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EUROPEAN UNIVERSITY INSTITUTE  
LAW DEPARTMENT

## **Working Group on International Criminal Law**

*Meeting of 22 November 2006*

### **Introduction**

At the meeting of the 22<sup>nd</sup> November 2006 were present:

Prof. Pierre-Marie Dupuy, Prof. Francesco Francioni, Noora Arajarvi, Christine Bakker, Silvia D'Ascoli, Valentina Falco, Amna Guellali, Suzan Huttemann, Johannes Schauble (visiting student from the University of Freiburg, Germany), Patricia Pinto Soares, Ottavio Quirico, Yannick Radi, Axelle Reiter, Vassilis Tzevelekos, Cristina Villarino Villa.

Annalisa Ciampi, Micaela Frulli, Dov Jacobs and Luisa Vierucci sent their greetings to all the members of the WG, as they could not be present at the meeting.

The meeting was devoted to the issue of:

*'General Principles and Custom in International Criminal Law'*, theme which was introduced and presented by Ottavio Quirico, visiting fellow at the EUI.

Ottavio's presentation and report is hereby attached, at the end of these minutes.

Ottavio's presentation was followed by an interesting and animated discussion about the place that general principles and custom hold nowadays in international law. For instance, in order to give a general idea of the main issues discussed, Prof. Francioni and Prof. Dupuy pointed out that the issue of 'general principles of law' acquires a special position in the field of international law and, even more, in the field of international criminal law, where what is at stake is not anymore – or not only – the

relation between States, but the relation between the individual and national States. Furthermore, when analysing the difference between general principles and custom and whether they are two completely separated and different sources of law, it was underlined that often for some principles affirmed through Declarations there is no time for State practice and custom, but that the latter (custom) can occur in a second moment. Sometimes ‘principles’ come out all of a sudden because there is a perception of a certain ‘danger’ for particular acts, situations, etc. For instance, a ‘new’ general principle may be affirmed because of ethical considerations. Therefore, the need to state and (re)affirm a certain important principle determines its enshrinement in Declarations, Treaties, and similar international instruments. When – and if – in a second moment the same principle is practised and accepted as a custom, then its transformation into customary law creates identification between the general principle and custom. But it is only in such a case that we can affirm that the two concepts coincide.

It was also observed that in international criminal law there is a ‘tension’ between the willingness of the international community to affirm and recognise the existence of principles of humanity and ethic, and the concern by the same international community to find some ‘legal grounds’ for those principles, some justifications in the existing law and practice (customs of States) for the existence of those principles and their utilisation. Similar problems and tensions arise when ethic is not given the place of a legitimate source of international law.

(Ottavio Quirico’s article follows at the end of this report, starting from page 4).

### **Date of the next meeting**

It was agreed that the WG-ICL would meet again in the first half of December, precisely on Thursday, 7 December 2006, from 15,00 to 17,00, in Villa Schifanoia, Sala Europa, and that the main theme of the meeting would be:

‘*The Crime of Aggression*’, presented by **Cristina Villarino Villa**.

The meeting was closed at 17,00.

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**General List of Participants of the EUI WG (in alphabetical order):**

Noora Arajarvi; Christine Bakker; Prof. Bruce Broomhall; Prof. Annalisa Ciampi; Prof. Luigi Condorelli; Silvia D'Ascoli; Francesca De Vittor; Sara Dezalay; Prof. Pierre-Marie Dupuy; Valentina Falco; Prof. Francesco Francioni; Prof. Micaela Frulli; Prof. Paola Gaeta; Elsa Gopala Krishnan; Amna Guellali; Suzan Huttemann; Dov Jacobs; Patricia Pinto Soares; Dr. Ottavio Quirico; Axelle Reiter; Prof. Luisa Vierucci; Cristina Villarino Villa; Prof. Salvatore Zappalà.

