

Chapter 2

Human Rights Obligations of the ICTs under International Law

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2.1 Introduction

This chapter considers the applicability of IHRL to the ICTs from the perspective of international law. It investigates whether and how international law in and of itself imposes human rights obligations on the ICTs. The ICTs are not party to any human rights convention, which raises the question of whether they have human rights obligations under international law at all. If so, these must stem from other sources of international law.¹ This chapter therefore investigates whether the ICTs, as legal entities, are bound by general international human rights law. To that end, this chapter first addresses the legal status of the ICTs in international law. Only international organizations with legal personality can have rights and obligations

¹ Their constituent instrument also contain human rights obligations for the ICTs, but these will be discussed in Chap. 3 *infra*.

under international law, separate from their member states. Section 2.2 addresses the legal personality of, particularly, the ad hoc Tribunals, since the legal personality of the ICC is clearly provided for by the Rome Statute. Section 2.3 discusses two rationales that have prevailed in international legal doctrine for considering international organizations with legal personality to be bound by international law: the so-called transfer thesis and the subject thesis. Despite some persisting questions regarding the origin of this obligation, the latter will be endorsed as the controlling rationale for considering international organizations, including the ICTs, to be bound by general international law in the field of human rights.

Section 2.4 addresses three concerns that must accompany the conclusion that the ICTs are bound by IHRL. First, it is difficult to establish the existence of norms contained in the unwritten sources of general international law: custom and general principles of law. Substantial disagreements persist regarding the proper methodology to establish the existence of norms belonging to these sources, the actual content of those norms, and the obligations arising from these norms. Second, international human rights norms are, to a certain extent, inherently flexible and differ considerably from the procedural norms that the ICTs primarily apply in the context of their proceedings. International human rights norms operate, on the international level, as standards of review of domestic practices, and their interpretation and application on this level are governed by interpretative tools and doctrines that aim to preserve a measure of discretion for states in their implementation of these norms. Third, the relationship between the legal instruments of an ICT and IHRL is fundamentally different from the relationship of domestic law with IHRL, because there is no *a priori* hierarchy between the law of international criminal procedure and IHRL since both are branches of international law. Therefore, the fact that the ICTs are bound by IHRL does not mean that they are, from a formalist perspective, fully precluded from deviating from the norms contained in this body of law. In principle, the legal instruments of the ICTs could incorporate deviations from IHRL, which could be rationalized as *lex specialis*. These considerations complicate the *a priori* assessment of the specific legal implications of the ICTs' being 'bound' by IHRL.

2.2 International Legal Personality of the ICTs

An important preliminary question is whether the ICC, ICTY, and the ICTR possess international legal personality. Legal personality is the ability to possess rights and obligations under international law.² Regarding the ICC, this question

² ICJ, Advisory Opinion, *Reparations for Injuries*, 11 April 1949, 8, which confirms that the question of whether the UN has the capacity to bring a claim depends on its international legal personality; see also Amerasinghe 2005, 80; Klabbers 2009, 52; Blokker 2010, 37. This study will not enter into debates on different theories regarding the way in which international legal personality comes about. For these debates, see e.g. Schermers and Blokker 2011, 988–989, Amerasinghe 2005, 79ff; Klabbers 2009, 47–50.

can easily be answered in the affirmative. The Rome Statute establishing the ICC simply provides that '[t]he Court shall have international legal personality'.³ The legal status of the *ad hoc* Tribunals, however, is slightly more complex. Unlike the ICC, they were not created by treaty, but by resolutions of the UN Security Council.⁴ These resolutions do not address the issue of the legal personality of the Tribunals. As a result, the *ad hoc* Tribunals are commonly regarded as subsidiary organs of the Security Council, itself a principal organ of the UN.⁵ The question remains whether they possess autonomous personality, independent from their parent organization.⁶ The institutional practice of the UN and of the Tribunals themselves provides indications both in favour and against such separate personality. For example, the UN itself, not the Tribunals, have concluded the headquarters agreements relating to the location of the ICTY and the ICTR in the Netherlands and Tanzania, respectively.⁷ At the same time, the Tribunals themselves have also concluded international agreements, for example, with the USA.⁸ It has therefore been argued that the Tribunals are best compared to other UN subsidiary organs that also possess separate legal personality, such as UNICEF.⁹ However, even if the Tribunals had not possessed such separate personality, they would still share the personality of the UN itself, which is their parent organization. In that case, the

³ Article 4(1) ICC Statute; see also Verhoeven 2003, 5.

⁴ UNSC Res 827 (25 May 1993) UN Doc S/Res/827; UNSC Res 955 (8 November 1994) UN Doc S/Res/955.

⁵ See e.g. Acquaviva 2011, 185, who states that the *ad hoc* Tribunals are 'organs of the UN, which is itself a subject of international law'. The Tribunals themselves have confirmed this. See e.g. ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (IT-94-I), 2 October 1995, 33–36.

⁶ See e.g. Amerasinghe 2005, 86, who states that Tribunals that fall under the aegis of a broader international legal organization may either share the personality of their parent organization, or have a separate personality, based on their constituent instrument; see also Gallant 2004, 399, who states that the *ad hoc* Tribunals share the legal personality of the UN.

⁷ Sluiter 2002, 20; Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters 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, 19 July 1994; Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Criminal Tribunal for Rwanda, 3 August 1995; see also, for an overview of several agreements, mainly on the enforcement of sentences, concluded by the UN on the ICTR's behalf: ICTR Website, Legal, Bilateral Agreements <http://www.unictr.org/Legal/BilateralAgreements/tabid/99/Default.aspx> accessed 3 June 2014; similarly, for an overview concerning agreements concluded by the UN on behalf of the ICTY: ICTY Website, Legal Library, Member State Cooperation <http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation> accessed 3 June 2014.

⁸ See e.g. Agreement on Surrender of Persons between the Government of the United States and the Tribunal, 5 October 1994, available online: http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_united_states_1994_en.pdf accessed 3 June 2014; Agreement on Surrender of Persons between the Government of the United States, 24 January 1995, reproduced in Morris and Scharf 1998, 391.

⁹ Sluiter 2002, 20.

ad hoc Tribunals would be bound by the same obligations under international law as the UN, which has legal personality, as has been authoritatively determined by the ICJ.¹⁰ Organs of an international organization are bound by the same obligations as their parent organizations in the same way that all state organs are bound by the states' international obligations.¹¹ One way or the other, the question of whether international organizations with legal personality are bound by international law is relevant to the ad hoc Tribunals either as UN organs with separate personality, or as sharing the legal personality of their parent organization, the UN.

2.3 Are International Organizations Bound by International Law?

The proposition that international organizations are bound by international law is widely accepted in international legal theory and practice. In fact, most of the literature in the field of international institutional law devotes little attention to this question, which may indicate that the matter has largely been settled, or that it is generally not considered to be an issue worthy of vigorous debates.¹² To a certain extent, it is true that little doubts exist regarding international organizations' being bound by international law; and it is difficult to find evidence in scholarship or practice that contradicts this. Even so, many theories that justify the binding effect of international law vis-à-vis international organizations walk a thin line between the 'is' and the 'ought' and fail to clarify the formal legal source of the obligations that they allege exist. In addition, many fail to offer a satisfactory theory to determine the exact scope and content of the international legal obligations incumbent upon international organizations. Klabbers has therefore rightly concluded that 'the discipline still lacks an adequate theory concerning the basis of obligation for international organizations'.¹³ This section critically examines the two main theories that provide rationales for considering international organizations to be bound by international law: the transfer thesis and the subject thesis. The examination below is not an exhaustive treatment of all possible theories that support the binding of international organizations to international law. Still, the two theories that

¹⁰ ICJ, Advisory Opinion, *Reparations for Injuries*, 11 April 1949, 8.

¹¹ See e.g. ILC, Articles on the Responsibility of International Organizations, in: ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (2011) UN Doc A/66/10, 50–170, Articles 6 and 8 clarify that the conduct of organs of international organizations shall be considered attributable to that organization; idem: Fedorova and Sluiter 2009, 21: 'the *ad hoc* Tribunals, as UN organs, inherit their obligations under general international law from the obligations incumbent upon the UN as an international organisation'.

¹² See e.g. Amerasinghe 2005, 20; Schermers and Blokker 2011, 997; Wellens 2004, 1; White 2005, 216–217; Sands and Klein 2009, 461–462.

¹³ Klabbers 2009, 284.

are discussed here can be said to be the most relevant and prevalent theories that can be discerned from international legal theory and practice.

2.3.1 *Transfer Thesis*

States may not evade their international obligations by creating an international organization to do their ‘dirty work’ for them.¹⁴ This is an argument that dominates the debates concerning international organizations’ obligations under international law. Allowing states to establish international organizations that are free from any legal constraints on their exercise of public power—the power that was previously or is concurrently exercised by the state itself—would undermine the effectiveness of the international legal order. International organizations should therefore be bound by the same legal obligations as the states that created them. The logic of this argument can be traced back to legal scholarship as early as De Vattel’s, who justifies his conception of a natural law of nations with a comparable parallel. He contends that ‘[m]en, when united in society, remain subject to the obligations of the Law of Nature’.¹⁵ Since individuals are bound by the laws of nature, they remain bound when they act in concert with one another, that is, when they act as a state. According to De Vattel, states are thus bound by natural law in their behaviour towards each other, by virtue of the obligations of the individuals of whom they are composed. Following this logic, international organizations are bound by the same international obligations as the states of whom they are composed. This is the central tenet of the transfer thesis, which holds that a transfer of power from states to an international organization necessarily entails a transfer of the corresponding obligations relating to that power.¹⁶ Its rationale lies in two legal principles: *pacta sunt servanda* and *nemo plus iuris transferre potest quam ipse habet*.

The first is clear: states must abide by their international obligations. This rule is a cornerstone of the international legal system, and is codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT).¹⁷ Its relevance for the transfer thesis lies in the fundamental necessity for states to comply with their

¹⁴ Reinisch 2001, 143; see also, e.g.: Committee on the Accountability of International Organizations, *Final Report on the Accountability of International Organizations* (International Law Association 2004), 18; Morgenstern 1986, 32; Mégret and Hoffmann 2003, 318. See further: ECtHR case law in this respect, e.g.: ECtHR, Judgment, *Beer and Regan v. Germany* (App No 28934/95), 18 February 1999, 57–58; ECtHR, Judgment, *Waite and Kennedy v. Germany* (App No 26083/94), 18 February 1999, 67.

¹⁵ De Vattel 1758, 6.

¹⁶ See also De Schutter 2010, 57ff, who uses the terminology of succession.

¹⁷ Vienna Convention on the Law of Treaties (VCLT) (adoption: 23 May 1969, entry into force: 27 January 1980); see e.g. Salmon 2011, 661: ‘the fundamental character of the rule ... has been proclaimed since time immemorial’.

international obligations, which they should not be able to circumvent through the creation of international organizations.

