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The End of an Era: Static and Dynamic Interpretation in International Courts

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Abstract:	90% of International Courts (ICs) legal decisions have been issued within the last two decades. This increase in case law - along with other significant changes in the operation of ICs - signals a new form of judicialised International Law. This change is best described as a shift from a 'static' regime of contractual relations between sovereign states to a more 'organic' regime of 'living law'. In Criminal Law, this development is exemplified by the reasoning of the ICTY, the ICTR and the ICC. In examining the institutional undercurrents that accompany these changes important questions arise: through what social processes is legitimacy imputed to ICs? How do ICs handle or avoid crises in legitimacy? In the context of recent critiques of judicial reasoning in International Criminal Law, the article suggests that the analysis of case law from ICs must become as dynamic and agile as contemporary International Law itself.

Reviewer #1: The article is very interesting and offers new philosophical insights on a topical subject as judicial interpretation of international law and the role of international courts.

My observations are the following:

Page 1 - Footnote 4: the correct title seems to be "The Global Spread of European Style INTERNATIONAL Courts"

We have made the necessary correction. Thanks.

Page 2 - lines 4-9: the dynamic interpretation of treaties is explored to a considerable extent in international law scholarship and there are a few important contributions that could be mentioned, first of all the articles by Malgosia Fitzmaurice: "Dynamic (Evolutive) Interpretation of Treaties, Part I", 21 Hague Yearbook of International Law (2008), pp. 101-153; Id., "Dynamic (Evolutive) Interpretation of Treaties, Part II", 22 Hague Yearbook of International Law (2009), pp. 3-31

These are helpful suggestions that we have incorporated. Thanks.

Page 2 -line 30: why does the author employ the term "member states"? Maybe he refers in general to members of the international community at large, but it is not clear. This would make an international lawyer think immediately to some international organization or other inter-state consortium involved in the discourse.

The term "member states" is used to reflect that states are still the predominant context for identifying the relevant social, cultural and economic developments, which feed into the interpretive practices of international courts. While these developments will usually only impact on interpretation, when those developments are widespread (i.e. cover more states), member states usually form the context for identifying those developments. To avoid the potential for misunderstanding that is referred to by the reviewer, we have decided to refer instead to "the societies that are subject to the IL in question". And have modified the following sentence to more clearly express our main point: "Consequently IL is now being shaped by a continuously evolving case law which is sensitive to underlying social, cultural and economic development, which undoubtedly leads ICs to make decisions on issues that would not have arisen under a 'static' model".

Page 6 - line 4 "means by which we which distinguish": is the second "which" superfluous?

Yes – a clear typo, which we have now corrected. Thanks.

Page 14 - lines 41-43: it seems to me that it is rather unusual to use the term "contract" to refer to international treaties- it might be deceptive inasmuch as States conclude contracts with private subjects

The term was selected to refer back to the "Pacta Sunt Servanda" paradigm we described at the beginning of the article. The context should explain that we do not mean for the word "contracts" to refer to contracts involving private parties. The term is supposed to reflect that in the absence of a universal international authority that can operate as a legislator and thereby create obligations for states, states are

only subject to obligations that they create for themselves through treaty making. We compare this treaty making to the making of a contract. Since we use “treaties” in brackets immediately after contracts, we do not think that misunderstanding is likely to happen, but in light of the reviewers comments we have decided to replace “contracts” with “agreements”

Page 22 - line 51: "train" is repeated twice

Now corrected

Page 23 - line 38: maybe the expression "against their state" is a bit too restrictive, unless it serves a specific intention on the part of the author. As he certainly knows, the Strasbourg court also examines cases brought by individuals against states different from the applicant's national state (not to mention cases brought by one state against another party to the convention)

Thank you for this pertinent observation. There was no intention to use this restrictive language. Sentence now reads:

“Whereas the ECHR adjudicates cases between states and individuals who claim that their human rights have been violated, the ICJ adjudicates criminal cases against individuals.”

Two further general observations:

1. as to the law-making role of the Strasbourg Court, the author mentions LGBT rights, however the extensive and evolutive interpretation of the European Convention, according to its nature of "living instrument", can be referred to several other topics, as for example all bioethical sensitive issues which have gained prominence in recent years

We certainly agree with this, and LGBT rights is used only as an illustration of the dynamic that is introduced to the law in this area by the Court. We mention a few other examples on p. 13. To be clear we have now added a footnote where we introduce the issue of LGBT rights, which makes it clear that this serves as an illustration only, and that other illustrations could be found.

2. concerning legal reasoning and morality, I would like to highlight the existence of authoritative cases where international courts rely on a rather limited and politically oriented interpretation of custom and opinio juris. In so doing they declare what the law in force is without taking in the least consideration the relevant moral issues, or to say with the author without blending "moral assessment ... into source-based argument" (page 3 - line 37). A recent example in point is the judgment delivered by the ICJ on 3 February 2012 in the dispute concerning the "Jurisdictional immunities of the State (Germany v. Italy)" where the Court reconstructed the scope of the customary rule on sovereign immunity in contrast with all moral considerations concerning the right of victims of war crimes to effective judicial protection and redress. This was indeed perceived as a bad decision which was the object of harsh criticism, since the Court was accused of having been too legalistic and mechanical in its assessment of international practice (as the author says at page 8 - line 42-44). All this notwithstanding the ICJ has long been recognized as one of the most

authoritative law-making courts (Hersch Lauterpacht, *The Development of International Law by the International Court* (1982); Robert Y. Jennings, "The Role of the International Court of Justice", 68 *British Yearbook of International Law* (1997) pp. 1-63; Stephen M. Schwebel, "The Contribution of the International Court of Justice to the Development of International Law", in W.P.Heere (ed.), *International Law and the Hague's 75th Anniversary* (1999) pp. 405-416.)

This comment is quite general and not addressed at any specific part of the article. Furthermore the issue addressed in the comment is quite complex, and we agree with most observations. We would perhaps add that even though a court does not explicitly address the moral issues that are affected by a given decision by that court, it does not mean that the moral issue has not been made the object of consideration. Not every consideration that plays a part in the deliberation process finds its way to the formal decision that is being published by the court. Furthermore, we think there is a distinction to be made between the moral issues raised by the particular circumstances of the particular case on the one hand, and the moral issues raised by the institutional issues related to the Courts legitimacy and the processes of identifying the best interpretation of the relevant laws to be applied to the case. In the Germany vs. Italy example mentioned by the reviewer, what appears as a legalistic decision that shows no consideration for the moral importance of redress for victims of war, may well be the result of Gauging the implications of not respecting sovereign immunity in situations where redress relates to incidents that happened 70 years ago, and where The ECtHR had already ruled on the case (in favour of Germany) and finding those implication morally problematic in that it could potentially destabilize international relations if similar kinds of intrusion into sovereign immunity were allowed more generally. Hence what may appear as insensitivity to the rights of victims of war is really the result of a moral balancing of this right against the moral importance of not risking to destabilize international relations more generally. Thus while we appreciate the comment, we do not think that the article allows for further elaboration on this complex issue.

The End of an Era: Static and Dynamic Interpretation in International Courts

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1. The Phenomenon of Judicialised International Law

Over the past couple of decades, one of the most important transformational processes in law and society has been the significantly increased importance attached to international law.¹ An important but academically neglected development in this process is the intensified juridification of international relations by a steady growing population of International Courts (ICs).² Nearly 90 per cent of the total IC output of legal decisions has been issued over the last two decades,³ and ICs are simultaneously gaining more autonomy from nation states: more have compulsory jurisdiction, many allow agents other than states to initiate litigation before them, and several have the authority to review state compliance with international rules.⁴ This development could be summed up as a move towards a new form of judicialised International Law that heralds a change not only in the role of International Law in (international) society, but also, and more importantly for our purposes, in the nature of International Law itself. The essential feature of this transformational process is to be found in the shift from what might be called a *pacta sunt servanda* regime of contractual relations between sovereign states (i.e. a regime in which Courts make decisions in disputes between parties in relation to the provisions of a treaty), to a more dynamic and self-sustaining regime of ‘living law’ (in which courts interpret treaties as legal principles that have a more general role in preserving and promoting a well functioning international community).⁵

¹ e.g., A. M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

² cf. C.P.R. Romano “The Proliferation of International Tribunals: Piecing together the Puzzle”. *NYU Journal of International Law and Politics*, Vol. 31, No. 4, (1999) pp. 709-51; and “A Taxonomy of International Rule of Law Institutions”. *International Dispute Settlement*, Vol. 2 (2011). See also Shany, Y. *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2004).

³ Karen Alter, “The New International Courts: A Bird’s Eye View”. *Buffett Centre for International and Comparative Studies Working Paper Series*, Vol. 09, No. 001 (2009) pp. 1-46.