## THE RELATIONSHIP BETWEEN GENERAL PRINCIPLES AND CUSTOM IN INTERNATIONAL CRIMINAL LAW

Ottavio Quirico\*

### Abstract

The concepts of “general principles” and “custom” are fundamental tools in order to understand international law as a whole. They assume special relevance in the domain of international criminal law because it is *extrema ratio*. Unless we conceive both of them in a prescriptive sense, we can assume that they are clearly distinguished concepts in international (criminal) law: custom, as a source, belongs to the realm of secondary norms in the Hartian sense, whereas general principles, as obligations *erga omnes*, belong to the realm of primary norms in the Kelsenite sense. In the naturalist framework general principles rank higher than custom, therefore no interference is possible. From a positivist perspective custom justifies general principles, but their mutual relationship depends on whether or not we regard treaties, general principles of law, and resolutions of international organizations as autonomous sources of obligations *erga omnes*. However, from both the naturalist and the positivist viewpoints, the question arises whether or not the creative role played by judges in defining general principles is respectful of the principle of legality in the field of international criminal law.

### *Preliminary comments*

The relationship between “general principles” and “custom” is a core issue in international law. Principles of international law provide fundamental concepts, facilitating contemplation of the matter on a general plane. Custom represents a determinant tool in a system lacking a central authority, whose nature is basically private, due to the objective criterion of the source. In international criminal law, general principles and custom assume a special relevance, because this domain, as a sub-system of the general system, is *extrema ratio*.

Taking into account the concept of obligation, assuming that the logical form of the norms is hypothetical (“If A is, B ought to be”), according to the principle of imputation, we can define international criminal law as an ensemble of secondary norms that punish breaches of primary norms *cogentes* (especially of human rights).<sup>1</sup> Thus, a parallel can be established between the generality of criminal breaches in domestic orders and that of

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\*\* The author would like to thank Prof. Dupuy, Prof. Francioni, Rory Brown, Silvia D’Ascoli, and all the members of the Working Group on International Criminal Law for their comments and suggestions on a previous draft of this paper. Naturally, all errors remain my own.

<sup>1</sup> See H. KELSEN, *Allgemeine Theorie der Normen (General Theory of Norms)*, Wien, Manz Verlag, 1979, tr. by M. Hartney, Oxford, Clarendon Press, 1991, p. 142; A. CASSESE, *International Criminal Law*, Oxford, University Press, 2003, p. 15. See also ICTY, Appeals Chamber, *Tadić*, IT-94-1, judgment of 15 July 1999, § 226.

international crimes. From this viewpoint, at least from a prescriptive perspective, general principles are a fundamental concept in international criminal law.

Taking into account the concept of a source, when we think of custom as the foundation of international criminal law, we must face the principle of legality: “*Nullum crimen, nulla poena sine praevia lege poenali*”. According to most of the literature and judicial opinion, we can assume that the sources of international law also apply to international criminal law.<sup>2</sup> Thus, custom must be considered a source in order to define international crimes and criminal sanctions. Indeed, given that legislative acts *stricto sensu* do not exist in the international “private” order, we have to think that consensual sources can govern criminal matters, conceiving the principle of legality in terms of: “*Nullum crimen, nulla poena sine iure*”.<sup>3</sup>

The analysis of some relevant criminal cases reveals that different concepts of “general principles” and “custom” exist. In short, among other possible viewpoints, “general principles” can be regarded either in a prescriptive or in a descriptive sense, whereas “custom” can be conceived either in a procedural or in a prescriptive way.

Considering “general principles” from a prescriptive viewpoint, and “custom” from a procedural viewpoint, their mutual relationship varies according to the positivist and the naturalist perspective.

*Prescriptive conception vs. descriptive conception of the “general principles”*

In a prescriptive sense, general principles are general obligations, i.e. obligations *erga omnes*.<sup>4</sup> Thus we can assume that the term “principle” means “obligation”, which is perfectly understandable, given that the concept of “obligation” is at the very root of the juridical reasoning. The adjective “general”, instead, refers to the objective and subjective structure of the obligation itself, describing its universality. On this plane the concept of “general principle” is basically a tool belonging to normative language, and we will think of it at the level of primary norms in the Kelsenite sense.

