

Precedent in International Criminal Courts and Tribunals

Aldo Zammit Borda*

Abstract

This article examines the use of precedent in international criminal adjudication and engages with the ‘theory of precedent’ suggested by Daniel Terris, Cesare P R Romano and Leigh Swigart. The article considers the inapplicability of the doctrine of binding precedent in this area. It also examines the principle of judicial comity, discussing instances in which international criminal courts and tribunals have appeared to depart from the findings of external judicial decisions. It further considers the reliance of such courts and tribunals on judicial decisions from both generalist and specialist international courts, as well as from national courts, examining the process of transposition associated with such reliance. It finds that the approaches of international criminal courts and tribunals to the use of external judicial decisions have generally been multiple, incoherent and, in some cases, contradictory. In this respect, the article finds little evidence for the view that it is possible to distil any consistent ‘theory of precedent’ from the practice of such courts and tribunals.

Keywords

Precedent, International Criminal Courts and Tribunals, Sources of Law, Jurisprudence

* PhD candidate, Trinity College, University of Dublin and Fellow, Honourable Society of the Middle Temple. This article draws on research conducted as part of my doctoral dissertation under the supervision of Professor Rosemary Byrne and with the assistance of the Trinity Postgraduate Research Studentship Award. With thanks to the School of Law, TCD. Any mistakes are of course mine only. Email: <zammitba@tcd.ie>.

1 Introduction

Legal scholarship often characterises the use by courts and tribunals of judicial decisions from other courts and tribunals ('external judicial decisions')¹ as a sort of inter-judicial dialogue. For instance, L'Heureux-Dubé, a former justice of the Supreme Court of Canada, uses the word 'dialogue' to describe the practice of national courts citing, analysing, relying on, or distinguishing the decisions of foreign and supranational tribunals.² This interaction, however, remains a 'messy process' according to Slaughter, taking place across, above and below borders.³ She observes that '[t]he activities of the many different types of courts involved in this process do not conform to a template of an emerging global legal system in which national and international tribunals play defined and coordinated roles.'⁴

While there are many levels of judicial interaction, this article focuses on the interaction of international criminal courts and tribunals, an under-explored area in the literature. Terris, Romano and Swigart observe that '[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable'.⁵ Similarly, Romano notes that '[t]he role of precedent across international courts is still a largely unmapped territory. While most literature to date has focused on the treatment by courts of their own precedents, there have been very few studies about the treatment of precedent across international courts'.⁶

In the sphere of international criminal law, the question of interaction was flagged as early as 1995, when the *Tadić* Trial Chamber asked whether the ICTY is 'bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context'.⁷ In that case, the judges

¹ This article makes use of the phrase 'external judicial decisions' instead of the more encumbered notion of 'precedent'. For a discussion of this point, see N Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', (2002) 15 *Leiden Journal of International Law* 483, 489.

² C L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15, 24. See also 'Developments in the Law: International Criminal Law' (2001) 114 *Harv Law Review* 1943, 2049.

³ A M Slaughter, 'Judicial Globalization', (2000) 40 *Virg JIL* 1103, 1104.

⁴ *Ibid.*

⁵ D Terris, C P R Romano & L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007) 120.

⁶ C P R Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *International Law & Politics* 755, 760.

⁷ *Prosecutor v Dusko Tadić (aka 'Dule')*, Decision on the Prosecutor's Motion Requesting Protective

found the lack of guidance on this subject in the Report of the Secretary-General to be 'particularly troubling because of the unique character of the International Tribunal'.⁸ Yet almost two decades later there remains a relative scarcity of normative guidance with respect to the use of external judicial decisions. For instance, in 2009 the ICTY, in conjunction with the United Nations Interregional Crime and Justice Research Institute, developed a *Manual on Developed Practices*, prepared as part of a project to preserve the legacy of the ICTY. Although this *Manual* runs into over 240 pages and aims to provide a 'blueprint of [the ICTY's] practices for use by other international and domestic courts', relatively little is said therein about the ICTY's practices with respect to the use of external judicial decisions.⁹ In this respect, Terris *et al* have observed that any official directives or policies concerning the use of external judicial decisions, where they exist, are 'always tacit, never explicit', and may vary from court to court.¹⁰

Against the backdrop of the scarcity of normative guidance on this subject, Terris, Romano and Swigart have found that a 'theory of precedent' may be emerging.¹¹ Their research, conducted between 2004 and 2006, is primarily based on qualitative interviews with international judges from various courts and tribunals, including international criminal courts and tribunals. According to Terris *et al*, it is possible to identify some consistent, systematic and general approaches, on the part of international and regional courts and tribunals, to the use of external judicial decisions.

This article sets out to 'test' Terris *et al*'s 'theory of precedent' with particular reference to the practice of international criminal courts and tribunals. In particular, it aims to determine whether it is possible to distil any method or 'theory of precedent' from such practice; that is, whether any systematic and general approaches to the use of external judicial decisions are emerging from the practice of the international criminal courts and tribunals. In this respect, the article is based on a qualitative analysis examining some of the final judgments of five international criminal courts and tribunals, namely:

1. the International Criminal Tribunal for the former Yugoslavia (*ICTY*);
2. the International Criminal Tribunal for Rwanda (*ICTR*);

Measures for Victims and Witnesses, Case No IT-94-1-T, 1995, 17.

⁸ *Ibid*, 19.

⁹ ICTY & United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices* (2009) 1.

¹⁰ Terris *et al*, above n 5, 120.

¹¹ *Ibid*.

3. the Special Court for Sierra Leone (*SCSL*);
4. the Extraordinary Chambers in the Courts of Cambodia (*ECCC*); and
5. the International Criminal Court (*ICC*).

The specific judgments which constituted the primary sources for this analysis have been listed in Annex I. The primary units of analysis were instances of use of external judicial decisions in the judgments. With respect to the *SCSL*, the *ECCC* and the *ICC*, in view of the relatively low number of final judgments delivered by the cut-off date (18 May 2012), all final judgments have been included. With respect to the *ICTY* and *ICTR*, the criteria for the selection of the final judgments were: (1) the date of delivery of the judgments; and (2) the judgments had to make, at least, some use of external judicial decisions.¹²

This article considers, first, the elements of the ‘theory of precedent,’ as elaborated in Terris *et al*’s book. It then sets out to ‘test’ this theory on the basis of the practice of international criminal courts and tribunals. It examines the inapplicability of the doctrine of binding precedent and discusses the principle of judicial comity, considering instances in which international criminal courts and tribunals have departed from the findings of external judicial decisions. The article makes the point that there is a growing expectation, in the field of international criminal adjudication, that such courts and tribunals ought to take express account of relevant external judicial decisions, even if contradictory. The article proceeds to consider the formal nature of the judicial acts that may be relied on by international criminal courts and tribunals, considering that such courts and tribunals have relied not only on final judgments and decisions, but also, *inter alia*, on advisory opinions and the submissions of advocates-general. The article then considers international criminal courts and tribunals’ reliance on judicial decisions from generalist and specialist courts and tribunals. In particular, it discusses the use by such courts and tribunals of jurisprudence from the International Court of Justice (*ICJ*), as well as human rights courts. The article also considers international criminal courts and tribunals’ reliance on judicial decisions from national courts and the process of transposition associated with such reliance. It concludes by outlining some possible areas for further research.