The second principle is normally treated as the prime rationale for the transfer of legal obligations to an international organization.¹⁸ Its origins date as far back as Emperor Justinian's *Codex Iuris Civilis*,¹⁹ and it means that nobody can transfer more power than they possess themselves or, put more generally: *nemo dat quod non habet* (nobody can give what they do not have). States' exercise of public power is constrained by their obligations under international (human rights) law, both under treaties and customary international law. When states endow an international organization with certain powers, they cannot grant the organization the unbridled competence, for the simple reason that they do not possess it themselves. Because their own exercise of power is constrained and qualified by certain legal obligations, they can only transfer the constrained and qualified form of the respective power to an organization. The legal constraints that limit states' freedom of action are transferred to the organization along with the power.²⁰

The literature often quotes case law of the ECtHR and the European Court of Justice (ECJ)²¹ in support of the transfer thesis. The ECJ seems to be the only international court that has actually relied upon the transfer thesis in practice. However, the limited instances in which it has done so indicates that the transfer thesis can only be successfully applied in very specific and limited circumstances. Furthermore, the case law of the ECtHR regarding violations of human rights in the context of transfer of power to international organizations does not provide actual support for the transfer thesis.

In the *International Fruit Company* case, the ECJ relied on the principle of *nemo plus iuris transferre potest quam ipse habet* as a rationale for considering the European Community bound by its member states' obligations under the General Agreement on Tariffs and Trade (GATT). The ECJ considered that the Community had assumed the functions previously exercised by member states in the area of tariffs and trade. Along with these functions, the member states could not but have also transferred the legal obligations incumbent upon them in this area: 'by conferring these powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the [GATT]'.²² Therefore, the ECJ

¹⁸ See e.g. Schermers 1998, 402; Mégret and Hoffmann 2003, 318; Reinisch 2001, 136; Schermers and Blokker 2011, 996; see also Naert 2010, 413; who offers a number of critical observations regarding reliance on this rule as a basis for establishing the obligations of international organizations under international law.

¹⁹ Straumann 2010, 112–113.

²⁰ See e.g. Hirsch 1995, 50–51, who quotes former ECJ Advocate-General Pescatore, who observed that 'the transfer of powers has *ipso jure* entailed a succession to certain treaty rights and obligations in relation to third States, Pescatore 1976, 637–638.

²¹ Previously Court of Justice of the European Communities; this study will henceforth use the general abbreviation 'ECJ'.

²² ECJ, Judgment, *International Fruit Company n.v. and others v. Produktschap voor Groenten en Fruit* (21–24/72), 5 May 1972, 15.

concluded that ‘in so far as ... the Community has assumed the powers previously exercised by Member States in the area governed by the [GATT], the provisions of that agreement have the effect of binding the Community’.²³ The ECJ also relied on the fact that other states party to the GATT had recognized the European Community (EC) as having replaced its member states, as a prime justification for the EC being bound by this treaty.²⁴ The ECJ has come to an identical conclusion in a case relating to other international conventions on tariffs and trade in the *Spoorwegen* case.²⁵

This ECJ case law supports the application of the transfer thesis. However, in other cases involving similar questions of obligations of the EC or the European Union (EU) under certain treaties, the ECJ did not come to a similar conclusion. For example, in numerous cases involving the question of whether the EU is bound by the ECHR, the Court has persistently reached a different conclusion.²⁶ Instead of applying the same doctrine of transfer of powers and corresponding transfer of obligations relating to that power, the ECJ has consistently reiterated that the EU is not a party to the ECHR and therefore cannot be considered bound by it. The Court has adopted a pragmatic solution to this evident problem. While the EU is not bound by the ECHR as such, it is bound by ‘general principles of community law’ in the area of fundamental rights.²⁷ These general principles, in turn, may be derived from the constitutional traditions of member states or from ‘international human rights treaties on which the member states have collaborated or to which they are party’.²⁸ In this context, the ECJ has acknowledged that the ECHR has special significance.²⁹ However, this does not detract from the core

²³ Ibid., 18.

²⁴ Ibid., 16; see also Hirsch 1995, 51.

²⁵ ECJ, Judgment, *Douaneagent der N.V. Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen* (38/75), 11 June 1974, 21: relating to the 1950 Convention on Nomenclature for the Classification of Goods in Customs Tariffs and the 1950 Convention establishing a Customs Cooperation Council; note that the ECJ also reaffirmed its findings from the *International Fruit Company* case pertaining to the GATT in this case: 16. See also Hirsch 1995, 50.

²⁶ Similarly, David 1999, 11–12.

²⁷ ECJ, Judgment, *Nold v. Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* (4/73), 14 May 1974, 13. See also e.g.: ECJ, Judgment, *Stauder v. City of Ulm Saulezamt*. (29/69), 12 November 1969, 7; ECJ, *Dzodzi v. Belgium* (297/88 and 197/89), 18 October 1990, 68; ECJ, Judgment, *ERT AE v. DEP* (260/89), 18 June 1991, 41; ECJ, Judgment, *Baustahlgewebe v. Commission of the European Communities* (185/95), 17 December 1998, 20–21, 79; ECJ, Opinion, *Opinion on the Competence of the Community to accede to the European Convention on Human Rights* (2/94), 28 March 1996, 32–34. See also Naert 2010, 398–400; Ahmed and De Jesús Butler 2006; Rosas 2001.

²⁸ ECJ, Judgment, *Nold v. Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* (4/73), 14 May 1974, 13; ECJ, Opinion, *Opinion on the Competence of the Community to accede to the European Convention on Human Rights* (2/94), 33.

²⁹ ECJ, Judgment, *ERT AE v. DEP* (260/89), 18 June 1991, 41.

reasoning of the Court, which rejects that the EU is, in any way, directly bound by the ECHR itself, absent formal ratification of this convention. Although the Court acknowledges the fundamental importance of human rights, and emphasizes that community measures must be in line with human rights and are otherwise void, this does not relate to human rights as enshrined under the ECHR specifically, but rather to rights recognized as ‘general principles of community law’.³⁰

The question is why the ECJ has applied the *nemo plus*-rule to member states’ obligations under the GATT, but not to those under the ECHR. This could be explained by the fact that EU member states’ obligations under the GATT are uniform, while those under the ECHR and its protocols differ amongst states, due to the different ratification status of a number of protocols, or differing reservations.³¹ Alternatively, the lack of recognition by other parties to the ECHR that the EC/EU has replaced its member states in certain areas has also been mentioned as an important distinction from the ECJ’s *International Fruit Company* case law.³² Most convincingly, however, the EU simply has not ‘replaced’ its member states in the area of human rights protection in a manner comparable to the way in which it has replaced its member states in the field of customs and trade policies.³³ The EU is not exclusively competent in the field of human rights protection, at least not in a manner comparable to the way it is exclusively competent in the field of trade. The conditions that the ECJ has formulated for a successful application of the transfer thesis can therefore not be said to exist when it comes to the protection of human rights.

The ECtHR has produced a substantial line of case law supporting the contention that states cannot evade their international obligations by creating international organizations that would not be bound by human rights norms. This case law is often quoted in support of the transfer thesis. The ECnHR was the first to hold that if a state concludes a treaty that disables it to perform its obligations under the ECHR, it would remain responsible for any resulting breaches of the Convention. Concluding otherwise would lead to a situation in which Convention obligations ‘could wantonly be limited or excluded’.³⁴ Applying this consideration to international organizations, the Commission found that the transfer of power by

³⁰ Hirsch 1995, 45. See also Naert 2010, 398–400, specifically n 1773 and 1776 for an elaborate account of ECJ case law pertaining to application of the ECHR in the EC/EU legal order.

³¹ Hirsch 1995, 51–52; Weiler 1985, 134.

³² Hirsch 1995, 51; De Schutter 2010, 62, who states that third States can ignore the transfer of power from member states to the EU. Absent their consent, the EU cannot succeed its member states in their pre-existing international obligations.

³³ See also De Schutter 2010, 61; Naert 2010, 412, who argues that such succession is difficult to sustain, because ‘only in some cases, there is real transfer rather than the creation of new and distinct power ... international organizations hardly ever truly replace their member states in the responsibility for their international relations’.

³⁴ ECnHR, Decision, *M & Co. v. Federal Republic of Germany*, (App No 13258/87), 9 February 1990, 10.

a state to an international organization was not incompatible with the convention *per se*, but it cannot exclude a state's continued responsibility under the convention with regard to the transferred powers.³⁵ The Commission therefore concluded that a state must ensure that fundamental rights receive 'equivalent protection' within the organization.³⁶ This equivalent protection doctrine has been further developed in the case law of the Court, most notably, in the *Bosphorus* case.³⁷ The Court has consistently held that, in order to abide by its obligations under the ECHR, a state must ensure that any international organization to which it transfers powers, will respect the relevant human rights on a level that is equivalent to the protection offered by the ECHR.³⁸

Another relevant line of ECtHR case law in this field concerns labour disputes between individuals and international organizations. In the *Boivin* case, the Court held that if the act complained about occurred within the exclusive competence of the international organization and thus fully outside the jurisdiction of any member state, the complaint is inadmissible *ratione personae*.³⁹ Thereby, the Court followed its approach from the *Behrami* case, and adopted a strict approach to jurisdiction.⁴⁰ International organizations are not parties to the Convention, as a result of which their acts fall beyond the Court's power of review.

As a result, neither the *Bosphorus* nor the *Boivin* case law has implications for the determination of international obligations of an international organization.

³⁵ See also ECtHR, Judgment, *Beer and Regan v. Germany* (App No 28934/95), 18 February 1999 57–58; ECtHR, Judgment, *Matthews v. United Kingdom* (App No 24833/94), 18 February 1999, 34; ECtHR, Judgment, *Waite and Kennedy v. Germany* (App No 26083/94), 18 February 1999, 67.

³⁶ ECnHR, Decision, *M & Co. v. Federal Republic of Germany* (App No 13258/87), 9 February 1990, 10.

³⁷ ECtHR, Judgment, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (App No 45036/98, 30 June 2005; see also ECtHR, Judgment, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (App No 13645/05), 20 January 2009; ECtHR, Judgment, *Gasparini v. Italy & Belgium* (App No 10750/03), 12 May 2009, 20.

³⁸ ECtHR, Judgment, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (App No 45036/98, 30 June 2005, 155–157; on the ECtHR's approach to the responsibility of member states for acts of international organizations, see e.g. Ryngaert 2011.

