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INTERNATIONAL CRIMINAL COURT AND THE DECISION-MAKING HERITAGE OF THE AD HOC TRIBUNALS: A STUDY OF "JUDICIAL ACTIVISM"

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ABSTRACT

This Article examines the theoretical and historical contexts, the applicable law and the practice of the International Criminal Court (ICC) to establish whether activist interpretation features in judicial decision-making of the court. The Article argues that the high level of detail in the normative framework of the court does not address activist judicial practice as was anticipated by the creators of the court. Influenced by the interpretive culture of the foregoing tribunals where normative realities were starkly different, judicial interpretation at the ICC nonetheless experiences similar activist tendencies that may defy the established legislative polices of the court and the principle of legality. It argues that the incoherent interpretive practice allows the judges to express their idiosyncratic understanding of law in a way that may be inconsistent with the policies previously announced by the states parties to the Rome Statute and the court's legislative authority – the Assembly of States Parties. The Article concludes that consistent and sound interpretive methodology is wanting for the court to be able to effectively adhere to the principle of legality.

INTRODUCTION

The creation of the modern international criminal courts triggered an active process of development of international criminal law and its institutions. Having started as a handful of customary legal rules, international criminal law has developed through the jurisprudence of these courts into a comprehensive body of positive law that today is largely reflected in the Rome Statute of the permanent International Criminal Court (ICC).

The judicial process in the early ad hoc tribunals took course under assumption of discoverability of *ex ante* specific components of international crimes, and of specific norms of international criminal law in general.[1] These cryptic norms were assumed to have existed in their latent form in either international custom or principles of law

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[1] *See, e.g.*, Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law*?, 2 J. INT'L CRIM. JUST. 1007, 1017 (2004) (describing the court's process of evaluating basic principles of a crime against the charged behaviour).

and only needed to be actively discovered by the judges. A wide range of interpretive methods – from the postulates of the Vienna Convention on the Law of Treaties to fundamental values of humanity – was employed for that purpose.[2] The interpretive processes at the ad hoc tribunals, such as the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), showed that in the context of customary international law the line between creation and discovery of law is hard to detect.[3] This ambiguity resulted in concerns of subjecting the entire process of legal development to the individual vision of a judge. The resulted expansion of the normative body of international criminal law sparked a vigorous debate about the age-old dilemma of relationship between a judge and the law, translating the debate into the international criminal law context.[4] The vigour of progressive jurisprudence of the ad hoc criminal tribunals raised many questions vis-à-vis judge-made law, its legitimacy at the arena of international criminal justice, and the boundaries to which the practice of expansive interpretation is permissible to extend without offending the principle of legality.

The common law tradition that greatly influenced all international criminal courts has a long history of debate on judicial discretion. In the twentieth century, American legal scholarship labelled certain age-old progressive practices of judicial freedom in interpretation of law as judicial activism. The practice of activist judging may have expanded to ad hoc international criminal tribunals drawing on both the courts' common law parentage and the nature of the international legal order with its decentralised legal architecture and the absence of legislative authority. The lack of normative clarity and complex realities in which ad hoc tribunals had to operate pleaded in justification of the progressive developments of law at these international courts.

Unlike the ad hoc tribunals, the ICC is equipped with a well-prepared and detailed set of comprehensive positive rules – the Rome Statute (the court's creating treaty), the Rules of Procedure and Evidence, the Elements of Crimes and other instruments. The normative reality of the ICC significantly limits the space for the progressive development of international criminal law through limiting the interpretive freedom of the judges and their capacity to actively develop applicable criminal law. The Rome Statute, in addition to supplying the judges with a codification of substantive and procedural norms, provides for interpretive guidelines mainly expressed through its articles 21 and 22.[5] In turn, the structure of the

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[2] *See* LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 48 (2014) [hereinafter GROVER, CRIMES IN THE ROME STATUTE].

[3] *See id.* at 61.

[4] *See id*. at 63–64.

[5] *See* Rome Statute of the International Criminal Court, arts. 21–22, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

court provides for the legislative authority assumed by the states parties to the Rome Statute and their Assembly (ASP). This further limits the judicial function by clearly distinguishing it from the legislative mandate. These normative and structural changes may have been intended to limit the role of the judges in the law-making processes.[6] However, the incoherent interpretive practice may allow the judges to express their personal understanding of even the most detailed law in a way that may be inconsistent with the pre-announced policies. A judge may invoke a particular interpretive canon to yield a desired outcome in his decision, rather than be guided by the law in light of consistent methodological reasoning.[7] In the absence of clear interpretive methodology, the ICC might run the risk of continuing the inertia of activist judging that gained momentum at the ad hoc tribunals. At the expense of the principle of legality, such practice may establish a similar culture of expansive judicial interpretation that defies established policies expressed in the codified law of the court.

The main objective of this Article is to examine the theoretical and historical contexts, the applicable law, and the practice of the ICC to establish whether activist interpretation features in the judicial decision-making of the court. For that purpose, this Article provides for a theoretical discussion of the concept of judicial activism and the related interpretive phenomena. It then uses the theoretical findings to analyse the context in which the early ad hoc international criminal tribunals operated. This Article argues that the ad hoc tribunals developed a culture of activist interpretation of law that subsequently emerged at the ICC despite its structural differences. This Article considers whether the legal architecture of the ICC with its high level of normativity and textual clarity helps abate the judicial interpretive function by subjecting it to the principle of legality and whether the interpretive rules as applied by the court are adequate to address activist judging. To reveal the activist tendencies in the work of the ICC, this Article considers a number of examples from the practice of the court that in the opinion of the author are most illustrative of the activist tendencies.

I. DECONSTRUCTING JUDICIAL ACTIVISM

The term "judicial activism" first appeared in legal parlance in January 1947, when Arthur Schlesinger Jr. introduced it in his article in a popular *Fortune* magazine intended for a very general audience.[8] An American historian and a social critic, Schlesinger profiled the then

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[6] Joseph Powderly, *The Rome Statute and the Attempted Corseting of the Interpretive Judicial Function*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 445 (Carsten Stahn ed., 2015).

[7] *See* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 583 (2010) [hereinafter Grover, *A Call to Arms*].

[8] Arthur M. Schlesinger Jr., *The Supreme Court*, FORTUNE, Jan. 1947, at 73.

judges of the United States Supreme Court.[9] He articulated the divisions among the judges by highlighting the differences among them in their perception of the judicial role.[10] Schlesinger discerned two main groups, characterizing one group as being "judicial activists," and the other as the "champions of self-restraint."[11] Judicially active judges, as portrayed by Schlesinger, are those who, being aware of the ambiguous range of law and believing in inseparability of law and politics, move the policy concerns and social results to the front in the exercise of their judicial power. The champions of self-restraint, on the other hand, believe that the meaning of the law is fixed. Deviation from the fixed meaning is inappropriate even in cases where the legislator made a clear mistake in law, in which situation the remedy must be left to the legislator.[12] By extrapolating his "judicial activism" and "self-restraint," Schlesinger reminded his audience of the fundamental formalist-realist philosophical dilemma of judicial discretion in the context of the doctrine of separation of powers and legal decision-making within the doctrine.[13]

Back in 1893, James Thayer, another American scholar, advanced a thesis about the counter-majoritarian nature of judicial review.[14] Writing in the nineteenth century, he argued that the powers of the unelected judges to review the legislation, including the Constitution of the United States, passed by the popularly elected officials, undermined the democratic system. For Thayer and his followers, such as Alexander Bickel, when the words of the legislator are ambiguous, the legislator himself should have the prerogative to effect clarification, not the unelected judge.[15] Otherwise, judicial review can stimulate deference to judicially reviewed interpretations and undermine the legislative constraints intended by the legislator.[16]

On the other side of the spectrum, the proponents of the activist judicial practice argued that the practice is consistent with democratic principles. It promotes judicial independence and provides for the system of checks and balances in the democratic structure of a

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[9] *Id.* at 73–79, 201–02, 204, 206, 208, 211–12.

[10] *Id.*

[11] *Id.* at 74–78.

[12] *See* Keenan D. Kmiec, Note, *The Origin and Current Meanings of Judicial Activism,* 92 CAL. L. REV. 1441, 1447–48 (2004) (citing Schlesinger, *supra* note 8, at 201–04) (explaining that legislative mistakes should be corrected by the legislature).

[13] *See* Schlesinger, *supra* note 8, at 75 (stating that Hugo Black, a 'judicial activist', believes the Court should intervene to help the defenceless even if it comes close to correcting the legislative branch).

[14] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893); *see also* STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 21 (2009) (discussing the counter-majoritarian nature of judicial review).

[15] *See* LINDQUIST & CROSS *supra* note 14, at 21–22.

