

**Prologue: A Plea for a
Casuistic Approach to
International Criminal Law**

1.1 INTRODUCTION

In *Rules, Norms and Decisions*, Kratochwil asserts that justice cannot be identified with the existence of a body of rules. Instead, '[d]oing justice involves, above all, the exercise of practical judgments in which abstract norms and concrete circumstances are fitted together'.¹ Courts should therefore constantly go back and forth between general rules of law and case-specific facts and use this interplay to develop an honest legal system.² This study takes Kratochwil's assertion as a starting-point for analysing the development of substantive international criminal law by international criminal courts.

The foundations of international criminal law lie in Nuremberg with the International Military Tribunal (IMT), which was set up to try the major war criminals of World War II. Upon the subsequent establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) and the permanent International Criminal Court (ICC) in the 1990's, international criminal law reached a more mature stage. It developed from a rudimentary notion of accountability for mass violence into a complex field of law generating individual criminal responsibility for war crimes, crimes against humanity, genocide and the crime of aggression. International criminal courts have played an important role in this development. Their decisions on the questions and issues raised in individual cases have gradually transformed the incomplete 'shopping list of crimes' into a practical legal system.³ International criminal law can therefore not be studied without paying attention to case law.

1 F.V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991) 241.

2 Kratochwil (n. 1 above) 240.

3 M. Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, 13 December 2006, PhD Thesis, available online at <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/5434/Thesis.pdf?sequence=1>>, 56, 83. See also A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008) 80; W.A. Schabas, 'Interpreting the Statutes of the *ad hoc* Tribunals' in L.C. Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) 886; A. Cassese, 'The ICTY: A Living and Vital Reality', 2 *Journal of International Criminal Justice* (2004) 585, 591-593; A.M. Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', 59 *Vanderbilt Law Review* (2006) 1, 3-5, 21-22, 41; R. Jennings and A. Watts, *Oppenheim's International Law, Volume I: Peace* (Oxford: Oxford University Press, 1996) 41; S. Darcy and J. Powderly, 'Introduction' in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 1, 2; M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 184, 187; G. Mettraux, *The Law on Command Responsibility* (Oxford: Oxford University Press, 2009) 3-4; R. Haveman, 'The Context of the Law' in R. Haveman et al. (eds.), *Supranational Criminal Law: A System Sui Generis* (Antwerp: Intersentia, 2003) 9, 9; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) 14; D. Terris et al., *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford: Oxford University Press, 2007) xix-xx.

The judicial development of international criminal law is characterised by a high degree of creativity. In the absence of a comprehensive codification, international criminal courts have set out to discover and create the law on a case-by-case basis.⁴ In this respect, they have been willing to loosely use and progressively expand existing definitions of international crimes and modes of liability.⁵ For example, the case law on Joint Criminal Enterprise (JCE), war crimes in non-international armed conflicts and rape as a type of genocide shows a judicial readiness to look beyond (the text of) the established legal framework. In this way, the courts have been able to advance and modernise underdeveloped and out-dated concepts of law.

It seems that the need and scope for radical judicial innovations diminish with the maturation of international criminal law. Due to the important pioneering work of the IMT and the *ad hoc* Tribunals, the ICC faces less fundamental obscurities and deficiencies when it evaluates new situations of fact. Furthermore – unlike the *ad hoc* Tribunals – the ICC does not only apply rudimentary concepts of customary international law, but primarily relies on a comprehensive framework of statutory rules. The detailed definitions of international crimes and forms of criminal liability in the ICC’s Rome Statute and Elements of Crimes limit the Court’s discretion to innovate.⁶ Also the stipulation of a strict hierarchy of legal sources and the explicit incorporation of the principle of legality in the Rome Statute, signify an ambition to put the ICC on a ‘tight leash’.⁷ Having said that, early ICC case law suggests that individual cases continue to bring forward previously unforeseen situations. The Court has regularly responded to these situations in creative ways that are difficult to trace back to the text of statutory rules. Thus, the ICC has proceeded to gradually clarify and develop the nature and scope of criminal responsibility for international crimes. In this sense, judicial creativity remains an inherent part of substantive international criminal law.⁸

4 Zahar and Sluiter (n. 3 above) 80.

5 B. van Schaack, ‘Crimen sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’, 97 *Georgetown Law Journal* (2008) 119, 123-124; Schabas (n. 3 above); Terris et al. (n. 3 above) 104.

6 J. Wessel, ‘Judicial Policy-Making at the International Criminal Court’, 44 *Columbia Journal of Transnational Law* (2006) 377, 400-401, 409, 414; Mettraux (n. 3 above) 12; Van Sliedregt (n. 3 above) 14-15.

7 This development has been met with criticism. See e.g. D. Hunt, ‘The International Criminal Court: High Hopes, “Creative Ambiguity” and an Unfortunate Mistrust in International Judges’, 2 *Journal of International Criminal Justice* (2004) 56, 59, 61; R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Criminal Law Review* (2009) 390, 391-392; A. Pellet, ‘Applicable Law’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1051, 1056-1062, 1083-1084.

8 Terris et al. are critical towards such continuous judicial creativity. They argue that what ‘may be necessary and productive in the early years could become a dangerous habit as judicial institutions reach their maturity. Depending, as they do, on the cooperation and goodwill of individual states, international judges cannot, in the long run, afford to be seen as unpredictable and unrestrained’. Terris et al. (n. 3 above) 225.

How should we appraise this creative practice? To what extent and under which conditions are international criminal courts authorised to adapt the law to new facts or changed circumstances? To answer these questions, we have to reflect upon the principle of *nullum crimen sine lege* – or the principle of legality – which protects accused from an arbitrary use of power by binding courts to existing law. In the specific context of substantive international criminal law, legality is often interpreted in procedural terms. This means that the progressive development of the law by courts is not prohibited *per se*, but is subjected to (requirements on) judicial reasoning. One of the most challenging aspects of judicial reasoning is (the substantiation of) the classification of individual cases under the law. Legal theory and domestic practice provide useful insights into the course of this process of classification. In particular, they assume that it can be described in terms of casuistry.

Casuistry takes as a starting-point that the law is inextricably linked to its practical function. This implies that the meaning of the law is not determined by abstract rules alone, but develops in interplay with the questions and issues raised in individual cases. The facts of these cases thus become an essential construct for the law's gradual clarification and advancement. Casuistry therefore employs a methodology of case-based reasoning, which particularly seeks to warrant that courts make the interplay between facts and law transparent and apply the law in a structured manner. In this way, the methodology of casuistry helps to clarify the meaning of the law and controls its case-by-case development. This study assesses the value of casuistry for substantive international criminal law. In particular, it proceeds to answer the following questions:

How can casuistic analyses contribute to the clarification of substantive international criminal law? And how can the casuistic method of reasoning help to structure and restrain judicial argumentation in such a way that the values underlying the principle of legality are respected?

This prologue explains the assumptions underlying the study and clarifies its theoretical underpinnings. Section 2 starts with an exploration of the benchmark of judicial creativity: the principle of legality. It assesses the role of legality in (international criminal) law and determines the influence of legality on the position of judges. The results of this assessment are relied upon throughout this study as a standard for scrutinising the judicial development of substantive international criminal law.

Related to the different views on legality, are different theories of legal reasoning. Instead of giving a comprehensive and detailed overview of all these theories, section 3 describes how traditional legalist views on judicial reasoning have been replaced with an approach that recognises the open texture of rules and the autonomous position of

courts. The thoughts and trends that are presented in this respect are largely inspired by (the role of judges in) domestic law and can therefore not be readily applied to the international context.⁹ Having said that, it will be shown that domestic insights on legalism and reasoning from open-textured rules are particularly useful for understanding and appraising (research on) the development of substantive international criminal law by international criminal courts.

Section 4 explores the theory and methodology of casuistry. It shows how casuistry structures judicial reasoning and balances the need for legal development against the requirements of legality. It seems that the abstract thoughts on casuistic reasoning are difficult to implement in practice. They should therefore be complemented with a practical reasoning model that offers concrete guidelines for analysing and structuring the law's judicial development. To this end, we can rely on insights from Artificial Intelligence and Law (AI&L) on logical reasoning and formal argumentation.¹⁰ Legal professionals have often been suspicious towards such analyses, since they believe that '[t]he life of the law is not logic (...)'.¹¹ This study recognises that judicial reasoning cannot be fully captured in mathematical schemes of formal logic. It therefore neither compares judicial decisions to the mechanical outcomes of computer-models, nor interprets international criminal law according to logical strictures. Instead, the study uses AI&L research to translate the abstract thoughts underlying casuistry into a plain and articulate model of judicial argumentation.¹² In this way, AI&L helps to give casuistry 'hand and feet'.

Moving from theory to practice, section 5 evaluates the basic features of casuistry in domestic affairs. This evaluation can assist in determining the added value of casuistry for substantive international criminal law and can help us to understand and scrutinise the judicial development of criminal responsibility for international crimes. After all, the legal skills and knowledge of international criminal lawyers are shaped by their domestic experience. A (re)appraisal of casuistry in domestic law therefore likely affects its role at the international level.

9 Van Sliedregt (n. 3 above) 13-14; Terris et al. (n. 3 above) 103-104, 114-115.

10 B. Roth, *Case-Based Reasoning in the Law: A Formal Theory of Reasoning by Case Comparison*, 26 November 2003, PhD Thesis, 1.

11 O.W. Holmes, *The Common Law* (Mineola: Dover Publications, 1991) 1. See also W. Friedmann, 'Legal Philosophy and Judicial Lawmaking', 61 *Columbia Law Review* (1961) 821, 823-825; M. Taruffo, 'Judicial Decisions and Artificial Intelligence', 6 *Artificial Intelligence and Law* (1998) 311, 316-317; A. von der Lieth Gardner, *An Artificial Intelligence Approach to the Law* (Cambridge: A Bradford Book, 1987) 1; V. Walker, 'Discovering the Logic of Legal Reasoning', 35 *Hofstra Law Review* (2007) 1687, 1692.

12 G. Sartor and L. Branting, 'Introduction: Judicial Applications of Artificial Intelligence', 6 *Artificial Intelligence and Law* (1998) 105, 107; H. Prakken and G. Sartor, 'Modelling Reasoning with Precedents in a Formal Dialogue Game', 6 *Artificial Intelligence and Law* (1998) 231, 232, 236; Von der Lieth Gardner (n. 11 above) 2, 191; Taruffo (n. 11 above) 321-322.

Against the background of legal theory and domestic practice, section 6 sets out the expected role and merits of casuistry in relation to substantive international criminal law. In particular, it assumes that casuistic analyses can give new insights into the meaning of international crimes and modes of liability and can put subtle restrictions on judicial creativity. In this way, casuistic analyses advance the legality of (judicial reasoning on) substantive international criminal law.

The prologue concludes with a few words on the limitations of this study (section 7) and an outline of the following research (section 8).