¹² In this context, minimal use was made of tables of authorities annexed to some of the judgments because such annexes did not always portray an accurate picture of the external judicial decisions actually used in the judgment.

2 A 'theory of precedent'

In their extensive study of international adjudication, Terris *et al* argue that, although the role of precedent across international courts has not yet been thoroughly studied, it seems that elements of 'a sort of "theory of precedent" are gradually emerging'.¹³ In this respect, the authors proceed to sketch out the elements of such a 'theory of precedent', which include:

1. No international judge seems to feel bound by the jurisprudence of another court. The jurisprudence of other courts is taken into consideration only when one's own court has no useful precedents. Although some judges might be more willing than others to cite, citing is generally done sparingly, selectively, and grudgingly.¹⁴
2. If, on a given point of law, judges of one court feel differently than those of another court, out of judicial comity they will simply omit to take cognizance of judgments that do not support the reasoning chosen. Judges avoid citing to say that 'they got it wrong'—this is severely frowned upon.¹⁵
3. The formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions, or anything else. They look at the jurisprudence rather than the specifics of the case; what ultimately matters is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive.¹⁶
4. In the judges' minds, international courts seem to be divided between generalists, like the ICJ, and specialists (all others), and between regional courts and the so-called universal courts, that is to say, those whose jurisdiction is not restricted to any particular geographic area. This means that specialised courts will consider, quote, and defer to the ICJ on matters of general public international law. Arguably, this should also imply that the ICJ will defer to specialised tribunals concerning matters over which they have special knowledge or competence.¹⁷

¹³ Terris *et al*, above n 5, 120.

¹⁴ *Ibid.*

¹⁵ *Ibid*, 120-121.

¹⁶ *Ibid*, 121.

¹⁷ *Ibid.*

5. 'Universal' courts might consider, but will refrain from quoting regional courts. This stems from the perceived need not to attribute particular value to the jurisprudence of certain regions in determining the content of rules of international law that have universal reach. Moreover, relying on the jurisprudence of national courts seems even more problematic. Much like the case of international rulings, they are a documentary source that can be used to provide evidence of a rule generated by one of the primary sources. Yet, their impact on substantive international law is limited by several factors.¹⁸

Against the backdrop of these elements, this article proceeds to examine whether any coherent and systematic general approaches to the use of external judicial decisions may be said to be emerging from the practice of international criminal courts and tribunals. In this context, a notable difference between Terris *et al*'s study and the present research is that the former was not confined to international criminal courts and tribunals only. In their study, Terris *et al* included interviews not only with serving judges from the ICTY, the ICTR, the SCSL and the ICC, but also with judges from other international and regional courts and tribunals, such as the ICJ, the European Court of Human Rights, the International Tribunal for the Law of the Sea and the World Trade Organization Appellate Body.¹⁹ However, given that their 'theory of precedent' is not qualified or restricted to any specific type of court, and is expressed in language that is all-encompassing, it appears to also be applicable to international criminal courts and tribunals. This article considers whether Terris *et al*'s 'theory of precedent' provides an appropriate framework for analysing the judicial practice of these international criminal courts and tribunals.

3 No precedent for the 'theory'

From the qualitative analysis of the judgments of international criminal courts and tribunals considered in this research, two general elements may be distilled. These elements feature consistently in the approaches of such courts and tribunals to the use of external judicial decisions, namely:

¹⁸ Terris *et al*, above n 5, 121.

¹⁹ *Ibid*, xvi, and Appendix B ('Judges Interviewed for This Book').

1. As Terris *et al* observe, international criminal courts and tribunals do not feel bound by the jurisprudence of other courts and tribunals.²⁰
2. International criminal courts and tribunals, with some exceptions, consistently approach external judicial decisions as ‘subsidiary means’ for the determination of rules of law, in accordance with the doctrine of sources.

However, any consistency in the approaches of international criminal courts and tribunals to the use of external judicial decisions stops there. Beyond these two elements, the research for this article has overwhelmingly demonstrated that it is *not* possible to identify any consistent and systematic approaches to the use of external judicial decisions. It would, therefore, be premature to speak of a coherent ‘theory of precedent’ along the lines of the one suggested by Terris *et al*. On the contrary, the practice of the international criminal courts and tribunals analysed in this article has been characterised by multiple, incoherent and, in some cases, contradictory approaches to the use of external judicial decisions.

This article does not aim to provide an explanation for the incoherence. Grover finds that the main reasons underlying the *ad hoc* Tribunals’ inconsistent approaches to interpretation include the vagueness of their statutes, as well as the scarcity of normative guidance on the subject. She observes that this state of affairs ‘opened the door for judges to develop their own methods which were perhaps inspired by their legal training and/or understanding of international criminal law’s normativity’.²¹ These observations inform the following analysis of the inconsistent approaches of international criminal courts and tribunals to the use of external judicial decisions.

4 The first element: jurisprudence of other courts and tribunals

The first element of the ‘theory of precedent’, as suggested by Terris *et al*, is that ‘no international judge seems to feel bound by the jurisprudence of another court’.²² According to the authors, this is unsurprising given the fact that ‘courts are not hierarchically organised, and all are, with few exceptions, self-contained jurisdictions. However, this also seems to stem from a certain sense of pride

²⁰ *Ibid*, 120.

²¹ L Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21 *EJIL* 543, 547.

²² Terris *et al*, above n 5, 120.

and defence of one's own judicial turf.²³ In the context of international criminal adjudication, international criminal courts and tribunals have consistently held that external judicial decisions have no binding force, but may bear persuasive value.²⁴ Yet rather than stemming from a sense of pride, as Terris *et al* suggest, or from a desire to defend one's own judicial turf, the view that external judicial decisions have no binding force in international criminal adjudication is based on three grounds: a rigorous application of the doctrine of sources of international law; the respect for the principle of legality; and the protection of individual rights in criminal law. In this context, Cassese emphasises the specificity of international criminal proceedings, which require greater circumspection and a strict interpretation of the applicable rules.²⁵ Similarly, in *Duch*, the ECCC Supreme Court Chamber underscored that, in light of the protective function of the principle of legality, external judicial decisions are non-binding and are not, in and of themselves, primary sources of international law.²⁶

Similarly, the ICTY Trial Chamber in *Tadić* stated that 'the International Tribunal is not bound by past doctrine',²⁷ and in *Kupreškić et al* it held that '[t]he Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes'.²⁸ In *RUF*, the SCSL Trial Chamber underscored that it was 'not bound by decisions of the ICTY Appeals Chamber'²⁹ and in *Lubanga*, the ICC Trial Chamber noted that 'decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute'.³⁰

²³ *Ibid.*

²⁴ See R Dixon and K A A Khan, *Archbold on International Criminal Courts: Practice, Procedure and Evidence* (3rd edn, 2009) 16. In this context, however, one of the judges interviewed in the Terris *et al* study intimated that 'I'm not certain that there is great practical difference between a decision that is binding, and one that is not binding but persuasive;' see Terris *et al*, above n 5, 121.