[16] *See* Thayer, *supra* note 14, at 130 (stating that the written form of a constitution or judges sworn to support it are not necessarily meant to take authoritative action over the legislature).

society.[17] Arthur Miller, perhaps the most passionate defender of judicial activism, went as far as granting the court absolute freedom as long as its members are competent to arrive at "sociologically wise decisions."[18] This, he argued, addressed the flaws of the legislature elected through imperfect electoral processes. To Miller, the courts consisted of wise members and were the beacon of decency and morality.[19] Similarly, Terry Paretti argued that the ideology and values of judiciary that is engaged in result-oriented judging mirror the values of the representatives of legislature, and therefore act in addition to, and not in lieu of, the legislator, elaborating him.[20]

Schlesinger captured the society's unconscious anxieties about judging and concisely placed terminology. He, however, did not articulate what exactly counts as activism or whether it was anything requiring correction. Despite the topic's subsequent and consistent rise to power, the concept of judicial activism remains ill-defined, partially due to subjective appreciation of this phenomenon by different people, especially when it comes to detail, thus defying clear and consistent definition and generating confusion.[21] Some commentators argue that judicial activism is a chimeric concept invoked only when one is unhappy about a particular judicial decision.[22] Not even the judiciary itself seems to have a clear understanding of the behaviour they are consistently charged with and the boundaries to which their decision-making should be confined.[23] Rosenberg suggested that, much like judicial independence, judicial activism is at all times present to a certain degree, and therefore the question is not whether judicial activism "is" or "is not" – the question is rather how much of it a particular judge exhibits.[24] Nevertheless, being an abstract concept devoid of an objective clear definition and measure, judicial activism still has intrinsic meaning, as do many other abstract legal concepts.

Judicial activism, in fact, is not the only category in the phenomenon it belongs to. This umbrella phenomenon can relatively be described as progressive judicial decision-making or judicial

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[17] Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POLS. 343, 370–71 (1992).

[18] A. S. MILLER, *In Defense of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 172 (Stephen C. Haplern & Charles M. Lamb eds., 1982).

[19] *See id.* at 180.

[20] *See generally* T.J. PARETTI, IN DEFENSE OF A POLITICAL COURT 105 (1999).

[21] *See* LINDQUIST & CROSS, *supra* note 14, at 29.

[22] *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2019 (2002) (stating that judicial activism is a label used for unfavourable decisions); *see also* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1077 (2002) (stating that judicial activism is a manner to convey strong opposition to a decision).

[23] *See* LINDQUIST & CROSS, *supra* note **Error! Bookmark not defined.**, at 30 (referencing the assessments of Justice Jackson, Judge Easterbrook, Justice Scalia, and Justice Ginsburg on the term 'judicial activism').

[24] *See* Rosenberg, *supra* note 17.

creativity, on a closer look at which other processes can be discerned. Overall, judicial creativity concerns "two related phenomena: gap-filling" and "activism" proper, both naturally effected through judicial interpretation of law.[25] Gap-filling concerns judicial determination of the law to resolve a dispute when the law did not previously "articulate a specific rule."[26] The authority of law-inflating decision-making migrates to the judiciary by either the agreement of the legislator to grant the authority of law determination through an act of deliberate omission in the law or by the legislator's unintended and unpremeditated oversight to provide for a definitive rule. Intentionally or otherwise, the legislator or other authoritative institutions therefore pass to judiciary the legitimacy for gap-filling determinations.

On the other hand, judicial activism "represent[s] a refusal to implement the announced public policy decisions," which are passed with various degrees of clarity, by the legislature or other "authoritative institutions."[27] This configuration is particularly descriptive of national legal systems where the judges would fall under the category if they refuse to defer to legislative or executive power in implementation of policy decisions, expand the court's jurisdiction, break precedent in common law systems, loosely construe applicable law, or progressively expand the law.[28]

Even gap-filling, however, does not happen in a vacuum but in the general legal context, therefore an interpretative choice needs to be supported by foreseeable reasoning rooted in the appropriate legal context. When a gap-filling determination becomes an avenue for judicial insertion of polices divorced from those announced by the legislative authority or from general legal context if no pre-existing policy is available, gap-filling effectively transforms into activism.

Speaking of the continental legal systems, judicial activism as such is an entirely foreign concept.[29] The role of judges in social policy-making is restricted by the philosophy of the civil law systems.[30] Although these systems accord the judges an interpretive function, the capacity of the judges to promote sustainable departure from the policies pronounced by the legislator is by far less viable than that of their common law colleagues.[31] In the absence of judicial precedent and the doctrine of *stare decisis*, a judge is built into the legal system

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[25] *See* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analysing International Adjudication*, 44 COLUM. J. TRANSNAT'L. L. 377, 386–87 (2006).

[26] *Id.*

[27] *See id.* at 386–87.

[28] *See* Lara M. Pair, *Judicial Activism in the ICJ Chapter Interpretation*, 8 ILSA J. INT'L & COMP. L. 181, 184 (2001).

[29] *See* Luz Este Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L. L.J. 345, 370 (2000) (stating that judicial activism has very little historical precedent).

[30] *See id.*

[31] *See id.*

as a mechanical executor of the will of the legislator without the discretion to pronounce decisions binding on subsequent cases.[32] That is to say that despite the challenges of interpretation of law that a civil law judge no doubt experiences as well, and despite any possible evolutionary interpretation of law that the judge may arrive at, he does not have the facility to influence the general policy unless the legislator effects it. Theoretically, a civil law judge may engage in as much activism as he wishes within the limits of an immediate litigation, but to little effect in reference to the whole system. Even the results of a gap-filling interpretation made by one court in relation to codified rules may be entirely ignored by other courts.

Internationally, identification of activist behaviour is a more difficult exercise due to the absence of a centralized hierarchical legal system, including the centralized legislator on the international level.[33] The relationship between international tribunals, especially the early ad hoc courts, and their creating bodies is dissimilar to the division of powers between the judiciary and the legislature domestically. Moreover, institutional arrangements within domestic systems may not readily translate to international courts. Similarly, the Thayerian argument of the counter-majoritarian and therefore undemocratic nature of judicial review[34] is largely irrelevant at the international level. In consequence, the interplay between the gap-filling and the activism proper is by far more complex than in more straightforward domestic legal systems.[35] With the acts and consent of states at the foundation of international law, the "fluid" border between the gap-filling "interpretation of existing law" and the activist derogation from the pronounced policies is arguably "the focal problem of international courts,"[36] not least because it triggers tensions with the principle of legality of judicial decision-making in the international context. Moreover, international judges seem to be perceived as the source of policies due to the parentage of judge-made law in international criminal law, which somehow conforms to the ideas of Paretti in that the judges represent the carrying agents of the core social values and that they effect these values through engaging in *de facto* policy-making and policy-correcting practices or *de jure* law-making practices that are labelled as activist, maintaining the claim of self-imposed legitimacy. In the words of the late Judge Robert

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[32] *See* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW, CASES – TEXT – MATERIALS 597 (5th ed. 1988).

[33] *See* Wessel, *supra* note 25, at 387.

[34] *Cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 345 (1998) (discussing the origins of the U.S. counter-majoritarian reproach with judicial review being perceived as counter-majoritarian and the majority rule in democracy as being in conflict with minority rights).

[35] *See* Wessel, *supra* note 25, at 387.

[36] *See* Noora Arajarvi, *Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality*, 15 TILBURG L. REV. 163, 163 (2011).

Jennings about the International Court of Justice (ICJ), "'[P]erhaps the most important requirement of the judicial function [is to] be seen to be applying existing, recognized rules, or principles of law' even when it 'creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction.'"[37]

II. JUDICIAL ACTIVISM IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW

The Charters of the Nuremberg and Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR, included rather vague subject-matter jurisdictional headings with broad open-ended definitions of crimes containing no detail of the requisite elements of the crimes, or even possible defences.[38] Coupled with formulations, such as "shall include but not be limited to," the charters explicitly delegated the authority to the judges in expansion of the definitions of crimes in order to adjudicate criminal cases legitimately.[39] Moreover, the procedure of these courts was largely left to the judges to develop and adopt with only the rights of the accused mentioned in the statutes.[40] This was widely seen by critics as *ex post facto* criminal legislation violating the principle of legality, for there was no comprehensive agreement among the legal scholars and practitioners on whether the charged international crimes actually existed *ex ante*.[41] "The prohibition of retroactive [law] was hotly debated . . . by those establishing the tribunal, in the preparatory stage, and by the accused, during the trial."[42]

The most significant judicial expansion of law took place at the ad hoc tribunals – the ICTY and the ICTR – at the end of twentieth century. Take for example the historical trial of Duško Tadic, a Bosnian Serb politician, who was convicted of crimes against humanity, "grave breaches of [the] Geneva Conventions," and other violations of the laws or customs of war. The seminal and innovative decision of the *Tadic* appeals court that concerned a challenge by the defence of the Tribunal's lawful establishment and jurisdiction over

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[37] Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 634 (2005) (quoting MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 232 (1996)) (alterations in original).

[38] *See* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 958–59 (2008).

