International Criminal Law & Practice Training Materials

What is International Criminal Law?

Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions, funded by the European Union

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MODULE 2:
WHAT IS INTERNATIONAL CRIMINAL LAW?

Part of the OSCE-ODIHR/ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions"

Developed by International Criminal Law Services

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2. WHAT IS INTERNATIONAL CRIMINAL LAW?

2.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI "War Crimes Justice Project", funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each module provides a general overview of the international criminal law relevant to the Module's topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

2.1.1. MODULE DESCRIPTION

This Module addresses the basic concepts underlying international criminal law (ICL). It describes how ICL is a subset of public international law, outlines the basic sources of ICL and explains how these sources are interpreted by international criminal courts. In particular, this Module discusses treaty law and customary international law. It also briefly discusses the relationship between ICL, international humanitarian law and international human rights law. The aim of the Module is to familiarise participants with the essential concepts that underpin the law that is practiced before international courts and the law that applies to many of the international crimes now prosecuted in the domestic courts of BiH, Croatia and Serbia. Please note that Module 5 addresses the application of international law in each of these domestic jurisdictions.

2.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The five primary sources of international criminal law;
- The distinction between treaty law and customary law;
- How treaties are interpreted;

- How to apply customary law before national and international courts and, in particular, what evidence is required to establish the elements of customary law;
- The hierarchy between custom, treaties and *jus cogens*; and
- The relationship between ICL, human rights and humanitarian law.

Notes for trainers:

- This Module establishes the foundation for all of the key concepts explained in the following Modules. It is vital that participants engage with the basic principles covered in this Module. It must not be viewed as a section of mere interest, but one from which the law emanates.
- Participants must be encouraged to explore the sources of international law and the ways in which this body of law functions. As this is often the first Module that is presented, it may be difficult to capture the participants' attention from the outset. However, bear in mind that many of the sources of international law have similar counterparts in national law; similarities between the international law approach and the relevant national law practices should be highlighted. It is important for trainers to draw these parallels and to provide examples of how understanding these concepts can directly assist the participants' legal work. The trainer may choose to engage participants in discussion by posing the following questions:
  - Do any of the national courts in the region apply or otherwise use unwritten law? Does this include customary international law? If so, examples should be cited.
  - How is customary international law defined in national case law, if at all?
  - Has national jurisprudence established any hierarchy between treaties that are ratified by the state, customary international law, and national legislation?
  - How and why are learned writings and jurisprudence, treaties that have been ratified but not domesticated, and governing instruments of international criminal courts used in national courts in the region?
  - Have any international law interpretation issues arisen in war crimes prosecutions before national courts from the region?
  - Which examples from jurisprudence of international criminal courts and national courts from the region can be used to show how and why various sources of international law are used to ascertain the applicable law?
- In practice, the subsidiary sources of international law often play a role that is more important than suggested by the subsidiary nature of those sources in theory. Courts are not always clear on whether they use these subsidiary sources as tools for interpreting law or as direct sources of law. Examples from jurisprudence could be used to illuminate these and other important aspects concerning the sources of international criminal law.
- A case study has been included in Module 1. It can be referred to in order to encourage the participants to discuss whether or not any of the crimes that arise from the statement of facts are prohibited in their national systems as a matter of national legislation, applicable treaty law, and/or customary international law.

2.2. WHAT IS PUBLIC INTERNATIONAL LAW?

In general, public international law governs the actions of states and how states interact with each other and individual citizens. Public international law involves rules and principles that deal with the conduct, rights and obligations of states and international organisations, as well as dealing with relations among states.

2.3. WHAT IS INTERNATIONAL CRIMINAL LAW?

International criminal law is a subset of public international law, and is the main subject of these materials. While international law typically concerns inter-state relations, international criminal law concerns individuals. In particular, international criminal law places responsibility on individual persons—not states or organisations—and proscribes and punishes acts that are defined as crimes by international law.

International criminal law is a relatively new body of law, and aspects of it are neither uniform nor universal. For example, some aspects of the law of the ICTY are unique to that jurisdiction, do not reflect customary international law and also differ from the law of the ICC. Although there are various interpretations of the categories of international crimes,[1] these materials deal with crimes falling within the jurisdiction of international and hybrid courts, including the ICTY, ICTR, SCSL, ECCC, and the ICC. These crimes comprise genocide, crimes against humanity, war crimes and the crime of aggression.[2] They do not include piracy, terrorism, slavery, drug trafficking, or other international crimes (whether or not also criminalised in the national laws of BiH, Croatia, and Serbia) that do not amount to genocide, crimes against humanity, or war crimes.