²⁵ A Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in S Yee and T Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001) 49.

²⁶ *Kaing Guek Eav (alias 'Duch')*, Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 2012, 97.

²⁷ *Prosecutor v Dusko Tadić (aka 'Dule')*, Judgment, Case No IT-94-1-T, 1997, 654.

²⁸ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, Judgment, Case No IT-95-16-T, 2000, 540.

²⁹ *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgment, Case No SCSL-04-15-T, 2009, 295.

³⁰ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No

Thus, in the majority of cases, international criminal courts and tribunals use external judicial decisions to determine rules of law, in accordance with the doctrine of sources. However, in some cases these courts and tribunals rely heavily—at times exclusively—on legal findings of external judicial decisions, with little or no effort to conduct a first-hand examination of the rule of law in question. Moreover, they occasionally use such decisions uncritically and fail to follow the two-tiered procedure to ensure that such decisions are relied on merely as subsidiary means.³¹ This approach could be characterised as ‘equivocal’ because the judgment may not indicate whether the court or tribunal considered the external judicial decisions as a means of determining antecedent rules of law or as direct sources of the rules in question.³²

Moreover, in two cases, the court or tribunal expressly found that none of the recognised sources provided an applicable rule, and proceeded to use legal notions or findings from external judicial decisions that had not emanated from one of the formal sources of international law. In effect, therefore, the external judicial decisions containing such legal notions or findings constituted the original source.³³

In their discussion of this first element of the ‘theory,’ Terris *et al* observe that ‘jurisprudence of other courts is taken into consideration only when one’s own court has no useful precedents.’³⁴ With respect to international criminal

ICC-01/04-01/06, 2012, 603.

³¹ The use of external judicial decisions as subsidiary means generally comprises the following two-tiered procedure: (1) the court or tribunal satisfies itself that the legal notions or findings of a given external judicial decision are grounded on a rule of law derived from one of the recognised sources (international conventions, international customary law, or general principles of law); and (2) the court or tribunal uses such legal notions or findings for guidance in the verification of the existence or interpretation of such a rule of law (i.e. for the determination of a rule of law).

³² For instance, in the *CDF* case, in clarifying the meaning of ‘widespread and systematic’ in the context of crimes against humanity under Article 2 of the SCSL Statute, the SCSL Trial Chamber failed to undertake any first-hand interpretation of the meaning of this phrase. Rather, it relied almost exclusively on external judicial decisions from the ICTY, in many instances simply adopting or subscribing to the ICTY’s views uncritically. See *Prosecutor v Moinina Fofana and Allieu Kondewa*, Judgment, Case No SCSL-04-14-T, 2007, 112.

³³ The first case concerns Judge Li’s famous dissent in *Erdemović* on the question whether duress could be a complete defence to the massacre of innocent civilians at international law. See *Prosecutor v Dragen Erdemović*, Judgment, Separate And Dissenting Opinion Of Judge Li, Case No IT-96-22-A, 1997, 1 *et seq.* The second case is the ECCC Supreme Court Chamber’s decision in *Duch*, where the ECCC Supreme Court Chamber had to determine the appropriate test for regulating adjudication of a multiplicity of offences for the same conduct (*‘concursum Delictorum’*). See *Kaing Guek Eav (alias ‘Duch’)*, above n 26, 289 *et seq.*

³⁴ Terris *et al*, above n 5, 120.

adjudication, the present research has found that, although the degree of reliance on external judicial decisions is somewhat dependent on the state of development of the internal case law of the referring court or tribunal, this observation applies to those issues that are relatively settled and uncontroversial in the court or tribunal's internal jurisprudence. Indeed, where specific issues are relatively well-settled in a court or tribunal's internal jurisprudence, a gradual shift in the locus of reference from external judicial decisions to the internal jurisprudence of the referring court or tribunal may, in some cases, be observed. For instance, although, in order to ascertain the customary international law status of Common Article 3 of the Geneva Conventions, the earlier judgments of the ICTY relied on the holdings of the ICJ,³⁵ as this issue became relatively more settled in the internal jurisprudence of the ICTY, a gradual shift in the locus of reference from external judicial decisions of the ICJ to the internal jurisprudence of the ICTY began to take place, and the later judgments of the ICTY began to rely exclusively on internal jurisprudence with respect to this matter.³⁶

Conversely, with respect to issues which remain unsettled and controversial in the internal jurisprudence of a referring court or tribunal, or with respect to novel issues (which continue to crop up throughout the lifespan of international criminal courts and tribunals),³⁷ such courts and tribunals have, generally, continued to have recourse to external judicial decisions.

Finally, with respect to this element, Terris *et al* assert that '[a]lthough some judges might be more willing than others to cite, citing is generally done sparingly, selectively, and grudgingly'.³⁸ While the present research has not, as such, addressed the question of selectivity, it may be safely said that, in the context of international criminal adjudication, citing has certainly been done neither 'sparingly' nor 'grudgingly'. Indeed, international criminal courts and tribunals make frequent and varied use of external judicial decisions. This happens both

³⁵ See, for instance, *Prosecutor v Dusko Tadić (aka 'Dule')*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-T, 1995, 98; and *Prosecutor v Zejnil Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić, Esad Landžo (aka 'Zenga')*, Judgment, Case No IT-96-21-T, 1998, 303.

³⁶ See, for instance, *Prosecutor v Naser Orić*, Judgment, Case No IT-03-68-T, 2006, 261; and *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Judgment, Case No IT-04-84-T, 2008, 34.

³⁷ For instance, over a decade after the ICTY was established, the *Blaškić* Appeals Chamber noted that the Tribunal had not yet 'had the occasion to pronounce' on the question of the necessary *mens rea* in relation to ordering under Article 7(1) of the ICTY Statute. See *Prosecutor v Tihomir Blaškić*, Judgment, Case No IT-95-14-A, 2004, 33.

³⁸ Terris *et al*, above n 5, 120.

directly, to derive guidance from the legal notions or findings of a given external judicial decision, with a view to verifying the existence or interpretation of a particular rule of law; and indirectly, in order to borrow a review of state practice and *opinio juris* in the context of customary international law, or a survey of national jurisdiction in the context of general principles of law ('reviews and surveys').

