

**Epilogue: Developing a
Casuistic Framework
of Judicial Reasoning**

5.1 INTRODUCTION

In *Judicial Creativity at the International Criminal Tribunals*, Judge Wald maintains that the judicial process in international criminal law

seldom climaxes in a ‘Eureka! I have found it’ moment: it is rather a journey of exploration horizontally across courts and countries and vertically, through experience with different cases in the same court over time. The first search does not always produce the prize; a dialogue is often indispensable between judges from different backgrounds and even from different courts (...).¹

In this study, I have described and assessed this journey of exploration in relation to the *ad hoc* Tribunals and the International Criminal Court (ICC) by using the theory and methodology of casuistry. In this way, I have shown that substantive international criminal law is not controlled by general rules alone, but operates and develops in interplay with the facts of individual cases. It is therefore important to assess the meaning of international crimes and modes of liability in light of legal practice. This assessment can reveal new insights that put the established views and critiques on the nature and scope of criminal responsibility for international crimes in a different perspective.

In this concluding epilogue, I take a reflective and critical approach towards the practice of the *ad hoc* Tribunals and the ICC. Whereas the previous case studies have primarily *described* how the courts apply the law in individual cases, the epilogue critically *reflects* upon this practice from a legality perspective. Based on this reflection, I make several recommendations for improving (the study of) judicial reasoning in international criminal law. My argument develops as follows. In section 2, I briefly reiterate the normative framework on which this study is based. Against this background, I proceed to sketch the reasoning process of the *ad hoc* Tribunals and the ICC. I thereby take a step back from the detailed analyses of the previous chapters and appraise judicial practice with a birds’ eye view. The most important finding following from this appraisal is that the courts do not explicate the interplay between law and facts in a consistent and structured way. Thus, they create uncertainties and ambiguities that are problematic in light of the principle of legality. I argue that these legality concerns can be addressed by complementing the court’s current reasoning process with casuistic argumentation techniques and by using these techniques to study judicial practice.

In the prologue to this study, I have explained the general theory and methodology of casuistry. It seems that casuistry is most effective when it is embedded in the specific

¹ P. Wald, ‘Note from the Bench’ in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) xxxv, xxxvii.

(legal, institutional and social) context in which the *ad hoc* Tribunals and the ICC operate and is customised to the particular challenges that characterise this context.² To realise such embedding and customisation, section 3 analyses two domestic models of legal reasoning from precedent: the rule-model and the reason-model. Sections 4 and 5 illustrate that international criminal law can particularly learn and benefit from the reason-model. By implementing the basic thoughts and argumentation steps underlying this model in international practice and doctrine, courts and scholars can make the casuistic interplay between facts and law more transparent and controlled. This will help to clarify the meaning of international crimes and modes of liability and to restrain the application of these concepts in individual cases. In this way, the values underlying the principle of legality can be advanced without forestalling the development of international criminal law.

In the concluding section of this epilogue (section 6), I look back on my findings on the role of casuistry in the case law of the *ad hoc* Tribunals and the ICC. In addition, I provide some broad prospects on the value of casuistry for the future practice, study and development of substantive international criminal law.

5.2 JUDICIAL REASONING IN INTERNATIONAL CRIMINAL LAW

5.2.1 *Basic Starting-Points and Assumptions*

Substantive international criminal law can be characterised as an open legal system. It is composed of (statutory and customary) rules that stipulate relatively indeterminate definitions of international crimes and modes of liability. These definitions do not control the meaning of the law completely and are unable to rigidly constrain the decision-making process of international criminal courts. Instead, they give the courts a certain leeway of discretion, which enables the judicial development of rudimentary and outdated legal concepts. As a result of this development, substantive international criminal law has taken ‘on a force of its own’: it has become ‘something that is not so much “laid” down from above as something that “grows up”’.³

2 More generally on the context-dependency of judicial reasoning, see D. Walton and G. Sartor, ‘Teleological Justification of Argumentation Schemes’, 27 *Argumentation* (2013) 111, 133; M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (New York: Oxford University Press, 2004).

3 D.N. MacCormick and R.S. Summers, ‘Further General Reflections and Conclusions’ in D.N. MacCormick and R.S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 531, 543. MacCormick and Summers use this expression in relation to domestic law, but is similarly applies to substantive international criminal law.

The facts of individual cases have played an important role in the judicial construction of international criminal law. The *ad hoc* Tribunals and the ICC have rethought the meaning of substantive legal concepts in terms of real situations and have adjusted international crimes and modes of liability in response to the issues and questions that arose in particular cases. In this way, the courts have inextricably linked the law to its practical function. The interplay between law and practice can be appraised positively insofar as it enables courts to do justice to the specific circumstances of individual cases, to adapt the law to changed conditions, and to modernise criminal responsibility for international crimes. At the same time, the law's susceptibility to change and its opportunities for creative progress also generate a certain degree of uncertainty and fluidity. This creates the risk that courts apply the law in an irregular, unforeseen, or incomprehensible way subject to the personal intuitions of individual judges. The principle of legality is thereby put under pressure.

As was clarified in the prologue to this study, the principle of legality does not prohibit the judicial development of substantive international criminal law *per se* and by all means. Instead, it mainly requires that this development proceeds in a rational and controlled way. How can such rationality and control be achieved and maintained? Considering that international criminal law does not provide for any effective institutional structures and mechanisms for control (such as an educational system for professional judicial training or a framework for legislative supervision), (the methodology of) judicial argumentation seems to impose the most powerful checks on the authority of the *ad hoc* Tribunals and the ICC.⁴ The courts' practice can thus best be controlled by developing an argumentation model that curtails the discursive process of public justification. Christie gives voice to this thought by asserting that

[i]n law as in science, we proceed by using a previously agreed upon method of arriving at conclusions on the basis of the evidence available. It is submitted that this model of legal argument, because it controls the decisions of courts and protects the participation of the parties in the resolution of their disputes, will permit the assertion that judicial decision-making is objective and fair.⁵

4 MacCormick and Summers (n. 3 above) 550. Lasser illustrates this connection between the lack of institutional control and the importance of judicial reasoning in a comparative case study of the French, US and EU judicial systems. Lasser (n. 2 above).

5 G. Christie, 'The Objectivity in the Law', 78 *Yale Law Journal* (1969) 1340-1341. This does not imply that the methods of the law are the same as the method of natural sciences. C.E. Smith, *Feit en Rechtsnorm. Een Methodologisch Onderzoek naar de Betekenis van de Feiten voor de Rechtsvinding en Legitimatatie van het Rechtsoordeel*, 10 September 1998, PhD Thesis, 58-61.

Following this assertion, the legality of international criminal law is primarily subject to judicial argumentation. The legality requirements (such as the foreseeability and equality of law) are satisfied when decisions are explained according to specific reasoning steps.⁶ It thus becomes essential that the *ad hoc* Tribunals and the ICC reveal the reasons for their findings. These reasons have to meet a certain validity threshold: the courts should explain their findings on the basis of an argumentation framework that is capable of ensuring the rationality of judicial decision-making.⁷ This framework is shaped by so-called secondary rules of adjudication, which formulate normative standards for identifying, interpreting and applying substantive international criminal law. Amongst others, they regulate whether and how courts have to make the reasons underlying their decisions transparent. In this way, secondary rules of adjudication allow for distinguishing between good and bad, relevant and irrelevant arguments.⁸

Precedents play an important role in secondary rules of argumentation, in particular in developing legal systems that are governed by indecisive and open-textured rules. The doctrine of precedent is based on the thought that judicial decisions need to cohere with the pre-established legal context of cases that have already been settled. It accordingly requires that courts formally follow or are normatively guided by decisions reached in prior cases and that they solve new problems conform solutions from the past. In this way, the doctrine of precedent gives expression to a case-based reasoning model in which courts use previous judicial findings to operationalise open-ended rules and vaguely defined legal concepts.⁹ The controlling force of this reasoning model depends on the

6 Similarly, 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) 237-238; C.E. Smith, *Regels van Rechtsvinding* (Den Haag: Boom Juridische Uitgevers, 2007) 120-121, 131-132, 136, 140; V. Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union', 7 *Columbia Journal of European Law* (2001) 63, 78-82; B. van Klink, 'Rechtsvinding en Rechtszekerheid in het Strafrecht' in E. Broers and B. van Klink (eds.), *De Rechter als Rechtsvormer* (Den Haag: Boom Juridische Uitgevers, 2001) 197, 212; MacCormick and Summers (n. 3 above) 550; Christie (n. 5 above) 1311, 1340; Smith (n. 5 above) 86.

7 M. Taruffo, 'Judicial Decisions and Artificial Intelligence', 6 *Artificial Intelligence and Law* (1998) 311, 315; V.R. Walker, 'Discovering the Logic of Legal Reasoning', 35 *Hofstra Law Review* (2007) 1687, 1687.

8 More generally on the need for protocols regulating argumentation, 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, 10; Walton and Sartor (n. 2 above) 124.

9 C. Groendijk and A. Oskamp, 'Case Recognition and Strategy Classification', *ICAIL Proceedings of the 4th International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1993) 125, 125. On the formal and substantive rationes underlying resort to precedent, see e.g. M. Adams, 'Heden en Verleden in de Rechtspleging. Rechtsvergelijkende en Rechtstheoretische Beschouwingen over de Precedent- en Zwaartekrachtwerking van Rechterlijke Uitspraken', 3 *Rechtsgeleerd Magazijn Themis* (2006) 106, 107-111; F. Schauer, 'Precedent', 39 *Stanford Law Review* (1987) 571, 571-606; 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, 481-500.

analogy between cases:¹⁰ courts can only justify the decision in the case before them with precedents concerning sufficiently similar situations. Walker therefore finds that

[t]he logic of legal reasoning should capture the kinds of reasons that courts routinely give for considering two cases to be similar, and for distinguishing one case from another. (...) At a minimum, it will involve identifying the attributes that are relevant for comparing legal cases, devising a valid and reliable method of classifying actual cases on those attributes and determining how judges and regulators should decide whether two cases are sufficiently similar or dissimilar.¹¹

To put Walker's objective into practice, we can rely upon insights from casuistry and Artificial Intelligence and Law (AI&L) on factor-based reasoning. These insights are particularly useful for structuring the interplay between law and facts and for controlling the application of the law in individual cases. Throughout this study, the theory and methodology of casuistry and AI&L have therefore been taken as a starting-point and bench-mark to analyse and evaluate the case law of the *ad hoc* Tribunals and the ICC.

