Leiden Journal of International Law, 19 (2006), pp. 847–873
 Printed in the United Kingdom doi:10.1017/S092215650600361X

International Criminal Courts and Tribunals: Bound by Human Rights Norms . . . or Tied Down?

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S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford: Oxford University Press, 2003. ISBN 0199258910, 308 pp., £67.50.

1. Bringing human rights into international criminal proceedings: a policy choice?

In scholarly writings[1] the relationship between human rights law and international criminal law is observed from three main perspectives: international criminal courts and tribunals can be seen as part of the complex machinery for the protection of internationally recognized human rights; to some extent human rights law can contribute to the definition of crimes; and of course they constitute individual entitlements against the abuse of public power, thereby providing the backbone of the rules governing the conduct of investigations and trials. Salvatore Zappalà's *Human Rights in International Criminal Proceedings* is a remarkable enquiry into the progressive consolidation of due process rights before international courts and tribunals. The author's analysis is at the same time wide-ranging and detailed. Contemporary issues are systematically put in historical perspective through a series of vivid sketches of the law and practice of the postwar international military tribunals. The bulk of the book – note, however, that the author's concise style prevented the book from becoming bulky – is devoted to a fairly in-depth analysis of the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Each chapter or section ends with comments on the relevant parts of the Statute of the International Criminal Court (ICC).

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1. See, among others, E. Lambert-Abdelgawad, 'Les Tribunaux pénaux pour l'ex-Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme', in M. Delmas-Marty, E. Fronza, and E. Lambert-Abdelgawad (eds.), *Les sources du droit international pénal* (2004), 97; W. A. Schabas, 'Droit pénal international et droit international des droits de l'homme: faux frères?', in M. Henzelin and R. Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation* (2002), 165; G. Mettraux, 'Using Human Rights Law for the Purpose of Defining International Criminal Offences – The Practice of the International Criminal Tribunal for the Former Yugoslavia', ibid., at 183; F. Pocar, 'The Rome Statute of the International Criminal Court and Human Rights', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court. A Challenge to Impunity* (2001), 67; G. Abi-Saab, 'Droits de l'homme et juridictions pénales internationales: Convergences et tensions', in R.-J. Dupuy (ed.), *Droit et justice: Mélanges en l'honneur de Nicolas Valticos* (1999), 245; A. Cassese, 'Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights', (1997) 2 *European Human Rights Law Review* 329.

Zappalà's monograph is above all an intelligently conceived, evenly structured book. It invites the reader to join the author on a smooth journey through the various stages of international criminal proceedings, contains valuable insights on the dynamics of the international criminal justice systems, and is not unforthcoming with practical suggestions for improvement. At this point, it should be clear that I am suggesting the reading of Zappalà's book to all those who are interested in international criminal law and have not yet read it some three years after its publication (since 2005 it has been available in paperback). However, a lengthy review essay such as this one could not be all about praise. There is actually one single issue on which I disagree with the author, even though, admittedly, it is an issue with vast ramifications – I refer to the place of human rights norms within the legal system of international criminal courts and tribunals.

I would describe the author's conception of the relationship between human rights law and international criminal law as informed by the idea that the latter operates as a self-contained system which should be assessed predominantly, if not exclusively, according to its own parameters. While the remainder of this essay takes issue with this conception, I remain nonetheless convinced that the above-stated qualities of the book reviewed here stand almost by themselves, regardless of the strength of the underlying theoretical assumptions.

The author's general conception of the relevance of human rights law in international criminal proceedings is foreshadowed in his declaration of methodological intents:

> This book is based on the assumption that *human rights law* is the ideal lens for investigating the structures and functioning of international criminal justice. This body of law provides one of the best interpretative tools for the analysis of the procedural mechanisms of international criminal justice, since it helps identify the proper balance between the rights of individuals and the interests of society. (p. 1, emphasis in original)

This choice of words ('lens', 'interpretative tools') at once suggests the instrumental character of human rights law and of its being *external* to the observed system.

In a sense, human rights law may be said to exist both within the system – the rights enshrined in the Statutes of the ad hoc Tribunals and the ICC – and outside it, in regional and universal human rights instruments, customary law, and general principles of law. To an extent, this impression is correct. But what is really outside or inside the system? Is human rights law not part of the law of international criminal courts and tribunals, beyond its explicit recognition in the latter's founding instruments? Or, to see it from a different angle, are not those courts and tribunals bound to respect at least generally accepted human rights?

While the author evades the first and more general question altogether, he answers the more specific ones in the negative. This is borne out by two complementary statements, in which Zappalà evinces his position as to how and why international criminal courts and tribunals *became bound* to observe certain human rights, most importantly due process rights:

> With regard to the extension of due process principles to international criminal trials, it is submitted that although there was no one specific rule imposing on States the

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> obligation to extend human rights safeguards to the international level, there were (and are), nonetheless, several good reasons to support this extension. (p. 5)

Then he adds,

> [T]he starting point adopted in this book is that this is more a *policy* issue than a legal question. And the policy choice has been made in favour of an extension to international criminal proceedings of international human rights provisions on due process. (p. 7, emphasis in original)

In sum, the drafters of the Statutes of the ad hoc Tribunals and the ICC recognized the opportunity to endow each of these founding instruments with its own 'bill of rights'. The imperative they felt, though – the author tells us – was political or moral as opposed to legal.

This assumption is debatable. Note, first, that when the author submits that states were under no obligation to extend human rights guarantees to the international level, he refers to the ICC and the ad hoc Tribunals indiscriminately. But the reference to the latter appears somewhat misplaced: unlike the ICC, the Tribunals were instituted by the UN Security Council, that is, an organ of an international organization, not by states. From this, it follows that the additional question that should have been posed is whether the United Nations is bound by human rights norms. For if it is, it is difficult to escape the conclusion that its organs and subsidiary bodies, including the ICTY and the ICTR, must act in conformity with those norms.[2]

Since it can be safely discounted that Zappalà's argument went haywire from its inception, the reader is inevitably led to presume that, in the author's view, human rights norms are addressed exclusively to states.[3] However, the assumption that international organizations have no legal duty to observe internationally recognized human rights is not something that one can advance without explanation, not least because, following international practice and jurisprudence as well as mainstream scholarly opinion, rather the opposite is true – as we shall see in a moment. Moreover, if the prevailing opinion is correct, it follows that human rights norms automatically bind the ICC also, which is itself an international organization. Narrowing the argument to states' obligations is therefore an oversimplification.

As previously noted, the author denies that states, when they instituted the ICC and (indirectly?) the ICTY and ICTR, were obliged to constitute them in such a way as to ensure respect for human rights at the international level. Still, what the author displays as a forgone conclusion appears at odds with arguably relevant case law.[4]

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2. On the status of the ad hoc Tribunals as subsidiary organs of the Security Council, cf. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, App. Ch., 2 October 1995, at 15.
3. The author never states it clearly. But see Zappalà, at 246: 'It is nowadays largely accepted that *national* criminal procedure cannot be based on premises other than firm respect of human rights. The creation of international rules governing criminal proceedings . . . must be set against this *background*' (emphasis added on 'background'). Cf. W. A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of International and Comparative Law* 461, at 467.
4. European Court of Human Rights, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, Reports 1999-I, at 67: 'It would be incompatible with the purpose and object of the Convention . . . if the Contracting States were thereby [by establishing international organizations and attributing certain competences thereto]

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More importantly, however, the argument's strategic relevance is nullified as soon as it is admitted that human rights norms bind international organizations.

The double limitation (*ratione personarum et materiae*) that the author imposed on the scope of human rights norms tends to portray the institutional space 'above states' as a sort of wilderness where states, international organizations, and judges brought human rights as benevolent pioneers would. In the following sections, I try to sketch an alternative account of the place of human rights norms in international criminal law. In section 2 it is argued that international courts and tribunals are at least bound by generally recognized human rights norms, and that, as a consequence, the latter form part of the legal system of the former. In section 3 I give some examples of the author's ideal of self-containedness in action. Section 4 shows how a peculiar effect of the author's approach is that certain rights – the right to an independent and impartial tribunal, the rights deriving from the *nulla poena sine lege* principle, the right of the convict to rehabilitation, and the right of appeal – are in principle (and paradoxically) denied before international criminal courts and tribunals. For each of those rights, I argue that, as a consequence of the approach adopted in section 2, there is no valid reason to deny their nature as rights. Section 5 makes a brief detour to assess whether the conduct of international criminal courts and tribunals may be indirectly scrutinized by human rights courts or bodies, and argues that the author, in line with his general approach, probably overstated the 'insulation' of those courts and tribunals from judicial review. I nevertheless agree with the author that for the time being the best way forward is to strengthen human rights guarantees within the system, and accordingly expound, in section 6, a different view as to what international criminal courts and tribunals themselves should do, or have already done, in order to ensure that at least generally recognized human rights are respected.

2. International criminal courts and tribunals are bound by generally recognized human rights norms

Human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR) do not bind international organizations.[5] International organizations are not parties to those treaties and normally cannot even accede to that status.[6] This does not exclude, however, norms identical or similar to those contained in the major human rights instruments applying to international organizations qua customary law or general principles of law. Leading scholars on the subject usually infer the applicability of general international law to an international organization from the fact that

absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'. See also section 5, *infra*.

5. On the position of international organizations vis-à-vis treaty-based human rights regimes, see P. Alston, 'The "Not-a-Cat" Sindrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 3 at 9.

6. But see Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, CETS No. 194, 13 May 2004 (not yet in force), whose Art. 17(1) provides that the EU may accede to the ECHR.