With respect to the direct use of external judicial decisions, Judge Shahabuddeen noted in his declaration in *Furundžija* that in interpreting a rule of international law, international criminal courts and tribunals may 'see value in consulting the experience of other judicial bodies with a view to enlightening [themselves] as to how the principle is to be applied in the particular circumstances before [them]'.³⁹ In *Stakić*, the ICTY Trial Chamber noted that 'when interpreting the relevant substantive criminal norms of the Statute, the Trial Chamber has used previous decisions of international tribunals', including the external judicial decisions of the ICTR and the Nuremberg and Tokyo Tribunals.⁴⁰ The ECCC Supreme Court Chamber, in *Duch*, noted that the ECCC 'relied heavily' on international human rights case law.⁴¹ The *Kupreškić et al* Trial Chamber went even further, emphasising that 'judicial decisions may prove to be of *invaluable* importance for the determination of existing law'.⁴²

In the literature, Cryer notes that '[t]he ICTY and the ICTR have had reference to domestic, as well as international, case law'.⁴³ Cassese finds the *ad hoc* Tribunals have, on occasion, 'drawn upon Strasbourg case law in order to clarify concepts that are ambiguous or unclear in international law'.⁴⁴ Moreover, with respect to the ICTY's use of external judicial decisions from national courts, Nollkaemper states that the ICTY 'has made extensive use of national case law in interpreting and applying its Statute and Rules of Procedure and Evidence and in determining points of general international law'.⁴⁵ Furthermore, Nerlich observes that 'the decisions of the [ICC] Chambers often contain references to the jurisprudence of

³⁹ *Prosecutor v Anto Furundžija*, Judgment, Case No IT-95-17/1-A, 2000, 258 (Declaration Of Judge Shahabuddeen).

⁴⁰ *Prosecutor v Milomir Stakić*, Judgment, Case No IT-97-24-T, 2003, 414.

⁴¹ *Kaing Guek Eav (alias 'Duch')*, above n 26, 431.

⁴² *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (aka 'Vlado')*, above n 28, 541. Emphasis added.

⁴³ R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (2nd edn, 2010) 12.

⁴⁴ Cassese, above n 25, 31.

⁴⁵ A Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (2003) 277.

the two *ad hoc* Tribunals of the United Nations'.⁴⁶

With respect to the indirect use of external judicial decisions, international criminal courts or tribunals have used such decisions to borrow their reviews or surveys. Such borrowed reviews or surveys could serve to supplement the referring court or tribunal's own review or survey on the same or similar issue and, indeed, may save the referring court or tribunal from having to undertake it from scratch.⁴⁷ Cryer points out that '[a]fter all, where cases contain a detailed review of State practice and/or *opinio juris*, it is far simpler to refer to the relevant case than repeat the discussion it contains'.⁴⁸ For instance, in both the *CDF* and *RUF* cases, the SCSL Trial Chambers relied on the *Strugar* Trial Judgment's review of 'case law developed by the military tribunals in the aftermath of World War II' to enumerate the factors that a chamber may take into account in determining whether a superior has discharged his duty to prevent the commission of a crime.⁴⁹

While the advantages of the indirect approach to the use of external judicial decisions are apparent—in terms of efficiency gains and avoiding the duplication of efforts—it is also clear that this approach has to be adopted with caution, as relying on a review or survey which was undertaken by another court or tribunal, founded on a different statutory framework, carries certain risks. These risks may include the danger of such reviews or surveys being defective or incomplete and, particularly with respect to reviews or surveys undertaken by *trial*-level courts or tribunals, their liability to appellate modification. Nevertheless, the analysis of a referring court or tribunal which engages with and scrutinises the reviews or surveys from an external judicial decision is likely to be more thorough and rigorous.

⁴⁶ V Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC', in C Stahn & G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 305-306.

⁴⁷ Peil makes a similar point with respect to the use of the teachings of publicists, namely, '[w]here a publicist has conducted a thorough review of State practice and concluded that the threshold for a rule of customary international law has (or has not) been met, judges frequently rely upon those teachings, rather than citing directly to primary evidence of State practice'. See M Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 *CJICL* 136, 153.

⁴⁸ R Cryer, 'Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders', in K H Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009) 184.

⁴⁹ *Prosecutor v Moinina Fofana and Allieu Kondewa*, above n 19, 248; and *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, above n 16, 315.

5 The second element: judicial comity

The second element identified by Terris *et al* is that ‘if, on a given point of law, judges of one court feel differently than those of another court, out of judicial comity they will simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say ‘they got it wrong’ is generally avoided, even severely frowned upon.’⁵⁰ In the context of international criminal adjudication, the present research has found that instances in which international criminal courts and tribunals adopt a conciliatory approach towards external judicial decisions (i.e. distinguishing decisions which appear relevant) far outnumber instances in which such courts and tribunals adopt a competitive approach (i.e. departing from external judicial decisions that appear to interpret the same, or a substantially similar rule of law, without distinguishing the matter). In this context, Simma holds that the principle of comity, that is, of respect for the competence of other courts and tribunals, could ‘be considered an emerging general principle of international procedural law’.⁵¹

However, it has been observed that ‘the effort, however admirable, to serve the cause of law through the art of distinguishing has its limits’.⁵² In a number of instances, international criminal courts and tribunals have, in the words of Terris *et al*, cited to say ‘they got it wrong’. In particular, the present research has identified instances in which courts and tribunals have departed from external judicial decisions that, in their view, have been made in error (*per incuriam*) or that are not in the interests of justice.⁵³ In some cases, however, departures from external judicial decisions remain cryptic. For instance, in *Furundžija*, the ICTY Trial Chamber departed obliquely from the Constitutional Court of Colombia’s holding that ‘the Geneva Conventions and the Additional Protocols passed into customary law in their entirety’, without providing any justification.⁵⁴

⁵⁰ Terris *et al*, above n 5, 120.

⁵¹ B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *EJIL* 265, 285–287.

⁵² M Shahabuddeen, *Precedent in the World Court* (1996) 126.

⁵³ For instance, in *Čelebići*, in the context of superior responsibility, the ICTY Appeals Chamber departed from a finding by the ICTR Trial Chamber in *Kayishema et al*, that ‘powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility,’ because, according to the ICTY Appeals Chamber, this finding was ‘based on a misstatement’ and, therefore, had to be accorded ‘no weight’. See *Prosecutor v Zejnil Delalić, Zdravko Mucić (aka ‘Pavo’), Hazim Delić, and Esad Landžo (aka ‘Zenga’)*, Judgment, Case No IT-96-21-A, 2001, 265.

⁵⁴ *Prosecutor v Anto Furundžija*, Judgment, Case No IT-95-17/1-T, 1998, 137.

In other cases, international criminal courts and tribunals appear reluctant to ‘acknowledge that a change has occurred’.⁵⁵ For instance, in *Muhimana*, the ICTR Trial Chamber adopted a somewhat ambivalent stance with respect to the appropriate definition of rape. It averred that the broad, conceptual definition of rape articulated in *Akayesu* and the narrower, mechanical definition put forward by *Furundžija/Kunarac* ‘are not incompatible or substantially different in their application’.⁵⁶ Yet, the conceptual definition of rape articulated in *Akayesu* is undoubtedly broader in scope, and may encompass additional acts and omissions, than the narrower, mechanical definition of *Furundžija/Kunarac*. The holding in *Muhimana* thus appears not accurate.