5.2.2 *A Sketch of Judicial Reasoning in International Criminal Law*

The previous section has established that the legality of substantive international criminal law depends on the quality of judicial argumentation. It is therefore appropriate to assess how international criminal courts explain their decisions in judgments. International criminal law has not developed an institutional practice in which advocates-general, reporting judges or academic commentators provide additional information on the reasons underlying the courts' findings. The judgments should therefore be self-explanatory and must by themselves provide a sufficient basis to understand the judicial decision. In this light, it is particularly opportune that the Statutes of the *ad hoc* Tribunals and the ICC regulate that the judgments have to include a reasoned and public opinion of the courts' findings and conclusions.¹² None of the relevant statutory

10 Kratochwil (n. 6 above) 223. Recall 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 a fact-situation within the scope of existing law.

11 Walker (n. 7 above) 1703-1704.

12 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(2); 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(2); Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), Article 74(4).

provisions, however, specifies any substantive standards that should be met in this respect.¹³ The *ad hoc* Tribunals and the ICC thus retain considerable freedom to fill in the specific details of their opinion, which has generated different types and levels of judicial argumentation. Nonetheless, it is possible to discern some typical reasoning patterns.

The *ad hoc* Tribunals and the ICC generally commence their reasoning process with a statement of the relevant rules. Whereas the practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) is defined by rules of customary law, the ICC primarily relies on the provisions of the Rome Statute. All three courts, however, recognise the need to interpret the applicable rules, since even the most detailed statutory regulations incorporate abstract terms and concepts that allow for different understandings. On this account, the courts engage in extensive analyses based on the methods of interpretation that are laid down in the Vienna Convention on the Law of Treaties (VCLT).¹⁴ These analyses typically result in the formulation of a standard or criterion. According to the ICTY, the term ‘systematic attack’, for example, refers to the ‘organized nature of the violence and the improbability of [its, MC] random occurrence’.¹⁵ Furthermore, the Tribunal has determined that an accused can only be held responsible as a ‘superior’ if he exercised ‘effective control’ over the persons who committed the indicted crimes. This requires that the accused had ‘the material ability to prevent or punish the subordinates’ alleged criminal conduct’.¹⁶ By thus rephrasing abstract legal rules in terms of more specific standards, the judicial criteria make the law more concrete. They clarify the contours of the rule for which they apply and frame the rule’s potential scope.¹⁷

13 Of course, the courts are bound to specific sources of law and methods of interpretations, but the Statutes do not ascertain how the courts should use these sources and methods in their process of justification.

14 On the judicial use of the canons of interpretation from the VCLT, see e.g. 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 Casese* (The Hague: Kluwer Law International, 2003) 847, 847-888; 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, 2010) 17, 17-45.

15 See e.g. *Prosecutor v. Kunarac et al.*, Judgment, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 94; *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004 (*Blaškić* Appeals Chamber judgment), para. 101; *Prosecutor v. Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 94; *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-T, Trial Chamber I, 12 June 2007, para. 49.

16 See e.g. *Prosecutor v. Mucić et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001 (*Mucić et al.* Appeals Chamber judgment), paras. 196-198; *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A, Appeals Chamber, 17 September 2003, para. 93; *Prosecutor v. Đorđević*, Judgment, Case No. IT05-87/1-T, Trial Chamber II, 23 February 2011, para. 1881; *Blaškić* Appeals Chamber judgment, para. 67.

17 Similarly in relation to domestic law, M. Taruffo, ‘Institutional Factors Influencing Precedents’ in D.N. McCormick and R.S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997) 437, 459.

The meaning of judicial criteria needs to be further specified on a case-by-case basis in light of the particular facts of individual cases.¹⁸ To structure this process, the *ad hoc* Tribunals and the ICC sometimes draw up lists of relevant factual circumstances.¹⁹ These lists specify the facts that determine whether a judicial criterion applies in an individual case. The ICTY has, for example, held that the existence of a policy to commit crimes against humanity can be inferred from *inter alia* the overall political background; the mobilisation of armed forces; and the execution of temporally and geographically repeated and coordinated military offensives.²⁰ In a similar way, the ICTR has ascertained that an accused's intent to commit genocide can be deduced from his acts, utterances and position and from the pattern of purposeful action.²¹ The latter category includes circumstances such as the methodical way of planning; the systematic manner of killing; the number of victims; and the scale of atrocities. In addition to drafting lists of *relevant* circumstances, the courts also identify facts that are in themselves *insufficient* to meet the standard of a judicial criterion. In relation to the genocidal intent-element, the ICTY has, for example, determined that the expression of derogatory language is relevant for establishing genocidal intent, but 'does not in and of itself evidence such intent'.²²

The lists of factual circumstances guide the implementation of judicial criteria in practice. The *ad hoc* Tribunals and the ICC accordingly substantiate their decisions with circumstances that can be traced back to the applicable fact lists. For example, the existence of a policy to commit crimes against humanity has regularly been based on the interval and relations between military operations:²³ the indicted crimes meet the policy threshold, because the villages in region X were attacked daily over a period of one month following a consistent pattern. Such reasoning neatly conforms to the related list of relevant facts, which qualifies 'the execution of temporally and geographically repeated and coordinated military offensives' as one of the circumstances from which the existence of a policy can be inferred. This practice suggests that the description, interpretation and evaluation of the facts of individual cases is guided by and connected to the lists of relevant factual circumstances. The *ad hoc* Tribunals and the ICC, however, often

18 E.g. *Prosecutor v. Vasiljević*, Judgment, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004, para. 100; *Prosecutor v. Lubanga*, Judgment, Case No. ICC 01/04-01/06-2842, Trial Chamber I, 14 March 2012 (*Lubanga* Trial Chamber judgment), para. 1001.

19 See e.g. *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-T, Trial Chamber I, 3 March 2000 (*Blaškić* Trial Chamber judgment), para. 204; *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998 (*Akayesu* Trial Chamber judgment), para. 523; *Prosecutor v. Krajišnik*, Judgment, Case No. IT-00-39-T, Trial Chamber I, 27 September 2006, para. 1081.

20 *Blaškić* Trial Chamber judgment, para. 204.

21 See e.g. *Akayesu* Trial Chamber judgment, para. 523.

22 *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010 (*Popović et al.* Trial Chamber judgment), para. 1399.

23 On this issue, see M. Cupido, 'The Policy underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate', 22 *Criminal Law Forum* (2010) 275 and chapter 2 of this study.

refrain from making this connection explicit. They do not explain in a consistent and structured way whether and how the circumstances of the case before them are reflected in the applicable lists of relevant facts. In crimes against humanity cases, the courts have, for example, not always explicated that the commission of patterned and frequent attacks at the villages in region X *demonstrates* the execution of temporally and geographically repeated and coordinated military offensives, which *evidence* the existence of a policy to commit crimes against humanity. As a result, the connection between the conclusions in individual cases and the legal framework of rules, criteria and relevant factual circumstance often remains unclear.

Despite the fact that judicial decisions are not a source of law proper, the legal findings of the *ad hoc* Tribunals and the ICC do have a certain precedential effect.²⁴ The ICTY and ICTR are in principle bound by the *ratio decidendi* of previous Appeals Chamber judgments in (substantially) similar cases.²⁵ Likewise, the Rome Statute of the ICC stipulates that the Court ‘may apply principles and rules of law as interpreted in its previous decisions’.²⁶ In practice, the courts accordingly tend to restate the judicial criteria from prior judgments when they define (the legal elements of) international crimes and modes of liability. In this way, the courts expand the influence of judicial criteria beyond the case in which they were drafted originally. Some criteria even transcend the context of a specific court. Both the *ad hoc* Tribunals and the ICC, for example, apply ‘the material ability to prevent or punish’ as a standard of effective control for superior responsibility.²⁷ This criterion thus appears to have become an integral part of substantive international criminal law.

24 For a scholarly evaluation of this issue, see C. Harris, ‘Precedent in the Practice of the ICTY’ in R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) 341, 341-356; A. Orié, ‘Stare Decisis in the ICTY Appeal System? Successor Responsibility in the Hadžihasanović Case’, 10 *Journal of International Criminal Justice* (2012) 635, 635-644; 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) 305-325; G. Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009) 285, 292-299.

25 *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000 (*Aleksovski* Appeals Chamber judgment), paras. 89-115; *Prosecutor v. Semanza*, Decision, Case No. ICTR-97-20-A, Appeals Chamber, 31 May 2000, para. 92; *Prosecutor v. Semanza*, Separate opinion Judge Shahabuddeen, Case No. ICTR-97-20-A, Appeals Chamber, 31 May 2000, paras. 6-17.

26 Article 21(2) ICC Statute.

27 *Prosecutor v. Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009 (*Bemba* confirmation of charges decision), para. 415; *Mucić et al.* Appeals Chamber judgment, para. 256; *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-A, Appeals Chamber, 27 January 2000, para. 135. On the relevance of external (inter)national precedents in general, see *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, Trial Chamber II, 14 January 2000, paras. 537-542.

It is not clear whether the lists of factual circumstances that can be used to establish a legal rule or judicial criterion carry a similar precedential weight and have a comparable case-transcending effect. The *ad hoc* Tribunals and the ICC qualify the function and application of relevant facts as a matter of evidence, as opposed to substantive law.²⁸ This seemingly implies that the lists of facts do not define the meaning of international crimes and modes of liability, but only help to explain whether a case meets the evidential threshold of the rule or criterion for which they are used. Even so, the *ad hoc* Tribunals and the ICC regularly reiterate the circumstances that were listed in previous judgments when they set out the applicable law in new cases. This suggests that the lists of factual circumstances steer the determination of relevant and insufficient facts and thus influence the courts' conception and use of substantive international criminal law.

5.2.3 *Evaluating International Criminal Law Practice*

How should we appraise this judicial practice? Does it comply with the standards of casuistry on which this study is based? As a starting-point, it must be recognised that the *ad hoc* Tribunals and the ICC take great effort to substantiate their findings with sufficient reasons. In this respect, they accept the law's openness and acknowledge that the statutory and customary definitions of international crimes and modes of liability cannot be applied deductively. Instead, the meaning of these substantive legal concepts needs to be established on a case-by-case basis according to a casuistic reasoning process. The *ad hoc* Tribunals and the ICC structure this process by formulating judicial criteria and relevant factual circumstances, such as 'the material ability to prevent or punish' or the execution of 'temporally and geographically repeated and coordinated military offensives'. The criteria and relevant circumstances designate the standards under which an international crime or mode of liability applies. These standards are phrased in universal terms, independent of the specific situation from which they arose. In this way, the applicability of judicial criteria and categories of factual circumstances is detached from the factual background of individual cases. This context-independency allows courts to rely upon the criteria and fact categories from precedents irrespective of the factual similarities and differences between cases.