1.2 LEGAL BENCHMARK: PRINCIPLE OF LEGALITY

1.2.1 *General Conception and Function*

The principle of legality prohibits the *ex post facto* criminalisation of conduct and the retroactive application of criminal law.¹³ A conviction can only be based on norms that already existed when the accused committed the act with which he is charged. In this way, the principle of legality restricts the authority of courts: ‘the judiciary is obliged in principle to refrain from penalising conduct not made criminal by the legislator through the wording of the law in question, and is thus confined to interpreting and applying, but not making the law’.¹⁴ The principle of legality also requires that legal norms are sufficiently foreseeable and accessible – either through published legislation or otherwise – so that accused can acquaint themselves with the state of the law and the consequences of its infringement. In addition, courts are compelled to interpret the law strictly and to resolve legal ambiguities in favour of the accused. Together, these legality

13 B. Broomhall, ‘Article 22: *Nullum Crimen sine Lege*’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observer’s Notes, Article by Article* (München: C.H. Beck oHG, 2008) 713, 714; M.C. Bassiouni, ‘Principle of Legality in International and Comparative Criminal Law’ in M.C. Bassiouni, *International Criminal Law, Volume I: Sources, Subjects and Content* (Leiden: Martinus Nijhoff Publishers, 2008) 73; M. Shahabuddeen, ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law?’, 2 *Journal of International Criminal Justice* (2004) 1007, 1008; Van Schaack (n. 5 above) 121; Haveman (n. 3 above) 44. The content and application of the principle of legality in national criminal justice systems varies. In particular the common law and civil law systems seem to have implemented the principle in different ways. See, e.g. M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002) 81-126; R. Haveman, ‘The Principle of Legality’ in R. Haveman et al. (eds.), *Supranational Criminal Law: A System Sui Generis* (Antwerp: Intersentia, 2003) 39, 40-50; E. Bleichrodt, ‘Freedom from Retrospective Effect of Penal Legislation’ in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia, 2006) 651, 653-655, 658; Bassiouni (n. 13 above) 76-85, 97-98.

14 Broomhall (n. 13 above) 716. Legality is thus linked to the doctrine of separation of powers. On this issue see, K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2010) 24-26; Boot (n. 13 above) 18-19, 387, 611-612.

requirements protect accused from an arbitrary use of power,¹⁵ which ultimately strengthens the rule of law and the legitimacy of the criminal justice system.¹⁶

In international criminal law, it has regularly been argued that (the extensive judicial interpretations of) the innovative statutory definitions of international crimes and modes of liability violate the prohibition of *ex post facto* criminalisation, because they create new law retroactively.¹⁷ The IMT and the *ad hoc* Tribunals have largely rejected these challenges, considering that the specific features of international criminal law (such as the absence of an international legislator) justify a lenient approach towards the principle of legality. The accused should only have been ‘able to appreciate that the conduct is criminal in the sense generally understood, without reference to the specific provision’.¹⁸ By thus stripping the principle of legality of any formal requirements, the courts have arguably enabled its ‘deformalization’¹⁹ and have turned legality into a substantive principle of justice that can be balanced against the need for punishment.²⁰ As a result, the principle of legality has not imposed any substantial restraints on the judicial clarification and refinement of substantive international criminal law. In fact, it has left room for the IMT and the *ad hoc* Tribunals to develop the law progressively.²¹

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- 15 P.P. Soares, ‘Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism’, 23 *Criminal Law Forum* (2012) 161, 164; M. Catenacci, ‘Nullum Crimen sine Lege’ in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Napoli: Editoriale Scientifica, 1998) 159, 159-161; S. Lamb, ‘Nullum Crimen, Nulla Poena sine Lege in International Criminal Law’ in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 733, 734; Bassiouni (n. 13 above) 74; Boot (n. 13 above) 18, 366, 611; Haveman (n. 13 above) 51; Shahabuddeen (n. 13 above) 1008; Gallant (n. 14 above) 20-23.
- 16 K. Rozemond, *De Methode van het Materiële Strafrecht* (Nijmegen: Ars Aequi, 2011) 22; Broomhall (n. 13 above) 716; Bassiouni (n. 13 above) 74; Shahabuddeen (n. 13 above) 1008; Gallant (n. 14 above) 14-17, 23-24. Luban rejects the connection between the principle of legality and the rule of law insofar as it concerns international criminal law. D. Luban, ‘The Legacies of Nuremberg’, 54 *Social Research* (1987) 779, 803.
- 17 Haveman (n. 3 above) 12; Van Schaack (n. 5 above) 125, 133; Boot (n. 13 above) 189-196, 264, 272, 283-284, 285; Broomhall (n. 13 above) 721; Gallant (n. 14 above) 67-155; Lamb (n. 15 above) 735-736.
- 18 *Prosecutor v. Hadžihasanović*, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, Case No. IT-01-47-AR72, Appeals Chamber, 16 July 2003, para. 34. According to Nilsson, this implies that ‘[a] defendant must, at the time he committed the act, have been able to understand that what he did was criminal’. J. Nilsson, ‘The Principle *Nullum Crimen sine Lege*’ in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (Groningen: Europa Law Publishing, 2007) 35, 64. See also Shahabuddeen (n. 13 above) 1010; Gallant (n. 14 above) 321.
- 19 K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013) 75.
- 20 Boot (n. 13 above) 612; Ambos (n. 19 above) 75.
- 21 E.g. *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000, para. 127; *Prosecutor v. Mucić et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, para. 173. By so reasoning, the international criminal courts largely confirm to the case law of the European Court of Human Rights (ECHR). This Court has found that ‘the gradual clarification of the rules of criminal liability through judicial interpretation from case to case’ does not violate the principle of legality, ‘provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’. *Scoppola v. Italy*, Judgment, Appl. No. 10249/03, 17 September 2009, para. 102. See also *Cantoni v. France*,

At first sight, the ICC cannot adopt a similarly lenient approach towards the principle of legality. Article 22 of the Rome Statute – which incorporates the first codification of legality in international criminal law – explicitly prohibits the law’s retroactive application and analogous extension. Moreover, the provision stipulates that the Court should interpret its Statute strictly. According to Boot, the role of the ICC thus ‘resembles the views of Montesquieu, requiring judges to solely act as “*les bouches de la loi*”’.²² Early ICC case law, however, signifies a different practice in which the Court refuses to be put on the ‘tight leash’ of the principle of legality.²³ The ICC has been willing to go beyond the text of the Rome Statute and has adopted progressive interpretations where considered necessary. The Court’s innovative notion of criminal responsibility based on the concept of ‘control over the crime’ (through a hierarchical organisation) is illustrative in this respect.²⁴ This creative practice is controversial, even within the confines of the ICC. In dissenting and concurring opinions, Judges Van den Wyngaert and Fulford have openly distanced themselves from the Court’s broad interpretations. Instead, they have pleaded for a stricter, grammatical reading of the Rome Statute that conforms to its ‘ordinary meaning’ or ‘plain text’.²⁵

Judgment, Appl. No. 17862/91, 11 November 1996, para. 35. The leeway that judges have to develop the law without making it unforeseeable ‘depends to a considerable degree on the content of the law concerned, the field it is designed to cover and the number and status of those to whom it is addressed. (...)’. Bleichrodt (n. 13 above) 655. Also the fact that judicial development advances the values that the statute seeks to protect seems relevant for determining the scope for such development under the ECHR. Bleichrodt (n. 13 above) 655.

- 22 Boot (n. 13 above) 395 (emphasis added). More nuanced, but also arguing that Article 22 lays down a less tolerant concept of legality than general international law are Cryer (n. 7 above) 403; Broomhall (n. 13 above) 717-718; Ambos (n. 19 above) 75-76.
- 23 For a critical approach towards this development, see J.D. Ohlin and G.P. Fletcher, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005) 539, 541-542; K. Ambos, ‘International Criminal Law at the Cross-Roads: From *ad hoc* Imposition to a Universal Treaty-Based System’ in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 161, 174-176. For a critical evaluation of the (negative) effects of the restrictions that the drafters have put on the ICC see, e.g. Van Sliedregt (n. 3 above) 14; Pellet (n. 7 above) 1056-1059; Hunt (n. 7 above) 61; Cryer (n. 7 above) 39.
- 24 *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, paras. 500-518.
- 25 E.g. *Prosecutor v. Lubanga*, Separate opinion of Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842, 14 March 2012, paras. 13-18; *Prosecutor v. Ngudjolo Chui*, Concurring opinion of Judge Christine van den Wyngaert, Case No. ICC-01/04-02/12, 18 December 2012, paras. 6, 11-21, 39, 44, 57, 64, 68-69, 70.

1.2.2 *Scholarly Appraisal*

Legal scholarship considers it inappropriate to ‘unreflectively transplant’ domestic legality requirements to the international level.²⁶ Instead, it finds that (protests based upon) the principle of legality should be assessed in light of the specific features of international criminal law and the particular difficulties of adjudicating international crimes.²⁷ Van Sliedregt accordingly reminds us that international criminal law is still infused with ‘power-politics’ and that the consensual nature of this field likely generates unworkable statutory provisions. Therefore, ‘judicial lawmaking is essential and compensates for a flawed process of lawmaking’.²⁸ Other scholars complement this line of reasoning by arguing that international crimes are *malum in se* – i.e. evil in themselves²⁹ – and generally prohibited under domestic law.³⁰ Hence, it is difficult to argue convincingly that an accused could not have foreseen the illegality of international crimes and the criminality of his actions. It rather seems that the ‘unforeseeability-argument’ can only be raised persuasively in relation to specifically ambiguous crimes and forms of participation.³¹ Think, for example, of war crimes that are subject to military necessity or accused who only provided remote and neutral assistance to a crime.

Notwithstanding the distinctive characteristics of international criminal law, legal scholarship stresses that the ‘creativity in adapting principles is bounded’.³² The

26 D. Robinson, ‘International Criminal Law as Justice’, 11 *Journal of International Criminal Justice* (2013) 699, 703. Also see D. Robinson, ‘International Criminal Courts and Tribunals: A Cosmopolitan Liberal Account of International Criminal Law’, 26 *Leiden Journal of International Law* (2013) 127.

27 M. Swart, ‘Legality as an Inhibitor: The Special Place of *Nullum Crimen sine Lege* in the Jurisprudence of the International Criminal Tribunals’, *South Africa Yearbook of International Law* (2005) 33, 33; Swart (n. 3 above) 177-181; Van Sliedregt (n. 3 above) 13-14; Van Schaack (n. 5 above) 135-138; Broomhall (n. 13 above) 717; Bassiouni (n. 13 above) 87-88; Boot (n. 13 above) 250, 306-307, 369. Interestingly, Judge Robertson in his dissenting opinion to the Norman et al. case before the SCSL has argued that the special characteristics of international criminal law, such as the absence of a legislator and the seriousness of the crimes, prompt a strict interpretation of the principle of legality. See *Prosecutor v. Fofana and Kondewa*, Dissenting opinion Judge Robertson, Case No. SCSL-04-14-AR72(E), Trial Chamber, 31 May 2004, para. 12.

28 Van Sliedregt (n. 3 above) 14.

29 Van Schaack (n. 5 above) 155-158; Gallant (n. 14 above) 41-42; Nillson (n. 18 above) 64. For a more nuanced view, see Boot (n. 13 above) 306, 386.

30 Boot (n. 13 above) 269-271; Gallant (n. 14 above) 320-324; Nillson (n. 18 above) 64.

31 S. Darcy, ‘The Reinvention of War Crimes by the International Criminal Tribunals’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 106, 126; R. Cryer, ‘The *ad hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 159, 183; G. Boas, ‘Omission Liability at the International Criminal Tribunals – a Case for Reform’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 204, 224; Schabas (n. 3 above) 887; Van Schaack (n. 5 above) 156-158; Hunt (n. 7 above) 59; Haveman (n. 13 above) 76; Ohlin and Fletcher (n. 23 above) 553-556.