Moreover, with respect to Terris *et al*’s suggestion that judges could simply ‘omit to take cognizance of judgments that do not support the reasoning chosen’,⁵⁷ there is a growing expectation that international criminal courts and tribunals ought to take express account of relevant external judicial decisions, even if contradictory, particularly in view of the duty of circumspection and the principle of legality. Due to the lack of formal structures and lines of communication across courts and tribunals, this expectation may entail significant difficulties. However, the present research has found that where international criminal courts and tribunals have failed to take express account of relevant external judicial decisions, their judgments are—at least in academic writing—considered to be less persuasive and are subject to intense criticism.⁵⁸

6 The third element: substance over form

With respect to the third element, Terris *et al* observe that:

⁵⁵ Shahabuddeen, above n 52, 130.

⁵⁶ *Prosecutor v Mikaeli Muhimana*, Judgement and Sentence, Case No ICTR- 95-1B-T, 2005, 550.

⁵⁷ Terris *et al*, above n 5, 120.

⁵⁸ Consider, for instance, the criticism levelled at the ICC Trial Chamber in *Lubanga*, for simply adopting the ‘overall control’ test as articulated in *Tadić*, without taking into express account the ‘effective control’ test as enunciated in *Nicaragua*: see T R Liefländer, ‘The Lubanga Judgment of the ICC: More than just the First Step?’ 1 *CJICL* (2012) 191, 193. See also the heavy criticism levelled at the ICTY Appeals Chamber, in *Kunarac et al*, in its consideration of the legal ingredients of crimes against humanity, for taking into account three Canadian cases that supported the Chamber’s reasoning, while failing to take into express account the leading Canadian case on crimes against humanity, namely *Finta*: see L van den Herik, ‘Using Custom to Reconceptualize Crimes Against Humanity’, in S Darcy & J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010) 93.

the formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions, or anything else. What they look at is the jurisprudence rather than any specific case; what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive.⁵⁹

In the context of international criminal adjudication, this observation is largely supported by the findings of the present research. International criminal courts and tribunals have relied not only on final judgments and decisions, but also, *inter alia*, on advisory opinions⁶⁰ and the submissions of advocates-general.⁶¹

With respect to the SCSL, for instance, Article 20(3) of the SCSL Statute states that, in hearing appeals, '[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.'⁶² Although Article 20(3) of the SCSL Statute only mentions the Appeals Chamber, the SCSL Trial Chamber subsequently found 'as a matter of course, the provision equally applies to triers of fact at first instance.'⁶³

While international criminal courts and tribunals rely on various types of judicial findings, the present research has found that, when relying on *first* instance decisions, they do not always take full account of the fact that such decisions are subject to reversal on appeal. In *Kunarac et al*, the ICTY Appeals Chamber had to verify whether the existence of a plan or policy (the 'policy requirement') was a legal ingredient of crimes against humanity under Article 5 of the ICTY Statute.⁶⁴ In its analysis, the Appeals Chamber relied, *inter alia*, on the Kosovo District Court case of *Trajkovic*,⁶⁵ which appeared to

⁵⁹ Terris *et al*, above n 5, 121.

⁶⁰ For instance, *Kaing Guek Eav (alias 'Duch')*, above n 26, 646.

⁶¹ For instance, *Prosecutor v Anto Furundžija*, above n 54, 201.

⁶² See Article 20(3) of the *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

⁶³ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Judgment, Case No SCSL-04-16-T, 2007, 630 (n 1269).

⁶⁴ *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Judgment, Case No IT-96-23&IT-96-23/1-A, 2002, 98.

⁶⁵ *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001.

support its interpretation that no policy requirement for crimes against humanity was required at international law.⁶⁶ However, about six months before the ICTY Appeals Chamber delivered its judgment, the Supreme Court of Kosovo overturned the *Trajkovic* decision in a manner material to its use by the ICTY Appeals Chamber.⁶⁷ Nevertheless, the *Kunarac et al* Appeals Judgment made no express mention of this turn of events, and it continued to rest, in part, on the reasoning of the *Trajkovic* first instance decision that had been overturned.

7 The fourth element: unity and fragmentation

The fourth element of the ‘theory of precedent’ outlined by Terris *et al* holds that:

In the judges’ minds, international courts seem to be divided between generalists (like the ICJ) and specialists (all others), and between regional courts and the so-called universal courts, that is to say, those whose jurisdiction is not restricted to any particular geographic area. This means that, fourth, specialized courts will consider, quote, and defer to the ICJ on matters of general public international law. ... Arguably, this should also imply that the ICJ will defer to specialized tribunals concerning matters over which they have special knowledge or competence, but, to date, the ICJ has not done so.⁶⁸

Although the UN Charter does not formally endow the ICJ with ‘exclusive jurisdiction’⁶⁹ Schwarzenberger asserts that the ICJ, and its predecessor the PCIJ, have to be accorded ‘pride of place in the hierarchy of the elements of law-determining agencies.’⁷⁰ In this respect, it has been noted that well reasoned and strongly supported decisions of the ICJ ‘will be powerfully influential for other tribunals deciding questions of international law, even though there is no

⁶⁶ Van den Herik, above n 58, 92.

⁶⁷ *In re Trajkovic*, Supreme Court of Kosova in Prishtina, AP.nr.145/2001, 30 November 2011. See also Opinion of Michael E. Hartmann, International Prosecutor for the Office of the Public Prosecutor of Kosovo, PP.Nr.68/2000, PPP.Nr._/2001, K. 31/99, 30 November 2001.

⁶⁸ Terris *et al*, above n 5, 121.

⁶⁹ D Anderson, ‘The ‘Disordered Medley’ of International Tribunals and the Coherence of International Law’, in K H Kaikobad and M Bohlander (eds), above n 35, 392.

⁷⁰ G Schwarzenberger, ‘The Inductive Approach to International Law’ (1947) 60 *Harv LR* 539, 553.

formal *stare decisis* effect'.⁷¹ In the context of international criminal adjudication, international criminal courts and tribunals have, indeed, by and large considered, quoted and deferred to the ICJ on matters of general public international law. For instance, in *Čelebići*, the ICTY Trial Chamber acknowledged that a particular decision of the ICJ 'constitutes an important source of jurisprudence on various issues of international law'⁷² and, in *Aleksovski*, the ICTY Appeals Chamber emphasised that the decisions of the ICJ may be accorded considerable weight 'due to their perceived status as authoritative expressions of the law'.⁷³

Yet, there have been a small number of cases in which international criminal courts and tribunals have come to a different conclusion from the ICJ, the most prominent of these being the collision between the ICJ in *Nicaragua* and the ICTY in *Tadić*.⁷⁴ However, as one commentator observes, '[a]mong the tribunals vested with international criminal jurisdiction, the ICTY has made such ample use of ICJ jurisprudence that the divergence in the *Tadić* judgment has to be seen in perspective'.⁷⁵

With respect to the second leg of this element, namely that the ICJ may itself defer to specialised tribunals, it has been noted that the ICJ has 'hardly ever openly referred to other international courts and tribunals'.⁷⁶ However, in the *Genocide* case the ICJ did attach 'the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it',⁷⁷ which could be seen to reflect the ICJ's respect for the ICTY's specialist competence in this field.