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the latter possesses international legal personality. Referring specifically to human rights norms, August Reinisch recently restated the prevailing position thus:

> The underlying tenor of recent developments appears to be that international organizations, as a result of their international legal personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or as general principles of law.[7]

Karel Wellens's monograph on the responsibility of international organizations is based on an identical premise.[8] In Gerhard Werle's treatise on international criminal law, the assertion that international criminal tribunals are subject to human rights norms is regarded as something that hardly needs justification,[9] whereas the relevance of individual human rights is occasionally grounded on their customary nature.[10] The result would of course be identical if generally recognized human rights were said to derive primarily from general principles of law rather than custom.[11]

With regard to jurisprudence, the opinion of the International Court of Justice (ICJ) on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, in which it was stated that international organizations 'are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law',[12] could perhaps be cited conclusively. However, it seems appropriate to seek evidence more directly related to the purposes of this essay. This evidence can be retrieved from the *travaux préparatoires* of the Statutes and the case law of the ad hoc Tribunals, and is actually copious.

Reference must be made, first, to two statements found in the Report of the Secretary-General that accompanied the adoption of the ICTY Statute. The Report emphasized that on conferring on the ad hoc Tribunal jurisdiction to try serious

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7. A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in Alston, *supra* note 5, at 37, 46.
8. K. Wellens, *Remedies Against International Organisations* (2002), 1: 'As subjects of international law, international organizations . . . are subject to rules and norms of customary international law to the extent required by their functional powers and they have to observe the general principles of law recognized by civilised nations'. See also F. Gianviti, 'Economic, Social, and Cultural Human Rights and the International Monetary Fund', in Alston, *supra* note 5, at 113, 137 (who denies that the norms contained in the Covenant on Economic, Social and Cultural Rights 'have . . . attained a status under general international law that would make them applicable to the [International Monetary Fund] independently of the Covenant'); V.-D. Degan, 'On the Sources of International Criminal Law', (2005) 4 *Chinese Journal of International Law* 45, at 82–3, who states that internationally recognized human rights are 'peremptory norms of general international law . . . obligatory for judges in any national or international criminal proceedings, even if they were not expressly provided'; C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations* (2005), 400.
9. G. Werle, *Principles of International Criminal Law* (2005), 39, at 42: '[l]ike national criminal law, international criminal law is subject to human rights limitations'. See also A.-M. La Rosa, *Juridictions pénales internationales. La procédure et la preuve* (2003), 446, who infers the applicability of the relevant human rights standards to international jurisdictions directly from the penal nature thereof: '[leur] nature pénale . . . [les] oblige . . . à respecter les règles qui ont été développées et consacrées dans des nombreux instruments internationaux pour assurer une procédure équitable aux individus faisant l'objet de poursuites répressives au niveau national'.
10. Werle, *supra* note 9, at 32 (where the author is concerned with the principle of legality and cites approvingly M. C. Bassiouni, *Introduction to International Criminal Law* (2003), 198).
11. Cf. B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', (1992) 12 *Australian Yearbook of International Law* 88; C. Safferling, *Towards an International Criminal Procedure* (2001), 26–7.
12. Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, at 89–90, para. 37.

violations of international humanitarian law, 'the Security Council would not be creating or purporting to "legislate" that law'. 'Rather', the Report continues, 'the International Tribunal would have the task of applying existing ... law'.[13] Even though the passage only refers to international humanitarian law, it would be preposterous to suggest that, on the same occasion, the Security Council has, or might have, enacted human rights norms.[14] In fact, this is explicitly excluded later in the Report, where the Secretary-General defines it as '*axiomatic* that the International Tribunal *must fully respect* internationally recognized standards regarding the rights of the accused'.[15] Whereas the term 'axiomatic' admittedly leaves undetermined the Secretary-General's position with regard to the source from which human rights standards derive their binding character, nonetheless it makes it crystal clear that the issue was not one of voluntary adherence inspired by sound policy considerations.[16] The language used in the Report should be understood as implying that human rights norms are binding on the ICTY qua customary international law or general principles of law – without excluding more, as we will see in due course.[17]

In the fundamental decision on jurisdiction rendered in the *Tadić* case, the Appeals Chamber considered that the fact that regional and universal human rights instruments are not applicable as such to proceedings before an international court 'does not mean ... that, by contrast, an international criminal court could be set up at the mere whim of a group of governments'.[18] Quite the contrary, the Chamber continued, 'Such a court ought to be rooted in the rule of law and offer all the guarantees embodied in the relevant international instruments',[19] or, in more pregnant words, 'must provide all the guarantees of fairness, justice and even-handedness, in *full conformity with internationally recognized human rights instruments*'.[20]

The foregoing bears out that Articles 21 of the ICTY and 20 of the ICTR – which contain the greater part of the ad hoc Tribunals' catalogues of due process rights – were declaratory of pre-existing rights and of corresponding duties of the UN as an international organization.[21] As such, they neither determine nor exhaust the

13. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at 29 (emphasis added).
14. This is clearly borne out by states' declarations concerning the establishment of the ICTY, conveniently reported in C. Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites* (2004), 318–20.
15. Report, *supra* note 13, at 106 (emphasis added).
16. Cf. Zappalà, at 5: 'in the case of UN ad hoc Tribunals it would have been inconsistent for the Security Council not *to impose* respect for UN standards' (emphasis added); at 47–8: 'All these international rules were drafted with municipal law in mind and impose obligation on States, requiring that the national criminal procedure system of each State comply with international guarantees. However, it was logical to extend these guarantees to international trials. This *extension has been realized by the express decision of the Security Council and the UN Diplomatic Conference* to ensure the highest standard of fairness in international criminal proceedings' (emphasis added).
17. See text at notes 34–6, *infra*.
18. *Tadić* case, *supra* note 2, at 42.
19. Ibid.
20. Ibid., at 45 (emphasis added). See also *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T, T. Ch. II, 18 June 1998, at 44; *Prosecutor v. Kallon, Norman and Kamara*, Decision on Constitutionality and Lack of Jurisdiction, Cases Nos. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), App. Ch., 13 March 2004, at 55.
21. Cf. *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, Décision faisant suite à la requête du procureur aux fins de disjonction, de jonction d'instances et de modification de l'acte d'accusation, Cases Nos. ICTR-95-1-T, ICTR-96-10-T, ICTR-96-17-T, T. Ch., 27 March 1997, where the trial chamber says of a right '*prévu* par l'article

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applicable law. Even in their absence, internationally recognized human rights would have been fully applicable within the system of the ad hoc Tribunals. Nor can it be argued that the incompleteness of the catalogue of human rights appearing in the Statutes of the ad hoc Tribunals reflects the Security Council's intention to derogate at least from certain generally recognized human rights.[22] According to the Report of the Secretary-General – a Report the Security Council approved in Resolution 827[23] – those rights 'are *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights'.[24] Since Articles 21 of the ICTY and 20 of the ICTR reproduce Article 14 of the ICCPR save for some minor adjustments, that statement supports the argument that the catalogue of rights appearing in the Statutes of the ad hoc Tribunals was not conceived as an exhaustive list.[25] Rather, that catalogue must be integrated and interpreted first and foremost by reference to general international law.[26] The same holds true for the ICC. The Rome Statute provides for a more detailed list of due process rights.[27] Nonetheless, it also contains an explicit open-ended clause, whereby 'the application and interpretation' of the law 'must be consistent with internationally recognized human rights'.[28]

As may have been noticed, the discussion has gradually shifted from the language of obligation to that of sources of law. At this point, drawing on a possible analogy between national law and the internal legal order of international organizations,[29] it may be opined that from the proposition that an international organization has an obligation under international law, it does not automatically follow that the norm carrying the obligation is part of the same organization's legal system. It is, however,

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14 du Pacte international relatif aux droits civils et politiques ... et *rappelé* par l'article 20 du Statut du Tribunal' (emphasis added). This fine remark is by Lambert-Abdelgawad, *supra* note 1, at 117.

22. See, in the same direction, *Rutaganda v. Prosecutor*, Judgment (Dissenting Opinion of Judge Pocar), Case No. ICTR-96-3-A, App. Ch., 26 May 2003, at 8: 'the ICCPR is ... a document that was adopted unanimously as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly. Only a clear-cut decision to depart from it would lead to a different conclusion. But in this case ... the intention of the Security Council to comply with the ICCPR was explicitly demonstrated through its approval of the Report of the Secretary General'.
23. S/RES/827 (1993), at 1.
24. Report, *supra* note 13, at 106 (emphasis added).
25. The case law recently developed under Rule 11 *bis* of the ICTY Rules on Procedure and Evidence confirms this. Under Rule 11 *bis* (B), the ICTY is authorized to refer a case only if it is 'satisfied that the accused will receive a fair trial'. In the first cases decided under Rule 11 *bis*, the Referral Bench had this to say about the applicable parameter: 'for present purposes, it can be accepted that the requirement of a fair criminal trial *includes* the following ...'. Unsurprisingly, what follows is a slightly modified edition of Art. 21 ICTY, again characterized as nothing more than an abridged version of the concept of fair trial (see, e.g., *Prosecutor v. Mejakić et al.*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis*, Case No. IT-02-65-PT, Referral Bench, 20 July 2005, at 68; *Prosecutor v. Janković*, Decision on Referral of Case under Rule 11 *bis*, Case No. IT-96-23/2-PT, Referral Bench, 22 July 2005, at 62).
26. Cf. A. Cassese, 'Procès équitable et juridictions pénales internationales', in M. Delmas-Marty, H. Muir Watt, and H. Ruiz Fabri (eds.), *Variations autour d'un droit commun. Premières rencontres de l'UMR de droit comparé de Paris* (2002), 245 at 247: 'la notion internationale de procès équitable est utilisée pour combler les lacunes, interpréter les dispositions statutaires ou règlementaires ou justifier les décisions des juges des tribunaux pénaux internationaux'.
27. ICC Statute, Arts. 22–4, 26, 55, 59, 66–8.
28. Art. 21(3) ICC.
29. Cf. G. Gaja, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553 (2005), at 7–9, paras. 18–23.

unnecessary to pronounce in favour of or against such an argument,[30] for the case law neatly supports the contention that human rights norms having acquired the status of general international law are applicable as part of the law of international courts and tribunals.