32 Robinson, ‘International Criminal Law as Justice’ (n. 26 above) 703.

particularities of the international context may ‘entertain the possibility of modifying familiar articulations’ of the legality principle, but cannot ‘contemplate their complete abandonment’.³³ From this perspective, scholars have taken a ‘procedural approach’ to legality. This approach allows a fair amount of creativity with respect to the *outcomes* of judicial decision-making, whilst it restrains the *process* through which these creative outcomes are implemented. In particular, it stipulates that the requirements of legal certainty and strict interpretation do not impede the progressive judicial interpretation of innovative statutory definitions *per se*. Instead, these requirements only warrant that the courts’ findings are based on precise reasoning and valid argumentation. Sources of law and methods of interpretation have to be used in a consistent and accurate way to avert unrestricted and uncertain decision-making.³⁴

According to legal scholarship, international criminal courts regularly fail to meet the procedural standards of the legality principle. It has, for example, been argued that the *ad hoc* Tribunals tend to stretch the requirements for establishing customary law.³⁵ Whereas the Tribunals claim to have recourse to both *opinio juris* and state practice,³⁶ in practice their identification of either element remains rather haphazard:

decisions cited did not provide any direct evidence for the proposed rule, key decisions were invoked or ignored in a sometimes arbitrary fashion, and treaties were invoked without indicating how these were relevant in the process of identifying a customary norm.³⁷

This allows for the proclamation of ‘nascent and previously unexpressed customary law’,³⁸ which creates uncertainties that cause tension with the foreseeability requirement

33 Robinson, ‘International Criminal Law as Justice’ (n. 26 above) 703. Similarly, Haveman (n. 13 above) 55, 76-77; Nillson (n. 18 above) 62-63; Ohlin and Fletcher (n. 23 above) 541, 551-552.

34 Swart delinks the principle of legality from the use of sources. Swart (n. 3 above) 246.

35 L. van den Herik, ‘Using Custom to Reconceptualize Crimes against Humanity’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 80, 100-105; A. Nollkaemper, ‘The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia’ in T. Vandamme and J.H. Reestman (eds.), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems* (Groningen: Europa Law Publishing, 2001) 13, 15-18; J. Powderly, ‘Judicial Interpretation at the *ad hoc* Tribunals: Method from Chaos?’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) 17, 26-32. Boot and Ambos have drawn a similar link between the strict understanding of customary international law and the principle of legality. Boot (n. 13 above) 305; Ambos (n. 23 above) 162-163.

36 Powderly (n. 35 above) 28.

37 Van den Herik (n. 35 above) 105. See also Danner (n. 3 above) 47; Van Schaack (n. 5 above) 165; Wessel (n. 6 above) 392; Boas (n. 31 above) 204-205, 207; Nollkaemper (n. 35 above) 15-17.

38 Lamb (n. 15 above) 745.

of the legality principle.³⁹ Also the ICC's interpretation of the Rome Statute has been met with criticism. Scholars have, for example, argued that the Court's use of interpretative techniques stemming from human rights law can provoke (excessively) broad interpretations of criminal law concepts.⁴⁰ After all, human rights lawyers do not think in terms of legality,⁴¹ but traditionally engage in teleological reasoning that regards the maximisation of victim protection as the law's exclusive purpose.⁴² The legality requirement of strict statutory construction is thereby easily lost out of sight.

1.3 LEGAL THEORY ON JUDICIAL REASONING

1.3.1 *From Legalism to Dialogue*

The procedural approach to legality prompts a further assessment of the process of judicial reasoning and of the restrictions that this process imposes on courts. Insights from legal theory are particularly useful in this respect. Legal theory takes as a starting-point that courts operate on the basis of argumentative legitimacy, which means that they have to articulate rational reasons for their decisions to the parties, the higher courts and the general public.⁴³ Such reason-giving is especially important when courts exercise a central role in the clarification and development of the law, like in international criminal law.⁴⁴ It is therefore opportune that the statutes of the *ad hoc* Tribunals and

39 On this issue, see also I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', 6 *International Criminal Law Review* (2006) 121, 121; Y. Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared' in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012) 149, 150, 156; Van Sliedregt (n. 3 above) 14; Wessel (n. 6 above) 392; Powderly (n. 35 above) 26-32.

40 D. Robinson, 'The Identity Crisis of International Criminal Law', 4 *Leiden Journal of International Law* (2008) 925, 934.

41 Haveman (n. 3 above) 32.

42 Robinson (n. 40 above) 934. See also Haveman (n. 3 above) 31-33; Soares (n. 15 above) 168-173; Wessel (n. 6 above) 440-447.

43 L.M. Soriano, 'The Use of Precedents as Arguments of Authority, Arguments *ab Exemplo* and Arguments of Reason in Civil Law Systems', 11 *Ratio Juris* (1998) 90, 91-92, 101; C.E. Smith, *Regels van Rechtsvinding* (Den Haag: Boom Juridische Uitgevers, 2007) 57, 140; C.E. Smith, *Feit en Rechtsnorm. Een Methodologisch Onderzoek naar de Betekenis van de Feiten voor de Rechtsvinding en Legitimatie van het Rechtsoordeel*, 10 September 1998, PhD Thesis, 25; Kratochwil (n. 1 above) 43, 212; Cassese (n. 3 above) 589; Taruffo (n. 11 above) 314-316. For a nuanced view on the connection between the audience to which the judge directs his judgment and the style of the judgment, see J. Bell, 'Book Review: *Comparing Precedent*', 82 *Cornell Law Review* (1996-1997) 1243, 1251-1252, 1261.

44 P.P.T. Bovend'Eert, 'Wetgever, Rechter en Rechtsvorming', 4 *Rechtsgeleerd Magazijn Themis* (2009) 145, 152; J.C.A. de Poorter and H.J.Th.M. van Roosmalen, *Motivering bij Rechtsvorming. Over de Motivering van Uitspraken met een Rechtsvormend Element door de Afdeling Bestuursrechtspraak van de Raad van State* (Den Haag: Raad van State, 2009) 16, 22.

the ICC explicitly stipulate that the courts should give a fully reasoned opinion for their findings.⁴⁵

Legal theory regularly assumes that judicial argumentation is guided or controlled by rules.⁴⁶ The reliance on rules allegedly warrants that decisions are objectively rational and conform to the rule of law.⁴⁷ The rules of substantive international criminal law have been increasingly captured in statutory provisions.⁴⁸ These provisions specify the legal elements – i.e. the necessary and sufficient conditions – of international crimes and modes of liability. Courts have the task to determine the applicability of these elements in individual cases. Hereto, they connect general legal rules to the particular facts of the case before them. Legal theories present different views on the course of this process.

Traditional legalist theories take the democratic ideal and the requirements of legal equality and certainty as a starting-point. From this perspective, they assume a strict division of labour between the legislator and the judiciary.⁴⁹ Whereas the legislator has the task to design clear rules that criminalise specific behaviour, the judiciary applies these rules deductively:⁵⁰ '[i]t is the function of a judge not to make the law but to declare the law, according to the golden mete-wand of the law and not the crooked cord of discretion'.⁵¹ In this way, the judicial authority to clarify and develop the law is confined. The decisions of courts (conclusions) should logically follow from the application of a legal rule (major) to the facts of individual cases (minor).⁵² Judicial interpretation is thereby permitted, but has to be closely linked to the text of the rule at issue (strict construction). When a gap in the law cannot be filled through interpretation, courts are not allowed to proceed autonomously, but should bring the issue to the legislator's

45 Statute for the International Criminal Tribunal for Rwanda, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc. S/RES/955 (8 November 1994) (ICTR Statute), Article 22; Statute for the International Criminal Tribunal for the former Yugoslavia, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc. S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc. S/RES/1877 (7 July 2009) (ICTY Statute), Article 23; Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (ICC Statute), Article 74.

46 Von der Lieth Gardner (n. 11 above) 3; Smith 2007 (n. 43 above) 12-13.

47 Walker (n. 11 above) 1687.

48 This does not change the fact that many rules of international criminal law still have a basis in customary international law.

49 This strict separation between the legislator and the judiciary can be traced back to the *trias politica*, one of the basic principles of modern democratic societies.

50 M.J. Borgers, 'De Communicatieve Strafrechter' in *Controverses rondom Legaliteit en Legitimatie, Handelingen Nederlandse Juristen-Vereeniging 2011-1* (Deventer: Kluwer, 2011) 103, 106; J. Uzman et al. 'The Dutch Supreme Court: A Reluctant Positive Legislator?' in A.R. Brewer-Carias (ed.), *Constitutional Courts as Positive Legislators* (Cambridge: Cambridge University Press, 2011) 645, 662; G. Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Dordrecht: Springer, 2005) 10-11; Shahabuddeen (n. 13 above) 185; Smith 2007 (n. 43 above) 24-28.

51 E. Coke, *The Second Part of the Institutes of the Laws of England* (London: E.&R. Brooke, 1797) 51.

52 Prakken and Sartor (n. 12 above) 238. See also Kratochwil (n. 1 above) 212, 220; Soriano (n. 43 above) 95.

attention. Thus, the legislator acquires the primary responsibility for determining, updating and advancing the law.⁵³

In recent years, legal theory has increasingly moved away from the classic legalist perception. In particular, it has postulated that the role of courts cannot be captured in terms of a strict division of labour between the legislator and the judiciary.⁵⁴ This has resulted in a redefinition of the courts' function in more sophisticated terms. The legislator and the judiciary are now often portrayed as 'partners in the business of law' who are engaged in a continuous dialogue with each other.⁵⁵ It must be emphasised that this does not imply that the judiciary can exercise a quasi-legislative function.⁵⁶ The dialogue model does not permit courts to make new laws without a basis in the existing legal system, to design general norms, or to interfere in political issues that allow for different solutions.⁵⁷ Yet, it ascribes the judiciary a certain formative function.⁵⁸ Courts are not perceived as mere *bouches de la loi*, but may also shape the law on a case-by-case basis. The dialogue model accordingly authorises courts to add new elements to the law that is already in place and to adjust legal concepts in response to societal changes.⁵⁹ In this way, judicial decisions become an essential source for understanding and explaining the meaning of the law.⁶⁰

53 R. van Gestel, 'Naar een Beter Huwelijk tussen Rechter en Wetgever of toch maar Liever *Living Apart Together*', 89 *Nederlands Juristenblad* (2014) 20, 20, 23; J. de Poorter, 'Wetgever en Rechter', 89 *Nederlands Juristenblad* (2014) 6, 6; Borgers (n. 50 above) 106, 115.

54 G. Lamond, 'Precedent and Analogy in Legal Reasoning', available online at <<http://plato.stanford.edu/entries/legal-reas-prec/>>; K. Rozemond, 'De Rechtsvindingsleemte in het Strafrecht', 169 *Rechtsgeleerd Magazijn Themis* (2008) 1, 1-4; W.D.H. Asser, 'Rechtsvorming door de Hoge Raad: Enkele Inleidende Opmerkingen' in W.M.T. Keukens and M.C.A. van den Nieuwenhuijzen (eds.), *Raad en Daad* (Nijmegen: Ars Aequi, 2008) 9, 12; Taruffo (n. 11 above) 322-323; Borgers (n. 50 above) 106, 116, 158-165, 171-172.