⁴ Karen Alter, “The Global Spread of European Style International Courts”. *West European Politics*. Volume 35, Number 1 (2012) pp. 135-154.

⁵ The literature surrounding the transformation of international law is considerable. Importantly, we note the contributions of: Klabbers, J. Peters, A. and Ulfstein, G. (2009); Koskenniemi, M. (2007); Dunoff, J.L. and

1 This dynamism⁶ heralds a change in approach whereby ICs
2 participate actively in developing the law.⁷ These developments
3 might also be explained in terms of a shift from *static*
4 international law to a more *organic* process. Ideal-typically,
5 static IL can be seen as comprising a thin background of *jus*
6 *cogens* supplemented by treaties (bilateral and multilateral)
7 fixing precise legal obligations between states, and expressed
8 through a court system with one general court (ICJ) and
9 perhaps several specialized courts with voluntary jurisdiction
10 and *ad hoc* judges. Organic IL, however, although similarly
11 characterized by a background of *jus cogens*, supplemented by
12 treaties, now develops an added layer of case law that
13 continuously interprets these treaty texts dynamically so as to
14 reflect the underlying social, cultural and economic
15 development, in the societies that are subject to the IL in
16 question. Simultaneously, increased access to ICs by litigants
17 other than states adds new forms of input to the decision
18 making process. This development undoubtedly leads ICs to
19 make decisions on issues that would not have arisen under a
20 ‘static’ model.
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22 The tendency to increased juridification and legalisation noted
23 above arises naturally from increasing resort to law as a means
24 to both conflict resolution and conflict prevention. This
25 straightforward relationship has, however, complex
26 undercurrents, three of which should be noted here as a prelude
27 to our more specific concern with contemporary approaches to
28 judicial reasoning in International Criminal Law⁸. The first
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33 Trachtman, J.P. (eds.) *Ruling the* (2009) Koskenniemi M. *World?*
34 *Constitutionalism, International Law, and Global Governance* (Cambridge:
35 Cambridge University Press, 2009) and most recently, Cassese, A *Realizing*
36 *Utopia* (OUP 2012).

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38 ⁶ The dynamic interpretation of treaties is explored to a considerable extent
39 in international law scholarship. An important contribution in this respect is
40 Malgosia Fitzmaurice: "Dynamic (Evolutive) Interpretation of Treaties,
41 Part I", *21 Hague Yearbook of International Law* (2008), pp. 101-153; and
42 "Dynamic (Evolutive) Interpretation of Treaties, Part II", *22 Hague*
43 *Yearbook of International Law* (2009), pp. 3-31.

44 ⁷ We might note that an IC such as ECtHR, is, of course, far removed from
45 the *pacta sunt servanda* paradigm, rather, the practices of this court would
46 serve as an illustrative example of what we have in mind. Similarly,
47 International Criminal Law has never been understood as part of the *pacta*
48 *sunt servanda* paradigm; The ICL, however, already served as the
49 paradigmatic example for W. Friedman to speak of “the changing structure
50 of International Law” in the 1970s. Hence, we might observe two distinct
51 but related trends: (i), a move beyond the *pacta sunt servanda*
52 paradigm and (ii), the increased development of the law by ICs - i.e.,
53 judicial activism. We are grateful to Ingo Venzke for this important
54 observation.

55 ⁸ These three dimensions have been identified in the work of Mikael Rask
56 Madsen where he explains the emergence and transformation of the
57 European Court of Human Rights (ECtHR) following three interdependent
58 social, legal and political processes: the institutionalisation, autonomisation
59 and legitimisation of the ECtHR. See for example, M. R. Madsen, “The
60 Protracted Institutionalisation of the Strasbourg Court: From Legal
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1 concerns the organisational/ institutional arrangements relating
2 to the social, economic and political conditions conducive to
3 the emergence and continued existence and operation of
4 International Courts. The second concerns the formal and
5 specific legal mechanisms and strategies through which
6 International Courts have developed the law and carved out
7 their role and function in International Law and International
8 Relations. A third aspect relates to questions of legitimation:
9 How do International Courts create legitimacy? Through what
10 social processes is legitimacy imputed to ICs? How do ICs
11 handle crises in legitimacy or, as a daily concern, how do they
12 avoid such crises? It is on this latter point that our thinking
13 must become as dynamic and agile as contemporary
14 International Law itself. For although it is sensible to regard
15 legitimacy as a by-product of legality, it would, we suggest, be
16 a mistake to assume that legitimacy only follows the *static*
17 conception of international legality⁹. This latter conception, we
18 argue, is often unreflectively reliant upon an under-theorised
19 notion of ‘source’ as a basis for conceptions of legality that is
20 now rapidly being superseded by the need of ICs to respond to
21 ever more complex fact situations and an ever expanding
22 corpus of relevant legal material (sources). The present
23 situation for ICs – at least for the more specialised and prolific
24 ones - is now such, we contend, that the decision making
25 processes are so complex that moral assessment blend into
26 source-based arguments. An understanding of how this blended
27 reasoning operates will allow for a deeper insight into how ICs
28 create and manage the legitimacy in their position as
29 institutionalised operators of the International Law that falls
30 under their jurisdiction. In what follows, we shall draw on both
31 history and theory in an attempt to provide a clearer
32 understanding of this phenomenon.

33 **2. Judicialisation and Autonomy**

34 A great deal of Legal Theory emphasises the autonomy of law
35 to explain two key aspects of legal order as opposed to other
36 forms of social normativity. One aspect is the distinctness of a
37 legal rationality (i.e. an allegedly special type of justificatory
38 reasoning); the other is its place in society as normatively
39 dominant or supreme (by which theorists refer to the ‘pre-

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Diplomacy to Integrationist Jurisprudence” In. Madsen, M. R and Christoffersen, J. (eds.) *The European Court of Human Rights Between Law and Politics*, (Oxford: Oxford University Press, 2011), pp. 43-60; Also Madsen, M. R. “Legal Diplomacy - Law, Politics and the Genesis of Post-War European Human Rights”, in Hoffmann S. L. (ed.), *Human Rights in the Twentieth Century: A Critical History* (Cambridge: Cambridge University Press, 2011), pp. 62-81.

⁹ Recent contributions in the Philosophy of International Law supports this, See. e.g. Samantha Besson and John Tasioulas (Eds.) *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010) and especially the contributions by Besson (Ch. 7) and Paulus (Ch. 9).

1 emptive' and 'exclusionary' quality of legal norms). Some of
2 the most influential Legal Theory construes in effect a
3 conceptual strategy for comprehending these essential products
4 of the autonomy of law.¹⁰ More often than not this body of
5 theory uses national constitutional orders (implicitly or
6 explicitly) as primary reference points for its conceptual
7 inquiries and focuses on the extent to which it is possible to
8 identify what the law of a given jurisdiction *is* without resort to
9 free-standing moral or political reason¹¹. It is important that we
10 attend to this strand of jurisprudential work, although the
11 critical account of the significance of the autonomisation
12 processes that we shall offer presently does not endorse the
13 accepted conceptual separation of law from morality (or
14 economy, or politics, or psychology). Instead, we propose a
15 framework of ideas that will allow us to discern, articulate
16 theoretically, and point empirically to the processes by which
17 legal agents (*in casu* International Courts / judges) develop the
18 law through adjudicative practices in such a way as to make the
19 entire *corpus* of doctrine more case-law dependent. It is
20 through this largely interpretive activity that international
21 courts enhance their own role in the field of international law
22 and governance¹². The focus of the inquiry, then, will be to
23 examine the way ICs administer their role in the field of
24 international law and governance and to identify the matrix in
25 which this administration takes place. Orthodox jurisprudential
26 scholarship provides a useful point of departure for the inquiry.
27 Gerald Postema presents the perhaps most detailed and
28 comprehensive account of law's autonomy¹³ by way of three
29 interrelated theses:

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(i) *The Limited Domain Thesis*

¹⁰ For an initial guide to the theory see, for example, the collection of essays in Robert P. George (Ed.) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996).

¹¹ Hart's 'Rule of Recognition' is a classic example. See, for example, Hart HLA *The Concept of Law* (Clarendon Law Series, Oxford University Press, 3rd Edition 2012) pp 94-96 and compare his analysis of International Law at pp. 213-23. Similarly, Ronald Dworkin, although a critic of Legal Positivism, has developed his legal theory specifically in relation to the American Legal System (see Ronald Dworkin, *Law's Empire*. (Fontana Press, 1986). Kelsen's notion of the 'Basic Norm' or *Grundnorm* can in principle be applied to both national and international law. See importantly Hans Kelsen, (a) (1966) *Principles of International Law* (R. W. Ticker Ed., Holt, Rhinehart and Winston Inc. , John Hopkins University Press, 1966) pp. 177, 178.