³⁹ ECtHR, Decision, *Boivin v. 34 Member States of the Council of Europe* (App No 73250/01), 9 September 2008, 6; ECtHR, Decision, *Connolly v. 15 Member States of the European Union* (App No 73274/01), 9 December 2008, 6–7; ECtHR, Decision, *Établissement Biret et Cie. S.A. v. 15 Member States of the European Union* (App No 13762/04), 9 December 2008, 6–8; ECtHR, Judgment, *Beygo v. 46 Member States of the Council of Europe* (App No 36099/06), 16 June 2009, 4–6; ECtHR, Judgment, *Rambus Inc. v. Germany* (App No 40382/04), 16 June 2009, 7–8.

⁴⁰ Lock 2010, 533; see also ECtHR, Judgment, *Behrami and Behrami v. France* (App No 71412/01), 2 May 2007, 151; ECtHR, Decision, *Berić and others v. Bosnia and Herzegovina* (App Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05), 21 September 2004 and 4 June 2005, 16–18.

Bosphorus implies that states may remain responsible under the Convention if states fail to ensure equivalent protection of Convention guarantees when they transfer powers to an international organization. *Boivin* implies that states cannot be held responsible under the Convention for possible breaches of Convention rights by acts of international organizations on which they had no direct impact. Neither case, however, has implications for the human rights obligations or the responsibility of an international organization itself. Admittedly, the *Bosphorus* case law does suggest that states are under an obligation to ensure equivalent protection of fundamental rights when they create international organizations. However, it is silent on the consequences *for the organization* if states fail to do so. In such cases, equivalent protection cannot be automatically implied, absent any clear provision in an organization's legal framework. Instead, the ECtHR's focus is on the continued responsibility of states for acts of the relevant organization, not on the transfer of human rights obligations to the international organization in question.⁴¹

The support in international legal practice for the transfer thesis as the basis for establishing international human rights obligations for international organizations must therefore not be overestimated. In addition, a number of conceptual problems arise when attempting to rely on the transfer thesis for the purpose of determining the actual human rights obligations that are transferred to an international organization. One such problem appears where member states' legal obligations differ, which is exacerbated as the membership of an international organization grows. Constituent treaties of (quasi-)universal international organizations or quasi-universal international courts like the ICC are ratified by a large number of countries.⁴² The large number of state parties necessarily implies a large degree of diversity among the international legal obligations undertaken by these states. An application of the transfer thesis would not only lead to a vast number of legal obligations incumbent on the organization, but also to an extreme diversity of obligations. This concern is even more pressing with regard to obligations in the field of IHRL, which is codified in a great number of international and regional treaties as well as optional protocols; all of which are ratified by a variety of states and subject to a diverse set of reservations, declarations, and understandings. A consistent application of the transfer thesis would therefore lead to a fragmented array of legal obligations.

This raises several questions. It is unclear how many member states must have a certain legal obligation for it to get transferred to an international organization. A strict application of the logic of the *nemo plus*-rule should entail that one state suffices. To conclude otherwise would fundamentally undermine the rationale behind

⁴¹ See e.g. Ryngaert 2011.

⁴² The ICC currently has 123 State Parties and a further 16 Signatories, See *United Nations Treaty Collection, Chapter XVIII, Penal Matters: The Rome Statute of the International Criminal Court*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en Accessed 6 January 2016.

this rule, because that would allow states to circumvent their legal obligations if other member states of the organization in question do not have similar obligations.⁴³ In addition, the strict application of the rationale behind the principle of *nemo plus iuris transferre potest quam ipse habet* may even lead to conflicting obligations incumbent on international organizations.⁴⁴ This principle fails to satisfactorily address these issues.

These problems have generally gone unrecognized in international scholarship on the matter, and those authors that have engaged with these issues have not succeeded in offering a solution that leaves the logic of the *nemo plus*-rule intact. Hirsch proposes that the international organization, when ‘only one or two’ member states have undertaken a legal obligation, can only be bound by these obligations if it consents to it; while if a majority of member states has undertaken an obligation, the organization is automatically bound.⁴⁵ However, on what basis should the organization decide whether or not to consent to any given obligation? And what if, in the example of the ICC, not two, but five states have committed to a certain obligation? And how about 30? Or 50? More fundamentally, the rationale of the *nemo plus*-rule would be undermined if consent from the organization in question were required for the creation of legal obligations. Clearly, this solution raises more problems than it solves.

In addition to the large amount and diverse spectrum of obligations that would theoretically bind organizations in accordance with the transfer thesis, another conceptual problem arises: the transfer thesis fails to accommodate the issues of evolving membership and evolving obligations of member states of an organization. The *nemo plus*-rule does not address the consequences for an organization of obligations undertaken by member states after the transfer of powers to the international organization.⁴⁶ The UN, for example, was established prior to the conclusion of most international human rights treaties, as a result of which these treaties, under the *nemo plus*-rule, might not apply to the UN. Scholarship does not provide a tenable solution to this problem.⁴⁷ In addition, the *nemo plus*-rule would also imply that when a state becomes member of an organization that has already been operative for a certain period, this particular state’s obligations would, at that point, also transfer to the organization. Such evolving membership would lead to even more dispersed and inconsistent obligations incumbent upon international organizations, subject to continual change.⁴⁸

⁴³ Naert 2010, 414.

⁴⁴ Ibid.

⁴⁵ Hirsch 1995, 58.

⁴⁶ Naert 2010, 413.

⁴⁷ See e.g. Schermers 1998, 403, who contends that international organizations should be bound by what he calls ‘law-making treaties’ ratified by member states after the transfer of power to the organization. However, he fails to offer a convincing formal legal basis for this argument.

⁴⁸ Similarly De Schutter 2010, 64.

This leads to the conclusion that the transfer thesis is essentially inadequate as a rationale for establishing an international organization's obligations under international law. The rule may be useful in situations where only a limited number of states set up an international organization with a clearly circumscribed mandate, so that it would not be so complex to determine the possible scope of the transferred obligations. The transfer thesis only holds in a situation where all members of an organization have identical obligations under international law, and the organization truly replaces the member states in the exercise of these competences. This is not the case for the ICTs. Neither the ICC nor the ad hoc Tribunals fully replace their member states in the exercise of their power to prosecute international crimes.⁴⁹ Furthermore, the ad hoc Tribunals were created by the Security Council of the UN and, strictly speaking, do not have 'member states', while their parent organization, the UN, has near-universal membership. As a result, the transfer thesis is not a useful theory to determine the existence of possible international legal obligations of the ICTs under international law, let alone the scope and content of such obligations.

2.3.2 *Subject Thesis*

The second theory supporting the argument that international organizations and institutions are bound by international law is based on their status as subjects of international law, i.e. their international legal personality. International legal personality is defined as the ability to carry rights and obligations under international law.⁵⁰ Although the concept of international legal personality is a contested one, it is commonly accepted that international organizations with international legal personality are autonomous subjects of international law.⁵¹

⁴⁹ However, it must be noted that the ad hoc Tribunals do enjoy primacy over states in their jurisdiction to adjudicate upon these matters. Similarly, although the principle of complementarity makes that the ICC does not have a similar primacy, the ICC is exclusively competent to adjudicate those cases that it determines to be admissible. To a certain extent, the ICTs therefore do 'replace' states in their exercise of the power to prosecute cases that are determined to be admissible by the ICT in question.

⁵⁰ ICJ, Advisory Opinion, *Reparations for Injuries*, 11 April 1949, 7; Klabbers 2009, 38; Shaw 2008, 1296–1303; Schermers and Blokkers 2011, 987–991.

⁵¹ See e.g. ICJ, Advisory Opinion, *Reparation for Injuries*, 11 April 1949, 9; ICJ, Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, 37; ICJ, Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996, para 25; see also Higgins 1994, 46; Wellens 2001, 1; Clapham 2006, 64; Shaw 2008, 259–260, 1296–1303; Klabbers 2009, 11; Schermers and Blokker 2011, 991. A full discussion of the contested concept of international legal personality, and the doctrinal debates surrounding this matter exceed the scope of the present study, which considers only those organizations that possess such personality.

The subject thesis holds that an international organization or institution with international legal personality, as a subject of international law, is bound by general international law for that reason alone. General international law is defined as the law contained in unwritten sources of international law: primarily customary international law, as well as general principles of law.⁵² Scholarly consensus evinces substantial—if not overwhelming—support for the subject thesis.⁵³ The simple fact of being an independent subject of international law, active in the international legal order, is argued to be sufficient to establish the binding effect of the general rules of that order. The ICJ's *WHO/Egypt* Advisory Opinion is often quoted as definitive proof for the subject thesis. In this case, the ICJ stated that:

[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁵⁴

General academic opinion on the matter accepts this Opinion as decisive authority supporting the claim that general international law is binding on international organizations.⁵⁵ However, the Opinion adds little to no reasoning as to the legal basis for considering international organizations bound by international law.⁵⁶ At the same time, questions can be raised regarding the actual implications of the ICJ's dictum. Rather than saying that international organizations are bound by the whole corpus of general international law, these sources seem to be identified as one of three possible sources that may contain obligations for them, the others being their

⁵² Article 38(1) ICJ Statute. International organizations, like states, cannot normally be bound by treaties unless they are party to them (the exception being the ECJ's approach to the treaty obligations of its member states under the GATT discussed in Sect. 2.3.1 above). For comparable definitions of general international law, see e.g. Verdirame 2011, 71. See also Pauwelyn 2003, 148; who also includes *ius cogens* as a third source of general international law. However, *ius cogens* is not a separate source of law, rather, it is a special status given to certain norms of (customary) international law; similarly Naert 2010, 409.

⁵³ See e.g. David 1999, 20; Shaw 2008, 1309; Hirsch 1995, 17; Reinisch 2005, 46; Clapham 2006, 65; De Schutter 2010, 68; De Brabandere 2010, 336; Schermers and Blokker 2011, 997.

⁵⁴ ICJ, Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, 37.

⁵⁵ See e.g. Hirsch 1995, 17; David 1999, 3; Shaw 2008, 1309, 1311; Amerasinghe 2005, 400; Clapham 2006, 65; McCorquodale 2009, 156; De Schutter 2010, 56; Schermers and Blokker 2011, 996. For authors who assert the subject thesis with respect to ICTs specifically, see e.g. Reinisch 1995, 186–187; Gradoni 2006, 851; Acquaviva 2007, 614; Sluiter 2002, 33; Croquet 2011, 97; Gradoni 2013, 82.

⁵⁶ Similarly Klabbers 2008, 165, where he states that 'the discipline may claim, following the ICJ in 1980, that international organizations are subjects of international law, and thus also subject to international law, but it remains unclear which international law, and why: there is no plausible theory of obligation'. For a similarly critical approach, see Alston 2005, 9, where he states that 'the conclusion is that [international organizations are ... non-state actors upon whom human rights obligations do not and cannot fall directly]'.

constitutions and agreements to which they are parties.⁵⁷ This arguably qualifies international scholarship's almost absolute reliance on the ICJ Opinion as definitively establishing the binding character of general international law on international organizations with legal personality.

