LEIDEN JOURNAL
of INTERNATIONAL LAW

CAMBRIDGE
UNIVERSITY PRESS

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Journal:	*Leiden Journal of International Law*
Manuscript ID:	LJIL-2014-0029.R3
Manuscript Type:	Original Article
Keyword:	Precedent, international criminal courts and tribunals, international criminal law, interpretation, international adjudication

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Appraisal-Based and Flexible Approaches to External Precedent in International Criminal Law

Abstract

This paper focuses on the approaches of international criminal judges to using external precedent, distinguishing between the appraisal-based and flexible approaches. On the one hand, the appraisal-based approach refers to uses of external judicial decisions which are preceded by an express legal appraisal. On the other hand, the flexible approach denotes a less stringent use of such decisions. It finds that, in a number of cases, international criminal judges have adopted a flexible approach to such decisions and have assimilated them within the legal framework of the referring court or tribunal without the necessary adjustment. This may have profound implications for the principle of legality and the fairness of the proceedings. The paper indicates that the adoption of either the appraisal-based or flexible approaches to external judicial decisions is not necessarily linked to the specific legal backgrounds of the judges involved, and different judges hailing from varying legal backgrounds have shifted between these approaches in different cases. This suggests that there is need for greater rigour in the judicial methodology for using external judicial decisions and, in particular, the importance of the appraisal-based approach to using such decisions, to ensure their the congruence with the legal framework of the referring court or tribunal.

Keywords

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1. Introduction

This paper examines the approaches of judges at five international and internationalized criminal courts and tribunals to using judicial decisions from other courts and tribunals[1] in the context of substantive law. The starting point for this discussion is that, generally, international judges are 'aware of the limits of reliance on the case law of...all national and international courts...They understand perfectly the need to take the specificity of international criminal justice into consideration.'[2] However, in some cases, judges have not appraised external judicial decisions appropriately to take account of the specificity of international criminal law ('ICL') and have adopted a flexible approach towards such case law. Using the notion of appraisal as a criterion, this paper distinguishes between the appraisal-based and flexible approaches. On the one hand, the appraisal-based approach refers to instance of use of external judicial decisions which are preceded by an express legal appraisal.[3] On the other hand, the flexible approach denotes a less stringent use of such decisions and refers to cases where they are used without express appraisal in the judgment.

[1] Referred to as 'external judicial decisions' or 'external precedent.'
[2] A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks', in M. Bergsmo (ed.) *Human Rights and Criminal Justice For the Downtrodden: Essays in Honour of Asbjorn Eide* (2003), 26.
[3] The elements of this appraisal are discussed below.

The findings of this paper are based on an analysis of the judgments, both trial and appeal, delivered by the (1) the International Criminal Tribunal for the former Yugoslavia ('ICTY'); (2) the International Criminal Tribunal for Rwanda ('ICTR'); (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').[4] Only express instances of use of external judicial decisions relating to substantive law were included in the analysis, and any uses relating mainly to procedural rules or sentencing were not covered.[5] In total, the analysis included (counting both trial and appeal): 74 judgments of the ICTY; 73 of the ICTR; 7 of the SCSL; 2 of the ECCC; and 1 of the ICC.

Part two of this paper outlines the elements of the appraisal-based approach and specifies the steps involved in the legal appraisal. Part three proceeds to discuss the legal basis for using external precedent by the various courts and tribunals. Part four then considers some instances in which international judges adopted an appraisal-based approach to external judicial decisions, focusing on instances where such decisions required adjustment. Subsequently, the limits of such adjustment are considered in relation to the subject of crimes against humanity under the Rome Statute of the ICC. Part five examines specific cases in which international judges adopted a more or less flexible approach to such decisions, focusing on: (1) national judicial decisions; (2) judicial decisions from international courts operating in other branches of law; and (3) judicial decisions from sister international criminal courts and tribunals. Part six provides a brief overview of instances where the approach of the same individual judge was not consistent in different cases. The paper finds that, in a number of cases, international criminal judges have adopted a flexible approach to external judicial decisions which may have profound implications for the law applied by the referring court or tribunal and may, ultimately, impact on the principle of legality and the fairness of the proceedings. It suggests that there is need for greater rigour in the judicial methodology for using external judicial decisions and, in particular, the importance of the appraisal-based approach to ensure the congruence of such decisions with the legal framework of the referring court or tribunal.

2. An outline of the appraisal-based and flexible approaches

There are a number of possible lenses through which one could analyse the use of external precedent in international adjudication. In the literature on interjudicial dialogue, for instance, the focus is on external judicial decisions as instances of an 'ongoing jurisprudential dialogue between international courts.'[6] Alternatively, one could assess the impact of decisions of

[4] Only judgments delivered by 18 May 2012 have been included (this date was chosen to be inclusive of the SCSL's *Taylor* Trial Judgment). The paper provides only a limited number of representative examples from this analysis. A full list of judgments is available on record with the author.

[5] The paper does not cover external judicial decisions used in relation to rules of procedure and evidence and sentencing because of the tribunal-specific and *sui generis* nature of these rules. See C. Stahn and L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box', in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (2012), 78-79. It is acknowledged, however, that in some cases the line between substance and procedure may be difficult to draw and '[w]hile textbooks commonly contain separate sections dealing with substantive and procedural law, respectively, the question of where the dividing line lies, and how they are connected, is usually neglected': see A. Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', (2012) 23 EJIL 769, at 771.

[6] C. P. R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue', (2009) 41 J Int'L L & Pol 755, at 758. See also A. M. Slaughter, 'A Global Community of Courts', (2003) 44 Harv Int'l L J 191, at 194.

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various international courts on the coherence of international law as a system.[7] On occasion, competing decisions of international courts have been characterised as instances of fragmentation in the system.[8] Moreover, from the perspective of the doctrine of sources of international law, one could assess whether judges approach external judicial decisions as subsidiary means or as sources of law,[9] or even as 'apparent quasi-independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law.'[10]

This paper adopts an appraisal-based framework for examining the approaches of international judges to external precedent. For an instance of use of an external judicial decision to be characterised as 'appraisal-based,' from a reading of the judgment, it has to be possible to identify an express legal appraisal of that decision. This criterion reflects the holding of the ICTY Trial Chamber in *Kupreškić et al.*:

> international criminal courts...must always carefully *appraise* decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.[11]

In the above, although the need for a careful appraisal of external judicial decisions was underscored, the Chamber did not articulate the precise content of this appraisal. In view of the centrality of this notion here, it is firstly useful to provide a definition. To 'appraise' ordinarily means '[t]o assess the value or worth of, to evaluate' or '[t]o estimate or assess the quality, worth, etc., of; to scrutinize critically'.[12] The particular legal framework of the referring court or tribunal (including its aims and objectives, the substantive law, and any

[7] For instance, Anderson maintains that '[j]udges have a duty to administer justice in the particular case, while keeping in mind the coherence of the legal system as a whole': see D. Anderson, 'The "Disordered Medley" of International Tribunals And the Coherence of International Law', 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), 397.

[8] The Report by the International Law Commission ('ILC') on the Fragmentation of International Law examines the conflict between the *Nicaragua* and *Tadić* decisions under the heading 'Fragmentation through conflicting interpretations of general law' and states, *inter alia*, '[t]he contrast between *Nicaragua* and *Tadic* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law': see Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (finalized by Martti Koskenniemi), UNGA 58th session, Doc. No. A/CN.4/L.682 (13 April 2006), at paras. 49-50. See also G. Acquaviva, 'Aiding and abetting international crimes and the value of judicial consistency: reflections prompted by the *Perisic*, *Taylor* and *Sainovic* verdicts', (2014) 3 *Questions of International Law* 3, at 4.