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<sup>2</sup> See A. CASSESE, *International Criminal Law*, p. 26; G. WERLE, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, p. 44. See also ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, §§ 190 *et seq.*

<sup>3</sup> See S. ZAPPALÀ, “Quale principio di legalità nel diritto internazionale penale?”, in *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, p. 278.

<sup>4</sup> On the theory of general principles as obligations see N. BOBBIO, *Teoria generale del diritto*, Torino, Giappichelli, 1993, p. 145; M. KOSKENNIEMI, “General Principles: Reflections on Constructivist Thinking in International Law”, in *Sources of International Law*, Aldershot, Dartmouth, 2000, pp. 364-365.

This conception emerges in international criminal law, for instance, from the jurisprudence of the ICTY in the case *Furundžija*, where the tribunal states that:

*“the prohibition of torture imposes upon States obligations erga omnes, that is obligations owed towards all the other members of the international community, each of which then has a correlative right [...] The principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm of jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”*.<sup>5</sup>

From the viewpoint of the structure it is important to notice that in the domain of international criminal law a general principle, regarded as an obligation *erga omnes*, should preferably be conceived as binding an individual (passive subject) to all the other (state and not state) subjects of international law (active subjects).

In a descriptive sense general principles are very abstract concepts, inferred from the observation of the international law order, which expedite a better holistic comprehension of the system. According to some of the literature, general principles could be defined as concepts that “emerge through inductive generalizations from individual rules” which “simply describe rules”.<sup>6</sup> From this viewpoint the term “principle” means “descriptive concept”, whereas the adjective “general” means “very abstract”. On this plane the notion of “general principle”, inferred from systematic interpretation, belongs essentially to normative meta-language.<sup>7</sup>

This conception emerges in international criminal law, for instance, again from the jurisprudence of the ICTY in the case *Furundžija*, where the tribunal states that:

*“The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law”*.<sup>8</sup>

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<sup>5</sup> ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, §§ 151, 153, (*emphasis added*). See also ICTY, Appeals Chamber, *Halilović*, IT-01-48, decision of 19 August 2005, § 16.

<sup>6</sup> M. KOSKENNIEMI, “General Principles: Reflections on Constructivist Thinking in International Law”, pp. 365-366.

<sup>7</sup> See U. SCARPELLI, C. LUZZATI, *Compendio di filosofia del diritto*, Torino, Giappichelli, 2000, p. 97.

<sup>8</sup> ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, § 183, (*emphasis added*). See also ICTY, Trial Chamber II-quater, *Delalić and others*, IT-96-21, judgment of 16 November 1998, §§ 424, 425; ICTR, Trial Chamber I, *Akayesu*, ICTR-96-4, judgment of 2 September 1998, §§ 462, 472, 475, 486, 487.

Taking into account the criminal normative plane, article 21 § 1 b) of the ICC Statute speaks of “principles and rules of international law”, so it is not possible to decide whether “principles” are on the same footing as “rules”, therefore whether or not they are prescriptive.

