EUROPEAN UNIVERSITY INSTITUTE
LAW DEPARTMENT

Working Group on International Criminal Law

Meeting of 9 May 2007

Introduction

The meeting of 9 May 2007 was devoted to the issue of : '*Customary International Law in International Criminal Tribunals*' - introduced and presented by Noora Arajarvi, first year PhD researcher. (Noora's full presentation is hereby attached, at the end of this report).

Participants to the meeting were:
Prof. Pierre-Marie Dupuy, Noora Arajarvi, Silvia D'Ascoli, Ottavio Quirico, Axelle Reiter, Johannes Schauble (visiting student from the University of Freiburg, Germany), Mark Toufayan, Cristina Villarino Villa.

Noora Arajarvi introduced the topic of customary international law in the jurisprudence of the UN ad hoc Tribunals and specified that – in relation to the outline she previously distributed – she would focus in particular on its part II: 'Role of the international ad hoc tribunals in the formation of customary law'.

After a brief overview of the evolution of customary criminal law and of the establishment of the UN ad hoc Tribunals, Noora considered in particular the construction of customary international law by the International Criminal Tribunals for the former Yugoslavia (ICTY). With regard to that, she presented some selected judgements of the ICTY, in particular the *Tadic*, *Furundzija*, *Kunarac*, and *Krstic*

cases. She highlighted the conceptual tension in the judicial application and construction of international customary criminal law.
Noora subsequently illustrated some of the main research questions on which her PhD will focus, for instance: whether it is necessary to use the 'words and language' of traditional customary international law for international customary *criminal* law; whether the case-law and jurisprudence of the ad hoc Tribunals represent a 'new source' of law; whether the concept of 'state practice' in customary law is out of date.

Noora's presentation was followed by an interesting discussion about all the issues at stake.
Professor Dupuy made a good appraisal of Noora's work and of the relevance and topicality of the issues involved in her research.
Cristina Villarino Villa commented upon the traditional notion of 'custom', its meaning in new areas of law, and the relevance of 'practice' in international criminal law. The importance of the notion of 'general principles of law' was also put forward.
Other comments followed by Ottavio Quirico, Silvia D'Ascoli, Axelle Reiter on the category of 'general principles of law', on the principle of legality (in particular the *nullum crimen sine lege* component), and on the role and importance of the 'international judge'.
At the end of the debate, Professor Dupuy concluded by summing up all the remarks made and the suggestions gave. He further dwelled on the role of international judges in the application and developments of international law.

(Noora's presentation follows at page 4)

Date of the next meeting
It was agreed that the WG-ICL would try to meet again in the month of June, after the deadlines of June Papers and such. Date and place to be decided, further details will follow via email.

The meeting was closed at 17,15.

General List of Participants (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.

9 May 2007, Working Group on International Criminal Law.
Presentation on: '*Customary International Law in International Criminal Tribunals*'

By **Noora Arajärvi**
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Customary International Law in International Criminal Tribunals

Introduction

I. Genesis of International Customary Criminal Law

II. Role of International Criminal Tribunals in the Formation of Customary Law

- **i. Establishment of the *ad hoc* tribunals**
- **ii. Construction of Customary International Law by the ICTY**

III. Conceptual Tensions in the Judicial Application and Construction of International Customary Criminal Law

Conclusion

Introduction

The hypothesis of my study is that the construction of international customary norms in international criminal law includes a normative element, and therefore, in the fields of international law that contain some moral considerations the traditional construction of custom based on state practice and *opinio juris* is not applicable.

After submitting the outline for the presentation I have noticed that it is impossible to address all the issues set out in the outline in depth in one introductory presentation. So, the main emphasis of my presentation today is the Part Two, the role of international criminal ad hoc tribunals in the formation of customary law. I will start by giving a short overview of the evolution customary international law in general, and then move on to its construction in international criminal law.

I. Genesis of International Customary Criminal Law

The Statute of the ICJ reproduces the list of sources of international law codified in the Statute of the Permanent Court of Justice, and defines international custom as evidence of a general practice accepted as law. The method of custom construction, often seen to derive from the article 38 of the Statute, to which I refer to as the traditional model, consists of two elements, state practice and *opinio juris*.