[9] See G. G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in M. Koskenniemi, *Sources of International Law* (2000), 153 at 171.

[10] See 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.

[11] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, also known as 'Vlado'*, Judgment, Case No. IT-95-16-T, 14 January 2000, at para. 542. Emphasis added. Significantly, however, this paper diverges from the *Kupreškić et al.* holding in that it requires such appraisals to be made express in the judgment.

[12] Oxford English Dictionary Online, 'Definition of *appraise*', http://www.oed.com/view/Entry/9774?redirectedFrom=appraise#eid [last accessed 5 January 2015].

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interpretive instruments such as elements of crime) furnishes the yardstick for this assessment. Against this yardstick, all external judicial decisions have to be evaluated.

Conceptually, at least, the legal appraisal should follow a determination of relevance, i.e. the appraisal of external judicial decisions should occur after those decisions would have been selected as relevant to the case at hand. It should, however, precede a determination of their persuasive value. The legal appraisal of external judicial decisions, firstly, entails an assessment of the law being interpreted and applied by those decisions and, secondly, an evaluation of the congruence of that law with the legal framework of the referring court or tribunal at the relevant time. As discussed below in relation to the *Barbie* case, the appraisal of the law being applied by those decisions should also take into account broader, contextual considerations which may interfere with the law being applied – such as the potential influence of local idiosyncrasies.[13]

While the need for this legal appraisal may appear evident in the case of national judicial decisions, as they belong to a different *corpus* of law, it is also important with respect to decisions from other areas of international law because of the specificities of ICL. These specificities include the fact that, although it is a branch of international law, ICL is 'an essentially hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law, [international humanitarian law ('IHL')] as well as human rights law.'[14] What this means, in effect, is that the requirements that the legal prohibitions be as clear, detailed, and specific as possible, and that there be no punishment for conduct that was not considered as criminal at the time when it was taken, flowing from the principles of legality and *nullum crimen sine lege*, are far more pronounced in ICL than they are in general international law.[15] ICL 'simultaneously derives its origins from, and continuously draws upon, international humanitarian law, human rights law and national criminal law.'[16] With respect to IHL, the Trial Chamber in *Krnojelac* emphasised the structural differences between this and other branches of international law:

> the Trial Chamber is mindful of the specificity of international humanitarian law. Care must be taken to ensure that this specificity is not lost by broadening each of the crimes over which the Tribunal has jurisdiction to the extent that the same facts come to constitute all or most of those crimes. In particular, when relying upon human rights law relating to torture, the Trial Chamber must take into account the structural differences which exist between that body of law and international humanitarian law, in

[13] Another example of such a local idiosyncrasy, taken from a different branch of international law, relates to the ICJ's *Nicaragua* case and the Connelly reservation to the jurisdiction of the Court. As Bianchi observes, '[t]he Connelly reservation, attached by the US to the unilateral declaration of acceptance of the Court's jurisdiction, prevented the Court from applying the [UN] Charter to the case at hand. Therefore, in order to decide the case on the merit, the Court was compelled to find rules of customary international law applicable to the conduct of the United States, regardless of the UN Charter provisions': see A. Bianchi, 'The International Regulation of the Use of Force: The Politics of the Interpretive Method' in L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies In a Fragmented International Legal Order: Meeting the Challenges* (2013), 296. In this case, therefore, the Connelly reservation may be characterised as a local idiosyncrasy which influenced the law being applied in *Nicaragua* and, in particular, its identification of rules of customary international law applicable to the use of force separate from the UN Charter provisions. Indeed, Bianchi postulates that 'the ICJ's findings might have been prompted by the need to circumvent the difficulty posed by the Connelly reservation to the jurisdiction of the Court': see ibid.

[14] A. Cassese *et al*., *International Criminal Law: Cases & Commentary* (2011), 13.

[15] A. Cassese, *International Criminal Law* (2008), 8. See also C. J. M. Safferling and L. Büngener, *International Criminal Procedure* (2012), 25.

[16] See Cassese *et al. supra* note 14, at 1.

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> particular the distinct role and function attributed to states and individuals in each regime. However, this does not preclude recourse to human rights law in respect of those aspects which are common to both regimes.[17]

Although decisions from sister international criminal courts and tribunals would already follow the logic of ICL, a legal appraisal of these decisions would nevertheless be necessary in order to assess their congruence with the specific legal framework of the referring court or tribunal at the relevant time and for any necessary adjustment to be undertaken.

Following this appraisal, the international judge would determine whether the external judicial decisions may (or may not) be assimilated within the legal framework of the referring court or tribunal and whether they would require adjustment. Admittedly, it is not possible to stipulate *a priori* the level of detail for this appraisal because this would depend on the particular circumstances of each case. As noted in *Kupreškić et al.*, the appropriate level of appraisal would depend on whether the decisions are national or international. It may also depend on other factors, such as the state of development of the referring court or tribunal's own jurisprudence.[18] This paper, therefore, does not seek to set down the appropriate level of detail of the appraisal in each case. It rather focuses on examining whether it is possible to identify an express legal appraisal preceding the use of external judicial decisions in the judgment. Thus, where an express appraisal is provided, the instance of use is characterised as 'appraisal-based'. Conversely, where a decision is used without express appraisal, the instance is characterised as 'flexible.'[19] This framework has the advantage of focusing attention on the appraisal (or lack thereof) accorded to external judicial decisions – a subject which has not received much attention in the literature.[20] The importance of this focus is not only limited to reasons of legal rigour, but is also necessary:

> to satisfy the fundamental requirements of the *principle of fair trial*, especially the obligation, derived from this principle, to respect the rights of the accused. Indeed, the adoption of a legally rigorous approach reduces the margin for arbitrary decisions by the international judge.[21]

The paper provides a basis for further research in this area. However, some limitations with respect to the scope of the analysis should be highlighted. In particular, the paper focuses solely on *express* appraisals of external judicial decisions as they may be identified from a reading of the judgment. Any appraisals which may have occurred 'behind the scenes', for instance, during judicial deliberations, but which would not have been expressly recorded in the judgment have not been taken into account. This is an important limitation because the

[17] *Prosecutor v. Milorad Krnojelac*, Judgment, Case No. IT-97-25-T, 15 March 2002, at para. 181.
[18] Cassese notes that when the ad hoc Tribunals had reached a stage when a copious case law had been developed, in some cases, it no longer remained necessary for the Tribunals to discuss the applicable law at great length and they confined themselves to citing previous case law without necessarily undertaking a detailed analysis. See A. Cassese, 'Black Letter Lawyering v. Constructive Interpretation: The *Vasiljević* Case', (2004) 2 JICJ 265, at 265.
[19] Elsewhere, this author has examined the approaches of judges to external precedent through the direct and indirect lenses. That analysis focused on whether judges relied on the legal findings or conclusions of particular external judicial decisions directly (the direct approach) or whether they borrowed from such decisions the reviews of state practice and *opinio juris* in the context of custom or, in the context of general principles, the surveys of national jurisdictions (the indirect approach). That analysis thus has a different focus from the present enterprise. See A. Zammit Borda, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', (2013) 14 MJIL 608-642.
[20] For a notable exception, see Cassese, *supra* note 2, at 19.
[21] Ibid., at 21.

