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The Casuistry of International Criminal Law: Exploring A New Field of Research

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1 Introduction

Since the 1990s, the international community has created several international criminal courts, such as the *ad hoc* Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) and the International Criminal Court (ICC). All these courts have been set up with the same goal in mind: to end impunity for mass atrocity by holding political and military leaders accountable for international crimes. In fulfilling this mandate, the courts have benefited greatly from the legacy of the International Military Tribunal (IMT), which adjudicated the major war criminals of the Nazi regime. At the same time, there has been need to modernize the underdeveloped and sometimes outdated international crimes and liability theories of the post-World War II era. The ICTY, ICTR and ICC have therefore regularly adopted creative interpretations of existing legal concepts, thus construing a more comprehensive and balanced notion of criminal responsibility for mass atrocity.[1]

So far, international scholarship has primarily analyzed the creative practice of international criminal courts according to a rule-based approach. This approach assumes that the meaning and scope of the law are determined by legal rules and that legal rules completely control the outcome of individual cases. Following this assumption, studies into judicial reasoning of international criminal courts have typically assessed and scrutinized (the judicial interpretations of) statutory, conventional and customary rules, thereby paying little or no attention to the way in which the courts have applied these rules to facts of individual cases.[2] Recent research shows that scholars' focus on rules has regularly resulted in legalist debates that give an incomplete and imprecise picture of the law and the process

1 Maria Swart, 'Judges and Lawmaking at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (PhD diss. Leiden, 2006), 56, 83; Alexander Zahar and Göran Sluiter, *Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), 80; William A. Schabas, 'Interpreting the Statutes of the ad hoc Tribunals,' in *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, ed. Lal C. Vohrah et al. (The Hague: Kluwer Law International, 2003), 886; Shane Darcy and Joe Powderly, 'Introduction,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joe Powderly (Oxford: Oxford University Press, 2011), 2; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 14.

2 The chapters in the edited volume *Judicial Creativity at the International Criminal Tribunals* illustrate this point. Whereas the chapters provide valuable analyses of the ways in which international criminal courts have creatively interpreted the law *in abstracto*, the application of the law *in concreto* plays a limited role. See *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joe Powderly (Oxford: Oxford University Press, 2011).

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of legal reasoning.[3] To refine and complete this picture, this article shows how the existing rule-based discourse can be complemented with insights from casuistry.[4]

Casuistry is an age-old theory of legal reasoning that is based on the thought that the law is inherently linked to its practical function. The meaning of legal rules should therefore be assessed and determined in interplay with their application in individual cases. For this purpose, casuistry adopts a methodology of analogical reasoning from precedent. The value and limitations of this methodology have been elaborately discussed in legal theory and domestic legal discourse. In particular common law scholars have paid much heed to the role of precedents and analogical reasoning.[5] This article takes these domestic views as a basis for exploring (1) how the methodology of casuistry can be used to analyze international criminal law and (2) how casuistry can help to appraise the application of international crimes and liability theories by international criminal courts. The aim of the article is thus not to develop a new theory of legal reasoning, nor to provide a comprehensive study of casuistry and analogical reasoning. Rather, the article seeks to demonstrate how existing views on casuistry can enrich the current rule-governed discourse on international criminal law. In particular, the article wishes to show international scholars the importance of using casuistic insights for studying international crimes and liability theories, whilst at the same time illustrating legal theorists the value of expanding the scope of their research to the field of international criminal law. In this way, the article seeks to stimulate an interactive debate between legal theorists and international scholars in which they can benefit from each other's expertise.

The article is structured as follows. Section 2 reflects on the character of legal reasoning and sets out the international debate on judicial creativity.[6] Against this background, section 3 describes the theory of casuistry and its methodology of analogical reasoning from precedent. Section 4 illustrates the value of these observations for international criminal law discourse in a case study of genocide. In particular, this section shows how (the methodology of) casuistry can be used to analyze, structure and evaluate genocide decisions. Based on these findings,

3 Marjolein Cupido, 'The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts,' *Melbourne Journal of International Law* 15 (2014): 378; Marjolein Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration,' in *Pluralism in International Criminal Law*, ed. E. van Sliedregt and S. Vasiliev (Oxford: Oxford University Press, 2015), 128; Marjolein Cupido, 'The Policy underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate,' *Criminal Law Forum* 22 (2011): 275.

4 Casuistry is closely linked to the school of legal heuristics, which implements many of the starting-points and techniques on which casuistry is based.

5 E.g., Julius Stone, *Precedent and Law: Dynamic of Common Law Growth* (Sydney: Butterworths Law, 1985); Melvin Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1991); Oliver W. Holmes, *The Common Law* (Mineola: Dover Publications, 1991); Roscoe Pound, *The Spirit of the Common Law* (Francetown: Marchall Jones Company Publisher, 1921).

6 The article focuses on the work of the *ad hoc* Tribunals and the ICC, since these courts have made the most important contribution to the development of international criminal law.

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section 5 makes some concluding observations about the need for further studying the casuistry of international criminal law.