¹² For a recent contribution to understanding this phenomenon, see Ingo Venzke *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. (Oxford University Press, 2012) Chapter 2. Importantly, see also, in this Special Issue: Matwijkiw Anja and Matwijkiw Bronik, "Stakeholder Theory: The Philosophical Advantages and Disadvantages for International Criminal Law".

¹³ Gerald J. Postema, 'Law's Autonomy and Public Practical Reason', in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996).

1 Postema says that law defines a limited domain of practical
2 reasons or norms for use by officials and citizens alike. Law
3 cannot operate as a specialized and specified normative field
4 without some form of delimitation between the legal and the
5 non-legal. Law, in other words must be perceived as a
6 delimited normative field, where the (pre-emptive and
7 exclusionary) norms of law and the negative sanctions attached
8 to them for non-compliance are valid only if they
9 characteristically belong to the domain. One important way of
10 delimiting the domain is codify and list the posited sources
11 that define law's limited domain. This is reflected in the
12 'Sources Thesis'.
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14 *(ii) The Sources Thesis*

15 This thesis holds that normative membership in law's limited
16 domain is determined by criteria which are defined exclusively
17 in terms of non-evaluative matters of social fact (about their
18 sources), such that the existence and content of member norms
19 can be determined entirely without appeal to moral or
20 evaluative argument. Legality is then clearly tied to positivity
21 in that positivity is necessary to maintain the coherence of the
22 limited domain thesis. In turn, the limited domain becomes
23 simultaneously the *referent* of the legal and the *means by which*
24 *we distinguish* the legal from the non-legal. But limiting the
25 domain in terms of positivity in this way is not sufficient – one
26 more element is required to assure autonomy in the analytical
27 sense.
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32 *(iii) The Pre-Emption Thesis*

33 Rules in Law's limited domain operate as 'pre-emptive' and
34 'exclusionary' reasons for action. This is perhaps best
35 understood by way of Raz's concept of the 'normal
36 justification' of authority. That is, even where legal rules (and
37 an account of obligation in respect of them) are superfluous in
38 the sense that a reasonable person would act in accordance with
39 them on their own common-sensical volitions, legal rules give
40 practical reasons for action which pre-empt ordinary choices of
41 action and which preclude other reasons for action. Thus, for
42 example, choosing a convenient parking place is pre-empted by
43 designated parking areas and restrictions, and reasons falling
44 outside the domain (for example, parking on double yellow
45 lines because you are in a hurry to get home to watch sport on
46 TV) is excluded. In this way, rules within the limited domain
47 are distinguished from norms outside of the domain - even
48 when they coincide in content, purpose and practical rationale.
49 These three interrelated theses express the core notion of
50 legality – it's exclusionary character *vis á vis* other normative
51 domains (morality, politics, religion, etc.) It remains clear
52 however, that this artificial notion of autonomy cannot fully
53 grasp the over-lapping normative complexity of any viable,
54 modern socio-economic formation. Law's autonomy is only
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1 relative and the Autonomy Thesis cannot explain legal practice
2 in its totality. Postema, of course, is fully aware of this, and he
3 points out that the AT needs to be embedded in an institutional
4 context. This is because the norms that are identified by the
5 ‘sources thesis’

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7 ... are authoritatively interpreted and applied, and the
8 system of norms is maintained, by adjudicative
9 institutions. Moreover adjudicative institutions are
10 authorized to settle issues left unsettled by the set of
11 source based legal norms available at any point in time.
12 Since, in such cases, by hypothesis, the existing legal
13 considerations are silent, indeterminate, or in conflict, the
14 Court’ setting of them is determined not by appeal to the
15 law, but by appeal to considerations outside its limited
16 domain. [Emphasis added]¹⁴

18 **3. From the ‘Limited Domain’ to ‘Transformative** 19 **Dynamics’**

20 Legal norms are applied and interpreted by Courts and it is in
21 this capacity that there is sometimes scope for Courts to operate
22 outside the limited domain. The line between applying,
23 interpreting, adjusting, modifying, adapting and altering the law
24 is fine: effectively, social normativity is being re-coded
25 (transformed) and dynamically (creatively, pragmatically)
26 fashioned into legal normativity from material that exists - or
27 might plausibly be purported to exist - both within and without
28 the limited domain. It is in this ‘Grey Zone’ of the law, that the
29 matrix of judicialisation is active. This matrix is the
30 transformative and dynamic location wherein Courts map and
31 re-code the ‘Grey Zone’ that is the normative area between the
32 intra-legal and the extra-legal. To lay claim to this territory,
33 Courts will promote argumentation frameworks that serve as
34 platforms for converting Grey Zones into *intra-legem* zones. In
35 so doing, Courts, in their case law, articulate legally what is
36 sometimes referred to as judicial politics, i.e. they manufacture
37 precedent in the Grey Zone. Effectively, through dynamic
38 judicial activity, courts synthesize new law which can be
39 absorbed by the pliable framework of doctrine and constituting
40 principle behind the existing positive law. This process of
41 dynamic judicialization - contrary to what, in theoretical
42 retrospect should appear to us increasingly as the *static* logical
43 ideal of a ‘limited domain’ - inevitably must involve political
44 and moral choices. Alec Stone Sweet captures the character of
45 this process in his article on the law’s ‘path dependence’. He
46 says,

47 I assume that judges seek to maximize, in addition to
48 private interests, at least two corporate values ... First,
49 they work to enhance their legitimacy vis-à-vis all
50 potential disputants by portraying their own rule-making
51 as meaningfully constrained by, and reflecting the current

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¹⁴ Postema, *supra* note 12, p. 93.

1 state of, the law. Second, they work to enhance the
2 salience of judicial modes of reasoning vis-à-vis disputes
3 that may arise in the future. Propagating argumentation
4 frameworks allows them to pursue both interests
5 simultaneously. Judges may also seek to enact their own
6 policy preferences through their decisions. Yet the more
7 they do so, the more likely judges will be to attempt to
8 hide their policy behaviour in legal doctrine. Once policy
9 is packaged as doctrine, it will operate as a constraint on
10 future judicial law-making to the extent that doctrine
11 narrows the range of arguments and justifications that are
12 available to litigators and judges, and to the extent that the
13 law is path dependent.¹⁵

14 There is, then, an intimate relationship between the precedent-
15 driven development of law (the process of converting Grey
16 Zones into established law) and the production of legitimacy.
17 Portraying a legal decision as emerging from within “the law”
18 as opposed to being policy led is more likely to produce the
19 desired outcome in the form of clarifying the law and, insofar
20 as this is seen as the operation of the expected and revered
21 ‘autonomy of law’, it renders the decision more ‘legitimate’.
22 This does not mean, however, and as we shall explain
23 presently, that we should hastily accept that the essence of
24 legality, and thus of *legitimacy* is automatically to be located in
25 this inner, doctrinal “packaging” as Stone Sweet has labelled
26 it. In fact, if the decision is perceived as a ‘bad’ decision,
27 Courts, as the juridico-political aspect of the wider social,
28 economic and cultural process become the focus of criticism
29 for being overly 'legalistic' and mechanical in their reasoning.
30 This fact of life is simply a reminder that the 'autonomy of law'
31 and the idea of a 'limited domain' are merely artificial
32 orientations to the infinitely complex flux of competing
33 normativities. For as Stone Sweet further points out:
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40 ... courts may abandon precedent and start over; they may
41 borrow doctrinal materials from other lines of case law
42 considered more successful in some way; and the rule of
43 incrementalism may be violated by dramatic new
44 rulings.¹⁶

45 So, whilst case law does produce more depth and complexity in
46 legal doctrine by adding to and qualifying existing texts, and
47 while cases may be closely interconnected through
48 argumentation frameworks, case law remains relatively
49 malleable. This is precisely the reason why ‘Law's Empire’ (to
50 use Dworkin’s familiar phrase) can continue to grow. But it is
51 important to notice that this growth, even though it takes us
52 outside ‘the limited domain’, is never wholly detached from the
53 domain. On the contrary – there is a certain sense in which
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58 ¹⁵ Martin M Shapiro and Alec Stone Sweet, *On Law, Politics, and*
59 *Judicialization* (Oxford; New York: Oxford University Press, 2002) p.128.

60 ¹⁶ Shapiro and Stone Sweet, *supra* note 14, p.132

1 Courts retain and protect the autonomy of the legal system
2 during the exercise of their competence to interpret and apply
3 the law to new cases.