[39] *See id.* (providing examples of open-ended definitions from the Charters of the Nuremberg and Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR).

[40] Grover, *A Call to Arms*, *supra* note 7, at 547; *see*, *e.g.*, Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144, 146 (1948) (illustrating how during the Nuremberg Trials, the military government legislated the rights of the defendant but left the judges latitude as to the adoption and revision of court procedure).

[41] *See, e.g.*, Andrew Altman & Christopher H. Wellman, *A Defense of International Criminal Law*, 115 ETHICS 35, 38 (2004) (explaining the absence of international crimes against humanity prior to Nuremberg).

[42] WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 406 (2010).

the trial had a profound effect on the development of international criminal law.[43] It elaborated the substantive law and the concept of criminality in reference to internal armed conflicts, seeking in particular to extend the grave breaches regime to non-international conflicts.[44]

To arrive at clearly defined international criminal norms and satisfy the fundamental principles of criminal law – those of legality and specificity – the tribunals had to administer the e~~l~~lusive body of customary international law. Although customary law was assuredly available and could to a certain extent address the tensions with the principle of legality, the level of abstraction of customary law could not provide for readily available specific and articulate legal standards required to adjudicate criminal cases legitimately. Believed to be imbedded in the body of customary law, these numerous quiescent standards were sought after by the judges of these tribunals in the rulings of national courts, international treaties, declarations of international organizations and academic works.[45] The perceived vagueness of the contents of customary international law created anxieties that the law would be created rather than discovered.[46] The subsequent arrival of the jurisprudence of the international criminal courts elaborating specific criminal norms divided the academic and professional world on the question of the origins of now available law. While some argued that the process was the discovery of *ex ante* criminal law that only needed to be retrieved, others advocated for judicial creation of *ex post facto* criminal legislation (either through gap-filling or activist processes) propelled by considerations of substantive justice.[47]

In a renowned example, the ICTR bench in the Jean-Paul Akayesu case encouraged the prosecutor to charge the accused with

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[43] *See* James Podgers, *A Victory for Process: Observers Say Tadi~~c~~é Conviction Enhances Credibility of International War Crimes* 83 ABA J. 30, 30 (1997).

[44] *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion on Jurisdiction, ¶¶ 46–56 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995), http://www.icty.org/x/cases/tadic/tdec/en/100895.htm (explaining how the court attained jurisdiction over Tadic through the Statute of the International Tribunal and how such jurisdiction expanded to other international crimes).

[45] *See, e.g.*, *id.* at ¶ 51 (agreeing with the Secretary-General of the United Nations that these standards were implicit within customary law).

[46] *See* GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 170 (explaining that while there was an assumed concern that judges would begin to legislate, these fears were dispelled by the restriction for judges to create only reasonable foreseeable laws).

[47] *See, e.g.,* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?,* 2 J. INT'L CRIM. JUST., 1007, 1014 (2004) (explaining how the European Court of Human Rights declared that rape became a reasonably foreseeable criminal law only waiting for judicial recognition); *see also* Joseph Powderly, *Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 17, 43 (Shane Darcy & Joseph Powderly eds., 2010) (arguing it is necessary to place as few formal interpretational constraints on judges as possible in order to ensure the effectiveness of the new international criminal mechanism).

the crime of genocide based on the act of rape despite the absence of explicit open-ended elements in the definition of the crime of genocide.[48] In particular, the *Akayesu* bench found that rape and sexual violence committed with the requisite intent to destroy in whole or in part a particular group constituted the crime of genocide.[49] In consequence of the decision, the ICTR expanded rape from its traditional conception as a crime against humanity or a war crime to the crime of genocide (if accompanied by the genocidal intent), regarded as the most heinous among the international crimes.[50] Some commentators argue that this episode of normative expansion is attributable to the presence on the bench of Judge Navanethem Pillay, a South African "judge with extensive expertise in international human rights law and gender-related crimes."[51] "In fact, Judge Pillay instructed the prosecutor to amend the indictment to include the rape as genocide charge."[52] The case was hailed as "the most groundbreaking decision advancing gender jurisprudence."[53] On the other hand, this decision reached far beyond judicial interpretation of law, exhibiting policy-making attitudes effected through judge-made law. This example is illustrative of the tendencies at the ad hoc tribunals to inflate the necessary exercise of judicial gap-filling into activist decision-making vis-à-vis the policies existing at the time the decision took place.

Despite the "growing pains," this historical process can be seen from the angle of having paved the way from substantive justice to greater adherence to strict legality through articulation of specific rules of international criminal law. Besides, in a situation where an international court has before it a case that needs to be decided in the absence of specific law, the court has the choice — either to articulate the law within what was seen or made to be seen as an acceptable and recognized framework, or to drop the idea of adjudicating it altogether. It is a fact that in the absence of relevant legislature, international criminal law two decades ago could not in absolute terms commit itself to the doctrine of strict legality. Instead, its instructions had to give

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[48] *See* Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN. ST. L. REV. 349, 363 (2003) (discussing *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-I, Amended Indictment (September 2, 1998)); s*ee also Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-I, Amended Indictment (September 2, 1998).

[49] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 731–34 (September 2, 1998), http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20APPEAL%20JUDGEMENT.pdf.

[50] *Id.*; *see also* Wessel, *supra* note 25, at 391 (discussing the ICTR elevating the crime of rape to the more serious crime of genocide).

[51] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 318 (2003).

[52] Wessel, *supra* note 25, at 391–92.

[53] Kelly D. Askin, *A Decade of Development of Gender Crimes in International Courts and Tribunals: 1993-2003*, 11 HUM. RTS. BRIEF 16, 17 (2004).

clear content to vague concepts of international criminal law by subjecting the conventional understanding of the principle of legality to significant qualifications.[54]

III. INTERPRETATION AS A MEDIUM OF ACTIVIST REASONING

In addition to vague jurisdictional headings and open-ended definitions of crimes, the statutes of all early criminal tribunals contained no guidance as to the interpretation of their provisions, inadvertently forcing the judges to apply the methods of interpretation available in their own domestic jurisdictions and in the domain of public international law, in particular interpretive methods as provided for by the Vienna Convention on the Law of Treaties (Vienna Convention).[55] These processes to a certain extent were influenced by the judges' mixed cultural and professional background, the tensions between the international criminal law's substantive justice parentage and the strict legality aspirations of criminal law,[56] and varying understanding of the principles of interpretation contained in Articles 31–33 of the Vienna Convention.[57] In search for the norms of international criminal law, the judges employed methods containing rather "inconsistent reasoning with references to . . . principles of interpretation," such as "literal, logical, contextual, purposive, effective, drafter's intent," "progressive," "[h]uman rights standards," and "customary law."[58] This inconsistency manifested in what seemed to be rather dynamic and adaptable choices of the principles to be applied in a specific episode of interpretation of law; it is difficult to define which of the methods and which materials aided the judges in the interpretive process, and to what extent consideration of these methods and materials was necessary.[59] Overall, no consistent hermeneutic was found; none of the interpretive principles had a clear, authoritative definition,[60] which only poured more oil on the flames of the debate on judicial activism at international criminal courts.

The judges of the ad hoc tribunals were not the first decision makers called to interpret international law. As of 1980, when the Vienna Convention entered into force, many international courts and tribunals used the principles of interpretation contained therein as "guidance and justification, as tools to build credibility and to exercise and to assert their judicial function . . . [and] as techniques to order

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[54] *See id.* (discussing how the court in *Akayesu* noted that there was no definition of rape in international law, and had to formulate the definition for that case).

[55] *See* Wessel, *supra* note 25, at 404–05.

[56] *See id.* at 418; Grover, *A Call to Arms*, *supra* note 7, at 554 (underscoring the tension between substantive justice and strict legality); Robinson, *supra* note 38, at 929 (describing the influence judges bring in from their particular fields).

[57] *See* GROVER, CRIMES IN THE ROME STATUTE *supra* note 2, at 48.

[58] Grover, *A Call to Arms*, *supra* note 7, at 547–48*; see also* GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 48–60; MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 126 (1985).

[59] *See* Grover, *A Call to Arms*, *supra* note 7, at 549.

[60] *See id.*

and structure their reasoning process."[61] Despite containing no special provisions with regard to criminal adjudication, the Vienna Convention is recognized by both the ad hoc tribunals and the International Criminal Court as relevant to interpretation of statutory law of these courts.[62]

The "Convention mandates a textual approach to interpretation, with the more discretionary teleological approach used as an ancillary basis."[63] Article 31 of the Vienna Convention provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[64] Thus, where the plain wording of the text cannot provide for a definitive answer to a question, the ordinary meaning should be given to the terms of a treaty "in their context and in the light of its object and purpose."[65] "Not the naked word itself, but its meaning in the totality of its context" is then thought to "provide certainty about how a treaty needs to be interpreted. Interpretation would then be about finding real meaning in a holistic view of the words to be interpreted by looking at . . . what the words aspire to do."[66]

The application of discretionary teleological approaches in the context of international criminal justice might become problematic and yield odd results when, for example, a "presumed expansive purpose is allowed to prevail so decisively over text, context, and other purposes."[67] Consider an example of the ICTY, which has frequently held that the purpose of the Geneva Conventions is to "ensure [the] 'protection of civilians to the maximum extent possible,'"[68] using this mantra to favour a "less rigorous standard" in interpretation of legal provisions.[69] However, it is debatable if the Geneva Conventions in fact reflect just a "singular purpose" (if at all we accept there is a specific purpose or a set of purposes commonly intended by the drafters), for it is one thing to agree on a text, and another to have a

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[61] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 639 (2010).

