may have been, and ultimately proved to be, insufficiently defined for application. However, that does not detract from the fact that the normative authority of the legal rules had been recognised,[33] obviating the need to establish the legal proposition as a formally valid rule of international law prior to its application. This supports the view (which is

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31. *Updated Statute of the International Criminal Tribunal for the former Yugoslavia*, (September 2009), art 24(1) [*Statute of the ICTY*]. *Cf.* the proposals by the Conference on Security and Co-operation in Europe, Amnesty International, and Slovenia, which all permitted – to a greater or lesser extent – application of domestic law; Morris & Scharf, *supra* note 1 at 369-70. A similar demarche led to the creation of the International Criminal Tribunal for Rwanda eighteen months later, the *Statute* of which is largely based on the *Statute of the ICTY* with only minor modifications; *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UNSCOR, 1995, UN Doc S/1995/134 at para 9; Virginia Morris & Michael P Scharf, *The International Criminal Tribunal for Rwanda* (Ardsley, NY: Transnational Publishers, 1998) vol 1 at n 466; William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 30.

32. In the case of art 3 of the *Statute of the ICTY*, *ibid*, "Violations of the laws or customs of war", the *Statute* enumerates a non-exhaustive list of prohibited acts, leaving the door open for the ICTY to ascertain novel custom. A similar non-exhaustive list is included in the *Statute of the International Criminal Tribunal for Rwanda,* UNSCOR 49th Sess, UN Doc S/Res/955 (1994) art 4.

33. See UNSCOR, 1993, 3217th Mtg, UN Doc S/PV.3217 [provisional], statement by the representatives of the United Kingdom, New Zealand and Brazil to the Security Council, reiterating that the ICTY is limited to applying extant legal norms [UNSCOR 3217th Mtg].

also borne out by case law) that when the Tribunal defined or substantiated the legal concepts examined below – whether an international crime or a procedural rule – it was *interpreting* the rule, as opposed to enquiring as to its validity. These are two qualitatively different processes. Domestic laws may form the basis of the validity of legal propositions if the laws either demonstrate the *opinio juris* of that state in the case of customary law,[34] or if the laws manifest a general principle of law.[35] In the cases examined, however, domestic law played neither of these roles. Instead, it is drawn on in a stage of reasoning when the question of legal validity has already been settled.

III. Interpreting Rape

A. The Historic Evolution of the Crime of Rape

One of the most controversial uses of domestic law by the ICTY is the interpretation of the crime of rape under Article 3 of the *Statute of the ICTY*. The earliest legal prohibitions of rape in times of war can be traced back to the fourteenth and fifteenth century war ordinances of Richard II (1385) and Henry V (1419),[36] although its modern form is normally traced to the US *Lieber Code* of 1863, which provided that "all rape, wounding, maiming, or killing of such inhabitants are prohibited

34. See *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [2012] ICJ Rep 99 at paras 70-78; the International Court of Justice examined domestic laws to assess whether a customary rule of immunity for state officials' tortious acts in other states existed.
35. *Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th - July 24th 1920 with Annexes at* 335; *The Corfu Channel Case (Albania v UK)*, [1949] ICJ Rep 4 at 18.
36. These ordinances are reprinted in Travers Twiss, *The Black Book of the Admiralty* (Cambridge: Cambridge University Press, 1871) vol 1 at 468; it was also mentioned in Alberico Gentili, *De Iure Belli Libri Tres*, translated by John C Rolfe (Oxford: Clarendon Press, 1933) at section 421: "[T]o violate the honour of women will always be held to be unjust". See generally, Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford: Clarendon Press, 1994) ch 6 and 8.

under the penalty of death …".[37] After the Second World War, rape was successfully prosecuted at the Tokyo War Crimes Tribunal[38] and was included as a crime against humanity in *Council Control Law No 10*, which regulated the Occupying Powers' individual war crimes courts operating in Germany.[39] Despite numerous conventional provisions prohibiting rape in times of war – notably, Article 27 of the fourth *Geneva Convention* of 1949, and Articles 76(1) and 4(2)(e) of *Additional Protocols I and II* of 1977, respectively[40] – doubts persisted in the latter half of the twentieth century as to whether rape constituted a "grave breach" of the *Geneva Conventions* capable of giving rise to individual criminal responsibility.[41]

However, by the time of the Yugoslav conflict, any hesitation to

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37. *Instructions for the Government of Armies of the United States in the Field*, USC art 44 (Government Printing Office 1898) online: <avalon.law.yale.edu/19th_century/lieber.asp#sec2>.
38. Meron, *supra* note 6 at 426.
39. *Council Control Law No 10*, (1946), art 2(1)(c). Rape was not, however, included in the subject-matter jurisdiction of the Nuremberg Tribunal: *Procès des Grands Criminels de Guerre Devant Le Tribunal Militaire International Tome 1: Documents Officiels* (Secretariat of the International Military Tribunal, 1947).
40. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 art 27 (entered into force 21 October 1950) [*Geneva Convention*]; *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 12 December 1977, 1125 UNTS 3 art 76(1) (entered into force 7 December 1978) [*Geneva Convention Protocol I*]; *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 art 4(2)(e) (entered into force 7 December 1978).
41. *Geneva Convention*, *ibid*, art 147; *Geneva Convention Protocol I*, *ibid*, arts 11, 85. Rape was not explicitly included in the "grave breaches" provisions of the *Conventions*; Niamh Hayes, "Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals" in Shane Darcy & Joseph Powderly, eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 129 at 130.