The traditional model has been construed in various ways by courts as well as by scholars. For example, Frederick Kirgis's sliding scale, which introduced the relative significance, or weight, of practice and *opinio juris* that is based on the idea that 'the more destabilizing or morally distasteful the activity … the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable'.[1]

In the *North Sea Continental Shelf* case the court relied heavily on actual state practice whereas in *Nicaragua* the actual practice was not thoroughly examined, and instead the court gave priority to words over deeds, thus it emphasized the importance of *opinio juris* in international custom formation. It could be said that in the latter case the ICJ considered the underlying issue of international peace and security - so

[1] I Frederick L. Kirgis, Jr., 'Custom on a Sliding Scale', 81 *American Journal of International Law* 146 (1987), at 149.

important, whether on practical or moral grounds, that to deny a customary rule prohibiting the use of force and intervention would reduce the significance of international law, as well as reduce the confidence in the court.[2]

In international criminal law similar rationales, international peace and security, protection of fundamental human rights, preservation of life and so on, might explain the need to move away from traditional model of custom construction. In this presentation I concentrate my analysis in a limited number of cases, mainly from the ICTY, and discuss the methods of constructing customary norms used in those cases, and if and how this differs from the traditional model.

In this presentation I will not analyse the Nuremberg jurisprudence but it is worth mentioning that already in the Nuremberg trials some official declarations of the Allied countries during the Second World War, condemning the acts of the Nazis, were invoked as evidence of state practice in establishing that a customary norm had emerged. In addition to the tribunal's interpretation of customary international law, the United Nations General Assembly passed two resolutions in 1946 that affirmed the principles of law articulated by the Nuremberg tribunal.[3] These resolutions have been relied on as a confirming evidence of customary nature of the Nuremberg law in subsequent cases.

II. Role of International Criminal Tribunals in the Formation of Customary Law

i. Establishment of the *ad hoc* Tribunals

In 1993 after a number of resolutions condemning violations of international humanitarian law in the territory of the former Yugoslavia, the Security Council decided by resolution 808 to create an international tribunal to deal with atrocities committed after 1991 in that territory. The resolution was adopted under the powers

[2] Charlesworth, H. C. M., 'Customary International Law and the Nicaragua Case', 11 *Australian Yearbook of International Law* 1 (1984-1987), at 27-29.
[3] Resolution 3(I) on Extradition and Punishment of War Criminals (13 February 1946) and Resolution 95(I) on Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal (11 December 1946).

given to the Security Council by the Chapter VII of the Charter of the United Nations thus the situation was determined as a threat to international peace and security.

In the resolution 808 the Security Council requested the Secretary-General to submit a report on all aspects, for example the legal basis, relating to the establishment of the ICTY. The Report sets out a Statute for the ICTY with explanations of each article. The tribunal has the competence to apply international humanitarian law that is 'beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.' Also, by resorting to the norms that are beyond any doubt customary international law, the court complies with the *nullum crimen sine lege* principle, which I will address in more detail later on in this presentation.

The Report of the Secretary-General lists international legal instruments that are also part of customary law relating to armed conflict: the 1949 Geneva Conventions, the 1907 Hague Convention [(IV) Respecting the Laws and Customs of War on Land] and Regulations annexed to it, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1945 Charter of the International Military Tribunal. Interestingly the nature of the armed conflict – international or internal – is not mentioned in relation to tribunal's competences. This omission is most likely deliberate in order to avoid raising the question whether, and at what point in time, the conflict in the territory of the former Yugoslavia constituted internal as opposed to international conflict, thus when the existence of the state of Yugoslavia ended and it was succeeded by six of the former Yugoslav republics. The status of successor states in relation to the treaties signed by the predecessor is not ultimately clarified in international law but all states are bound by customary norms. By applying only those norms that have become part of customary international law at the time the alleged atrocities took place, the court, again, would act in conformity with the *nullum crimen* principle.

The International Criminal Tribunal for Rwanda was created by the Security Council Resolution 955 (1994). The ICTR Appeal Chamber stated in the case Rutaganda,[4] that

[4] *Prosecutor v. Rutaganda*, (1999), 6 December 1999, ICTR-96-3-T, para. 86.

'the creation of the Tribunal, in response to the alleged crimes perpetrated in Rwanda in 1994, raised the question all too familiar to the Nuremberg Tribunal and the ICTY, that of jurisdictions applying ex post facto laws in violation of this principle. In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, i.e. The ICTR, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to, and whether individuals incurred individual criminal responsibility for violations of these international instruments.' At the time when the acts considered by the ICTR took place, in 1994, Rwanda was a party to the Geneva Conventions, the both Additional Protocols thereto, as well as the Genocide Convention, and therefore those legal instruments could be applied directly by the court, without having to show that the norms codified in the instruments had acquired the status of customary international law. Because of the primacy of conventional law in the ICTR, in my study the jurisprudence of the ICTR does not play such a central role as that of the ICTY, where all the rules applied ought to be of customary nature.

ii. Construction of Customary International Law by the ICTY

The Appeals Chamber of the ICTY held in the *Tadic* case that the common article 3 of the Geneva Conventions formed part of customary international law. In relation to the Additional Protocol II, though, the Chamber acknowledged that 'many provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law', but not all.[5] In *Tadic* the court did point to various sources dating from the Spanish Civil War in reviewing evidence of state practice and *opinio juris*. Unlike in some following cases, the court did not avoid using the traditional vocabulary of custom formation, but used the expressions of state practice and *opinio juris*.