Legal theory learns us that the general and context-independent standards of judicial criteria and fact categories do not fully describe and control the law's meaning. Whereas such standards may be suited to settle so-called 'easy cases',²⁹ 'hard cases' that fall outside the law's established meaning cannot be resolved by the deductive application of general

28 E.g. *Bemba* confirmation of charges decision, para. 416, nn. 537, 538; *Blaškić* Appeals Chamber judgment, para. 69.

29 Smith (n. 5 above) 203.

legal standards.³⁰ The previous case study on genocide, for example, shows that the mere finding that *génocidaires* act ‘with the clear purpose to destroy a protected group’ is insufficient to ascertain whether genocidal intent can be established in relation to persons who sought to destroy a protected group outside the context of a collective campaign of destructive violence. It is therefore inappropriate for courts to justify an accused’s classification as a criminal perpetrator with mere reference to a rule, criterion or fact category. Instead, they should use additional argumentation techniques that bridge the gap between the general legal standards and the case-specific facts.³¹ In this way, courts can clarify why a marginal situation falls within or outside the scope of the law and at the same time give further insights into the meaning of the law, which are relevant for future cases.³²

According to Burchard, the current argumentation practice of the *ad hoc* Tribunals and the ICC gives insufficient expression to the complexity of classifying individual cases under general legal rules. He argues that when looking at

the outwardly visible mode of operation of international criminal tribunals (...) [l]egal reasoning, especially in the judgments, is still couched in the language of discovery; it is based on syllogistic forms of argumentation; solutions of legal problems are portrayed as the singularly correct ones; and the overall rhetorical style is that of closure.³³

The previous findings and case studies make clear that Burchard’s claim is (too) strongly worded and needs to be nuanced in light of legal practice. Having said that, we should recognise that there is still room for improving the argumentation process of the *ad hoc* Tribunals and the ICC. In particular the interplay between law and facts governing the classification of (hard) cases under general rules can be displayed in a more structured and transparent way. Certainly, the courts at times already seek to elucidate this interplay by explicitly connecting their findings of fact to the relevant legal standards. For example,

30 Similarly in relation to the function and value of judicial criteria in domestic (criminal) law, K. Rozemond, *De Methode van het Materiële Strafrecht* (Nijmegen: Ars Aequi, 2011) 15, 17, 24; K. van Willigenburg, *Casuïstiek en Precedentwerking in het Materiële Strafrecht*, PhD manuscript, on file with author, 5, 7, 167; Smith (n. 6 above) 118.

31 Similarly, F. Koster, ‘Iets over Cassatietechniek’ in G. Mols and M. Wladimiroff (eds.), *Homo Advocatus: Spong-Bundel* (Den Haag: Sdu Uitgevers, 1998) 73, 76; Smith (n. 6 above) 176-177; Van Willigenburg (n. 30 above) 151.

32 M.J. Borgers, ‘De Communicatieve Rechter’ in *Controverses rondom Legaliteit en Legitimatie, Handelingen Nederlandse Juristen-Vereniging 2011-1* (Deventer: Kluwer, 2011) 103, 133.

33 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, 85.

the *Popović et al.* Trial Chamber of the ICTY has held that Popović' participation in forcible transfer did not meet the 'significant contribution' criterion for JCE, because

there is a paucity of evidence concerning any action taken by him in support of this goal [of forcible transfer, MC]. *Informing Momir Nikolić of the plan to remove the population, and instructing a member of the VRS to stop distributing bread do not amount to a significant contribution to the JCE to forcibly remove as required by the jurisprudence.*³⁴

Although reasoning in somewhat broader terms, the *Lubanga* Trial Chamber has similarly linked the 'essential contribution' criterion for joint perpetration to Lubanga's involvement in the recruitment and conscription of child soldiers:

[t]he *role of the accused* within the UPC/FPLC and the *hierarchical relationship* with the other co-perpetrators, viewed in combination with the *activities he carried out personally* in support of the common plan, as demonstrated by the rallies and visits to recruits and troops, lead to the conclusion that the implementation of the common plan would not have been possible without his contribution.³⁵

By thus connecting general criteria for criminal responsibility to (the absence of) specific factual circumstances, the Trial Chambers give further insights into the nature and scope of the law. Unfortunately, however, there is no uniform practice on this point. The *ad hoc* Tribunals and the ICC do not consistently specify the facts on which their findings are based and they do not always link these facts explicitly to the applicable legal standards. For example, the *Gotovina et al.* Trial Chamber in relation to Gotovina's *mens rea* considered that

[h]aving evaluated *Gotovina's acts and conduct above* and considering Gotovina's participation in and statements at the Brioni meeting, the Trial Chamber finds that Gotovina had the state of mind that the crimes forming part of the objective should be carried out. *Considering all of the above*, the Trial Chamber accordingly finds that Gotovina was a member of the JCE. The Trial Chamber finds that Gotovina thus intended that his actions contribute to the JCE.³⁶

34 *Popović et al.* Trial Chamber judgment, para. 1173 (emphasis added).

35 *Lubanga* Trial Chamber judgment, para. 1270.

36 *Gotovina et al.* Trial Chamber judgment, para. 2371 (emphasis added).

The Trial Chamber's general reference to previously stated facts leaves ambiguous which specific actions underlie Gotovina's qualification as a JCE member. It also makes one wonder how Gotovina's conduct relates to the 'significant contribution' requirement for JCE liability. Similar uncertainties arise in relation to the findings of the *Lubanga* Trial Chamber on the conscription of child soldiers. According to the Trial Chamber, Lubanga had knowledge of this illegal practice because 'the evidence discussed above' showed that he 'was fully aware that children under the age of 15 had been, and continued to be, enlisted and conscripted by the UPC/FPLC and used to participate actively in hostilities during the timeframe of the charges'.³⁷ Lubanga's awareness of the existence of a non-international armed conflict was likewise explained with general reference to the evidence 'rehearsed above'.³⁸

These examples show that the *ad hoc* Tribunals and the ICC regularly leave the interplay between the applicable legal standards and the facts of individual cases somewhat opaque. This makes it difficult for future courts to connect their factual evaluation to the decisions made in prior cases. They cannot specify how their findings of fact relate to previous judicial assessments of factually similar situations. As a result, it remains uncertain whether the courts apply the law in a consistent way, i.e. whether they attach equal relevance and weight to particular factual circumstances. Of course, this does not necessarily mean that the *ad hoc* Tribunals and the ICC engage in unrestrained reasoning and apply the law to the facts as they see fit. On the contrary, the previous case studies make clear that the courts' judgments display broadly universal patterns. Case law analyses, for example, show that the acts of individual *génocidaires* are in principle embedded in a context of collective violence.³⁹ Furthermore, judicial practice demonstrates that the common plan-element of JCE and joint perpetration generally refers to the coordinated participation of accused in political and military structures, instead of their criminal agreement with the physical perpetrators.⁴⁰

These universal practices of the *ad hoc* Tribunals and the ICC suggest that the courts are genuinely guided by the law, which may lead us to nuance any shortcomings in their judgments. At the same time, we can doubt whether the finding that extensive *scholarly analyses* display largely consistent judicial *outcomes*, remedies the fact that the *judgments* themselves leave the complex *process* of classifying (hard) cases under the law somewhat obscure. In this respect, we should realise that the courts have their own communicative function and their own responsibility to inform the parties, the affected communities and

37 *Lubanga* Trial Chamber judgment, para. 1347.

38 *Lubanga* Trial Chamber judgment, para. 1349.

39 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.

40 See, M. Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration' in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014) 128 and chapter 3 of this study.

the general public of the reasons underlying their decisions. The *ad hoc* Tribunals and the ICC arguably fail to fulfil this task insofar as they do not explicate the interplay between facts and law in their judgments. This is problematic in light of (the values underlying) the principle of legality, because it thus becomes difficult to determine from the outside whether the courts have applied the law in a consistent and rational way.

To address this legality concern, we should examine how the *ad hoc* Tribunals and the ICC can make the classification of (hard) cases under the law more transparent. In this respect, particular attention needs to be paid to the ways in which the courts can apply existing judicial criteria and lists of factual circumstances in a more meaningful and structured way. In other words, we should seek to determine how general criteria and fact categories can be used to clarify the interplay between facts and law. In addition, we have to assess how knowledge about this interplay can help to control the application and development of substantive international criminal law. In this respect, we can rely on insights from casuistry and AI&L. These theories ascribe an important role to reasoning from precedent. In particular, they employ a methodology of analogical reasoning on the basis of factors derived from previous cases. Because this methodology looks beyond abstract legal concepts into the law's practical application, it provides valuable guidelines for explaining, structuring and evaluating the classification of individual cases under general legal standards.

To be workable, the methodology of casuistry and AI&L need to be tailored to the specific context in which the *ad hoc* Tribunals and the ICC operate.⁴¹ The courts themselves have limited abilities to realise such a tailored practice of casuistic reasoning, since they are constrained by their institutional position. The courts' primary function lies in the field of responsive problem-solving, which means that they are, above all, responsible for making reasonable decisions on specific legal matters on a case-by-case basis. Judicial argumentation is thus necessarily related to and limited by the situation under consideration. The *ad hoc* Tribunals and the ICC can therefore not be expected to draft general models for judicial reasoning, nor to assess the implications of their decisions for the legal system as a whole.⁴² This leaves an important role for legal

41 Similarly, A. von der Lieth Gardner, *An Artificial Intelligence Approach to the Law* (Cambridge: A Bradford Book, 1987) 1; Walker (n. 7 above) 693.