recognize rape as a war crime or a grave breach of the *Geneva Conventions* had started to dissipate.[42] In late 1992, the International Committee of the Red Cross stated that rape constituted a grave breach under the fourth *Geneva Convention*, a sentiment that was echoed shortly after by the United States, which considered that "the legal basis for prosecuting troops for rape is well established under the *Geneva Conventions* and customary international law".[43] In early 1993, during negotiations regarding the formation of the ICTY, the widespread and systematic nature of rape and sexual assault in the former Yugoslavia became apparent.[44] The concern of the international community was reflected in the proposals for the statute of the Tribunal that were advanced: proposals from the United States and France both classified rape as a grave breach of the *Geneva Conventions*, whereas the proposals of Italy, the Netherlands, the Organization of the Islamic Conference and the Secretary-General re-affirmed rape as a crime against humanity.[45] At the suggestion of the Secretary-General,[46] rape was explicitly included in the list of crimes against humanity over which the ICTY has jurisdiction.[47] As a reflection of the fact that these crimes can also be committed in non-international armed conflicts, the *Statute of the International Criminal Tribunal for Rwanda* explicitly classifies rape as a crime against humanity, as well as recognising that rape may constitute a

42. Meron, *supra* note 6 at 426; see further Grace Harbour, "International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 19.
43. Cited in Meron, *ibid* at n 22.
44. UNSCOR 3217th Mtg, *supra* note 33: "We must ensure that the voices of the groups most victimized are heard by the Tribunal. I refer particularly to the detention and systematic rape of women and girls, often followed by cold-blooded murder" – statement of the Permanent Representative of the United States of America.
45. Morris & Scharf, *supra* note 1 at 379-83. The report of the Commission of Experts, as well as proposals by the National Alliance for Women's Organizations, Amnesty International, and the Lawyers Committee for Human Rights also considered rape as a crime against humanity.
46. *Report pursuant to SC Res 808*, *supra* note 7 at para 48.
47. *Statute of the ICTY*, *supra* note 31, art 5(g).

serious violation of Common Article 3 and the Additional Protocol I of the *Geneva Conventions*.

B. Interpretation of Rape within the ICTR/ICTY

Whilst the prohibition on rape had been indubitably recognised as a rule of international criminal law, the question of which acts constituted rape had neither been defined in conventional nor customary law, nor in judicial practice. The first judgment to address the issue was *Akayesu,*[48] delivered by the Trial Chamber of the ICTR in September 1998.

Akayesu was *bourgemestre* of a commune in Rwanda, charged with "the performance of executive functions and maintenance of public order within his commune".[49] In 1994, hundreds of Tutsi civilians sought refuge in the *bureau communal* of Akayesu's commune, only to be subjected to beatings, sexual assault, rape and murder at the hands of local militia and the police.[50] The Prosecutor of the ICTR charged Akayesu *inter alia* with rape as a crime against humanity, and as a violation of Common Article 3 and the Second Additional Protocol of the *Geneva Conventions*.[51] The Trial Chamber acknowledged that:

> there is no commonly accepted definition of [rape] in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[52]

Moving away from the more traditional approaches to defining rape commonly found in domestic law, which specify *actus reus* and *mens*

48. *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, (2 September 1998) (*International Criminal Tribunal for Rwanda*) [*Akayesu*].
49. *Ibid* at para 4.
50. *Ibid* at para 12A.
51. Navanethem Pillay, "Equal Justice for Women: A Personal Journey" (2008) 50 Arizona Law Review 657 at 665-66. The charge of rape was included on an amended indictment which was modified following questioning from the Bench brought to light evidence of rape and sexual assault.
52. *Akayesu*, *supra* note 48 at para 596.

rea requirements,[53] the Trial Chamber opted for a broad conception of rape that defined the crime as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[54] This definition has been widely praised for shifting the focus to "the overwhelming [coercive] circumstances which are knowingly exploited by the perpetrator, rather than [restricting] the context and criminality of the act to the internal acquiescence of the victim".[55] The conceptual definition enunciated in *Akayesu* was followed two months later in the *Celebici* case,[56] the first case involving rape to be heard by the ICTY. In addition to being the first ICTY chamber to adopt the *Akayesu* definition of rape, the *Celebici* case broke new ground in other respects. Of particular note is the Trial Chamber's determination that rape in situations of armed conflict may constitute torture, a position that was followed by chambers in subsequent cases.[57]

Just one month after the *Celebici* judgment, the ICTY was again

53. See *Sexual Offences Act 2003* (UK) c 42. For example, s 1 defining rape as follows:

    1. A person (A) commits an offence if:
        (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
        (b) B does not consent to the penetration, and
        (c) A does not reasonably believe that B consents.

54. *Akayesu*, *supra* note 48 para 598.

55. Hayes, *supra* note 41 at 134; See also Pillay, *supra* note 51 at 666-67. Pillay, herself one of the judges in the Trial Chamber in *Akayesu,* stated that, "I must say that the testimony of one of the witnesses motivated me to reexamine traditional definitions of rape. Witness 'JJ' was being asked by the prosecutor, in respect of each of the multiple rapes she endured, whether there was penetration: 'I am sorry to keep on asking you each time – did your attacker penetrate you with his penis'? Her answer was: 'That was not the only thing they did to me; they were young boys and I am a mother and yet they did this to me. It's the things they said to me that I cannot forget'". See also Phillip Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law" (2013) 54 Boston College Law Review 1207 at 1210.

56. *Prosecutor v Delalic ("Celebici case")*, IT-96-21-T, Trial Chamber Judgment (16 November 1998) at para 478.