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lack of an express appraisal in the judgment would not necessarily indicate that such an appraisal had not taken place, but could simply mean that, for reasons of drafting styles or space limitations, it was not expressly included in the judgment. Nevertheless, it is considered that, where judges have used external precedents in their judgments without express appraisal – sometimes 'without indicating (or even so much as raising the question of) the value or significance of their reference to the case law of other national or international courts'[22] – it is legitimate to characterise their approaches as more or less flexible.

3. The legal basis for using external precedent

Before proceeding to examine the approaches of international judges to external precedent, it is necessary to consider the legal basis for using such precedent by the respective courts and tribunals.[23] Naturally, the point of departure has to be their constitutive statutes and legal framework. Thus, although the Statutes of the ad hoc Tribunals do not contain specific provisions on the applicable law, judges at these Tribunals have generally, and with some notable exceptions,[24] followed the doctrine of sources under customary international law, as reflected in Article 38(1) of the Statute of the International Court of Justice ('ICJ'). Within this doctrine, external precedents have the value of subsidiary means for the determination of rules of international law.[25] Judges at these courts and tribunals have consistently reiterated that such precedents do not have binding force. For instance, in *Kupreskic et al.*, the ICTY Trial Chamber held:

> [b]eing international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a 'subsidiary means for the determination of rules of law'…Clearly, judicial precedent is not a distinct source of law in international criminal adjudication.[26]

In *Karemera et al.*, the ICTR Appeals Chamber held further that '[t]here is no doctrine of precedence in international law which requires a Trial Chamber to follow practices or decisions adopted by another international court.'[27] The ECCC similarly emphasised that the judicial decisions of the ad hoc Tribunals (and presumably other courts and tribunals) 'are

[22] Ibid., at 21-2.
[23] See Zammit Borda, *supra* note 19, at 612.
[24] For instance, in his celebrated dissent in *Erdemović*, Judge Li appeared to depart from the traditional view of judicial decisions as subsidiary means under Article 38(1)(d) of the ICJ Statute. He 'took the position that legal norms might be inferred from case law, including national case law, and that the criteria for doing so were distinct from the identification of rules of customary law or general principles of law': see Nollkaemper, *supra* note 10, at 290. See also A. Zammit Borda, 'The Use of Precedent as Subsidiary Means and Sources of International Criminal Law', (2013) 18 *Tilburg Law Review* 65, 75.
[25] For a discussion of judicial decisions under Article 38(1)(d) of the ICJ Statute, see A. Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals', (2013)24 EJIL 649, 649. It is noted that '[j]udicial decisions used as evidences of customary international law are more intimately connected with the law-creating processes, and their consideration under Article 38(1)(d) risks muddying the distinction between law-creating processes and law-determining agencies. As such, they are more appropriately considered under Article 38(1)(b), rather than Article 38(1)(d). The same reasoning applies to all judicial decisions used as material sources of rules of international law, such as judicial decisions used in identifying (or negating) general principles of law', ibid., at 657.
[26] *Kupreškić et al.* Trial Judgment, *supra* note 11, at para. 540.
[27] *Prosecutor v. Édouard Karemera, Athieu Ngirumpatse*, Joseph Nzirorera, Decision on Interlocutory Appeal Regarding Witness Proofing, Case No. ICTR-98-44-AR73.8, 11 May 2007, at para. 7.

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non-binding and are not, in and of themselves, primary sources of international law for the ECCC.'[28] Thus, judges at these courts and tribunals have generally taken the view that external precedent has no binding force in the referring court or tribunal, but may have persuasive value.[29]

With respect to the SCSL, Article 20(3) of its 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.' Although this Article was drafted in mandatory language ('*shall* be guided…'), in practice, it has been interpreted permissively, allowing the SCSL judges, where appropriate, to have recourse to relevant decisions of the ad hoc Tribunals. Indeed, a SCSL Chamber emphasised that Article 20(3) should not be construed to mean that the decisions of the ad hoc Tribunals are in any way binding on the SCSL. In the *RUF* Case, the SCSL Trial Chamber insisted that it is 'not bound by decisions of the ICTY Appeals Chamber'.[30] Moreover, in *Taylor*, the SCSL Appeals Chamber rejected the specific direction requirement, which had been upheld by the ICTY Appeals Chamber, in *Perisic*, a few months earlier.[31] Thus, Article 20(3) of SCSL Statute may be seen as a particularization of the general rule regarding the status of judicial decisions under Article 38(1)(d) of the ICJ Statute. It does not, however, detract from that rule, namely, that such external judicial decisions do not have binding force, but may have persuasive value.

With respect to the ICC, Article 21 of the Rome Statute makes provision for that Court's applicable law and sub-paragraph (2) thereof states that the ICC 'may apply principles and rules of law as interpreted in its previous decisions.' However, this provision only covers the ICC's *own* previous decisions and not external precedent. This was confirmed by the ICC Trial Chamber, in *Lubanga*, which held that 'decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the [Rome] Statute.'[32] This Article does not therefore expressly provide a legal basis for the ICC to use external precedent. Thus, given that Article 21 of the Rome Statute does not expressly embrace external precedent, the view may be taken that the use of such precedent should be excluded. However, it is considered that the better position would be to recall that Article 21(1)(b) authorizes the Court to apply 'the principles and rules of international law' and that, therefore, the Court may use external judicial decisions through this channel, i.e. as subsidiary means for the determination of these rules of law.[33]

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[28] *Kaing Guek Eav alias 'Duch'*, Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC, 3 February 2012, at para. 97.

[29] The distinction between binding force and persuasive value of external precedent, particularly when viewed in binary terms, has been challenged. Jacob, for instance, makes the point that 'a crude binary understanding of a case's normativity ('binding or not') belies the complexity of the reasoning processes accompanying the practical application of precedents': see M. Jacob, 'Precedents: Lawmaking Through International Adjudication', (2011) 12 *German Law Journal* 1005, at 1015-1016.

[30] *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgment, Case No. SCSL-04-15-T, 2 March 2009, at para. 295.

[31] See Acquaviva, *supra* note 8, at 13.

[32] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06, 14 March 2012, at para. 603.

[33] Nerlich considers that the basis for using external precedent when interpreting the Rome Statute and its subsidiary instruments may be found 'in a broader conception of the context in which these instruments have to be interpreted, and in the purpose underlying Article 31(3)(c) of the Vienna Convention': see V. Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC', in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court* (2009), 320.