55 De Poorter (n. 53 above) 7; Borgers (n. 50 above) 158-165.

56 Smith does ascribe the judiciary a quasi-legislative function insofar as it concerns the interpretation and use of rules referring to open concepts, such as 'reasonableness' and 'norms of social order'. Smith 2007 (n. 43 above) 35. This study does not concern such open concepts, but relates to the open texture of concepts that are in themselves clear, e.g. perpetration, intent, killing.

57 R. Jennings, 'The Judiciary, International and National, and the Development of International Law', 45 *International and Comparative Law* (1996) 1, 3; B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1971) 140-141; Shahabudeen (n. 3 above) 187; Smith 2007 (n. 43 above) 47, 129; Bovend'Eert (n. 44 above) 151; Uzman et al. (n. 50 above) 670.

58 G.J. Wiarda, *Drie Typen van Rechtsvinding* (Deventer: Kluwer, 1999) 30-34; Smith 2007 (n. 43 above) 35, 37; Smith 1998 (n. 43 above) 2-4; Uzman et al. (n. 50 above) 677.

59 J. Uzman, *Constitutionele Remedies bij Schending van Grondrechten. Over Effectieve Rechtsbescherming, Rechterlijk Abstineren en de Dialoog tussen Rechter en Wetgever*, 5 December 2013, PhD Thesis, 151-154; A. Hammerstein, 'Rechtsvorming door de Rechter is Onvermijdelijk', 10 *Ars Aequi* (2009) 672, 672-673; Bovend'Eert (n. 44 above) 150-151; Poorter (n. 53 above) 6; Borgers (n. 50 above) 116, 120.

60 D.N. MacCormick and R.S. Summers, 'Introduction' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 1, 11-12; M. Taruffo, 'Institutional Factors Influencing Precedents' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 437, 459; Soriano (n. 43 above) 92, 94-95.

1.3.2 *Legal Reasoning and the Open Texture of Rules*

The development of the dialogue model and the allocation of a formative function to courts are linked to thoughts about the nature of legal rules. Legal theory recognises that rules are context-independent – i.e. applicable to an infinite number of future situations. Since it is impossible to preconceive all (combinations of) circumstances that these situations will present,⁶¹ rules are normally put in relatively abstract and indeterminate terms that refer to classes of actions and persons (such as ‘armed conflict’, ‘superior’ or ‘inhumane acts’).⁶² In this way, rules acquire an ‘open texture’,⁶³ which makes it difficult to define beforehand which cases fall within the scope of the law.⁶⁴ This neither implies

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- 61 Van Willigenburg nuances this argument by acknowledging that even when legislator are unable to foresee all possible combinations of circumstances at a certain time, this does not negate their ability to gradually adjust norms in the course of time in light of specific fact-situations. K. van Willigenburg, ‘Casuïstiek en Scherpe Normen in het Materiële Strafrecht’, 27 *Delikt en Delinkwent* (2011) 365, 379-380. Other reasons for the abstractness and indeterminacy of the law are the need to adjust the law to societal and technical developments and the wish to prevent that overly detailed statutory regulations make the law undesirably complex. K. Rozemond, *Strafvorderlijke Rechtsvinding* (Deventer: Gouda Quint, 1998) 30-32; Borgers (n. 50 above) 109; Rozemond (n. 16 above) 22-23.
- 62 Kratochwil (n. 1 above) 72; Smith 2007 (n. 43 above) 87. Schauer distinguishes two types of indeterminacy. On the one hand, there are vague regulations that furnish virtually no conclusive answer (e.g. other inhuman actions). On the other hand, there are statutes that are precise for most applications and only become imprecise in the context of a particular case. In this case, Schauer speaks of the ‘vague edges of normally precise statutes’. F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass.: Harvard University Press, 2009) 162-163. On the inherent vagueness of the law see also H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) 128-129; J. Klabbers, ‘The Meaning of Rules’, 20 *International Relations* (2006) 295, 297; L. Branting, ‘Building Explanations from Rules and Structured Cases’, 34 *International Journal of Man-Machine Studies* (1991) 797, 798; Smith 2007 (n. 43 above) 21, 41, 87-88; Borgers (n. 50 above) 109; Rozemond (n. 16 above) 15. Although, of course, there are regulations that provide for strict orders and prohibitions, for example in the field of traffic or environmental law.
- 63 Hart (n. 62 above) 128. See also J. Brennan, *The Open Texture of Moral Concepts* (Michigan: Macmillan, 1977); H. van der Wilt, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’, 8 *International Criminal Law Review* (2008) 229, 263-264; E. van Sliedregt, ‘System Criminality at the ICTY’ in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 183, 199-200; M. Cupido, ‘The Policy underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate’, 22 *Criminal Law Forum* (2011) 275, 301 and chapter 2 of this study; Klabbers (n. 62 above) 298. Van Willigenburg nuances the inherent connection between abstract norms and vague norms. While acknowledging that abstract norms have a stronger tendency for vagueness, he argues that they are not completely identical. K. van Willigenburg, *Casuïstiek en Precedentwerking in het Materiële Strafrecht*, PhD manuscript, on file with author, 131-133. On the open texture of the law from the perspective of AI&L, see e.g. Von der Lieth Gardner (n. 11 above) 2.
- 64 Kratochwil (n. 1 above) 18, 241; Rozemond (n. 16 above) 15; Smith 2007 (n. 43 above) 16, 37; Rozemond (n. 61 above) 30; Hart (n. 62 above) 126-128; Branting (n. 62 above) 798. According to Hart, the inconclusive and open character of the law should be considered as a positive feature: ‘we should not cherish, even as an ideal, the conception of a rule so detailed that the questions whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Hart (n. 62 above) 126.

that legal rules are inconsequential, nor that the deductive application of rules plays no role in judicial reasoning.⁶⁵ In particular in so-called ‘easy cases’ that fall within a rule’s ‘core of settled meaning’, there is generally little doubt whether the requisite legal elements are met.⁶⁶ The task of judges is then confined to a relatively mechanical process of reasoning by subsumption:⁶⁷ ‘the decision follows from a legal rule, a description of the facts of the case and some other premises which are easy to prove’.⁶⁸ Consider, for example, the rules governing the commission of international crimes, which have long been premised on the paradigm of the ‘hands-on’ perpetrator.⁶⁹ Based on these rules, courts have been able to classify persons who have physically committed a crime – i.e. those who have ‘pulled the trigger’ – as criminal perpetrators by means of a deductive process.

Having said that, we should be mindful that – even if the words of a rule are clear in themselves – there will always be a penumbra of hard cases in which the rule’s applicability is not clear-cut.⁷⁰ Think, for example, of cases concerning senior politicians who have played a strategic role in the implementation of a policy to commit widespread crimes. Because these leadership figures do not comply with the image of the paradigmatic ‘hands-on’ perpetrator, their criminal responsibility cannot be established deductively. The process of reasoning by subsumption falls short here.⁷¹ It is therefore necessary to nuance the central position of rules as all decisive standards and to refine the absolute deductive nature of judicial reasoning. In particular, it should be acknowledged that rules cannot always settle discussions about the meaning and scope of the law, but often form the ‘mere’ starting-point of a further judicial argumentation process.⁷² The primary challenge of this process is the classification of individual cases under the law. The process of classification has even been characterised as one of ‘the most puzzling and interesting problems in legal reasoning’ or as the most ‘tricky’ phase

65 J.R. Murray, ‘The Role of Analogy in Legal Reasoning’, 29 *UCLA Law Review* (1981-1982) 833, 850; Kratochwil (n. 1 above) 12, 41, 209-211, 214, 227; Soriano (n. 43 above) 95; Smith 2007 (n. 43 above) 79; Smith 1998 (n. 43 above) 28, 37-38, 95-96, 203.

66 H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, 71 *Harvard Law Review* (1958) 593, 607; Hart (n. 62 above) 129; Rozemond (n. 16 above) 16, 23.

67 Rozemond (n. 61 above) 39; Hart (n. 62 above) 126-127. On the different conceptions of ‘clear’ (settled) and ‘hard’ (marginal) cases, see Smith 2007 (n. 43 above) 32, 75-77, 87; Smith 1998 (n. 43 above) 71-72, 124-130.

68 A. Peczenik, *On Law and Reason* (New York: Springer, 2009) 14.

69 This changed with the coming into force of the Rome Statute of the ICC that explicitly incorporates a concept of indirect perpetration. See Article 25(3)(1) ICC Statute.

70 Borgers (n. 50 above) 127-128.

71 Kratochwil (n. 1 above) 227; Rozemond (n. 16 above) 16, 23; Smith 2007 (n. 43 above) 18-19, 31, 87; Rozemond (n. 61 above) 39; Hart (n. 66 above) 606-615.

72 K. Rozemond, ‘De Casuïstische Grenzen van het Materiële Strafrecht’, 37 *Delikt en Delinkwent* (2007) 465, 479-481; Kratochwil (n. 1 above) 227; Soriano (n. 43 above) 95; Klabbers (n. 62 above) 300.

in judicial argumentation.⁷³ The challenges that courts face in this respect stem from the interplay between law and facts:

a ‘technically’ perfect case is of itself equally unreliable in regard to the interpretation or classification of the facts. For rarely indeed do the raw facts (...) fit cleanly into any legal pattern (...). No matter what the state of law may be, if the essential pattern of the facts is not seen by the court as fitting cleanly under the rule you contend for, your case is still in jeopardy (...).⁷⁴

It follows from this account that the classification of cases under legal rules requires that courts close the gap between law and facts by exercising a certain degree of discretion.⁷⁵ Whereas this process can be appraised positively insofar as it enables courts to achieve a reasonable solution in each case, it also brings about the risk that judges freely tweak the law to fit the facts and apply legal rules arbitrarily as if they are *lui-même la règle*.⁷⁶ To limit this risk and to prevent that judicial decisions are based on the personal preferences of judges, legal theory relies on so-called ‘secondary rules of adjudication’.⁷⁷ These rules circumscribe judicial creativity by formulating formal standards of argumentation that specify what good legal reasoning is.⁷⁸ In particular, secondary rules instruct courts to justify their decisions with reference to accepted principles of criminal justice and to connect their decisions to the text, history and purpose of legal rules.⁷⁹ Thus, it is warranted that

[h]owever extensive the scope of law-creating judicial interpretation may be, it is always limited, although not totally determined, by existing legal materials. The undeniable freedom of judicial decision is one within the law.⁸⁰

73 Kratochwil (n. 1 above) 247. See also Smith 2007 (n. 43 above) 81.

74 K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960) 237. See also Smith (n. 43 above) 81.

75 A. Peczenik, ‘Jumps in Logic and Law. What Can One Expect from Logical Models of Legal Argumentation’, 4 *Artificial Intelligence and Law* (1996) 297, 300; Rozemond (n. 16 above) 15.

76 Smith 1998 (n. 43 above) 4-6; Smith 2007 (n. 43 above) 138.

77 Hart (n. 62 above) 97. See also Kratochwil (n. 1 above) 9, Smith 2007 (n. 43 above) 131, 136, 143; Smith 1998 (n. 43 above) 78-80, 85-87, 143.