42 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) 128-129; Kratochwil (n. 6 above) 41. In cases where chambers have taken up a more constructive task, developing general theories of law, these theories have often been nuanced or adapted by later chambers in light of the specific circumstances of the case before them. Consider, for example, the slight changes that the *Lubanga* Trial Chamber and the *Katanga* Trial Chamber have already introduced in the control over the crime theory for (indirect) co-perpetration that was first set out by the *Lubanga* Pre-trial Chamber. *Prosecutor v. Katanga*, Judgment, Case No. ICC 01/04-01/07-3436, Trial Chamber II, 8 March 2014, paras. 1386-1387, 1406; *Lubanga* Trial Chamber judgment, paras. 1009-1012

doctrine. Scholars should assist and complement the courts' work by developing methodological guidelines for judicial reasoning and by using these guidelines to analyse case law. Of course, this effort cannot produce a strict argumentation framework that determines all decisions beforehand and explains the law in every detail. Since the law's logic is inherently limited, it is simply impossible to detract all legal uncertainties and to constrain the judicial reasoning process completely.⁴³ Even so, it would be useful if scholars seek to find a middle ground between 'the extremes of absolute certainty and total arbitrariness (...) which gives real substantive but not absolute weight to the ideal (...) of the equality before the law and rule of law'.⁴⁴

5.3 DOMESTIC LESSONS IN REASONING FROM PRECEDENT

5.3.1 *A Comparative Look at Precedents*

Domestic law provides valuable starting-points for developing an international model for casuistic reasoning from precedent. Domestic legal systems mainly resort to precedents to establish the meaning of the law, to solve interpretative doubts, and to fill gaps in the legal framework.⁴⁵ In particular in areas of law that are not codified or that are governed by incomprehensive and vague statutes, precedents are an indispensable means for concretisation.⁴⁶ The value of precedents and the way in which they are applied, differ per system.⁴⁷ In light of these differences, domestic practice can be classified in two ideal types.⁴⁸

The first type represents the common law tradition. In this tradition, the qualification of precedents as sources of law and the adoption of a *stare decisis* doctrine have 'evolved into a very specific practice of reasoning from decided cases'.⁴⁹ This practice is characterised by a close connection between (the meaning of) the law and (the judicial decisions on) the facts of individual cases. The common law courts 'contextualise' their

43 Similarly, J. Horty, 'Common Law Reasoning', available online at <www.umiacs.umd.edu/~horty/articles/clr-2013-3-21.pdf>, 41.

44 Bankowski et al. (n. 9 above) 495.

45 K. Langenburcher, 'Argument by Analogy in European law', 57 *Cambridge Law Journal* (1998) 481, 496; B. Levenbook, 'The Meaning of a Precedent', 6 *Legal Theory* (2000) 185, 211; MacCormick and Summers (n. 3 above) 458-459; MacCormick and Summers (n. 8 above) 11-12.

46 MacCormick and Summers (n. 3 above) 458-459.

47 E.g. Walton and Sartor (n. 2 above) 132; J. Bell, 'Book Review: *Comparing Precedent*', 82 *Cornell Law Review* (1996-1997) 1243, 1246, 1271.

48 Since these are ideal types, the reasoning styles of the individual legal systems may show variation. Moreover, it seems that the differences between these ideal types have diminished over the past years. On this issue, see e.g. G. Gilmore, 'Legal Realism: Its Cause and Cure', 70 *Yale Law Journal* (1961) 1037, 1042; MacCormick and Summers (n. 8 above) 2-4, 12.

49 R.A. Shiner, *Legal Institutions and the Sources of Law* (Dordrecht: Springer, 2005) 32.

findings within specific factual situations and link the standards from previous cases to the circumstances from which they emerged.⁵⁰ This contextual approach necessitates a detailed articulation of the facts of each case. It also postulates that courts determine the applicability of precedents to the case before them in light of the factual resemblance between these cases.⁵¹ Reasoning from precedent accordingly becomes a type of story-telling and story-matching whereby the law evolves through the ‘analogical extrapolation from one story to the next’.⁵² This process involves a broad practice of analogising and distinguishing. Common law lawyers continuously ‘engage in complex factual triages, distinguishing as factually different and distant those cases whose outcome would militate against their client’s interests; and, conversely, presenting as analogous the facts of cases whose outcomes militate in favour of their clients’.⁵³ In this way, the common law is safeguarded against broad generalisations from previous decisions and remains susceptible to piecemeal reform:⁵⁴

the common law is in constant flux, always in a process of further becoming, developing, and transforming as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial decisions, but it is defined by continuous motion. (...) It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences which formed the basis of the litigation that led to the prior relevant court adjudications.⁵⁵

The second ideal type is based on the civil law tradition. Though civil law systems generally do not recognise precedents as binding sources of law, the normative role of precedents has gained power over the past years. The role of precedents in civil law is characterised by a magisterial and deductive style of reasoning. This style excludes extensive factual comparisons:⁵⁶ there is ‘none of the detailed analysis and in-depth

50 Grosswald Curran (n. 6 above) 76-77; McCormick and Summers (n. 3 above) 537. See also J. Raz, *The Authority of Law*, available online at <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253457.001.0001/acprof-9780198253457>, 188.

51 Bankowski et al. (n. 9 above) 489.

52 Bankowski et al. (n. 9 above) 489.

53 Grosswald Curran (n. 6 above) 77. See also Bankowski et al. (n. 9 above) 489.

54 Raz (n. 50 above) 195-197.

55 Grosswald Curran (n. 6 above) 75. Similarly, Bankowski et al. (n. 9 above) 489.

56 McCormick and Summers (n. 3 above) 444, 448, 536. See also Grosswald Curran (n. 6 above) 87-88. A nuanced approach is, however, required in this respect. According to Lundmark, the style of civil law judgments is becoming ‘less ministerial, bold and declaratory and more discursive, cautious, and fact-oriented. In short, judicial decisions are becoming more amenable to distinguishing and to (...) the use of the fact-based result of the decision in addition to the announced rationale and the discerned principles’.

discussion of the point and purport of rulings on issues in prior cases, none of the careful teasing-out of points of distinction, both at the factual and at the legal level'.⁵⁷ Following this practice, civil law courts use precedents as interpretative devices, i.e. as aids for good statutory interpretation that assist judges in giving a rational and reasonable explanation of legal rules.⁵⁸ In particular, the courts conform to the ways in which a legal rule was interpreted in previous cases and apply the standards that were formulated in that respect in later cases that are governed by the same rule.⁵⁹ For example, the Dutch courts have continuously reiterated the Supreme Court's interpretation of co-perpetration as the 'close and knowing cooperation' between multiple participants.⁶⁰ This criterion articulates a relatively abstract standard that can be employed irrespective of the factual differences and similarities between cases. The meaning and scope of the 'close and knowing cooperation' criterion are accordingly determined by the canonical formulation rather than by the factual context from which the criterion emerged (as is the case in the common law).⁶¹

5.3.2 *Precedents: Rule versus Reason*

Against the background of domestic practice, legal theory has developed two models of reasoning from precedent: the rule-model and the reason-model. The main distinction between these models lies in their definition of the analogy between cases: when are a precedent and present case sufficiently similar for the decision in the latter case to be modelled on the former?

Under the rule-model, two cases are similar when they are governed by the same judicial rule.⁶² The model therefore finds that precedents have to be generalised into a rule that explains their outcome. This rule must in principle be followed in all later cases

T. Lundmark, 'Book Review: *Interpreting Precedents: A Comparative Study*', 46 *American Journal of Comparative Law* (1998) 211, 223-224. On this issue see also M. Adams, 'The Rhetoric of Precedent and Comparative Legal Research', 62 *The Modern Law Review Limited* (1999) 464, 464; M. Aikenhead, 'Book Review: D. Neil MacCormick and Robert S. Summers, *Interpreting Precedents: A Comparative Study*', 8 *Artificial Intelligence and Law* (2000) 283, 284.

57 MacCormick and Summers (n. 3 above) 536.

58 MacCormick and Summers (n. 3 above) 458-459; Grosswald Curran (n. 6 above) 87-88; Bankowski et al. (n. 9 above) 484.

59 MacCormick and Summers (n. 3 above) 536-538.

60 In Dutch, the courts require a 'nauwe en bewuste samenwerking'. See HR 29 October 1934, NJ 1934, 1673 m.nt. T.

61 MacCormick and Summers (n. 3 above) 537.

62 G. Lamond, 'Precedent', 5 *Philosophy Compass* (2007) 699, 700; G. Lamond, 'Precedent and Analogy in Legal Reasoning', available online at <<http://plato.stanford.edu/entries/legal-reas-prec/>>; J.F. Horty, 'Rules and Reasons in the Theory of Precedent', 17 *Legal Theory* (2011) 1, 1; B. Roth, *Case-Based Reasoning in the Law: A Formal Theory of Reasoning by Case Comparison*, 26 November 2003, PhD Thesis, 9.

that satisfy its conditions for application.⁶³ In this way, precedential constraint becomes analogous to constraint by rules. In the common law, this approach has resulted in intense discussions on how to determine the rule – i.e. the *ratio decidendi* or holding – underlying a decision.⁶⁴ These discussions are spurred by the fact that the exact meaning and scope of *ratio decidendi* are often indeterminate.⁶⁵ Courts do not always articulate a case's *ratio* explicitly and even if they do, the *ratio*'s formulation lacks canonical force. The rules underlying precedents consequently have to be construed in retrospect and can be reviewed and adapted by later courts.⁶⁶ This involves a creative process in which prior decisions are generalised and given case-transcending meaning.⁶⁷ Since this process is organic and may endure continuously, established precedential rules can be adjusted to insights from new cases.⁶⁸

The designation of precedents as rules implies that precedents outline an exclusionary category of relevant circumstances, which stipulate the necessary and sufficient conditions for application.⁶⁹ A precedent, for example, applies when conditions x, y, and z are present. If a new case in addition to x, y, and z also incorporates conditions a and b, the precedent is still applicable.⁷⁰ Since x, y, and z are jointly *sufficient* conditions for application, the new case remains within the scope of the precedential rule. Some critics have argued that this approach does not conform to the actual character and practical function of precedents. In particular, they have asserted that precedents – unlike rules – do not represent whole categories that specify the conditions under which they apply beforehand. Instead of exhausting all possible applications in advance, precedents 'represent only salient possibilities, kinds of situations to which the applicability of some legal predicate has been treated as clear or intuitively seems clear'.⁷¹ In other words, precedents exemplify types of situations to which the law applies, but do not limit the law's scope to these situations. In this way, they leave room for legal

63 F. Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991) 187; G. Lamond, 'Do Precedents Create Rules?', 11 *Legal Theory* (2005) 1, 2; J.F. Horty and T. Bench-Capon, 'A Factor-Based Definition of Precedential Restraint', 20 *Artificial Intelligence and Law* (2012) 181, 182; Van Willigenburg (n. 30 above) 1; Levenbook (n. 45 above) 185; Horty (n. 62 above) 1.