[62] *See* Grover, *A Call to Arms*, *supra* note 7, at 546.

[63] Wessel, *supra* note 25, at 415.

[64] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

[65] *Id.*

[66] Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOY. L.A. INT'L & COMP. L. REV. 99, 113 (2011).

[67] *See* Robinson, *supra* note 38, at 935 (discussing the departure from strict constructionism).

[68] *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgement, ¶146 (Int'l Crim. Trib. for the Former Yugoslavia March 24, 2000) (quoting Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Chamber Judgement, ¶ 168 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)).

[69] *Aleksovski*, ¶146.

common purpose shared by the parties to a treaty.[70] International treaties are often a product of a compromise or a consensus arising from necessity rather than from a common intent.[71] As Robinson correctly noted

> [i]f the Geneva Conventions had one sole purpose of "maximizing" the protection of civilians, then they would contain only a single article, forbidding any use of force or violence that could affect civilians. Instead, the Geneva Conventions contain complex provisions, indicating a much more nuanced purpose of promoting civilian protection while [at the same time] balancing military effectiveness and state security.[72]

An interpretation that ascribes to the Geneva Conventions purpose to "maximiz[e] humanitarian protection," may "distort the balances struck in the law"[73] and may go beyond the policies established by the drafters, or rather prefer one policy over the others equally promoted by the Conventions.

In this vein, international criminal courts are "heavily influenced by the distinctively liberal . . . [and] progressive approach" to "purposive interpretation" featuring a "distinctively progressive" philosophy that "aims at increasing the protection of human dignity."[74] As the norms of international criminal law "are often drawn from human rights or humanitarian law, practitioners" tend to "fall back on these familiar interpretive approaches"[75] that welcome judicial policy-making through correction of law.[76]

The technique commonly employed by the international criminal courts is:

> (i) to adopt a purposive interpretive approach;
>
> (ii) to assume that the exclusive object and purpose of [the statutory law, instilled by the intent of the parties] is to maximize victim protection; and
>
> (iii) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself.[77]

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[70] *See* Robinson, *supra* note 38, at 935.

[71] *Id.* (discussing the Geneva Convention striking a balance between civilian protection, military effectiveness, and state security).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 933–34.

[75] *Id.* at 934.

[76] *See, e.g.*, Rep. of the Int'l Comm. of Inquiry on Darfur to the U.N. Secretary-General, Int'l Comm. of Inquiry on Darfur, ¶ 494 (demonstrating how the court drew norms from human rights and humanitarian law).

[77] *Id.*

Applying an *a priori* teleological approach that prioritizes victim protection means that there is hardly an ambiguity left, because all ambiguities have already been resolved against the accused.[78] "Victim-focused teleological reasoning" creates "sweeping interpretations" that contradict the fundamental principles of criminal law and therefore appear as aggressively activist in nature.[79] Moreover, "the assumption that criminal norms must be coextensive with similar norms in human rights or humanitarian law, overlook[s] the different structure and consequences of these areas of law, and thus neglect[s] the special principles necessary for blame and punishment of individuals."[80]

Overall, the intent of the parties can present a serious challenge in the complex context of international criminal law. The text of a treaty and the supplementary means of interpretation, such as *travaux préparatoire*, are arguably the most reliable source of extraction of the parties' intention.[81] As mandated by the Vienna Convention, the search for the intent boils down to essentially textual matter which "comes in two very different guises" — ordinary meaning prescribed by the Convention and "surface textualism."[82] The ordinary meaning approach, endorsed by many judges of the ad hoc tribunals,[83] "relies on the meaning of language shared by the legislative drafter and statutory audience."[84] A meaning is ordinary only if the drafter and the audience have agreed on the understanding of textual meaning.[85] In the absence of such an agreement, the judicial proclamation that a certain text has resolved into an ordinary meaning or even has remained an ambiguity is subject to unfettered judicial discretion, limited at best by the boundaries of common-sense logic, if we accept its relative existence.[86] Even in the presence of common understanding, the application of the text to the facts of a "case may look strange."[87] "The judge must then decide whether the legislature has the responsibility to write the text to prevent strange results, or whether the judge has the responsibility to decide the case other than in accordance with ordinary meaning."[88] Consider, for example: "(1) a drafting error; (2) changing circumstances which make

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[78] *See* William Schabas, *Interpreting the Statutes of the Ad Hoc Tribunals*, *in* MAN'S INHUMANITY TO MAN 847, 886 (2003).

[79] *See* Robinson, *supra* note 38, at 929.

[80] *Id.*

[81] *See* Martin Ris, *Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 14 B.C. INT'L & COMP. L. REV. 111, 114–115 (1991).

[82] *See* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L. J. 865, 872 (1993).

[83] *See* GROVER, CRIMES IN THE ROME STATUTE *supra* note 2, at 49.

[84] *See* Popkin, *supra* note 82, at 875.

[85] *Id.*

[86] *See id.*

[87] *Id.*

[88] *Id.*

historical plain meaning seem odd,"[89] such as for example the protected groups of the crime of genocide.[90]

"Surface textualism," much like Schlesinger's "champions," conservatively interprets a text "in light of an ideal drafter's conception of grammar and style."[91] This technique "is not genuinely concerned with the understanding of language shared by writer and audience" beyond the actual text.[92] Instead, the understanding remains on the surface of the document, imposing standards of grammar and style without regard for the common understanding of language.[93] The "assumption of surface textualism is the rejection of judicial law making" in both its gap-filling and activist forms.[94] The text is the law, not for the purpose of deferring to plain meaning, but to avoid judicial interventions in law-making. Surface textualism "is most apparent when the judge" approaches the "body of statutory law as . . . a super text," with ideal integration of all its components where "the same word has the same meaning throughout the statutory code."[95] In relation to this approach, as famous American judge Learned Hand noticed, "there is no surer way to misread any document then to read it literally."[96]

In the context of international criminal law, the aspirations of this approach have little practical value. Reference to "context" in Article 31 of the Vienna Convention, for example, qualifies textual technique by encouraging a more inclusive approach with application of interpretive aids that range from the very text of the treaty, to the treaties "that form the basis of a particular provision," to "historical context," "the nature of international law," and the "nature of the conflicts," to name a few.[97] By providing a generic guidance into interpretation, the principles of interpretation contained in the Vienna Convention become the subject of the judicial choice arrived at by reference and on the grounds of considerations and policies that might very well be other than those intended by the law. In this regard Koskenniemi remarks that the existence of these rules does not provide any "safeguard[s] against arbitrariness."[98] The practice of the ad hoc tribunals in some cases exhibits a clear departure from the postulations of the Vienna Conventions and its aspirations to "order

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[89] *Id.* at 875–76.

[90] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 731–34 (September 2, 1998), http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20%20APPEAL%20JUDGEMENT.pdf.

[91] Pokin, *supra* note 82, at 872.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

[97] *See* GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 52.

[98] Martii Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 2 EUR. J. INT'L L. 215, 216 (1997).

and structure their reasoning process"[99] and therefore to introduce a sustainable interpretive method aiming at enforcing the principle of legality in criminal adjudication.

The *Kunarac* appeals chamber, for example, admitted that interpretation of what constitutes war crimes should be informed by the recent developments of law and custom.[100] Labelled progressive interpretation, this technique found support with other chambers of the ad hoc courts, such as the *Musema* trial chamber and its "conceptual definition" of the crime of rape,[101] or the *Tadic* appeals chamber and its expansive interpretation of jurisdiction.[102] Long before indirect perpetration found its way to the jurisprudence of the International Criminal Court, the concept was applied by the *Stakic* court.[103] Later, Judge Schomburg of the *Simic* trial chamber in its dissenting opinion sought to adopt it as a distinct mode of liability.[104] As Grover points out, the "changing world" argument of the Nuremberg tribunal to which many of these chambers refer to in support "could speak equally to changes in social mores or technology rather than legal developments."[105]

Thus, interpretation in international criminal law increasingly invokes notions of fundamental values or community interests, as overriding interpretive guidelines.[106] In this vein, Venzke, for example, in line with Paretti's arguments discussed above, argues that interpretation may not only be about finding the intent of the parties, "but also what interests the [international] community," or "what is morally the best answer."[107] Any of these approaches tends to share the assumption that the judges as interpreters find something that is already "out there" be it the intent of the parties, the interest of international community or morality's best answer. In doing so, the judges of international criminal courts "seek stable ground" to justify their decisions "as based on something that already exists."[108]

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[99] *See* Van Damme, *supra* note 61, at 639.