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5 The notion of autonomy as applied to international law and
6 international organisations (including international courts)
7 takes on an added dimension in that legal autonomy is not only
8 a matter of separating the legal from the non-legal (the political
9 and the moral) – in the context of international law, it becomes
10 also a matter of separating the international from the national.
11 This means that autonomy as applied to the jurisprudence of
12 international courts becomes a rather complex notion, which
13 might be quite difficult to contain. To give a sense of this,
14 Collins and White provide in their introduction to an edited
15 volume dedicated to the exploration of the meaning of
16 institutional autonomy for international organisations¹⁷ a sense
17 of what autonomy in international institutions entails at its most
18 basic level. In a commentary to the ICJs *Reparations* decision
19 from 1949¹⁸, they write:

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25 When the Court claimed that “fifty states, representing the
26 vast majority of the members of the international
27 community, had the capacity ... to bring into being an entity
28 possessing objective international personality, and not
29 merely personality recognized by them alone ...”, it clearly
30 recognized the impossibility of considering autonomy as
31 merely a matter of the internal relations between institution
32 and member states. The effect of bringing into being an
33 organization such as the UN was that states had created an
34 entity which was clearly more than the sum of its separate
35 parts – having the ability, in other words, to exercise powers
36 which no state could exercise in isolation.” (Collins and
37 White, 2011, p.2)

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39 An autonomous international organisation, then, is an
40 institutional entity with its own will. In the case of International
41 Courts, this will is expressed – of course – through the court’s
42 case law. There is then – despite the complexity – a structural
43 similarity between IC autonomy *vis a vis* states and IC
44 autonomy *vis a vis* other forms of normativity. It can be
45 maintained therefore, as a general observation of ICs legal
46 autonomy, that this autonomy entails that the legal system
47 (which the Court is a part), and thereby the autonomy of those
48 who perform the functions of this system, do so in a way that is
49 not dictated by other sources of power and authority in
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57 ¹⁷ Richard Collins and Nigel D. White, *International Organizations and the*
58 *Idea of Autonomy: Institutional Independence in the International Legal*
59 *Order* (London; New York: Routledge, 2011).

60 ¹⁸ *Reparations for Injuries Suffered in the Service of the United Nations*,
61 Advisory Opinion, ICJ Reports, 1949, p. 174.

1 (international) social life¹⁹. While ICs can receive input and
2 derive inspiration from such other sources, its case law cannot
3 be reduced to being a product of those other sources. ICs are
4 autonomous because they operate a system of autonomous
5 reasoning. Because of this autonomous reasoning it is not
6 possible therefore to deduce computationally (as it were)
7 answers to legal problems straight from the norms in the
8 limited domain, and therefore one is forced to identify a form
9 of reasoning which can operate *outside* the limited domain - yet
10 not be seen as purely political or moral. If the law is
11 autonomous, then it's must be able to define its own terms, and
12 sanction the consequences that flow from describing the world
13 in these terms. It must be able to identify and welcome
14 solutions, trends, examples and analogies from its surrounding
15 environment (society) and must be able to respond to these in
16 ways that are considered relevant and legitimate. Yet it must do
17 so in way that is alert to the inequitable influences and sectional
18 interests of the power and status differences that permeate
19 social life. This *ideal* of equitable neutrality is for the most
20 part unattainable; yet the aspiration to autonomy is rightly
21 operative as a functioning *telos* for the way courts operate. But
22 rather than thinking about autonomy as an all-or-nothing
23 attribute of a legal system, it would be more productive
24 theoretically to focus on the degree to which a legal system or a
25 court looks inwardly (to its own extant pronouncements) rather
26 than outwardly when generating and developing argumentative
27 frameworks. This perspective on judicial activity, in a different
28 context, is what animates the American Legal Realist
29 distinction between (a detached and *ex post facto*) 'formalism'
30 and (a vibrant and responsive) judicial realism. Looking
31 'inwardly' here, means to attempt to construct answers to legal
32 questions through the concepts that inhere in established canons
33 of interpretation, and in doctrinal analysis, that seeks to
34 establish commonalities and differences between various legal
35 categories. In this 'involutional' doctrinal process judges over
36 time, and by way of a series of cases, will attempt to refine the
37 more precise content of legal categories. But it is not so much
38 the judicial aspiration to present legal reasoning in line with the
39 ideals of law's autonomy that will lead us astray here, but
40 rather, the theoretical idolatry of the myth of *static* autonomous
41 sources – in short, a naive belief that the Kingdom of the
42 Limited Domain is a real place. This, essentially, is what Legal
43 Realists past and present have rightly identified as a
44 disingenuous (unrealistic) 'formalism' at work in the
45 characterisation of law and the nature of adjudication.²⁰
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57 ¹⁹ See also John Merrills: 'International Adjudication and Autonomy', in:
58 Collins and White, *supra* note 16.

59 ²⁰ See Brian Tamanaha: *Beyond the Formalist-Realist Divide: The Role of*
60 *Politics in Judging* (Princeton: Princeton University Press, 2010).
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4. Static and Organic Conceptions of Legality

1 Examples of the failure to develop more dynamic and organic
2 understandings of legal processes and consequently a failure to
3 develop more agile critical concepts are numerous, but the
4 ICTY's analysis of what constitutes a 'belligerent reprisal' in
5 *Kupreškić*, and Kuhli and Gunther's commentary upon it offer
6 an apposite illustration of the general problem and a suitable
7 platform from which to progress²¹. Before dealing with the
8 specific issue in *Kupreškić*, it will be useful to illustrate the
9 problem at hand with a more general example.
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13 The International Criminal Court (ICC) adjudicates cases
14 where there is suspicion that a perpetrator has committed a
15 crime against humanity. In this illustration the crime is that of
16 murder, and the elements of it are described as follows: ²²
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- 19 (i) The perpetrator killed one or more persons.
- 20 (ii) The conduct was committed as part of a widespread or
- 21 systematic attack directed against a civilian population.
- 22 (iii) The perpetrator knew that the conduct was part of or
- 23 intended the conduct to be part of a widespread or systematic
- 24 attack against a civilian population.
- 25
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27 The ICC, in cases brought before the court, will seek to define
28 more precisely what "part of a widespread or systematic attack
29 directed against a civilian population" means. Clearly, "part of"
30 indicates a relationship between a particular perpetrator and a
31 group of perpetrators in the sense of connection or
32 coordination. "Widespread or systematic attack" indicates that
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37 ²¹ The following analysis should be seen as a contribution to the ongoing
38 debate in ICL theory over the extent to which ICL can and/ or should
39 emulate the strict legality requirements familiar to us in national law. Mark
40 Drumbl and Mark Osiel suggest that IL should operate with legality criteria
41 that focus more on the extent to which agents might reasonably expect
42 impunity for their acts rather than on the formal requirement that only *lex*
43 *scripta* suffice as a basis for punishing individuals. The recent contribution
44 by Darryl Robinson in "A Cosmopolitan Liberal Account of International
45 Criminal Law" (*Leiden Journal of International Law* – forthcoming -
46 Electronic copy available at: <http://ssrn.com/abstract=2122926>) sums up
47 the debate so far (*see* especially section 6.1.) In relation to the analysis
48 below we might note especially David Luban's "Fairness to Rightness:
49 Jurisdiction, Legality, and the Legitimacy of International Criminal Law"
50 (*Georgetown Law Faculty Working Papers* (2008) - Electronic copy
51 available at SSRN: <http://ssrn.com/abstract=1154177>) – especially sections
52 6-8 of this paper.