Nevertheless, in addition to the ICJ, other international courts and tribunals have also endorsed the subject thesis, or at least seem to support its outcome: the binding effect of general international law on international organizations. The ECJ has held that the EU is bound by customary international law. According to the Court, 'the European Community must respect international law in the exercise of its powers'.⁵⁸ Equally, the ICTY has considered it 'trite' that it is itself bound by customary international law.⁵⁹ In addition, the ICTY has extended the duty to cooperate with the Tribunal from states to international organizations, stating 'there is no reason in principle why primary rules of international law should not apply to collective enterprises undertaken by states in the framework of international organizations'.⁶⁰

Scholarship has addressed these questions more extensively and different substantiations have been furthered in defence of the subject thesis. The most prevalent argument is that general international law is general in that it applies indiscriminately to all subjects of international law, which implies that international organizations with legal personality, as subjects, are bound by it.⁶¹ General

⁵⁷ Similarly Vasiliev 2014, 101: '[the ICJ] qualifies the applicability of general international law to international organizations, by limiting it to obligations incumbent upon them under that law. It is uncertain, however, what obligations in relation to the choice of applicable law—or in any other relevant aspect for that matter (including, as will be seen, human rights standards)—are bestowed upon IOs, and international criminal courts in particular, by sources other than their constitutions and agreements to which they are parties'.

⁵⁸ ECJ, Judgment, *Anklagemyndigheden v. Poulsen and Diva Navigation Corp.* (286/90), 24 November 1992, 9. The ECJ has come to this finding in a number of cases. See e.g. ECJ, Judgment, *Opel Austria GmbH v. Council of the EU* (T-115/94), 22 January 1997, 90; ECJ, Judgment, *A. Racke GmbH & Co. v Hauptzollamt Mainz* (162/96), 15 June 1998, para 7; ECJ, Judgment, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* (C-386/08), 25 November 2010, 42.

⁵⁹ ICTY, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, *Prosecutor v. Simić et al.* (IT-95-9-PT), 27 July 1999, 42. For a full discussion of the ICTY's approach to international human rights law, specifically, see *infra* Sect. 3.2.

⁶⁰ ICTY, Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, *Prosecutor v. Simić et al.* (IT-95-9-PT), 27 July 1999, 46; see also Committee on the Accountability of International Organizations, *Final Report on the Accountability of International Organizations* (International Law Association 2004), 18; for an extensive discussion, see e.g. Acquaviva 2011, 185–203.

⁶¹ *Third Restatement of the Law: Foreign Relations Law of the United States*, Washington D.C.: American Law Institute Publishers (1986), 101.d: '[g]eneral international law is law that applies to states and international intergovernmental organizations generally'; Hafner 2005, 606: 'their status as subjects of international law makes them addressees of international law. Consequently, their activities are governed by those rules of international law which generally apply to such activities'; Cameron 2007: 'the generality of general international law makes that it applies to all subjects'; De Brabandere 2010, 337: 'once a norm has become customary international law it applies to all subjects of international law, irrespective of their nature'.

international law is said not to have any specific addressees (it is ‘*addressatlos*’) and therefore applies to all subjects of international law.⁶² According to Clapham, for example, obligations under general international law arise because ‘the international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them’.⁶³

The rationale for this lies in the effectiveness of international relations and the unity of the international legal order. From this perspective, it seems natural that, for the sake of coherence, all those who participate in the international legal order must abide by its ‘general’ rules.⁶⁴ Morgenstern stated that the ‘applicability of the relevant rules can be explained as a necessary implication of legal capacity and activity in the international legal order’.⁶⁵ Furthermore, it is their international legal personality that makes international organizations distinct and autonomous actors on the international plane. Their ‘distinct will’, distinguishable from their member states, is regarded by many as one of the constitutive factors of legal personality.⁶⁶ As seen in the above, their legal obligations cannot be derived from those of their member states. This implies that international organizations, as independent actors, must also have independent obligations under international law.

In this respect, it is helpful to draw a parallel with new states.⁶⁷ It is generally accepted that new states are bound by the existing corpus of customary international law.⁶⁸ As for international organizations’ being so bound, there is not an immediately apparent, solid legal justification for this, grounded firmly in the sources of international law. After all, states become bound by customary international law through implied consent. They may, consensually, opt out of custom *inter partes*, or may persistently object to the formation of a norm of custom in order to prevent becoming bound by such a general rule.⁶⁹ Generally, international law, as a legal order, is built on sovereign equality and consent. Considering new—sovereign—states bound by obligations to which they have not consented appears to derogate from these sacrosanct principles; still, it is generally accepted.

⁶² Bleckmann 1977, 110, where he states that norms of general international law can be considered ‘*addressatlos*’; similarly David 1999.

⁶³ Clapham 2006, 87.

⁶⁴ Similarly Verdirame 2011, 72, where he states that considering international organizations bound by general international law ‘ensures systemic coherence’.

⁶⁵ Morgenstern 1986, 32.

⁶⁶ Klabbers 2009, 49; Higgins 1994, 46.

⁶⁷ Similarly Verdirame 2011, 71; Naert 2010, 393–394.

⁶⁸ See e.g. Brownlie 2008, 602; Shaw (n 50), 91, who also refers to: Tunkin 1976, 129; however, it must be acknowledged that this contention has been subject to a great deal of criticism; in practice, however, Shaw’s conclusion appears to have prevailed. He contends that an approach to new states and custom that would permit new states to pick and choose which customs to adhere to ‘could prove highly disruptive’. Shaw therefore offers a solution of ‘implicit consent’, stating that ‘the proviso is often made that by entering into relations ... with other states, new states signify their acceptance of the totality of international law’.

⁶⁹ See e.g. Shaw 2008, 89–91.

In a similar vein, international organizations have become powerful actors on the international plane and their activities increasingly impact on individuals. For that reason alone, their exercise of public power should be governed by the same rules that apply to states, even if, as stated by Klabbers, there is no plausible theory of obligation.⁷⁰

Furthermore, international organizations and institutions are creatures of international law. Their constituent instruments, normally treaties, are part of international law and their adoption as well as their subsequent interpretation is governed by international law.⁷¹ For this reason alone, it has been argued that ‘no superiority over international law can be pleaded on their behalf.’⁷² Clearly, the principle that all subjects of international law are bound by general international law—primarily in the form of custom—has gained widespread acceptance. As a result, it is safe to conclude that, as (organs of) international organizations with legal personality, the ICTs are bound by general international law.

However, concluding that the ICTs are formally bound by general international law does not immediately solve all questions regarding the scope and content of their international legal obligations. One caveat to such identification pertains to the capability of international organizations to bear international obligations. Although general international law thus applies indiscriminately to all subjects of international law, including international organizations and the ICTs, significant differences between states and international organizations have a distinct impact on the way in which general international law can apply to the latter, both regarding the question of which norms are binding upon them, and regarding the question of the scope and content of the obligations that such norms give rise to regarding specific international organizations. This caveat does not invalidate the subject thesis, but it complicates its practical utility for the determination of the actual international legal obligations incumbent upon the ICTs.

It has been noted that ‘large areas of international law are patently inapplicable to international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as states’.⁷³ As a result, many rules of general international law may simply be irrelevant to specific international organizations, which have more limited functions and capacities than states. In that sense, it is relevant to quote the ICJ’s Advisory Opinion on *Reparations for Injury*, where it held that ‘[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity

⁷⁰ Klabbers 2008, 169, who also appears to endorse the subject thesis, despite what he calls the absence of a plausible theory of obligation.

⁷¹ See e.g. Klabbers 2009, 92; Shaw 2008, 1309.

⁷² Schermers and Blokker 2011, 996; similarly Arsanjani 1981, 132: ‘[i]nternational organizations, as both creations and creators of international law, cannot ignore the principles that created them and that they are designed to promote. International organizations must be deemed incapable of excluding themselves arbitrarily from international obligations’.

⁷³ Morgenstern 1986, 4; see also Hirsch 1995, 36; Reinisch 2001, 135; Naert 2010, 395–396; Schermers and Blokker 2011, 995.

such as the [UN] must depend upon its purposes and functions'.⁷⁴ The ICJ thus recognized that the rights and obligations of an international organization under international law are not necessarily identical to those of states. Like its rights, an organization's obligations depend on its purposes and functions.

This militates in favour of a functional approach to the obligations of international organizations under international law. Only obligations under general international law that pertain to actual functions exercised by any specific international organization are binding on that organization. In such an understanding of a subject thesis, an ICT, for example, would not be bound by customary international law relating to the delimitation of maritime borders, because such rules have nothing to do with the areas in which the ICTs exercise public power. Similarly, the international seabed authority would not be bound by the right to liberty, simply because it has no power to deprive individuals of their liberty.

Such a functional approach to the international obligations of international organizations finds broad support in international scholarship on the issue.⁷⁵ However, the functional approach may be too limited, in that more rules than would seem relevant based on an international organization's function alone will actually be relevant for its activities.⁷⁶ The two cases noted above are examples of obvious irrelevance of certain fields of customary law to specific international organizations. Similarly, the relevance of the right to liberty to an ICT, which tries and possibly sentences individuals for international crimes, and of customary law on the delimitation of maritime boundaries to the international seabed authority is equally obvious. However, there is a substantial grey area where it is all but clear whether customary law in any given area would apply to a specific international organization. For example, is an ICT bound by customary law relating to the right to family life? At first sight, one might be inclined to answer this question in the negative. However, several decisions of the ICC show that it has been confronted with these issues and has actually decided to fund visits of relatives of detainees to the ICC Detention Unit, based, *inter alia*, on the right to family life.⁷⁷ Although a functional approach to the obligations of an international organization under international law thus addresses a number of conceptual problems, it does not provide a straightforward blueprint for establishing the international obligations of international organizations. In addition, the lack of clarity regarding which fields of customary international law are relevant to the functions of an ICT leaves them a large measure of discretion.⁷⁸ Still, it is clear that the ICTs are bound by general international human rights law insofar as it contains rules that are relevant to their functions.

⁷⁴ ICJ, Advisory Opinion, *Reparations for Injuries*, 11 April 1949, 9.

⁷⁵ Hafner 2005, 606, who states that international organizations are bound by customary international law that is relevant to their activities. See also Morgenstern 1986, 4; David 1999, 20; Naert 2010, 395; Schermers and Blokker 2011, 995, 1004.

⁷⁶ Naert 2010, 395.

⁷⁷ See, generally: Abels 2013.

⁷⁸ See *infra* Sect. 7.4.1, where an adaptation of the functional approach will be proposed.