The present author is of the view that Article 21 of the Rome Statute does not exclude the use of external precedent. In this respect, Acquaviva notes that the ICC 'heavily relies, in its reasoning on both substantive and procedural matters, on the case-law of other international criminal courts and tribunals, despite its relatively close[d] system dictated by Article 21 of the Rome Statute.'[34] Similarly, the editors of *Archbold* observe that:

> [i]n determining the scope and application of Article 21 of the Rome Statute, the ICC has emphasized the obligation to apply its own regime. However, this does not mean that the accumulated jurisprudence emanating from the ICTY/R, SCSL, ECCC and STL will be simply jettisoned away. Rather, the jurisprudence from other international or internationalized or hybrid courts is not 'automatically applicable to the ICC without detailed analysis.'[35]

While it is, therefore, possible to identify a basis for the use of external precedent even with respect to the Rome Statute, different judges and commentators may hold differing views with respect to the legitimacy of such use. For instance, with respect to the ICC, Nerlich takes the view that 'the doctrinal foundation for relying on the precedent of the *ad hoc* tribunals when interpreting the [ICC's] legal texts is admittedly weak.'[36] A related question concerns the methodology for selecting relevant decisions, particularly considering that on a given point of law, there may be several international and national decisions which could be considered relevant. With the exception of Article 20(3) of SCSL (which refers specifically to the case law of the ad hoc Tribunals), the available normative guidance on the methodology for selecting external judicial decisions is limited. The lack of a clear methodology has given rise to suggestions of selectivity and instrumentality in the use of such decisions.[37]

Indeed, several factors may influence the method by which external precedents are selected, including the specific wording of the legal framework, the background and approaches of the judges involved, the submissions of the parties and (it has been suggested) law clerks.[38] Additional considerations, such as the absence of a formal chain of communication between the various courts and tribunals, as well as language barriers, may also be pertinent. On this subject, some useful insights may be gained from the literature on domestic courts. For instance, in a study examining the use of foreign decisions in the domestic sphere, it has been observed that 'any assumption of egalitarianism [between jurisdictions] would be highly

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[34] See Acquaviva, *supra* note 8, at 8.
[35] R. Dixon and K. A. A. Khan , *Archbold on International Criminal Courts: Practice, Procedure and Evidence* (2009), 171 (para. 5-56). Schabas considers that 'the text of [Article 21(s) of the Rome Statute] clearly applies only to case law of the Court, but surely cannot be taken as depriving the Court of the authority to consider principles and rules of law derived from the case law of other judicial bodies. There are too many examples of references to the case law of the ad hoc tribunals and human rights courts like the European Court of Human Rights for such an a contrario interpretation of Article 21(2) to be entertained': see W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 396.
[36] Nerlich however continues, 'but it does exist and if used in full awareness of its weakness, it may well make for a better understanding of the provisions that the ICC has to apply': see Nerlich, *supra* note 33, at 320.
[37] Bohlander and Findlay, for instance, find that, in the ICTY decisions they analysed, common law sources had been used more frequently than civil law sources and they argue that more emphasis should be placed on the 'legal-methodological integrity' of the selection process: see M. Bohlander and M. J. Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law Principles', (2002) *The Global Community Yearbook of International Law and Jurisprudence* 2, at 7.
[38] Ibid., at 12.

unrealistic.'[39] In view of resource constraints, judges searching for relevant external precedent may tend to focus their search on larger jurisdictions because:

> a larger population means a larger trial caseload, therefore more appeal cases, and therefore a larger number of legally significant appeals. This in turn suggests that an appeal court in a large province is likely already to have dealt with, and to have developed the doctrine to accommodate consistently, cases of a type arising for the first time in a smaller province.[40]

While the methodology for selecting external judicial decisions gives rise to important questions of law and legitimacy, these would require a separate focus and are not covered by this paper. Rather, the inquiry herein begins after the relevant decisions would have been selected and concerns the legal appraisal of such decisions, an issue which is considered next.

4. The appraisal-based approach

As noted above, the appraisal-based approach implies that it is possible to identify an express legal appraisal preceding the use of external judicial decisions in the judgment. This legal appraisal, firstly, entails an assessment of the law being applied and, secondly, an evaluation of the congruence of that law with the legal framework of the referring court or tribunal at the relevant time. The appraisal of the law being applied would, moreover, also have to take into consideration broader contextual factors which may interfere with the law being applied, such as the possible influence of local idiosyncrasies. The next section discusses some instances in which an appraisal-based approach was adopted. In particular, it focuses on those instances in which, following a legal appraisal, it was found that the external judicial decisions in question required adjustment. Subsequently, the limits of such adjustment are considered in relation to the subject of crimes against humanity under the Rome Statute of the ICC.

4.1 Instances of use of the appraisal-based approach

The assessment of the law being applied by particular tribunals is not always a straightforward analysis and, in some cases, may be problematic. For instance, in *Erdemović*, Judge Cassese was of the view that, with respect to the *Einsatzgruppen* case,[41] the United States Military Tribunal sitting at Nuremberg 'acted under Control Council Law No. 10, and therefore its decisions carry more weight than the ones by national courts acting under national legislation.'[42] However, in contrast, Judge McDonald and Judge Vohrah considered that '[i]n relation to the post-World War Two military tribunals constituted under the London Charter or Control Council Law No. 10, doubt remains as to whether any of these military tribunals were truly "international in character".'[43] In this respect, they considered that 'to the extent that the post-World War Two military tribunals constituted under the London Charter

[39] McCormick proceeds to characterize the universe of citable decisions an 'uneven playing field': see P. McCormick, 'The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority 1922-92', (1994) 32 *Osgoode Hall Law Journal* 271, at 282.

[40] P. McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices' (1993-1994) 22 *Manitoba Law Journal* 286, at 297–298.

[41] The *Trial of Otto Ohlendorf et al.*, , in Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, (U.S. Govt Printing Office, Washington D.C., 1950), vol. IV (*'the Einsatzgruppen* case').

[42] *Prosecutor v. Dragen Erdemović*, Judgment, Case No. IT-96-22-A, 7 October 1997, at para. 27 (Separate And Dissenting Opinion Of Judge Cassese).

[43] Ibid., at para. 53 (Joint Separate Opinion of Judge McDonald and Judge Vohrah).

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or Control Council Law No.10 were held to be international, this was merely with regard to their constitution, character and competence....There was no statement to the effect that the tribunals applied purely international law.'[44] This suggests that the character of the law being applied by particular tribunals (and the decisions they deliver) could itself give rise to divergent views.

In *Krstić*, the Trial Chamber had to consider the lawfulness of evacuations based on imperative military reasons. The Chamber referred to the case of Field Marshall Erich von Manstein, who had been convicted by a British military tribunal of the mass deportation and evacuation of civilian inhabitants of Ukraine.[45] In this case, the Trial Chamber noted that 'the judge advocate went so far as to suggest that deportation of civilians could never be justified by military necessity, but only by concern for the safety of the population.'[46] However, rather than simply borrowing the Judge Advocate's holding, the Chamber undertook a legal appraisal, particularly in the light of the Geneva Convention IV. On the basis of its assessment, the Chamber found that Judge Advocate's holding:

> is contradicted by the text of the later Geneva Convention IV, which does include 'imperative military reasons', and the Geneva Convention is more authoritative than the views of one judge advocate.[47]

This is a good example of a legal appraisal which resulted in the need for adjustment of the external judicial decision in question, to ensure its congruence with the legal framework of the ICTY. In this case, the adjustment consisted in the rejection of that part of the Judge Advocate's holding which had been superseded by the Geneva Conventions.