[100] Prosecutor v. Kunarac, Case No. ICTY-96-23, Judgement, ¶ 67 (June 12, 2002).

[101] *See* Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement and Sentence, ¶ 228 (Jan. 27, 2000).

[102] *See* Prosecutor v. Tadic, Case No. ICTY-94-1-AR/72A, Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction (Oct. 2, 1995), http://www.icty.org/x/cases/Tadíc/acdec/en/51002.htm (noting that a narrow interpretation of jurisdiction could be appropriate for a national law, but not in international law).

[103] *See* Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 741 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) (applying the concept of indirect perpetration).

[104] *See* Prosecutor v. Simic, Case No. ICTY-95-9-A, Judgement, Dissenting Opinion of Judge Schomburg, ¶ 17 (Nov. 28, 2006).

[105] *See* GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 57.

[106] *See* Venzke, *supra* note 66, at 114.

[107] *See id.*

[108] *Id.*

It appears that the tendency to imbue the judges of international criminal courts with discretion to take for the law concepts as vague as interests of international community and morality might stimulate their use in resistance to the law that does not coincide with subjective values of a particular judge. Moreover, absence of comprehensive and strictly construed statutory rules at the ad hoc tribunals stimulated the decisions made on the basis of sources other than the statutory law – customary international law and principles of law. In this setting, telling activism from the unavoidable gap-filling would require the showing of defiance of the established principles and rules of international law, which per se can be a rather flexible and relativist exercise, as the norms of customary international law as well as the content of the principles of international law are far from consistency. From the perspective of criminal law, such a situation undermined the legitimacy of criminal justice, and yet at the same time stimulated the criminal justice system to bring itself into balance by thrusting the progressive development of much needed specific criminal law rules.

IV. JUDICIAL ACTIVISM AND THE ROME STATUTE

While many academicians and practitioners appreciated the progressive developments that had taken place at the ad hoc tribunals with the tremendous up-growth of normativity in international criminal law, the creators of the permanent international criminal court with permanent jurisdiction "were not anxious for it to be repeated."[109] Well aware of the normative realities in which the ad hoc tribunals had to adjudicate their cases, the delegates at the Rome Conference in 1998 closely followed the principle of specificity in negotiating the treaty that was to establish the new court.[110]

Unlike the statutes of the ICTY and the ICTR whose drafts were proposed by the UN Secretary General and subsequently approved by the UN Security Council, the statute of the ICC was a product of many years of multilateral negotiations dating back to 1994 when the International Law Commission presented its Draft Statute.[111] During the early negotiations, the many delegations to the ICC's Preparatory Committee meetings prior to the Rome Conference sought inclusion of the familiar "open-ended elements" of crimes "to expand the discretion of the court."[112] Seeing the gap-filling role of the judges as desirable, they argued that the ICC's judges, much like the judges of the ad hoc

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[109] *See* William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 755 (2008).

[110] *See* Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 152 (1999).

[111] GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 69–70.

[112] *See* William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L. J. 477, 482 (1999). William Lietzau was a member of the U.S. delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court. *Id.* at 480.

tribunals, would in a much familiar way address problems arising from ambiguity in the law.[113] Mindful of the interpretive legacy of the ad hoc courts, the critics argued that judicial practice of this nature, even if deliberately delegated, creates tensions between the judicially propelled normative expansion and instructions of the fundamental principles of criminal law regardless of the legal system in which it operates.[114] In the words of William Lietzau, "several hundred years of experience recommend against imbuing judges with legislative power."[115]

At the conclusion of the negotiations, the creators of the court included in the Rome Statute an exhaustive list of defined crimes and adopted the Elements of Crimes and the Rules of Procedure and Evidence as a response to the policy-making legacy of the court's predecessors.[116] The resulting text of the Rome Statute and its high degree of specificity in the definitions of crimes, as well as the inclusion of Articles 21 and 22 containing interpretive guidance, may evidence the drafters effort to keep the judges out of uncontrollable law-making.[117] For this reason, and the many differences inherent in the establishment of the ICC, the normative framework of the permanent court formulates certain limitations to the exercise of gap-filling.[118] The detailed statutory law of the ICC however is unlikely to preserve its decision-making practices from the activism proper, although is likely to make it more difficult to justify.

Despite its detailed codified rules, and despite the fact that the court does not formally recognise the doctrine of *stare decisis*, the practice of the ICC, just like the practice of its predecessors, exhibits judicial patterns much like those found in common law precedential structure.[119] The chambers of the court tend to follow the established precedent even when the interpretation of the statutory law on which the precedent is based might appear as somewhat overarching and innovative in nature. The precedential bias of the court may unseal the loophole through which judicial decision-making can make its way into the policy-making of the court, despite the aspirations of the court's creators to the contrary.

V. RULES OF INTERPRETATION IN THE ROME STATUTE

In contrast to the ad hoc tribunals, where the judges "determine[d] . . . the additional sources of law they would draw upon," the ICC in its statutory law contains provisions that are designed to

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[113] *Id.* at 481–82.

[114] *Id.* at 482.

[115] *Id.*

[116] *See* Dominic McGoldrick, *Criminal Trials Before International Tribunals: Legality and Legitimacy*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES, 9, 44 (David McGoldrick et al. eds., 2004).

[117] *See id.*

[118] *See* Wessel, *supra* note 25, at 396.

[119] *See id.* at 410–11.

minimise the straightforward accessibility of relatively vague customary law and principles.[120] "Article 21 of the Rome Statute is . . . an important innovation" that determines the "sources of law" and "the relative weight" these sources should "be accorded."[121] This article contains a comprehensive hierarchy of applicable law, which is a three-tier cascade of applicable norms. It mandates the primacy of application of the statutory law of the court. If the statutory law of the court does not give a definitive answer to resolve an issue, it is to be followed by the "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."[122] In fact, the issue of the auxiliary facility in the sources of law again arose at the ICC's Preparatory Committee meeting.[123] A group of states advocated for full-fledged application of the principle of legality on the basis of *lex scripta* by providing the court with a comprehensive and exhaustive set of rules.[124] Another, much larger group, held that such approach would ignore the "nature of the international legal order."[125] To avoid such a limiting approach, the majority suggested that "the judges should be allowed to identify and take into account general principles of international law."[126] The reference to the established principles and rules of international law in fact refers to customary international law[127] that historically has been both the source of law and the interpretive aid in relation to gap-filling and interpretation of the statutory law of the ad hoc tribunals.[128] Finally, failing still to resolve the issue at hand, the court shall move on to "general principles of law derived by the Court from national laws of legal systems of the world."[129] In *Bashir*, pre-trial chamber I confirmed that

> [T]hose other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna*

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120 *See* SCHABAS, *supra* note 42, at 381–82.

121 *Id.* at 382.

122 *See* Rome Statute, *supra* note 5, art. 21. Part 3 of the Rome Statute enumerates general principles of international criminal law to be applied to crimes within the jurisdiction of the Court. *Id.*

123 *See* BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW 291 (2010).

124 *See id.*

125 *Id.*

126 *Id.*

127 *See* KAI AMBOS, DER ALLGEMEINE TEIL DES VOLKERSTRAFRECHTS 43–44 (2002).

128 *See* Grover, *A Call to Arms supra* note 7, at 563–64.

129 *See* Rome Statute, *supra* note 5, art. 21.

> *Convention on the Law of Treaties* and article 21(3) of the Statute.[130]

Article 21 is important because it provides for a nuanced approach to the sources of law in comparison to that of the authoritative list of sources of public international law set out in article 38(1) of the Statute of the International Court of Justice that does not establish a hierarchy among the primary sources: convention, custom and general principles.[131] In this light, the innovations of article 21 may reflect the attempt of the drafters to harness creativity inherent in public international law by subjecting it to fundamental principles of criminal law — separation of the culpable on the basis of predefined strictly construed norms accepted as legitimate authority.[132] Article 21 proclaims primacy of such authority — the sources contained in paragraph 1(a). Paragraphs 1(b) and 1(c), with all the vagueness of the sources of law they contain, are primarily helpful to the court as both the gap-filling facility, and most importantly as the court's utility to interpret the Statute where the Statute's phraseology leaves ambiguities unresolved by resorting to the prescriptions of the Vienna Convention.[133] Article 21(3) further elaborates its interpretative instructions by subjecting the judicial consideration of the abovementioned sources to "internationally recognized human rights."[134]

Besides interpretive guidelines of article 21, the Rome Statue in its article 22 expressly addresses interpretive purposes by compelling the principle of legality, which was not a part of statutory *lex scripta* in any of the foregoing international criminal courts.[135] The ad hoc tribunals have applied the principle "rather flexibly" accepting that judge-made law does not offend the principle of legality, "providing the law is foreseeable and accessible."[136] Unlike the ICC, the ad hoc tribunals prosecuted crimes that had been committed prior to its coming into operation and therefore had to ensure that the offences conformed to customary law while at the same time elaborating on the vague norms of the custom.[137] In the ICC's qualitatively different

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[130] Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for the Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 126 (Mar. 4, 2009).