53 ²² 'The Elements of Crimes' are reproduced from the *Official Records of the*
54 *Assembly of States Parties to the Rome Statute of the International Criminal*
55 *Court - First Session, New York, 3-10 September 2002* (United Nations
56 Publication, Sales No. E.03.V.2 Part II.B and *corrigendum*). 'The Elements
57 of Crimes' adopted at the 2010 Review Conference are replicated from the
58 *Official Records of the Review Conference of the Rome Statute of the*
59 *International Criminal Court, Kampala, 31 May-11 June 2010*
60 (International Criminal Court Publication, RC/11).
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1 murders were somehow planned and premeditated. Similarly,
2 “directed against” means that the attack must have had a more
3 or less specific purpose or intention. And, “knew that the
4 conduct was part of or intended the conduct to be part of”
5 means that the perpetrator must have been aware of what
6 conduct he or she was involved in.
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8 Each of these issues could separately be made the object of a
9 doctrinal legal inquiry in which the law would look (inwardly)
10 to itself and its own doctrinal canons of construction. In that
11 sense, the law and its judges are attempting to “work the law
12 pure”. This is not to say that political, ethical, religious,
13 economic or other normative standards are neglected or
14 ignored. The point is that these other standards become relevant
15 only to the extent that they can be articulated legally. But, as
16 noted, this form of relevant articulation (i.e. *the legal*) need not
17 be anchored in the inflexible and inorganic understandings of
18 the static era of International Law. On the contrary, just as with
19 the European Court of Human Rights (ECTHR), the ICC’s
20 activities should be understood in the context of political
21 support for more humanitarian forms of government.
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26 The ECTHR has adopted a dynamic approach to Human Rights
27 and developments in the case law of the Court must be seen
28 against the background of a political will to strive for higher
29 humanitarian standards in this regard. This entails recognition
30 of the overall support for the court in using its competence to
31 decide concrete matters as an instrument for this purpose.²³
32 Hence, the ECTHR has used its case law as an instrument to
33 promote, for example, a ban on a specific form of physical
34 punishment of children in public schools (*Tyrer v. United*
35 *Kingdom*); action against prohibition of homosexual activity
36 demands on national courts to assure that accused persons
37 receive a fair trial in criminal proceedings (*Hauschildt v.*
38 *Denmark*) and the protection of women’s health in situations
39 where abortion was prohibited but where the well-being of the
40 mother was threatened by the pregnancy (*Tysiac v. Poland*).
41 The emergence of the ICC and the ICTY; and ICTR should be
42 seen in a similar light. That is, the adjudicative institutions of
43 International Criminal Law must be seen as products of the
44 overall political will to push for higher standards with respect
45 to protection of civilian populations in war zones and more
46 generally for promoting respect for the laws of war. This means
47 that the ICTY cannot be understood simply and literally as an
48 *ad hoc* Tribunal whose only purpose is to make decisions in
49 those (random) cases that are brought before it. It is possessed
50 of a wider judicial remit whereby standards of law in these
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59 ²³ See for example Luzius Wildhaber, ‘The European Court of Human
60 Rights in Action’, *Ritsumeikan Law Review*, Vol. 21 2004.
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1 cases are made –and are expected to be made - more specific.
2 Whilst we might say that ICL is still in its infancy (compared to
3 e.g., International Human Rights Law or International Trade
4 Law) there is a widespread consensus that the ICTY has been
5 valuably effective in producing usable case-law in this
6 respect.²⁴ It is perfectly understandable, therefore, that these
7 organic achievements have led some commentators to suggest
8 that the ICTY has, in some of its rulings, engaged not simply in
9 adjudication and application, but in law-making.

10 Orthodoxly, this can be seen as operating outside of and
11 beyond the traditional domain and functions of Courts. Kuhli
12 and Günther rightly suggest that lawmaking “implies the idea
13 that courts create normative expectations beyond the individual
14 case.”²⁵ This observation makes a familiar distinction between
15 discourses of ‘norm justification’ and discourses of ‘norm
16 application’. The former is a discourse that is usually assumed
17 to be characteristic of legislatures, and concerns the issue of
18 what norms should be issued; the latter concerns the issue of
19 how a given rule should be interpreted and applied to a certain
20 set of circumstances - usually seen as the business of the
21 courts. This distinction however is difficult to maintain, it is
22 superficially plausible in a situation where legislatures are
23 operational and capable of engaging in continuous, majoritarian
24 decision-making processes. No such legislature exists in the
25 international normative-institutional space that occupies us
26 here. Rather, and as we noted in our introductory remarks, the
27 paradigmatic perspective up until recently has viewed
28 International Law as a creation of agreements (treaties)
29 between states, and the enforcement of these by the ICJ, has
30 primarily been a matter of interpreting these agreements
31 (treaties). The starting point, then, has not been the existence of
32 a regulatory authority with the capacity to legislate for all, but
33 rather the opposite: No Rights or Duties existed for any states
34 other than by the express consent of the parties. There has, of
35 course, always been a notion of customary law and/ or *jus*
36 *cogens*, but the purpose of these rules has predominantly been
37 to serve as instruments for solving conflicts by upholding the
38 foundational principle that no state should be bound by any law
39 other than by its own consent.
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48 The historical starting point in International Law, therefore, is
49 not the existence of a clear cut divide between legislator and
50 judiciary. But, importantly, history shows that the same could
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55 ²⁴ See Schabas (2006) and more recently Schlutter (2010), who in chapter
56 five, V (p. 186-259) explicitly addresses “the findings of the ICTY on the
57 evolution of new customary international criminal law..

58 ²⁵ Milan Kuhli and Klaus Günther ‘Judicial Lawmaking, Discourse Theory,
59 and the ICTY on Belligerent Reprisals’, in von Bogdandy, A. and Venzke, I.
60 (Eds) *International Judicial Lawmaking*. (Springer, 2012) p.365.
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be said of National Law. Suri Ratnapala says of the situation in England in the 17th Century:

Parliament exercised *jurisdictio*, not as a general legislature, but as the highest court. The legislative power of Parliament originated from its authority as the supreme court to supply a rule of law where no [rule] existed ... However the infrequency and brevity of parliamentary sessions under the Tudors and the emergence of other courts provided the major impetus to the conversion of Parliament into a mainly legislative organ”²⁶

In England, then, the ‘Supreme Court’ (Parliament) was initially involved in both application and justification. When economic and social relations reached a certain level of complexity this *modus operandi* became inadequate and parliament evolved into a purely legislative organ. There are many parallels between this state of affairs and the political situation we see in the contemporary international space. Although the political domain is functionally differentiated (broadly speaking between trade / economy; human rights/ fundamental rights, and Criminal Law/ Humanitarian Law) and although the international space is not completely devoid of legislative-like bodies (e.g., the UN, and various regional political corporations), it is accurate to say that courts are today operating on premises that resonate more with the functions of the 17th Century English Parliament, than, say, with a contemporary Danish (or German) High Court. In light of this, whilst the distinction between ‘discourse of application’ and ‘discourse of justification’ might be a useful heuristic, we should be cautious in our reception of it. It does, however, help us to articulate the extent to which ‘judicial lawmaking’ might be seen as the result of the *collapse* of our reliance on this convenient distinction. Kuhli and Günther’s discussion *Kupreškić* is particularly revealing in this regard²⁷.

²⁶ Suri Ratnapala, ‘John Locke’s Doctrine of the Separation of Powers: A Re-evaluation’, *American Journal of Jurisprudence*, no. 38, 1993. p.196

²⁷ It should be noted that the *Kupreškić* decision on belligerent reprisals has been the object of much critique. Schlütter finds the Court’s assessment of *opinio juris* “almost ironic” and she finds the Courts approach “radical” in that it is “more or less ignoring the relevant practice of states and orientating itself mostly towards the legal views of the ILC, the ICRC and the UNGA.” (See p.235.) Schlütters abbreviations refer to: The International Law Commission, the International Committee of the Red Cross and the United Nations General Assembly). Similarly, Martins Paparinskis in *The British Year Book of International Law 2008* describes the decision as “sweeping” and says that “its legal rationale is subject to some doubt” and that the arguments used in the decision are “initially suspect” – see p. 323 -325. Kuhli and Günther then, follow an already established line of critique that has been levelled against this decision. Whilst we are not primarily concerned to endorse or condemn the decision *per se*, we do wish to make the case for a methodological approach that can explain how it was possible for the ICTY to arrive at their conclusion. That is, to show how the judgment on belligerent reprisals (i.e. the arbitrary killing of innocent

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5. The ICC, ICTY and *Kupreškić*

The *Kupreškić* case was concerned with whether or not an armed attack on a small Bosnian village was a violation of the law of armed conflict or whether the attack was justified as a “belligerent reprisal”.. The focus, therefore, is on how the ICTY decided on the issue of whether or not belligerent reprisals can be said to be allowed under international customary law and hence on whether the Court applied an already existing standard; or constructed a new standard? This question addresses a key object in general jurisprudence: What does it mean to declare what the law *is*? In the *Kupreškić* Decision, it seems that the law to be applied to the case is clear. The court in Para. 536 states:

...it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949. Hence, whether or not the armed conflict of which the attack on Ahmici formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

Despite what appears to be the identification of existing law on the matter, Kuhli and Günther suggest that the ICTY *makes* law in this case. They arrive at this conclusion by focusing on the argument developed in previous paragraphs of the decision. Here the Tribunal speculates about whether or not the prohibition on belligerent reprisals that already exist in treaty law could be said to constitute a universal requirement (i.e. could be said to exist as customary law). Here is a passage from the decision:²⁸

The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of

civilians as an instrument of war) is not acceptable under customary international law. While we could have addressed the practice of the ICTY more generally, perhaps including more case law in our analysis, we have instead opted for an approach where the close discussion of one difficult case allows us to develop a more pointed analysis of the problems at hand.