The possibility of different judges adopting different approaches to the same national judicial decision emerges in the *Krstić* and *Blagojević et al.* decisions. The issue in both cases was the interpretation of the 'intent to destroy' requirement in the context of genocide. In *Krstić*, the Trial Chamber noted that, *inter alia*, some recent decisions had 'interpreted the intent to destroy clause...so as to encompass evidence relating to acts that involved cultural and other non-physical forms of group destruction.'[48] In particular, the Chamber referred to a decision of the Federal Constitutional Court of Germany, which had stated:

> the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group...the intent to destroy the group...extends beyond physical and biological extermination...The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.[49]

However, appraising this statement in light of the specificity of ICL and, in particular, the principle of *nullum crimen sine lege*, the *Krstić* Trial Chamber held that 'despite recent developments [as articulated by the German Court's finding above], customary international

[44] Ibid., at para. 54 (Joint Separate Opinion of Judge McDonald and Judge Vohrah).
[45] See *Von Lewinski* (called von Manstein), British Military Court at Hamburg (Germany),19 December 1949, in 16 Annual Dig. and Reports of Public International Law Cases 509, 521 (1949), cited in *Prosecutor v. Radislav Krstić,* Judgment, Case No. IT-98-33-T, 2 August 2001, at para. 526.
[46] *Krstić* Trial Judgment, ibid., at para. 526 (fn 1178).
[47] Ibid.
[48] Ibid., at para. 577.
[49] Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa).

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law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.'[50] Following this legal appraisal, the *Krstić* Trial Chamber concluded that the progressive interpretation of the German Court decision could not be reconciled with the *nullum crimen* principle and, therefore, had to be rejected.

Relying on the same national judicial decision, the *Blagojević et al*. Trial Chamber proceeded to find that the term 'destroy' in the genocide definition can encompass the forcible transfer of a population, relying, *inter alia*, on the expansive reasoning of the German Court.[51] In particular, the Chamber noted that the German Court had held that:

> such an interpretation would not be in violation of international law and that 'it has generally been accepted that the limit of the meaning of the text has been exceeded only when the intention to destroy relates solely to a group's cultural identity [that is, cultural genocide]'. The Constitutional Court upheld thereby, as constitutional, an interpretation by the Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf) and the Bundesgerichtshof (Federal Supreme Court) of the term 'destroy' as meaning the destruction of 'the group as a social unit in its specificity, uniqueness and feeling of belonging [and that] the biological-physical destruction of the group is not required.[52]

Unlike the judges in *Krstić*, who had appraised the decision in light of the specificity of ICL and the *nullum crimen* principle, the judges in *Blagojević et al*. appeared to take the view that the expansive interpretation of 'intent to destroy', as articulated by the German Court, would not be in violation of international law at the relevant time. However, this conclusion was rejected by the *Blagojević et al.* Appeals Chamber, which held that:

> the Appeals Chamber is not convinced by the Trial Chamber's reasoning that the forcible transfer operation alone...would suffice to demonstrate the principal perpetrators' intent to 'destroy' the protected group. The *Krstić* Appeal Judgment clearly held that 'forcible transfer does not constitute in and of itself a genocidal act', and it is simply a relevant consideration as part of the overall factual assessment.[53]

4.2 The limits of adjustment

As noted above, the particular legal framework of the referring court or tribunal provides the yardstick against which external judicial decisions would have to be assessed. Given that such decisions would normally be interpreting and applying legal provisions external to that framework, the legal appraisal would serve to assess their congruence and indicate the required adjustment as appropriate. In this respect, the degree to which such decisions could be adjusted to reflect the specificities of the referring court or tribunal may have limits. This section provides some reflections on this point in relation to the subject of crimes against humanity under the Rome Statute of the ICC.

[50] *Krstić* Trial Judgment, *supra* note 45, at para. 580.
[51] *Prosecutor v. Vidoje Blagojević, Dragan Jokić*, Judgment, Case No. IT-02-60-T, 17 January 2005, at para. 665.
[52] Ibid., at para. 664.
[53] *Prosecutor v. Vidoje Blagojević, Dragan Jokić*, Judgement, Case No. IT-02-60-A, 9 May 2007, at para. 123.

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It has been noted that the numerous compromises which were made in order to obtain agreement on the Rome Statute have 'caused the Statute and *Elements of Crimes* to diverge substantially from the actual content of customary international law as it existed at the time.'[54] One important instance of such a divergence is the requirement that crimes against humanity, under Article 7(2)(a) of the Rome Statute, be committed pursuant to, or in furtherance of, 'a State or organizational policy.'[55] This requirement was seen as a necessary shield against the prosecution of crimes which were not actively supported by a state or similar entity.[56] On this issue, the position in the Rome Statute is different from the position of the ICTY Appeals Chamber, which in *Kunarac et al.*, following a review of state practice and *opinio juris*, found that, at the time of the alleged acts (in the early 1990s), '[t]he practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such [policy] requirement exists under customary international law.'[57]

With respect to the policy requirement, therefore, the provisions of Article 7(2)(a) of the Rome Statute and the holding in *Kunarac et al.* differ fundamentally. In view of this divergence, it may simply not be possible to adjust the *Kunarac et al.* decision to cohere with the Rome Statute framework, as this would necessitate a re-characterisation of that decision. This case, therefore, provides a good example of the limits of adjustment of external judicial decision. However, the matter does not necessarily end there. The *Kunarac et al.* decision may still exert some degree of influence on the Rome Statute regime with respect to the interpretation of the policy requirement under Article 7(2)(a) of the Rome Statute. Pursuant to this argument, the *Kunarac et al.* decision would tend to favour a broader, rather than stricter, interpretation of the policy requirement under Article 7(2)(a). In this sense, therefore, external precedent may still exert some degree of indirect influence, even where it may not be directly adjustable on a given issue. If the view is taken that precedent represents a collective 'body of wisdom,'[58] then it would seem unwise to disregard it – possibly even in relation to relatively closed systems such as the Rome Statute and where particular decisions may not be directly adjustable. For instance, Judge Hunt suggests that the influence exerted by precedent may provide a useful means for the development of the law. He expresses the hope that the ICC judges 'will accept a responsibility to see that international criminal law continues to develop in the future and does not stand still and therefore become obsolete.'[59]

According to Judge Hunt, the emphasis on the development of the law is supported by Article 10 and Article 21 of the Rome Statute.[60] However, any responsibility that ICC judges may have with respect to the development of the law has to remain subordinate to their primary responsibility to apply the law of the Rome Statute framework, including the *nullum crimen*

[54] D. Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges', (2004) 2 JICJ 56, at 67.
[55] Hunt observes that '[n]o such requirement of policy exists in current international criminal law': see ibid., at 64-65.
[56] Ibid., at 64.
[57] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Judgment, Case No. IT-96-23&IT-96-23/1-A, 12 June 2002, at para. 98 (fn 114).
[58] N. Duxbury, *The Nature and Authority of Precedent* (2008), 99.
[59] Hunt, *supra* note 54, at 60-61.
[60] Article 10 provides that 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.' Article 21 (Applicable Law) refers to the various sources to which the Court may have recourse and refers, *inter alia*, to general principles of law and those principles and rules of law 'as interpreted in its previous decisions'. See also Hunt, *supra* note 54, at 60-61 (fn 22).

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principle as set out in Article 22. In particular, they have to ensure that the definitions of a crimes 'be strictly construed and shall not be extended by analogy.'[61] In light of this, where external judicial decisions fundamentally diverge from, and may not be adjusted to, the Rome Statute framework, it is considered that any influence that they may exert has to be strictly circumscribed by the provisions of that framework.[62] Indeed, some have questioned why the case law of the ad hoc Tribunals should exert *any* influence on the Rome Statute. For instance, Nerlich considers:

> [w]hy should the case law of the ad hoc tribunals shed light on the Rome Statute or its subsidiary instruments? The Rome Statute has established an international criminal jurisdiction that is distinct from, and independent of, the ad hoc tribunals; and when interpreting legal texts applicable in a given jurisdiction one does not normally turn to the jurisprudence of other jurisdictions relating to the interpretation of other legal texts.[63]

While the present author considers that the above view may be too restrictive, particularly given the common purpose underlying the ad hoc Tribunals and the ICC, and the complex relationship between the Rome Statute and customary international law,[64] it does focus attention on the importance of an appraisal-based approach to external judicial decisions, in order to ensure the congruence of such decisions with the ICC's legal framework. The next part proceeds to examine cases in which a more flexible approach to external judicial decisions was adopted.