International criminal law also includes laws, procedures and principles relating to modes of liability, defences, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues. Each of these topics will be addressed in these materials.

[1] ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 4 (2d ed. 2010).
[2] Related to the crime of aggression, see ICC ASP RC/Res.6, The Crime of Aggression, 11 June 2010; Rome Statute of the International Criminal Court, Art. 8*bis* (2002).

2.4. SOURCES OF ICL

Notes for trainers:

- The next section considers each of the sources of international criminal law. It is important that participants understand the nature of these sources so that they can determine the extent to which they apply, if at all, in their domestic jurisdictions. Each of these sources have been interpreted and applied by the different international criminal courts. It is crucial for participants to be aware of the specific jurisdiction and statutory bases of each of these courts, including their statutes, rules of procedure and evidence, governing instruments and their jurisprudence. This understanding will enable participants to appreciate the relative importance of the various sources of law of such international criminal courts in domestic contexts, and to apply the correct sources of law to their domestic jurisdictions.
- The trainer may choose to engage the participants by posing the following questions:
  - Is it useful or necessary for national courts in the region to refer to decisions of the ICTY on the definition of its Statute as a matter of customary international law?
  - For courts in the region, of what importance, if any, is the fact that much of the jurisprudence of the ICTY on substantive international criminal law concerns customary international law as it existed at the time of the offences, rather than treaty law? Of what importance, if any, are the differences between the ICTY Statute and customary international law as it existed in the early and mid-1990s for domestic courts in the region?
  - Do other international courts, such as the ICC, SCSL or ECCC have any relevance to the development of national jurisprudence in the region?
- What is the role of national practitioners in raising these issues for consideration before their domestic courts? Are they of academic interest, or can they serve the interests of the prosecution or of a client? Participants should be encouraged to give any examples of cases where they have used jurisprudence from international jurisdictions in their national cases.

2.4.1. OVERVIEW OF THE FIVE SOURCES OF ICL

As international criminal law is a subset of public international law, the sources of ICL are largely the same as those of public international law.[3] The five sources of ICL used by international and hybrid criminal courts generally are:

1) treaty law;
2) customary international law (custom, customary law);
3) general principles of law;
4) judicial decisions (subsidiary source); and
5) learned writings (subsidiary source).

The sources of law can sometimes overlap and have a dynamic relationship. For example, a treaty can reflect, become or influence the development of customary international law and vice versa. A judgement of an international court may influence the development of treaty and customary international law. Generally, international and hybrid courts use treaties and custom as the main sources of international criminal law, in addition to their own governing instruments (which may include treaties).

The five sources of ICL roughly correlate with the classic expression of the sources of international law contained in Article 38(1) of the Statute of the International Court of Justice (ICJ):

> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The relevance and importance of these sources in national criminal jurisdictions differ between countries. For example, in some jurisdictions, the direct source of international criminal law is national legislation incorporating ICL. In this instance, treaty and customary international law cannot be used as a direct source. Conversely, some courts can apply treaty law but not customary international law, while in others, custom can be applied as well.[4] Moreover, even if national legislation is the direct source of the applicable law, international criminal law treaties, commentaries on them and international judicial decisions are often used as aids to interpret the national law and are sometimes considered persuasive (not binding) precedent.

Different courts may apply these sources in different ways. For example:

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[3] *See, e.g.,* Dapo Akande, *The Sources of International Criminal Law*, in OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW AND JUSTICE 41-53 (Cassese, *et al.* eds. 2009); CRYER, *supra* note 1, at 9-12.
[4] *See, e.g.,* CRYER, *supra* note 1, at 64-84.

- National courts may not find it necessary to refer directly to international law sources when the content and meaning of the applicable national laws (including incorporated or otherwise applicable international law) are unambiguous.
- National legislation and judicial decisions can be evidence of customary international law—but they are not directly applied by international courts. Indeed, the ICTY Appeals Chamber has held that "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings".[5]
- At the ICC, the Rome Statute, Elements of Crimes, and Rules of Procedure and Evidence provide the primary sources of law.[6] Treaties and principles and rules of international law are applied once the primary sources have been utilised, and finally, general principles of law, including relevant and appropriate national laws are considered.[7]

2.4.2. TREATY LAW

Treaties are agreements (usually in written form) creating rights and obligations, usually between states. Some treaties also create duties and provide for the protection of individuals.