57. *Ibid* at para 496.

required to interpret the crime of rape in the case of *Furundžija*.[58] The reasoning of the Trial Chamber in *Furundžija* is one of the clearest examples of recourse to domestic law that exists in international case law. In that case, the defendant was leader of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, who raped and tortured a female Bosnian Muslim civilian.[59] The Trial Chamber dismissed the *Akayesu* definition for want of specificity,[60] and, stating that "no definition of rape can be found in international law",[61] reasoned that:

> [to] arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim "nullum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[62]

This reliance was subject to two caveats: first, that reference should not be made solely to jurisdictions belonging to one "legal family", such as common or civil law; and second, that account must be taken of the "specificity of international criminal proceedings when utilising national law notions".[63] The Chamber surveyed the definition of rape in 18 legal systems,[64] noting that "most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either

58. *Prosecutor v Furundžija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) [*Furundžija* Trial Chamber].
59. *Ibid* at paras 121-130.
60. *Ibid* at para 177.
61. *Ibid* at para 175.
62. *Ibid* at para 177.
63. *Ibid* at para 178.
64. *Ibid* at nn 207-14. The comparative survey examined Chile, China, Germany, Japan, the Socialist Federal Republic of Yugoslavia, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, the Netherlands, England and Wales, and Bosnia and Herzegovina.

the vagina or the anus".[65] Although the Tribunal did not find a universal definition of rape in criminal systems throughout the world – indeed, it explicitly acknowledged significant divergence between jurisdictions regarding whether forced oral sex constituted rape – it recognised that rape attached "to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced penetration".[66] Drawing from this conclusion, the Chamber defined rape as:

> (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[67]

Both the first sentence of the *actus reus* (that rape covers vaginal and anal penetration with a penis or any other object) and the second limb of the test (the requirement of coercion or threat or use of force) are drawn from the Chamber's examination of the laws of rape in domestic jurisdictions. Whilst the *Furundžija* definition of the crime of rape was affirmed on appeal,[68] the ICTR subsequently re-affirmed the *Akayesu* definition, which in its view "clearly encompasse[d] all the conduct described in the definition of rape set forth in *Furundžija*".[69] In light of the continued divergence between the "conceptual" *Akayesu* and the more "mechanistic" *Furundžija* definitions of rape, the issue was raised again in the case of

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65. *Ibid* at paras 181, 183. Domestic laws did not, however, agree as to whether forced oral penetration constituted rape. The Chamber adopted a teleological approach with regard to this point, stating that the *raison d'être* of international humanitarian law is to protect dignity, and forced oral penetration constituted "a most humiliating and degrading attack upon human dignity". As such, it was to be included within the definition of rape.
66. *Ibid* at para 179.
67. *Ibid* at para 185.
68. *Prosecutor v Furundžija,* IT-95-17/1-A, Appeals Chamber Judgment (21 July 2000) at paras 211-12.
69. *Prosecutor v Musema*, ICTR-96-13-T, Judgment and Sentence at para 227 (27 January 2000) (International Criminal Tribunal for Rwanda, Trial Chamber). As Hayes notes, this adherence to the *Akayesu* definition was unsurprising "given that the Trial Chamber contained the same three judges as in *Akayesu*"; Hayes, *supra* note 41 at 140.

Kunarac[70] before the ICTY.

In that case, the three accused – members of the Bosnian Serb military accused of participating in the Foča "Rape Camps"[71] – were charged with rape as a crime against humanity and as a breach of the laws or customs of war. The Trial Chamber acknowledged that the *Furundžija* definition provided the *actus reus* element of the crime of rape in international law but that "in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition".[72] The Chamber continued:

> [i]n stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which … is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[73]

As in *Furundžija*, the Trial Chamber turned to explain why reference to domestic laws could aid the interpretation of the crime of rape:

> the value of these sources is that they may disclose "general concepts and legal institutions" which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.[74]

The Chamber considered that the "common denominator" of rape, as

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70. *Prosecutor v Kunarac*, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgement (22 February 2001) [*Kunarac* Trial Chamber].
71. For more information on the Foča "Rape Camps", see Matteo Fiori, "The Foča 'Rape Camps': A Dark Page Read Through the ICTY's Jurisprudence" (2007) 2 Hague Justice Journal 9.
72. *Kunarac* Trial Chamber, *supra* note 70 at para 438.
73. *Ibid* [footnotes omitted].
74. *Ibid* at para 439.

found in the domestic laws of 38 jurisdictions,[75] was wider than the requirement of force, threat of force or coercion proposed by the Trial Chamber in *Furundžija*. In the opinion of the Trial Chamber, the true common denominator of the surveyed jurisdictions was that "serious violations of sexual *autonomy* are to be penalised".[76] Thus, whilst accepting the *actus reus* limb of the *Furundžija* definition, the Trial Chamber considered that the "coercion or force or threat of force" requirement should be expanded to criminalise the specified sexual acts "where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily as a result of the victim's free will, assessed in the context of the surrounding circumstances".[77]

On appeal, the ICTY Appeals Chamber elaborated on whether true consent was ever possible when the victim was a detainee in an armed conflict. It examined domestic laws that criminalise sexual acts between prisoners and inmates as crimes of strict liability, or which carry a presumption of non-consent.[78] The Chamber interpreted rape in international criminal law in accordance with these laws, recognizing the possibility that there could be circumstances that "were so coercive as to negate any possibility of consent".[79]

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75. *Ibid* at paras 443-45, 447-52, 453-56. The comparative study surveyed the laws of Bosnia and Herzegovina, Germany, South Korea, China, Norway, Austria, Spain, Brazil, United States (New York, Maryland, Massachusetts, California), Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, England and Wales, Canada, New Zealand, Australia (New South Wales, Victoria, ACT, Western Australia, South Australia), India, Bangladesh, South Africa, Zambia and Belgium.
76. *Ibid* at para 457.
77. *Ibid* at para 460.
78. *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) at para 131 citing laws from Germany and the United States (California, New Jersey, the District of Columbia).
79. *Ibid* at para 132.