5. The flexible approach

This part covers cases where external judicial decisions have been borrowed and introduced in their new environment on the basis of a limited appraisal. It is organized by decision type, namely:

1. National judicial decisions;
2. Judicial decisions from international courts operating in other branches of law;
3. Judicial decisions from sister international criminal courts and tribunals.

5.1 National judicial decisions

Cryer *et al.* observe that '[t]he assertions of international law in domestic cases can be affected by local idiosyncrasies. These can arise from the domestic statutes that are being

[61] Article 22(2) of the Rome Statute.
[62] For instance, in case of ambiguity with respect to the definition of a crime, this should be interpreted in favour of the person being investigated, prosecuted or convicted (see Article 22(2) of the Rome Statute).
[63] Nerlich, *supra* note 33, at 317.
[64] On the complex relationship between the Rome Statute and customary international law, Grover observes that '[o]n balance, it is submitted that states parties should be presumed to have intended that Articles 6, 7, and 8 [of the Rome Statute], to the extent possible and without violating the principle of legality, be interpreted in light of relevant and applicable law as it existed when the crime is alleged to have been committed…Further, Articles 10 and 22(3) [of the RS] contemplate custom evolving and Article 21(2) [RS] renders custom and treaty law authoritative interpretive aids. In interpreting Articles 6, 7, and 8 in light of relevant and applicable law which exists at the time the alleged crime was committed, Article 22 serves as a reminder that, where the Rome Statute cannot be reconciled with subsequent law, the definitions of crimes in Articles 6, 7, and 8 prevail': see 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, at 581-582.

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evaluated or applied, or from a court seeing international criminal law though a distinctly national lens.'[65] In spite of this, in a number of the judgments examined by this paper, there was no express legal appraisal preceding the use of national judicial decisions. This is problematic, in view of the possible local idiosyncrasies which could interfere with the law being applied.

In *Akayesu*, the Trial Chamber had to interpret the meaning of 'causing serious bodily or mental harm to members of the group' under Article 2 of the ICTR Statute (genocide). In so doing, the Chamber used the findings of the District Court of Jerusalem in the *Eichmann* case,[66] without, however, expressly considering whether the interpretation contained in *Eichmann*, which was based on a national law – namely Article 1 of the Nazis and Nazi Collaborators–Punishment Law (5710-1950) – reflected applicable international law.[67] Although the Israeli national law, on which *Eichmann* was based, made reference specifically to 'crimes against the Jewish people', the ICTR Trial Chamber, with little express discussion in the judgment, took the view that this was equivalent to 'genocide under another legal definition.'[68] While this view finds support in the writings of some scholars,[69] others have pointed out the dangers inherent in the peculiar categorization of the Israeli law.[70] In view of the rather limited appraisal of this case, therefore, the approach may be characterised as flexible.

The dangers of a flexible reliance on national judicial decisions may be especially pronounced with respect to decisions which appear to be interpreting international law but which, in reality, would be based on a peculiar interpretation from a distinctly national lens. Such decisions – which could be characterised as 'red herrings' – have the potential to mislead, particularly where they are relied on without appraisal. For the reasons discussed below, *Barbie* could be regarded as such a decision.[71] In this context, a succession of ICTY Trial Chambers have relied on the expansive interpretation of 'civilians', as articulated in *Barbie*, to find that the term for the purposes of crimes against humanity included those who were members of a resistance movement and former combatants. The *Mrksić (Vukovar)* Rule 61 Decision was the first to hold that the specific situation of the victim at the moment the

[65] R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2010), 12. In *Čelebići*, the judges at the Trial Chamber noted that in any national legal system, legal notions are 'utilised in a specific legal context and are attributed their own specific connotations by the jurisprudence of that system': *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as 'Pavo', Hazim Delic, Esad Landzo also known as 'Zenga'*, Judgment, Case No. IT-96-21-T, 16 November 1998, at para. 431.

[66] *Attorney General of Israel v. Adolf Eichmann* 36 ILR 5, Jerusalem District Court (12 December 1961).

[67] *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, at para. 503.

[68] Ibid.

[69] W. Schabas, 'Judicial Activism and the Crime of Genocide' in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010), 64.

[70] For instance, it has been pointed out that 'to proscribe the murder of Jews as a crime against Jews carries the dangerous implication that it is not a crime against non Jews. […T]o define a crime in terms of the religion or nationality of the victim, instead of the nature of the criminal act, is wholly out of keeping with the needs of the times and trend of modern law': see T. Taylor, 'Large Questions in the Eichmann Case', *New York Times Magazine*, 22 January 1961. Kittrie notes that although '[t]he explanation has been offered, in partial answer to this argument, that in referring to "crimes against the Jewish people" the Israeli law was merely classifying the object of the crime, similar to the way a statute book may divide offenses according to whether they are "crimes against property" or "crimes against a person"...Yet the question remains whether such differentiation between the objects of international crimes serves a valid purpose and is at all necessary.' See N. K. Kittrie, 'A Post Mortem of the Eichmann Case. The Lessons for International Law' (1964) 55 *Journal of Criminal Law, Criminology, and Police Science*, at 24-25.

[71] *Fédération Nationale Des Déportés et Internés Résistants et Patriotes and Others v. Barbie,* 'Arrêt', French Court of Cassation (Criminal Chamber), International Law Reports, Vol. 78 (1985).

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crimes were committed, rather than his status, had to be taken into account in determining civilian status for the purposes of Article 5 of the ICTY Statute.[72] Subsequently, in interpreting the meaning of civilians in a similar context, in *Tadić*, the Trial Chamber considered the *Barbie* case to be of assistance, as it had addressed '[p]recisely this issue.'[73] Although the Chamber took note of the fact that 'the court in the *Barbie* case was applying national legislation',[74] and that the prosecution of the accused for crimes against humanity had been relied upon 'to deny the accused's appeal on the bases of disguised extradition and an elapsed statute of limitations',[75] the Chamber nevertheless relied on it to hold that a wide definition of civilian population was justified and that those actively involved in a resistance movement could qualify as victims of crimes against humanity.[76]

Subsequently, both the *Blaškić* Trial Chamber[77] and the *Kupreškić et al.* Trial Chamber[78] imported the expansive interpretation of civilians. Indeed, in *Kupreškić et al.*, the Chamber held that this expansive interpretation was 'borne out by the case law', a holding which could potentially give the impression of widespread support for this interpretation.[79] In fact, however, the only two cases referred to by the Chamber were the *Barbie* case and the *Mrksić et al. (Mrksić (Vukovar) Rule 61* Decision (which itself had relied on *Barbie*).