2.4 The Meaning of ‘Being Bound’ by General IHRL

Three obstacles complicate the determination of the actual human rights obligations of an ICT under international law. First, substantial disagreements persist regarding the proper methodology to establish the existence of norms of general international—human rights—law, the actual content of those norms, and the obligations arising from these norms. Second, the inherently flexible nature of human rights norms limits their prescriptive capacity for the functioning of an ICT. Third, from a positivist perspective, states and ICTs are permitted to devise ‘special’ human rights law, geared specifically to govern the functioning of an ICT, which could be rationalized as *lex specialis* to the *lex generalis* of IHRL.

2.4.1 Indeterminacy of ‘General International Law’

Since the ICTs are not parties to human rights treaties, their human rights obligations derive from their internal legal instruments and the sources of general international law: custom and general principles of law.⁷⁹ However, the scope and normative content of the obligations derived from these sources are difficult to determine, particularly in the field of human rights.⁸⁰ So even if we accept that ICTs are formally bound by general international human rights law, the question is *which* human rights norms are binding on them, and how?⁸¹

The constituent elements of customary international law are extensive, virtually uniform and consistent state practice, *usus*, combined with the conviction that such practice is required by law, *opinio iuris*.⁸² Establishing these elements in classical inter-state fields of international law is already complex, but these difficulties

⁷⁹ See *infra* Chap. 3 on the way in which the ICTs’ internal law and practice obliges them to abide by international human rights law.

⁸⁰ Vasiliev 2014, 107: ‘the uncertainty as to what human rights standards apply qua customary law and general principles of law is a general one—it lurks in the unwritten and nebulous character of those sources’; similarly Naert 2010, 651, who also notes the great uncertainty regarding the extent to which human rights are part of customary international law; Sluiter 2003, 938: ‘a major difficulty is the identification of human rights being part of customary law or amounting to general principles of law’; Warbrick 1998, 46, noting, with regard to the establishment of custom and general principles of law, that ‘there are obstacles in the way of demonstrating conclusively that there are such rules of sufficient detail to provide practical assistance’; Fedorova and Sluiter 2009, 26.

⁸¹ Similarly Cameron 2007, 276: ‘arguing that international organizations are generally bound by customary human rights law may calm fears that they are operating in some kind of legal void, but it leaves many important questions open. In particular, what is the specific content of those rights?’

⁸² Simma and Alston 1989, 88; Chinkin 2010, 110.

increase exponentially in the field of human rights.⁸³ It is for these reasons that Brownlie wrote that 'in the real world of practice and procedure, there is no such entity as "International Human Rights Law"'.⁸⁴ This field of law differs significantly from other fields of public international law, in that it is concerned with states' treatment of persons within their jurisdiction, as opposed to states' relations with other states. Consequently, the practice needed to establish the existence of custom is internal, rather than international, as a result of which it becomes more difficult to establish such practice in the traditional way.⁸⁵ For example, it is difficult to determine whether a state acts internally in a certain way because of a sense of an international legal obligation to do so or because of other considerations.⁸⁶ The principle of reciprocity plays an important role in interactions between states, and thus in the development of customary international law, but it is practically irrelevant in the context of IHRL.⁸⁷ Besides, IHRL has developed subsequent to the emergence of domestic legal regimes for the protection of human rights. In many states, the institution of constitutional human rights guarantees preceded the ratification of international human rights treaties, which makes it difficult to argue that the practice of human rights protection was inspired by an international obligation to do so. Furthermore, human rights norms are regularly violated. With such abundant negative practice, it is difficult to argue in favour of the existence of customary law, because it is uncertain which practice should be considered as *usus*: the way states actually behave, or the way they profess to behave?⁸⁸

There is a dissonance between the nature of international human rights law and a formalist approach to the classical sources of international law. This has resulted, for example, in an increased focus on the adoption and importance of soft-law

⁸³ Addo 2010, 28: 'human rights are recognized as part of international law, and as a consequence, it may have inherited some shortcomings, including its indeterminacy, from the parent discipline'; Vasiliev 2014, 108: 'both methodologies [for ascertaining custom and general principles] rest on the need to engage in a global-scale and cumbersome comparative research of the practice of states in their mutual transactions and internal law-making and adjudicative practices'.

⁸⁴ Brownlie 1995, 77, and 83: '[t]he vast majority of States and authoritative writers would now recognize that the fundamental principles of human rights form part of customary or general international law, *although they would not necessarily agree on the identity of the fundamental principles*'.

⁸⁵ D'Amato 1995, 75; similarly Schabas 2009, 100, 'the tribunals are not employing customary law 'as if they were applying PIL in the classic sense, for example in determining the limits of fishing zones, or the scope of diplomatic immunities, or other issues involving reciprocal rights of states in which the distinct elements of practice and *opinio juris* usually manifest themselves rather clearly'.

⁸⁶ Simma and Alston 1989, 99, who note that, when internal state practice is concerned, it becomes difficult to distinguish between the performance of customary law obligations operating purely at the domestic level, such as in the case of human rights, and internationally concordant domestic behaviour followed for reasons other than a sense of international legal obligation, such as driving on the correct side of the road.

⁸⁷ See e.g. Craven 2000, particularly 504–513; Mégret 2010, 128.

⁸⁸ Chinkin 2010, 112; Fedorova and Sluiter 2009, 26.

instruments such as non-binding declarations in the UN General Assembly, which are often argued to amount to evidence of *usus* as a constituent element of custom.⁸⁹ However, this approach has been criticized for conflating practice with *opinio iuris*.⁹⁰ In determining custom, it essentially employs *opinio iuris* as proof of practice, which has been argued to defy the nature of this source of law, which is and should remain practice-based.⁹¹ Using statements of states to establish practice dilutes the notion of practice, since it focuses on states' opinions, instead of on how they actually act. At the same time, certain commentators have proposed to abandon the concept of customary human rights law altogether and to focus on new or different sources instead.⁹² Another approach adopted in both practice and academia is to base the customary status of certain human rights norms, particularly relating to civil and political rights, on their widespread recognition in regional and international human rights conventions.⁹³ However, this approach has equally been subject to criticism: if custom can be established by pointing to the existence of treaties, this begs the question of the distinction between these two sources of international law.⁹⁴ Clearly, identifying a norm of custom is a difficult exercise and this difficulty increases exponentially in the field of IHRL. Moreover,

⁸⁹ Schachter 1982, 334; see also, Simma and Alston 1989, 92; Meron 1989.

⁹⁰ See e.g. Koskeniemi 1990, for a critique of Meron's monograph on this point; see also Paust 1996.

⁹¹ See e.g. Van Hoof 1983, 107–108: 'it is dangerous to denature the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity which the sources of international law have to provide ... what if States making statements [concerning the importance of the UDHR] at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions? (...) even if abstract statements or formal provisions in a constitution are considered as state-practice, they have at any rate to be weighed against concrete acts'; see also Koskeniemi 2005, 411–438, where he discusses the circularity of the focus on *opinio iuris*, which he calls 'the psychological element' of custom (see in particular: 431–438); Simma and Alston, 89, 96–97, who are concerned with the move from an inductive to a deductive approach to establishing customary international law, which focuses on 'rhetoric' rather than on hard practice; Jennings 1982, 5, who notes that 'what we perversely persist in calling customary international law is not only *not* customary law: it does not even faintly resemble a customary law'; Weisburd 1996, 140, where he notes that 'evidence does not support the proposition that states generally are prepared to acknowledge that human rights norms are internationally enforceable ... then, labelling such norms rules of customary law would appear to be a contradiction in terms'.

⁹² Simma and Alston 1989, 102ff, who propose to focus on 'general principles of law' instead; and Henkin 1996, 37ff, who notes that human rights law is not customary in the traditional sense, and proceeds to call it 'non-conventional' and 'constitutional' law.

⁹³ See e.g. Hannum 1996; De Schutter 2010, 56; Vasiliev 2014, 104–105: treaties may be considered as 'evidence of the existing customary rules, save for cases in which they derogate from custom'.

⁹⁴ See e.g. Schabas 2009, 80: 'the process itself seems tautological, and often the search for customary norms—whether described as *opinio iuris* or as state practice—leads back to one of the other primary sources, international conventions.' The ICTY has also noted this problem: ICTY, Judgement, *Prosecutor v. Delalić et al.* (IT-96-21-T), 16 November 1998, para 302.

in the field of criminal procedure in particular, the divergence in domestic practice is so substantial that it will be very difficult to establish *usus* in this area.⁹⁵

What is more, determining that a given human rights norm is custom does not yet complete the process of delineating the norm, since its scope and normative content, including the concrete obligations that arise from it, must also be determined. Human rights norms may give rise to several kinds of obligations, which can be negative and/or positive obligations, and obligations of conduct and/or of result.⁹⁶ These obligations have often been developed in the judicial practice of treaty bodies and regional human rights courts. It is then difficult to determine whether such interpretation of human rights norms also reflect the obligations that arise under the so-called customary 'version' of the human rights norm.⁹⁷ Human rights discourse rests on the assumption of the 'knowability' of the substantive content of human rights. In practice, however, a large measure of interpretative controversy remains.⁹⁸

For example, there will be a general agreement that the prohibition of torture is a norm of customary international law, perhaps even with *ius cogens* status. However, the scope and meaning of the term torture, and the specific obligations that arise from this norm may be more difficult to establish.⁹⁹ The obligation not to engage in torture seems obvious, but how about the use of evidence in a criminal trial that was obtained through torture or inhumane treatment?¹⁰⁰ Or what about the admissibility of cases where there has been a threat or use of torture?

⁹⁵ Vasiliev 2014, 108, noting the scarcity of international custom governing the conduct of criminal proceedings in general; see also Gallant 1999, 696, who questions whether the privilege against self-incrimination is a customary human rights: 'even if the privilege were treated as customary international law, implementation of the privilege *varies so widely* that it would be difficult to determine just how far the right to silence extends'.

⁹⁶ On the nature of human rights obligations, see e.g. Mégret 2010, 124, and generally Addo 2010.

⁹⁷ Fedorova and Sluiter 2009, 26, who note that 'the norms laid down in the treaties are not completely reflective of international custom or general principles of law'; see also Gallant 1999, 696: 'some of the protections against unfair criminal prosecutions contained in the ICCPR may not yet have passed into customary international law, or it may be quite difficult to determine the extent of the customary right'.

⁹⁸ Koskeniemi 1991, 399.

⁹⁹ Similarly, e.g.: D'Amato 1995, 48, who notes: 'what are the parameters of torture? Does it have to be "official torture" to count as a violation of human rights norms, or would torture by paramilitary or irregular troops, or even a band of criminals, also violate the anti-torture norm? Is the battering of wives "torture"? And where can one draw the line between torture and inhumane treatment or punishment?'

¹⁰⁰ See e.g. Article 15 ICAT which prohibits the use of statements obtained through torture as evidence in criminal proceedings. However, the scope of this standard is not necessarily clear-cut. See e.g. ECtHR, Judgment, *Gäfgen v. Germany* (App No 22978/05), 1 June 2010, 183–187, where the ECtHR ultimately found the claimant to have had a fair trial, even though he had been threatened with torture, and much of the evidence against the claimant had been gathered as a result of his statements given pursuant to these threats.