C. The Legacy of the ICTY Approach

The interpretation of the crime of rape in *Kunarac* has become "the most widely used definition in the ICTY, ICTR and Special Court for Sierra Leone",[80] and the antecedent upon which it is based, *Furundžija*, forms the basis for the definition of rape in the Elements of Crimes of the International Criminal Court ("ICC").[81] At the time of the Trial Chamber judgment in *Furundžija*, it was clear that a conventional definition of

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80. Valerie Oosterveld, "The Influence of Domestic Legal Traditions on The Gender Jurisprudence of International Criminal Tribunals" (2013) 2 Cambridge Journal of International and Comparative Law 825 at 831; Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Leiden: Martinus Nijhoff Publishers, 2011) at 407, 424; see *Prosecutor v Kvocka*, IT-98-30/1-T, Judgment (2 November 2001) at paras 177-79 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v Semanza*, ICTR-97-20-T, Judgement (15 May 2003) at paras 344-46 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence (1 December 2003) at paras 910-15 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Judgment and Sentence (22 January 2004) at paras 705-709 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Taylor,* SCSL-03-01-T, Judgment (18 May 2012) at para 415 (Special Court for Sierra Leone, Trial Chamber). *Cf. Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment and Sentence (16 May 2003) at para 456 (International Criminal Tribunal for Rwanda, Trial Chamber); The ICTR Trial Chamber in *Muhimana* effectively held the *Kunarac* definition to be an elaboration of the *Akayesu* definition; *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment and Sentence (28 April 2005) at paras 550-51 (International Criminal Tribunal for Rwanda, Trial Chamber); (Subsequently, the ICTR Appeals Chamber in *Gacumbitsi* followed the *Kunarac* definition), *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, Judgment (7 July 2006) at paras 151-52 (International Criminal Tribunal for Rwanda, Appeals Chamber).

81. Weiner, *supra* note 55 at 1217. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 art 7(1)(g) (entered into force 1 July 2002) [*Rome Statute*]; *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, ICC, 1st Sess, ICC Doc ASP/1/3 (2002).

rape in international criminal law was unlikely to come to fruition. The case was decided just a few months after conclusion of the *Rome Statute of the International Criminal Court* ("*Rome Statute*"), which failed to define the crime due to the fundamentally different philosophical, legal, and cultural approaches of the delegates to sexual offences, and to rape in particular.[82]

However, where the delegates to the Rome conference failed, the Preparatory Committee for the ICC Elements of Crime succeeded, elaborating a definition of rape that was confirmed by the first Assembly of States Parties in 2002.[83] This definition drew upon the jurisprudence of the ICTY and ICTR, giving most weight to the definition expounded by the Trial Chamber in *Furundžija*. This was thought to be "particularly persuasive because its definition of rape was based on a survey of municipal rape law and thus came with the authority of timeliness and neutrality".[84] Indeed, as Kristen Boon notes, the influence of the *Furundžija* definition is demonstrated by the fact that the proposal for the definition of rape put forward by Costa Rica, Hungary, and Switzerland mirrored word-

82. *Rome Statute*, *ibid*; William A Schabas, *An Introduction to the International Criminal Court,* 4d (Cambridge: Cambridge University Press, 2011) at 117. Note that a definition of rape was originally considered in the 1996 Preparatory Committee for the *Rome Statute*, which defined rape as "causing a person to engage in or submit to a sexual act by force or threat of force": Mahmoud Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Netherlands: Transnational Publishers, 2005) vol 2 at 53. See also, Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent" (2001) 32 Columbia Human Rights Law Review 625 at 644.

83. Pursuant to art 9 of the *Rome Statute*, *ibid*, the Elements of Crimes is a document that assists the Court in the interpretation and application of arts 6, 7, and 8 of the *Statute*. The document must be passed by a two-thirds majority of States Parties.

84. Boon, *supra* note 82 at 646.

for-word the definition laid down by the Trial Chamber.[85] Refusal by the ICTY to elaborate a definition of the crime of rape would have put the Preparatory Commission of the Elements of Crime back to the position of paralysis in which the states parties to the *Rome Statute* found themselves. In March 2016, the ICC delivered its first conviction for rape as a war crime and a crime against humanity in the *Bemba* case,[86] sentencing the defendant to 18 years of imprisonment. In its verdict, the Trial Chamber adopted the gender-neutral definition of rape contained in the Elements of Crimes, citing the Trial Chamber judgment in *Furundžija* as authority for the proposition that forced oral sex may also constitute rape. The judgments of the tribunals, and in particular that of the *Furundžija* Trial Chamber, have enabled international criminal law to move past the social, cultural and moral divides that stymied a conventional definition of rape.

Yet despite the influence of the ICTY's jurisprudence, there remain questions regarding some elements of the definition of rape, in particular regarding the role of consent. Formally, the absence of consent is not a requirement in the definition of rape in the Elements of Crimes, a fact that was recognised by the *Bemba* Trial Chamber, which noted that "the victim's lack of consent is not a legal element of the crime of rape under the Statute".[87] However, echoing the *Kunarac* Appeal Chamber judgment, the Trial Chamber also held that when the perpetrator took advantage of

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85. Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, 2nd Sess, *Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 para 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)*, PCNICC/1999/WGEC/DP.8 (1999); Boon, *ibid* at n 95.

86. *The Prosecutor v Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (21 March 2016) (International Criminal Court, Trial Chamber) [*Bemba*]. The Court did address the question of rape in the *Katanga* case, in which the defendant was acquitted of sexual violence charges; *The Prosecutor v Germain Katanga,* ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute (7 March 2014) (International Criminal Court, Trial Chamber).

87. *Bemba*, *ibid* at para 105.

a "coercive environment" to commit rape the prosecution does not need to prove the victim's lack of consent.[88] These two positions give rise to some conceptual problems: whilst formally not part of the definition of rape, the importance placed on the existence of coercive circumstances is based on the fact that there could be, in the words of the *Kunarac* Appeals Chamber, "circumstances that were so coercive as to negate any possibility of consent".[89] In other words, coercive circumstances are only important insofar as they allow chambers to induce the absence of consent from circumstantial evidence. It seems therefore that despite protestations to the contrary, the absence of consent remains the *sine qua non* of the crime of rape – the relevant question is how that absence of consent may be evidenced.

IV. Evaluating the Tribunal's Use of Domestic Law

Despite their considerable legacy, arguments have still been levelled at the reasoning of the ICTY in *Furundžija* and *Kunarac* and against the use of domestic law in particular. This Part examines the main principled argument, based on the principle of legality, that could be brought against the use of domestic law,[90] and methodological critiques that have been levelled at the reasoning of the Tribunal, before moving to explicate the Tribunal's approach.