The words prefacing Section III (entitled 'Applicable and Authoritative Provisions') of the Appeals Chamber's Decision in *Barayagwiza* are in this respect eloquent:

> The International Covenant on Civil and Political Rights *is part of general international law and is applied on that basis*. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus they are not binding of their own accord on the Tribunal. They are, however, *authoritative as evidence of international custom*.[31]

In the same Decision, Article 9 of the ICCPR was directly applied, and the relevant practice of the Human Rights Committee (HRC) referred to, before reaching the conclusion that the 'established human rights jurisprudence governing the detention of suspects' had been violated.[32] Finally, in the *Kajelijeli* case the Appeals Chamber was even more explicit in declaring that 'customary international law as reflected *inter alia* in the International Covenant on Civil and Political Rights' forms part of '*the sources of law* for this Tribunal'.[33]

This does not mean that the ad hoc Tribunals are bound exclusively by human rights norms of general international law. The point may be illustrated with an example. Within the ad hoc Tribunals there is a lingering controversy as to whether the Appeals Chamber may legitimately substitute a conviction for an acquittal, thereby depriving the accused of the right of appeal against that conviction.[34] Even if one assumes that Article 14(5) of the ICCPR must be interpreted as prohibiting the highest court from entering a new conviction, it may nonetheless be argued that such

30. But see *Prosecutor v. Brima, Kamara and Kanu*, Decision on Prosecution Request for Leave to Amend the Indictment, Case No. SCSL-04-16-PT, T. Ch., 6 May 2004, at 30, where a trial chamber of the SCSL went out of its way to opine that due process safeguards are generally stronger in international criminal proceedings than in domestic ones, since international human rights instruments are directly applicable in the former context, while they are not (necessarily) so in municipal law systems: '[the] burden of proof is even more demanding in matters before the international criminal tribunals than it is in the municipal systems. The reason is that the protection of the rights of suspects and accused persons is not only often more clearly spelt out and entrenched in the statutes of those tribunals, but is also, in addition, reinforced by other international conventions and instruments that are conspicuously absent in municipal legislations.'

31. *Barayagwiza v. Prosecutor*, Decision, Case No. ICTR-97-19-A, App. Ch., 3 November 1999, at 40 (emphasis added). Cf., for a seemingly more 'secluded' approach, *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, App. Ch., 15 July 1999, at 321.

32. *Barayagwiza* case, *supra* note 31, at 63–7. See also *Prosecutor v. Mrskić et al.*, Décision relative à la requête aux fins de mise en liberté déposée par l'accusé Slavko Dokmanović, Case No. IT-95-13a-T, T. Ch., 22 October 1997, at 58–60. The Special Court for Sierra Leone (SCSL) cited Art. 9(2) ICCPR (the right of arrested persons to be informed promptly of the reasons for their arrest and of the charges against them) among the 'relevant provisions of the law' (*Prosecutor v. Brima, Kamara and Kanu*, Decision on Prosecution Request for Leave to Amend the Indictment, Case No. SCSL-04-16-PT, T. Ch., 6 May 2004, at 22).

33. *Kajelijeli v. Prosecutor*, Judgment, Case No. ICTR-98-44A-A, App. Ch., 23 May 2005, at 209 (emphasis added).

34. See *Semanza v. Prosecutor*, Judgment (Separate Opinion of Judges Shahabuddeen and Güney and Dissenting Opinion of Judge Pocar), Case No. ICTR-97-20-A, App. Ch., 20 May 2005.

a prohibition is not part of general international law,[35] and in this way does not bind the ad hoc Tribunals. But this argument still would not be decisive. Recall that the Report of the Secretary-General affirmed the necessity to abide by 'internationally recognized' human rights standards (as opposed to 'generally recognized' ones); that the same document explicitly identified Article 14 of the ICCPR as one of those standards; and that the meaning of the term 'axiomatic' is sufficiently undetermined to be understood as embracing more than general international law. Ultimately, it could be said that by adopting the Report of the Secretary-General, the Security Council accepted Article 14(5) of the ICCPR as part of the law of the ad hoc Tribunals, irrespective of the status of that provision under general international law.[36]

As for the role of human rights jurisprudence, apart from the cases where the latter constitutes evidence of customary law, international criminal courts and tribunals are obviously not bound to strike the balance of interpretation as single human rights courts or bodies, or even all of them, do. Needless to say, the applicability of general international law does not prevent international criminal jurisdictions from developing, through interpretation and taking account of their specific situation and exigencies, their own human rights judicial policy. Nonetheless, the dialogue with other human rights courts and bodies must be kept alive for international courts and tribunals to live up to their claim to be models of fairness.[37] As the ICTY eloquently said in *Mucić*, 'Although the Appeals Chamber will necessarily take into consideration decisions of other international courts, it may, after careful consideration, come to a different conclusion'.[38] Also in this respect, the author of

35. Along one of the (many) lines of reasoning developed by Judge Shahabuddeen in *Rutaganda v. Prosecutor*, Judgement (Separate Opinion), Case No. ICTR-96-3-A, App. Ch., 26 May 2003, at 27: 'Certainly, with a total of 41 states (including the six states which signed the Seventh Protocol [to the ECHR] but have not yet ratified it) taking the position that a court of appeal could make a conviction even if there was no right of appeal from the conviction, it could not be said that there was any customary international law to the opposite effect.'
36. Cf. Judge Pocar's argument, *supra* note 22.
37. See, e.g., Schabas, *supra* note 3, at 516.
38. *Prosecutor v. Mucić et al.*, Judgment, Case No. IT-96-21-A, App. Ch., 20 February 2001, at 24. According to the English (original) version of the Judgment, the Chamber actually spoke of 'other decisions of international courts'. But the French version seems more reasonable in context ('tiendra nécessairement compte des décisions rendues par d'autres juridictions internationales'). Cf. A. Cassese, 'The Influence of the European Court of Human Rights on the International Criminal Tribunals – Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide* (2003), 19; J. Nicholls, 'Evidence: Hearsay and Anonymous Witnesses', in R. Haveman, O. Kavran, and J. Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (2003), 239 at 287: 'it is difficult to find reasons why the international norms embodied in the European Court's jurisprudence should not guide, and to an extent bind, the decisions of the ICTY'. See, more generally, A. Clapham, 'Symbiosis in International Human Rights Law: The *Öcalan* Case and the Evolving Law on the Death Sentence', (2003) 1 JICJ 475, at 489: 'symbiotic relationship[s] between different legal systems . . . can only reinforce the crucial recognition that human rights are indeed universal'. See also, in the same vein, the recent case law of the SCSL: *Prosecutor v. Brima, Kamara and Kanu*, Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, Case No. SCSL-04-16-PT, T. Ch. II, 20 May 2005, at 38; Decision on the Confidential Joint Defence Motion to Declare Null and Void Testimony-in-Chief of Witness TF1-023, Case No. SCSL-04-16-PT, T. Ch. II, 25 May 2005, at 21–2; Decision on Joint Defence Motion for Leave to Recall Witness TF1-023, Case No. SCSL-04-16-PT, T. Ch. II, 25 October 2005, at 23; Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Case No. SCSL-04-16-PT, App. Ch., 8 December 2005, at 89.

the book reviewed here could have taken his cue directly from the ad hoc Tribunals. Yet the fact that his book cites no more than 21 decisions from Strasbourg and barely two (one second-hand) from the HRC is evidence, not of inaccuracy, of course, but of a different approach.

3. The ad hoc Tribunals vacuum-sealed

When confronted with the sometimes difficult task of ascertaining the applicable law (both substantive and procedural), the ad hoc Tribunals have been relying heavily on custom and general principles of law.[39] Notwithstanding this, Zappalà chose to remove those 'external sources' from the picture and studiously described every solution as coming from within the system (narrowly construed). What follows is intended to exemplify the author's approach.

He submits, indeed persuasively, that 'it would be better from the viewpoint of individual rights for relevant evidence on sentencing issues to be presented after the judgment', and coherently pleads for the restoration of the ICTY previous practice of holding separate proceedings for judgment and sentence. In his view, that result could be reached by means of 'a theological [*sic*] interpretation of the rights of the accused *as internationally recognized in the Statutes* of the International Criminal Tribunals and Court' (p. 199, emphasis added) – as if they were not recognized before at the international level. Elsewhere, he argues that the ICTY could have dismissed a defendant's motion of no case to answer on the ground that, at the relevant time, the admissibility of such motions was not 'specifically provided for' in the Rules of Procedure and Evidence (RPE). For him, the fact that the motion 'was examined at all evinces great concern for the rights of the accused' as well as 'a real attempt to guarantee the highest possible standards' (p. 91). Then there is the author's account of the Appeals Chamber's decision in *Barayagwiza* to release the accused and dismiss the indictment with prejudice to the Prosecutor:

> The real problem . . . was that there was no specific legal basis in the Statutes or the Rules for the Chambers of the Tribunal to react when confronted with egregious violations of the rights of the accused by the Prosecution . . . . Thus the Appeals Chamber had to resort to the doctrine of abuse of process and devised an *extra ordinem* procedural sanction . . . . This was probably unfair to the Prosecution and to the victims of those crimes; in particular, on account of the lack of an explicit legal basis . . . (p. 189)

Suppose, for argument's sake, that in *Barayagwiza* the Appeals Chamber had drawn the applicable rules from general principles of law – and it seems that the

39. For the relevant case law on general principles, see A. Cassese, 'The Contribution of the International Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognised by the Community of Nations', in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World. Essays in Memory of Li Hopei* (2001), 43; L. Gradoni, 'L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux pénaux internationaux', in E. Fronza and S. Manacorda (eds.), *La justice pénale dans les décisions des Tribunaux ad hoc* (2003), 10. For custom, see, with further references to doctrine, L. Gradoni, 'L'attestation du droit international pénal coutumier dans la jurisprudence du Tribunal pour l'ex-Yougoslavie: "régularités" et "règles"', in M. Delmas-Marty et al., *supra* note 1, at 25. On sources of international criminal law in general, see A. Cassese, *International Criminal Law* (2003), 25–37. See also A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1051.