As D'Amato aptly noted: we 'need to know more than just the words'.¹⁰¹ Asserting that the prohibition of torture is a norm of customary international law is not enough to determine the actual obligations this customary prohibition imposes upon states.

These concerns also apply to general principles of law, with regard to which three further issues can be raised. First, there is confusion as to the nature of this source of law: some authors contend that these general principles can be derived from national law, whereas others contend it must be regarded as referring to principles of international law proper, i.e. principles governing inter-state relations.¹⁰² Second, general principles of law that govern criminal procedure are exceedingly difficult to establish, given the global divergence of models of the criminal process.¹⁰³ Third, general principles of law are, both by name and by nature, general legal standards.¹⁰⁴ The general nature of such principles makes it unlikely that concrete legal rules, such as those that govern a criminal process, can be derived from them. Principles, as opposed to rules, 'do not set out legal consequences that follow automatically when the conditions provided are met'.¹⁰⁵ According to Dworkin, principles state reasons that argue in a certain direction, but do not necessitate a particular decision.¹⁰⁶ As a result, it is difficult to establish concrete legal obligations under such general principles.

While the conduct of national criminal proceedings must adhere to written rules of IHRL, which are further developed by human rights courts and supervisory bodies, the conduct of international criminal proceedings must, from a formalist perspective, make do with custom and general principles of law. Identifying the norms contained in these sources of international law is difficult, and establishing specific legal obligations that arise from such norms is even more complex. This is not to say that it is impossible. Still, the complexity of reliance on customary human rights norms or general principles of law arguably grants the ICTs a significant measure of discretion in interpreting and applying international human rights norms contained in the unwritten sources of international law.

¹⁰¹ D'Amato 1995, 49.

¹⁰² For a discussion of the different positions regarding the meanings of this term, see: Vasiliev 2009, 31–42, who concludes that the text of Article 38 of the ICJ Statute refers to principles that are recognized in domestic law, which is the view that a majority of international legal scholars subscribe to.

¹⁰³ Mégret 2013, 68, who notes that the very idea that there might be general principles common to all nations when it comes to criminal procedures may be a stretch; and 71, where he notes that 'the practice is likely to be so divergent and so difficult to analyse out of context that it would provide very little clue as to emerging international norms'.

¹⁰⁴ Ibid., 72, who notes, when discussing the value of general principles of law for international criminal procedure, that these are 'likely to be so general as to not be particularly useful'.

¹⁰⁵ Dworkin 1977, 25; Vasiliev 2009, 44–45.

¹⁰⁶ Ibid., 26.

2.4.2 *Inherent Flexibility of Human Rights Standards*

IHRL, as it applies to states, is inherently flexible. It leaves states a certain measure of discretion regarding the implementation of their human rights obligations. As a result of that, IHRL is 'largely under-determinative when it comes to fleshing out the normative detail of international criminal proceedings'.¹⁰⁷ This circumstance is important to be aware of when discussing the position of IHRL in the law and practice of the ICTs.

In general, human rights norms do not provide clear-cut and determinate prescriptions that can mechanically be imported into any legal system. These norms must be able to operate in a plurality of different legal systems and in areas of exercise of public power in which a multitude of interests and considerations come into play. In the practice of human rights courts and supervisory bodies, international human rights norms are employed as standards of review of domestic practice, in the context of which a plurality of different practices may satisfy the requirements of IHRL. There is no 'one-size-fits-all' approach to the domestic implementation of these norms. As a result, concluding that the ICTs are 'bound' by human rights norms may have only limited regulatory implications for the conduct of international criminal proceedings. If this body of law does not provide clear-cut rules and obligations that states must simply implement, the same considerations apply to the ICTs. This section pinpoints several manifestations of the elastic nature of IHRL and the discretion it leaves states in deciding how to discharge their human rights obligations. The intention is to illustrate that the application of IHRL to the ICTs cannot and should not be a mechanical exercise of copy-pasting.

The nature of IHRL is fundamentally different from that of the law of international criminal procedure. The former provides for standards of review, while the latter provides for specific principles and rules that govern the conduct of criminal proceedings before the ICTs.¹⁰⁸ Human rights are structured as principles and minimum guarantees, which endows them with a general character, whereas a system of criminal procedure needs to be 'much more precise'.¹⁰⁹ This naturally shapes the impact that IHRL can have on international criminal procedure. Human

¹⁰⁷ Vasiliev 2014, 116.

¹⁰⁸ Addo 2010, 186–187: 'according to the applicable international law in this field, the primary responsibility for the guarantee and assurance of human rights rests with national authorities. This rule is founded on the principle of subsidiarity and confirms that international supervision ... is secondary to national decision-making'; Warbrick 1998, 51: many international standards 'are really standards of review of national decisions rather than rules of decision themselves and, at best, they create minimum levels of protection rather than normal or optimum ones'; similarly Trechsel 2011, 156, who notes that the case law of the ECtHR can be described as 'judges judg[ing] judges judging judges', because it is a review procedure. According to Trechsel, before the ECtHR, 'the distance to the trial proceedings and to the accused is considerable. Those judges are not really actors in the administration of justice, but rather some sort of inspectors or supervisors'. The ECtHR is a judge of criminal proceedings, whereas the ICTs conduct criminal proceedings.

¹⁰⁹ Safferling and others 2012, 61.

rights obligations come in many shapes and forms. For example, there is a distinction between obligations of conduct and obligations of result. As for the latter category, IHRL requires a certain ‘result’ to be reached, but is neutral as to the manner in which this is to be achieved. In such cases, states have a broad margin of discretion.¹¹⁰ States’ obligations in connection with the right to a fair trial are obligations of result as much as of conduct, but states exercise broad discretion regarding the conduct of criminal proceedings as long as the trial overall can be qualified as ‘fair’.¹¹¹ For example, the ECtHR has consistently held that the right to a fair trial ‘does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law’.¹¹² Accordingly, it ‘is not the role of the Court to determine, as a matter of principle, whether particular types of evidence ... may be admissible The question for the Court instead is whether the *proceedings as a whole*, including the way in which the evidence was obtained, were *fair*’.¹¹³ This standard is very context and case-specific.

Concepts such as this ‘fairness of the proceedings as a whole’ standard enable the application of human rights to a broad range of procedural contexts. It has been argued that fair trial norms ‘use broad terms that leave room for fine-grained adaptations of these ingredients to the varying circumstances in which domestic and international courts operate’.¹¹⁴ The criminal justice systems of ECHR member states operate on a scale that ranges from adversarial to inquisitorial paradigms, but the ECtHR has developed standards of review that apply to all systems irrespective of their legal-cultural provenance.¹¹⁵ International human rights supervisory courts and bodies are tolerant of diversity in criminal procedure.¹¹⁶

¹¹⁰ Shany 2006, 917: ‘[r]esult-oriented norms are, as a rule, indifferent to the way in which a desired object is attained, provided that its eventual attainment is ensured. States thus enjoy broad discretion as regards the choice of means and manner of implementation or result-oriented norms and the path to the desired end is bound to be uncertain’.

¹¹¹ Harris and others 2009, 20; similarly Warbrick 1998, 51: ‘The human rights standards in the main create obligations of result for states—to secure a fair trial for the defendant, rather than to secure it in any particular way’.

¹¹² See e.g. for a recent judgment: ECtHR, Judgment, *Ivanovski v. Macedonia* (App No 10718/05), 24 April 2014, 42; similarly Harris and others 2009, 256, who refer to: ECtHR, Judgment, *Schenk v. Switzerland* (App No 10862/84), 12 July 1988, 34; ECtHR, Judgment, *Jalloh v. Germany* (App No 54810/00), 11 July 2006, para 94.

¹¹³ Harris and others 2009, 256.

¹¹⁴ Damaška 2011, 379.

¹¹⁵ Harris and others 2009, 203: ‘in criminal cases, the interpretation of Article 6 is complicated by the basic differences that exist between common law and civil law systems of criminal justice’; similarly 9: ‘in connection with the right to a fair trial, ... there is much diversity of practice resulting, most clearly, from the differences between civil and common law systems of criminal justice’.

¹¹⁶ Mégret 2009, 54–55: ‘[t]hey have only occasionally hinted that widely divergent practices might be problematic, or promoted a particular approach to a domestic procedure, or criticized a particular tradition’; Harris and others 2009, 329: ‘as to the mechanics of the trial process, the Court has been far less intrusive. Given the great diversity of practice in European criminal justice systems concerning, for example, the rules of evidence, the Court has allowed considerable discretion as to means, requiring only that the outcome of the procedure followed is a fair trial’.

On the one hand, this better enables the application of such principles in the context of international criminal justice, the procedural law of which is an amalgamation of both types of procedural systems. On the other hand, the broad nature of human rights standards limits their immediate utility and prescriptive capacity. The ECtHR's assessment of standards of fairness is necessarily context-specific: what may be fair in one case may be unfair in another: 'international human rights law is too broad and under-determinative on the issue of the "right procedure"'.¹¹⁷

An important doctrine in this context is the 'margin of appreciation', which has been developed by the ECtHR.¹¹⁸ It is a doctrine of judicial deference, whereby the international bodies that review domestic compliance with human rights norms defer, to a certain extent, to the judgment of the domestic authorities. Thus, states are granted a measure of discretion in implementing a specific human rights norm in their domestic context.¹¹⁹ The margin of appreciation is based on the subsidiary role of human rights bodies as review mechanisms of domestic compliance, as opposed to primary adjudicators.¹²⁰ In addition to judicial deference to domestic authorities' discretion, the doctrine's rationale lies in the 'normative flexibility of certain human rights, which may provide limited conduct-guidance and preserve a significant 'zone of legality' within which states are free to operate'.¹²¹ As such, the doctrine 'allows for a diversity of systems for the protection of human rights and even for different conceptions of the rights themselves and acknowledges the superiority of the organs of a state in fact-finding and in the assessment of what the local circumstances demand'.¹²² It thus allows for a 'geographically and culturally plural notion of implementation'.¹²³ The proper use of the margin may

¹¹⁷ Mégret 2009, 41–42.

¹¹⁸ See also Article 1 of Protocol 15 to the ECHR, which, once it enters into force, will formally introduce the margin of appreciation into the Convention preamble. The HRC and the IACtHR have also employed this doctrine. See e.g. Legg 2012, 6: '[t]he HRC has been "speaking silently" the language of the margin'.

¹¹⁹ Shany 2006, 909–910; Harris and others 2009, 11: 'it means that a state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right'.