78 Kratochwil (n. 1 above) 241.

79 Kratochwil (n. 1 above) 238, 241, 243; Friedmann (n. 11 above) 829, 839-843; Smith 2007 (n. 43 above) 43, 45, 135-136, 140; Smith 1998 (n. 43 above) 68-69, 87-97; Borgers (n. 50 above) 103, 116-117, 129-130; Murray (n. 65 above) 861.

80 H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1993) 103. See also Bell (n. 43 above) 1260; Hart (n. 62 above) 126-127, 145.

In this way, judicial reasoning becomes a rhetorical exercise that is neither completely constrained (determinate), nor completely uncontrolled (indeterminate), but receptive to bounded creativity.⁸¹ Whereas the absence of a deductive paradigm allows courts to gradually clarify and develop the law on a case-by-case basis, this leeway is confined and structured by the totality of legal principles, rules and precedents.

1.4 HOW TO MANAGE THE OPEN TEXTURE OF LEGAL RULES?

1.4.1 *Casuistry: Basic Starting-Points and Methodology*

The recognition of the open texture of legal rules and the discretionary nature of judicial reasoning has resulted in a renewed interest in and appreciation for casuistry, a type of moral reasoning that has its roots in antiquity. The theory and methodology of casuistry are considered to aptly reflect the conception of the law as an open system that is shaped by judicial decisions in individual cases.⁸²

Casuistry takes as a starting-point that the law should be assessed along the lines of practical wisdom.⁸³ Issues of practical wisdom cannot be decided on the basis of initial axioms or universal principles,⁸⁴ but are shaped by the specific context in which they arose. This becomes particularly clear when we look at clinical medicine, a quintessential practical wisdom.⁸⁵ The central question in clinical medicine is always, ‘what medical condition is affecting this patient and how should this be treated?’. To answer this question, physicians do not only need to have general scientific knowledge of medicine, but should also possess a pattern of recognition. This pattern enables them to (i) establish a set of paradigmatic diseases, injuries or disabilities, (ii) evaluate the patients’ medical condition in light of this set, and (iii) place the patient’s condition in one of the recognised types.⁸⁶

Casuistry establishes a similar interplay between legal theory and practice. It recognises that the law is largely laid down in general rules that quickly settle discussions

81 C.C. Arnold, ‘Introduction’ in C. Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame Press, 1982) vii, xi; Von der Lieth Gardner (n. 11 above) 62, quoting J.T. Wisdom, *Proceedings of the Aristotelian Society* (1945); Kratochwil (n. 1 above) 12; Taruffo (n. 11 above) 322-323; Smith 2007 (n. 43 above) 105; Soriano (n. 43 above) 91; Murray (n. 65 above) 836-838, 850; Wiarda (n. 58 above) 19-33; Branting (n. 62 above) 802.

82 Taruffo (n. 11 above) 322-323; Van der Wilt (n. 63 above) 264.

83 A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988) 24-46. On this issue see also Kratochwil (n. 1 above) 214; Walker (n. 11 above) 1690.

84 Jonsen and Toulmin (n. 83 above) 34.

85 Jonsen and Toulmin (n. 83 above) 36-42.

86 Jonsen and Toulmin (n. 83 above) 40.

about the accurate course of action in prototype cases.⁸⁷ Marginal cases can, however, not be decided on the mere basis of abstract definitions and universal prescriptions. They require considerations that are ‘not written into the rules themselves’.⁸⁸ Casuistry therefore finds that the meaning of the law can only be determined in light of legal practice, i.e. by looking at the ways in which courts apply legal rules in individual cases.⁸⁹ By thus interpreting the law in interplay with its practical application,⁹⁰ case-specific facts become an essential construct for the gradual building of legal rules.⁹¹ Casuistry accordingly evaluates the law through a circular motion – a *Hin- und Herwandern des Blickes* – between rules and facts.⁹² An important consequence of this approach is that the law transforms continuously. It is constantly rethought against the background of social, political and historical changes and is modified with each new case coming before the courts.⁹³

[A]ny modification of the system (by the introduction of new concepts or by changing the old) brings about a modification of the concepts themselves; concepts are not like the individual stones in a pile which remain unchanged except in their external relations when the pile is disturbed – a change in the conceptual scheme always entails a modification of the existing concepts.⁹⁴

In *The Abuse of Casuistry*, Jonsen and Toulmin explain how casuistry was historically valued for enabling the law’s gradual modernisation and its adjustment to the challenges of new fact situations.⁹⁵ However, in the 17th century, casuistry came under attack. In *Lettres Provinciales*, Pascal most prominently asserted that casuistry does not impose any meaningful limitations on (judicial) reasoning and consequently leads to arbitrariness, inequality and uncertainty.⁹⁶ As a result of Pascal’s attack, casuistry has become

87 In this sense, casuistry departs from critical studies assuming that ‘rules are empty vessels’ and ‘indeterminate notions’. It also disregards the finding of Klabbers that uncertainties at the fringes of a rule ‘signifies fundamental uncertainty even with respect to the core, for the line between core and penumbra can never be drawn with precision’. Klabbers (n. 62 above) 295, 297.

88 Jonsen and Toulmin (n. 83 above) 8.

89 Jonsen and Toulmin (n. 83 above) 26. See also Kratochwil (n. 1 above) 18; Von der Lieth Gardner (n. 11 above) 37; Smith 1998 (n. 43 above) 63.

90 H. van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some Reflections’, 46 *Israel Law Review* (2013) 207, 228.

91 Jonsen and Toulmin (n. 83 above) 44; Smith 2007 (n. 43 above) 167; Smith 1998 (n. 43 above) 131, 148.

92 K. Engisch, *Logische Studien zur Gesetzesanwendung* (Heidelberg: Carl Winter, 1963) 14-15; Smith 2007 (n. 43 above) 82-86, 93; Smith 1998 (n. 43 above) 33, 131.

93 Rozemond (n. 72 above) 476; Van der Wilt (n. 63 above) 266-268.

94 Brennan (n. 63 above) 123. For a similar evaluation of common law practice, see G. Lamond, ‘Do Precedents Create Rules?’, 11 *Legal Theory* (2005) 1, 17; Von der Lieth Gardner (n. 11 above) 37.

95 Jonsen and Toulmin (n. 83 above) 13.

96 Jonsen and Toulmin (n. 83 above) 156-157, 231-249.

associated with unbounded and unstructured decision-making.⁹⁷ The definition of casuistry in the *Oxford Dictionary* as ‘the use of clever but unsound reasoning’ illustrates the perseverance of this critical attitude.⁹⁸

Jonsen and Toulmin recognise that casuistry is not risk-free. Judges may be tempted to abuse the context-dependent and flexible character of casuistic reasoning for deciding cases according to their own preferences. At the same time, Jonsen and Toulmin emphasise that casuistry can make a valuable contribution to the clarification and development of the law when it is applied in an honest way. Thus, instead of rejecting casuistry completely, a distinction must be drawn between good (discerned) and bad (lax) casuistry.⁹⁹ This distinction relates to methodological soundness: whereas good casuistry conforms to the constraints of the casuistic methodology, bad casuistry neglects them.

The methodology of casuistry has never been endorsed explicitly, yet some basic starting-points can be inferred from practice.¹⁰⁰ Practice particularly demonstrates that casuistry entails a process of analogical reasoning from precedent.¹⁰¹ This process is based on the thought that decisions in individual cases should be connected to the existing legal framework and to the outcomes of previous experience.¹⁰² From this perspective, courts need to reapply the procedures that were used to resolve earlier problems in new cases.¹⁰³ General principles and paradigm situations for which these principles were designed originally play an important role in this respect. The more the circumstances of a case resemble those of a paradigm, the stronger the reason to reapply the principle governing the paradigm in the present case. The outcome of a case thus depends on the similarities and differences between the present and the paradigm situation.¹⁰⁴ Courts should therefore assess and explain whether these situations display sufficient resemblance in relevant respects.¹⁰⁵ When they fail to do so (properly), casuistic reasoning gets on a slippery slope and can produce bad casuistry.¹⁰⁶

97 Jonsen and Toulmin (n. 83 above) 238.

98 <www.oxforddictionaries.com/definition/english/casuistry?q=casuistry>. According to Posner, casuistry entails ‘logic-chopping, the drawing of phony distinctions, the use of the forms of logic to defend irrational results, literal-mindedness, deceit by half-truths’. R.A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1999) 122.

99 Jonsen and Toulmin (n. 83 above) 15-16.

100 Jonsen and Toulmin (n. 83 above) 140, 251.

101 Note that I do not use the terms ‘analogies’ and ‘analogical reasoning’ to describe situations in which rules are extended by analogy to cases that were not originally covered by it, but to depict the qualification of specific fact-situations within the scope of existing law.

102 Jonsen and Toulmin (n. 83 above) 35. On this issue see also Van der Wilt (n. 63 above) 265.

103 Jonsen and Toulmin (n. 83 above) 35, 46.

104 Jonsen and Toulmin (n. 83 above) 35. For a similar characterisation of judicial decision-making, see Kratochwil (n. 1 above) 223; Hart (n. 62 above) 127.

105 Hart (n. 62 above) 127.

106 Rozemond (n. 72 above) 473.

Casuistry implements the process of analogical reasoning by means of a taxonomy.¹⁰⁷ The taxonomy first formulates a general rule, which stipulates the elements of, for example, a crime or mode of liability.¹⁰⁸ Against this background, the taxonomy subsequently introduces paradigm cases that exemplify the most manifest breaches of the general rule.¹⁰⁹ The taxonomy of genocide would, for example, incorporate the Holocaust against the European Jews during World War II as a paradigm case: everyone agrees that this situation qualifies as genocide. The general rule is, however, not limited to paradigm cases.¹¹⁰ The taxonomy therefore proceeds to incorporate situations that ‘move (...) away from the paradigm by introducing various combinations of circumstances and motives that made the offense in question less apparent’.¹¹¹ This justifies the application of genocide to more marginal cases that differ from the Holocaust in scope, style and technique. As cases deviate from the paradigm to an increasing extent, their classification under the same legal principle becomes more ambiguous and arguable. The controversies surrounding the qualification of the crimes committed in Srebrenica and Darfur as genocide are illustrative in this respect.¹¹² These crimes differ from the Holocaust paradigm to such an extent that their equivalent characterisation is doubtful. The taxonomy of casuistry does not offer a conclusive solution for these doubts. It only describes cases along the lines of probability (‘probable’, ‘thinly probable’, ‘hardly probable’).¹¹³

It follows from this account that the taxonomy of casuistry is not a strict and all-decisive mechanism, but a tool that guides courts through the complexities of cases. (Paradigmatic) precedents are essential in this regard, since they constitute the context of deliberation – i.e. the ‘inventory or alternatives’¹¹⁴ – in which courts explain their decisions.¹¹⁵ With the continuous settlement of cases – each entailing a specific combination of factual circumstances that needs to be taken into account – the scope of judicial

107 Jonsen and Toulmin (n. 83 above) 251-252.

108 Jonsen and Toulmin (n. 83 above) 251.

109 Jonsen and Toulmin (n. 83 above) 252.

110 Kratochwil in this respect notes that paradigms or types ‘are different from classical definitions since the instances subsumed under them do not need to have all the defining characteristics as the *taxa* and *genera* of definitions in classical logic’. Kratochwil (n. 1 above) 225.