2 Reasoning with open-textured rules in international criminal law

2.1 Judicial creativity in international criminal law

It is generally accepted that the decisions of international criminal courts are guided and controlled by legal rules. The rules of international criminal law are mostly laid down in statutes, conventions and customary law.[7] The ICC can, for example, qualify acts as genocide, crimes against humanity or war crimes when the conditions stipulated in Articles 6 to 8 of the Rome Statute are met.[8] Looking at these statutory provisions, it becomes clear that the rules defining international crimes and liability theories are usually formulated in relatively abstract and indeterminate terms, such as 'intent,' 'policy,' or 'armed conflict.' In this way, the rules attain what Hart calls an 'open texture.'[9]

The open texture of legal rules makes it difficult to establish which specific fact situations fall within the scope of international criminal law.[10] In particular in marginal cases that are outside a rule's core of settled meaning it is often unclear whether the legal elements of a rule are met.[11] For example, it is difficult to determine whether the element of genocidal intent – which requires that the accused intended to physically or biologically destroy a national, ethnic, racial or religious group – is satisfied when the accused neither expressly called for a group's annihilation, nor played any decisive role in large-scale discriminatory killings. As this example shows, rules cannot function as all decisive standards for judicial decision-making, but only form the starting-point of a complex argumentation process. International criminal courts have exercised a considerable amount of discretion in this argumentation process and have adjusted the meaning of legal

7 In this sense, international criminal law does not differ from domestic legal systems. On the meaning of rules for judicial decision-making in general, see, e.g., Anne von der Lieth Gardner, *An Artificial Intelligence Approach to Legal Reasoning* (Cambridge, MA: MIT press, 1987), 3; Carel E. Smith, *Regels van rechtsvinding* (Den Haag: Boom Juridische uitgevers, 2007), 12-13.

8 United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Treaty Series, vol. 2187, Articles 6-8.

9 Herbert L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 128.

10 Similarly, Hart, *Concept of Law*, 128; Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court,' *International Criminal Law Review* 8 (2008): 263-64; Elies van Sliedregt, 'System Criminality at the ICTY,' in *System Criminality in International Law*, ed. Andre Nollkaemper and Harmen van der Wilt (Cambridge: Cambridge University Press, 2009), 199-200; Jan Klabbers, 'The Meaning of Rules,' *International Relations* 20 (2006): 298; Jan B.M. Vranken, *Asser-Vranken (Algemeen Deel)* (Zwolle: Tjeenk Willink, 1995), 68-70.

11 Vranken emphasizes that application of legal rules in individual cases is not always hard and that difficulties particularly arise in five categories of cases. Vranken, *Asser-Vranken*, 54-68.

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rules to the specific facts of individual cases.[12] In this way, the courts have gradually given shape and substance to rudimentary legal concepts and have adapted these concepts to the realities of modern warfare. Substantive international criminal law has thus become 'something that is not so much "laid" down from above as something that "grows up."'[13]

The progressive judicial development of international criminal law is not unchallenged. Scholars – but also international judges – have expressed serious concerns about the (potentially) creative role of international criminal courts and the far-reaching implications of their innovative decisions.[14] In particular, it has been contended that the judicial reform of international crimes and theories of liability leads to legal uncertainty and arbitrariness. This puts pressure on the principle of legality, which traditionally requires that the law is interpreted and applied in a strict, foreseeable and consistent way.[15] To dispel such legality concerns, two ICC judges have recently pleaded for an 'ordinary meaning approach.'[16] This approach takes the plain text of statutory and conventional provisions as the primary benchmark for judicial decision-making and thus forestalls courts from progressively developing existing legal rules.

12 Similarly (in relation to domestic law), Klaas Rozemond, 'De casuïstische grenzen van het materiele strafrecht,' *Delikt en Delinkwent* 37 (2007): 479-81; Friedrich V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991), 227; Leonor M. Soriano, 'The Use of Precedents as Arguments of Authority, Arguments *ab Exemplo* and Arguments of Reason in Civil Law Systems,' *Ratio Juris* 11 (1998): 95; Klabbers, 'Meaning of Rules,' 300.

13 D.N. MacCormick and R.S. Summers, 'Further General Reflections and Conclusions,' in *Interpreting Precedents: A Comparative Study*, ed. D.N. MacCormick and R.S. Summers (Aldershot: Ashgate Publishing, 1997) 531, 543. MacCormick and Summers use this phrase in relation to domestic law, but it similarly applies to substantive international criminal law.

14 E.g., Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* (Oxford: Oxford University Press, 2006), 15-18; Allison M. Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' *California Law Review* 93 (2005): 96-102; J.D. Ohlin and G.P. Fletcher, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case,' *Journal of International Criminal Justice* 3 (2005): 541-42, 551-61; K. Ambos, 'International Criminal Law at the Cross-Roads: From *ad hoc* Imposition to a Universal Treaty-Based System,' in *Future Perspectives on International Criminal Justice*, ed. Carsten Stahn and Larissa van den Herik (The Hague: T.M.C. Asser Press, 2010), 174-76; *Prosecutor v. Lubanga*, Separate Opinion of Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842, 14 March 2012; *Prosecutor v. Ngudjolo Chui*, Concurring Opinion of Judge Christine van den Wyngaert, Case No. ICC-01/04-02/12, 18 December 2012.

15 On the meaning of legality in international criminal law, see, e.g., Bruce Broomhall, 'Article 22: *Nullum Crimen sine Lege*,' in *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, ed. Otto Triffterer (München: Verlag C.H. Beck, 2008), 713-29; K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2010); M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002).

16 E.g., *Prosecutor v. Lubanga*, Separate Opinion of Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842, 14 March 2012, paras. 13-18; *Prosecutor v. Ngudjolo Chui*, Concurring Opinion of Judge Christine van den Wyngaert, Case No. ICC-01/04-02/12, 18 December 2012, paras. 6, 11-21, 39, 44, 57, 64, 68-69, 70.

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The 'ordinary meaning approach' adds an important moderating perspective to the prevailing practice of judicial creativity. At the same time, legal scholarship has questioned whether this approach is practically feasible. Van Sliedregt has, for example, reminded us that international criminal law is still infused with power politics and that the consensual nature of this field of law 'is likely to generate provisions that, being the result of a political compromise and the outcome of a diplomatic process, are contrived and unworkable.'[17] It is therefore doubtful whether the meaning of statutory provisions can be determined on the mere basis of the plain text of legal rules. Arguably, 'judicial lawmaking is essential and compensates for a flawed process of lawmaking.'[18] On this account, scholars have conceded that legality requirements such as strict interpretation and non-retroactivity only play a moderate role in the international context.[19] An important justification for this nuanced conception of legality is that international crimes are *malum in se* – i.e. evil in themselves – and generally prohibited under domestic law. It is therefore difficult to argue convincingly that the accused could not have foreseen the illegality of international crimes or the criminality of their conduct.[20] In most cases, the creative use and progressive development of international criminal law does not cause any illegitimate uncertainty about the state of the law.