¹²⁰ Vasiliev 2014, 95: '[h]uman rights courts such as the ECHR are subsidiary mechanisms by nature: they carry out supervisory functions in relation to domestic proceedings and in doing so necessarily accord a margin of appreciation to states in regard of a variety of nuances of judicial organization and process. This is different for international criminal tribunals, which decide substantive issues on the merits and, except at the appellate level, are not super-structures but full-fledged systems doing the gritty justice work such as the disposition of cases at the first instance'.

¹²¹ Shany 2006, 909–910.

¹²² Harris and others 2009, 350; Mégret 2010, 133: 'one rationale for the margin of appreciation is that states and domestic courts are better suited to assess local peculiarities and that there is simply too much uncertainty about how human rights are to be implemented for international supervision to exercise more than relatively minimum control'.

¹²³ Mégret 2010, 132; Benvenisti 1999, 843–844: 'this doctrine, which permeates the jurisprudence of the ECHR, is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual and national interests or among different moral convictions'.

result in significantly different approaches to the implementation of specific human rights norms, all of which are nonetheless ‘consistent with [their] universality’.¹²⁴ As such, the doctrine ‘does not reject the universal nature of the human right, but does reject an unnatural uniformity of legal expression’.¹²⁵ This plurality of the legal expression of human rights fosters these norms’ elasticity, but also limits their prescriptive capacity.

States enjoy a broad margin of appreciation regarding certain aspects of the right to a fair trial. The proper role of IHRL in this context is ‘a “minimalist” one of preventing the worst of abuses rather than a “maximalist” determination of “ideal” procedural standards’.¹²⁶ The wide recognition of the margin of appreciation doctrine, including in many areas relevant to the work of the ICTs, enlarges the normative flexibility of these norms and render them less capable of prescribing specific obligations for ICTs. The margin of appreciation is partly granted because of the relative ‘comparative advantage of local authorities’, who are considered to be better placed to determine the proper interpretation and application of certain human rights norms in the domestic context.¹²⁷ This principled choice of human rights bodies to defer to the judgment of domestic authorities on certain issues suggests that a similar deference to the judgment of the ICTs should be called for in the context of international criminal justice.¹²⁸

Furthermore, IHRL incorporates a system of restrictions, whereby states can derogate from or limit their human rights obligations. This possibility is intertwined with considerations similar to those underlying the doctrine of the margin of appreciation. The margin of appreciation is connected to the nature and degree of supervision exercised by the ECtHR, while the doctrines of limitations and derogations relate more directly to the nature of the rights in question, nonetheless, all three doctrines have the effect of allowing states a measure of discretion in their domestic implementation of human rights norms. The doctrine of derogations in particular further recognizes that certain exceptional situations may legitimately

¹²⁴ Legg 2012, 40.

¹²⁵ Legg 2012, 45; Mégret 2010, 132: ‘there is no expectation of absolute uniform implementation, rather that a certain minimum standard should be achieved, while respecting the cultural, legal, and political specificity of each state’.

¹²⁶ Mégret 2009, 54.

¹²⁷ Shany 2006, 927; similarly Legg 2012, 145, where he introduces the factor of ‘expertise’, according to which domestic authorities are sometimes simply better placed to assess certain matters.

¹²⁸ Similarly Damaška 2011, 380: ‘as is amply illustrated by the “margin of appreciation” left to member states of the Council of Europe by the European Court of Human Rights, a wide range of more or less liberal procedural arrangements is compatible—even in the context of domestic administration of justice—with fair trial standards. This then holds a fortiori for international criminal procedure, which need not necessarily echo the decisions of the Strasbourg Court’; similarly Mégret 2009, 55: the ICTs ‘have used this margin of appreciation considerably, and have been quick to point out that international human rights standards merely set the “absolute minimum”’.

impact on states' ability to respect human rights norms. This renders the scope of application of these norms more flexible and context-dependent. At the same time, the application of these doctrines to states begs the question of whether ICTs are also allowed to employ derogations or limitations with respect to their human rights obligations.

IHRL allows states to limit the enjoyment of certain rights subject to a number of strict requirements. The UDHR contains a general limitations clause that has been the model for limitation clauses attached to specific rights in the ICCPR, ECHR, and ACHR.¹²⁹ These limitations are sometimes referred to as 'public interest exceptions', because they arise from 'the need to balance the interest of the community against the interests of the individual'.¹³⁰ The limitation of rights is subject to three conditions: the limitation (i) must be lawful, (ii) must pursue a legitimate aim, and (iii) must be necessary in a democratic society.¹³¹ Lawfulness means that the restriction must have its basis in law, which, in turn, has to be foreseeable and accessible and include safeguards against abuse.¹³² In addition, a limitation must pursue one of the stated aims in the relevant provision. These aims differ per provision, but examples of recurring legitimate aims are national security, public order, and the rights of others.¹³³ Third, the requirement that interferences be 'necessary in a democratic society' means that the interference must correspond to a 'pressing social need' and that it is 'proportionate to the legitimate aim pursued'.¹³⁴ In their assessments of these requirements, human rights bodies tend to defer, to a certain extent, to the judgment of domestic authorities.¹³⁵ This shows the close link between the doctrine of the margin of appreciation and the system of limitations.¹³⁶ States are accorded a measure of discretion in their decisions to limit

¹²⁹ Article 29(2) UDHR; the ICCPR, ECHR, and ACHR contain limitation clauses attached to specific rights; see e.g. Articles 18(3), 19(3), and 22(2); Articles 8(2), 9(2), 10(2), and 11(2) ECHR; 12(3), 13(2), 15, 16(2), 22(3) ACHR; Article 11 ACHPR.

¹³⁰ Ovey and White 2006, 219. See also McHarg 1999.

¹³¹ Arai 2006, 334–335; Harris and others 2009, 344; Mégret 2010, 141.

¹³² See e.g. ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 26; ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 37; ECtHR, Judgment, *Doerga v. Netherlands* (App No 50210/99), 27 April 2004, 45; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 121; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 123; Arai 2006, 336–337.

¹³³ See e.g. Arai 2006, 339; Ovey and White 2006, 226–231.

¹³⁴ ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 44; ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 44; ECtHR, Judgment, *Keegan v. United Kingdom* (App No 28867/03), 18 July 2006, 30; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 43; ECtHR, Judgment, *Michaud v. France* (App No 12323/11), 6 December 2012, 120.

¹³⁵ Harris and others 2009, 349.

¹³⁶ Similarly Fedorova and Sluiter 2009, 41–42; Addo 2010, 184: 'international human rights treaties appreciate the competing nature of rights and the need for governmental supervisory responsibility that feeds on discretion. This is often reflected in the list of permissible limitations concerning public order, national security and the rights of others'.

rights because such decisions often involve issues of morality that may differ per society or a balancing exercise between the scope of individual rights, on the one hand, and public interest concerns, including national security or public order on the other.¹³⁷ The fact that a substantial number of human rights norms are not absolute but may be limited, and that the assessment of such limitations is case-specific and context-dependent, enlarges the ‘normative flexibility’ of human rights norms.

In addition, under certain exceptional circumstances, states are permitted to derogate from certain human rights obligations.¹³⁸ Most human rights treaties contain a derogation clause to that effect. Like limitations, the invocation of derogations is subject to several conditions. They are only permitted in time of war or other public emergency threatening the life of the nation, they cannot go further than ‘strictly required by the exigencies of the situation’, and they may not be inconsistent with other international obligations of the state.¹³⁹ In its assessment of these criteria, the ECtHR has generally allowed states a wide margin of discretion.¹⁴⁰ It has held that ‘it falls in the first place to each contracting state, with its responsibility for “the life of [its] nation” to determine whether that life is threatened by a public emergency’.¹⁴¹ The ECtHR seems to believe that national authorities are better placed to decide on the presence of an emergency and ‘the nature and scope of derogations necessary to avert it’.¹⁴² There is, of course, a limit to states’ margin of discretion in this context. Several rights cannot be derogated from, including the right to life and the prohibition of torture.¹⁴³ Human rights bodies have generally affirmed that they are competent to review both states’ assessments of the existence of an emergency situation, as well as the necessity of the derogation.¹⁴⁴ In particular, human rights bodies assess the proportionality and non-discriminatory nature of the respective measures.¹⁴⁵

The potential relevance of the doctrine of derogations to the present inquiry lies, first, in the fact that it further illustrates the non-absolute nature of most

¹³⁷ See e.g. Ovey and White 2006, 234.

¹³⁸ Mégret 2010, 143.

¹³⁹ Article 15 ECHR; Article 4 ICCPR; Article 27 ACHR.

¹⁴⁰ Harris and others 2009, 349; Flinterman 2006, 1055–1056. See also ECtHR, Judgment, *A. and others v. United Kingdom* (App No 3455/05), 19 February 2009, 173, which contains a discussion of the Court of the concept of derogations.

¹⁴¹ See e.g. ECtHR, Judgment, *A. and others v. United Kingdom* (App No 3455/05), 19 February 2009, 173.

¹⁴² Flinterman 2006, 1056; ECtHR, Judgment, *A. and others v. United Kingdom* (App No 3455/05), 19 February 2009, 173.

¹⁴³ Article 4(2) ICCPR; Article 15(2) ECHR; Article 27(2) ACHR, which provides a more comprehensive list.

¹⁴⁴ Nowak 2005, 86.

¹⁴⁵ Nowak 2005, 97; HRC, General Comment 29, States of Emergency (Article 4) (2001), UN Doc CCPR/C/21/Rev.1/Add.11; Harris and others 2009, 10; ECtHR, Judgment, *A. and others v. United Kingdom* (App No 3455/05), 19 February 2009, 181.

human rights standards, including the right to a fair trial. The nature of these standards is such that in certain situations, states may legitimately deviate from their obligations. The doctrine of derogations is further of particular interest to international criminal justice, because it comes into play in exceptional situations whereby states can derogate from their human rights obligations. The ICTY has also emphasized that the situation in which it operates allows for derogations, to justify its apparent departure from human rights standards regarding the use of anonymous witnesses.¹⁴⁶ Several authors have been critical of the idea that the ICTs might be permitted to derogate from human rights standards.¹⁴⁷ Their arguments will be discussed below. For now it is sufficient to note that the doctrines of derogation and limitation may diminish the prescriptive capacity of IHRL for the conduct of international criminal proceedings.¹⁴⁸

The generality of human rights norms as 'standards of review' renders them suitable for application to a wide variety of procedural systems and at the same time less determinative. As Mégret notes, IHRL 'is interested in broad outcomes, not the discrete ways of implementing them'.¹⁴⁹ This inability to provide specific guidance is exacerbated by the discretion that human rights supervisory bodies have granted states when assessing their compliance with human rights obligations. Furthermore, the systems of restrictions of human rights norms introduces 'a typical elasticity to human rights'.¹⁵⁰ This elasticity necessarily impacts on the interpretation and application of

¹⁴⁶ ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić* (IT-94-I), 10 August 1995, 61; see further, *infra* Sect. 3.5. As will be seen, the ICTs have referred to this doctrine more often, although the military tribunal-parallel has disappeared from its case law. The interesting question is whether such reliance on the doctrine of derogations should be regarded as a formal invocation of derogations, or as a mere illustration of the non-absolute nature of human rights standards. On that issue, see e.g. Cassese 1997, 331, who states that, despite the fact that the ICTY had been established because of a war and national emergency situation, its Statute does not explicitly permit derogation from basic human rights guarantees, although the right to a fair trial is a derogable right. This approach will be assessed in Chap. 7, *infra*.