²⁸ *Kupreškić*, Trial Judgment p.207-208.

1 the elements of custom, namely *usus or diuturnitas* has
2 taken shape. This is however an area where *opinio iuris*
3 *sive necessitatis* may play a much greater role than *usus*,
4 as a result of the aforementioned Martens Clause. In the
5 light of the way States and courts have implemented it,
6 this Clause clearly shows that principles of international
7 humanitarian law may emerge through a customary
8 process under the pressure of the demands of humanity or
9 the dictates of public conscience, even where State
10 practice is scant or inconsistent. The other element, in the
11 form of *opinio necessitatis*, crystallising as a result of the
12 imperatives of humanity or public conscience, may turn
13 out to be the decisive element heralding the emergence of
14 a general rule or principle of humanitarian law.

15 It might be considered superfluous for the ICTY to discuss the
16 question of whether or not what is prohibited by applicable
17 treaty law is also prohibited as international customary law.
18 Why, we might ask, do the ICTY raise this question? The most
19 obvious answer seems to be because the Secretary General of
20 the UN in his original report, which contained the draft statute
21 for the Tribunal stated:²⁹

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25 The application of the principle *nullum crimen sine lege*
26 requires that the international tribunal should apply rules
27 of international humanitarian law which are beyond any
28 doubt part of customary law so that the adherence of some
29 but not all States to specific conventions does not arise...

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31 It would seem, therefore, that the Court perceives its function
32 and legitimacy as closely related to the possibility of clarifying
33 what the status of customary law is. Kuhli and Günther,
34 commenting on the above quote from the *Kupreškić* case find it
35 striking that the Tribunal "... by expressly referring to those
36 states, decided the customary law question with a view toward
37 possible future cases (involving the United States, France etc.)
38 over which the ICTY itself would almost certainly have no
39 jurisdiction."³⁰ This, however, might be a misreading of the
40 Tribunal's intentions. Raising the issue might be seen as a way
41 of explaining the weight that is needed to advance the argument
42 that the provisions in question are valid law despite not
43 receiving explicit support from a number of important states in
44 the international community. One could say that the court
45 openly addresses the fact that these states may have their
46 reasons for not wanting to endorse these provisions as part of
47 international law. It would therefore require compelling and
48 weighty argument brought to bear on the decision to regard
49 these provisions as forming influential part of customary
50 international law.
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59 ²⁹ Quoted in Kuhli and Günther, *supra* note 23, p.369.

60 ³⁰ *Ibid.* p.376.

1 These influential reasons are laid out in the following part of
2 the decision, and the ICTY is quite transparent in this regard:
3 *opinio juris* is what must lift the weight of the argument.
4 Congruously, then, we see the ICTY in the following
5 paragraphs advert to the various documents that may serve as
6 evidence of a universal or widespread *opinion*.³¹ But the Court
7 also puts forward a broader view of the matter. At para. 528-9
8 the Tribunal states that:
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11 It cannot be denied that reprisals against civilians are
12 inherently a barbarous means of seeking compliance with
13 international law. The most blatant reason for the
14 universal revulsion that usually accompanies reprisals is
15 that they may not only be arbitrary but are also not
16 directed specifically at the individual authors of the initial
17 violation. Reprisals typically are taken in situations where
18 the individuals personally responsible for the breach are
19 either unknown or out of reach. These retaliatory
20 measures are aimed instead at other more vulnerable
21 individuals or groups. They are individuals or groups who
22 may not even have any degree of solidarity with the
23 presumed authors of the initial violation; they may share
24 with them only the links of nationality and allegiance to
25 the same rulers.

26 529. In addition, the reprisal killing of innocent persons,
27 more or less chosen at random, without any requirement
28 of guilt or any form of trial, can safely be characterized as
29 a blatant infringement of the most fundamental principles
30 of human rights. It is difficult to deny that a slow but
31 profound transformation of humanitarian law under the
32 pervasive influence of human rights has occurred. As a
33 result belligerent reprisals against civilians and
34 fundamental rights of human beings are absolutely
35 inconsistent legal concepts.
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37 Against this background of reasoning, Kuhli and Günther write:
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40 It is striking to note the types of reasons that the ICTY is
41 providing here. We hear practical arguments concerning
42 the effectiveness of reprisals relative to the effectiveness
43 of courts [see para 530 – we do not discuss this issue
44 here]. We hear purely moral arguments concerning the
45 inhumanity of attacking civilians and civilian objects.
46 These are not the kinds of reasons that bear on the task of
47 identifying existing international law. They are reasons
48 taken from a discourse of norm justification. Effectively
49 the ICTY is arguing that customary law in this instance
50 should be created.³²
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52 One could not find a more straightforward illustration of the
53 fetishisation of a doctrinal distinction (between law ‘as it is’
54 and law as it ‘ought to be’). In international law the distinction
55 forces us desperately to invest qualities of permanence and
56 pedigree in the notion of custom. Since Lauterpacht’s
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60 ³¹ See para. 529-535 (including footnotes).

61 ³² Kuhli and Günther, *supra* note 23, p. 378, original emphasis.
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1 exposition of progressive interpretation, however, this is a
2 particularly brittle device, and one that has had tenuous
3 purchase for many years.³³ In moving to a conclusion we will
4 argue that this distinction cannot be drawn with any analytical
5 clarity, and that rather than imposing a mechanical formula for
6 discerning what is customary in international law, we should
7 instead be prepared to engage with the normative implications
8 that press upon us within what we can call ‘the matrix of
9 judicialisation’. By this is meant the historical, moral,
10 organisational and political context of international courts at
11 work. We may say, with Torben Spaak, that ‘recognising’ or
12 identifying the empirical ‘raw material’ of law does not
13 automatically reveal the semantic potential of its normative
14 scope.³⁴ The *Kupreškić* case is a profound example of the
15 importance of this observation, but the point is more general in
16 International Law and can be made in parallel to the ECtHR’s
17 case law on LGBT rights. Let us then briefly consider the scope
18 of principle involved³⁵.
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23 **6. Conclusion: Interpretation and Legality in International** 24 **Law**

25 In a recent study³⁶, Larry Helfer and Eric Voeten have shown
26 how LGBT rights have become increasingly articulated,
27 widened, accepted and integrated in the development of the
28 aims of the convention. The various legal issues involved are:
29 Decriminalisation of consensual sexual activity in private;
30 Equalisation of age of consent for homosexual activity; the
31 right to serve openly in the Armed Services; Equal treatment of
32 unmarried (and later married) same-sex couples with regard to
33 various social rights; Rights associated with gender
34 reassignment, Transsexual marriage rights, and Rights to
35 gender reassignment. Whilst the case law shows a marked
36 development in the recognition of these various rights, the
37 convention texts in which these rights are based have remained
38 the same.
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45 ³³ See importantly P. Capps “Lauterpacht’s Method” *British Yearbook of*
46 *International Law* 2012.

47 ³⁴ Spaak says: “the identification of the legal raw material at the level of the
48 sources of law is a purely factual matter, whereas the interpretation and
49 application of this raw material often involves moral reasoning...” See
50 Spaak, Torben “Legal Positivism and the Objectivity of Law.” *Annali e*
51 *Diritto*, Vol. 253, pp. 253-267, 2004.

52 ³⁵ The case law on LGBT rights is merely one of a number of examples that
53 we could have used as illustration of our point. The extensive and evolving
54 interpretation of the European Convention, according to its nature of “living
55 instrument”, can be referred to several other topics, as for example a number
56 of bio-ethically sensitive issues which have gained prominence in recent
57 years in ECtHR jurisprudence.