The previous observations give expression to strained views on judicial creativity. On the one hand, the progressive judicial development of international criminal law is appraised positively insofar as it allows courts to tailor open-textured legal concepts to unforeseen situations and case-specific circumstances.[21] On the other hand, there is fear that the consequent flexibility of the law leads to judicial arbitrariness, which violates the legality requirements of foreseeability and consistency. This tension underlies and defines studies in the field of international criminal law.

17 Van Sliedregt, *Individual Criminal Responsibility*, 14.

18 Van Sliedregt, *Individual Criminal Responsibility*, 14. Also see Elies van Sliedregt, 'International Criminal Law,' in *The Oxford Handbook of Criminal Law*, ed. Markus D. Dubber and Tatjana Hörnle (Oxford: Oxford University Press, 2014) 1139, 1147.

19 Elies van Sliedregt, 'International Criminal Law', 1148-49; Darryl Robinson, 'International Criminal Law as Justice', *Journal of International Criminal Justice* 11 (2013): 706-8.

20 E.g., Shane Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2011) 106, 126; Robert Cryer, 'The *ad hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2011), 159, 183; Gideon Boas, 'Omission Liability at the International Criminal Tribunals – a Case for Reform,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2011), 204, 224; Beth van Schaack, '*Crimen sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals,' *Georgetown Law Journal* 97 (2008): 156-58; Schabas, 'Interpreting the Statutes of the *ad hoc* Tribunals,' 887.

21 This conforms to the finding of Vranken that lawyers seek to find the most reasonable solution in individual cases. Vranken, *Asser-Vranken, Vervolg*, 12.

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2.2 *Studying the creative practice of international criminal courts*

One of the central questions occupying international scholarship is how the values underlying the principle of legality can be respected and safeguarded without forestalling the law's adjustment to new, unforeseen circumstances. Current studies primarily address this question by analyzing (the restraining value of) the methodology of judicial reasoning.[22] Scholars appear to assume that the foreseeability and equality of the law can be fostered by requiring that (progressive) judicial decisions are carefully justified with reference to accepted principles of criminal justice and connected to the text, history and purpose of legal rules.[23] This 'methodological approach' toward issues of legality is indeed particularly appropriate for international criminal law. Considering that this field of law largely depends on unwritten and open norms and lacks any effective institutional mechanisms that control judicial decision-making (such as an educational system for professional judicial training or a framework for legislative supervision), (the methodology of) judicial argumentation arguably imposes the most powerful checks on the authority of international criminal courts.[24]

So far, studies into the methodology of judicial reasoning have concentrated on the sources of law that international criminal courts use to justify their decisions. Scholars have, for example, analyzed to what extent customary international law retrains judicial authority and have evaluated whether courts have construed

22 The chapters in the edited volume *Judicial Creativity at the International Criminal Tribunals* illustrate this point. Whereas the chapters provide valuable analyses of the ways in which international criminal courts have creatively interpreted the law *in abstracto*, the application of the law *in concreto* plays a limited role. See *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joe Powderly (Oxford: Oxford University Press, 2011).

23 This assumption is also reflected in legal theory and domestic law. See, e.g., Michelle Taruffo, 'Judicial Decisions and Artificial Intelligence,' *Artificial Intelligence and Law* 6 (1998): 315; Vern R. Walker, 'Discovering the Logic of Legal Reasoning,' *Hofstra Law Review* 35 (2007): 1687; Kent Greenawalt, *Statutory and Common Law Interpretation* (New York: Oxford University Press, 2012), 226; Paul Scholten, *Asser-Scholten (Algemeen Deel)* (Zwolle: Tjeenk Willink, 1974) 130-32.

24 On the connection between the character of legal reasoning and the institutional context, see, e.g., George Christie, 'The Objectivity in the Law,' *Yale Law Journal* 78 (1969): 1340-41; Kratochwil, *Rules, Norms and Decisions*, 237-38; Carel E. Smith, *Feit en rechtsnorm. Een methodologisch onderzoek naar de betekenis van de feiten voor de rechtsvinding en legitimatie van het rechtsoordeel* (PhD diss., Leiden, 1998), 86; Smith, *Regels van rechtsvinding*, 120-21, 131-32, 136, 140; Vivian Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union,' *Columbia Journal of European Law* 7 (2001): 78-82; D. Neil MacCormick and Robert S. Summers, 'Further General Reflections and Conclusions,' in *Interpreting Precedents: A Comparative Study*, ed. D. Neil MacCormick and Robert S. Summers (Aldershot: Ashgate Publishing, 1997), 550.