111 Jonsen and Toulmin (n. 83 above) 252.

112 On this issue see, M. Cupido, ‘The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts’, 15 *Melbourne Journal of International Law* (2014) 378, and chapter 4 of this study.

113 Jonsen and Toulmin (n. 83 above) 254. Also Kratochwil recognises that legal conclusions should be phrased in terms of acceptability rather than ‘trueness’. Kratochwil (n. 1 above) 42. He further emphasises that ‘there is no way by which we could once and for all decide on the basis of which “resemblance” we are entitled to treat a case as “similar” or, vice versa, as dissimilar’. Kratochwil (n. 1 above) 225.

114 Kratochwil (n. 1 above) 232; Jonsen and Toulmin (n. 83 above) 135; Borgers (n. 50 above) 133.

115 Jonsen and Toulmin (n. 83 above) 14.

discretion becomes more and more confined.¹¹⁶ When applied carefully, the casuistic taxonomy thus warrants that judicial reasoning – although not strictly logical or deductive – is still rational and controlled.¹¹⁷ The taxonomy also allows for the development of a refined understanding of the law.¹¹⁸ After all, each time a general principle is applied to a new case, the relevant facts of this case, their mutual relations and relative weight are incorporated in the taxonomy.¹¹⁹ By consistently assessing the value of new facts and by re-evaluating precedent cases in light of these facts, courts clarify and fine-tune the factual underpinnings of substantive legal concepts on a case-by-case basis.¹²⁰

1.4.2 *Analogical Reasoning from Factors: Basic Starting-Points and Methodology*

The theory and methodology of casuistry can be operationalised by using insights from AI&L.¹²¹ Like casuistry, AI&L assumes that judicial reasoning cannot be described in terms of reasoning from rules alone, but also incorporates forms of case-based reasoning.¹²² From this perspective, it translates the rather abstract thoughts on casuistry into a plain and practical framework of analogical reasoning from precedent.

AI&L takes as a starting-point that judges assess and decide cases on the basis of factors. ‘Factors are an abstraction from facts in that a given factor may be held to be present in the case on the basis of several fact situations, and (...) strengthen the case for one or other of the parties to the dispute.’¹²³ For example, the accused’s presence at the crime scene can be a factor that strengthens the prosecutor’s claim that the accused knew of the commission of crimes. The formulation of factors involves a complex process of

116 Lamond discusses this process in relation to the common law. Lamond (n. 94 above) 20. See also Kratochwil (n. 1 above) 243.

117 Jonsen and Toulmin (n. 83 above) 255-256; Kratochwil (n. 1 above) 211.

118 Jonsen and Toulmin (n. 83 above) 255.

119 Jonsen and Toulmin (n. 83 above) 142.

120 On the gradual reinterpretation and recharacterisation of precedents see also F. Schauer, ‘Precedents’, 39 *Stanford Law Review* (1987) 571, 574.

121 On the relevance of this research for substantive international criminal law, see also Cupido (n. 63 above); Cupido (n. 112 above).

122 Branting (n. 62 above) 798. See also C. Groendijk and A. Oskamp, ‘Case Recognition and Strategy Classification’, *ICAAIL Proceedings of the 4th International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1993) 125, 125, 127; G. Vossos et al., ‘An Example of Integrating Legal Case-Based Reasoning with Object-Oriented Rule-Based Systems: IKBALS II’, *ICAAIL Proceedings of the 3rd International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1991) 31, 31-32; Von der Lieth Gardner (n. 11 above) 45-46.

123 T. Bench-Capon and G. Sartor, ‘Theory-Based Explanation of Case Law Domains’, *ICAAIL Proceedings of the 8th International Conference on Artificial Intelligence and Law* (New York: ACM Press, 2001) 12, 12. See also J.F. Horty et al., ‘A Factor-Based Definition of Precedential Restraint’, 20 *Artificial Intelligence and Law* (2012) 181, 183.

interpretation.¹²⁴ In particular, it is difficult to determine the exact terms and level of abstraction of factors in a rational way. For example, is the accused's contribution to the planning of crimes a relevant factor for establishing his criminal participation, or should account be taken of the specific type and degree of preparatory involvement?

In contrast to (the legal elements of) rules, factors do not stipulate the necessary and sufficient conditions of criminal responsibility. Instead, they provide open-ended illustrations of legally relevant patterns of facts that courts can rely upon to make and explain their decision. This implies, on the one hand, that factors do not automatically compel a specific outcome when they are established. The existence of a factor does not determine, but merely favours a decision and moves the decision-maker in that direction.¹²⁵ On the other hand, not all factors have to be established in every case. Only prototype cases bring together all factors favouring a decision in *optima forma*.¹²⁶ Sartor illustrates this as follows:

[a]ssume (...) that the qualification of a worker as an employee would be favoured to the extent that the worker is dedicating a larger proportion of his working time to one work-giver; is following the directions of the work-giver; is working within the premises of the work-giver; or using the work-giver's tools.¹²⁷

According to these factors, 'the prototypical employee is a person who is working full time for a single employer, under detailed directions, within the employer's premises and using the employers' tools'.¹²⁸ This does, however, not mean that persons who differ from the prototype because they reflect a less optimal combination of factors (for example, persons who work only 50 percent of their time for a single employer without detailed directions) are automatically excluded from the status of employee.¹²⁹ Whether this is so, depends on the holistic assessment of all applicable factors and the correlation between them.¹³⁰ In this respect, the relative strength of the factors favouring and disfavouring a decision have to be weighed against each other.

124 J.F. Horty, 'Rules and Reasons in the Theory of Precedent', 17 *Legal Theory* (2011) 1, 5; Sartor (n. 50 above) 738; Branting (n. 62 above) 834-835; Horty et al. (n. 123 above) 186, 211. The difficulties surrounding the process of establishing the relevant factors resemble the difficulties of the common law to determine the level of generality of precedents. On this issue see, Lamond (n. 54 above); Schauer (n. 120 above) 595.

125 G. Sartor, 'Reasoning with Factors', 19 *Argumentation* (2005) 417, 417; Sartor (n. 50 above) 177.

126 Sartor (n. 50 above) 191-192. Sartor's description of prototypes corresponds with Hart's 'standard case' – i.e. a case in which no doubts are felt about its application. Hart (n. 66 above) 607-608.

127 G. Sartor, *Factors and Dimensions in Legal Reasoning*, available online at <<http://complexite.free.fr/Berder/doc/Sartor3.pdf>>. See also Sartor (n. 50 above) 192-193.

128 Sartor (n. 127 above).

129 Sartor (n. 50 above) 193.

130 Sartor (n. 50 above) 180; Sartor (n. 125 above) 423. AI&L research recognises the holistic character of factors, but struggles to put this into a logical framework. See, e.g. C. Tata, 'The Application of Judicial Intelligence and Rules to Systems Supporting Discretionary Judicial Decision-Making', 6 *Artificial Intelligence and Law* (1998) 203, 214-218; Prakken and Sartor (n. 12 above) 271-272; Sartor (n. 50 above) 180.

Does this flexibility make factor-based reasoning completely unbounded? Are there no restrictions to the formulation of factors? And can factors be balanced in such ways that prototypes are applicable to an infinite number of situations? Clearly not. AI&L research stipulates at least two guiding principles that control the function of factors. First of all, the formulation of factors is constrained by so-called ‘teleological links’ between factors and legal objectives.¹³¹ This means that factors need to be connected to the objective of the rule for which they are used. They should originate from the desire to achieve the purpose of a rule and reflect the belief that acting and deciding under certain conditions promotes that purpose.¹³² Sartor accordingly adopts the following reasoning scheme:

having goal G; and believing that doing A, under pre-condition C, promotes G is a reason for having the propensity to do action A under pre-condition C (viewing precondition C as a factor favouring action A).¹³³

In relation to international criminal law, this reasoning scheme, for example, clarifies that having the *purpose* to limit the accused’s criminal responsibility to crimes of which he had knowledge; and *believing* that the accused’s presence at the crime scene promotes this objective; is a reason for considering the accused’s presence as a *factor* for establishing his criminal responsibility. By thus connecting facts to legal objectives, factor-based reasoning refines and simplifies the process of teleological reasoning.¹³⁴

Furthermore, the application of prototypes to more ambiguous situations is confined by a process of analogical reasoning. AI&L takes as a starting-point that judicial decisions need to be consistent: whereas like cases should have a similar outcome, unlike cases have to be decided differently.¹³⁵ To meet this standard, courts are prompted to draw analogies and compare the case before them to cases that have already been settled. In particular, courts should reapply prior judicial evaluations of factors in later cases that

131 T. Bench-Capon and G. Sartor, ‘Using Values and Theories to Resolve Disagreement in Law’ in J. Breuker et al. (eds.), *Legal Knowledge and Information Systems: Jurix 2000 the Thirteenth Annual Conference* (Amsterdam: IOS Press, 2000) 73, 74-75; G. Sartor, ‘Teleological Arguments and Theory-Based Dialectics’, 10 *Artificial Intelligence and Law* (2002) 95, 97-98; Sartor (n. 50 above) 188. On the selectivity of the observation of facts and the guidance of judicial observations of facts by the applicable rules of law, see Smith 2007 (n. 43 above) 83.

132 D.H. Berman and C.D. Hafner, ‘Representing Teleological Structures in Case-Based Legal Reasoning: The Missing Link’, *ICAIL Proceedings of the 4th International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1993) 50, 55-56; T. Bench-Capon, ‘The Missing Link Revisited: The Role of Teleology in Representing Legal Argument’, 10 *Artificial Intelligence and Law* (2002) 79, 82; Sartor (n. 50 above) 739; Sartor (n. 125 above) 418. For a contrary view, see Roth (n. 10 above) 27.

133 Sartor (n. 50 above) 179.

134 Sartor (n. 50 above) 178, 180, 188-189.

135 Bench-Capon and Sartor (n. 131 above) 74; Sartor (n. 50 above) 738.

are characterised by a similar factual context. Thus, the fact that precedent (X) had outcome (Y) in the presence of factors (Z), justifies that the combination of factors (Z) produces outcome (Y) in future cases as well.¹³⁶ According to this reasoning scheme, the decisions from precedent cases can be reapplied in new cases as long as the similarities between the factors of these cases outweigh the differences.¹³⁷ In this light, it can, for example, be argued that the judicial decision to hold a mid-level accused responsible as a co-perpetrator for his participation in mob violence allows later courts to reapply the concept of co-perpetration to similar incidents of small-scale criminality. Whether co-perpetration is also applicable to situations concerning the commission of more widespread crimes orchestrated by high-level accused is, however, less clear-cut. Arguably, the factors underlying these two situations differ to such an extent that they cannot be governed by the same legal principle.¹³⁸

1.5 LESSONS FROM DOMESTIC LAW: A COMPARATIVE LOOK AT JUDICIAL REASONING

In domestic law, the practice and role of courts has regularly been described and valued in terms of casuistry. Posner, for example, asserts that casuistry ‘undergirds the common law system (...)’.¹³⁹ Common law courts particularly seem to endorse the casuistic thought that law and facts interact, as can be seen from the detailed descriptions of facts in judgments and the extensive process of distinguishing. Distinguishing occurs when the facts of a case are differentiated from the factual context of precedents and are used to justify a defeat from these precedents.¹⁴⁰ According to Lamond, this practice suggests that precedents are tailored to a specific factual context.¹⁴¹ Therefore, they do not *per se* bind later courts, but only have to be followed in cases that are characterised by a similar set of factual circumstances.¹⁴² When the facts of a case differ from those of precedents in relevant respects, courts can use these differences as a basis for distinguishing.¹⁴³ This

136 Bench-Capon and Sartor (n. 131 above) 74; Sartor (n. 50 above) 738.

137 Differently, Roth (n. 10 above) 15, 18-20, 50-51.

138 This example is inspired by the discussion on JCE liability. On this issue, see Van Sliedregt (n. 63 above) 200.

139 Posner (n. 98 above) 122.

140 J. Harty, ‘Common Law Reasoning’, available online at <www.umiacs.umd.edu/~harty/articles/clr-2013-3-21.pdf>, 3.

141 Lamond (n. 94 above) 15. See also Lamond (n. 54 above). Thus, Lamond goes against the traditional view that precedents generate rules that later courts should apply. On this issue see also Van Willigenburg (n. 63 above) 144-146.