ICL has many treaty sources. These range from obvious examples such as the Genocide Convention and the grave breaches provisions of the four 1949 Geneva Conventions to relevant human rights treaties and treaties that are not as widely ratified as the Geneva Conventions, including the:

- Rome Statute of the International Criminal Court;
- 1977 Additional Protocol II to the Geneva Conventions (AP II);
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights);
- Pact on Security, Stability and Development in the Great Lakes Region (2006) and its Protocol on the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (Great Lakes Pact and Protocol); and
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Depending on the jurisdiction, in-force treaties that have been ratified (or acceded to) by the relevant state can be a direct source of applicable law. In jurisdictions where treaties cannot be a direct source of law, they often can serve as aids to interpretation of other applicable law.

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[5] Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeal Chamber, 29 Oct. 1997, ¶ 23.
[6] Rome Statute, Art. 21; *see also* Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 March 2009, ¶¶ 128 – 132.
[7] Al Bashir, PT-C I Decision of 3 March 2009, ¶ 44.

In some jurisdictions, treaty law is the main source of ICL. For example, the Rome Statute of the ICC is a treaty and a primary source of law for that court.[8] However, at the ICTY and ICTR, treaty law is less important than custom as a direct source (although some of the crimes in their Statutes are copied verbatim from treaties, for example, the Genocide Convention).

The Statute of the ICTR inherently adopts the position that treaties can be used as a source for international criminal law, since it criminalised violations of the Additional Protocol II to the Geneva Conventions, the whole of which was not considered to reflect customary international law at the time.[9]

The ICTY has laid down clear rules for when treaties can be a direct source of international criminal law (at least at that court), holding that treaties can be applied that:

- were unquestionably binding on the parties to the conflict at the time of the alleged offence; and
- were not in conflict with or derogating from peremptory norms of international law.[10]

However, the ICTY Appeals Chamber was careful to note that although treaties can be applied as a direct source of ICL, "in practice the International Tribunal always ascertains that the relevant provision is also declaratory of custom".[11] This ruling is specific to the ICTY, and will not necessarily apply in other international criminal courts (*e.g.*, it does not apply at the ICC) or in national jurisdictions.

2.4.2.1. TREATIES AND LEGALITY PRINCIPLES

The principle of legality which prevents the retrospective application of crimes and penalties often arises when treaties (as with other sources of ICL) are relied upon as a basis for prosecuting international crimes.

See Module 3 for an in-depth discussion of this issue.

2.4.2.2. TREATY INTERPRETATION

Not all ICL-relevant treaties expressly provide for the criminalisation and punishment of violations of those treaties by individuals. From an ICL perspective, such criminalisation and punishment often stems from, for example, customary international law[12] or through the

[8] Rome Statute, Art. 21. Non-ICC treaties and principles and rules of international law, including of IHL, are secondary sources, with other sources relegated to a third tier.
[9] CRYER, *supra* note 1, at 10.
[10] *See, e.g.,* Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 98; Dusko Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, 2 Oct. 1995, ¶ 143; Dario Kordić et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, ¶ 44; *but see Kordić*, AJ ¶¶ 41-6.
[11] *Galić,* AJ ¶ 85.
[12] AKANDE, *supra* note 3, at 48.

adoption of new treaties (*e.g.*, some provisions of the Rome Statute of the ICC) and national implementation legislation.

The ICTY and ICTR have interpreted their Statutes like treaties in conformity with the general rules of treaty interpretation in Articles 31 – 32 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).[13] These rules also constitute customary law.[14] The provisions are as follows:

Article 31 of the 1969 Vienna Convention

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …

3. There shall be taken into account, together with the context:

[…]

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[13] For an example of how the ICTY applied the principles set out in the Vienna Convention (although without expressly mentioning the convention), *see Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 71 – 142.

[14] *See, e.g.,* Milomir Stakić, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, ¶ 411; *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction¶¶ 79-93; Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶ 297. *See also* Momcilo Krajišnik, Case No. IT-00-39, Decision on Interlocutory Appeal by Momcilo Krajišnik, Appeal Chamber14 Feb. 2002.