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international custom in a consistent and structured way.[25] Furthermore, scholars have examined the methods of interpretations that regulate how courts should determine the meaning of statutory, conventional or customary rules and principles. In this respect, particular attention has been paid to controlling value of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which requires that courts interpret the law 'in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.'[26]

By studying these methodological tools for decision-making, scholars have provided important insights into the meaning of international criminal law and the legality of judicial decisions. For example, they have shown that teleological reasoning plays a dominant role in international criminal law and that customary law is not always based on traditional sources of state practice and *opinio iuris*.[27] At the same time, we should be mindful of the limitations of these insights. After all, domestic research on legal reasoning makes clear that sources of law and methods of interpretation cannot completely control the courts' decisions. In particular, legal sources and interpretative methods are insufficient for determining which specific acts fall within the scope of a general legal rule, i.e. they cannot help courts to decide how the law should be applied to the facts of individual cases.[28] For example, in genocide cases courts can use the methods of interpretation from the VCLT to clarify *in abstracto* that *génocidaires* should act with a specific *purpose* to destroy a protected group, rather than with mere *dolus eventualis*.[29] However, the VCLT does regulate whether an *individual accused* who played an instrumental role in mass killings without explicitly calling for the destruction of an ethnic group meets the purpose standard. The reasoning techniques that have so far been studied by international scholars are thus not exhaustive and cannot completely ascertain the legality of international criminal law. Therefore, there is reason to explore whether current research can be complemented with new perspectives on legal reasoning and to assess how these perspectives can con-

25 Larissa van den Herik, 'Using Custom to Reconceptualize Crimes against Humanity,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2011) 80, 100-105; Andre Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia,' in *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems*, ed. Thomas Vandamme and Jan-Herman Reestman (Groningen: Europa Law Publishing, 2001) 13, 15-18; Joseph Powderly, 'Judicial Interpretation at the *ad hoc* Tribunals: Method from Chaos?,' in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2011) 17, 26-32.

26 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155 (emphasis added). On the courts' use of the methods of interpretation, see, e.g., Powderly, 'Judicial Interpretation at the *ad hoc* Tribunals,' 17-44; Schabas, 'Interpreting the Statutes of the *ad hoc* Tribunals,' 847-65.

27 E.g., Van den Herik, 'Using Custom,' 101-5; Darryl Robinson, 'The Identity Crisis of International Criminal Law,' *Leiden Journal of International Law* 21 (2008): 933-38.

28 E.g., Scholten, *Asser-Scholten*, 35-36; Vranken, *Asser-Vranken*, 50.

29 Also in this phase, the methods of interpretation from the VCLT do not *control*, but only *guide* judges in making decisions.

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tribute to the transparent and structured application of the law to the facts of individual cases.

3 Casuistry and case-based reasoning

3.1 Interplay between law and facts

Legal theory and domestic practice suggest that insights from casuistry can help us to better understand and value the decision-making process of international criminal courts. Casuistry takes as a starting-point that the law is inextricably linked to its practical function. This implies that questions of law cannot be answered on the basis of general rules alone.[30] Even though rules constitute an important element of legal decision-making, the outcome of individual cases is usually subject to considerations that are 'not written into the rules themselves.'[31] Casuistry therefore seeks to establish the meaning of the law by looking at the application of legal rules in practice.[32] On this account, it evaluates the law through a circular motion – a *Hin- und Herwandern des Blickes* – between abstract rules and concrete cases.[33] An important consequence of this approach is that case-specific facts influence the meaning of the law: facts and law are weaved together.[34]

Casuistry regards facts as open-ended illustrations of legally relevant circumstances that courts can use to determine whether an accused's conduct falls within the scope of the law. Some scholars have claimed that the formulation of relevant circumstances is constrained by so-called 'teleological links' between facts on the

30 Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 24-46. Similarly, Scholten, *Asser-Scholten*, 9-10.

31 Jonsen and Toulmin, *Abuse of Casuistry*, 8. Similarly, Scholten, *Asser-Scholten*, 76.

32 Jonsen and Toulmin, *Abuse of Casuistry*, 26. Also see, Kratochwil, *Rules, Norms and Decisions*, 18; Gardner, *Artificial Intelligence Approach*, 37. In this sense, casuistry resembles the tradition of legal hermeneutics. On this tradition, see., e.g., Smith, 'Feit en rechtsnorm,' 63; Scholten, *Asser-Scholten*, 10-12, 37, 76-77; Johannes J.H. Bruggink, *Wat zegt Scholten over het recht. Een rechtsfilosofische studie rond het 'Algemeen Deel'* (Zwolle: Tjeenk-Willink, 1983), 20.

33 Karl Engisch, *Logische Studien zur Gesetzesanwendung* (Heidelberg: Carl Winter, 1963), 14-15; Smith, *Regels van rechtsvinding*, 82-86, 93; Smith, 'Feit en rechtsnorm,' 33, 131; Scholten, *Asser-Scholten*, 120-21; Vranken, *Asser-Vranken*, 85.

34 Similarly, Jan B.M. Vranken, *Asser-Vranken, Vervolg* (Zwolle: Tjeenk Willink, 2005), 105-6, 113-14.

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one hand, and the objective of the rule for which they are used, on the other.[35] This means that facts should originate from the desire to achieve the objective of a rule and reflect the belief that acting and deciding under certain conditions promotes that objective. The following reasoning scheme clarifies this point: 'having goal G; and believing that doing A, under pre-condition C, promotes G is a reason for having the propensity to do action A under pre-condition C (viewing precondition C as a factor favoring action A).'[36]

In contrast to rules, facts do not stipulate the necessary and sufficient conditions of criminal responsibility. They rather favor a certain outcome and provide reasons for a decision without automatically compelling a specific result.[37] For example, the fact that an accused participated in mass executions of an ethnic group can be a *reason* for deciding that he acted with the genocidal intent to destroy this group without *requiring* courts to arrive at this conclusion. It follows from this account that the description of a case in terms of relevant facts cannot determine a specific outcome. Instead, this description only provides input for a further reasoning phase in which all facts *pro* and *con* a decision are balanced against each other.[38] Whilst this balancing exercise is relatively unproblematic when all facts point in the same direction, difficulties arise when they pull in opposite ways. Suppose, for example, that an accused vigorously called for the extermination of the Rwandan Tutsi's, but at the same time saved individual Tutsi's from being killed. Whereas the former circumstance is a clear reason for deciding that the accused acted with the intent to physically destroy the Tutsi's as an ethnic group, the latter circumstance contradicts this finding. In this case, courts have the difficult task to determine which of these circumstances carries more weight and is ultimately decisive.