64 MacCormick and Summer (n. 3 above) 474; Kratochwil (n. 5 above) 221; Shiner (n. 49 above) 36; Roth (n. 62 above) 12. For an overview of the debate on *ratio decidendi*, see N. Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008); R. Cross and J.W. Harris, *Precedent in English Law* (Oxford: Clarendon Press, 1991).

65 Although Hart argues that 'in the vast majority of decided cases there is very little doubt' about the rule for which a precedent is an authority. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) 131.

66 Shiner (n. 49 above) 36, 55; Van Willigenburg (n. 30 above) 1-2, 76-77; Lamond (n. 63 above) 2, 9-10.

67 Kratochwil (n. 6 above) 221; Van Willigenburg (n. 30 above) 76-77, 80; Shiner (n. 49 above) 54-55.

68 Shiner (n. 49 above) 53.

69 Van Willigenburg (n. 30 above) 29-30, 141-142; Raz (n. 50 above) 183.

70 At least, as long as this does not lead to a result that is so unsatisfactory that the courts should reinterpret the rule or formulate an exception to it.

71 Von der Lieth Gardner (n. 41 above) 52. Similarly, Bell (n. 47 above) 1260-1261.

development and refinement in light of previously unaccounted circumstances.⁷² The impact of precedents on future decisions thus becomes more nuanced than the qualification of precedential *rationes* as rules suggests. On this account, scholars have presented an alternative approach to reasoning from precedent: the reason-model.⁷³

The reason-model takes as a starting-point that like cases should be treated similarly.⁷⁴ From this perspective, it depicts precedents as examples of correct decisions relative to a particular factual situation. Later courts are required to treat these examples as rightly decided on their facts and have to ‘reach a decision that is consistent with the earlier court’s assessment of the balance of reasons’.⁷⁵ This means that courts should follow precedents insofar as the circumstances of the case before them are analogous to the facts of precedent cases. The reason-model values this process of following precedents as an important formative exercise, because it affects the level of precedential constraint.⁷⁶ After all, ‘[e]very time a precedent is followed, further facts are added to the list of those regarded as insufficient to defeat’ the precedent.⁷⁷ By thus gradually defining the factual circumstances that do not justify a deviation from previous decisions, courts are restrained to a more and more precise concept of law. At the same time, the law retains a certain openness and flexibility, because it is shaped on a case-by-case basis.⁷⁸ Each case constitutes ‘a new square in a mosaic, or a sculptor’s stroke, changing the face of the whole, altering its meaning through the addition of facts in its trajectory through time’.⁷⁹

In practice, most new cases differ from precedents, either because they incorporate additional relevant facts or because they lack certain characteristic circumstances. Under the reason-model, courts can use these differences as a basis for distinguishing a case

72 A. Peczenik, ‘Jumps in Logic and Law. What Can One Expect from Logical Models of Legal Argumentation’, 4 *Artificial Intelligence and Law* (1996) 297, 311; Von der Lieth Gardner (n. 41 above) 52; Raz (n. 50 above) 187-189; Levenbook (n. 45 above) 201-211; Lamond 2007 (n. 62 above) 701-702; Lamond (n. 63 above) 3, 9-15.

73 The distinction between the rule- and reason-model should, however, not be exaggerated. As Roth shows, both models portray similar reasoning steps. Roth (n. 62 above) 11-13. Also Horty nuances the differences between the rule-model and the reason-model by defining rules by default. Horty (n. 62 above) 3. In addition to the reason-model, other alternative models perceive that the binding element of precedents should be found in the set of principles that justify the decision (the rationale of the decision), or that precedents are examples that need to be followed in future cases whose facts are on all fours with the precedent. Lamond 2007 (n. 62 above) 702-704; Lamond (n. 32 above) 2.

74 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, 99.

75 Horty (n. 62 above) 3. See also Lamond (n. 63 above) 3; Horty and Bench-Capon (n. 63 above) 183; Roth (n. 62 above) 10.

76 Horty (n. 62 above) 20.

77 Lamond (n. 63 above) 17. Similarly, Horty (n. 62 above) 9; Horty and Bench-Capon (n. 63 above) 201-202. Horty himself refers to an important difference between his own findings and those of Lamond. Horty (n. 62 above) n. 19.

78 E. Levi, ‘An Introduction to Legal Reasoning’, 15 *University of Chicago Law Review* (1948) 501, 503.

79 Grosswald Curran (n. 6 above) 107.

from prior situations and for justifying a defeat from precedent.⁸⁰ Suppose, for example, that a court establishes an accused's knowledge of the commission of crimes in a notorious detention facility on the basis of his supervision over this facility. This decision creates the general presumption that an accused's role as 'crime scene supervisor' is sufficient to ascertain the knowledge-requirement in future cases as well. However, when these cases incorporate additional circumstances that have not been accounted for previously – e.g. the criminal activities in a facility were incidental and well-hidden from outsiders – courts are permitted to set the established presumption aside.⁸¹

As the previous example shows, the process of distinguishing allows for adjusting the meaning and scope of precedents to changed circumstances and new insights. This raises fundamental questions about the status and effect of precedents.⁸² In particular, we can wonder whether there remains anything of the case-transcending value of precedents when they only have to be followed in the unlikely event that cases are factually identical. Does the reason-model not effectively reduce precedents to particularistic decisions that cannot restrain future judges (*Einzelfallgerechtigkeit*)? No, not completely. As said, courts are required to treat precedents as correctly decided on the basis of their facts. On this account, they have to engage in a process of analogical reasoning that explores the factual similarities and differences between the precedent and present case and should use this assessment to explain the court's decision. This process becomes more and more confined with the increasing adjudication of cases, each entailing a specific combination of circumstances that needs to be respected. Take the following example concerning JCE liability.

The JCE concept establishes criminal responsibility on the basis of the accused's acceptance and pursuance of a common criminal plan. Suppose that the ICTY in one case applies JCE in relation to an accused who was instrumental to the preparation of crimes, but who did not participate in the crimes' execution. Under the reason-model, this finding does not imply that future chambers can – as a rule – establish JCE liability each time an accused fulfilled a preparatory role (as the rule-model of reasoning from precedent suggests). Nevertheless, the reason-model requires that the ICTY's previous evaluation of facts is respected. The original precedential starting-point can therefore only be renounced on the basis of factual differences between the present and precedent case that justify a different balance of reasons. This means that an accused's criminal responsibility under JCE can no longer be absolved merely because he did not commit any crimes physically. Yet, future chambers may still find that the accused in the case before them played a much smaller and less significant role than the accused in

80 Lamond (n. 63 above) 3, 16.

81 Van Willigenburg (n. 30 above) 146-147.

82 Lamond 2007 (n. 62 above) 704; Van Willigenburg (n. 30 above) 146.

precedent cases. Based on this distinction, they can conclude that the present accused cannot be held responsible under JCE.

The previous account shows that the reason-model takes a typical contextual approach in which the meaning of precedents is embedded in particular fact situations: facts and law are weaved together. Whereas precedents thus lose their general rule-like applicability, they retain important controlling and case-transcending value. In particular, precedents help to clarify the law's factual scope and to structure its application in individual cases.⁸³ In this way, they control the rationality and consistency of judicial decision-making without tying courts to pre-established precedential rules.

5.3.3 Reasoning from Precedent in AI&L

AI&L has drawn inspiration from legal theory to design logical frameworks of case-based reasoning that combine the rule- and the reason-model of reasoning from precedent. AI&L takes as a starting-point that precedents can stipulate rule-like interpretations of legal norms.⁸⁴ Think, for example, of the Dutch 'close and knowing cooperation' criterion for co-perpetration. Whereas AI&L recognises that these interpretations impose important restraints on judicial argumentation, it also emphasises that they cannot control the application of the law completely, because there is a 'gap in generality between open-textured rule antecedents and specific case facts'.⁸⁵ For example, the 'close and knowing cooperation' criterion does not determine whether the co-perpetrators' cooperation needs to relate to the execution of crimes or whether collaboration during the preparatory stage also suffices. To close this gap between rules and facts, AI&L instructs courts to conduct contextual analyses conform the reason-model.⁸⁶ It has therefore developed guidelines that help courts to identify the relevant facts of a case and to draw legal inferences from these facts.⁸⁷ The value of these guidelines is two-fold: they offer a tool based on which courts can structure their argumentation, as well as an analytical scheme for scholars to evaluate judicial reasoning.

83 Soriano (n. 74 above) 100-101.

84 K.D. Ashley, 'Case-Based Models of Legal Reasoning in a Civil Law Context', available online at <www.lrdc.pitt.edu/Ashley/Mexico.pdf>, 5.

85 L. Branting, 'Building Explanations from Rules and Structured Cases', 34 *International Journal of Man-Machine Studies* (1991) 797, 798. See also G. Vossos et al., 'An Example of Integrating Legal Case-Based Reasoning with Object-Oriented Rule-Based Systems: IKBALS II, *ICAIL Proceedings of the 3rd International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1991) 31, 31-32, 35; T. Bench-Capon and G. Sartor, 'Using Argument Schemes for Hypothetical Reasoning in Law', 18 *Artificial Intelligence and Law* (2010) 153, 153-154; Ashley (n. 84 above) 9.

86 Branting (n. 85 above) 798. See also Ashley (n. 84 above) 5; Vossos et al. (n. 85 above) 32.

87 Ashley (n. 84 above) 6-7.

AI&L guidelines designate factors as the primary determinants of judicial reasoning. Factors are (categories of) legally significant fact patterns that *favour* a certain outcome and provide *reasons* for a specific decision.⁸⁸ This implies that factors – unlike statutory provisions and judicial criteria – do not stipulate the necessary and sufficient conditions of criminal responsibility that have to be established in every case. Instead, they constitute open-ended illustrations of circumstances that courts can use to determine whether an accused's conduct falls within the scope of the law. For example, the fact that a person discriminatorily attacked persons of a specific ethnicity in a village can be a *reason* for deciding that he acted with genocidal intent, without *requiring* courts to arrive at this conclusion. This allows for applying factors in a flexible way. Courts can tailor their description and evaluation of factors to the specific features of the case under consideration.⁸⁹ For example, they can establish an accused's genocidal intent on the basis of his personal expression of violent thoughts or his participation in a collective campaign of destructive violence, depending on the case-specific context.