[131] *See* SCHABAS, *supra* note 42, at 381–82, 391 (illustrating article 21 and the guidelines it sets out in finding sources of law).

[132] *See id.* at 391.

[133] *Id.*

[134] *See* Rome Statute, *supra* note 5, art. 21, ¶ 3.

[135] *Id.* art. 22. Article 22 provides for the individual elements of the principle of legality by including prohibition of non-retroactivity, rule of strict construction, prohibition of analogy, and no interpretation *in malam partem*. *See id.*

[136] *See* SCHABAS, *supra* note 42, at 404.

[137] *See id.* at 406 (elaborating that "unlike the earlier models of Nuremberg, Tokyo, The Hague, Arusha, and Freetown, the International Criminal Court does not purport to prosecute offences committed prior to its coming into force").

circumstances, the function of the principle of legality in the Rome Statute is to ensure the role of the states parties to the Rome Statute and the court's legislative authority — the Assembly of States Parties — as distinct from the role of judiciary in interpretation and application of law. In absolute terms, however, the application of the doctrine of strict legality in the ICC might be underpinned by considerations of substantive justice as long as the court does not yield new policies that have not been envisioned by the states parties thus surpassing the Assembly of States Parties in its legislative discretion.[138] This can be illustrated by the instances where the Assembly of States Parties as the legislator has left the door open for judicial creativity and considerations of substantive justice.[139] Take for example the residual category of "other inhumane acts of a similar character" as a "crime against humanity."[140]

Read together, articles 21 and 22 safeguard the principle of legality and instruct the judges to use the principle as a primary interpretive guide.[141] The important effect of article 22 is de facto proclamation of primacy of the textual approach to interpretation as opposed to teleological interpretation common at the ad hoc tribunals. Some commentators suggest that the ICC, unlike the foregoing tribunals, should develop a consistent methodology of interpretation of its statutory law based on the instructions of articles 21 and 22 of the Statute and the apposite prescriptions of the Vienna Convention.[142] Thus, Sadat and Jolly, for example, offer a seven-tier hierarchical interpretive methodology that:

(i) accords primacy to the plain meaning of the text of the statute (article 21(1)(a)) and the context

(ii) in light of the object and purpose of the statute and the principle of legality,

(iii) followed by the *travaux préparatoire* to resolve ambiguities of the statute's phraseology;

(iv) sources contained in articles 21(1)(b), 21(1)(c) and 21(2);

(v) provisions of article 21(3),

(vi) considerations of judicial efficiency and the effectiveness of trials (subject to article 21(3));

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[138] *See* Grover, *A Call to Arms*, *supra* note 7, at 555.

[139] *See id.* at 554–55 (illustrating that because the International Criminal Court "cannot adhere to strict legality doctrine absolutely," it is subjected to certain qualifications "underpinned by considerations of substantive justice").

[140] *See* Rome Statute, *supra* note 5, art. 7, ¶ 1(k).

[141] *See* Wessel, *supra* note 27, at 414.

[142] *See* Leila Sadat & Jarrod Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot*, 27 LEIDEN J. INT'L L. 755, 755–56 (2014).

> (vii) and finally considerations of normativity of international criminal law, its transparency and consistency. [143]

This, as argued by Sadat and Jolly, should allow for the court to retain the necessary creativity within the framework of established interpretative techniques without inflating it to the proportions of "judicial activism." [144]

It is noteworthy that the drafters of the Rome Statute have subjected the carefully crafted hierarchy of applicable law enshrined in article 21(1) and the import of strict construction of article 22 to considerations of internationally recognised human rights as mandated by article 21(3). The fact that the application and interpretation of all court's legal texts must be consistent with the concept as vague as internationally recognized human rights opens Pandora's box and effectively questions the mandatory nature of the Statute's interpretive regime and the principle of legality itself. The antilogous capacity of article 21(3) sits in entrusting the judges with a powerful discretion to dismiss any provision of any of the court's instruments on the pretext of its inconsistency with internationally recognized human rights, the concept to which the Rome Statute gives no definition whatsoever.[145] As Powderly remarked, the role of article 21(3) is somewhat "ironic, given that the supposed rationale for its inclusion lay once again with 'the principle of legality and the desire to limit judicial discretion.'"[146] However, one may also argue that internationally recognized human rights, as vague as they can be, almost certainly include within their ambit the very principle of legality.[147] In this sense, articles 21(3) and 22 are not entirely antecedent to one another. Rather, read together these provisions are called to provide for a balance between the principle of legality and the rights of the accused.

The concept of treaty interpretation as provided for in the Vienna Convention should be resorted to cautiously "to avoid displacement of the applicable law."[148] If the principle of legality were to be applied appropriately, it would require that "considerations of context, object and purpose as well as interpretive aids," should not be invoked to broaden or modify the plain meaning of *lex scripta* of the statutory instruments.[149] In this regard, relying on the rules of interpretation laid down in the Vienna Convention, as suggested by Sadat and Jolly

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[143] *See id.* at 764.

[144] *See id.* at 758.

[145] *See* Rome Statute, *supra* note 5, art. 21.

[146] *See* Powderly, *supra* note 6, at 485 (quoting LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 48 (2014)).

[147] *See id.* at 486.

[148] *See* Grover, *A Call to Arms*, *supra* note 7, at 574.

[149] *See id.* at 557.

and as instructed by the *Bashir* pre-trial chamber,[150] might be inappropriate in regard to the substantive law. The Vienna Convention, after all, with its contextual, teleological and purposive interpretative prescriptions has never been intended for the straightforward application to a criminal law treaty for the purposes of establishing individual criminal responsibility.[151]

The ambiguous interpretive machinery of international law with its wealth of methods and techniques allows the judges to select a particular method of interpretation in order to justify the preferred outcome, which in reality may largely be based on non-legalistic grounds, such as personal preferences or idiosyncratic policy principles.[152] Moreover, considerations of substantive justice and other arguments that might undermine the principle of legality, such as immorality, the changing world, foreseeability, essence of the offence, reclassification of the offence and others,[153] often stand on the way of the authoritative determination of the content of this principle for international criminal justice. Considerations of substantive justice, invoked in support of the social interest to prosecute, condemn and punish antisocial conduct, commonly limit the scope of strict legality not only on the international level but also in various national jurisdictions, where the absolute application of the doctrine of strict legality in theory receives practical qualification by considerations of substantive justice.[154] The absence of consistent interpretive methodology at the ICC may be detrimental to the objectives of the court's detailed statutory law when normative specificity is subjected to judicial creativity.

VI. JUDICIAL ACTIVISM IN THE PRACTICE OF THE ICC

The practice of the ICC consistently exhibits the uneasy dynamics between the detailed statutory law of the ICC, its interpretive prescriptions, and the propensity of the judiciary to search for innovative solutions based on idiosyncratic preferences. Although the detailed review of the entire court's practice is outside the scope of the given work, below follow the examples that are illustrative of the activist potential in judicial decision-making at the International Criminal Court.

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[150] *See* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for the Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 126 (Mar. 4, 2009).

[151] *See* Jennifer Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT'L L. REV. 857, 876 (2002) (explaining the original purpose of the Vienna Convention, which was to protect the roles and functions of foreign consulates).

[152] *See* Vitalius Tumonis, *Judicial Creativity and Constraint of Legal Rules: Dueling Cannons of International Law*, 20 U. MIAMI INT'L & COMP. L. REV. 93, 95, 132 (2012).

[153] *See* GROVER, CRIMES IN THE ROME STATUTE, *supra* note 2, at 108, 151.

[154] *Id.* at 109.

The *Lubanga* case[155] — the ICC's first trial — against the Congolese warlord Thomas Lubanga Dyilo is perhaps the most controversial example of creative decision-making in the court's practice. Lubanga was charged with conscription and enlistment of child soldiers by committing the crime "jointly with another,"[156] which is to say by co-perpetrating the crime. When interpreting the word "committed" in article 25(3)(a) in order to accommodate the concept of co-perpetration within the ambit of commission and thus to distinguish between co-perpetration as the principle liability and forms of accomplice liability, the majority of the trial chamber chose to assign a complex meaning to the concept of commission basing its reasoning on "control theory" of co-perpetration.[157] The theory was pioneered in 1960s by Claus Roxin, a leading German theorist of criminal law, and accepted by German criminal law.[158] It requires that the co-perpetrator to make an "essential" contribution in the commission of a crime to be principally liable.[159] Such interpretation departed from the arguably obvious and settled solution to hold that co-perpetration is equivalent to joint criminal enterprise type I liability (JCE I), the mode of liability that the ad hoc tribunals had created and used for two decades, and that requires contribution in just any way to be considered principle to the crime – commission. The resulted jurisprudence, that incorporated the German theory and developed a complex distinction within the concept of commission, set the course of the ICC's understanding of the commission of a crime.[160] This new approach was fundamentally different from traditional — it focused on the quantity of an individual's involvement in the crime ("essential contribution") to qualify him as a principal to a crime, as opposed to the traditional focus on the quality of the involvement.[161] In accordance with the traditional JCE liability, co-perpetration requires an agreement to commit a crime — a common plan —

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[155] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (January 29, 2007); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (March 14, 2012).