However, if we assume that law is a logical system of rights and duties encompassing all possible human behaviour, thinking of the general principles in a descriptive sense, we have to acknowledge that we are reasoning outside the strict logic of law.<sup>9</sup> In truth we have to ask whether the descriptive conception of the general principles can be reconciled with the prescriptive one. In the above mentioned case *Furundžija* it seems that the tribunal’s reasoning is prescriptive, and not descriptive; indeed, when the tribunal speaks of “respect for human dignity”, it refers to the *obligation* to respect human dignity. If it is true that, in this case, the tribunal detects a duty having a general content, and not a specific one, still the logic is prescriptive. Taking into account the “Principles of the Nuremberg Tribunal”, formulated by the ILC in 1950, we can make the same kind of assumption. For instance, principle 5, despite its natural reading as a descriptive phrase, is certainly prescriptive, in its historical context, stating that: “Any person charged with a crime under international law has *the right* to a fair trial on the facts and law”.<sup>10</sup> Instead, principle 1 does not expressly speak of “rights” or “duties”, stating that: “Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”, so, at first glance, it could seem descriptive. Nevertheless the noun “crime” and the adjective “responsible” implicitly refer to the hypothetical form of the norm (“If A is, B ought to be”), because of the principle of imputation; therefore not only one, but two obligations are set, and the logic is still prescriptive, although only at a general level.

*Procedural conception vs. prescriptive conception of “custom”*

Taking into account the concept of “custom” from a procedural perspective, we can think of it as a source. Hence we can define it as an ensemble of behaviours, repeated over time (*diuturnitas*), which regulate obligations through their mutation into *opinio iuris sive necessitatis*.<sup>11</sup> Thus we will think of it at the level of secondary norms in the Hartian sense.<sup>12</sup>

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<sup>9</sup> See H. KELSEN, *Peace through Law*, Chapel Hill, The University of North Carolina Press, 1944, pp. 26-27.

<sup>10</sup> *Emphasis added.*

<sup>11</sup> See H. KELSEN, “Théorie du droit international public”, *RCADI*, 1953-III, vol. 84, pp. 122-123.

<sup>12</sup> See H. L. A. HART, *The Concept of Law*, Oxford, University Press, 1961, p. 79.

This conception emerges in international criminal law, for instance, from the jurisprudence of the ICTY in the case *Hadžihasanović and Kubura*, where the tribunal speaks of “*customary law status*” of the “principles prohibiting attacks on civilians and unlawful attacks on civilian objects”.<sup>13</sup> Indeed, speaking of “customary international law” the ICTY refers to custom as a source of general obligations.

Although this definition, at first glance, seems to be formally satisfactory, it raises many problems, especially taking into account international practice.<sup>14</sup> Among other problems, largely discussed in the literature, the question arises as to what legal status customary behaviour enjoys prior to its mutation into *opinio iuris sive necessitatis*. Furthermore, in the domain of international criminal law, it is particularly important to ascertain to what extent decisions of judges integrate the customary process, beyond states’ practice; indeed the creative role of judges could conflict with the necessity of defining crimes *ex ante*, according to the principle of legality.<sup>15</sup>

From a prescriptive viewpoint, the concept of “custom” seems to refer not only to the behaviour rule, but also to the behaviour governed by an obligation, in a normative sense. This is possible because of the coincidence of the behaviour governing and the behaviour governed in the customary structure.<sup>16</sup> This interpretation emerges in international criminal law, for instance, from the jurisprudence of the ICTY in the case *Jelisić*, where the tribunal speaks of “violations of the *laws or customs* of war”.<sup>17</sup> Here the reference to “customs”, on the same footing as “laws”, seems to include the concept of “obligation”. At the normative level the same terminology is employed at article 8 (War Crimes) of the ICC Statute. Even more pertinently, the Annex to the Hague Convention II, concerning “Regulation

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<sup>13</sup> ICTY, Appeals Chamber, *Hadžihasanović and Kubura*, IT-01-47, decision of 11 March 2005, § 28, (*emphasis added*). See also ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, §§ 137-140; ICTY, Appeals Chamber, *Strugar*, IT-01-42, decision of 22 November 2002, § 10.