The previous observations suggest that casuistry allows courts to tailor their description of facts to the circumstances of the case under consideration. Casuistry also seems to leave courts great leeway to balance the relevant facts of a case as they see fit. In this light, it has been argued that casuistry does not impose any meaningful restrictions on judicial decision-making and thus opens the door to

35 This argument has particularly been presented in literature on case-based reasoning in the field of Artificial Intelligence and Law. See, e.g., Trevor Bench-Capon and Giovanni Sartor, 'Using Values and Theories to Resolve Disagreement in Law,' in *Legal Knowledge and Information Systems: Jurix 2000 the Thirteenth Annual Conference*, ed. Joost Breuker et al. (Amsterdam: IOS Press, 2000), 74-75; Donald H. Berman and Carole D. Hafner, 'Representing Teleological Structures in Case-Based Legal Reasoning: The Missing Link,' in *ICAIL Proceedings of the Fourth International Conference on Artificial Intelligence and Law* (New York: ACM Press, 1993), 55-56; Trevor Bench-Capon, 'The Missing Link Revisited: The Role of Teleology in Representing Legal Argument,' *Artificial Intelligence and Law* 10 (2002): 82; Giovanni Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Berlin: Springer, 2005), 188, 739; Giovanni Sartor, 'Reasoning with Factors,' *Argumentation* 19 (2005): 418. For a contrary view, see B. Roth, *Case-Based Reasoning in the Law: A Formal Theory of Reasoning by Case Comparison* (PhD diss., Maastricht, 2003), 27. Similarly – though in more abstract terms – Scholten, *Asser-Scholten*, 118-20.

36 Sartor, *Legal Reasoning*, 179.

37 Sartor, 'Reasoning with Factors,' 417; Sartor, *Legal Reasoning*, 177.

38 Sartor, *Legal Reasoning*, 178.

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legal arbitrariness, inequality and uncertainty.[39] The definition of casuistry in the *Oxford Dictionary* as 'the use of clever but unsound reasoning' is illustrative for this critical attitude.[40] Indeed, it is important to realize that casuistry is not risk-free. Judges may abuse the context-dependent and flexible character of casuistic reasoning to decide cases according to their own preferences.[41] At the same time, it must be emphasized casuistic reasoning is not completely unbounded, but is restrained by clear methodological strictures.[42]

3.2 *The methodology of casuistry*

The methodology of casuistry reflects a process of reasoning from precedent.[43] The doctrine of precedent requires that courts in principle follow the decisions reached in prior cases.[44] The controlling force of precedents depends on the analogy between cases: courts only have to follow precedents concerning fact situations that resemble the case before them.[45] Courts should therefore develop a process of analogical reasoning in which judicial findings are explained in terms of the factual similarities and differences between the case at hand and relevant precedents.[46] More specifically, courts have to determine whether a rule applies to the case before them by (1) analyzing the previous cases in which this rule was applied; (2) comparing the facts of the current case with the facts of previous cases; and (3) evaluating the rule's applicability to the case at hand in light of this factual comparison.[47] By reasoning in this way, courts clarify and develop the law on a case-by-case basis.[48]

It is important to clearly distinguish this process of analogical reasoning from the type of analogical reasoning that is prohibited under domestic and international criminal law. Whereas these prohibitions proscribe the expansion of rules by ana-

39 Jonsen and Toulmin, *Abuse of Casuistry*, 156-57, 231-49.

40 http://www.oxforddictionaries.com/definition/english/casuistry?q=casuistry. For a similar critical view, see Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), 122.

41 Rozemond, 'Casuïstische grenzen,' 473.

42 Jonsen and Toulmin, *Abuse of Casuistry*, 15-16.

43 Jonsen and Toulmin, *Abuse of Casuistry*, 35, 251-52. Similarly, Vranken, *Asser-Vranken*, 85; Vranken, *Asser-Vranken, Vervolg*, 25-26.

44 Rupert Cross and Jim W. Harris, *Precedent in English Law* (Oxford: Clarendon Press, 2004), 3. When a precedent was wrongly decided there are possibilities for overruling. E.g., Greenawalt, *Statutory and Common Law Interpretation*, 199.

45 Kratochwil, *Rules, Norms and Decisions*, 223; Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: The University of Chicago Press, 1949), 2-3; Greenawalt, *Statutory and Common Law Interpretation*, 219-20, 232.

46 For a critical view on the value of analogical reasoning, see, e.g., Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008); Larry Alexander, *Legal Rules and Legal Reasoning* (Aldershot: Ashgate Publishing, 2000), 208.

47 This type of analogical reasoning conforms to the reason-model of reasoning from precedent, which was recently developed by Grant Lamond as an alternative to the traditional rule-model. Lamond, 'Do Precedents Create Rules?,' 1; Grant Lamond, 'Precedent,' *Philosophy Compass* 2 (2007): 699. On the traditional rule-model, see, e.g., Eisenberg, *Nature of the Common Law*, 50-76.