[156] *See* Rome Statute, *supra* note 5, at art. 25; *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 9 (January 29, 2007).

[157] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶ 994 (March 14, 2012); *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, ¶ 10 (Mar. 14, 2012).

[158] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, ¶¶ 10–11 (Mar. 14, 2012).

[159] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 999 (Mar. 14, 2012).

[160] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 330 (Jan. 29, 2007).

[161] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 999 (March 14, 2012).

whereas modes of participation such as instigation, aiding and abetting, and contributing to a group crime do not.

Judge Adrian Fulford, a judge with the common law background, took issue with the majority decision, arguing that such interpretation of the clear language of article 25(3)(a) was erroneous and that it had improperly incorporated a theory originating from the German jurisdiction into article 25(3)(a).[162] Later in *Ngudjolo Chui*, Judge Christine van den Wyngaert, a judge with the civil law background, joined Judge Fulford in his criticism and dismissed the reasonableness of the prevailing interpretation of commission in the ICC's jurisprudence.[163]

Indeed, the majority decision does not provide much insight into the basis on which they preferred a German law theory to any other national theory or to the JCE theory.[164] The inventive interpretation of article 25(3)(a) is rather striking given that it was the result of interpretation not of the vague customary norms or principles of law – they in fact were disregarded completely even as interpretive means – but of detailed and clear wording of the Rome Statute. This illustrates the point made earlier: the level of detail in law is no safeguard from the activist judging.

Another similar example from the ICC jurisprudence that demonstrates the dynamics is the interpretation by the pre-trial chamber in the Kenya situation of the policy requirement imposed by the Rome Statute on "crimes against humanity."[165] The pre-trial chamber in deciding whether to permit the prosecutor of the court to launch an official investigation into the situation had to interpret article 7(2)(a) of the statute that requires that the attack against any civilian population be committed pursuant to or in furtherance of a "state or organizational policy" to commit such an attack.[166] Unlike in the *Lubanga* case, where the subject of interpretation – commission – was previously at the heart of practice at the foregoing tribunals, the policy requirement as a separate contextual element of crimes against humanity was a novel introduction by the Rome Statute into

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[162] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, ¶ 10 (Mar. 14, 2012).

[163] Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Wyngaert, ¶¶ 41–42 (December 18, 2012).

[164] *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶ 994 (March 14, 2012).

[165] Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 77–79 (Mar. 31, 2010).

[166] *See* Rome Statute, *supra* note 5, art. 7(2)(a).

international criminal law.[167] It was put to the chamber that the gangs of young men who conducted the attacks, and who enjoyed varied forms of support from the main political parties of Kenya, acted in furtherance of a "state or organizational policy."[168] As the statute does not provide for any criteria pursuant to which a group may qualify as an "organization" for the purposes of article 7(2)(a), the majority sought clarification through interpretation, the result of which was the definition establishing low threshold for policy, which allowed for a conclusion that groups responsible for violence in Kenya can be considered organizations despite the lack of state-like nature.[169]

At the forefront of their reasoning, the majority placed the consideration of "whether a group has the capability to perform acts which infringe on basic human values."[170] The majority did not offer much explanation to substantiate this preference, with the exception of an isolated excerpt from a scholarly opinion.[171] The interpretive prescriptions of article 21 invoking, *inter alia*, the context of other statutory provisions, customary law and principles[172] remained unused. Instead, the majority used a mere declaration of their preference in the 'basic human values' criterion.[173] The decision-making of the majority seemed to abandon the exercise of interpretation all together and jumped all the way to the desired result.

In consequence, the resulted conclusion inflated the scope of crimes against humanity to the effect that any group directing an attack against any civilian population and at that performing acts infringing on basic human values could now qualify as an organization for the purposes of article 7(2)(a). It is very unlikely that the drafters of the Rome Statute intended to blur the borderline between crimes against humanity, as a category of international crimes, and serious national crimes through introduction of this relatively low threshold. There is no doubt that crimes against humanity are acts that infringe on basic human values.[174] The point is, however, that such acts should

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[167] Statutes of the ad hoc tribunals do not include a policy requirement in the definition of crimes against humanity. *See* Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Kaul, ¶ 31 (Mar. 31, 2010). However, in the practice of the tribunals "the consideration of 'policy' . . . may have evidential relevance for the presence of a 'systematic' attack." *Id.*

[168] *Id.* ¶¶ 115–16 (majority opinion).

[169] *See id.* ¶ 117 (applying an expanded definition of "organization").

[170] *Id.* ¶ 90.

[171] *Id.* (quoting Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 EUR. J. INT'L L. 533, 567 (2008).

[172] *See* Grover, *A Call to Arms*, *supra* note 7, at 556.

[173] Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 90 (Mar. 31, 2010).

[174] *See* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 87 (2004).

meet specific requirements in order to reach the level of crimes against humanity. "[I]t is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the acts are embedded."[175] Yet, the majority decision seems to defy this fundamental canon.[176]

Grounded in the court's statutory law and other sources of law mandated by article 21, Judge Hans-Peter Kaul in his dissenting opinion pointed out that the consequences of such interpretation could entail an indefinite expansion of the scope of the Court's interventions into crimes that are to be prosecuted by the national criminal justice systems, thus infringing on the sovereignty of the States that created the ICC and set the limits to its jurisdiction.[177] Such approach would be at odds with the court's mandate of addressing "serious crimes of concern to international community as a whole," which in turn would undermine the very nature of international criminal law.[178] Indeed, it is unlikely that the Statute in light of its context and purpose attributes the capacity to adopt and impose a policy to any group that can infringe on basic human values. To be able to carry out such policy on a level necessary to meet the requirements of crimes against humanity, a group would need to be in possession of a certain level of state-like organisation.[179] Any other groups (including those of organized crime) would fall outside the scope of article 7(2)(a). The conclusion of the majority is closely tied to the failure of choosing and employing the appropriate interpretive methods in identification and clarification of applicable law.[180]

Loose interpretation of law affects not only substantive law of the court but also its procedural law. In August 2015, the Ruto trial chamber for the first time considered the interpretation and application of rule 68 of the rules of procedure and evidence since it had been amended by the Assembly of States Parties in 2013.[181] The amended rule 68, in particular its sub-rules 68(2)(c) and 68(2)(d), introduced new admission mechanisms in relation to prior recorded testimony, which allowed the *Ruto* trial chamber to admit into

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[175] Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Kaul, ¶ 52 (Mar. 31, 2010).

[176] *See id.* ¶ 117 (majority opinion) (concentrating on the overall scope of the crime instead of the constitutive contextual elements).

[177] *Id.* ¶ 10 (Kaul, J., dissenting).

[178] *See id.* ¶ 17.

[179] *See id.* ¶ 51–52.

[180] Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1218 (2009) (noting that, although difficult to define, judicial activism "is tied to the practice of judging" by using inappropriate judicial methods, not merely obtaining poor results).

[181] *See* I.C.C. Assembly of States Parties, Amendments to the Rules of Procedure and Evidence, Res. ICC-ASP/12/Res.7 (November 27, 2013) [hereinafter 2013 ICC Rules of Evidence and Procedure Amendments], https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf.

evidence for the truth of its contents testimony against the accused, that the prosecution recorded before the amendment had taken place, of five witnesses who subsequently either recanted the evidence under oath or being allegedly subjected to interference refused to testify at all.[182]

In contrast to the old version of the rule, the newly amended rule 68 borrowing from the procedural law of the ad hoc tribunals increased the instances in which the prior recorded testimony can be introduced in lieu of oral testimony.[183] Similar procedural law of the ad hoc tribunals allowed for admission of written statements and transcripts of witnesses previously given in proceedings before these tribunals.[184] The new rule 68 imposes no such limitations and allows for admission of "prior recorded testimony" that may have never been produced in court or may have been produced in fora other than the ICC.[185] Another significant novelty that the amendment introduced was admissibility of prior recorded testimony that goes to proof of acts and conduct of the accused.