<sup>14</sup> For an overview of the problems related to custom in international law see R.-J. DUPUY, “Coutume sage et coutume sauvage”, in *La communauté internationale*, Mélanges offerts à Ch. Rousseau, Paris, Pedone, 1974, pp. 75 *et seq.*; M. KOSKENNIEMI, “The Normative Force of Habit: International Custom and Social Theory”, in *International Law*, Aldershot, Dartmouth, 1992, pp. 213 *et seq.*

<sup>15</sup> On the creative role played by judges in international law see P.-M. DUPUY, *Droit international public*, 8<sup>ème</sup> éd., Paris, Dalloz, 2006, p. 348, according to which: “L’intervention et l’interprétation du juge comportent [...] une virtualité normative propre”. For the same kind of reflection in the field of international criminal law see S. ZAPPALÀ, “Quale principio di legalità nel diritto internazionale penale?”, p. 278, who states that: “il giudice internazionale non ha soltanto il compito di interpretare e applicare le norme, deve anche individuarle nella complessa e multiforme realtà della prassi internazionale”.

<sup>16</sup> See P.-M. DUPUY, “L’unité de l’ordre juridique international”, *RCADI*, 2002, vol. 297, p. 161.

<sup>17</sup> ICTY, Trial Chamber I, *Jelisić*, IT-95-10, decision of 14 December 1999, § 138, (*emphasis added*). See also ICTY, Trial Chamber II, *Mrkšić and others*, IT-95-13/1, decision of 23 January 2004, § 9.

respecting the *laws and customs* of war on land”, at section 1, chapter 1, article 1, speaks of “*laws, rights, and duties* of war”, as does the Hague Convention IV of 18 October 1907.<sup>18</sup>

On the normative plane article 38 § 1 b) of the ICJ Statute, defining “international custom” as “evidence of a general practice accepted as law”, does not help in establishing what the most suitable definition of “custom” is.

*Formal differences and analogies between “general principles” and “custom”*

Given the above-developed purely structural analysis, we can conclude that there is a perfect coincidence, or, at least, a partial overlap, between the concepts of “custom” and “general principles”, only if we conceive both of them in the prescriptive sense. Instead, there is no coincidence if we adopt a descriptive conception of the “general principles”, or if we assume a procedural conception of “custom”. Specifically, assuming that “custom” is a source, and that “general principles” are obligations *erga omnes*, we will establish a clear differentiation, thinking of the former at the level of secondary norms in the Hartian sense, and of the latter at the level of primary norms in the Kelsenite sense. From this viewpoint we must analyze the vertical relationship between the two concepts, which is dynamic in a positivist perspective, and static in a naturalist perspective.

*The positive framework: the vertical dynamic relationship between custom and general principles*

In the positive sphere, in addition to custom, we have to take into account treaties and general principles of law inferred from domestic systems in order to establish what the relationship is between custom as a source and general principles as obligations.

As for treaties, we have to ascertain whether or not they can be direct sources of general principles. Interpretations vary according to the cases in the decisions of the international criminal tribunals.

Following the jurisprudence of the ICTY in the case *Furundžija* it seems possible to think of treaties as a direct source of general principles in international criminal law. Indeed the tribunal states that: “the prohibition of torture laid down in human rights treaties

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<sup>18</sup> *Emphasis added.*

*enshrines an absolute right [...] These treaty provisions impose upon States the obligation to prohibit and punish torture*”.<sup>19</sup>

Following the jurisprudence of the ICTY in the case *Tadić*, it seems that treaties can create, modify, or extinguish general principles only by becoming customary rules. Indeed the tribunal states that: “*Some treaty rules have gradually become part of customary law. This holds true for common article 3 of the 1949 Geneva Conventions*”.<sup>20</sup>

According to the jurisprudence of the ICTY in the case *Delalić and others*, treaties can only crystallize custom. Indeed the tribunal states that: “*the definition of torture contained in the Torture Convention [...] reflects a consensus which the Trial Chamber considers to be representative of customary international law*”.<sup>21</sup>

*En passant*, it is noteworthy that only if we assume that the Statutes of the ICTY and of the ICTR crystallize customary international law we can consider them respectful of the principle of legality; otherwise they would set up criminal rules with retroactive effect.