58 ³⁶ Laurence R. Helfer and Erik Voeten, ‘International Courts as Agents of
59 Legal Change: Evidence from LGBT Rights in Europe’ *International*
60 *Organization*, vol. 67 (forthcoming 2013)
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1 We are talking particularly about the longstanding articles 8, 12
2 and 14; respectively: rights to privacy, rights to marry, and the
3 right not to be discriminated against. The ‘raw’ sources of law
4 have, then, remained the same for 50 years; yet the perception
5 of what that law entails with regards to LGBT rights has
6 evolved. Does this mean that ECtHR has developed new law?
7 On one interpretation of what that question means, the answer
8 would be an obvious ‘Yes’. If, however, one takes as a starting
9 point for legal interpretation that which was immediately
10 apparent to the consciousness of the representatives that drafted
11 the convention texts, then it would be plausible to suggest that
12 the purpose of setting out a right to privacy, or a right not to be
13 discriminated against, was not intended as an instrument that
14 should be used to force member states to condone homosexual
15 activity, or for them to formally re-register the sex of post-
16 operative trans-sexuals. In fact, Art. 14 does not even list
17 sexual orientation as one of the grounds that may give rise to a
18 claim of equal treatment: sexual orientation has become
19 accepted only as such through the general clause of “other
20 status”. When the convention was adopted few would have
21 perceived homosexual or trans-sexual activities as envisaged by
22 this kind of protection. On this view (i.e. some version of
23 Scalia’s “original intent” thesis),³⁷ the ECtHR ‘makes’ new
24 law in these instances.
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30 On a less *static* view, however, the textual foundation of the
31 law is so wide that the protection of these rights can easily be
32 seen as covered by the relevant provisions. Organically
33 speaking, the law is not (an immediate or unreflective)
34 intention frozen in time, but rather, a textual expression of
35 moral and social value arising in more or less specific
36 circumstances from commitment to a more or less general
37 normative principle. Standards of behaviour that cohere with
38 this commitment may demand that previous understandings of
39 the scope and application of legal rules are revised and
40 developed over time and circumstance. The law, on this view,
41 demands a commitment to the principled social values
42 expressed textually, but not a commitment to a *fixed* historical
43 version of what that text should mean. The consequence of this
44 is that although the drafters did not have in mind, for example,
45 homosexual activity when they drafted Articles 8 and 14, the
46 value of respect for the principles underpinning privacy and
47 equal treatment are seen as better served if one accepts that
48 these activities do indeed fall within the ambit of the textual
49 provisions.
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56 In explaining how and why movement between on the one
57 hand, text (as ‘raw material’), and, on the other, principle (as
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59 ³⁷ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*.
60 (Princeton University Press, 1998)
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1 the *semantic* source of binding normative potential), can and
2 must vary in magnitude, we need only consider the complexity
3 of the matrix of judicialisation alluded to above. Some forms of
4 legal regulation are, relatively speaking, semantically and
5 normatively precise, that is, they have a more limited and
6 focused semantic scope (regulation of pension age can be seen
7 as an example of this). Others, as illustrated in *Kupreškić* and in
8 our Human Rights examples, are more open. In both cases, the
9 law operates as a form of adjustment mechanism, the function
10 of which is to co-ordinate action in the public sphere.³⁸ If we
11 imagine legal rules functioning in socially co-ordinatory and
12 regulatory terms as bumpers or shock absorbers, legal texts that
13 appear specific and detailed express a higher level of consensus
14 and/ or a need for close co-ordination of action. Conversely,
15 wider constructive interpretation responds to more expansive
16 problems. One might imagine the two contrasting contexts of
17 co-ordinatory action in terms of, on the one hand, and for
18 example, the tightly constrained proximities of the individual
19 wagons on a high speed train, as opposed, on the other, to the
20 looser and more unpredictable relations between automobiles
21 on roads and motorways. Co-ordination takes place in both
22 cases, but where there is little room for manoeuvre (as with the
23 individual wagons of a high-speed train) shock absorption is
24 short, sure, unilinear and homogeneous. Employing this
25 metaphor, we can say that, when the ECTHR, for example, uses
26 its interpretive discretion to say that LGBT rights are protected
27 by the convention, they adapt to the more expansive co-
28 ordinatory context that is available to them; that is, they
29 become sensitive to the more diverse trajectories of more
30 subtly responsive, slower moving vehicles on wider roads and
31 motorways. Precisely because there is such a scope for
32 interpretive manoeuvre, the ECTHR has a more onerous
33 responsibility with regards to the co-ordinatory effect of its
34 rulings. The Court itself is aware of this. In a decision from
35 2003 (*Karner v. Austria*), the Court says that, it “determine[es]
36 issues on public-policy grounds in the common interest ...”,
37 thereby signalling the aim of building public consensus in
38 legitimising support for their interpretive strategies.

47 This being said, there are obvious differences between the
48 ICTY and the ECTHR. The ECTHR has a much longer history,
49 has rendered more decisions, operates on the basis of treaty
50 text, has a permanent existence, a much wider jurisdiction and
51 so on. Yet there are also obvious similarities. Both Courts are
52 international courts situated in Europe, both courts are assigned
53 cases that relate to basic moral issues (i.e. human rights /
54 humanitarian law), and both Courts were created as a response
55 to war time atrocities. It is plausible to assume, therefore, that

60 ³⁸ See Postema, *supra* note 12.

1 some of the same mechanisms that one finds in the ECTHR's
2 approach case law might also be common to the ICTY. One
3 difference, however, should perhaps be singled out: Whereas
4 the ECTHR adjudicates cases between states and individuals
5 who claim that their rights have been violated, the ICTY
6 adjudicates criminal cases against individuals.

7 The ECTHR can pronounce that a state acts in contravention of
8 the convention – the ICTY can send an accused individual to
9 prison. This difference is important – and it stresses the
10 important role in all ICTY case law of *nullum crimen sine*
11 *legem*, a principle which is also set out in the ECHR, art 7.
12 Insisting *statically* on the observance of this maxim threatens to
13 return us to square one, but this need not be so.
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17 What is it that gives a certain decision its legal character?
18 Faced with this question the positivist's 'source thesis' stands
19 out as particularly attractive: If normative membership in law's
20 limited domain is determined by criteria which are defined
21 exclusively in terms of non-evaluative matters of social fact,
22 then it will be a morally-neutral endeavour to identify what the
23 law *is*. Driven by a demand for positive identifiability it
24 appears to be possible, by detaching *the legal* from issues of
25 morality and politics, to make legal judgments on the basis of
26 simple empirical facts. The rationale for this approach,
27 paradoxically, suggests a *moral* advantage in serving the Rule
28 of Law in that classically, this detachment equates to the liberal
29 assurance that the state apparatus does not use its power
30 arbitrarily.³⁹ But, as we have seen in our lengthy examination
31 of the concept of law's autonomy, the problem is that
32 methodologically, it is simply not possible to avoid an overlap
33 between law and morality. Thus, whilst there are good reasons
34 to distinguish between instances of law-making and law
35 application, and while law-making can be entirely legitimate
36 (as Kuhli and Günther concede), it might be worth considering
37 whether the process of identifying what the law *is* involves
38 value judgments of the kind Kuhli and Günther seem to
39 dismiss.⁴⁰
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46 The legal matter before the court in *Kupreškić* asks if it is
47 possible to identify sufficient support for a prohibition against
48 belligerent reprisals in customary law. The ICTY recognised
49 that there was not sufficient evidence in the form an existent
50 and consistent state practice to support the view that belligerent
51 reprisals are illegal. But they then argued that customary law
52 might be identified through a study of the *opinio juris* of state
53 agents. Whilst customary law usually requires that both the
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57 ³⁹ For a good exposition, see H.L.A. Hart, 'Positivism and the Separation of
58 Law and Morals' *The Harvard Law Review*, vol. 71, No. 4, 1958. pp.593-
59 629.

60 ⁴⁰ See Kuhli and Günther. *supra* note 18, p.378.
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1 conditions of *usus* and *opinio* be met, in this type of case
2 (where *usus* is more a matter of refraining from engaging in
3 certain activities) *opinio* plays a much greater role in
4 establishing the foundation of law on the issue. To identify
5 what the law *is*, therefore, it is necessary to undertake an
6 inquiry into what relevant agents take the law to be. In so
7 doing, one cannot rely on a criterion of absolute consensus -
8 one must allow, critically, for the possibility that some agents
9 reason perversely. It is necessary, therefore, to operationalise
10 criteria for sifting the central and correct conceptualisations of
11 the legal duty from the peripheral and diluted understandings –
12 and, in turn, these diluted understandings from the plain
13 *wrong* understandings of the requirements of international law
14 with regard, in this case, to belligerent reprisals.⁴¹ To identify
15 what the law *is*, one must, in other words, engage in an
16 interpretive exercise to what both Lauterpacht and Dworkin see
17 as ‘Constructive Interpretation’. For Lauterpacht, this requires a
18 construction of an image of what international law is *for* and
19 what values it serves. In answering these meta-legal questions,
20 law must stand up and be counted as to what, precisely, are its
21 identifiable normative orientations. Customary authorities are
22 not, then, to be seen as static empirical objects but rather, ideal-
23 typical reconstructions of existing practices viewed in the best
24 possible light. They are judgments about what best appears to
25 justify the overall enterprise of having a system of international
26 rights and duties that impose limitations on the freedom of
27 individuals and states. Hence, if a tribunal engages in
28 normative discourse - as did the ICTY in *Kupreškić* case - one
29 should not necessarily, as Kuhli and Günther suggest, perceive
30 this as an instance of *ad hoc* law-making. Rather, this judicial
31 activity is more accurately rendered as an attempt to serve the
32 often unattainable ideals of law’s autonomy by showing
33 *publicly* and *transparently* how the court arrives at their
34 conclusions about *what the law is*.⁴²

41 See John Finnis *Natural Law and Natural Rights*. (The Clarendon Press, Oxford, 1980 Chapter 1.

42 See H. P. Olsen and S. Toddington *Law in its Own Right* (Oxford, Hart Publishing, 1999) Chapter 1. Here we give an account of the way legality is located in a ‘continuum of practical reason’ and strives to produce legitimacy in a process of ‘transparent autonomy’.