142 Lamond (n. 94 above) 15, 18, 23.

143 See also Harty (n. 140 above) 7; Van Willigenburg (n. 63 above) 31, 146-147.

nuanced way of analogical reasoning based on factual resemblance fits well with the methodology of casuistry.

The casuistic character of civil law systems is less obvious.¹⁴⁴ The civil law's rigorous interpretation of the principle of legality has traditionally given rise to a legalist approach in which the judiciary is only allowed to apply existing law.¹⁴⁵ Civil law courts accordingly present their judgments in a syllogistic, magisterial style, whereby conclusions follow necessarily from the application of general statutory rules.¹⁴⁶ Analogical reasoning based on factual resemblance hardly plays a role in this respect. Having said that, research shows that civil law argumentation cannot be reduced completely to the deductive application of general rules. The civil law courts are not a mere *bouche de la loi*,¹⁴⁷ but regularly take up a formative and authoritative role by formulating judicial criteria and rules of thumb.¹⁴⁸ For example, the Dutch Supreme Court has interpreted the broad statutory provision on co-perpetration in terms of the 'close and knowing cooperation' between multiple participants.¹⁴⁹ In addition, it has ascertained that such cooperation may materialise in the accused's contribution to the planning of crimes.¹⁵⁰ The accused's mere presence at the crime scene and the failure to distance himself from the crimes do, however, not suffice.¹⁵¹ By reasoning in this way, the Supreme Court has filled the gap between the general terms of the statutory provision on co-perpetration and the specific contribution of individual accused to the commission of crimes. The Court has used the factual context of cases to give concrete meaning to the criminal code and to clarify the nature and scope of criminal responsibility for co-perpetration. The concept of

144 Z. Bankowski et al., 'Rationales for Precedent' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 481, 482-484; Smith 1998 (n. 43 above) 18. For a nuanced view on the distinctiveness of common law and civil law reasoning from the perspective of AI&L, see Tata (n. 130 above) 223.

145 Soriano (n. 43 above) 93.

146 Bankowski et al. (n. 144 above) 482-483.

147 M.J. Borgers, 'Legaliteit en Rechtsvinding in het Materiële Strafrecht' in A.A. Franken et al. (eds.), *Constance Waarden: Liber Amicorum Constantijn Kelk* (Den Haag: Boom Juridische Uitgevers, 2008) 193, 197-199; Soriano (n. 43 above) 93; Borgers (n. 50 above) 118-121; MacCormick and Summers (n. 60 above) 11-12; Bankowski et al. (n. 144 above) 458.

148 D.N. MacCormick and R.S. Summers, 'Further Reflections and Conclusions' in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 531, 531-534; A.A. Franken, 'Casuïstiek en Legaliteit in het Materiële Strafrecht', *32 Delikt en Delinkwent* (2006) 949, 949-951; Rozemond (n. 16 above) 16; Bell (n. 43 above) 1249-1250; Soriano (n. 43 above) 97-98, 101; Smith 2007 (n. 43 above) 118; Van Willigenburg (n. 63 above) 137-140, 166-170; Bankowski et al. (n. 144 above) 494.

149 In Dutch, the courts require a 'nauwe en bewuste samenwerking'. See HR 29 October 1934, NJ 1934, 1673 m.nt. T. On the casuistic development of co-perpetration see Rozemond (n. 16 above) 154-164; Van Willigenburg (n. 63 above) 372-375.

150 HR 17 November 1981, NJ 1983, 84 m.nt. ThWvV; HR 15 April 1986, NJ 1986, 740.

151 HR 22 December 2009, NJ 2010, 193 m.nt. PMe; HR 18 March 2008, NJ 2008, 209; HR 19 October 1994, NJ 1994, 50 m.nt. ThWvV.

co-perpetration can therefore not be assessed on the basis of the abstract law alone, but has to be evaluated in connection to its application in practice. In this way, the typical casuistic interplay between theory (rules) and practice (cases) also enters the civil law.

Surely, this brief discussion on the role of casuistry in domestic law is somewhat undifferentiated and oversteps some important variations among the common and civil law systems. Nevertheless, it shows how casuistry can help to describe, explain and appraise a number of essential features of judicial reasoning. Furthermore, it demonstrates that casuistic analyses can give a more comprehensive account of the nature and scope of criminal responsibility.

1.6 CASUISTRY IN INTERNATIONAL CRIMINAL LAW

1.6.1 *An Unfortunate Blind Spot*

The previous sections have shown that the principle of legality does not hinder the judicial development of substantive international criminal law. Instead, the open nature of this field of law has enabled the *ad hoc* Tribunals to gradually build a relatively sophisticated concept of criminal responsibility for international crimes. Whereas the ICC relies on stricter and more detailed statutory rules, also in this context the need for the law's progressive advancement has generated a creative judicial practice. An analysis of this practice based on the theory and methodology of casuistry is, however, still missing. Studies of judicial reasoning in international criminal law tend to focus on the ways in which courts have used sources of law and methods of interpretation to design a general legal framework consisting of rules, principles and judicial criteria.¹⁵² Only little attention has been paid to the application of this framework in individual cases. As a result, our conception of international crimes and modes of liability does not take account of the casuistic interplay between law and facts.

Legal theory and domestic practice make clear that it is inopportune to maintain this blind spot for casuistry. In particular, they show that the open texture of general legal standards complicates deductive reasoning and gives courts a certain discretion to tailor the meaning and scope of the law to the specific circumstances of individual cases. This judicial influence is particularly prominent in fields of law that are characterised by an open and evolving legal framework, like international criminal law. Casuistry gives apt expression to these thoughts and practices. It recognises the discretionary powers of courts and acknowledges that they are regularly confronted with unprecedented

¹⁵² See also C. Burchard, 'The International Criminal Legal Process: Towards a Realistic Model of International Criminal Law in Action' in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 81, 81, 84-86.

problems that require innovative solutions.¹⁵³ Courts are therefore authorised to adapt and refine the meaning of original paradigms.¹⁵⁴ At the same time, casuistry sees the need for confining the judicial authority to engage in creative law-making in light of legality requirements. It accordingly provides for a methodology of analogical reasoning that structures the judicial development of the law without imposing an onerous legal framework. By implementing this methodology in the study and practice of substantive international criminal law, the need for legal development can be balanced against the requirements of foreseeability, certainty and equality.

1.6.2 *Filling in the Blanks: Objectives of Current Study*

This study complements existing research on judicial reasoning by international criminal courts with insights from casuistry. By using the casuistic theory and methodology to analyse (judicial reasoning on) substantive international criminal law, the study seeks to advance our legal understanding on two different levels.

On a conceptual level, casuistry is used to develop our conception of the nature and scope of international crimes and modes of liability. Of course, legal doctrine has already engaged in accurate analyses of substantive legal concepts. Yet, its focus on open-textured rules leaves an incomplete picture of the meaning of these concepts. A study based on casuistry that analyses the law's application in individual cases and assesses the factors that judges use to determine criminal responsibility, can complement this picture. For example, it can clarify which circumstances define the finding of a common plan between the members of a JCE. Additional analyses of the courts' weighing of relevant factors allow for a further refinement of our legal understanding. These analyses can, for example, make clear to what extent incidental calls for leniency towards individual victims negate the genocidal intent of accused who were otherwise closely involved in the commission of genocide. Based on such conceptual insights, we can try to determine the influence of the law *in abstracto* on the law *in concreto*. In particular, we can assess whether and how theoretical differences in the legal definitions of international crimes and modes of liability generate a varied legal practice. For example, has the ICC's replacement of JCE with a concept of joint perpetration resulted in a different type of criminal responsibility for senior political and military leaders? To answer this question, the study analyses the factors that the *ad hoc* Tribunals and the ICC use to establish the criminal responsibility of individual accused. If these factors are essentially similar, there is reason to nuance the critique that international criminal courts engage in a course of *Alleingang*.

¹⁵³ Jonsen and Toulmin (n. 83 above) 151, 181-227.

¹⁵⁴ Jonsen and Toulmin (n. 83 above) 194.

On a normative level, casuistry offers a framework for judicial argumentation that can advance the legality of (legal reasoning on) substantive international criminal law. This framework takes as a starting-point that courts have a certain amount of discretion to make reasonable decisions in individual cases. To prevent that such discretion leads to arbitrariness, casuistry stipulates methodological standards – i.e. secondary rules of adjudication – that structure and restrict the judicial authority to develop the law.¹⁵⁵ Of course, these standards are not the only ones controlling the argumentative practice of international criminal courts. The Vienna Convention on the Law of Treaties (VCLT), for example, also has an important regulative function in this respect. Article 31 of the VCLT stipulates a number of canons of interpretation, which require that international courts interpret their statutes ‘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’.¹⁵⁶ In this way, the VCLT-canons govern the *interpretation* of legal rules *in abstracto*. They, for example, assist courts in determining whether the term ‘intent’ in the legal definition of genocide means that perpetrators must have acted with a specific *purpose* or whether a standard of *dolus eventualis* suffices. Having said that, we should be mindful that the VCLT does not control the *application* of abstract interpretations *in concreto*, i.e. it does not control the use of the law in individual cases. For example, the canons of interpretation do not help courts to determine if the evidence against a specific accused meets the *dolus eventualis* standard. The standards of casuistry fill this gap in the argumentation framework of international criminal courts. They particularly structure the process of classification, i.e. the process through which individual cases are classified within the scope of the law. Analyses of international case law based on the standards of casuistry accordingly constitute an essential supplement to the existing research on the VCLT-canons. This study therefore focuses on the normative role of casuistry and leaves the guiding function of the VCLT-canons in international criminal law out of consideration.¹⁵⁷

AI&L research on case-based reasoning with factors incorporates the methodological standards from casuistry and translates them into a plain framework of argumentation. Without stipulating hard and fast rules that forecast the outcome of every

155 Smith 2007 (n. 43 above) 19.

156 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

157 The role of VCLT-canons in international criminal law has already been discussed by other scholars. They have, for example, questioned to what extent these canons of interpretation are applicable to international criminal law and are able to restrict international criminal courts. After all, the canons of interpretation (e.g. textual, purposive, structural interpretation) are themselves general rules, which require interpretation. Moreover, the VCLT does not provide for a clear hierarchy that regulates any contradictions between the different canons of interpretation. On these issues, see e.g. V. Nehrlich, ‘The Status of ICTY and ICTR Precedent in Proceedings before the ICC’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009) 305, 317-320.

case,¹⁵⁸ this framework creates a ‘straitjacket’ for judicial discretion that frames the scope of courts’ creativity. In this way, it offers a useful basis for scrutinising and appraising the case law of international criminal courts. In particular, AI&L standards can be used to determine whether the *ad hoc* Tribunals and the ICC formulate and apply factors in a sufficiently restricted way. For example, is there an adequate teleological link between the factors that the courts use to establish genocide and the objectives underlying this crime? And is it justified to qualify the atrocities committed in Rwanda and Srebrenica as genocide in light of their factual analogy to the Holocaust prototype? The answers to these questions will give new insights into the opportunities and limitations of the law. On the one hand, these insights may nuance prevailing critiques on judicial argumentation. They can, for example, clarify that the influence of human rights law on (the interpretation of) international criminal law has not resulted in a legal practice that violates the principle of legality. On the other hand, analyses of factors may also strengthen previously voiced critiques by showing that the limits of casuistic reasoning have been neglected. It is then essential to enhance the quality of judicial argumentation and to bring about a more controlled practice. The methodological standards of casuistry and factor-based reasoning provide a useful starting-point in this respect.