Article 32 of the 1969 Vienna Convention

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

BiH, Croatia, and Serbia are all parties to the Vienna Convention. As such, in principle, the above interpretation rules could be utilised when treaties are interpreted. However, due regard must be given to any national rules of legal interpretation and possibly stricter principles of interpretation in criminal contexts. For example, the principle of interpretation in favour of the accused in case of doubt may demand stricter interpretation than the Vienna Convention rules.[15]

2.4.3. CUSTOMARY INTERNATIONAL LAW

Custom is generally understood as consisting of:

- state practice and
- *opinio juris*.[16]

The state practice must be consistent, uniform and general among the relevant states, although it does not have to be universal. *Opinio juris* can be defined as a general belief or acceptance among states that a certain practice is required by law.[17] This sense of legal obligation, coupled with state practice, differentiates custom from acts of courtesy, fairness or mere usage.

Treaties only bind states that are parties to them, whereas general customary law binds all states and "local" custom binds as few as two states only.

[15] *See, e.g.,* Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, ¶¶ 319, 500-1; *but see* Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, ¶ 502.
[16] *See, e.g.,* Drazen Erdemović, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeal Chamber, 7 Oct. 1997, ¶ 49.
[17] CRYER, *supra* note 1, at 11.

Treaties only bind states that are parties to them, whereas general customary law binds all states and "local" custom binds as few as two states only. Much of the content of substantive ICL exists in customary law, whether or not the same rules simultaneously exist in treaty law. However, it is generally more difficult to determine the content of custom than that of treaty law.

In general, and depending on the circumstances, evidence of state practice and *opinio juris* may include:

- diplomatic correspondence;
- official policy statements and press releases by governments;
- executive decisions and practices;
- opinions of government legal advisers;
- military manuals;
- comments on draft statements on international law by the International Law Commission;
- authoritative commentaries on treaties;
- national legislation;
- national and international judicial decisions;
- contents of treaties; and
- the practice of international organisations and their organs, including, for example, UN General Assembly and Security Council resolutions relating to legal questions.[18]

> *In appraising the formation of customary rules or general principles, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.*

Custom can originate in treaties, and treaties can constitute evidence of custom. Treaties can also be an aid to interpreting custom. The same rule can exist simultaneously in treaty law and custom; the definition of genocide and the grave breaches provisions of the Geneva Conventions are examples. Treaties sometimes codify customary law existing at the time. The Rome Statute of the ICC does so to a certain degree, but some of its provisions are more restrictive than custom, while others are less restrictive than custom. Likewise, some elements of the definition of crimes in the ICTY and ICTR Statutes go beyond what was customary law at the time.

The ICTY *Tadić* case provides an excellent example of how the ICTY Appeals Chamber surveyed a broad range of sources to determine that Article 3 of the ICTY Statute, which provides the ICTY with jurisdiction over the laws and customs of war, applied to both internal and international conflicts under customary international law. In making this determination, the appeals chamber reviewed many sources, including: a report of the Secretary-General of the UN, statements from

[18] *See, e.g.*, *Kordić*, AJ ¶¶ 47-68.

UN Security Council meetings, the object and purpose of Article 3 and of the creation of the ICTY, a historical review of cases before the ICJ, a historical review of previous conflicts, public statements of politicians, instructions from generals to soldiers found in an army manifestos/instructions and publications from rebel groups.[19] The chamber considered that reliance should be placed primarily on official pronouncements of States, military manuals and judicial decisions. The chamber reasoned:

> When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[20]

The ICTY *Martić* case also provides an illustration of how the ICTY has approached an analysis of customary international law. The accused was charged with ordering shelling attacks that killed and wounded civilians. The crime fell under Article 3 of the ICTY Statute even though it was not specifically mentioned in the article. The ICTY trial chamber therefore had to determine whether the alleged actions constituted a crime under customary international law.

In its analysis of customary international law, the ICTY, *inter alia*, analysed whether customary international law included a prohibition on reprisals against the civilian population or individual civilians. It reviewed the text of various instruments, including UN General Assembly resolutions and treaties, including AP I and AP II.[21]

Judicial decisions (both international and national) and learned writings can also be used to establish the content of custom,[22] although careful consideration has to be given to whether they correctly state customary law.