At the normative level, article 38 § 1 a) of the ICJ Statute speaks of “international conventions, whether general or particular”, so allowing every kind of interpretation. However, although it is not at all unreasonable to think of treaties as a source of general principles, this generalization is forbidden by the principle of the relative effectiveness (*pacta tertiis neque prosunt neque nocent*), expressly established by article 34 of the 1969 Vienna Convention on the Law of Treaties.<sup>22</sup>

As for general principles of law inferred from domestic systems, the interpretation of the international criminal tribunals is almost unanimous in asserting that they are the result of a purely jurisdictional mental operation. Hence, the judge should establish what the general principles of law are following this pattern: 1. A comparison among national systems; 2. The search for common principles; 3. The transposition of the common principles on the international plane.<sup>23</sup>

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<sup>19</sup> ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, §§ 144-145, (*emphasis added*). Accordingly in the literature see P. DAILLIER, A. PELLET, *Droit international public*, 7<sup>ème</sup> éd., Paris, LGDJ, 2002, pp. 205, 248-249.

<sup>20</sup> ICTY, Appeals Chamber, *Tadić*, IT-94-1, decision of 2 October 1995, § 98, (*emphasis added*).

<sup>21</sup> ICTY, Trial Chamber II-quater, *Delalić and others*, IT-96-21, judgment of 16 November 1998, § 459, (*emphasis added*). See also ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, § 227; ICTY, Trial Chamber II, *Kupreškić*, IT-95-16, judgment of 14 January 2000, § 580.

<sup>22</sup> Accordingly see P.-M. DUPUY, *Droit international public*, 8<sup>ème</sup> éd., Paris, Dalloz, 2006, pp. 346 *et seq.*; S. VILLALPANDO, *L'émergence de la communauté internationale dans la responsabilité des États*, Paris, Puf, 2005, p. 87, especially note 294.

<sup>23</sup> See A. PELLET, “Applicable Law”, in A. CASSESE, P. GAETA, J. R. W. D. JONES, *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, University Press, 2002, p. 1073.

Again in the case *Furundžija* the ICTY states that:

“Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: [...] *international courts must draw upon the general concepts and legal institutions common to all the major systems of the world*. This presupposes *a process of identification of the common denominators in these legal systems* so as to pinpoint the basic notions they share [...] account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided”.<sup>24</sup>

On the normative plane, accordingly, article 21 § 1 c) of the ICC Statute speaks of “general principles of law *derived by the Court from national laws of legal systems of the world*”.<sup>25</sup>

However it does not seem impossible to provide a customary interpretation of the general principles of law inferred from domestic systems. From this viewpoint we will regard acts of recognition of the general principles in domestic orders (especially legislative acts) as the expression of a tacit consent on the international plane.

In the course of the case *Tadić* the ICTY remarks that:

“*the principle reflected in the Latin maxim unus testis, nullus testis, which requires testimonial corroboration of a single witness’s evidence as to a fact in issue, is in almost all modern continental legal systems no longer a feature [...]* It follows that *there is no ground for concluding that this requirement of corroboration is any part of customary international law* and should be required by this International Tribunal”.<sup>26</sup>

Hence judges would play just a partial constitutive role or a purely declarative role in the establishment of general principles of law, exactly as they do in the customary process of establishment of general principles of international law.<sup>27</sup> This interpretation is possible because, after all, regarded as obligations *erga omnes* from a prescriptive perspective, general principles of law inferred from domestic orders are structurally equal to general principles of international law. Article 38 § 1 c) of the ICJ Statute does not seem to exclude this

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<sup>24</sup> ICTY, Trial Chamber II, *Furundžija*, IT-95-17/1, judgment of 10 December 1998, § 178, (*emphasis added*). See also ICTY, Appeals Chamber, *Erdemović*, IT-96-22, judgment of 7 October 1997, separate and dissenting opinion of Judge Cassese, § 2; ICTY, Appeals Chamber, *Blaškić*, IT-95-14, judgment of 29 October 1997, § 23; ICTY, Trial Chamber I, *Erdemović*, IT-96-22, judgment of 29 November 1996, § 19.