1.7 LIMITATIONS

1.7.1 *Deliberate Delineations*

In this study, casuistry is used to assess how international criminal courts apply the law to the facts of individual cases and to evaluate the arguments that they put forward in this respect. Restrictions are essential to pursue these tasks accurately, in particular considering the complexity and vast amount of factual evidence that is presented in international trials. The study is therefore limited to the *substantive* part of international criminal law, which covers four core crimes (war crimes, crimes against humanity, genocide and the crime of aggression) and a variety of modes of liability (such as joint perpetration, JCE and superior responsibility). It must be emphasised that this does not mean that procedural rules are unsusceptible to the creative forces of international courts. In fact, the *ad hoc* Tribunals have even drafted their own Rules of Procedure and Evidence. Yet, the practice of judicial creativity seems to be more controversial in relation to substantive law where the principle of legality has more restraining value. Moreover, substantive international criminal law is less forum-specific than the rules of procedure. Despite differences of definition, international criminal courts exercise

158 Sartor (n. 50 above) 739.

jurisdiction over the same core crimes and all seek to establish the criminal responsibility of individuals for these crimes. This allows for making valuable ‘cross-court comparisons’. The study draws such comparisons in relation to three substantive issues: (i) the policy to commit crimes against humanity, (ii) the contextual embedding of genocide and (iii) the common plan-element of JCE and joint perpetration liability. The choice for these issues is determined by the confusion and disagreement that they have generated. By analysing the law on the basis of casuistry, the study seeks to provide new insights that can help to resolve these controversies.

The *ad hoc* Tribunals have the most extensive record as the adjudication of international crimes is concerned. Their case law therefore constitutes the primary basis for the casuistic analyses in this study. Insofar as possible, the Tribunals’ case law is compared with early judgments and decisions of the ICC. The ICC became operative in 2002 and rendered its first final judgment in 2013. Being a relatively young court without an clear legacy, it is as yet impossible to establish a definite line of reasoning on the basis of which conclusive statements on *the* position of the ICC can be made. This is particularly so considering that most of the Court’s current case law consists of pre-trial decisions, which are difficult to analyse casuistically, because they are rendered before the full examination of evidence and do not include an extensive factual substantiation. The analyses of ICC case law in this study are therefore mere preliminary and may need to be adjusted in response to future developments.

The case law of other *ad hoc* courts (such as the Special Court for Sierra Leone) and mixed tribunals (such as the Extraordinary Chambers in the Courts of Cambodia) falls outside the scope of this study.

1.7.2 *Inherent Limitations*

This study is subject to two limitations that are inherent to casuistry. First, casuistic analyses focus on the justification of judicial decisions, i.e. they examine the reasons that courts give for their findings. (Empirical) research into decision-making by domestic courts shows that this process of justification does not always adequately express how courts actually reach their verdict (process of heuristics). Whereas judicial justifications are generally phrased in terms of legal rules stemming from recognised sources of law, the true reasons underlying a verdict may instead lie in the informed experience of judges and their educated conception of criminal justice.¹⁵⁹ Assessments of the process of

159 W. van Rossum, ‘Vier Reflecties op Empirisch Onderzoek naar Rechterlijke Oordeelsvorming’, 38 *Nederlands Juristenblad* (2010) 2467, 2467, 2471; Taruffo (n. 11 above) 314. From a more theoretical perspective, see Smith 2007 (n. 43 above) 162; Bell (n. 43 above) 1270-1271; Murray (n. 65 above) 839-842.

justification can therefore only provide limited insights into the true judicial decision-making process.

Having said that, we should be mindful that the processes of justification and heuristics are not completely independent.¹⁶⁰ Since courts need to look for decisions that can be justified, justificatory norms and practices also influence the heuristic process. On this account, legal research into judicial reasoning has generally focused on the rational methods of justification, rather than the (possibly irrational) ways in which courts reach decisions.¹⁶¹ It even seems to be accepted that courts decide cases on the basis of an illogical ‘hunch’, as long as they can justify their findings with sound legal arguments. The process of justification thus serves as a validity test: decisions that do not meet the strictures of legal reasoning are rejected for being irrational.¹⁶² Following this notion, this study can legitimately focus on the judicial justification process.

A second limitation of this study concerns its focus on factual analogies. Casuistry and AI&L assume that judicial decisions need to be consistent and accordingly seek to explain variations in case law in terms of the factual similarities and differences between cases. This is certainly a good starting-point for analysing and scrutinising (the legality of) judicial reasoning in international criminal law. However, it must be borne in mind that (in)consistent reasoning patterns may also result from procedural, contextual or structural circumstances, such as the legal background of judges (in common or civil law and in criminal law or humanitarian law), the political context in which courts function, the applicable sources of law (statutory or customary law) and the influence of the parties (defence and prosecution) on judicial argumentation.¹⁶³ Since the theory and methodology of casuistry and AI&L do not account for such circumstances, this study leaves it to future research to determine their impact on judicial reasoning in international criminal law.

1.8 OUTLINE

How does this study proceed from here? Each of the following chapters analyses a specific concept of substantive law by using the methodology of casuistry. Based on

160 D.N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) 270. See also M. IJzermans, ‘De Verhouding tussen Heuristiek en Legitimatie bij Rechtsvorming’ in E. Broers and B. van Klink (eds.), *De Rechter als Rechtsvormer* (Den Haag: Boom Juridische Uitgevers, 2001) 99, 101; Smith 2007 (n. 43 above) 159; Smith 1998 (n. 43 above) 1-2; Poorter and Van Roosmalen (n. 44 above) 15.

161 Van Willigenburg (n. 63 above) 90-92.

162 Similarly, Von der Lieth Gardner (n. 11 above) 18.

163 The importance of this influence has been noted by e.g. C. Hafner and D. Berman, ‘The Role of Context in Case-Based Legal Reasoning: Teleological, Temporal, and Procedural’, 10 *Artificial Intelligence and Law* (2002) 19, 19-64; Kratochwil (n. 1 above) 214; Haveman (n. 3 above) 22-37; Rozemond (n. 61 above) 19; Van der Wilt (n. 90 above) 225; Smith 2007 (n. 43 above) 19; Bell (n. 43 above) 1252, 1261, 1271; MacCormick and Summers (n. 60 above) 9; Burchard (n. 153 above) 92-109.

these analyses, the meaning of the studied concepts is further defined. Chapter II relates to the policy to commit crimes against humanity. The legal status of this notion is uncertain. Whereas some scholars argue that crimes against humanity – as a rule – have to be committed pursuant to a (state) policy, others maintain that the finding of a policy is a mere evidentially relevant circumstance from which the existence of a systematic attack can be inferred. Also the *ad hoc* Tribunals and the ICC are divided on this issue. While the ICTY disqualifies the policy as an autonomous requirement of crimes against humanity, Article 7(2) of the Rome Statute of the ICC explicitly incorporates a policy element. Chapter II evaluates the implications of these different judicial approaches by conducting casuistic case law analyses. It looks into legal practice and assesses how the ICTY and the ICC have dealt with the policy issue in individual cases. In this way, it shows that the practical effect of the courts' different theoretical framework is limited, because the ICTY and the ICC apply and substantiate the policy in a comparable way.

Chapter III entails a similar casuistic analysis of JCE and joint perpetration, two theories of liability that are essential for establishing the criminal responsibility of senior leaders for international crimes. So far, courts and scholars have regularly emphasised the distinctive rationales underlying these theories. Whereas the ICC's concept of joint perpetration is thought to reflect an objective rationale that relates to the accused's control over the crime (*actus reus*), the *ad hoc* Tribunals' JCE concept is allegedly premised on a subjective rationale that concentrates on the accused's shared intent to implement a common criminal purpose (*mens rea*). Chapter III scrutinises this distinction by assessing the application of JCE and joint perpetration in individual cases. This assessment shows that the *ad hoc* Tribunals and the ICC establish JCE and joint perpetration liability on the basis of similar factual circumstances, which makes the assumed distinction between these theories nominal rather than actual.

Chapter IV relates to the crime of genocide. In this respect, it is still uncertain whether genocidal acts require some sort of contextual embedding: can a single perpetrator who acts with the intent to destroy a protected group commit genocide? Or, is it required that individual perpetrators participate in a collective campaign of (destructive) violence to qualify as *génocidaires*? Also at this point, the legal frameworks of the *ad hoc* Tribunals and the ICC differ. Under Tribunal case law, the existence of a collective violent action is not an autonomous element of genocide, but only evidences the accused's genocidal intent. By contrast, the ICC's Elements of Crimes require that the accused acted 'in the context of a manifest pattern of similar conduct', which marks the context of collective violence as a separate legal element. Chapter IV seeks to give new insights into this divergence by analysing genocide on the basis of casuistry. These analyses call for a nuanced appraisal. In particular, they show that (the type and level of)

genocide's contextual embedding cannot be captured in a uniform legal standard, but depends on the factual circumstances of the situation under consideration.

The case studies all display a certain disconnection between the law *in abstracto* and the law *in concreto*: whereas the legal frameworks of the *ad hoc* Tribunals and the ICC differ, their evaluation of individual cases is similar. This disconnection is explicable in light of the open texture of legal rules, which provides courts a certain leeway to adjust the law to case-specific circumstances. The resulting flexibility is not objectionable *per se*, but remains subject to a nuanced and thorough process of judicial argumentation. On this account, chapter V – the epilogue of this study – critically scrutinises the reasoning practice of the *ad hoc* Tribunals and the ICC on the basis of the methodological standards from casuistry and factor-based reasoning. The analysis shows that the judgments of the courts do not explain the interplay between law and facts in a sufficiently precise and consistent way. To address this concern, the epilogue develops a casuistic argumentation framework that is based on a reason-model of analogical reasoning. By implementing this model in the practice and study of substantive international criminal law, courts and scholars can develop a refined understanding of international crimes and modes of liability and warrant that the application of these concepts in individual cases meets the standards of the legality principle.