Chamber actually set out on that way, at least in respect of the abuse of process doctrine, as the several references it made to national judicial practice testify.[40] In that case, could it be argued that the Chamber's move would have been 'unfair to the Prosecution', when the ad hoc Tribunals have been relying without hesitation on general principles of law either to dismiss procedural motions filed by the defence or to define the crimes charged?[41]

A further example is provided by Zappalà's in-depth analysis of Rule 15(C) RPE (ICTY). As is well known, that rule was amended so as to allow a judge who has reviewed an indictment to sit also as member of the trial chamber in the same case.[42] In the author's opinion, Rule 15(C), as amended, may raise 'some doubts about its conformity with the principle of impartiality', since it could be argued, on the basis of relevant human rights jurisprudence,[43] 'that the reviewing judge has already decided that there are grounds for believing that an accused has committed certain crimes' (p. 105). The author is even doubtful about the 'congruity' of the possibility envisaged in Rule 15(C) with the presumption of innocence (p. 106). However, the only implication he draws from it is that 'it would be *inappropriate* for the Presidents of the ad hoc Tribunals to allow reviewing judges to sit on the Trial Chamber in cases they have confirmed' (p. 106, emphasis added).

Zappalà does not fail to note that such practice is in no circumstances justified under Article 39(4) of the ICC Statute, yet he stops short of considering the argument to be decisive. A few pages later, however, he seems to let a ray of sunshine filter through the closed domes of the ad hoc Tribunals, when he suggests that 'the ICC Statute not only contains procedural rules for the Court but at the same time represents a codification of rules on international criminal procedure'. In his view, though, these rules can at best serve as 'guidelines for the interpretation of the provisions of the ad hoc Tribunals' system', particularly when the latter are 'silent' or 'ambiguous'. But there is more. For Zappalà, 'the *same* should be true for *express rules* that are in contrast with international human rights standards' (p. 194, emphasis added). However, there are no two ways about it: either the 'express rule' cannot be superseded by a norm with mere interpretative value, or it can be construed, say, in two different ways, one of which is compatible with human rights, and in that sense it can be said to be ambiguous. In both cases, the author's last utterance appears redundant. Regrettably, the fact that the sunbeam in the domes was actually refracted light is confirmed by the author's analysis of the ad hoc Tribunals' rules on provisional detention.

He recalls that according to the original version of Rule 65 RPE (ICTY), accused persons could only be provisionally released in exceptional circumstances, making detention on remand unexceptional in derogation from internationally recognized

40. *Barayagwiza* case, *supra* note 31, at 73–112.
41. See *supra* note 39.
42. Cf. La Rosa, *supra* note 9, at 38.
43. The author cites *De Cubber v. Belgium*, Judgment of 26 October 1984, [1984] ECHR (Ser. A) 86; *Hauschildt v. Denmark*, Judgment of 24 May 1989, [1989] ECHR (Ser. A) 154. See also *Prosecutor v. Brima, Kamara and Kanu*, Separate and Concurring Opinion of Justice Geoffrey Robertson on Joint Defence Appeal against the Decision on the Report of the Independent Counsel, Pursuant to Rule 77(C)(iii) and 77(D), Case No. SCSL-04-16-PT, App. Ch., 17 August 2005, at 11.

human rights. The subsequent removal of the reference to 'exceptional circumstances', in the author's view, 'reduc[ed] the contrast with international human rights law and the prohibition of the reversal of the onus of proof', even though the new version of Rule 65 'still leaves it to the accused to prove that "he will appear for trial and . . . will not pose a danger to any victim, witness or other person"', and in spite of the fact that release 'remains at the complete discretion of the Chamber even if all the conditions set out above are fulfilled' (p. 95). The contrast therefore remains and it is indeed a poor consolation that its magnitude has been, allegedly, reduced. Nor is it of any assistance to state that the prohibition on shifting the burden of proof to the detained person is 'in any event . . . not specifically provided for in the system of the ad hoc Tribunals as it is in Article 66 of the ICC Statute' (p. 95). As noted above, the author elsewhere submits that the provisions of the ICC Statute have acquired general validity qua customary law. On that basis, perhaps the author could have concluded that Article 66 ICC superseded the ad hoc Tribunals' rules on provisional release, had he not been guided by the implicit assumption that previous ad hoc Tribunals' law prevails as *lex specialis*.[44]

Be that as it may, human rights norms would in principle bind the ad hoc Tribunals regardless of whether the provisions of the ICC Statute have acquired customary status. As for the content of those norms, the author could have used relevant human rights case law as a reference point for discussion and assessment. The European Court of Human Rights (ECtHR) judgment in the *Ilijkov* case, for instance, would have provided clear guidance on the burden-of-proof aspects of detention on remand:

> the existence of the concrete facts outweighing the rule of respect for individual liberty must be . . . convincingly demonstrated. [I]t was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[45]

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44. On the possibility of setting aside a provision not in conformity with human rights norms and substituting it with a functionally equivalent customary rule, see section 6, *infra*.

45. *Ilijkov v. Bulgaria*, Judgement of 26 July 2001 (not reported), at 85. In introducing the issue of the independence and impartiality of international criminal tribunals, the author cautions that the 'categories' derived from the otherwise pertinent case law of the ECtHR 'are to a certain extent misleading' for the purpose of his study, 'which is not to evaluate the conformity of a single case to a system of protection of human rights but to assess the structure of the system in general' (100). This statement invites the question as to what parameters the author actually used in assessing the law and practice of international courts and tribunals. Even if the author shows a marked tendency to evaluate the system by its own standards, rarely is his approach purely descriptive. However, the fact that he largely underplayed the importance of 'external sources' of human rights law, and his consequent failure to assemble a definite set of external parameters (for purposes of assessment), occasionally find reflection in wavering judgements. Consider, for instance, his discussion on appeal and revision: he argues that the powers of the Prosecutor 'to impugn decisions of the Tribunals' are 'clearly at odds with the *ne bis in idem* principle' (194), and that the provisions concerning revision are 'in breach of' the same principle' (193); he opines that 'To confer upon the Prosecutor such a broad power to seek revision is a violation of international human rights principles (i.e. *ne bis in idem*), which does not seem to be justified by another rule of equal importance' (183); then he concludes, 'Respect for *human rights* is also satisfactory with regard to appeal and review proceedings, notwithstanding the somewhat unclear nature of review proceedings' (252, emphasis added). He never attempts a definition of the *ne bis in idem* principle in human rights law.

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As regards the exceptional conditions in which the ad hoc Tribunals operate – in particular the difficulties encountered in apprehending some of the accused[46] – it would perhaps be better, and surely consistent with human rights law, to take them into account in the assessment of individual cases rather than at the stage of lawmaking.

4. Denied rights

In the closed world of the ad hoc Tribunals strange occurrences become possible: non-explicitly recognized individual rights may be denied and, at the same time, guaranteed by the 'normative structure'. This is what happens, in the book under review, to the right to be tried by an independent and impartial tribunal, the *nulla poena sine lege* principle, and the right of the convict to rehabilitation. As regards the right of appeal, the author's arguments are different but the underlying logic is similar: since all contemporary international criminal jurisdictions recognize the right of appeal, the author could hardly deny it. And yet he represents it as not required by human rights law – a kind concession.

4.1. The right to be tried by an independent and impartial tribunal

From the fact that the constituent instruments of the ad hoc Tribunal and the ICC do not expressly provide for the right to be tried by an independent and impartial tribunal, Zappalà infers the following:

> In the ICC and in the system of the ad hoc Tribunals, the requisite independence is not established as a right of the accused. It is more an attribution that must characterize the judges. However, it can persuasively be argued that in substance this does not affect the right of the accused to be tried by an impartial and independent tribunal. In particular, this right is granted through the ... norms that provide for the nomination of the independent and impartial judges. (p. 103)

The idea that the independence and impartiality of the tribunal is not a right of the accused but rather an attribution of judges guaranteed by nomination prerequisites and procedure is a bit puzzling. The guarantees surrounding the appointment of judges are something that human rights bodies routinely assess in deciding whether the individual right to an independent and impartial tribunal was infringed. Is it plausible, then, to talk of due process guarantees while denying the existence of a correspondent individual right? Is there not something Kafkaesque in the author's assertion that, before the ad hoc Tribunals and the ICC, 'independence is not established as a right' but 'this right is granted through the ... norms'? Of course, this construction becomes unnecessary once it is realized that the human rights catalogues appearing in the founding instruments of international courts and tribunals are neither conceived as exhaustive lists nor could, if they were so, be determinative of what counts as human rights.