As Sadat points out, although the *Barbie* case could appear to be interpreting international law, it was in fact merely providing a peculiar interpretation of a 1964 French law driven by very specific national circumstances.[80] The expansive definition of civilians which the French Court of Cassation had adopted was largely driven by domestic considerations, namely, overcoming the statute of limitations with respect to war crimes. In the domestic context, this expansive definition served to clear the way for the prosecution of Barbie for crimes committed against the French Resistance as crimes against humanity rather than war crimes.[81] Nevertheless, the ICTY judges who relied on *Barbie* in the abovementioned cases do not appear to have paid much attention to the local idiosyncrasies of this case and their approaches may, therefore, be characterised as flexible. It is notable that the expansive interpretation of civilians was subsequently rejected by the ICTY Appeals Chamber in favour of a narrower construction of the term based, primarily, on Article 50(1) of Additional Protocol I.[82]

Where judges adopt a flexible approach to external precedent, this may influence the outcome of their decisions and, indeed, may have profound implications for the principle of legality

[72] See the reference in *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šljivančanin*, Judgment, Case No. IT-95-13/1-T, 27 September 2007, at para. 450.
[73] *Prosecutor v. Dusko Tadić aka 'Dule'*, Judgment, Case No. IT-94-1-T, 7 May 1997, at para. 641.
[74] Ibid., at para. 642.
[75] Ibid.
[76] Ibid., at para. 643.
[77] *Prosecutor v. Tihomir Blaškić,* Judgment, Case No. IT-95-14-T, 3 March 2000, at para. 212.
[78] *Kupreškić et al.* Trial Judgment, *supra* note 11, at para. 548.
[79] Ibid.
[80] See L. N. Sadat, 'The Nuremberg Paradox', (2010) 58 Am J Comp L 151, at 180.
[81] This interpretation was affirmed in a judgment of the Court of Cassation of 3 June 1988. Moreover, Sadat argues that the French Court of Cassation interpreted Article 6(c) of the Nuremberg Charter (on crimes against humanity) in order to permit Barbie's trial in France, while at the same time limiting the Nuremberg Charter's application to any crimes outside the World War II context, thus potentially shielding democratic states from criminal liability. See ibid., at 181.
[82] See, *inter alia*, *Prosecutor v. Tihomir Blaškić,* Judgment, Case No. IT-95-14-A, 9 July 2004, at para. 113; *Prosecutor v. Dario Kordić and Mario Čerkez,* Judgment, Case No. IT-95-14/2-A, 17 December 2004, at para. 97; and *Prosecutor v. Stanislav Galić,* Judgment, Case No. IT-98-29-A, 30 November 2006, at para. 144.

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and the fairness of the proceedings. For instance, in the *Mrksić (Vukovar)* Rule 61 Decision, after considering that an expansive definition of civilians was supported by the case law (*Barbie*), the Chamber found that 'resistance fighters who had laid down their arms' could fall within the meaning of civilians for the purposes of crimes against humanity.[83] This finding led the Chamber to reconfirm the indictment against the three Accused and to issue an international warrant of arrest against them on the basis, *inter alia*, of crimes against humanity. In contrast, however, the *Mrksić et al.* Trial Chamber, which was delivered after the findings of the Appeals Chambers in *Blaškić* and *Kordić et al.*, adopted a narrower definition of this term. On the evidence, it found that 'of the 194 persons identified as among those alleged in the Indictment to have been murdered at Ovčara…, 181 were known to be active in the Croatian forces in Vukovar…'.[84] In light of this evidence and the narrower definition of civilians adopted by the Chamber, it found that, while the crimes charged against the Accused could qualify as war crimes, they could not qualify as 'crimes against humanity in the particular circumstances of this case.'[85] The Chamber thus proceeded to dismiss the charges based on crimes against humanity and to retain those based on war crimes.[86]

It should be emphasised that, in many cases, the appellate mechanism may serve to rectify problematic uses of external judicial decisions at first instance. However, there may be limits to this safeguard and it should not be considered as a substitute for the appraisal-based approach. This is because some first instance judgments may not be appealed. For instance, in *Bisengimana*, in its analysis of the general elements of crimes against humanity under Article 3 of the ICTR Statute, the Trial Chamber relied on the expansive interpretation of civilians, as articulated in the *Blaškić* Trial Judgement.[87] Even though this expansive definition was subsequently rejected by the *Blaškić* Appeals Judgment, as the *Bisengimana* conviction (which was based on a guilty plea) was not subsequently appealed,[88] the expansive definition of civilians was not revisited.

5.2 Judicial decisions from international courts operating in other branches of law

As the cases of *Furundžija* and *Kunarac et al.*, discussed below, attest, although international judicial decisions, such as international human rights decisions, would generally apply international law, they may still require adjustment when used in the context of international criminal adjudication. In *Furundžija*, the Trial Chamber, finding that IHL did not provide a definition of torture, relied on the definition of the 1984 Torture Convention and, *inter alia*, the jurisprudence of the European Court of Human Rights ('ECtHR'),[89] to flesh out the elements of torture in an armed conflict.[90] Amongst the elements of the definition which the Trial Chamber identified, one was that 'at least one of the persons involved in the torture process must be a public official.'[91] However, in subsequently dismissing this public official requirement, in *Kunarac et al.*, the Trial Chamber emphasized that:

[83] Transcript of *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šljivančanin*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (*Mrksić (Vukovar)* Rule 61 Decision), Case No. IT-95-13-I, 3 April 1996.
[84] *Mrksić et al.* Trial Judgment, *supra* note 72, at para. 481.
[85] Ibid., at paras. 479-81.
[86] Ibid., at paras. 483-4.
[87] *The Prosecutor v. Paul Bisengimana*, Judgment, Case No. ICTR-00-60-T, 13 April 2006, at para. 49.
[88] Ibid., at para. 9.
[89] *Prosecutor v. Anto Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, at para. 160.
[90] Ibid., at paras. 159–162.
[91] Ibid.

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> [i]n attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law....The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be *adjusted* in international humanitarian law only if they take into consideration the specificities of the latter body of law.[92]

Although, in *Furundžija*, the public official requirement did not play a critical role, because the accused was himself a public official, this case underscores the need for an appraisal-based approach to external precedent, in order to assess its congruence with the legal framework of the referring court or tribunal and to effect any adjustment as may be necessary.

5.3 Judicial decisions from sister international criminal courts and tribunals

In view of the similarity of the factual and legal issues with which they are concerned, international criminal judges often refer to the decisions of sister international criminal courts and tribunals. However, a flexible approach to using these decisions may risk taking limited account of the congruence of these decisions with the legal framework of the referring court or tribunal. In some cases where the judges of the ad hoc Tribunals had to define recurring legal concepts, such as 'committing' as a mode of participation, they appear to have simply borrowed such definitions from previous judgments with limited appraisal. This approach may be problematic.

In *Seromba*, the Trial Chamber relied on the holding in *Krstić* that 'committing' covers 'physically perpetrating a crime',[93] to find that '[p]articipation by 'committing' means the direct physical or personal participation of the accused in the perpretation [sic] of a crime or the culpable omission of an act that was mandated by a rule of criminal law.'[94] From an analysis of the *Seromba* judgment, it would appear as if the judges simply borrowed the *Krstić* holding without appraisal.[95] However, subsequently, the *Seromba* Appeals Chamber emphasized that 'committing' is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime. In this respect, the Appeals Chamber found that 'the Trial Chamber erred in law by holding that 'committing' requires direct and physical perpetration of the crime by the offender.'[96] This case would suggest that, even where a particular issue is well settled in the jurisprudence, depending on the circumstances of each case, some level of appraisal of external judicial decisions would still be appropriate.