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[19] *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 86 – 137.
[20] *Ibid.* at ¶¶ 99.
[21] *Martić*, Case No. IT-95-11-R61, Decision on the Review of the Indictment Under Rule 61, 8 March 1996, ¶¶ 16 – 17, 19.
[22] *See, e.g., Tadić*, AJ ¶¶ 255-270; *Stakić*, TJ ¶¶ 501, 519.

2.4.3.1. CUSTOM AND LEGALITY PRINCIPLES

See Module 3 for an in-depth discussion of this issue.

2.4.4. OTHER SOURCES OF ICL

The ICTY and ICTR Statutes are not treaties, but are resolutions of the UN Security Council adopted under the enforcement provisions of Chapter VII of the UN Charter. However, the binding power of the resolutions stems from Article 25 of the UN Charter, a treaty.[23]

2.4.4.1. GENERAL PRINCIPLES OF LAW

Where no rule in custom or treaty law could be found, the ICTY has on occasion—and usually with some circumspection—considered general principles of law in search of an applicable ICL rule. These principles are formulated through the process of examining the national laws and practices of principal legal systems of the world in order to determine whether the court could deduce a common approach. If a common approach exists, the court could derive a general principle of law that could be applied in the ICL context.

> *Where a principle "is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified".*

Not every nation's practices need to be reviewed—only enough to show that most nations within the various systems of law (*e.g.,* common law and civil law) recognise a principle of law. Where a principle "is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified".[24] Where national approaches are too divergent, such a finding is precluded.

For example, in a joint separate opinion to the appeals judgement of the ICTY's *Erdemović* case, two judges surveyed the statutory laws and jurisprudence of twenty-seven nations[25] before determining there was no "consistent concrete rule which answers the question of whether or not duress is a defence to the killing of innocent persons".[26]

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[23] U.N. Charter art. 25.
[24] United Nations War Crime Commission, Law Reports of Trials of War Criminals: United States v. Wilhelm List and others, vol. VIII, 34, 49 (1949).
[25] France, Belgium, The Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, the former Yugoslavia, England, the USA, Canada, South Africa, India, Malaysia, Nigeria, Japan, China, Morocco, Somalia, and Ethiopia. *See generally Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, AC ¶¶ 66 – 72.
[26] *Ibid.* at ¶ 72.

2.4.4.2. JUDICIAL DECISIONS AND LEARNED WRITINGS

The ICTY and ICTR refer to and generally follow their earlier jurisprudence, although they are not always bound to do so. Trial chambers are not obligated to follow the decisions of other trial chambers, but they must follow the decisions of the appeals chamber. The appeals chamber may depart from its own prior decisions, but only in exceptional situations when it is in the interests of justice to do so.[27]

The ICTY and ICTR have also referred to judicial decisions of national courts and other international courts, including the ICJ, the International Military Tribunal at Nuremberg (Nuremberg tribunal), other post-World War II courts, the European Court of Human Rights (ECtHR). They have usually done so when looking for evidence of custom. They have similarly considered the publications of international authorities, including scholarly writings and reports of relevant bodies such as the International Law Commission and International Committee of the Red Cross (ICRC).

Other international, hybrid and national courts often adopt the same approach. They do not apply ICTY or ICTR decisions as law. But they often consider, for example, ICTY and ICTR findings on customary law or general principles of law, what meaning the ICTY and ICTR gave to a particular treaty provision, or the relevance and persuasiveness of ICTY and ICTR reasoning when interpreting their own law.[28]

2.4.5. HIERARCHY BETWEEN CUSTOM AND TREATY LAW, AND *JUS COGENS*

Generally, there is no hierarchy between treaty law and custom. Where a rule derived from one source conflicts with a rule derived from the other, rules of interpretation such as *lex posterior derogat priori* (a later law repeals an earlier law), *lex posterior generalis non derogate prior speciali* (a later general law does not repeal an earlier special law) and *lex specialis derogate legi generali* (a special law prevails over a general law) are used for resolution. As general principles of law are used to fill gaps in treaty and customary law, it is subordinate to treaty and customary law.

> *Neither custom nor treaty law may conflict with jus cogens.*

Neither custom nor treaty law may conflict with *jus cogens*, *i.e.* peremptory norms of general international law.[29] As *jus cogens* reflect the fundamental principles from which there can be no derogation, treaty law and customary law must always be interpreted consistently with norms that have attained this peremptory status. Examples of *jus cogens* are the prohibition of genocide and torture.