46. Cf. Zappalà, at 88.

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In any event, the reader could have been compensated by an in-depth discussion of the 'structural' guarantees that made the right to independence and impartiality dispensable. The ECtHR has consistently held that in order to establish whether a tribunal can be considered independent, 'regard must be had, *inter alia*, to the manner of appointment of its members and their term of office'.[47] On these issues, however, the author is inexplicably unforthcoming. He contends that the ad hoc Tribunals' independence 'is broad, but of course intrinsically limited by their having been *created* by the Security Council' (p. 102, emphasis added). Yet not a single word is said on how, by whom, and for how long the judges are appointed. The author relied perhaps excessively on the fact that the Statutes of the ad hoc Tribunals unexceptionally provide that 'the judges shall be persons of high moral character, impartiality and integrity'.[48] This is important, but hardly sufficient if considered in isolation from other structural guarantees of independence.[49] In *Tumey* v. *Ohio*, a case recently recalled by the Special Court for Sierra Leone,[50] Chief Justice Taft put it thus:

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honour and the greatest self-sacrifice could carry it on without danger of injustice.[51]

To avoid any misunderstanding, let me say that I am persuaded that the ad hoc Tribunals' institutional architecture fulfils the criteria for independence.[52] As is well known, in *Naletilić* v. *Croatia* the ECtHR itself held that the ICTY, 'in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence'.[53] Moreover, although 'independence of government' is regarded as 'fundamental' in human rights case law, the fact that judges are appointed by the executive does not automatically warrant, according to the same case law, a finding of structural bias.[54] In any case, arguments relying on a supposed analogy between the Security Council and the 'executive' are obviously flawed in the first place, as the Hague District Court pointed out in *Milošević* v. *The Netherlands*.[55] And even if they were correct, I believe that the ad hoc Tribunals would easily pass the test formulated by the HRC in *Bahamonde* v. *Equatorial Guinea*, according to which Article 14(1) of the ICCPR is violated whenever 'the functions

47. *Incal v. Turkey*, Judgment of 9 June 1998, Reports 1998-IV, at 65.
48. ICTY Statute, Art. 13; ICTR Statute, Art. 12.
49. See, e.g., *Le Compte, Van Leuven and De Meyre v. Belgium*, Judgment of 23 June 1981, [1981] ECHR (Ser. A) 43, at 55, 57; *Ettl and Others v. Austria*, Judgment of 23 April 1987, [1987] ECHR (Ser. A) 117, at 38–41.
50. *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, Case No. SCSL-2004-14-AR72(E), App. Ch., 13 March 2004, at 30.
51. 273 U.S. 510 (1927), at 532.
52. But see Amerasinghe, *supra* note 8, at 249–50: 'in the case of these tribunals . . . the UN is, derivatively, at least, a party in the proceedings before the tribunals. Therefore, the . . . principle . . . is that reappointment of judges of these tribunals militates against their independence and is, therefore, prohibited'.
53. *Naletilić v. Croatia*, Decision of 4 May 2000, Reports 2000-V, and in (2002) 121 ILR 209: 'Involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence'.
54. *Lithgow and Others v. UK*, Judgment of 8 July 1986, [1986] ECHR (Ser. A) 102, at 202.
55. *Milošević v. The Netherlands*, Judgment of the President of the Hague District Court of 31 August 2001 in the Interlocutory Injunction Proceedings, in 48 NILR 357, at 3.3. See also *Tadić* case, *supra* note 2, at 43.

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and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former'.[56]

But this is not the end of the matter: objective guarantees of independence may be relatively strong (or weak). As far as the ad hoc Tribunals are concerned, if one considers that there is little chance that an individual may be appointed as a judge if a permanent member of the Security Council dislikes him or her, and given that a judge's term of office is relatively short (four years) and renewable, it is difficult to escape the conclusion that, in the Tribunals' case, the guarantees of independence are only narrowly above the minimum standard. In *Sramek*, the European Court of Human Rights found that a three-year term of office does not by itself jeopardize independence.[57] While it remains unclear whether the Strasbourg Court would be prepared to go below the three-year threshold,[58] the *Sramek* judgment has already been authoritatively criticized for having set too low a standard.[59] With respect to the manner of appointment and term of office, Article 36(6a) of the ICC Statute – according to which the Assembly of States Parties elects the judges by secret ballot and for a non-renewable nine-year term – represents undoubtedly a marked improvement.

On the existence of 'safeguards against outside pressure' and the related question of whether the ad hoc Tribunals present 'an appearance of independence' – to use once again the case law of the Strasbourg Court as a blueprint for analysis[60] – the author is comparatively more eloquent. For one thing, he notes that although severe budget restrictions might in the past have 'adversely affect[ed] the Tribunals' independence, especially in that they may . . . influence . . . the ability of the Tribunals to conduct effective trials', the problem has now been overcome thanks to the budget increases progressively granted by the General Assembly (p. 102). But even here the discussion appears truncated, in that it disregards a fundamental aspect of the relation between funding and independence, that is, the identity of the principal contributors, which is all the more important in cases where voluntary contributions account for a large share of the budget.[61]

In matters of independence from external political pressures, Zappalà could not, and did not, avoid the troublesome *Barayagwiza* case. *Barayagwiza* is a complex

56. Communication No. 468/91, 10 November 1993, at 9.4. See also the excerpts from concluding observations on single countries collected in S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (2004), 404–5.
57. *Sramek v. Austria*, Judgment of 22 October 1984, [1984] ECHR (Ser. A) 84, at 38.
58. Perhaps not fortuitously, three years is the duration of the (renewable) judicial mandate according to Article 13(3) of the SCSL Statute.
59. See S. Trechsel, *Human Rights in Criminal Proceedings* (2005), 54–5: 'It is slightly disappointing that the Court gave no reason at all for accepting a term of three years. In fact, it seems excessively low . . . If a government had an unfettered power to appoint (and (not) reappoint) judges after a relatively short term of office, they could hardly be regarded as independent . . . Even when additional controls are in place, an uneasy feeling remains'. Cf. *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Separate Opinion of Justice Geoffrey Robertson), Case No. SCSL-2004-14-AR72(E), App. Ch., 13 March 2004, at 12, where the President of the SCSL confessed that he was puzzled by the applicant's failure to raise any issue as to the renewability of the three-year term of the judges appointed to the SCSL (see note 58, *supra*).
60. See *supra* note 47.
61. Cf. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/60/267-S/2005/532 (2005), at 61–2.

drama, whose most famous scene is Carla Del Ponte's *Possiamo chiudere la baracca*.[62] In that case, the Appeals Chamber overturned its own previous decision, in which it had ordered that the accused be released and the indictment dismissed on account of the violation of human rights suffered by the latter. The revision proceedings were characterized, *inter alia*, by the Rwandan government's open threats to put an end to its co-operation with the ICTR if faced with a decision in favour of Barayagwiza.[63] The latter was eventually found, at first instance, guilty of genocide, and of conspiracy and public incitement to commit genocide.[64] Having said that, Zappalà's contention that in *Barayagwiza* independence was not 'fundamentally at stake' because the ICTR decision was 'taken principally to fulfil its mission, rather than to satisfy external political pressures' (p. 104), seems to rest on a misinterpretation of the principle of independence. If the decision of the Appeals Chamber was technically indefensible (and I am not suggesting that it is), it would be irrelevant to argue that the Chamber yielded to political pressure reluctantly and that its real intent was the fulfilment of its mission. Independence can be subjectively maintained and, at the same time, objectively lost by a tribunal that has to bend to external pressure in order to accomplish its mission, however important.

4.2. *Nulla poena sine lege* and the right to rehabilitation

As regards the *nulla poena sine lege* principle (obviously part of human rights law), the author argues that it is 'admitted' before international criminal tribunals, 'but only to the extent that the convicted person cannot legitimately claim that neither national nor international law attached any penalty to his or her act' (p. 196). He explains:

> In other words, the ... principle cannot really be considered as giving rise to a right of the individual: it should, instead, be interpreted as a principle of equity involving considerations of fairness and the interests of justice as a whole. (p. 196)

It is indeed unusual to see 'equity', 'fairness', and 'justice' taking the place of rights. Are not the former inextricably linked to the latter? In any event, the absence of rights does not prevent the author from detecting violations of the corresponding 'principle'. For instance, the author sees one such violation in aggravating circumstances being defined too vaguely in Rule 101 RPE (ICTY), but he explains them

62. Reported in *Barayagwiza v. Prosecutor*, Decision on Prosecutor's Request for Review and Reconsideration (Declaration of Judge Rafael Nieto-Navia), Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, at 2: 'Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depends on the government of Rwanda. This is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, *judex naturalis*. Otherwise I am afraid, as we say in Italian, *possiamo chiudere la baracca*. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner.'

63. *Barayagwiza v. Prosecutor*, Decision on Prosecutor's Request for Review and Reconsideration, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, at 34.

64. *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003, at 1093, 1106–7. Barayagwiza would have been sentenced to life imprisonment if the Appeals Chamber had not previously ordered that the violation of his rights be taken into account in determining the sentence, which in the end was fixed at 35 years, from which seven years (the time Barayagwiza had spent in custody awaiting trial) were deducted.

away as reflections of 'the relatively primitive stage of development of this field of international law' (p. 202).

As regards the right to rehabilitation, Zappalà argues, convincingly in my view, that the fact that Rule 125 RPE (ICTY) directs the President of the Tribunal to take into account, for purposes of pardon or commutation of sentences, demonstration by the criminal of his or her rehabilitation, 'clearly indicates' that rehabilitation 'must be one of the purposes of the penalty' (p. 207). Once more, however, the author's logic of self-containedness keeps him from relying on arguments directly drawn from human rights law: according to Article 10(3) of the ICCPR, reformation and social rehabilitation must be 'the essential aim' of a penitentiary system. According to Zappalà, rehabilitation should be understood as a 'purpose' of penalties or else as 'one of the various elements that may be given consideration at the sentencing stage'; it cannot, however, 'be construed as a right of the convicted person . . . at this stage of development of the international criminal law system' (pp. 205–7). At first sight, this statement may seem to tally with the ICCPR reference to 'aims' rather than 'rights'. And yet, when read in context, Article 10(3) of the ICCPR clearly appears as a corollary of the important right of 'all persons deprived of their liberty' to be 'treated with humanity and with respect for the inherent dignity of the human person' (Art. 10(1) ICCPR). Furthermore, it is difficult to see how something that is said to be a purpose of the law cannot find reflection in, or be the reflection of, a right, for the sole reason that it is a purpose among others. Human or constitutional rights are normally subject to balancing without ceasing to be what they are: rights.[65]

4.3. Right of appeal

In Zappalà's view, the right of appeal 'guaranteed under international human rights provisions would not perforce have required the creation of an appeal section in the ad hoc Tribunals or in the ICC systems' (p. 159). If this contention is valid, then the following praise may be considered justified:

> there was no compelling need to provide for a right of appeal in the Statutes of the ad hoc Tribunals. These Tribunals, however, were created with the purpose of ensuring the highest standards of protection of fundamental rights. (p. 160)

Leaving aside the recurrence of the idea of rights that are at the same time fundamental and non-existent (but for a graceful bestowal), the author's contention that the establishment of a two-tier judicial system is more than human rights law actually requires with regard to international criminal jurisdictions deserves a closer examination. Crucial to its validity is the following argument:

> the exception of trials held before the highest available court, which is explicitly provided for by the rules of the European Convention, but which may also be considered implicit in the other provisions, would naturally have covered international judicial organs. (p. 160)

65. See R. Alexy, *A Theory of Constitutional Rights* (2002); S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme* (2001).