It should be emphasised that this flexibility does not authorise courts to define whatever factors suit them best. AI&L research clarifies that factors have to be determined in light of the reasons underlying the criminalisation of conduct.⁹⁰ In other words, factors should follow from the desire to achieve the purpose of a rule and reflect the belief that acting and deciding in accordance with certain factors advances that purpose.⁹¹ In this light, AI&L requires that courts construe teleological links between factors and the purpose of the rule for which they are used. In genocide cases, courts should, for example, ask themselves which factual circumstances contribute to the physical or biological destruction of a protected group and define the relevant facts of the case on this basis.

AI&L emphasises that the description of cases in terms of factors does in itself not determine or explain a judicial decision, but only provides input for a further reasoning phase in which all factors *pro* and *con* a decision are weighted in their variable combinations.⁹² Whereas this weighing process is relatively unproblematic when all factors point in

88 G. Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Dordrecht: Springer, 2005) 184. Contrary, Roth (n. 62 above) 27.

89 This has also been explicitly recognised by the ICTY. See e.g. *Popović et al.* Trial Chamber judgment, para. 832; *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004 (*Krstić* Appeals Chamber judgment), para. 14.

90 T. Bench-Capon, 'The Missing Link Revisited: The Role of Teleology in Representing Legal Argument', 10 *Artificial Intelligence and Law* (2002) 79, 93.

91 In this sense, AI&L seems to differ from Christie who argues that analogical reasoning does not require rules: 'any two cases will be considered similar if according to whatever criterion or similarity is imposed, they are within a certain degree of proximity'. Christie cited by Kratochwil (n. 6 above) 222.

92 Sartor (n. 88 above) 178. Differently, see Roth (n. 62 above) 15, 18-20, 50-51.

the same direction, difficulties arise when they pull in opposite ways. Suppose, for example, that an accused vigorously called for the extermination of an ethnic group, but at the same time saved individual members of this group from being killed. Whereas the former circumstance is a clear reason for deciding that the accused acted with genocidal intent, the latter circumstance contradicts this finding. But which of these factors carries more weight and is ultimately decisive? How should the factors favouring a conviction for genocide be balanced against the factors disfavouring this conclusion? To answer these questions, AI&L turns to analogical reasoning from precedent.

AI&L perceives precedents as past situations in which competing sets of factors were weighted and decided upon.⁹³ It assumes that new cases should be decided conform precedents and accordingly holds that a prior court's evaluation of factors must be reapplied in later cases. This means that courts can only depart from precedents insofar as the factors of the case under consideration differ from the factors of precedents in relevant respects. Because each case deals with a unique factual context, every judicial decision presents new (combinations of) factors that need to be respected. In this way, courts are put under increasing precedential constraint.⁹⁴ Suppose, for example, that a court decides that the accused's saving of individual persons does not negate his genocidal intent, because he otherwise favourably participated in the genocidal campaign to destroy the ethnic group to which these persons belonged. Future courts have to apply this evaluation analogically. They can therefore only deviate from the prior court's balance of factors if the case before them includes relevant circumstances that were unavailable in the precedent, such as the fact that the accused was forced to participate in the genocidal campaign by his superior.

Prototypes are an important starting-point and yardstick in the process of analogical reasoning.⁹⁵ Prototypes are standard cases that contain an optimal combination of factors. Whereas they do not exhaustively define the law, new cases can only be classified in terms of a prototype if they display sufficient factual resemblance to the prototypical notion.⁹⁶ The applicability of prototypes accordingly depends on (i) the extent to which the factors of the prototype are present in the new situation and (ii) the presence of

93 Sartor (n. 88 above) 738.

94 Horty (n. 62 above) 3.

95 Sartor (n. 88 above) 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. H.L.A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) 593, 607-608. Similarly see Smith (n. 6 above) 140.

96 Similarly in relation to legal theory, Christie (n. 5 above) 1337.

additional factors in the new situation that hinder the prototypical features from playing their normal function.⁹⁷ In this light,

[m]uch legal argument involves debating whether a case is really the same as the problem or not. (...) The dialectical process is one of characterizing and recharacterizing the relevant features of the problem and case in terms of their legal significance in support of an argument either that the cases should be decided alike or differently.⁹⁸

This dialectical process covers a variety of arguments and rhetorical techniques that elucidate the (importance of) factual distinctions and analogies.⁹⁹ Amongst others, it includes the practice of ‘downplaying’ and ‘emphasising’. This practice allows courts to re-characterise the factual differences and similarities between cases by describing them at a different level of generality.¹⁰⁰ Suppose, for example, that a court is confronted with a case in which two accused made different contributions to the commission of crimes. Whereas one of the accused *executed* crimes, the other contributed to the crimes’ *preparation*. The court can downplay this distinction and show that it is irrelevant by drawing a parallel in terms of a more abstract factor.¹⁰¹ For example, it can argue that both accused were *closely involved* in a criminal activity and made an *essential contribution* to this activity. The court’s argumentation on this point is restrained by the teleological basis of factors. This means that findings on the relevance of factual differences and similarities should be linked to the purpose of the applicable legal rule.¹⁰² In the example case, the court thus has to determine whether the accused’s physical commission of crimes is decisive in light of the purpose of the mode of liability under which he is charged.

97 Sartor (n. 88 above) 191.

98 V. Alevan and K.D. Ashley, ‘How Different Is Different? Arguing about the Significance of Similarities and Differences’, 1168 *Lecture Notes in Computer Science* (1996) 1, 8. On this issue, see also Kratochwil (n. 6 above).

99 See, e.g. D.B. Skalak and E.L. Rissland, ‘Arguments and Cases: An Inevitable Intertwining’, 1 *Artificial Intelligence and Law* (1992) 3, 15-41; T. Bench-Capon and G. Sartor, ‘Theory-Based Explanation of Case Law Domains’, *ICAIL Proceedings of the 8th International Conference on Artificial Intelligence and Law* (New York: ACM Press, 2001), 17-20.

100 Alevan and Ashley (n. 98 above) 8-12; Roth (n. 62 above) 92-98.

101 Alevan and Ashley (n. 98 above) 8; Sartor (n. 88 above) 777.

102 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, 57; Roth (n. 62 above) 101-102; Bench-Capon (n. 90 above) 87-88.

5.4 LESSONS LEARNT: A NEW APPROACH TO JUDICIAL REASONING IN INTERNATIONAL CRIMINAL LAW

5.4.1 *The Reason-Model in International Criminal Law*

Domestic theory and practice provide us with different models of reasoning from precedent that include numerous guidelines for judicial argumentation. This section evaluates how these models can help to clarify and structure the reasoning practice of the *ad hoc* Tribunals and the ICC. The section focuses on argumentation techniques from the reason-model, since these techniques seem particularly valuable for international criminal law. The reason-model requires that courts engage in a context-dependent process of analogical reasoning in which the (in)applicability of legal rules is explained in terms of the presence and absence of relevant factual circumstances. In this way, courts can clarify the interplay between law and facts and structure the application of the law to these facts, even in hard cases in which general (precedential) rules and criteria fall short.

How can the *ad hoc* Tribunals and the ICC put the reason-model in practice? The first step of the reason-model is the formulation of relevant factors. The *ad hoc* Tribunals and the ICC can implement this step quite easily. They have already drawn up a number of lists of facts that are relevant or insufficient for establishing (the elements of) international crimes and modes of liability. ICTR case law, for example, stipulates that the element of genocidal intent can be inferred from the accused's acts, utterances and position and from the pattern of purposeful action.¹⁰³ Even though these lists of facts are necessarily non-exhaustive (since it is impossible to foresee all relevant circumstances that future cases will present), they allow courts to elucidate the crucial facets of criminal responsibility and to reveal the circumstances under which such responsibility can be ascertained. Thus, the lists structure the available evidence and guide courts through the complexities that this evidence presents. For example, the relevant circumstances for establishing genocidal intent instruct courts to assess the existence of a genocidal context in addition to the accused's personal conduct. Considering this guiding function, it is advisable that the *ad hoc* Tribunals and the ICC supplement each legal element and each judicial criterion with a list of circumstances from which these elements and criteria can(not) be inferred. In this respect, the courts have to be mindful of the teleological links between law and facts: the listed facts should be connected to the legal purpose of the rule or criterion for which they are used. For example, the fact that genocide prohibits the *biological* or *physical* destruction of protected groups hinders the

103 E.g. *Akayesu* Trial Chamber judgment, para. 523.

incorporation of factual circumstances relating to a group's *cultural* destruction in the list of facts from which genocidal intent can be inferred.

In the second step of the reason-model, the lists of factors are operationalised in interplay with the particular circumstances of individual cases. This means that the *ad hoc* Tribunals and the ICC have to explain how their assessment of the facts of the case before them relates to the circumstances that are included in the lists of relevant factors. To implement this type of reasoning in practice, the *ad hoc* Tribunals and the ICC do not have to change their argumentation process rigorously. The courts' judgments already include findings of law that stipulate the legally relevant circumstances in general terms; findings of fact that specify the circumstances of specific cases; and concluding findings, which ascertain if the established facts meet the legal standards. However, as shown before, the judgments do not always make the connections between these reasoning steps explicit. They do not consistently link the courts' factual findings to the established legal framework and thus create uncertainties about the interplay between law and fact. To remedy this defect and to clearly articulate the linkage between general legal rules and case-specific facts, the courts are advised to structure and present their arguments according to a specific reasoning scheme. In relation to the policy for crimes against humanity, this scheme could, for example, broadly take the following shape. The courts (i) establish that a number of villages was encircled and attacked from different directions during a period of three months; (ii) argue that this fact shows the execution of temporally and geographically repeated and coordinated military offensives; (iii) recall that the execution of such offensives is included in the list of factual circumstances from which a policy to commit crimes against humanity can be inferred and; (iv) ascertain that this is a decisive reason for establishing a policy to commit crimes against humanity that trumps the applicable counter-indications. This argumentation scheme structures the available information in such a way that the lists of relevant facts are openly connected to the circumstances of individual cases. Thus, it is made clear which (combinations of) fact are sufficient to establish a rule or criterion and which are not.