88. *Ibid* at para 106. See also rule 70, *Rules of Procedure and Evidence*, Assembly of States Parties to the Rome Statute of the International Criminal Court, lst Sess, New York, 3-10 September 2002, ICC-ASP/1/3.

89. *Prosecutor v Kunarac*, IT-96-23& IT-96-23/1-A, Judgment (12 June 2002) at para 132 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

90. See *e.g.* Jessica Corsi, *Legal Fictions: Creating the Crimes of Rape and Sexual Violence under International Law* (PhD Dissertation, University of Cambridge, Faculty of Law, 2016) [unpublished].

A. An Affront to the Principle of Legality?

Although the principle of legality has various iterations,[91] here it is understood to mean "no crime without law", or *nullum crimen sine lege.*[92] This was arguably breached in two ways in the abovementioned jurisprudence: first, in *Furundžija*, the Trial Chamber included forced oral sex in the definition of rape; and, second, in *Kunarac*, the Appeal Chamber expanded the requirement of "coercion or threat or use of force" to the absence of consent "assessed in the context of the surrounding circumstances". These two interpretations criminalised conduct that would not have fallen within the definition of the crime of rape under the penal law of Bosnia and Herzegovina in force at the time, which covered only forcible sexual intercourse and required force or threat of force to the victim or someone "close to her". [93] The argument could hence be made that the ICTY in effect retroactively criminalised conduct, breaching *nullum crimen sine lege*. In both cases, however, the argument has fatal flaws.

In *Furundžija*, it was clearly not the case that the use of domestic law constituted a breach the principle of legality. As noted above, the expansive interpretation which bought oral sex under the definition of rape did *not* result from the survey of domestic law; in fact, the Trial Chamber explicitly noted that "a major discrepancy may, however, be discerned in the criminalization of forced oral penetration" in domestic systems.[94] Instead, the Chamber brought oral sex within the definition

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91. For other variants of the principle of legality, see Kenneth S Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 11-14.
92. Theodor Meron, "Remarks on the Principle of Legality in International Criminal Law" (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 107 at 107.
93. *Furundžija* Trial Chamber, *supra* note 58, n 214 (The Penal Code of Bosnia and Herzegovina (1988) Chapter XI states that "[w]hoever coerces a female person with whom he is not married to, into sexual intercourse by force of threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison").
94. *Ibid* at para 182.

of the crime of rape using a purely teleological methodology. It reasoned that forced oral sex constitutes "a most humiliating and degrading attack on human dignity"; that the very purpose of international humanitarian and human rights law was to protect human dignity; and, *therefore*, "it is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape".[95] Whilst this expansive interpretation might be critiqued, such criticism cannot be placed at the foot of the Trial Chamber's use of domestic law.[96]

The argument has slightly more purchase with regards to the reasoning of Trial Chamber in *Kunarac*. Recall that the Chamber used domestic law to reason that absence of voluntary consent, and not just coercion or the threat or use of force, constituted the second limb of the definition of rape.[97] This departed from both the *Furundžija* definition of rape and the crime under the penal law of Bosnia and Herzegovina in force at the time. This question was pertinent because one victim, "DB", had initiated sexual intercourse with Kunarac without coercion or the threat or use of force on his part.[98] However, evidence was presented that another soldier, "Gaga", had threatened the victim with death if she did not have intercourse with Kunarac. The defendant himself had therefore not used or threatened to use force or coerced the victim to have sexual intercourse with him, and his actions thus fell outside the *Furundžija* definition of rape.

However, to argue that this use of domestic law breached the principle of legality is erroneous. Neither was a strict principle of legality recognised as a rule of international law in the pertinent period, nor was the application of such a principle acknowledged in the practice of the

95. *Ibid* at para 183.

96. *Ibid* at para 184. The Trial Chamber went on to pre-empt the criticism that its teleological reasoning breached the principle of legality by arguing that the acts would in any case have been considered as sexual assault under the domestic law of Bosnia and Herzegovina. As long as the defendant was sentenced on this basis, the Chamber was of the opinion that the categorization of the act was unimportant.

97. *Kunarac* Trial Chamber, s*upra* note 70 at para 460.

98. See especially *ibid* at paras 219, 647.

ad hoc tribunals. From Nuremberg up until the inclusion of a strong principle of legality in the *Rome Statute*,[99] the principle has been treated "as a flexible principle of justice that can yield to competing imperatives … the condemnation of brutal acts, ensuring victim accountability, victim satisfaction and rehabilitation, the preservation of world order, and deterrence".[100] As international criminal law has developed, what has been considered as protected by the principle of legality has evolved. This is best captured by characterising the change as a move from legality in law ascertainment in the *Statute of the ICTY* to legality in content determination in the *Rome Statute*.[101] The former encompasses non-retroactivity in the creation of crimes, as evidenced by the limitation of the subject-matter jurisdiction of the ICTY to "rules of international humanitarian law which are *beyond any doubt* part of customary law".[102] The latter, on the other hand, reflects the stricter principle that crimes must be interpreted strictly, not by analogy, and in favour of the defendant.[103] The principle of legality at the time of the *ad hoc* tribunals

99. *Rome Statute*, *supra* note 81, arts 11, 22, 23, 24.

100. Beth Van Schaack, "The Principle of Legality & International Criminal Law" (2009) 103:1 Proceedings of the Annual Meeting (American Society of International Law) 101 at 102; See also, Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003) at 72. *Cf.* Theodor Meron, *War Crimes Law Comes of Age: Essays* (New York: Oxford University Press, 1999) at 244.

101. Larisa van den Herik, "Interpretation in International Law: The Object, the Players, the Rules and the Strategies" in János György Drienyovszki & Martin Clark, eds, *Event Report: Temple Garden Seminar Series in International Adjudication* (London: British Institute of International and Comparative Law, 2015), online: <www.biicl.org/documents/715_report_tgc_interpretation_in_international_law_140515.pdf>. Van den Herik draws the law ascertainment/content determination distinction from Jean d'Aspremont, "The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished" in Andrea Bianchi, Daniel Peat & Mathew Windsor, eds, *Interpretation in International Law* (New York: Oxford University Press, 2015) 111.

102. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, UNSC, 48th Sess, UN Doc S/25704 (1993) at para 34 [emphasis added].

103. *Rome Statute*, *supra* note 81, art 22(2).

was clearly understood in the former sense.[104] This was reflected in the practice of the tribunals, which took "a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg".[105]

To sum, the principle of legality has been viewed as a malleable principle that has changed shape with the development of the legal regime. As noted above, "much like the beginning of criminal law jurisprudence in common law jurisdictions, legality was originally conceived of as a flexible concept to allow for critical legal developments, even if they occurred retroactively".[106] Whilst one might claim that a strict conception of the principle has reached the status of custom in contemporary international criminal law,[107] to claim that was the case for the *ad hoc* tribunals is a different – and quite unsustainable – proposition.[108]

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104. See *e.g. Prosecutor v Hadzihasanovic*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction with respect to Command Responsibility (16 July 2003) at para 34 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), (recognizing that the accused must have understood "that the conduct is criminal in the sense generally understood, without reference to any specific provision"); *Prosecutor v Delalic and others*, IT-96-21-T, Judgment (16 November 1998) at para 403 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). See also *Prosecutor v Karemera and others*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defense of Joseph Nzirorera, Édouard Karemera Andr**é** Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise (11 May 2004) at para 43 (International Criminal Tribunal for Rwanda, Trial Chamber). See also, Meron, 'Remarks', *supra* note 92 at 108.
105. Schabas, *supra* note 31 at 63.
106. Grover, *supra* note 15 at 188. See also, Van Schaack, *supra* note 100 at 102; Gallant, *supra* note 91 at 405.
107. Gallant, *ibid* at 352-404.
108. For an interesting view on legality, tracing the differences in conceptions of the principle back to the division between international lawyers and criminal lawyers, see Dov Jacobs, "International Criminal Law" in Jörg Kammerhofer & Jean d'Aspremont, eds, *International Legal Positivism in a Post-Modern World* (New York: Cambridge University Press, 2014) 451 at 471-73.

Strict adherence to the principle of legality has not, then, been mandated as a rule of international law, nor did it feature in the practice of the *ad hoc* tribunals. One could nevertheless maintain that the Tribunal should have narrowly interpreted the crimes within their subject-matter jurisdiction. However, to do so would be an avowedly normative argument. Such an argument would be based on the idea that the value of a strict interpretation of the principle of legality is in itself sufficiently important to override countervailing considerations of substantive justice, condemnation, and deterrence, amongst others. It would have to counter the claim that "by subordinating the principle of [*nullum crimen sine lege*] to a vision of substantive justice, tribunals have determined that the former injustice is less problematic than the other".[109]

What values does the principle of legality uphold that might override these considerations? On the domestic plane, four purposes of the principle have been identified: the protection of human rights of the would-be accused, increased legitimacy of the criminal system, respect for the separation of powers between the legislature and judiciary, and effective pursuance of the purposes of criminalisation.[110] However, none of these purposes inherently outweigh the countervailing considerations: breaching the human rights of the accused is not inherently worse than letting a breach of the victim's human rights go unpunished, nor is it clear that the legitimacy of the international criminal system would be augmented by adherence to the principle of legality instead of advancing the battle against impunity. The separation of powers argument posits that it is for the legislature as the democratically elected lawmaker to determine criminal conduct in a society, not the judiciary. However, on the international plane, the concept of the separation of powers is notably different to that within domestic law. Indeed, it could even be argued that the Security Council in effect delegated the task of defining certain

109. Beth Van Schaack, "*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals" (2008) 97 Georgetown Law Journal 119 at 140. See also Grover, *supra* note 15 at 152-54. See also *Furundžija* Trial Chamber, *supra* note 58, para 184.

110. Gallant, *supra* note 91 at 20-30. See also Grover, *ibid* at 137-51.

crimes to the ICTY by including those crimes within its subject-matter jurisdiction.[111] With regard to the final justification of the principle of legality, the purposes of criminalising conduct are myriad, including considerations of accountability, restorative justice, and reconciliation. Each of these purposes, it might be argued, could be fulfilled not by adherence to a strict principle of legality, but rather by judicial flexibility that permitted the extension of crimes to acts that were known to be wrong (*malum in se*)[112] or to which the accused was put on notice regarding potential future criminalisation.[113]

To conclude, the argument that the use of domestic law breached the principle of legality holds no weight with regard to the classification of oral sex as rape by the Trial Chamber in *Furundžija*. In relation to the extension of the crime by the Trial Chamber in *Kunarac,* one cannot make the argument that the use of domestic law violated the principle of legality insofar as it existed as a rule of international law, nor was the reasoning of the Chamber incongruent with the general approach to legality taken by the *ad hoc* tribunals. To critique the use of domestic law would have to be based on an argument of moral values, not law, the strength of which is unclear at best.

B. Methodological Critiques

Another strand of criticism that has been levelled at the Tribunal is based on purported methodological flaws in the reasoning of chambers. These critiques can be gathered in two broad categories: those that criticize with the breadth and depth of the Tribunal's comparative survey and those that take issue with using domestic law on the international plane more generally.

The first group of critics argues that the Tribunal should have surveyed the law of more countries and taken account of contextual

111. For a similar argument, see Tom Ginsburg, "International Judicial Lawmaking" (2005) University of Illinois College of Law Working Paper No LE05-006 at 13-14.