In terms of intention behind the proposal, the amendments pursue two major goals: (i) to facilitate expeditiousness and efficiency of proceedings, and (ii) to overcome obstacles to appearance of witnesses in person to testify, such as threats, intimidation or coercion.[186]

One of the controversial interpretive issues in the decision was the construction of "retroactivity" and the "detrimental effect" in the alleged retrospective application of the amended rule 68 to the Ruto case.[187] The trial chamber held that the resolution of the ASP that

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[182] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶¶ 1, 23, 33 (Aug. 19, 2015).

[183] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 33 (Aug. 19, 2015).

[184] *See*, *e.g.*, International Criminal Tribunal for Former Yugoslavia, Rules of Procedure and Evidence, Rule 92, (amended December 10, 2009), http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 92, (amended May 13, 2015), http://unictr.unmict.org; Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 92, (amended May 14, 2005), http://www.securitycouncilreport.org.

[185] *See* 2013 ICC Rules of Evidence and Procedure Amendment, *supra* note 181, ¶ 2.

[186] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 12 (Aug. 19, 2015).

[187] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 19 (Aug. 19, 2015).

effected the amendment,[188] article 24(2)[189] and article 51(4)[190] of the Statute read together take the amended rule 68 out of the scope of the principle of non-retroactivity in the sense that the introduced procedural novelties in this particular case are of neutral application and are not detrimental to the fundamental rights of the accused.[191]

The court made its finding despite the fact that the resolution of the ASP that had effected the amendment in its relevant paragraph leading into the text of the amended rule emphasized the importance of non-retroactivity of the new law by specifically referencing article 51(4) in relation to the rule 68 amendments.[192] The resolution held:

> the following shall replace rule 68 of the Rules of Procedure and Evidence, emphasizing article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of accused . . . .[193]

In his partly concurring opinion, Judge Eboe-Osuji as a matter of *obiter dictum* concurred with the majority in that rule 68, as such, was not excluded from the case, but rather limited in application subject to its detrimental effect on the accused in the present case and in this particular situation.[194] He, however, made a very important observation in that, as any regulatory instrument, the amendments to the rules of procedure "in their own terms can very well operate in a manner that can have detrimental effect on the rights of the

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[188] 2013 ICC Rules of Evidence and Procedure Amendment, *supra* note 168, ¶ 2.

[189] Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 22 (August 19, 2015). The decision quoted the following portion of the Rome Statute: "In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply." *Id.* ¶ 22 n.28 (quoting Rome Statute, *supra* note 5, art. 24(2)).

[190] *Id.* at ¶ 17 n.24. The decision quoted Article 51(4) which reads: "The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted. *Id.* (quoting Rome Statute, *supra* note 5, art. 51(4)).

[191] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶¶ 19, 23–27 (Aug. 19, 2015) (explaining that Article 51(4) would "only bar the application of the amended Rule 68 if it applied 'retroactively to the detriment of the person who is being prosecuted'").

[192] 2013 ICC Rules of Evidence and Procedure Amendment, *supra* note 181, ¶ 2.

[193] *Id.* (emphasis omitted).

[194] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony,' ¶ 18 n.2 (Aug. 19, 2015).

accused."[195] Indeed, altering the rules of evidence can make a conviction likelier than before the changes are introduced.[196] It is not unlikely that unsworn evidence of a recanted or an absent witness taken by an interested party and accepted by the court for the truth of its content is at least potentially detrimental to the accused in light of the guarantees provided by the law at the time of trial's commencement.[197] In this regard, the ASP, as the legislator in the context of the ICC, in its resolution specifically referenced article 67 of the Rome Statute that, *inter alia*, protects the rights of the accused to confront witnesses against him, at least those witnesses that testify to the accused person's acts and conduct.[198] This appears to be a legislative message of what shall not fall out of the scope of the principle.

In this regard, the appeals chamber responding to an application by the African Union decided to allow the Union to present its *Amicus Curiae* observations in appeal in order to shed light on the intent of the states parties vis-à-vis the non-retroactivity principle in relation to the amended rule 68.[199] The African Union represents the position of more than a fourth of the entire ASP's membership.[200] In its observations, the AU explained that retroactive application of the amended rule would be "in contravention of the understanding achieved during the negotiations" in that it would not be applied to ongoing proceedings.[201] The AU explained that "the thrust of the amendments was to streamline the presentation of evidence as a means of reducing the length of ICC proceedings"[202] and to "have a deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the trial

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[195] *Id.*

[196] *See*, *e.g.*, Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶¶ 19, 23–7 (Aug. 19, 2015) (with the adoption of Rule 68, incriminating testimony was admissible against Ruto which would otherwise not have been admissible, contributing to his conviction).

[197] However, acceptance into the evidentiary record does not automatically accord the evidence with strong probative value. The court might attach little weight to the evidence when it deliberates on the final issue.

[198] *See* 2013 ICC Rules of Evidence and Procedure Amendment, supra note 181, ¶ 2.

[199] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, The African Union's *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties, ¶¶ 2– 3 (Oct. 19, 2015).

[200] The AU consists of 54 African countries. *Member States of the AU*, AFRICAN UNION, http://www.au.int/en/AU_Member_States (last visited Nov. 11, 2016). Of these countries, 34 are also states parties to the Rome Statute, making Africa the continent with the most members. *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20 parties%20to%20the%20rome%20statute.aspx (last visited Nov. 11, 2016).

[201] *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, The African Union's *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties, ¶ 52 (Oct. 19, 2015).

[202] *Id.* ¶ 10.

chamber as evidence."[203] The retroactive application of the rule 68 to the ongoing cases therefore, in the opinion of the AU, would defeat the very purpose of the amendments.[204]

In February 2016, the appeals chamber reversed the decision of the trial chamber "to the extent that prior recorded testimony was admitted under the amended rule 68 . . . for the truth of its contents."[205] The appeals chamber found that the rule 68 was applicable subject to the requirements of article 51(4) of the statute – that is whether the new law is "applied retroactively *to the detriment of the accused*."[206] The change of the procedural regime during the course of the trial made it possible to admit prior recorded evidence that would not have been admissible in this form under former rule 68 without proper opportunity of the accused to cross-examine the witnesses. The retroactive application of the rule therefore was detrimental to the accused.

Recalling the Schelsinger's understanding of judicially active judge as a judge who overrides the legislative will with his/her own judicial will on the pretext of policy considerations, the decision of the trial chamber in *Ruto* might very well be a good dose of activist decision-making.

CONCLUSION

The openness of the ICC to activist tendencies in judging originates from the same fundamental dilemma about judicial role and the limits of judicial power as was portrayed by Schelsinger in the context of the United States Supreme Court. The complex normative realities of the ad hoc tribunals directly applying customary law imbued the judges of international tribunals with de facto legislative discretion and tilted the balance in the perception of the judicial role to viewing a judge as a developer of the system of international criminal justice rather than a judge who simply applies the law. In the absence of a legislative authority, a judge at the ad hoc tribunals was de facto accepted as a policy-maker. A judge at the ICC finds himself in qualitatively different normative circumstances where his role seems more proper as an arbiter and an interpreter of law passed to him by the states parties to the Rome Statute and the ICC's legislative authority – the Assembly of States Parties. In this sense, the ICC is more of a civil law court. However, the judging culture of the foregoing international criminal tribunals appears to have influenced the ICC to an extent that despite very different normative and institutional

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[203] *Id.* ¶ 9.

[204] *See id.* ¶¶ 14–22 (arguing that applying rule 68 retroactively is contrary to the purpose of the amendment).

[205] Prosecutor v. Ruto, Case No. ICC-01/09-01/11 OA 10, Judgment on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of the Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony," (Feb. 13, 2016).

[206] *See id.* at ¶ 74 (emphasis added).

environment the judges of the ICC seem to feel accepted as policy-makers occasionally expressing the policy-making forwardness of the earlier tribunals.

It is not surprising that the discussion of judicial activism primarily originates from the common law tradition which influence was very strong at the ad hoc tribunals for obvious reasons. No restraint is needed where the system has already restrained the powers of a judge, whereas in a system where such powers are significant and where the influence of judicial decision can reach further than the immediate litigation, the judge himself is questioning the boundaries of his discretion. The discretion is at all times relative to personal understanding and the way of thinking about the law that a judge has developed through his personal and professional history. Any two judges are likely to eventually disagree, even if in slight detail, on what constitutes activist judging, when gap-filling becomes activism and alters a policy rather than clarifies it, and if altering a policy is appropriate or not.

The considered examples from the ICC's practice illustrate that the high degree of normativity and the textual clarity of the law of the court is not enough to curtail the uncontrollable judicial policy-making. Irrespective of the ideational choices that a judge makes in relation to his judging, the adjudication itself and interpretation of law in particular, shall be organised in such a manner as to ensure coherence of legal reasoning and continuity with the context in which a particular issue receives judicial determination. Whether it assumes conservative or creative aspect, the interpretation of law shall not become the invention of law in defiance of the principle of legality. To undertake this balancing act, the judges need to operate within the constraints of a comprehensive legal culture of interpretation supported by robust and consistent interpretive methodology.