<sup>25</sup> *Emphasis added*.

<sup>26</sup> ICTY, Trial Chamber II, *Tadić*, IT-94-1, judgment of 7 May 1997, §§ 537-539, (*emphasis added*). See also ICTY, Appeals Chamber, *Furundžija*, IT-95-17/1, judgment of 21 July 2000, declaration of Judge Robinson, § 12.

<sup>27</sup> See P.-M. DUPUY, “L’unité de l’ordre juridique international”, pp. 184 *et seq.*

interpretation, speaking of “general principles of law recognized by civilized nations”, although it is true that it clearly distinguishes general principles of law (under c)) from customary general principles (under b)). However, this viewpoint seems to be upheld by the observation that international judges tend to search for confirmation of their interpretation of the general principles of law in states’ customary behaviour.<sup>28</sup>

Another possible foundation of the general principles relies upon the observation that general principles, especially in the field of human rights, would represent generally shared moral principles, whose affirmation in the positive field of international law would be possible through resolutions of international organizations, namely of the UN General Assembly. A typical example of this trend is the UN General Assembly Universal Declaration on Human Rights of 10 December 1948.<sup>29</sup> This interpretation seems to be upheld by the observation that general principles exist in international law even in the absence of a customary practice. Nevertheless this hypothesis presupposes the binding force of the international organizations’ resolutions, which are rather more commonly seen as instruments not endowed with binding effectiveness, only useful to prove the existence of customary general principles. Otherwise we should think that resolutions represent only the beginning of the process establishing general principles, in the end governed by the tacit consent of states. However from this viewpoint we still would resort to the consensual mechanisms of custom in order to explain the regulation of the general principles.

Given the above developed considerations, in the sphere of positive law, custom will not be the sole source of the general principles if we think that treaties too can directly regulate general obligations, that general principles of law are a pure creation of international judges, or that resolutions of international organizations can regulate general obligations with binding effectiveness, so that only a partial “overlap” between custom and general principles would be possible. Instead, custom will be the sole source of the general principles if we think that treaties cannot directly regulate general obligations, that general principles of law inferred from domestic orders have a customary origin, and that

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<sup>28</sup> For a critical vision of the relationship between general principles of international law and general principles of law in international criminal law see L. GRADONI, “L’exploitation des principes généraux de droit dans la jurisprudence des tribunaux pénaux internationaux”, in *La justice pénale internationale dans les décisions des tribunaux ad hoc*, Milano, Dalloz/Giuffrè, 2003, pp. 12, 32-36.

<sup>29</sup> See B. SIMMA, P. ALSTON, “The Sources of Human Rights Law: Custom, *ius cogens*, and General Principles”, *Australian YBIL*, 1988-1989, pp. 100 *et seq.*; B. SIMMA, “International Human Rights and General International Law: a Comparative Analysis”, *Collective Courses of the Academy of European Law*, 1993, vol. IV-2, pp. 218 *et seq.*

resolutions of international organizations have no (at least direct) binding effectiveness, so that a thorough “coincidence” is possible.

*The natural framework: the vertical static relationship between general principles and custom*

From the naturalist perspective the vertical relationship between prescriptive general principles and procedural custom is static and revolutionized. Indeed general obligations do not rank anymore under custom, but above it. Since general principles exist naturally, we do not need custom anymore to justify them, therefore no coincidence or partial overlap between the two concepts is possible.

Specifically in the jurisdictional moment, when judges can resort to *aequitas* in deciding a case (article 38 § 2 of the ICJ Statute), the possibility exists of introducing natural law in the realm of positive law.