Bibliography

- 1
2
3 **Alter, Karen** 'The New International Courts: A Bird's Eye View'. *Buffett*
4 *Centre for International and Comparative Studies Working Paper Series*,
5 Vol. 09, No. 001 (2009) pp. 1-46.
- 6 **Alter, Karen** 'The Global Spread of European Style Courts'. *West*
7 *European Politics*. Volume 35, Number 1, (2012) pp. 135-154.
- 8 **Besson Samantha**, 'Theorizing the Sources of International Law', in:
9 Samantha Besson and John Tasioulas (eds.) – *The Philosophy of*
10 *International Law*, (Oxford: Oxford University Press, 2010)
- 11 **Samantha Besson and John Tasioulas** (eds.) – *The Philosophy of*
12 *International Law*, (Oxford: Oxford University Press, 2010).
- 13 **Cassese, Antonio** *Realizing Utopia* (Oxford University Press, 2012).
- 14 **Collins Richard and White, Nigel D.** (eds.), *International Organizations*
15 *and the idea of Autonomy: Institutional Independence in the International*
16 *Legal Order* (London; New York: Routledge, 2011)
- 17 **Dunoff, J. L. and Trachtman J. P.**, (eds.) *Ruling the World?*
18 *Constitutionalism, International Law, and Global Governance* (Cambridge:
19 Cambridge University Press, 2009)
- 20 **Dworkin, Ronald** *Law's Empire*. (Fontana Press, 1986)
- 21 **Finnis, John** *Natural Law and Natural Rights*. (The Clarendon Press,
22 Oxford, 1980)
- 23 **Fitzmaurice, Malgosia**: Dynamic (Evolutive) Interpretation of Treaties,
24 Part I, 21 *Hague Yearbook of International Law* (2008), pp. 101-153.
- 25 **Fitzmaurice, Malgosia**: Dynamic (Evolutive) Interpretation of Treaties,
26 Part II, 22 *Hague Yearbook of International Law* (2009), pp. 3-31.
- 27 **Hart, H. L. A.** (a) Positivism and the Separation of Law and Morals. *The*
28 *Harvard Law Review*, vol. 71, no. 4 (1958) pp. 93-629.
- 29 **Hart H. L. A.**, (b) *The Concept of Law*. (Oxford University Press,
30 Clarendon Oxford, 1961 and (c) 3rd Edition 2012)
- 31 **Helper Laurence R. and Voeten Erik** 'International Courts as Agents of
32 Legal Change: Evidence from LGBT Rights in Europ' *International*
33 *Organization*, vol. 67 (forthcoming 2013)
- 34 **Venzke Ingo** *How Interpretation Makes International Law: On Semantic*
35 *Change and Normative Twists*. (Oxford University Press, 2012)
- 36 **Kelsen, Hans**, (a) *Principles of International Law*, edited by R. W. Ticker (
- 37 Holt, Rhinehart and Winston Inc. 1967)
- 38 **Kelsen, Hans** (b) *The Pure Theory of Law* (Max Knight [Trans.] University
39 of California Press, Berkeley, 1967)
- 40 **Klabbers, J. Peters, A. and Ulfstein, G.** *The Constitutionalization of*
41 *International Law* (Oxford University Press, 2009)
- 42 **Koskenniemi, M.** (2007) 'The Fate of Public International Law: Between
43 Technique and Politics'. *The Modern Law Review*, Vol. 70, Issue 1 (2007)
44 pp. 1-30.
- 45 **Kuhli Milan and Gunther Klaus** 'Judicial Lawmaking, Discourse Theory,
46 and the ICTY on Belligerent Reprisals' in: Armin von Bogdandy and Ingo
47 Venzke (eds.) – *International Judicial Lawmaking*. (Springer, 2012)
- 48 **Luban, David**: Fairness to Rightness: Jurisdiction, Legality, and the
49 Legitimacy of International Criminal Law, *Georgetown Law Faculty*
50 *Working Papers* (2008) (Electronic copy available at SSRN:
51 <http://ssrn.com/abstract=1154177>).
- 52 **Madsen M. R.** (a), 'The Protracted Institutionalisation of the Strasbourg
53 Court: From Legal Diplomacy to Integrationist Jurisprudence', In M. R.
54 Madsen and J. Christoffersen (eds.), *The European Court of Human Rights*
55 *between Law and Politics*, (Oxford: Oxford University Press, 2011)
- 56 **Madsen M. R.** (b), 'Legal Diplomacy - Law, Politics and the Genesis of
57 Postwar European Human Rights', In S. L. Hoffmann (ed.), *Human Rights*
58 *in the Twentieth Century: A Critical History*, (Cambridge: Cambridge
59 University Press, 2011),
60
61
62
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64
65

1 **Merrills John:** “International Adjudication and Autonomy” in: Richard
2 Collins and Nigel D. White (eds.), *International Organizations and the idea*
3 *of Autonomy: Institutional Independence in the International Legal Order*
4 (London; New York: Routledge, 2011)
5 **Olsen H. P. and Toddington S..** *Law in its Own Right* (Oxford, Hart
6 Publishing, 1999)
7 **Paparinskis, Martins** ‘Investment Arbitration and the Law of
8 Countermeasures, in’: *The British Year Book of International Law* (Oxford
9 University Press, 2008)
10 **Paulus Andreas,** ‘International Adjudication’, in: Samantha Besson and
11 John Tasioulas (eds.) – *The Philosophy of International Law*, (Oxford:
12 Oxford University Press, 2010).
13 **Postema Gerald J.,** 'Law's Autonomy and Public Practical Reason', in
14 Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism*
15 (Oxford University Press, 1996).
16 **Ratnapala,Suri** “John Locke’s Doctrine of the Separation of Powers: A Re-
17 evaluation” in *American Journal of Jurisprudence*, no. 38 (1993)
18 **Robinson, Darryl:** A Cosmopolitan Liberal Account of International
19 Criminal Law”, *Leiden Journal of International Law* (forthcoming)
20 (Electronic copy available at: <http://ssrn.com/abstract=2122926>)
21 **Romano P.R.,** ‘The Proliferation of International Tribunals: Piecing together
22 the Puzzle’. *NYU Journal of International Law and Politics*, Vol. 31, No. 4,
23 (1999) pp. 709-51.
24 **Romano,C.P.R.** ‘A Taxonomy of International Rule of Law Institutions’.
25 *International Dispute Settlement*, Vol. 2. (2011)
26 **Scalia,Antonin** *A Matter of Interpretation: Federal Courts and the Law*.
27 (Princeton University Press, 1998)
28 **Schabas, William.** *The UN International Criminal Tribunals: The Former*
29 *Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006)
30 **Schlutter Birgit,** *Developments in Customary International Law* (Martinus
31 Nijhoff Publishers, 2010)
32 **Yuval Shany** – *The Competing Jurisdictions of International Courts and*
33 *Tribunals* (Oxford University Press, 2004).
34 **Shapiro Martin M. and Alec Stone Sweet,** *On Law, Politics, and*
35 *Judicialization* (Oxford University Press, 2002)
36 **Slaughter,A. M.** *A New World Order* (Princeton University Press, 2004).
37 **Spaak, Torben** ‘Legal Positivism and the Objectivity of Law’. *Annali e*
38 *Diritto*, Vol. 253, pp. 253-267, 2004.
39 **Wildhaber,Luzius** ‘The European Court of Human Rights in Action’, in
40 *Ritsumeikan Law Review*, vol- 21. (2004)

41 CASE LAW

42 European Court of Human Rights

43 *Tyrer v. The United Kingdom*, 1978, no. 5856/72.

44 *Hauschildt v. Denmark*, 1990, series A, no 154; no. 10486/83.

45 *Karner v. Austria*, 2003, no. 40016/98

46 *Tysiac v. Poland*, 2007, no. 5410/03

47 International Court of Justice

48 *Reparations for Injuries Suffered in the Service of the United Nations*,
49 Advisory Opinion, ICJ Reports, 1949, p. 174.

50 International Criminal Tribunal for the Former Yugoslavia

51 *Kupreškić*, Trial Chamber Judgment, 14 January 2000, Case No. IT-95-16-T