48 Lamond, 'Do Precedents Create Rules?,' 17-18, 20.

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logy to situations *outside* the rules' original scope,[49] casuistry adopts a more factual way of analogical reasoning. In particular, casuistry uses analogies to determine whether disputed cases fall *within* the scope of a rule by reapplying prior evaluations of this rule to later situations that are characterized by a similar factual context.[50] Suppose, for example, that a court decides that the accused's saving of individual members of an ethnic group does not negate his intent to commit genocide when he otherwise favorably participated in the violent campaign against this group. Casuistry requires that future courts apply this finding analogically. They can therefore only deviate from the prior court's evaluation of facts if the case before them includes relevant circumstances that were unavailable in the precedent, such as the fact that the accused was forced to participate in the genocidal campaign by his superior. As this example shows, the process of analogical reasoning limits judicial discretion by binding judges to previous evaluations of case-specific facts.[51] Thus, it contributes to the foreseeability of the law, warrants that rules are not applied arbitrarily, and strengthens the values underlying the principle of legality.[52]

Prototypes constitute an important starting-point and yardstick in the process of analogical reasoning.[53] Prototypes are standard cases that clearly fall within the scope of a legal rule. In relation to genocide, the Holocaust has traditionally been qualified as a prototypical case, since the legal definition of genocide is based on 'the factual matrix' of the crimes committed against the European Jews during World War II.[54] More recently, the mass atrocities committed in Rwanda in 1994 have presented a new standard situation that could be qualified under the definition of genocide in a relatively uncontroversial way. This is not to say that the scope of genocide is limited to such prototypical cases. Courts can also bring more marginal situations that deviate from the standard cases under the definition of genocide. It is therefore not necessarily problematic that the ICTY has qualified the Srebrenica massacre as genocide, even though this massacre was more limited in scope than previous genocide cases and caused a relatively small number of casualties in comparison to the Holocaust and Rwandan genocide. Having said that, we should be mindful that the courts' leeway to expand the law to marginal

49 Scholten, *Asser-Scholten*, 4-5, 60-61. This type of analogical reasoning is thus based on the thought that the meaning of the rule is pre-determined, which casuistry calls into question.

50 As also described by Greenawalt. Greenawalt, *Statutory and Common Law Interpretation*, 225, 236, 241.

51 Cross and Harris, *Precedent in English Law*, 206; Lamond, 'Do Precedents Create Rules?,' 25-26.

52 Also Vranken links the binding character of precedents to the values underlying the principle of legality. Vranken, *Asser-Vranken*, 121-24.

53 Sartor, *Legal Reasoning*, 192. Sartor's description of prototypes corresponds with Hart's 'standard case.' Herbert L.A. Hart, 'Positivism and the Separation of Law and Morals,' *Harvard Law Review* 71 (1958): 607-8.

54 Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012), 120. See also, Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials,' in *The Trial on Trial: Volume 2 – Judgment and Calling to Account*, ed. Antony Duff et al. (Portland: Hart Publishing, 2006), 197-98; William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 104.

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situations is limited. The methodology of casuistry requires that courts pay due attention to prototypes and use prototypical cases as a bench-mark for evaluating the application of the law to new situations. This means that courts can only qualify new situations under a legal rule when the similarities between the rule's prototype cases and the new situation outweigh the differences.[55] In genocide cases, courts should accordingly assess whether situations like the Srebrenica massacre show sufficient parallels with Holocaust-type phenomena. To this end, they have to evaluate (1) to what extent the Srebrenica situation resembles prototype cases like the Holocaust and the Rwandan genocide and (2) whether the Srebrenica situation displays unique characteristics that put the prototypical features of the Holocaust and Rwandan genocide in a new perspective.

As the previous observations show, casuistry requires that courts 'contextualize' their decisions within particular fact situations and tailor the meaning of (prototypical) precedents to a specific factual context. Judicial reasoning thus becomes a type of storytelling and story-matching whereby the law evolves through the 'analogical extrapolation from one story to the next.'[56] It must be recognized that this type of analogical reasoning from precedent neither regulates the law in every detail, nor completely controls the outcome of each case. Indeed, there will always be leeway to balance relevant facts in different ways and to draw different analogies between cases.[57] However, this does not mean that casuistic reasoning can be reduced to an irrational exercise.[58] By contrast, the methodology of casuistry stipulates a sophisticated framework of assessment, which incorporates distinctive reasoning techniques. These techniques require that courts make the alternatives for decision-making explicit and justify their choice for a specific outcome on the basis of established practice.[59] In this way, it is warranted that judicial decisions are 'fitted' to the existing system of law.[60] Creativity is not prohibited, but confined by previous experience and standing procedures. This helps to make the application of abstract rules in individual cases more transparent, consistent and foreseeable.

3.3 The expected value of casuistry for international scholarship

Current research into international criminal law has not yet (fully) implemented the thoughts and reasoning techniques underlying casuistry. By focusing on (the abstract interpretation of) general definitions of international crimes and liability theories, international scholars have lost sight of the concrete application of

55 Sartor, *Legal Reasoning*, 180.

56 Z. Bankowski et al., 'Rationales for Precedent,' in *Interpreting Precedents: A Comparative Study*, ed. D. Neil MacCormick and Robert. S. Summers (Aldershot: Ashgate Publishing, 1997), 489. Similarly, Greenawalt, *Statutory and Common Law Interpretation*, 235-36; Lamond, 'Do Precedents Create Rules?,' 18.

57 E.g., Cross and Harris, *Precedent in English Law*, 195; Greenawalt, *Statutory and Common Law Interpretation*, 235.

58 Similarly, Scholten, *Asser-Scholten*, 54; Levi, *Introduction to Legal Reasoning*, 4, 104.

59 Levi, *Introduction to Legal Reasoning*, 4; Cross and Harris, *Precedent in English Law*, 207; Greenawalt, *Statutory and Common Law Interpretation*, 235; Lamond, 'Do Precedents Create Rules?,' 25-26.

60 Similarly, Vranken, *Asser-Vranken, Vervolg*, 18-19.

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these concepts in individual cases. Likewise, legal theorists have so far not committed to studying the applicability and value of casuistry for international criminal law discourse. The casuistry of international criminal law thus remains largely unexplored. This is unfortunate, since it seems that international criminal law discourse can benefit greatly from insights from casuistry. By complementing current research with studies that use the methodology of casuistry to analyze the case law of international criminal courts, scholars can particularly (1) clarify the law conceptually and (2) better appraise judicial practice normatively.