In many points of the case *Furundzija* the ICTY examined whether customary rules prohibiting various alleged offences exist that give rise to individual criminal

[5] *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

responsibility.[6] The methods in reaching conclusions varied from point to point. In relation to torture as a war crime the court stated that the 'general prohibition against torture has evolved in customary international law'.[7] In analyzing this evolution the court refrained from entering into traditional custom formation discourse of finding evidence of state practice and *opinio juris*. Instead, the court looked into written documents on the prohibition of torture as a war crime to establish if the provisions have evolved into customary law. The documents cited as evidence that the general prohibition of torture exists under customary law include the 1863 Lieber Code, the 1907 Hague Conventions together with the Martens clause, and the 1946 Allied Control Council Law No. 10, which incorporated torture into the list of crimes against humanity.

Geneva Conventions and the fact that they have virtually universal ratification were invoked as the main source of evidence of the customary nature of torture as a war crime.[8] The *Furundzija* court also stated that the content of the prohibition of torture is the same under customary international law and under the treaty law. Even though the court did not use the traditional vocabulary in establishing custom, it did resort to practice and declarations of states in concluding that no state has officially authorised the use of torture in armed conflict, and in facing allegations of torture states have either denied the existence of such practice or condemned it as a unique error of an individual official. Thus, by behaving in this manner the states have not downgraded the prohibition of torture but have accepted the normative prohibition even when actual practice may not affirm it.

As the last point the court referred to the *Nicaragua* case[9] of the ICJ which did not concern torture but the formation of custom in international law in general[10]. However, the ICJ had stated that the common article 3 of the Geneva Conventions,

[6] *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, 10 December 1998.
[7] *Furundzija*, para. 137.
[8] Para. 138. In the previous paragraph the court referred in passing to a decision of the Constitutional Court of Columbia which had held that the Geneva Conventions and also the Additional Protocols thereto have in their entirety become customary law.
[9] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. The United States of America*), I.C.J. Reports 14 (1986).
[10] *Furundzija,* para. 138.

which explicitly mentions also torture[11], had developed into customary international law.[12]

In order for individual criminal responsibility to arise there must exist a definition of the elements of the crime. The court in *Furundzija* began this analysis of the definition of torture by stating that international humanitarian law does not offer such definition.[13] The definition drawn from the Torture Convention[14] was applied by the ICTR in the *Akayesu* case[15] but the ICTY considered that unless it can show that the definition has crystallized in customary criminal law, in other words as a customary norm giving rise to individual criminal responsibility instead of state responsibility which the Torture Convention imposes, it cannot apply that definition in criminal cases under its jurisdiction. The *Furundzija* court referred to a previous decision of the ICTY, *Delalic*[16], where it was held that the definition of torture laid out in the Torture Convention is representative of customary international law because it is a broader definition than given in the United Nations Declaration on Torture[17] and in the Inter-American Convention to Prevent and Punish Torture.[18]

In investigating whether a definition of torture has become to exists in customary law and what the contents of that definition would be, the *Furundzija* court held that although the definition of the Torture Convention is limited to the scope of that Convention, it can still be an authoritative source 'because it spells out all the necessary elements implicit in international rules on the matter'.[19] Thus it can be utilized as part of the evidence of the emergence of a customary definition for torture. Further evidence spelling out similar or coinciding definitions was drawn from the United Nations Declaration on Torture which was adopted in the General Assembly

[11] Article 3 (1) (a) of the Geneva Conventions.
[12] For discussion see Theodor Meron, 'The Geneva Conventions as Customary Law', 81 *American Journal of International Law* (1987) 348.
[13] *Furundzija*, para. 159.
[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/39/51 (1984), 1465 UNTS 85.
[15] *Prosecutor v. Akayesu,* 2 September 1998, ICTR-96-4-T.
[16] *Prosecutor v. Delalic*, 16 November 1998, IT-96-21-T.
[17] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res. 3452, U.N. Doc. A/10034 (1975).
[18] Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67, 25 I.L.M. 519 (1986).
[19] *Furundzija*, Para. 160

by consensus.[20] In addition, the court pointed to the definition set forth in Inter-American Convention to Prevent and Punish Torture[21], United Nations Special Rapporteur, European Court of Human Rights and the Human Rights Committee of the United Nations.[22] The court then concluded that 'the broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in the article 1 of the Torture Convention'.[23]