The third step of the reason-model seeks to control the interplay between law and facts through a process of analogical reasoning from precedent. In this step, courts position the case before them relative to positively and negatively decided precedents based on the presence and absence factors.¹⁰⁴ In particular, they use the lists of relevant facts to compare the case before them with prior cases and justify their conclusions based on the thus established analogies. Such analogical reasoning is not included the current reasoning practice of the *ad hoc* Tribunals and the ICC. The effects of this hiatus become

104 Rozemond (n. 30 above) 13; Sartor (n. 88 above) 193.

abundantly clear when we examine the ICTY's development of the JCE doctrine from the *Tadić* to the *Brđanin* case.¹⁰⁵

In the *Tadić* case, the ICTY Appeals Chamber relied on JCE to hold Tadić accountable for the murder of five men in the village of Jaskici. Even though it could not be ascertained that Tadić had physically killed the victims, the Appeals Chamber considered that the death of the men was a natural and foreseeable consequence of the common plan between Tadić and the members of his military unit to ethnically cleanse Jaskici. By reasoning in this way, the Appeals Chamber established Tadić's responsibility under JCE on the basis of his agreement to participate in a relatively small-scale campaign of violence that was geographically and temporally confined.¹⁰⁶ In the *Brđanin* case, the Prosecution sought to apply JCE in a different way. The Prosecution in this case claimed that Brđanin – a senior Bosnian-Serb politician – had cooperated with the leadership of the Serbian Democratic Party and the army of the Republika Srpska to formulate 'a "strategic plan" to gain control over the Serb-populated areas in Bosnia-Herzegovina and to create a separate Bosnian state from which non-Serbs would be removed'.¹⁰⁷ Brđanin was thus accused of having contributed to a political campaign covering a broad range of crimes committed over a long period of time by a large group of persons. In first instance, the *Brđanin* Trial Chamber decided that JCE does not apply to this type of situation:

[a]lthough JCE is applicable in relation to cases involving ethnic cleansing, as the *Tadić* Appeal Judgement recognizes, it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one invoked in the present case.¹⁰⁸

The *Brđanin* Appeals Chamber, however, dismissed this decision. It considered that the prior application of JCE to small-scale mob violence committed by low- and mid-level perpetrators 'depended (...) on the size of these cases themselves and not on the requirement that JCE apply only to small-size cases'.¹⁰⁹ In this light, the Appeals Chamber held that the JCE concept is not limited to confined incidents of group-

105 *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999 (*Tadić* Appeals Chamber judgment), paras. 185-229.

106 E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) 136.

107 Van Sliedregt (n. 106 above) 159.

108 *Prosecutor v. Brđanin*, Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 355.

109 *Prosecutor v. Brđanin*, Judgment, Case No. IT-99-36-A, Appeals Judgment, 3 April 2007 (*Brđanin* Appeals Chamber judgment), para. 425 (emphasis added). Admittedly, the Chamber refers to the several cases in which JCE was applied to situations of large-scale violence. However, this does not count as a true contextual evaluation.

criminality, but can also be used to establish the criminal responsibility of senior political figures who contributed to large-scale system criminality from a remote position.¹¹⁰ Thus, the *Brđanin* Appeals Chamber designed a specific type of ‘leadership JCE’ that differs from the original JCE concept of the *Tadić* case.

The findings of the *Brđanin* Appeals Chamber have been endorsed in later judgments, which makes ‘leadership JCE’ part of the ICTY’s established case law.¹¹¹ Scholars have, however, heavily criticised this development, arguing that it extends JCE beyond its original scope in an illegitimate way.¹¹² This critique is well explicable when the judicial development of JCE liability is analysed according to the methodological standards of the reason-model. These standards are premised on the thought that courts have to respect the evaluation of facts underlying prior decisions. From this perspective, the absence of a requirement that restricts JCE to small-scale mob violence does in itself not justify the extension of JCE liability to situations that fundamentally differ from existing practice. Instead, the finding that *Tadić* and *Brđanin* can both be held accountable under JCE despite their seemingly different roles, deserves further explanation. In this respect, the Tribunal should have engaged in a context-dependent process of analogical reasoning that defines and weighs the factual similarities and differences between the contribution of senior leaders to the commission of large-scale criminality, on the one hand, and the involvement of low- and mid-level perpetrators in small-scale mob violence, on the other.

Of course, this reasoning process would not necessarily have halted the ICTY from progressively expanding JCE beyond its original paradigm, but at least this expansion would have been explained more openly. The Tribunal could, for example, have argued that the differences between the *Tadić* case and the *Brđanin* case are irrelevant in light of the values underlying JCE. The need to hold senior political and military figures responsible for the crimes that they have masterminded from a remote position is so prominent that it allows for the innovative construction of a broad concept of criminal responsibility.¹¹³ By explaining the development of JCE in this way, the ICTY could have spurred a more fruitful debate about the benefits and problems of this type of liability.

110 Van Sliedregt (n. 106) 137.

111 Van Sliedregt (n. 106) 164.

112 E.g. C. Farhang, ‘Point of No Return: Joint Criminal Enterprise in *Brđanin*’, 23 *Leiden Journal of International Law* (2010) 137; 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.

113 Interestingly, the Appeals Chamber itself seems to reject this teleological argument and finds that ‘policy considerations are inappropriate as a basis for a theory of individual criminal responsibility’. *Brđanin* Appeals Chamber judgment, para. 421.

5.4.2 *Is Implementing the Reason-Model Practically Feasible?*

So far, I have argued that the *ad hoc* Tribunals and the ICC can improve the judicial argumentation process by structuring their judgments according to the reason-model. It can, however, be questioned whether implementing the reason-model is practically feasible. Does this model not impose a too onerous burden on international criminal courts? In answering this question, we should be mindful that the role of courts is shaped by a delicate balance between a number of (possibly contradictory) objectives and values,¹¹⁴ such as the right to a reasoned opinion and demands for procedural fairness and administrative efficiency. Promoting one of these objectives can go at the expense of the other. For example, advancing judicial argumentation with a process of analogical reasoning from precedent can complicate judgments and prolong the drafting procedure.¹¹⁵ We should therefore be careful not to expect too much from the *ad hoc* Tribunals and the ICC, nor force them to disregard valid needs for efficiency and pragmatism. Instead, it is preferable to take a flexible approach that tailors the nature and scope of judicial argumentation to the specific features of individual cases and legal procedures.¹¹⁶ This allows courts to focus judicial reasoning on those situations and issues that are most significant, complex or controversial.

One of the circumstances that can influence the level of judicial argumentation is the distinction between easy cases and hard cases. Whereas the courts' argumentation in easy cases may be limited to a straightforward application of the law, decisions in hard cases require further explanation. Of course, the distinction between easy and hard cases is not always self-evident and can be difficult to define.¹¹⁷ This also relates to the fact that the complexity of cases can never be determined in general, but should always be assessed relative to a specific legal question. Having said that, it seems that courts are usually capable of recognising the difficult elements and controversial features of a case in practice. Note, for example, the distinct reasoning of the ICTY and ICTR on the crime of genocide.¹¹⁸ Whereas the ICTR has established the occurrence of genocide in Rwanda without complex (analogical) reasoning (from precedent), the ICTY has assessed the established facts more critically and has justified its findings on the occurrence of genocide more elaborately. This distinction can be explained by the fact that the

114 Similarly, J. de Poorter and H. 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) 9; Walker (n. 7 above) 1691.

115 On this issue in relation to domestic law, MacCormick and Summers (n. 3 above) 548.

116 Similarly in relation to domestic law, Adams (n. 9 above) 116-117; De Poorter and Van Roosmalen (n. 114 above) 22.

117 E.g. J. Klabbers, 'The Meaning of Rules', 20 *International Relations* (2006) 295, 297.

118 On this issue, see Cupido (n. 39).

genocidal character of the Rwandan violence is generally undisputed. There is clear evidence of large-scale violence directed at the physical extermination of Tutsi's. By contrast, the qualification of the atrocities committed in the former Yugoslavia as genocide is more controversial, since the apparent objective of the Balkan war was to expulse rather than to destroy certain ethnic groups. This requires that genocide convictions are explained with particular care.

Apart from the complexity of cases, also the stage of a case before the court (pre-trial, trial or appeal) and the arguments of the parties may influence the implementation of the reason-model in practice. In general, it, for example, seems reasonable that Pre-Trial Chamber decisions on issues that will be addressed again during trial are based on less meticulous argumentation than the final judgments of Trial Chambers. The influence of the parties on judicial reasoning becomes particularly prominent when the trial is structured as an adversarial 'battle' between the prosecution and defence. Because courts are only meant to supervise this battle without actively intervening it, they can focus their argumentation on those issues that have been disputed by the parties and on the specific precedents that the parties have used to substantiate their position. At the international level, the *ad hoc* Tribunals and the ICC, however, take a more vigorous position and exercise an autonomous responsibility to provide a complete and accurate construction of each case. They should therefore look beyond the arguments of the parties and address all matters that they deem significant.

The adoption of a flexible approach towards judicial argumentation has the effect that the reason-model will not always be implemented in full. It is important to emphasise that this does not detract from the model's potential value, since even the acceptance of some basic elements of the reason-model that are easily put in practice can advance the argumentation practice of the *ad hoc* Tribunals and the ICC. For example, the mere specification of relevant and insufficient factual circumstances and the construction of linkages between these circumstances and the facts of individual cases already have an important clarifying effect. Furthermore, it seems that the reason-model's analogical reasoning process is not only effective when cases are compared with every applicable precedent in all relevant respects. The transparency and controllability of judicial reasoning will already benefit from the designation of obvious factual distinctions and similarities between cases (e.g. small-scale mob violence by low- and mid-level perpetrators versus large-scale system criminality by senior leaders). Also the specification of the viewpoints from which cases are (dis)similar (e.g. case X is similar to case Y insofar as it concerns the organised character of the attack) will be advantageous to the court's argumentation practice.

I recognise that these changes will not give judicial argumentation a mathematic level of precision. This is inevitable, since even the most detailed description of rules, criteria,

factors and precedents cannot preclude the existence of hard cases for which there are no or only contradictory precedents available.¹¹⁹ Courts will therefore always retain a certain discretion to apply the law in an autonomous way. Nevertheless, the reason-model makes it possible to structure and control this judicial discretion by confining courts to a specific context of deliberation: 'there is a set of prescriptions to follow, or a set of alternatives to choose, that define the context in which the discretionary decision shall be made'.¹²⁰ By thus guiding courts through the complexities of individual cases, the reason-model structures judicial argumentation and precludes that each case is decided on its own merits. This promotes efficient, consistent and transparent reasoning and ultimately advances the legality of substantive international criminal law.