112. Gallant, *supra* note 91 at 41.

113. Van Schaack, *supra* note 109 at 167.

differences that might affect the operation of the law in practice. Jaye Ellis, for example, argues that the *Furundžija* Trial Chamber "took a far too narrow approach, paying no attention to questions of culture, legal or otherwise", as well as criticizing the Tribunal for not conducting a sufficiently extensive comparative survey.[114] However, others, such as Fabian Raimondo, have defended the reasoning of the Tribunal, claiming that "[t]he choice of legal systems it made was appropriate for demonstrating the universality of the general principle of law thus found, as they were representative of the different legal families and regions of the world".[115]

In my view, this methodological critique holds little weight, although not for the reasons Raimondo claims. The argument presupposes a certain vision of the appropriate method transposed from the scholarly realm, in which it is the job of comparative law to present a representative, comprehensive, contextualised survey of the legal approaches taken in different systems. This presupposes too much. Methodological concerns have a place in an examination of the judicial use of extra-systemic law, but these concerns must be tailored to the justification for recourse to that law advanced (or presupposed) by the court. Ellis' critique, for example, is based on the assumption that the Tribunal attempted to induce a general principle of law from its comparative surveys, which would be applicable by virtue of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*[116] ("*VCLT*"). However, none of the chambers noted above

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114. Jaye Ellis, "General Principles and Comparative Law" (2011) 22 European Journal of International Law 949 at 968; *Cf.* Basil Markesinis, "National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law" (2006) 65 Cambridge Law Journal 301 at 306 (arguing that "it is thus one of the primary functions of the comparatist to warn national lawyers against the danger of thinking that they can understand foreign law simply because they have mastered a foreign language. The exegesis of foreign law is an art that has to be learned …").
115. Fabián O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff Publishers, 2008) at 114.
116. 23 May 1969, UN Doc A/Conf 39/27.

justified their recourse to comparative law on the basis that it allowed them to induce general principles of law. The closest one gets to such an assertion is by the Trial Chamber in *Furundžija,* however neither did it mention "general principles of law" specifically nor did it note the relevance of such principles under Article 31(3)(c).[117] To hold the Tribunal to the methodological yardstick of a general principle of law is therefore wrong.

The second strand of criticism is based on the purported impropriety of transposing domestic law concepts to the international level. International lawyers will be familiar with Lord McNair's admonition that domestic law concepts cannot be transposed "lock, stock and barrel" to the international sphere,[118] but instead must be tailored to the peculiarities of international law. Within the ICTY, this argument has been most forcefully put in some of the opinions and judgments of the Tribunal itself.[119] For example, in the *Erdemović* case, Judge Cassese, in a discussion entitled "The Notion of a Guilty Plea (or: The Extent to which an International Criminal Court can rely upon National Law for the Interpretation of International Provisions)", argued that domestic law could only be drawn upon if the international instrument expressly stated that such recourse was permissible, or if reference to domestic laws was necessarily implied by the "very nature and content of the concept" (such as determination of nationality for the purposes of diplomatic protection).[120] His main contention was that *prima facie* similar concepts in international criminal law were hardly ever identical to those in domestic criminal law: international criminal law had a different focus

117. *Furundžija,* Trial Chamber *supra* note 58 at para 177.

118. *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 28 at 148 (separate opinion of Lord McNair).

119. See also, Frédéric Mégret, "Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure" (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. *Cf. ibid.*

120. *Prosecutor v Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese (7 October 1997) at para 3 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Erdemović* – Judge Cassese].

and applicability, was a fusion of civil and common law systems, and faced challenges and issues specific to a supra-national criminal tribunal.[121] Those that used domestic laws to interpret the provisions of the *Statute of the ICTY* or *RPE* too readily, he argued, were not cognizant of these potential incongruities.[122] Similarly, in *Blaškić*, the Appeals Chamber – presided by Cassese – reprimanded the Trial Chamber for the use of "domestic analogy":

> [t]he Appeals Chamber wishes to emphasise at the outset that the Prosecutor's reasoning, adopted by the Trial Chamber in its Subpoena Decision, is clearly based on what could be called "the domestic analogy" … The setting is totally different in the international community … the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.[123]

There is, however, reason to think that the distinction between domestic and international law is to some extent overstated. This is aptly demonstrated by the abovementioned *Erdemović* case in which the majority, having surveyed the domestic law of Canada, the United States, Malaysia, and England and Wales, concluded that a valid guilty plea must meet three criteria: it must be voluntary, informed, and unequivocal.[124] These domestic laws were relevant because the concept of a guilty plea had been imported into international criminal procedure from common law systems and as a result:

> we may have regard to national common law authorities for guidance as to

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121. *Ibid* at paras 3-5.

122. For a defence of this view, see Harmen van der Wilt, "Commentary" in André Klip & Göran Sluiter, eds, *Annotated Leading Cases of International Criminal Tribunals* (Oxford: Hart Publishing, 1999) vol 1 654.

123. *Prosecutor v Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1996 (29 October 1997) at para 40 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Blaškić* Appeals Chamber].

124. *Prosecutor v Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) at paras 6-8 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Erdemović* – Judges McDonald and Vohrah].

> the true meaning of the guilty plea and as to the safeguards for its acceptance. The expressions "enter a plea" and "enter a plea of guilty or not guilty", appearing in the Statute and the Rules which form the infrastructure for our international criminal trials *imply necessarily*, in our view, a reference to the national jurisdictions from which the notion of the guilty plea was derived.[125]

Instead of recourse to domestic law, Cassese was of the view that interpretation must be based on the object and purpose that provision served within the context of international criminal law.[126] However, having reflected on the object and purpose of the guilty plea, he was of the view that the same three criteria identified by the majority in *Erdemović* were applicable "by virtue of a contemplation of the unique object and purpose of an international criminal court and the constraints to which such a court is subject [namely, to respect the rights of the accused under Article 21 of the Statute], rather than by reference to national criminal courts and their case law".[127] In this case, at least, the specificity of the international criminal justice system did not call for a different solution than that adopted by domestic systems. The claim of "exceptionalism" of the ICTY therefore seems overstated.