In addition to relying on the generalist competence of the ICJ, international criminal courts and tribunals regularly rely on the specialist external judicial decisions of other courts and tribunals operating within different branches of international law, in particular human rights courts. For instance, in *Kunarac et al*, the ICTY Trial Chamber held that '[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights

⁷¹ J I Charney *et al*, 'The "Horizontal" Growth of International Courts and Tribunals: Challenges or Opportunities?', 96 *AJIL* (2002) 369, 370.

⁷² Referring to *Nicaragua*. See *Prosecutor v Zejnir Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić, Esad Landžo (aka 'Zenga')*, above n 35, 230.

⁷³ *Prosecutor v Zlatko Aleksovski*, Judgment, Case No IT-95-14/1-A, 2000, 96.

⁷⁴ Simma, above n 51, 279.

⁷⁵ *Ibid*, 283-284.

⁷⁶ *Ibid*, 287.

⁷⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 p 43, 170.

law'.⁷⁸ The decisions of international and regional human rights courts have been accorded highly persuasive value, particularly when the issue before the international criminal courts and tribunals was one of due process.

8 The fifth element: universal criminal courts?

The fifth element put forward by Terris *et al*, namely that universal courts 'might consider, but will refrain from quoting regional or national courts',⁷⁹ would not appear to be directly applicable to the specific context of international criminal adjudication. In this respect, the definition of 'universal' courts adopted by the authors is courts 'whose jurisdiction is not restricted to any particular geographic area'.⁸⁰ It should be noted, first, that with reference to the specific context of international criminal adjudication, this is not a particularly felicitous definition, as courts and tribunals which would normally be regarded as international, would not be considered 'universal' under this definition. Indeed, of the five international criminal courts and tribunals covered by the present research, only one—the ICC—falls within the definition of a 'universal' court. The jurisdictions of the others—namely the ICTY, the ICTR, the SCSL and the ECCC—are all restricted *ratione loci* and cannot, therefore, be considered 'universal' according to this definition. Given that, at the time of writing, the ICC had only delivered one final judgment, namely *Lubanga*, it would be difficult to assess how frequently this court would quote decisions of regional or national courts. In *Lubanga*, the ICC Trial Chamber relied extensively on judicial decisions from sister international criminal courts and tribunals, such as the ICTY⁸¹ and the SCSL.⁸² It also referenced two judicial decisions of the European Court of Human Rights, primarily because these had been cited in the Defence submissions.⁸³

With respect to the use of judicial decisions from national courts, Terris *et al* observe that '[d]omestic courts rarely pronounce themselves on rules of international law; they are rather a more useful source when it comes to searching for general principles of law. Additionally, they seem to be considered

⁷⁸ *Prosecutor v Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, Judgment, Case No IT-96-23-T& IT-96-23/1-T, 2001, 467.

⁷⁹ Terris *et al*, above n 5, 121–122.

⁸⁰ *Ibid*, 121.

⁸¹ *Prosecutor v Thomas Lubanga Dyilo*, above n 30, 533.

⁸² *Ibid*, 603.

⁸³ *Ibid*, 581.

a last resort, to be looked at only when international sources do not help'.⁸⁴ In line with this observation, international criminal courts and tribunals have generally considered that they should first 'explore all the means available at the international level before turning to national law',⁸⁵ and that national judicial decisions should only be used as a last resort. Indeed, an order of natural selection appears to have developed in the practice of international criminal courts and tribunals, which indicates that relevant *international* judicial decisions are preferred over *national* judicial decisions. For instance, in *Furundžija* the ICTY Trial Chamber considered that the decisions of courts and tribunals applying national law were 'less helpful'.⁸⁶ And in *Kupreškić et al*, the ICTY Trial Chamber stated that national judicial decisions 'would carry relatively less weight'.⁸⁷

Cassese notes that, when using national judicial decisions, international criminal courts and tribunals sometimes adopt a 'wild' and mechanical approach.⁸⁸ For instance, in order to determine whether the Tribunal had respected the accused's right to be promptly informed of the charges against him, the ICTR Appeals Chamber in *Barayagwiza* had to determine whether the period during which the accused was held in custody in Cameroon at the ICTR Prosecutor's request should be counted, even though the accused was not yet under the physical control of the Prosecutor.⁸⁹ After citing external judicial decisions from the United States and Singapore, the *Barayagwiza* Appeals Chamber determined that 'Cameroon was holding the Appellant in constructive custody for the Tribunal'.⁹⁰ Conspicuously absent from the Chamber's analysis, however, was any express attempt to transpose the findings of decisions from these two national jurisdictions to the specificities of international criminal law and the context of international criminal proceedings.⁹¹

The dangers of a mechanical reliance on national judicial decisions may be especially pronounced with respect to decisions that appear to be interpreting international law but that, in reality, are solely based on particular interpretations of national law and that could therefore be misleading ('red herring' decisions).

⁸⁴ Terris *et al*, above n 5, 122.

⁸⁵ *Prosecutor v Drazen Erdemović*, Judgment, Case No IT-96-22-A, 1997, 3 (Separate and Dissenting Opinion of Judge Cassese).

⁸⁶ *Prosecutor v Anto Furundžija*, above n 54, 195-196.

⁸⁷ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, above n 28, 541.

⁸⁸ Cassese, above n 25, 22.

⁸⁹ *Jean-Bosco Barayagwiza v The Prosecutor*, Decision, Case No. ICTR-97-19-AR72, 1999, 56.

⁹⁰ *Ibid*, 61.

⁹¹ Cassese, above n 25, 22.

For instance, a succession of ICTY Trial Chambers mechanically relied on the expansive interpretation of 'civilians', as articulated in the French case of *Barbie*⁹² (while rarely referring to the specific national circumstances that gave rise to this expansive interpretation) to find that the term 'civilians', for the purposes of crimes against humanity, included those who were members of a resistance movement and former combatants.⁹³ However, this expansive interpretation of 'civilians' was subsequently rejected by the ICTY Appeals Chambers, *inter alia*, in *Blaškić*,⁹⁴ *Kordić et al*,⁹⁵ and *Galić*,⁹⁶ in favour of a narrower interpretation. Conspicuous in its absence from the findings of these ICTY Appeals Chambers was any explicit reference to the *Barbie* case.⁹⁷

In other cases, however, international criminal courts and tribunals have adopted a more reflective approach, which implies 'a rigorous legal conception of the role and functions of international tribunals and the sources of law from which they may draw'.⁹⁸ This was the case, for instance, with respect to the *Kupreškić et al* Trial Judgment.⁹⁹ In particular, this research found that the reflective approach requires international criminal courts and tribunals to ensure that any legal notions or findings derived from external judicial decisions: (1) are appropriately transposed in light of the specificities of international criminal law and the context of international criminal proceedings; (2) take into account the inter-temporality of rules of international law; and (3) are in consonance with international law.