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The author's thesis rests therefore on two premises: there is no internationally recognized right of appeal against a judgment passed in the first instance by a supreme court or tribunal (major premise); international criminal courts and tribunals are by definition supreme (minor premise). Let me consider these two premises in turn.

Article 14(5) of the ICCPR, unlike Article 2 of the Seventh Protocol to the ECHR, provides for an *unqualified* right of appeal in criminal proceedings. This could have been an obstacle to the author's thesis, but he overcomes it by asserting that what is explicitly stated in the ECHR is implicit in any other human rights instrument. However, this affirmation is supported neither by the text of the ICCPR nor by the relevant practice of the HRC.

In *Fanali* v. *Italy*, the HRC found that Italy's reservation to Article 14(5) of the ICCPR, which covers single-instance proceedings instituted before the Constitutional Court with respect to charges brought against the president of the republic and its ministers, was valid and applicable to the case before it.[66] The decision in *Fanali* in no way suggests that Italy's reservation was made redundant by the existence of an implicit exception to Article 14(5) of the ICCPR. If anything, the fact that Italy, along with other contracting parties,[67] deemed it necessary to file such a reservation constitutes evidence in favour of the opposite interpretation. Subsequent cases, more or less directly, confirm that there is no 'supreme court exception' implicit in Article 14(5) of the ICCPR. In *Estevill* v. *Spain* the HRC considered the communication inadmissible on the grounds that the author, 'by insisting on being tried only by the Supreme Court . . . *renounced his right of appeal*'.[68] Moreover, in a series of cases brought against Tajikistan, the HRC recently considered that 'the absence of a possibility to appeal judgments of the Supreme Court passed at first instance to a higher judicial instance falls short of the requirements of [Article 14(5)]'.[69] The same conclusion was reached in a case where the review of judgments delivered by the Military Chamber of the Tajik Supreme Court was 'at the discretion of a limited number of high-level judicial officers'.[70]

66. Communication No. 75/1980, 31 March 1983, at 11.6–12.
67. See the reservations appended to Article 14(5) by Belgium, Denmark, Luxembourg, the Netherlands, Norway, Switzerland (and perhaps also those of the Republic of Korea and Trinidad and Tobago), reproduced in http://www.ohchr.org/english/countries/ratification/4_1.htm.
68. Communication No. 1004/2001, 13 May 2005, at 6.2 (emphasis added). See further Joseph et al., *supra* note 57, at 456: 'one may wave one's Article 14(5) rights by consenting to, or demanding, a trial at first instance in the State's highest court'.
69. *Aliboeva v. Tajikistan*, Communication No. 985/2001, 16 November 2005, at 6.5. The HRC reached the said conclusion '[i]n the absence of any explanation from the State party' (ibid.). In the HRC practice, this standard formula signals that the state concerned did not contribute to the clarification of the relevant questions of fact (including national law and practices). Of course, it does not of itself imply that the violation of the right of appeal may have been excused by means of an implicit exception potentially applicable to an unknown factual configuration. However, in the same case, the HRC also stated that 'even if a system of appeal may not be automatic, the right to appeal . . . imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case' (ibid.). This statement seems to suggest that in certain circumstances the denial of the right of appeal might be deemed compatible with the more general right to receive a fair trial. But it also confirms, above all, that there is no wholesale 'supreme court exception' implicit in Art. 14(5) ICCPR. See also *Khalilova v. Tajikistan*, Communication No. 973/2001, 13 April 2004, at 7.5.
70. *Saidova v. Tajikistan*, Communication No. 964/2001, 20 August 2004, at 6.5.

The argument invoked by the author in support of his 'major premise' is therefore unfounded. But the premise itself is not necessarily false. In fact, it could have been argued – along the lines traced by Judge Wald in *Tadić* – that treaty provisions like Article 14(5) of the ICCPR, in so far as they express an unqualified right of appeal, do not reflect general international law accurately.[71] Let me turn, then, to the minor premise.

The author believes that international criminal jurisdictions would 'naturally' fall within the supreme court exception.[72] As for its meaning and scope, it should be borne in mind that the exception was intended to apply to (national) judicial systems where the right of appeal is generally recognized. Obviously, a state that abolished or substantially limited the right of appeal could not avoid responsibility by redefining its judicial system or part of it as a network of supreme courts, otherwise the right of appeal would be rendered nugatory. The supreme court exception actually presupposes the continued existence of a judicial hierarchy made up of higher and lower courts. That is why one should be extremely cautious when transposing the exception to the international level. Since single-instance international jurisdictions are not by definition integrated into a judicial hierarchy, they are 'supreme' in a meaning that substantially differs from that of the exception. Suppose for a moment that an international criminal tribunal is established, against the general trend, as a single-instance jurisdiction. As its founding instrument does not recognize a right of appeal, the tribunal is said to be supreme, and since it is so considered, there is no right of appeal against its judgments. Circular arguments that would make a mockery of the right of appeal are easy to dismiss. What remains, then, is the author's suggestion that the supreme court exception for some reason covers international *criminal* jurisdictions. However, all he submits in this respect is that 'decisions of international courts are generally not subject to appeal' (p. 159).[73] This is tantamount to saying that no appeal lies as of right before international *criminal* courts and tribunals because that is the prevailing situation before other international jurisdictions *with no power to convict*. Under human rights law, every individual is entitled to appeal against his or her conviction. The analogy relied on by the author is therefore inappropriate.[74]

All this finds confirmation in the case law of the ad hoc Tribunals. In *Tadić*, the Appeals Chamber noted, first, that Rule 77 of the RPE did not expressly provide for the right to appeal against a conviction for contempt pronounced at first instance by the Appeals Chamber itself. It then observed that the Rules must nonetheless be interpreted in the light of internationally recognized human rights, and that 'Article 14 [ICCPR] reflects an imperative norm of international law to which the

71. See text at notes 79–82, *infra*.
72. Citing approvingly V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995), Vol. 1, at 293–5, the author observes that 'the Tribunals were themselves the highest courts, and thus speaking of review by a higher court would not really make sense' (Zappalà, at 159).
73. Note that the author presents this inductive argument as something that adds force to the deductive (and rather obscure) argument that international jurisdictions 'naturally' fall under the supreme court exception.
74. Cf. La Rosa, *supra* note 9, at 212: 'Même en insistant sur la nature internationale de ces instances, il est difficile de s'éloigner des principes et garanties des droits de l'Homme qui prévoient, dans les cas de procédures pénales, un droit d'examen par une autre juridiction.'

https://doi.org/10.1017/S092215650600361X Published online by Cambridge University Press

Tribunal *must adhere*', before concluding that 'a person found guilty of contempt by the Appeals Chamber must have the right to appeal the conviction'.[75] Quite significantly, in reaching this conclusion the Appeals Chamber emphasized that the procedure was 'of a penal nature'.[76] Zappalà knew this decision well, but he clouded the reasoning behind it and then displayed the case as a demonstration of the ad hoc Tribunals' goodwill (pp. 160–1).

On another occasion the author misreports relevant documents so as to make them fit his thesis. In concluding his general remarks on the right of appeal before international criminal jurisdictions, he notes that appeal proceedings 'have the counter-effect of implying considerable loss of time . . . without being really required by human rights law' (p. 161). He cites in support the opinions of Judges Wald and Robinson, to whom he also attributes the no-nonsense view that appellate proceedings 'may globally worsen the efficiency of the Tribunal in fulfilling its mission' (p. 161). These statements are unfounded.

In contempt proceedings ancillary to the *Aleksovski* case,[77] Judge Robinson regretfully stated that 'much judicial time ha[d] been unnecessarily expended'.[78] He did so because he believed that Mr Nobilo, the defence counsel accused of contempt, had not acted in such a way as to warrant a prosecution in the first place. Since Judge Robinson did not even mention appeal proceedings in his one-page separate opinion, to see him credited with the view that these proceedings are a potential waste of time is indeed surprising. Judge Wald's opinion is misquoted as well. She disagreed with the majority over the existence of a right to appeal against a contempt conviction pronounced in the first instance by the Appeals Chamber. Since there was, in her opinion, no basis in either the Statute or the RPE 'for an appeal from one Appeals Chamber bench to another', the Appeals Chamber had exceeded its statutory powers in recognizing such a right.[79] Furthermore, she denied that jurisdiction could be extended on the basis of the right of appeal as recognized, without qualifications, in Article 14(5) of the ICCPR. In her opinion, the circumstance that several states appended reservations to that provision, and the fact that Article 2 of the Seventh Protocol to the ECHR contains an exception to the right of appeal in cases where the person concerned is tried in the first instance by the highest tribunal, are clear indications to the effect that Article 14(5) of the ICCPR does not reflect general international law.[80] She was therefore unable to maintain the existence of 'a universal principle that a right of appeal must be afforded even when a conviction first arises in the highest tribunal'.[81] From the foregoing it appears that