In relation to rape, one could argue that the definition of the crime in domestic law embodies the values of a particular circumscribed society that cannot simply be transposed to international law. Indeed, the difficulties that states parties to the *Rome Statute* encountered when trying to settle upon a statutory definition of rape certainly gives weight this idea. However, this does not suggest that, as a matter of principle, domestic laws cannot be used to inform the Tribunal's definition of the crime of rape, but rather that domestic law should be drawn on by the Court when it accords with the values that underpin international criminal law. Indeed, such a limitation was acknowledged by Judges McDonald and Vohrah in *Erdemović.* In their view:

> [i]n the event that international authority is entirely lacking or is insufficient, recourse may then be had to national law to assist in the interpretation of terms and concepts used in the Statute and the Rules. We would stress again

125. *Ibid* at para 6 [emphasis added].
126. *Erdemović* – Judge Cassese, *supra* note 120 at para 8; *Blaškić* Appeals Chamber*, supra* note 123 at para 47.
127. *Erdemović* – Judge Cassese, *ibid* at para 10.

> that no credence may be given to such national law authorities if they do not comport with the spirit, object and purpose of the Statute and the Rules … In our observation, there is no stricture in international law which prevents us from making reference to national law for guidance as to the true meaning of concepts and terms used in the Statute and the Rules.[128]

The judgments of the Trial and Appeals Chambers in *Furundžija* and *Kunarac* could certainly have made the link between the values underpinning the definition of rape in domestic jurisdictions and international criminal law more explicit. If they did so, it would be significantly harder to argue that it was inappropriate to draw on domestic law concepts to inform their understanding of international criminal law.

The methodology of the ICTY may certainly be criticized for its incompleteness, brevity, or acontextuality, and justifiably so.[129] As a nascent tribunal that was initially underfunded and understaffed, the inability of the bench to carry out exhaustive comparative research is unsurprising.[130] More extensive, representative, and thorough comparative surveys of domestic law would have been ideal. However, in my view, this does not necessarily undermine the Tribunal's reasoning. Instead, the methodological flaws must be balanced against the values that the use of domestic law furthered and the significant legacy that the judgments in the *Furundžija* and *Kunarac* cases left.

C. Understanding the Tribunal's Reasoning

How then are we to judge the ICTY's use of domestic law? The Tribunal's use of domestic law should be seen as a way to reconcile competing values that were at tension in the early days of its operation. On the one hand, there was the clear desire amongst members of the international community to punish those that had committed war crimes in the former Yugoslavia. On the other hand, there was recognition that this should be

128. *Erdemović* – Judges McDonald and Vohrah, *supra* note 124 at para 5.

129. See Ellis, *supra* note 114 at 968.

130. In a private conversation, the person charged with carrying out comparative research for the case of *Erdemović* stated that the 18 jurisdictions surveyed was the totality of the domestic criminal law books in the ICTY library at the time.

achieved via legal, not political, means. Several statements made before the UN Security Council in the debates leading up to the creation of the ICTY give voice perfectly to these competing values. In the lead up to the adoption of Security Council Resolution 808 (1993), for example, the Spanish representative to the Security Council stated that:

> the establishment of an international criminal tribunal … fulfils its dual objective of meting out justice and discouraging such grave violations in the future, we believe that this undertaking is so important and so sensitive that it is necessary to ensure the maximum respect for legal rigour in its functioning.[131]

The desire for "legal rigour", in the words of the Spanish Representative, was, however, quite impossible considering the nascent state of international criminal law in 1993. As noted in Part I, above, not only was the *Statute of the ICTY* laconic, but it also had little to draw on in terms of precedent from its predecessors, notably the international military tribunals in Nuremberg and Tokyo. Once these competing values are acknowledged, the use of domestic law is comprehensible. Faced with an insufficiently defined rule, but still required to mete out justice as a court of law, the ICTY used the only external material that was available to it which was relevant to the provisions being interpreted: domestic law. This allowed the judges to ground their reasoning in an external source, demonstrating that the interpretation was not a simple transposition of their own moral values.[132] Domestic laws were used as a tool of last resort that allowed the tribunal to thread a *via media* between indeterminacy and the radical subjectivity that loomed without recourse

131. UNSC, 48th year, 3175th Mtg, UN Doc S/PV.3175 (1993) [provisional], reprinted in Morris & Scharf, *supra* note 1 at 173. See also the statements of the representative of the United States, the United Kingdom and New Zealand. See also the statements by the representatives of Japan, Morocco, New Zealand, and Russia in the debates leading up to the adoption of Resolution 827 (1993), UNSCOR 3217th Mtg, *supra* note 33 at 179.

132. *Cf.* Van Schaak, *supra* note 109 at 167 (arguing that the ICTY considered domestic law as "sufficiently robust to provide notice to the defendant of a novel construction of ICL").

to external material.[133]

V. Conclusion

The use of domestic law in interpretation is a phenomenon that has until now been largely ignored. This article has shown that the use of domestic law as an interpretive aid has had an indelible impact on the jurisprudence of the ICTY and on contemporary international criminal law more generally. Without drawing on domestic law, the Tribunal would have been left struggling to fill the laconic statute that was drawn up by the UN Secretary-General in 1993. It provided the only means by which the Tribunal could apply the crimes within its subject-matter jurisdiction given the absence of relevant international case law or analogous international definitions. Whilst one might have qualms with the methodology adopted by the Tribunal, its approach is at the very least comprehensible.

The Tribunal's use of domestic law raises numerous questions of interest for scholars of international law, including broader questions regarding interpretation that have not been addressed in this article. In particular, the fact that recourse to domestic law does not fit within the framework of the *VCLT* provisions on interpretation makes us reconsider the centrality of those provisions to how we think about and evaluate interpretation in international law. I have addressed these issues elsewhere;[134] suffice to say, however, that the use of domestic law demonstrates that interpretation is still full of theoretical and practical problems that will continue to tax the mind of scholars and practitioners of international law alike.

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133. This is supported by the justification given for the use of domestic law by the majority of the Appeals Chamber in *Erdemović* – Judges McDonald and Vohrah, *supra* note 124 at para 3.

134. Daniel Peat, *Legitimate Interpretation: Comparative Reasoning in International Courts and Tribunals* (PhD Thesis, University of Cambridge, 2015) [Monograph forthcoming].