With respect to the conceptual value of casuistry it must be recalled that casuistry is based on the thought that the law is inherently linked to its practical function. Following this thought, the meaning and scope of legal rules can only be determined in light of the rules' application to the facts of specific cases. It is therefore important that international scholarship takes account of the facts underlying judicial decisions and examines these facts in interplay with the general legal framework. In particular, scholars should examine which factual circumstances courts use to establish criminal responsibility for international crimes and assess how the facts pleading for and against a decision are balanced against each other. Based on such insights, scholars can continue to develop a more comprehensive and precise understanding of the rules defining international crimes and theories of liability.

In relation to the normative value of casuistry, it is important to bring to mind that casuistry entails a specific methodology. This methodology *inter alia* requires that courts justify the formulation of relevant facts with reference to the teleological links between these facts and the goal of the rule for which they are used. Furthermore, cases have to be decided according to the (ordering of) facts underlying previous cases. Whilst these requirements do not stipulate a strict and all-decisive reasoning regime, they do offer a useful structure for legal argumentation that restrains judicial decision-making.[61] This argumentative structure can possibly be used as a normative standard against which the decisions of international criminal courts can be tested. In this way, international scholarship can make a more balanced and comprehensive assessment of international criminal law practice.

4 Casuistic reasoning in international criminal law: a case study

To illustrate how casuistry can contribute to our understanding of international criminal law, this section analyzes the case law on genocide according to the casuistic methodology.

The crime of genocide was first defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide as the commission of one of the listed acts with the intent to destroy, in whole or a part, a national, ethnic, racial or religious group, as such.[62] This definition has been reproduced verbatim

61 Jonsen and Toulmin, *Abuse of Casuistry*, 255-56; Kratochwil, *Rules, Norms and Decisions*, 211.

62 United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Treaty Series, vol. 78, Article 2.

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in the statutes of the *ad hoc* Tribunals and the ICC.[63] The definition of genocide emphasizes the accused's *intent to destroy*. It neither contains an explicit contextual element, nor alludes to a collective act. This has raised the question of whether an individual person who acts with the intent to destroy, can commit genocide or whether persons should participate in a collective campaign of (destructive) violence to qualify as *génocidaires*. The case law on this issue is divided. On the one hand, the *ad hoc* Tribunals find that the existence of a collective act is not a necessary requirement of genocide, but a mere factor that is evidential of the accused's genocidal intent.[64] On the other hand, the ICC's *Elements of Crimes* explicitly require that the accused operated 'in the context of a manifest pattern of similar conduct.'[65] Before the ICC, the context of collective violence thus constitutes a distinct legal element.

At first sight, this variation in the legal frameworks of the *ad hoc* Tribunals and the ICC creates the impression that the courts adopt a different understanding of genocide. In particular, it seems that incidental acts of discriminatory violence can be qualified as genocide before the *ad hoc* Tribunals, whilst these situations fall outside the scope of the ICC's concept of genocide. However, when we assess the courts' application of genocide in individual cases according to the methodology of casuistry, a different – more nuanced – picture emerges.[66] Looking at the facts that are used to establish genocide, it becomes clear that both the *ad hoc* Tribunals and the ICC take account of a variety of *individual* and *contextual* circumstances. These circumstances specifically relate to the accused's subjective goals and objective conduct and to the purpose and scope of the collective campaign of violence. The courts' assessment of these circumstances depends on the specific facts of the case under consideration. Whilst in some cases the acts and utterances of the individual accused are emphasized, in other cases the focus is on the course and objectives of the collective act in which the accused operated. The construction of genocidal intent thus differs per case. Therefore, there is reason to nuance the variations in the legal framework of the *ad hoc* Tribunals and the ICC. On the one hand, the Tribunals' acceptance that genocide can be committed by a lone *génocidaire* does not mean that the *ad hoc* Tribunals do not attach any value to the existence of a genocidal context. On the other hand, the inclusion of an autonomous contextual element in the *Elements of Crimes* does not automatically imply that the ICC pays more extensive attention to the existence of a campaign of collective violence. Whether this is so, depends on the specific facts of the case at hand. The courts' findings on genocide are thus not exclusively deter-

63 United Nations, *Statute of the International Tribunal for Rwanda*, 8 November 1994, UN Doc. S/RES/955, Article 2(2); United Nations, *Statute of the International Tribunal for the former Yugoslavia*, 25 May 1993, UN Doc. S/RES/827, Article 4(2); United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Treaty Series, vol. 2187, Article 6.

64 *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-A, 5 July 2001, para, 48; *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-T, 14 December 1999, para. 100; *Prosecutor v. Kayishema*, Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 94.

65 International Criminal Court, *Elements of Crimes*, 11 June 2010, ICC-PIDS-LT-03-002/11, Articles 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7).

66 Cupido, 'Contextual Embedding of Genocide,' 378.

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mined by their abstract legal framework, but are additionally shaped by the factual situation under consideration.

From a casuistic standpoint, the courts' varied practice is not necessarily problematic. After all, casuistry assumes that the law develops in interplay with the facts of individual cases and is modified with each new situation coming before the courts. It is therefore only logical that the genocide concept is adjusted to the specific circumstances of individual cases. This does, however, not imply that all forms of differentiation are acceptable and that international criminal courts can apply genocide at free will. By contrast, the judicial application of genocide needs to comply with the methodological strictures of casuistry. When we evaluate the genocide decisions of the *ad hoc* Tribunals and the ICC according to these strictures at least two critical points emerge.