The interpenetration of human rights law, in relation to torture, to international criminal law was further discussed in case *Kunarać*.[24] After reviewing many human rights instruments and jurisprudence of various jurisdictions, the court concluded that '… the definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law … Article 1 of the Torture Convention can only serve, for present purposes, as an interpretational aid'.[25] Furthermore, Trial Chamber in *Kunarać* stated, challenging the argumentation of *Delalic* that 'the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law'.[26] This decision can be seen as a move towards construction of customary criminal law independently from the impetus of human rights law.

The case *Krstic* concerned the criminal responsibility of General Krstic for acts, including mass executions and forcible transfer of Bosnian Muslims that took place in Srebrenica in 1995.[27] In relation to the killings the accused was charged with genocide, and alternatively, with complicity to genocide.

The Trial Chamber of the ICTY considered that the definition given to the crime of genocide in article 4(2) of the Statute of the ICTY needs to be interpreted taking into

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[20] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res. 3452, U.N. Doc. A/10034 (1975).
[21] Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67, 25 I.L.M. 519 (1986).
[22] *Furundzija*, Para. 160.
[23] Ibid para. 161.
[24] *Prosecutor v. Kunarać*, IT-93-23-T & IT-96-23/1-T, Judgment of 22 February 2001.
[25] Ibid para 482.
[26] Ibid para 496.
[27] *Prosecutor v. Radislav Krstic*, IT-98-33-T, 2 August 2001.

account the customary international law at the time the act was committed. The court, again, did not resort to find evidence of state practice and *opinio juris* but instead referred to five different sources arising mainly from the international sphere.

First, the court stated that the Genocide Convention was the main source because the article 4 of the ICTY Statute adopts its definitions. In addition the Genocide Convention has been acknowledged to have codified existing norms of international law as was affirmed in the advisory opinion of the ICJ in *Reservations to the Convention on the Prevention and Punishment of Genocide* (1951).[28]

Secondly, the court considered international case-law, especially in the ICTR, as a source of customary law. For instance, in discussing the meaning of a 'group' as a target of genocide, the court recognized that in the cases *Akayesu* (1998) and *Kayishema and Ruzindana* (2001) the ICTR confirmed the principles put forth in preceding soft law instruments such as the UN General Assembly resolution 96 (1946), the statement of the UN Secretariat (1948), the ICJ judgment (1951) and finally by the International Law Commission (1996).

Thirdly, the reports of international committees, for instance the Report of the International Law Commission on the Draft Code of Crimes against Peace and Security of Mankind, were stated to be relevant for the interpretation of the article 4 of the ICTY Statute.

Fourthly, the preparatory works and the draft text of the Rome Statute of the International Criminal Court were viewed as evidence of the status of customary international law on genocide. By assessing that the draft text produced by Preparatory Commission for the ICC constitutes evidence of the *opinio juris* of the states, the court demonstrated that the traditional model of 'state practice supported by *opinio juris*' has not entirely vanished in the vocabulary of construction of custom by the ICTY.

[28] *Reservations to the Convention on the Prevention and Punishment of Genocide*, I.C.J. Reports (1951) 15.

Finally, 'legislation and practice of States, especially their judicial interpretations and decisions' were evaluated by the court. For example, the court referred to the French Criminal Code and a decision by the German Constitutional Court in determining the intent to destroy as an element of genocide.

However, as in the *Furundzija* case, the concepts of state practice and *opinio juris* as understood in the traditional construction of customary law were not really articulated. Also, perhaps surprisingly, especially in the light of traditional approach to the construction of customary international law, is that the court does not draw any distinction between the legally binding documents, actual practice of states or the so-called soft law documents such as General Assembly resolutions.[29]

In 2003 in case *Hadzihasanovic*, which was concerned with the definition of command responsibility, the Appeals Chamber returned to the traditional construction of custom and stated that 'to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*'[30] and that 'it is the task of a court to interpret the underlying State practice and *opinio juris*'.

In the light of these developments in the jurisprudence of the ICTY, a large part of my study is to recognize and analyse the changes in the custom construction and the reasons for the court's somewhat capricious approaches. Also, I consider if the changed compositions of the Chambers have had a direct bearing on the understanding of what is to be invoked as evidence of custom.