5.5 LESSONS LEARNT: A NEW APPROACH TO STUDYING INTERNATIONAL CRIMINAL LAW

The previous section has drawn attention to some institutional and practical limitations that complicate the full implementation of the reason-model in judicial practice. The onus is on legal doctrine to assist the courts in facing these complications and to fill the gaps in their argumentation process. To fulfil this task, scholars are advised to develop a practical discourse that studies substantive international criminal law by using insights from casuistry and AI&L. This discourse could particularly explore the process of casuistic factor-based reasoning from a methodological, conceptual and normative perspective.

On a methodological level, legal doctrine can seek to develop argumentation techniques that international criminal courts can use to clarify and structure the application of legal rules, judicial criteria and fact categories in individual cases. In this respect, this study has already looked into the role of fact(or)s. Further research is, however, needed to fully understand the character and function of factors and factor-based reasoning. Amongst others, it still has to be established whether and how factors interact. On this point, AI&L research has sometimes ascertained that factors can support a decision individually, while they negate this decision in their combination.¹²¹ For example,

[t]he fact that the weather is hot may favour the conclusion that one should not go jogging. Similarly, the fact that it is raining also favours the conclusion

119 Roth (n. 62 above) 76.

120 Taruffo (n. 7 above) 320. See also Kratochwil (n. 6 above) 232. MacCormick and Summers present a more critical approach indicating that courts may abuse the extensive discussion of facts to 'overdistinguish' cases and to engage in non-overt departures. MacCormick and Summers (n. 3 above) 546-547.

121 E.g. Sartor (n. 88 above) 225.

that one should not go jogging. However the combination of hot weather and rain can meet one's tastes and indeed be a reason for one to decide to go jogging.¹²²

In future research, legal scholarship should assess whether a similar interaction between factors influences the practice of international criminal courts. In addition, scholars can seek to develop prototypes of international crimes and modes of liability. To this end, they should analyse which factors characterise the prototype of, for example, genocide or JCE and examine to what extent new situations can deviate from these prototypes. Criminologists have already made a start with such research by defining prototypical notions of criminal participation in international crimes.¹²³ Legal scholars can further refine these notions by using methodological insights from casuistry and AI&L. Thus, they can facilitate the process of analogical reasoning in practice. A third methodological issue that requires further exploration concerns the technical support for case-based reasoning. AI&L has developed a number of electronic systems that help to arrange complex (combinations of) fact and vast amounts of evidence in terms of factors, precedents and objectives.¹²⁴ In this way, these systems contribute to the development of a comparison-base that can be used to examine the relations between cases. The *ad hoc* Tribunals and the ICC already employ various electronic databases – such as E-court and Live-note – for categorising evidence and transcripts. It would be interesting to see whether and how insights from AI&L can help to improve these databases.

In a second line of research, scholars can use the methodology of casuistry and factor-based reasoning to study the conceptual patterns underlying the case law of international criminal courts. Whereas it should be recognised that the law's inherent flexibility can make it difficult to develop universal standards, the previous case studies show that it is often possible to infer basic rules of thumb from the courts' judgments. These rules of thumb give new insights into enduring ambiguities and controversies about the nature and scope of criminal responsibility for international crimes. For example, they can clarify that genocide is in principle not committed by lone *génocidaires* or that an accused's preparation of a military attack generally ascertains his control over crimes. The rules of thumb can also be used to assess whether the decisions of

122 E.g. Sartor (n. 88 above) 225.

123 A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008) 233, 233-265; S. Harrendorf, 'How Can Criminology Contribute to an Explanation of International Crimes?', 12 *Journal of International Criminal Justice* (2014) 231, 231-252.

124 For a short overview, see e.g. H. Prakken and G. Sartor, 'The Role of Logic in Computational Models of Legal Argument – A Critical Survey', available online at <www.cs.uu.nl/groups/IS/archive/henry/kowalskivolume.pdf>, 14-34.

international criminal courts in individual cases give expression to a comprehensive and consistent notion of criminal responsibility for international crimes.¹²⁵ Scholars should thereby take account of constructive thoughts underlying AI&L. AI&L assumes that judicial decisions do not only present competing factors, but also disclose a certain value-ordering.¹²⁶ This means that the finding that (set of) factors X outweighs (set of) factors Y also implies that the values promoted by X carry more weight than the values promoted by Y. Suppose, for example, that a court decides that the accused's active participation in a political policy to ethnically cleanse a region (factor X) outweighs his unawareness of the specific ways in which this policy was implemented (factor Y). According to AI&L, this decision signifies that the effective prosecution of international crimes (value promoted by factor X) offsets an overly strict interpretation of individual criminal responsibility (value promoted by factor Y). It would be useful if future research explores such constructive considerations further and assesses how they can be used to explain and organise (the relations between) individual decisions.

Finally, legal doctrine can start a normative line of research that takes the insights from casuistry and factor-based reasoning as a starting-point for critically appraising judicial argumentation in international criminal law. In this respect, scholars can use the reason-model of case-based reasoning as a framework and standard to analyse the reasoning practice of international criminal courts. In this way, they can, for example, determine the relevance of the facts that are listed in the categories of factual circumstances and evaluate the courts' application and weighing of these facts in individual cases. This evaluation constitutes an important complement to the existing studies into the use of sources of law and methods of interpretation. It can reveal previously unnoticed irregularities in the judicial reasoning process, but may also nuance existing critiques. The case study into the policy to commit crimes against humanity, for example, shows how seemingly unreasonable inconsistencies in the courts' general legal framework fade away in practice.

The three lines of research set a difficult task for legal doctrine. It may be doubted whether scholars are able to fulfil this task and can solve the complex methodological, conceptual and normative issues discerned above. Can they, for example, ever ascertain the interaction between factors in a conclusive way? And will they be capable of

125 On such constructive notions, see K. Rozemond, *Strafvorderlijke Rechtsvinding* (Arnhem: Gouda Quint, 1998) 14, 40-42; K. Rozemond, 'De Casuïstische Grenzen van het Materiële Strafrecht', 37 *Delikt en Delinkwent* (2007) 465, 487-488; J. Struiksma, *Het Geschil als Spil. De Empirische Cyclus van de Rechtswetenschap*, available online at <<http://dare.uvu.vu.nl/bitstream/handle/1871/38649/Het%20geschil%20als%20spil.pdf?sequence=1>>, 39-40, 41-43; Smith (n. 5 above) 88-97; MacCormick and Summers (n. 8 above) 10; Bench-Capon and Sartor (n. 99 above) 12-16.

126 Bench-Capon and Sartor (n. 99 above) 14; Bench-Capon (n. 90 above) 81. On the importance of legal values for judicial decision-making see also Smith (n. 5 above) 162-165.

determining the effect of individual decisions on general principles of international criminal law with sufficient precision?¹²⁷ Such concerns are legitimate and give cause for a careful and critical attitude towards research on judicial reasoning. At the same time, we should be wary not to lapse into obstructive scepticism about the possibilities for studying the casuistry of substantive international criminal law. Instead, it is more fruitful to openly encounter existing ambiguities and disagreements and to take them as a starting-point for a discursive and reflective debate about the challenges of rationalising (legal argumentation on) criminal responsibility for international crimes.¹²⁸ Thus, instead of thinking in terms of limitations and putting the onus for the development of international criminal law entirely on the courts, legal doctrine should acknowledge its possibilities and take up its own responsibilities. This is one of the biggest challenges for scholarly discourse in the upcoming years.

5.6 CONCLUSIONS

At the end of this study, I should return to the question that formed the starting-point of analysis: how can casuistry help to clarify and control (the development of) substantive international criminal law? The previous analyses of casuistry and the evaluations of casuistic reasoning by international courts primarily show that ‘facts matter’. The *ad hoc* Tribunals and the ICC establish and develop criminal responsibility for international crimes in interplay with the factual circumstances of individual cases. Thus, they use facts to give shape and colour to abstract concepts of international crimes and modes of liability. The meaning of these concepts should therefore be ascertained in light of their application in practice.

Practice shows that the *ad hoc* Tribunals and the ICC have a certain discretion to develop the law on a case-by-case basis and to apply abstract rules to specific facts in sometimes innovative ways. This enables the courts to gradually fine-tune substantive international criminal law, thus giving it ‘a vigorous life of its own’.¹²⁹ Whereas such judicial development is not problematic *per se*, the principle of legality requires that it

127 Horthy and Bench-Capon (n. 63 above) 211.

128 Similarly, G. Sartor, ‘A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review’ in G. Bongiovanni et al. (eds.), *Reasonableness and Law* (New York: Springer, 2009) 17, 41-42; Sartor (n. 88 above) 157. According to Von der Lieth Gardner, ‘lawyers are not merely free to disagree; on hard questions of law they are expected to do so. Unlike other domains, in which writers of expert systems hope for consensus among the experts, the legal system makes institutional provision for expert disagreement – for instance, in the institutions of opposing counsel, dissenting judicial opinions, and appellate review of lower courts decisions’. Von der Lieth Gardner (n. 41 above) 3. In other words, disagreement about complex legal issues is an inherent part of the law and instead of circumventing it, we should accept and embrace it.

129 Schabas (n. 14 above) 886.

proceeds in a transparent, foreseeable and consistent way. Domestic theory and practice concerning casuistry, factor-based reasoning and reasoning from precedents offer useful guidelines for putting this legality requirement into effect. In particular, they define a reason-model of analogical reasoning that can help the *ad hoc* Tribunals and the ICC to elucidate and structure the interplay between law and facts. Legal doctrine can assist and complement this judicial effort by using insights from casuistry and factor-based reasoning to conduct methodological, conceptual and normative research into judicial argumentation.

I realise that it will not be easy to implement a framework of casuistic reasoning in practice, in particular because judicial argumentation is ‘an area of daunting complexity, where highly sophisticated legal expertise merges with cognitive and emotional competence’.¹³⁰ To encounter this complexity successfully, it is important that scholars and practitioners combine their mutual strengths in a constructive dialogue that allows for the free exchange of ideas and concerns. This is surely challenging in a field of law that brings together professionals from various legal cultures (most importantly, common and civil law) and fields of law (public international law, criminal law, human rights law) with different perceptions on legal reasoning. In the coming years, we should seek to transcend these differences and to be more open to previously unforeseen insights, approaches and ideas. In this way, we will be better able to advance substantive international criminal law without violating the values underlying the principle of legality.

130 G. Sartor and L. Branting, ‘Introduction: Judicial Applications of Artificial Intelligence’, 6 *Artificial Intelligence and Law* (1998) 105, 105.