75. *Prosecutor v. Tadić*, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin. Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001, at 3–4 (emphasis added).
76. Ibid., at 4.
77. Provided that this is the case to which the author actually meant to refer, when he succinctly indicates 'their dissenting opinions, 31 May 2001'.
78. *Prosecutor v. Aleksovski*, Judgment on Appeal by Anto Nobilo Against Finding of Contempt (Separate Opinion of Judge Patrick Robinson), Case No. IT-95-14/1-AR77, App. Ch., 30 May 2001, at 5.
79. *Prosecutor v. Tadić*, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin (Separate Opinion of Judge Wald Dissenting From the Finding of Jurisdiction), Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001, at 2.
80. Ibid., at 3.
81. Ibid., at 4.

what Judge Wald had in mind was a limited derogation from the right of appeal, applicable only in those exceptional cases where, within a two-tier jurisdictional system such as that of the ad hoc Tribunals, the highest judicial organ decides in the first instance.[82] She never intended to argue that the right of appeal, as a matter of law, is redundant before international criminal tribunals, nor did she spend a single word blaming the time-consuming character of appeal proceedings.[83]

5. Insulation from external review

The author's portrayal of the law(s) of international criminal courts and tribunals as impregnable citadels is crowned by the affirmation that these are, and should be, immune from mechanisms of external legal review of any kind:

> every international legal system of adjudication is a sort of 'self-contained system' that *cannot be subjected* to the supervision of organs belonging to a different system. Among international judicial bodies *there cannot be* such vertical relationships. . . . [T]he experience of the relationship between the EU and the system of the ECHR bears out the notion that *there is no room* for mechanisms of external review of the system of international criminal justice. (pp. 13–14, emphasis added)

What the author refers to is in part a historical datum.[84] However, it is difficult to see how a statement of principle ('cannot be subjected', etc.) can be drawn from historical facts. Moreover, since there exist 'mechanisms of external review' that are not judicial in nature, the inference appears wider than its factual basis. But the author has another, more political argument to offer:

> There does not seem to be an appropriate international organ to conduct such a review: regional human rights courts, on account of their non-universal character, are not suitable as they do not have international legitimacy, while the UN Committee does not really operate as a judicial body. (p. 14)

This contention is unpersuasive. As regards non-universal human rights regimes, the ECHR may be taken as an example. In a case involving an international organization or states not bound by the ECHR, lack of 'international legitimacy' is surely not a reason that would lead the ECtHR to decline jurisdiction, or to consider its exercise inappropriate, if the case concerns an alleged violation of the rights and freedoms of a person placed under the jurisdiction of any of the states party to the ECHR.[85] The

82. Cf. ibid., at 3 ('the failure to provide a right of appeal for a conviction that originates in the highest tribunal is not a fundamental violation of this right') and 4 ('The absence of such a right in Article 21 of the Statute setting out the rights of an accused person thus does not present an unacceptable departure from agreed human rights principles').

83. The author did not resort to the normative-sociological argument that international jurisdictions can dispense with appeal proceedings because international judges are typically chosen among the most qualified jurists (cf. Trechsel, *supra* note 59, at 370).

84. Even if, ironically, the only example of separation and autonomy on which the author explicitly relies is the relationship between the ECJ and the ECtHR, i.e. something that may acquire a totally different shape in a not too distant future.

85. See *Banković and Others v. Belgium and 16 Other Contracting States*, Decision of 12 December 2001, Reports 2001-XII, at 59-61; *Assanidze v. Georgia*, Judgment of 8 April 2004, Reports 2004-II, at 137.

https://doi.org/10.1017/S092215650600361X Published online by Cambridge University Press

effective exercise of those states' jurisdiction, not 'international legitimacy', marks the boundaries of 'European public order'.[86]

In the same vein, the author asserts that the application filed by Ilse Hess against the United Kingdom was dismissed by the European Commission of Human Rights essentially because the administration of the prison of Spandau was 'regulated by an international agreement between France, Russia [sic], the UK, and the United States' (p. 8), that is' by a partly 'extra-European' instrument. It was not, however, the existence of the international agreement per se, but the fact that the latter had established over the prison a 'joint authority', not divisible 'into four separate jurisdictions', that led the Commission to conclude that the matter could not be considered within the jurisdiction of the United Kingdom under Article 1 ECHR. In the *Hess* case it was indeed found that the conclusion of an agreement 'of the kind in question . . . could raise an issue under the Convention if entered into when the Convention was already in force for the respondent Government'.[87] Moreover, the ECtHR recently recalled that contracting parties are, under Article 1 ECHR, responsible for all acts and omissions of their organs, 'regardless of whether the act or omission in question was a consequence of domestic law or the necessity to comply with international legal obligations'.[88]

Of course, matters are more complicated when the conduct complained of is (or was) requested by an act of an international organization. In the author's view, an individual application against such acts may succeed on the merits only if the applicant is able to show that the level of protection of human rights within the international organization concerned falls below the ECHR standards. In support, he cites the ECtHR decisions in the so-called *European Space Agency* cases.[89] Those cases, however, are authorities only for the proposition that the equivalent protection test is applicable prospectively, that is to say in cases where the Court has to calculate what the applicant's situation would be if he put himself (or is put) in the hands of the international organization concerned.[90] They do not stand for the view that the test applies also in cases where the act performed by the state to comply with its obligations is, or recognizes, or condones, a violation of human rights. Rather, that view could have been argued on the basis of the earlier and controversial

86. *Loizidou v. Turkey*, Judgment (Preliminary Objections) of 23 March 1995, [1995] ECHR (Ser. A) 310, at 75.

87. *Hess v. United Kingdom*, Decision of 28 May 1975, in (1975) 18 YB ECHR 146, at 176. Cf. *Matthews v. United Kingdom*, Judgment of 18 February 1999, Reports 1999-I, at 34, where the respondent state's argument that it could not control the state of affairs complained of (viz. the exclusion of Gibraltar from the elections to the European Parliament) was famously rejected by the Court, stating that the responsibility of the UK derived 'from its having entered into treaty commitments subsequent to the entry into force' of the human rights norms invoked by the complainant.

88. *Bosphorus v. Ireland*, Judgment of 30 June 2005 (not yet published), at 153. See also *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, Reports 1998-I, at 29.

89. *Waite and Kennedy v. Germany* case, *supra* note 4; *Beer and Regan v. Germany*, Judgment of 18 February 1999, Reports 1999-I.

90. See *Waite and Kennedy v. Germany* case, *supra* note 4, at 68–9: 'a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention . . . since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board'. The situation was analogously 'prospective' in the *Naletilić v. Croatia* case (*supra* note 53), where the applicant filed an application against the Croatian government's decision to transfer him to the ICTY.

decision of the European Commission of Human Rights in the *M. & Co.* case.[91] In any event, the 'M. & Co. doctrine' has recently been superseded, or perhaps only refined, by the judgment in the *Bosphorus* case,[92] where the ECtHR held that a finding of equivalence raises a presumption of conformity that 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights *was manifestly deficient*', for in such cases, reasoned the Court, 'the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order in the field of human rights'.[93]

In this connection, it is interesting to note that another regional court – the EC Court of First Instance (CFI) – indeed ruled that violations of human rights as protected by the EC legal order can 'affect the validity of a Security Council measure *or its effect* in the territory of the Community',[94] but then proceeded to verify the compatibility of the same measure with *jus cogens*, 'understood as a body of higher rules of public international law binding on all subjects of international law'.[95]

Many of the foregoing considerations apply, *mutatis mutandis*, to the procedure for individual communications established under Additional Protocol I to the ICCPR. Even though the HRC is obviously not a judicial body, it still operates as a mechanism of external review through its observations on individual complaints, its concluding remarks on reports periodically submitted by each state party, and its general comments. Besides, there is no reason to believe that the HRC would stop its inquiries at the gates of international criminal justice.[96]

Nonetheless, the author's contention that '[t]he most realistic perspective is to strengthen human rights protection within the system' (p. 14) is perfectly reasonable. But was it not a false start in that direction to assume that international criminal courts and tribunals are bound only by their own statutes?

6. Making human rights norms prevail over incompatible provisions: *jus cogens*? Not necessarily . . .

Whereas the prospects of external (quasi-)judicial scrutiny of the acts of international criminal jurisdictions are still uncertain, it is clear that external remedies against violations of human rights are no substitute for internal ones. Internally, judges

91. *M. & Co. v. Germany*, Decision of 9 February 1990, 64 DR 138, at 145.
92. *Bosphorus v. Ireland* case, *supra* note 88, at 150–6. For the view that the Court departed from the M. & Co. doctrine or even left it far behind, see, respectively, the Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky, and Garlicki (at 1) and the Concurring Opinion of Judge Ress (at 1).
93. *Bosphorus v. Ireland* case, *supra* note 88, at 156 (emphasis added).
94. Case T-315/01, *Yassin Abdullah Kadi*, 21 September 2005 (not yet published), at 224.
95. Ibid., at 226.
96. See, by analogy, Committee on Economic, Social and Cultural Rights, General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. No. E/C.12/1997/8 (1997), at 7 ('The Committee considers that the provisions of the Covenant . . . cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions') and 9 ('When measures are taken which inhibit the ability of a State party to meet its obligations under the Covenant, the terms of sanctions and the manner in which they are implemented become appropriate matters for concern for the Committee').

may, for instance, set aside provisions incompatible with human rights norms and, if necessary (namely, if the solution cannot be directly inferred from human rights law), 'replace' them with functionally equivalent ones drawn from general international law, as possibly reflected in the ICC Statute. This statement conjures up *jus cogens*.[97] In fact, international criminal jurisdictions have already invoked peremptory norms in order to justify operations of the kind just described. However, as we shall see in a moment, clinging to *jus cogens* is not, in this regard, a strict necessity.