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[27] *See, e.g.,* Georges Anderson Rutaganda, Case No. ICTR-96-3-A, Appeal Judgement, 26 May 2003, ¶¶ 26, 188; Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, ¶¶ 107-114.

[28] Note that Article 20 of the SCSL Statute provides that the Appeals Chamber of the SCSL shall be guided by the decisions of the ICTY/ICTR Appeals Chamber. Statute of the Special Court for Sierra Leone, Art. 20.

[29] For more information regarding treaties, *see* Vienna Convention on the Law of Treaties, Art. 53.

2.5. PRINCIPLES AND MODES OF INTERPRETATION OF ICL

A treaty should be interpreted in good faith and according to ordinary meaning to be given to the terms of a treaty in their context and in light of their object and purpose

A primary method of interpreting international criminal law, as stated in Article 31(1) of the Vienna Convention on the Law of Treaties, is that a treaty should be interpreted in good faith and according to ordinary meaning to be given to the terms of a treaty in their context and in light of their object and purpose. The ICTY applies this principle in interpreting its Statute and treaties.

ICTY chambers have therefore relied on the primary object of establishing the tribunal—to punish serious violations of international humanitarian law committed in the former Yugoslavia and thereby contribute to national reconciliation and the restoration and maintenance of peace[30]—in interpreting its Statute.[31] The trial chamber in *Delalić* stated, "The interpretation of the provisions must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to their creation".[32]

The ICTY, like many other international and national courts, determines the purpose of treaties through a teleological approach. It will apply a contextual, rather than rigid or literal, approach to interpretation. Interpreting the purpose of the ICTY Statute requires taking into account "the fundamental purpose of the Statute, to ensure fair and expeditious trials of persons charged […] so as to contribute to the restoration and maintenance of peace in the former Yugoslavia".[33]

Examples of methods used to interpret provisions of international treaties and other international documents are listed below. Some of these methods are similar to those employed by national courts to interpret national legislation. The extent to which the principles cited below may be relied upon in domestic courts to apply and interpret international treaties and other international documents may vary from country to country.

(1) *Like cases are treated alike*: Similar cases should be treated the same and ideally with the same reasoning.
(2) *Declarations/advisory opinions are not given*: Tribunals do not indicate in advance how it will interpret rules and provisions.
(3) *In dubio pro reo*: The version of a statute or rule that is more favourable to the defendant should be applied.
(4) *Policy considerations to aid interpretation*: Policy provisions may shed light on the purpose behind a particular provision, but their use at the ICTY has been contested.[34]

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[30] *See* S/Res/955 (1994), Nov. 8, 1994.
[31] *See, e.g.,* Zejnil Delalić, et al., Case No. IT-96-21-T, Trial Judgement, 16 Nov. 1998, ¶ 170.
[32] *Ibid*.
[33] Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgement 21 July 2000, ¶ 280.
[34] *Compare*, *e.g.*, *Erdemović*, Separate and Dissenting Opinion of Judge Cassese, Appeal Chamber, 7 Oct. 1997, ¶ 11(ii) (rejecting the appropriateness of analysing policy considerations as an aid to interpretation),

(5) *Conflict in two or more official texts*: Under Article 22 of the Vienna Convention, if there is a difference between two authentic texts (*e.g.* between English and Spanish), unless the treaty specifies which text should prevail, the version which best reconciles the text in view of their object and purpose should be followed. This principle is also reflected in Rule 7 of the ICTY RPE.

(6) *Principle of "effectiveness"*: A word should not be interpreted so as to make it redundant.[35] Also, rules should not be made meaningless by restrictively interpreting other provisions of the same instrument.[36]

(7) *Presumption against lacunae*: Gaps in international customary or treaty law can be filled by reference to general principles of criminal law. However, words that appear to have been deliberately left out of a provision by the legislating or treaty-making authority cannot be read into the provision.

(8) *Ejusdem generis*: Meaning "of the same kind", this is used to interpret loosely written statutes or legislation. This aid of statutory interpretation should be used carefully, and only after precise legal definitions for provisions have been established. This will avoid violating the specificity requirements of the principle of legality.[37]

(9) *Expressio unius est exclusio alterius*: Meaning "to express one thing is to exclude another", this generally means that if something is omitted from a statute or legislation, it is understood to be excluded. This aid of statutory interpretation should also be used carefully, especially when interpreting international criminal law provisions where the inclusion of some fundamental rights could be interpreted as the exclusion of other rights.[38]

(10) *Lex specialis derogat generali*: If conduct is regulated by a general provision and a specific provision, the specific provision should prevail.[39]

(11) *Lura novit curia*: This principle provides that it is for the court to determine the law and the parties to prove the facts. However, in the international criminal law setting, where an accused's rights are at stake, this principle should not be applied and the court can intervene when necessary to protect the rights of the accused.[40]

(12) *Mandatory or Directory construction*: Even when a provision seems to be drafted in mandatory language, it can be interpreted as directory when that approach will best reflect the intent of the drafters.