III. Conceptual Tensions in the Judicial Application and Construction of International Customary Criminal Law

[29] The role of General Assembly resolution in custom formation has not been agreed upon. Akehurst has stated that only those resolutions which claim to be declaratory of existing law, thus *lex lata*, can be used as authoritative evidence of state practice of customary law by the courts; see Michael Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1974-1975) 1, at 6. On the other hand Judge Ammoun adopted wider approach in his separate opinion in the *Barcelona Traction* (*Belgium v. Spain*) case by stating that positions taken by delegates of states in international organizations and conferences, with a special emphasis on the United Nations, 'naturally form part of state practice'.

[30] *Prosecutor v. Hadzihasanovic*, IT-01-47-AR72, 16 July 2003, para. 12.

There has been academic discourse on whether the Charter of the International Military Tribunal codified existing customary international law or created new, retrospective law, which could have breached the principles of legality, mainly the *nullum crimen* principle. The International Military Tribunal jurisprudence has been relied on and reasserted on later trials, for example, in Canadian case *Regina v. Finta*, where the accused was a former Hungarian general suspected of Nazi war crimes and crimes against humanity, Justice Cory quoted Kelsen stating that '[...] to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions'. [31] On the reverse, Judge Cassese has stated that 'policy-oriented approach in the area of criminal law runs contrary to the fundamental principle *nullum crimen sine lege*'.[32]

It has been suggested that the breach of the *nullum crimen* principle could be justified on a rationale that those who commit the most heinous atrocities should not go unpunished even when no clear legal rule has prohibited the acts at the time they were committed. If one adopts the view that the tribunal created new law, perhaps a more substantive justification for retroactive application of the principles of law is that 'the principle of legality is … a *principle of justice* flowing from natural law doctrine'.[33] From this could be deduced that principle of legality should not be accepted for the purpose of allowing immoral outcome. I hope to address further in my PhD Thesis the issue of natural law doctrine in international criminal law, as well as what is meant by immorality and who should determine it.

Conclusion

Other approaches, not explicitly linked to international criminal law, on the reformulation of customary international law have been put forth, for example the efficiency argument by Eyal Benvenisti. He has suggested that in the Gabčíkovo-Nagymaros Project case[34] the ICJ bypassed the traditional construction of customary norms in relation to environmental issues. Benvenisti considers that 'the ICJ has …

[31] *Regina v. Finta*, [1994] 1 S.C.R. 701, Supreme Court of Canada 24 March 1994.
[32] In *Prosecutor v. Erdemović*, IT-96-22-A, Separate and Dissenting opinion of Judge Cassese, para. 11, 111 ILR 386 (1998).
[33] Garibian, Sévane, 'Crimes against humanity and international legality in legal theory after Nuremberg', 9 *Journal of Genocide Research* (2007) 93, at 99.
[34] *Hungary/Slovakia*, (1997) I.C.J. Reports 7.

the power to invent custom' if the newly formed custom is more efficient, no other entity is taking active steps towards the same goal, and that treaty (or treaty negotiations) between states have been inefficient, usually because of the non-reciprocal nature at hand.[35] In this context of analysis, environmental issues, efficiency is defined as the 'optimal allocation of world's resources among states'. Despite the disputable nature of this interpretation, perhaps something from the efficiency argument could be incorporated in the construction of custom by international criminal tribunals. This, however, so far has not been, really at the focus of my research.

I will conclude my presentation by a few questions that have arisen during the first year of my research: Is it necessary to use the model and language of customary international law in construction of norms in the criminal tribunals, or instead could the developments in international criminal law reflect a completely new source of evidence of international law?

In international criminal law, the decisions of courts play an increasing role in custom formation, and the resolutions and statements of non-state institutions have often been accepted as evidence of practice, *opinio juris*, or even both, as was implied in the *Nicaragua* case. How far can declarations or even practice of non-state organs, whether international organizations, NGOs, or secessionist movements, have an impact on the formation of customary international law, and also be bound by it? Has the concept of state practice as an element of custom become outdated, at least in some fields of international law?

On the same vein, how much does the jurisprudence of the courts like the ICTY have influence on the subsequent practice and *opinio juris*, or could it be said that decisions themselves crystallize or even create new customary norms?

[35] Eyal Benvenisti, 'Customary international law as a judicial tool for promoting efficiency', in Eyal Benvenisti and Moshe Hirsch (Eds.), *The Impact of International Law on International Cooperation* (2004), at 85.