In keeping with his fundamental assumptions, Zappalà invokes *jus cogens* exclusively in relation to states' obligations. He briefly discusses the possibility that states' duties under the Statutes of international courts and tribunals come into conflict with their human rights obligations (deriving from either treaty law or custom). Relying on Article 103 of the UN Charter, he concludes,

> States have no choice other than to comply with the Council's decision and co-operate with the Tribunals. Of course, if one were to consider the individual right involved as protected by a rule of *jus cogens* . . . the conflict should be solved in the opposite way. (p. 9)

I find this unobjectionable, but what about the obligations of international courts and tribunals qua organs of international organizations? I shall not enter into a discussion on whether all human rights, or only part of them, may be considered norms *juris cogentis*. Suffice it to note that, in this regard, the author's opinion differs widely from that expressed by the Appeals Chamber in *Tadić*. As we have seen, while the latter saw in the right of appeal, as enshrined in Article 14(5) of the ICCPR, 'an *imperative norm* of international law to which the Tribunal must adhere',[98] Zappalà denies even its opposability to international criminal jurisdictions.[99]

Suppose now, for the sake of argument, that not all customary human rights norms are part of *jus cogens*. Since international organizations are bound to respect generally recognized human rights,[100] all their acts in conflict with the latter should be at least set aside by their judicial organs, regardless of whether the right in question is or is not part of *jus cogens*. This is so because the wrongfulness of an act or omission by an organ of an international organization may not be excluded by the circumstance that another organ of the same organization (even superordinate) has acted, or requires the first organ to act, in breach of the obligation in question. The commission of, or the order to commit, a wrongful act is hardly a justification for reiterating it, or for implementing the order to commit it.[101] Therefore the ad hoc Tribunals are arguably required to set aside provisions of the Statute and hierarchically inferior norms, such as those contained in the Rules on Procedure and Evidence, if these turn

97. Cf A. Cassese, *International Law* (2005), 206.
98. See *Tadić* case, *supra* note 75, at 3 (emphasis added).
99. See section 4.3, *supra*.
100. See section 2, *supra*.
101. See, by analogy, Article 3 of the ILC Articles on State Responsibility: 'The characterization of an act of a State as internationally wrongful . . . is not affected by the characterization of the same act as lawful by internal law' (J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002), 86). On the reasons behind the provisional decision not to transpose the content of Art. 3 in the draft articles on responsibility of international organizations see G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), at 19–20, para. 37.

out to be inconsistent with generally recognized human rights. In this respect, it is recalled that the Appeals Chamber, in its decision on jurisdiction in the *Tadić* case, considered itself entitled to look on the legality of its own creation by the Security Council, hence it was ready to set aside nothing less than the whole Statute.[102] Similarly, in another instance, even though the Appeals Chamber characterized its own reasoning as interpretation – in fact, a rather tortuous interpretation of the Rules in conformity with the Statute, and of the Statute in conformity with *jus cogens* – it arguably disregarded the jurisdictional provisions that, in conflict with 'an imperative norm of international law', would have debarred it from hearing an appeal against a decision it had itself rendered.[103] Interestingly, the Appeals Chamber of the Special Court for Sierra Leone has adopted a similar approach:

> The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law.[104]

This notwithstanding, the notion of *jus cogens* is not indispensable in this context. The same result could be reached through the application of the law on international responsibility. As argued above, the Security Council cannot effectively exempt its subsidiary organs from observing generally recognized human rights, just as it cannot release the United Nations from its international obligations. UN judges would not, and indeed could not, under the law of international responsibility, endorse such operations, as the Decision on jurisdiction in the *Tadić* case demonstrates. It is sometimes argued that the Security Council, when it acts under Chapter VII of the UN Charter, has *jus cogens* as it is sole legal constraint.[105] But if, hypothetically, the Security Council's conduct, or states' conduct mandated by a Security Council's resolution adopted under Chapter VII, are in conflict with an obligation of the United Nations, and are not justifiable at least as a necessary and proportionate response to a threat to the peace, it is difficult to escape the conclusion that the United Nations incurs international responsibility for having committed either a wrongful act through one of its organs, or, to paraphrase provisional Article 15(1) of the draft articles on responsibility of international organizations, because 'it has adopted a binding decision to commit an act that would be internationally wrongful if committed by it and would circumvent one of its international obligations'.[106] In such circumstances the characterization of the international obligation in question as *jus cogens* is not crucial a priori, that is, simply because the Security Council has

102. See *Tadić* case, *supra* note 2, at 20–2.
103. See *Tadić* case, *supra* note 75, at 3, and Judge Wald's separate and partly dissenting opinion, *supra* note 79.
104. *Prosecutor v. Taylor*, Appeals Chamber, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, App. Ch., 31 May 2004, at 43.
105. See, for a stimulating discussion, E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 187–204, 341–57. See also C. Olivier, 'Human Rights Law and the International Fight Against Terrorism: How Do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law?', (2004) 73 *Nordic Journal of International Law* 319, 403–7.
106. International Law Commission, Report of the work of its fifty-seventh session (2 May to 3 June and 11 July to 3 August 2005), UN Doc. A/60/10 (2005), at 100; see also Titles and texts of the draft articles adopted by the ILC Drafting Committee on 27 May 2005, UN Doc. A/CN.4/L.666/Rev.1 (2005), at 4–5; Gaja, *supra* note 29, at 15–16, paras. 35–8.

acted under Chapter VII. That characterization becomes judicially relevant only once it is established that the Security Council has acted in pursuance of a legitimate objective, within the limits of its powers, and in conformity with the principles of necessity and proportionality. In this respect, when human rights are concerned, Article 4 of the ICCPR is obviously relevant and may be applied by analogy due to the clear affinity between the notions of 'public emergency' and 'threat to the peace'.[107] For instance, if the establishment of an ad hoc Tribunal under Chapter VII is deemed to be a useful, or even an essential, contribution to the restoration or maintenance of peace, this does not automatically imply that such a measure may lawfully require that human rights other than *jus cogens* be sacrificed.

It seems that the CFI applied a similar reasoning in its recent *Kadi* judgment. In that case, the European judges felt empowered to check indirectly the lawfulness, 'with regard to *jus cogens*', of a Chapter VII Security Council resolution aimed at combating international terrorism.[108] The CFI further specified that if such resolutions turn out to be incompatible with 'fundamental peremptory provisions of *jus cogens*', they 'would bind neither the Member States of the United Nations nor, in consequence, the Community'.[109] However, contrary to what the foregoing passages seem to imply, the CFI has not held that *jus cogens* is the only limit to the Security Council's actions or decisions aimed at restoring or maintaining peace. The CFI actually found that 'The Security Council's powers of sanction in the exercise of that responsibility must . . . be wielded in compliance with international law'.[110] Moreover, in trying to demonstrate that the right of access to a court (whose violation was alleged by the applicant) is not absolute, the CFI recalled that 'at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for . . . by Article 4(1) [ICCPR]'.[111] It seems, therefore, that the CFI was presupposing the existence of a threat to the peace and the need to limit the enjoyment of certain human rights when it equated the legal parameter it was going to apply with *jus cogens*. In the European judges' view, the latter comprises 'the mandatory provisions concerning the universal protection of human rights', and ultimately coincides with the incompressible core of those rights.[112] Finally, in order to determine whether that core had been affected, the CFI considered whether the features of the sanctioning regime established by Security Council afforded 'adequate protection of the applicant's fundamental rights as recognized by *jus cogens*'.[113]

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107. On the interpretation of Art. 4, see generally Human Rights Committee, General Comment no. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).
108. *Kadi* case, *supra* note 94, at 226.
109. Ibid., at 230.
110. Ibid., at 229.
111. Ibid., at 287.
112. Ibid., at 231. Here, the CFI recalls the 'intransgressible principles' evoked by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 257, para. 79.
113. *Kadi* case, *supra* note 94, at 290. See also ibid., at 289: 'the applicant's interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security

Turning now to the ICC, it may be argued that since the latter's constituent instrument is a treaty by which contracting states could have derogated *inter se* from generally recognized human rights, the foregoing considerations do not apply here.[114] The ICC itself, however, would have remained bound to observe those rights in its relations with third states. If that had been the case, the judicial organs of the ICC, when called to set aside a norm of the system by reason of an alleged conflict between it and generally recognized human rights, would have had to settle the preliminary question of the *jus cogens* nature of the rights in question only in cases *not* involving the rights of a third state. If, instead, these rights were involved, the obligation to set aside provisions conflicting with generally recognized human rights would be, as argued above, a corollary of the primary obligation of the ICC to respect those rights. However, if one concedes that fundamental human rights give rise to *erga omnes* obligations, the obligation owed to third states would be breached even in cases involving exclusively states parties.[115] Fortunately, all these potential intricacies are dispelled by Article 21(3) of the ICC, which stipulates that the 'application and interpretation' of the law 'must be consistent with internationally recognized human rights'. The same complications would of course disappear as soon as it is admitted that generally recognized human rights are part of *jus cogens*, understood as international *ordre public*.[116]

It may ultimately be unreasonable to fear that such a broad recognition of human rights as *jus cogens* may make the structure and functioning of international criminal proceedings too rigid and ultimately ineffective. Human rights norms actually come with inbuilt situational, normative, and interpretative flexibility. They bind international criminal courts and tribunals without tying them down.

Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed.'

114. The same can be said of other international criminal jurisdictions set up by convention, such as the SCSL.

115. See Human Rights Committee, General Comment no. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at 1.

116. See, e.g., *Loizidou v. Turkey* case, *supra* note 86, at 75. Cf. A. Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', (1999) 10 EJIL 237, at 248–9, 262; R. Kolb, *Théorie du* ius cogens *international: essai de relecture du concept* (2001), 68–83, 98–124, 173–7; see also L. Gradoni, '*Nullum crimen sine consuetudine*: A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia Has Been Identifying Custom', (2004) *ESIL Agora Papers*, available at http://www.esil-sedi.org, at 18.