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with Erdemović, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 73 – 78 (discussing the use of policy considerations as an aid to interpretation).

[35] *Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 13.

[36] *Mrkšić*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, 22 Oct. 1997, Appeal Chamber, ¶ 41.

[37] *See, e.g.,* Zoran Kupreškić, et al., Case No. IT-95-16-T, Trial Judgement, 14 Jan. 2000, ¶¶ 562 – 564. See Module 3 for more information on the principle of legality.

[38] *See, e.g., ibid*. at ¶ 566.

[39] *Ibid*. at ¶¶ 683 – 4.

[40] *See, e.g., ibid*. at ¶ 740.

2.6. RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW AND ICL

International criminal law is related to other areas of international law, including humanitarian law and human rights law. Indeed, both international humanitarian law and human rights law helped develop ICL and continue to contribute to its interpretation and application (and the reverse is also true).

International criminal law can be seen as an alternative to when states do not abide by their human rights obligations.

The major distinction between international criminal law and these other bodies of law is the fact that ICL deals with individual criminal responsibility for violations of international law. Conversely, humanitarian or human rights laws primarily focus on the actions and obligations of states, governments or parties to a conflict.

International human rights law and humanitarian law are also related to each other. For example, the International Court of Justice has held that:

> [T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.[41]

The laws and customs of war, or international humanitarian law, were created to protect citizens during armed conflicts. Under ICL, many violations of international humanitarian law are now considered war crimes. However, the two bodies of law have distinct modes of interpretation and application, and while international humanitarian law can be useful in interpreting ICL, the two should not be conflated.

In particular, international humanitarian law is broader than ICL—not all violations of international humanitarian law constitute war crimes.[42] In addition, not all international humanitarian law treaties criminalise violations, although the violations may be classified as war crimes through customary law.[43] Moreover, international humanitarian law is primarily addressed to states and parties to conflicts. International criminal law, on the other hand, is addressed to individuals, involves only the most serious crimes and violations can result in criminal liability and penalties such as imprisonment.

International human rights law is designed to protect the basic rights and freedoms of all persons and is based primarily on treaty law. To a large degree, international criminal law

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[41] International Court of Justice, Advisory Decision: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ¶ 106 (2004).
[42] CRYER, *supra* note 1, at 271-2. *See e.g. Tadić* AJ ¶ 94. This is discussed in more detail below in Module 8.
[43] CRYER, *supra* note 1, at 271.

developed as a response to mass violations of human rights by states against citizens and persons within their territory. The prosecution of genocide and crimes against humanity developed from human rights standards. Indeed, human rights law influenced the drafting of the statutes of international criminal tribunals and judges at these courts have used human rights law to interpret substantive international criminal laws and procedures.[44] However, international human rights obligations are primarily imposed upon states—not individuals. States must decide for themselves how to enforce human rights obligations and deal with human rights violations by state agents. Moreover, not all human rights are protected by international criminal law. International criminal law can be seen as an alternative to when states do not abide by their human rights obligations.[45]

This section deals with complex and important issues, and is only meant to give an overview of the topic. The general approach by international courts is to harmonise these branches of international law and ensure the widest protection for civilians.[46]

[44] *See, e.g.*, Ferdinand Nahimana et al., Case No. ICTR-99-52-T, Trial Judgement, 3 Dec. 2003 ¶¶ 983-1010; Simon Bikindi, Case No. ICTR-01-72-T, Trial Judgement, 2 Dec. 2008, ¶¶ 378-97; Mile Mrkšić et al., Case No. IT-95-13/1-T, Trial Judgement, 27 Sept. 2007 ¶¶ 59-60.
[45] CRYER, *supra* note 1, at 13.
[46] *See, e.g.,* International Court of Justice, *supra* note 40.

2.7. FURTHER READING

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2.7.2. ARTICLES

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