From the above, it is clear that international criminal courts and tribunals have adopted a plethora of approaches to the use of external judicial decisions. Therefore, it is premature to speak of general and systematic approaches to the

⁹² The major decisions of the Criminal Chamber of the Court of Cassation in this case are the *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie*, Judgment of 6 October 1983 and Judgment of 20 December 1985, Cass. crim, 1986 J.C.P. II G, No. 20, 655, 1986 *Journal Du Droit International*, as well as Judgment of 3 June 1988, Cass. crim. 1988 J.C.P. II G, No. 21, 149 (Report of Counselor Angevin). See L N Sadat, 'The Nuremberg Paradox' (2010) 58 *AJ Comp L* 151, 180.

⁹³ See, *inter alia*, *Vukovar Rule 61 Decision* of 3 April 1996, at 29; *Prosecutor v Dusko Tadić (aka 'Dule')*, above n 14, 641; and *The Prosecutor v Tihomir Blaškić*, Judgment, Case No IT-95-14-T, 2000, 212.

⁹⁴ *Prosecutor v Tihomir Blaškić*, above n 37, 113.

⁹⁵ *Prosecutor v Dario Kordić and Mario Čerkez*, Judgment, Case No IT-95-14/2-A, 2004, 97.

⁹⁶ *Prosecutor v Stanislav Galić*, Judgment, Case No IT-98-29-A, 2006, 144.

⁹⁷ Rather, these Appeals Chambers consistently made reference to Article 50(1) of Additional Protocol I for the purposes of interpreting the term 'civilian' in Article 5 of the ICTY Statute.

⁹⁸ Cassese, above n 25, 20.

⁹⁹ *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, above n 28, 542.

use of external judicial decisions or, indeed, of any 'theory of precedent' along the lines of the one suggested by Terris *et al.* International criminal courts and tribunals ought to more expressly specify their approaches to the use of external judicial decisions in their judgments. In addition, more research in this area is required, to attain specific normative guidance on this subject. These measures may, to varying extents, all contribute to promoting greater coherence in the approaches of courts and tribunals to the use of external judicial decisions.

9 Concluding remarks

As noted in the Introduction, according to Terris *et al.*, '[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable'.¹⁰⁰ While this observation was made with respect to international adjudication generally, it also applies to international criminal adjudication, where the existing literature has tended to confine itself to studying the use of external judicial decisions from one or more specific sources (such as decisions of human rights courts or of national courts).¹⁰¹ Even within this confined perspective, however, it has been noted that this subject 'has received only limited scholarly attention'.¹⁰² This article has aimed to provide a first step in the study of the approaches of international criminal courts and tribunals to the use of external judicial decisions. It is hoped that this brief article may serve as a basis for further research in this area. For instance, as the body of judgments rendered by the ICC becomes more sizeable, it may be important to study how the approaches of the chambers of the ICC to the use of external judicial decisions would compare to the approaches of the *ad hoc* Tribunals and/or the internationalised courts. Moreover, in the same manner as the judicial decisions of the *ad hoc* Tribunals' predecessors, namely the Nuremberg and Tokyo Tribunals, played a crucial role in the development of the former's jurisprudence, it would be significant to examine the contribution of judicial decisions of *ad hoc* Tribunals and internationalised courts to the jurisprudence of the ICC.¹⁰³ Finally, although

¹⁰⁰Terris *et al.*, above n 5, 120.

¹⁰¹See, for instance, Cassese, above n 25, 19 and Nollkaemper, above n 45, 277.

¹⁰²Nollkaemper was writing specifically with regard to the approach of the ICTY to external judicial decisions from national courts. See Nollkaemper, above n 45, 278.

¹⁰³Naturally, the *ad hoc* Tribunals and the ICC are based on very different statutory frameworks and it would be unwise for the ICC to rely on, or borrow mechanically from, the jurisprudence of the former. As Grover notes, '[t]he jurisprudence of the *ad hoc* tribunals is so rich that it is

the ICC Trial Chamber did provide some indication of its approach to the use of external judicial decisions in *Lubanga*,¹⁰⁴ it would be interesting to consider whether other chambers of the ICC specify, in a more direct and detailed manner, their approaches to the use of external judicial decisions in future judgments.

Annex I – List of Sources

The following is a list of the final judgments which constituted the primary sources for this research:

ICTY

1. Prosecutor v Erdemović, Sentencing Judgement, IT-96-22-T, ICTY Trial Chamber, 29 November 1996.
Prosecutor v Erdemović, Judgment, IT-96-22-A, ICTY Appeals Chamber, 7 October 1997.
2. Prosecutor v Tadić (aka 'Dule'), Judgment, IT-94-1-T, ICTY Trial Chamber, 7 May 1997.
Prosecutor v Tadić, Judgment, IT-94-1-A, ICTY Appeals Chamber, 15 July 1999.
3. Prosecutor v Delalić, Mucić (aka 'Pavo'), Delić, & Landžo (aka 'Zenga'), Judgment, IT-96-21-T, ICTY Trial Chamber, 16 November 1998.
Prosecutor v Delalić, Mucić (aka 'Pavo'), Delić, and Landžo (aka 'Zenga'), Judgment, IT-96-21-A, ICTY Appeals Chamber, 20 February 2001.

perhaps tempting for those working at the [International Criminal] Court, many of whom spent time working at the tribunals, to transpose familiar legal approaches wholesale, which would be mistaken'. See Grover, above n 21, 550.

¹⁰⁴For instance, with respect to the crime of conscription, enlistment and use of children under the age of 15, the ICC Trial Chamber stated that 'the jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the [Rome] Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute'. See *Prosecutor v Thomas Lubanga Dyilo*, above n 30, 603.

4. Prosecutor v Furundžija, Judgment, IT-95-17/1-T, ICTY Trial Chamber, 10 December 1998.
Prosecutor v Furundžija, Judgment, IT-95-17/1-A, ICTY Appeals Chamber, 21 July 2000.
5. Prosecutor v Jelisić, Judgment, IT-95-10-T, ICTY Trial Chamber, 14 December 1999.
Prosecutor v Jelisić, Judgment, IT-95-10-A, ICTY Appeals Chamber, 5 July 2001.
6. Prosecutor v Kupreškić, Kupreškić, Kupreškić, Josipović, Papić, & Šantić (aka 'Vlado'), Judgment, IT-95-16-T, ICTY Trial Chamber, 14 January 2000.
Prosecutor v Kupreškić, Kupreškić, Kupreškić, Josipović, & Šantić, Judgment, IT-95-16-A, ICTY Appeal Chamber, 23 October 2001.
7. Prosecutor v Kunarac, Kovač, and Vuković, Judgment, IT-96-23-T & IT-96-23/1-T, ICTY Trial Chamber, 22 February 2001.
Prosecutor v Kunarac, Kovač and Vuković, Judgment, IT-96-23& IT-96-23/1-A, ICTY Appeals Chamber, 12 June 2002.
8. Prosecutor v Kordić and Čerkez, Judgment, IT-95-14/2-T, ICTY Trial Chamber, 26 February 2001.
Prosecutor v Kordić and Čerkez, Judgment, IT-95-14/2-A, ICTY Appeals Chamber, 17 December 2004.
9. Prosecutor v Stakić, Judgment, IT-97-24-T, ICTY Trial Chamber, 31 July 2003.
Prosecutor v Stakić, Judgment, IT-97-24-A, ICTY Appeals Chamber, 22 March 2006.
10. Prosecutor v Brđanin, Judgment, IT-99-36-T, ICTY Trial Chamber, 1 September 2004.
Prosecutor v Brđanin, Judgment, IT-99-36-A, ICTY Appeals Chamber, 3 April 2007.
11. Prosecutor v Halilović, Judgment, IT-01-48-T, ICTY Trial Chamber, 16 November 2005.