The ICJ certainly gives a moral interpretation of general principles, especially of human rights, in the *Corfu Channel* case, stating that there are: “obligations [...] based [...] on *certain general and well recognized principles*, namely: *elementary considerations of humanity*, even more exacting in peace than in war”.<sup>30</sup> Furthermore, the reference to “elementary considerations of humanity” allows for a natural interpretation of the general principles.

However, the natural conception of the general principles is hardly convincing. The first criticism consists in observing that values change in time: not being timeless, they cannot be natural.<sup>31</sup> Furthermore, if we can easily explain the existence of general obligations *cogentes* in the naturalist perspective, it is rather difficult, if not impossible, to justify the existence of general obligations *non cogentes*.

It is also noteworthy that international criminal tribunals normally rely upon custom in their decisions; otherwise, if they assumed a role of pure creators of law, they would enhance the already mentioned risk of violating the principle of legality.<sup>32</sup>

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<sup>30</sup> ICJ, *Corfu Channel*, judgment of 9 April 1949, § 2, p. 22, (*emphasis added*). In the literature on the introduction in the positive sphere of moral values by jurisdictional organs see P.-M. DUPUY, *Droit international public*, p. 348. See also M. BOS, “John Austin et les principes généraux du droit international public”, in *Hacia un nuevo orden internacional y europeo*, Estudios en homenaje al Profesor Manuel Díez de Velasco, Madrid, Tecnos, 1993, pp. 119 *et seq.*

<sup>31</sup> See N. BOBBIO, *Teoria generale del diritto*, p. 33; U. SCARPELLI, C. LUZZATI, *Compendio di filosofia del diritto*, pp. 19-24.

<sup>32</sup> See L. GRADONI, “L’attestation du droit international pénal coutumier dans la jurisprudence du Tribunal pour l’ex-Yougoslavie – ‘Régularités’ et ‘Règles’”, in *Les sources du droit international pénal*, pp. 30 *et seq.*

### *Conclusions*

In conclusion, unless we conceive both “general principles” and “custom” in a prescriptive meaning, we can assume that they are clearly distinguished concepts in international (criminal) law. Custom, as a source, belongs to the realm of secondary norms in the Hartian sense, whereas general principles, as obligations *erga omnes*, belong to the realm of primary norms in the Kelsenite sense.

The way we see the relationship between custom, as a procedural structure, and general principles, as a prescriptive structure, in international criminal law, and, more generally, in international law, relies upon a fundamental choice between the static naturalist justification and the positivist dynamic foundation of the general principles. Both the naturalist and the positivist explanations provide advantages and disadvantages, nevertheless problems related to the positivist view seem to be more tolerable than those related to the naturalist conception.

In the natural framework general principles rank above custom, so that no interference is possible between the two concepts. In other words custom is not an essential tool in the justification of general principles, i.e. general obligations, which are presupposed. Theories conferring upon judges an autonomous power of creating law are often inspired by a naturalist conception of the general principles.

In the sphere of positive law, custom ranks above general principles as a source of obligations *erga omnes*. In this space it is not at all ascertained whether or not custom is the sole source of general principles. In fixing the relationship between custom and general principles a key role is played, on one side, by judges, and, on the other, by treaties and resolutions of international organizations, as sources of general international law.

Both from the naturalist and the positivist perspectives the creative role played by judges poses some problems with regard to the principle of legality in the domain of international criminal law.<sup>33</sup> Indeed the naturalist view of the general principles could confer upon judges an unlimited power to define criminal norms *ex post*, especially through the instrument of the *aequitas*. From the positivist viewpoint, given that judges do not confine themselves to interpret and apply norms, but also complete them by detecting and

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<sup>33</sup> Judges create law whenever their decisions are definitive, but it is clear that we rather refer to the discretionary power with which jurisdictional organs are endowed (see U. SCARPELLI, C. LUZZATI, *Compendio di filosofia del diritto*, p. 99).

defining the complex reality of the international practice, the question arises whether or not this process is respectful of the necessity to define *ex ante* criminal breaches and sanctions.

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