First, it seems that the *ad hoc* Tribunals and the ICC sometimes attach different value to similar factual circumstances. Consider, for example, the courts' use of forcible transfer as evidence of genocidal intent. On the one hand, the ICTY's qualification of the Srebrenica massacre as genocide is partly based on evidence showing that large groups of Bosnian Muslims were expelled to other areas. In the *Tolimir* case, the Yugoslav Tribunal has, for example, inferred the existence of a genocidal campaign in the Srebrenica region from *inter alia* 'the almost simultaneous implementation of the operations to kill the men from Srebrenica and *the forcible transfer of the Bosnian Muslim women, children and elderly out of Potočari*...; [and, *MC*] *the forcible transfer of the Bosnian Muslim population from Žepa*.'[67] The ICC, on the other hand, seems to attach different value to evidence of forcible transfer for establishing genocide. In evaluating the allegations against the Sudanese president Al-Bashir, the Court has explicitly held that the fact that people were not precluded from fleeing the Darfur region and safely reached refugee camps contradicts the claim that genocide occurred.[68] For the ICC, the forcible transfer of the population thus constitutes a counter-indication of genocide.

The seemingly different evaluation of similar facts by the *ad hoc* Tribunals and the ICC raises questions in light of the principle of legality, which requires that the law is applied in a foreseeable and consistent way. Even though the courts operate in a unique legal context and are in principle not bound by each other's case law, the fact that the *ad hoc* Tribunals and the ICC both adopt the concept of genocide as regulated in the Genocide Convention suggests that they should apply genocide similarly. This does not mean that there can be no valid reasons that explain the courts' contradictory assessment of facts. It may well be that the specific character and context of the Srebrenica and Darfur massacre justify a different factual evaluation. For example, it appears that the crimes committed in Srebrenica diverge from the Darfur crimes insofar as the Bosnian Serb army meticulously separated the men from the women, children and elderly. Whilst the former group was summarily executed, the latter group was transported to other areas.

67 E.g., *Prosecutor v. Tolimir*, Judgment, Case No. IT-05-88/2-T, 12 December 2012, para. 773 (emphasis added).

68 *Prosecutor v. Al-Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, 4 March 2009, para. 198.

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In this way, the Bosnian Serbs ascertained that the Bosnian Muslims from the Srebrenica region could no longer exist as a distinct ethnic group. A similar practice of separation is absent in Darfur where the Sudanese army seems to operate in a less organized and more opportunistic way. Unfortunately, the ICTY and ICC have not made these factual differences explicit, thus raising pertinent questions about the justificatory reasons underlying their distinctive appraisals.
Second, the *ad hoc* Tribunals and the ICC have sometimes neglected the teleological links between the objectives underlying genocide and the facts that are used to prove this crime. The legal concept of genocide criminalizes conduct that is aimed at the *physical or biological destruction* of a protected group.[69] Crimes that are directed at the cultural destruction of a group or the expulsion of a group from their homes thus fall outside the scope of genocide. Nonetheless, the *ad hoc* Tribunals have sometimes referred to the commission of such non-destructive crimes – like forcible transfer, illegitimate detention or the deliberate destruction of property – to substantiate their finding that genocide occurred. The *Tolimir* Trial Chamber of the ICTY has, for example, partly inferred the existence of a genocidal campaign in the Srebrenica region from the forcible transfer of the Bosnian Muslim women, children and elderly and from the deliberate destruction of mosques and Bosnian Muslim homes.[70]
From a casuistic perspective, the ICTY's use of non-destructive acts as relevant facts for establishing genocide is not self-evident. The Tribunal thus seems to detach the circumstances that are used to prove genocide from the destructive purpose of this crime. After all, it is unclear how it can be ascertained that an attack was directed at the physical or biological destruction of a group on the basis of evidence of crimes that cannot realize these specific types of destruction. Also here, it may be possible to argue that in the specific context of the Srebrenica massacre the demolition of mosques did give expression to a genocidal policy directed at the annihilation of Bosnian Muslims. However, since this seems to be a rather far-fetched argument the ICTY should have explained its findings on this point more clearly.
The observations above show that the methodology of casuistry provides a helpful framework for analyzing how international criminal courts apply the crime of genocide in individual cases. These analyses give new insights into the meaning of genocide and the legality of the courts' decisions, thus contributing to the conceptual clarification and normative advancement of substantive international criminal law. It would therefore be valuable if current studies into (judicial reasoning on) international crimes and liability theories are complemented with a more practical discourse in which international case law is assessed by using methodological techniques from casuistry.

69 Robert Cryer et al., *An introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 224-25.

70 *Prosecutor v. Tolimir*, Judgment, Case No. IT-05-88/2-T, 12 December 2012, para. 773.

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5 Concluding remarks

In this article, I have evaluated whether and how insights and standards from casuistry can be used to analyze and scrutinize international criminal law practice. By using the example of genocide, I have shown that casuistic case law analyses can clarify the meaning and scope of international criminal law and restrain the application of substantive legal concepts in individual cases. In light of these findings, it is surprising and unfortunate that the casuistry of international criminal law remains as yet unexplored. Neither international scholars, nor legal theorists have so far used the methodology of casuistry to study the case law of international criminal courts. Thus, they miss to uncover important conceptual and normative insights on criminal responsibility for international crimes and sometimes present an incomplete or incorrect picture of the law. For example, the case study on genocide shows that designated differences in the legal frameworks of the *ad hoc* Tribunals and the ICC have to be nuanced in light of legal practice and that the courts should pay further attention to the consistent evaluation of similar relevant facts. It is therefore important that international scholars and legal theorists combine forces and supplement current discourse with studies into the casuistry of international criminal law. In these studies, scholars should particularly seek to expose the patterns of fact underlying the judgments of international criminal courts; uncover hiatus and irregularities in the case law; and develop instruments that can help the international criminal courts to apply the law to the facts in a more transparent and structured way. In this way, international scholars and legal theorists can mutually contribute to the further advancement of international criminal law.

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