In *Duch*, the ECCC Trial Chamber had to consider whether rape constituted a discrete crime against humanity, separate from torture, in the period within the court's temporal jurisdiction, namely 1975-1979. In this respect, the trial judges used, *inter alia*, the decisions of the ad hoc Tribunals and the SCSL to support their conclusion that rape could constitute a discrete crime

[92] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, at paras. 470–471. Emphasis added.
[93] *Krstić* Trial Judgment, *supra* note 45, at para. 601.
[94] *The Prosecutor v. Athanase Seromba*, Judgment, Case No. ICTR-2001-66-I, 13 December 2006, at para. 302.
[95] It should be noted that, in this case, the Trial Chamber also referred to the internal decision of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, Case No. ICTR-95-1-A, 1 June 2001, at para. 187.
[96] *The Prosecutor v. Athanase Seromba,* Judgment, Case No. ICTR-2001-66-A, 12 March 2008, at para. 161.

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against humanity.[97] However, in this case, the trial judges did not sufficiently appraise these external judicial decisions to satisfy themselves that they reflected the relevant law at the relevant time. In view of the different temporal jurisdictions of the ECCC, on the one hand, and of the ad hoc Tribunals and the SCSL, on the other hand, the law applied by the decisions of the ad hoc Tribunals and the SCSL was not necessarily congruent with the ECCC legal framework. Indeed, on appeal, the ECCC Supreme Court Chamber observed that:

> [t]he ICTY was established in 1993 and its temporal jurisdiction extends to criminal acts committed since 1991. The ICTR was established in 1994, with its jurisdiction covering criminal acts committed during the same year. The SCSL's temporal jurisdiction applies with respect to criminal acts committed since 30 November 1996. Thus, these particular convictions do not lend support to a finding that rape was a crime against humanity under international law during 1975-1979.[98]

The Supreme Court Chamber proceeded to reverse the Trial Chamber's findings on this point.[99] This case, again, underscores the importance of the legal appraisal of external precedent in order to ensure that the law being applied by such precedent reflects the applicable law of the referring court or tribunal at the relevant time.

6. Inconsistent approaches between cases

The above analysis has distinguished between cases where judges have adopted appraisal-based or flexible approaches towards external precedent. However, this discussion would have to be nuanced further, in that, in some instances, the approach of the same individual judge has not been consistent between different cases. For instance, in his extra-curial consideration of the use of ECtHR case law by the ad hoc Tribunals, Judge Cassese emphasized the importance of the appraisal-based approach. In particular, he stated that 'even where international criminal tribunals apply the case law of other international courts, such as the European Court, international criminal proceedings display their own specific characteristics which cannot be ignored.'[100] However, as noted above, in *Furundžija* (where Judge Cassese sat together with Judges Mumba and May), in using, *inter alia*, ECtHR case law to set out the elements of torture, the Chamber did not sufficiently adjust the definition of torture derived from international human rights case law to the specificities of ICL, as it retained the public official requirement. Indeed, it is notable that Judge Mumba, who presided over the *Furundžija* Trial Chamber, presided also over the *Kunarac et al.* Trial Chamber, which subsequently dismissed the public official requirement, and which underscored the need to take account of the structural differences between IHL and international human rights law, therefore, advocating a more appraisal-based approach. With respect to their legal appraisals of external judicial decisions, therefore, the approaches of Judges Cassese and Mumba have, in practice, not been consistent between different cases.

Indeed, a similar observation may be made in relation to Judge Liu, who also sat on the *Kunarac et al.* Trial Chamber which, as noted, adopted an appraisal-based approach. However, subsequently, the *Blagojević et al.* Trial Chamber (over which Judge Liu presided) adopted a more flexible approach to national judicial decisions, by borrowing, as discussed

[97] *Kaing Guek Eav alias Duch,* Judgment, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, at para. 361.
[98] *Kaing Guek Eav alias 'Duch'*, Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC, ECCC Supreme Court Chamber, 3 February 2012, at para. 178.
[99] Ibid., at para. 180.
[100] Cassese, *supra* note 2, at 22.

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above, the broad interpretation of genocide articulated by the German Court. Therefore, even here, Judge Liu's approach has not been consistent from one case to another. The purpose of this brief sketch has been to indicate that the approaches of judges to external judicial decisions are not set in stone and even the same judge may, in practice, shift between a more appraisal-based to a more flexible approach between different cases. This suggests that it is not only judges from a particular legal system (such as common law) who are more likely to adopt a particular approach to external precedent. Indeed, given that, in some cases, the same individual judges (from different legal systems) have adopted an inconsistent approach between cases, it is submitted that there may be an insufficient emphasis on judicial methodology regarding the use of external judicial decisions at the international criminal courts and tribunals. Greater focus on this subject and, in particular, on the importance of an appraisal-based approach to such decisions would, therefore, be desirable.

7. Concluding remarks

This paper has focused on the approaches of international criminal judges to using external judicial decisions and, in particular, has distinguished between the appraisal-based and flexible approaches. Because of the limited number of judgments examined and the fact that the analysis has only included express legal appraisals, only a few remarks may be made here.

The analysis found that, in a number of cases, international criminal judges have adopted a flexible approach to external judicial decisions. In particular, they did not undertake a legal appraisal to ensure such decisions were congruent with the legal framework of the referring court or tribunal at the relevant time. Nor did they take account of broader, contextual considerations which could have influenced the law being applied by those decisions, such as the potential interference of local idiosyncrasies. The flexible approach to using external judicial decisions is problematic because it tends to encourage the assimilation of such decisions into the legal framework of the referring court or tribunal, possibly without the necessary adjustment. This issue is particularly pronounced with respect to red herring decisions, which appear to be interpreting international law but which, in reality, would be based on a peculiar interpretation of that law. These decisions, therefore, have greater potential to mislead when relied on without appraisal.

Using external judicial decisions without the necessary adjustment could have profound implications for the law applied by the referring court or tribunal and could, ultimately, impact on the principle of legality and the fairness of the proceedings. This, therefore, suggests the need for greater rigour in the judicial methodology for using external judicial decisions and, in particular, the importance of the appraisal-based approach to ensure the congruence of such decisions with the legal framework of the referring court or tribunal. The appraisal-based approach would enable international judges to determine, firstly, whether such decisions may be assimilated within the legal framework and, secondly, whether they require adjustment. In this context, it is worth recalling that judges should be 'wary not to embrace too quickly and too easily concepts and notions developed in a different legal context' without appropriate adjustment.[101]

In some cases, the legal appraisal may indicate that the law applied by certain external judicial decisions diverges so fundamentally from the legal framework of the referring court

[101] See *Kunarac et al.* Trial Judgment, *supra* note 92, at paras. 470–471.

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or tribunal that it would not be possible to assimilate such decisions directly. In such cases, even though such decisions could continue to have an indirect effect on interpretation, any influence they may exert has to be strictly circumscribed by the provisions of the legal framework of the referring court or tribunal.

Finally, the analysis suggested that the adoption of either the appraisal-based or flexible approaches to external judicial decisions is not necessarily linked to the specific legal backgrounds of the judges – it is not a matter which, for instance, only concerns judges from common law systems. Indeed, in some cases, the approach of the same individual judge (from different legal systems) has not been consistent between cases. This would indicate, again, the need for greater rigour in the judicial methodology for using external judicial decisions and, in particular, the need for more attention to the appraisal-based approach.

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