Prosecutor v Halilović, Judgment, IT-01-48-A, ICTY Appeals Chamber, 16 October 2007.

12. Prosecutor v Martić, Judgment, IT-95-11-T, ICTY Trial Chamber, 12 June 2007.

Prosecutor v Martić, Judgment, IT-95-11-A, ICTY Appeals Chamber, 8 October 2008.

13. Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, & Pandurević, Judgment, IT-05-88-T, ICTY Trial Chamber, 10 June 2010.

14. Prosecutor v Haradinaj, Balaj, & Brahimaj, Judgment, IT-04-84-T, ICTY Trial Chamber, 3 April 2008.

Prosecutor v Haradinaj, Balaj, & Brahimaj, Judgment, IT-04-84-A, ICTY Appeals Chamber, 19 July 2010.

15. Prosecutor v Gotovina, Čermak, & Markač, Judgment, IT-06-90-T, ICTY Trial Chamber, 15 April 2011.

ICTR

1. Prosecutor v Akayesu, Judgment, ICTR-96-4-T, ICTR Trial Chamber, 2 September 1998.

Prosecutor v Akayesu, Judgment, ICTR-96-4-A, ICTR Appeals Chamber, 1 June 2001.

2. Prosecutor v Kayishema and Ruzindana, Judgment, ICTR-95-1, ICTR Trial Chamber, 21 May 1999.

Prosecutor v Kayishema and Ruzindana, Judgment, ICTR-95-1-A, ICTR Appeals Chamber, 1 June 2001.

3. Prosecutor v Rutaganda, Judgment, ICTR-96-3-T, ICTR Trial Chamber, 6 December 1999.

Rutaganda v Prosecutor, Judgment, ICTR-96-3-A, ICTR Appeals Chamber, 26 May 2003.

4. Prosecutor v Musema, Judgment, ICTR-96-13-T, ICTR Trial Chamber, 27 January 2000.

- Musema v Prosecutor, Judgment, ICTR-96-13-A, ICTR Appeals Chamber, 16 November 2001.
5. Prosecutor v Bagilishema, Judgment, ICTR-95-1A-T, ICTR Trial Chamber, 7 June 2001.
Prosecutor v Bagilishema, Judgment, ICTR-95-1A-A, ICTR Appeals Chamber, 3 July 2002.
 6. Prosecutor v Ntakirutimana and Ntakirutimana, Judgment and Sentence, ICTR-96-10 & ICTR-96-17-T, ICTR Trial Chamber, 21 February 2003.
Prosecutor v Ntakirutimana and Ntakirutimana, Judgment, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber, 13 December 2004.
 7. Prosecutor v Semanza, Judgment, ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003.
Semanza v Prosecutor, Judgment, ICTR-97-20-A, ICTR Appeals Chamber, 20 May 2005.
 8. Prosecutor v Niyitegeka, Judgment, ICTR-96-14-T, ICTR Trial Chamber, 16 May 2003.
Niyitegeka v Prosecutor, Judgment, ICTR-96-14, ICTR Appeals Chamber, 9 July 2004.
 9. Prosecutor v Kajelijeli, Judgment and Sentence, ICTR-98-44A-T, ICTR Trial Chamber, 1 December 2003.
Kajelijeli v Prosecutor, Judgment, ICTR-98-44A-A, ICTR Appeals Chamber, 23 May 2005.
 10. Nahimana, Barayagwiza, & Ngeze v Prosecutor, Judgment, ICTR-99-52-T, ICTR Trial Chamber, 3 December 2003.
Nahimana, Barayagwiza, & Ngeze v Prosecutor, Judgment, ICTR-99-52-A, ICTR Appeals Chamber, 28 November 2007.
 11. Prosecutor v Ntagerura, Bagambiki, & Imanishimwe, Judgment, ICTR-99-46-T, ICTR Trial Chamber, 25 February 2004.
Prosecutor v Ntagerura, Bagambiki & Imanishimwe, Judgment, ICTR-99-46-A, ICTR Appeals Chamber, 7 July 2006.

12. Prosecutor v Simba, Judgment and Sentence, ICTR-01-76-T, ICTR Trial Chamber, 13 December 2005.
Simba v Prosecutor, Judgment, ICTR-01-76-A, ICTR Appeals Chamber, 27 November 2007.
13. Prosecutor v Nchamihigo, Judgment and Sentence, ICTR-01-63-T, ICTR Trial Chamber, 12 November 2008.
Nchamihigo v Prosecutor, Judgment, ICTR-2001-63-A, ICTR Appeals Chamber, 8 March 2010.
14. Prosecutor v Bikindi, Judgment, ICTR-01-72-T, ICTR Trial Chamber, 2 December 2008.
Bikindi v Prosecutor, Judgment, ICTR-01-72-A, ICTR Appeals Chamber, 18 March 2010.
15. Prosecutor v Setako, Judgment and Sentence, ICTR-04-81-T, ICTR Trial Chamber, 25 February 2010.
Setako v Prosecutor, Judgment, ICTR-04-81-A, ICTR Appeals Chamber, 28 September 2011.

SCSL

1. Prosecutor v Brima, Kamara, & Kanu, Judgment, SCSL-04-16-T, SCSL Trial Chamber, 20 June 2007.
Prosecutor v Brima, Kamara, & Kanu, Judgment, SCSL-2004-16-A, SCSL Appeals Chamber, 22 February 2008.
2. Prosecutor v Fofana and Kondewa, Judgment, SCSL-04-14-T, SCSL Trial Chamber, 2 August 2007.
Prosecutor v Fofana and Kondewa, Judgment, SCSL-04-14-A, SCSL Appeals Chamber, 28 May 2008.
3. Prosecutor v Sesay, Kallon, & Gbao, Judgment, SCSL-04-15-T, SCSL Trial Chamber, 2 March 2009.
Prosecutor v Sesay, Kallon, & Gbao, Judgment, SCSL-04-15-A, SCSL Appeals Chamber, 26 October 2009.
4. Prosecutor v Taylor, Judgment, SCSL-03-01-T, SCSL Trial Chamber, 18 May 2012.

ECCC

1. Kaing Guek Eav (alias 'Duch'), Judgment, 001/18-07-2007/ECCC/TC, ECCC Trial Chamber, 26 July 2010.
Kaing Guek Eav (alias 'Duch'), Appeal Judgment, 001/18-07-2007-ECCC/SC, ECCC Supreme Court Chamber, 3 February 2012.

ICC

1. Prosecutor v Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, ICC Trial Chamber, 14 March 2012.