¹⁴⁷ Affolder 1998, 478; Stapleton 1998, 600; Fedorova and Sluiter 2009, 38–41.

¹⁴⁸ Vasiliev 2014, 111: 'the availability of those avenues to states indicates that the minimum standard of protection required under customary international law in certain limited circumstances is lower than what those provisions establish by default. The existence of the respective clauses in the human rights treaties and the derivative state practice obfuscates the mandatory minimum scope of protection under general international law'; similarly Defranca 2001, 1396, 'to the extent that certain due process norms may be derogable under international law, the strength of these protections in an international system of adjudication remains an open question'.

¹⁴⁹ Mégret 2009, 53: 'It lacks the "thickness" of domestic traditions in that it is only interested in a few key principles and typically neglects most of the technical, ritual, and institutional features that are so characteristic of ordinary criminal procedure. Fundamental intuitions about the need or fight to a fair trial await concretization in actual forms'; Safferling and others 2012, 62: on many issues, 'human rights offer an underlying rationale, but do not give a prescriptive answer'.

¹⁵⁰ Mégret 2009, 57.

these norms by the ICTs.¹⁵¹ These considerations must accompany an assessment of the position of IHRL in the law and practice of the ICTs. Simply asserting that ICTs are ‘bound’ by human rights law does not do justice to the complex interplay between human rights and international criminal procedure, and fails to properly appreciate the inherent flexibility of IHRL. An important key to understanding the nature of the impact of IHRL on the ICTs is to acknowledge the prescriptive limits of this under-determinative body of international law.

2.4.3 Permissibility of *Lex Specialis*

IHRL has a fundamentally different relationship with domestic law, than with the law of international criminal procedure. This section argues that, from a formalist perspective, the relationship between IHRL and international criminal procedure leaves room for states and ICTs to devise ‘special’ human rights law governing the functioning of an ICT that could deviate from general international law. From a formalist perspective, the legal instruments of the ICTs could create ‘special’ human rights law that could be rationalized as *lex specialis* to general international human rights law.

States are precluded from invoking their internal law as a justification for non-compliance with international law.¹⁵² International law is per definition superior to domestic law from the perspective of international law.¹⁵³ The same cannot be said for the internal law of international organizations for the simple reason that their internal law is also international law. As a result, the primary internal law governing the functioning of international organizations is on an equal hierarchical level to other fields of international law, such as IHRL. Therefore, international organizations could arguably invoke their internal law to excuse non-compliance with possible other international obligations they may have under general international law.¹⁵⁴ In contrast with conflicts between domestic and international law,

¹⁵¹ Vasiliev 2014, 139: ‘international human rights standards create obligations as to result while the states as their addressees enjoy a ‘margin of appreciation’ in the framework of review of their human rights practices by regional courts and treaty-monitoring bodies. There is no reason why the nature of human rights as ends-oriented obligations should fundamentally change in the context of international courts and tribunals; similarly McIntyre 2003, 200.

¹⁵² Article 27 VCLT.

¹⁵³ Nollkaemper 2011, 286.

¹⁵⁴ It must be emphasized that international organizations and their member states may only invoke such deviations from general international law *inter partes*, since a treaty (including a constituent treaty of an international organization) may only affect the rights and obligations of parties to the treaty, not those of non-parties (Article 34 VCLT). Arguably, for the ad hoc tribunals, for example, this would include the entire membership of the UN, because their Statutes were adopted by the Security Council.

conflicts between obligations under an organization's constituent instruments and obligations under general international law may, in principle, be resolved in favour of the former obligation. This conclusion is strengthened by the reigning rules of precedence in international law, such as *lex posterior* and, in particular, *lex specialis*.

An international organization like an ICT is first and foremost bound by its constituent instrument.¹⁵⁵ It determines the organization's powers under international law and is its primary source of applicable law.¹⁵⁶ As a result, such a constituent instrument could take precedence over general international law. This is the result of the relationship between general (customary) international law and treaty law. The law of treaties does not bar states from creating a treaty that deviates from existing (customary) international law.¹⁵⁷ Nothing in the VCLT, which is widely ratified and generally accepted as codifying customary international law, suggests anything to the contrary. The VCLT sets only one substantive limit to the competence to enact treaties, which is that they are null and void when they conflict with norms of *ius cogens*.¹⁵⁸ However, the implications of this are arguably limited. Debates on which norms of international law constitute such peremptory norms are infinite. Although some authors have contended that all norms of human rights law have attained *ius cogens* status, others fundamentally disagree. These debates extend beyond the scope and ambition of the present study. It is acknowledged that *ius cogens* binds international organizations and states alike; however, at present, it is too difficult to derive many concrete legal obligations for international organizations in the field of IHRL from this.¹⁵⁹

Parties to a treaty may adopt a new treaty that sets aside the previous treaty. In case of a conflict between a more recent treaty and other international obligations, the former may take precedence over the latter due to the *lex posterior* principle.¹⁶⁰ Similarly, states may adopt treaties that set aside or modify customary international law, although this cannot affect their obligations towards non-parties due to the *pacta tertiis* rule.¹⁶¹ Since constituent instruments of international organizations are treaties, the functioning of which is governed by the VCLT,¹⁶² such instruments may also deviate from existing customary international law or

¹⁵⁵ ICJ, Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, 37.

¹⁵⁶ See e.g. Amerasinghe 2005, 20; Klabbers 2009, 178.

¹⁵⁷ See e.g. Higgins 1994, 19, who recognizes that custom may be subject to change; Pauwelyn 2003, 148ff; Naert 2010, 377.

¹⁵⁸ Article 53 VCLT.

¹⁵⁹ See e.g. Paulus 2005; D'Amato 1990; Bianchi 2008.

¹⁶⁰ Article 30 VCLT.

¹⁶¹ Article 24 VCLT; see also Brownlie 1995.

¹⁶² Ahlborn 2011, 407–417, who discusses the dual nature of the constituent instrument of international organizations as both constitution and treaty; see also Brölmann 2001, on the usefulness of VCLT in that respect.

even contract out of it. The legal results of such deviation may be qualified as *lex specialis*, which may elaborate as well as depart from *lex generalis*.¹⁶³ When creating an ICT, states are thus permitted to deviate from customary international law.¹⁶⁴

This conclusion finds support in the final report of the International Law Commission's (ILC) Study Group on Fragmentation. According to the report, the concept of *lex specialis* may apply to the relationship between customary international law, which can be considered 'general law', and treaty law, which is (often) more specific.¹⁶⁵ In its analysis, the report quotes a substantial amount of case law supporting the contention that *lex specialis* deviating from general international law is perfectly permissible.¹⁶⁶ According to Thirlway, 'it is universally accepted that ... as between the parties to a treaty the rules of the treaty displace any rules of customary law on the same subject'.¹⁶⁷ Furthermore, the ICJ has 'accepted that general international law may be subject to derogation by agreement and that such agreement may be rationalized as *lex specialis*.'¹⁶⁸ Analogously, then, constituent instruments of international organizations may sometimes function as *lex specialis*, taking precedence over the application of general—customary—international law, *lex generalis*. Indeed, 'special law may be used to apply, clarify, update or modify as well as set aside general law'.¹⁶⁹

Simma and Pulkowski relate this understanding of *lex specialis* to the question of so-called self-contained regimes in international law. Special law, they argue, may create and exist within specific sub-regimes of international law and be the primary law governing such a sub-regime, taking precedence over general international law. Within such regimes, there may be judicial institutions, which, according to Simma and Pulkowski, 'are not required to provide a justification for applying the special rules under which they were created', rather than general

¹⁶³ Simma and Pulkowski 2006, 485–490, for a discussion of the origin, relevance and character of the *lex specialis* maxim in international law.

¹⁶⁴ Gradoni 2013, 84, who notes that '[b]y establishing a treaty-based tribunal like the SCSL, the contracting parties may derogate from customary international law as long as they stay within the boundaries of jus cogens'; Vasiliev 2014, 101, who raises similar questions: 'are states precluded from departing from custom, and may they not have done so, when creating those courts? For one, the state practice of creating such courts, as demonstrated by the ICC Statute, seems to confirm that adjustments to that norm are indispensable. Transposing it in an unadulterated form to the regimes of other international judicial organs may be difficult if not impossible'.

¹⁶⁵ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682 ('Koskenniemi report'), 39; quoting Villiger 1985, 161. See also Pauwelyn 2003, 133, who holds that 'in practice most cases of apparent, as well as genuine, contradiction between treaty and custom must be decided in favour of the treaty norm'.

¹⁶⁶ Koskenniemi report (n 165), 44–46, particularly the cases mentioned in footnotes 93–96.

¹⁶⁷ Thirlway 1989, 144.

¹⁶⁸ Koskenniemi report (n 165), 46.

¹⁶⁹ Koskenniemi report (n 165), recommendations, 8.

international law, even when the former does not fully conform to the latter.¹⁷⁰ This should not be taken as to imply that such special norm-regimes, or the tribunals operating within them, are truly isolated 'self-contained' regimes. General international law may apply in the background, or where the primary rules of the specific treaty are silent.¹⁷¹

As a result, conflicts between a norm contained in the constituent instrument or other internal law of an ICT and a norm contained in general international law, may in principle be resolved in favour of the former. This is due to the fact that there is no *a priori* hierarchy between these sources of international law. In addition, the principles of precedence in international law further support this contention, since the internal law of international organizations can constitute *lex specialis*, which takes precedence over general international law, *lex generalis*. That is not to say that ICTs' legal instruments reflect major explicit deviations from human rights law. The point here is that, from a formalist perspective, they could.¹⁷² These considerations mitigate the normative force of IHRL with respect to international criminal procedure and should be considered when addressing the complex relationship between these two bodies of law.

2.5 Conclusion

From the perspective of international law, the ICTs are bound by general international human rights law, whether found in custom or general principles of law, insofar as the norms contained in these sources are relevant to their activities. The legal basis for this lies in the legal personality of the ICTs and their status as subjects of international law, or as organs of such subjects. This conclusion is supported by the subject thesis: the theory that all subjects of international law are bound by the general rules of international law. This theory has been widely accepted in international legal theory and practice. The functional application of the subject thesis makes that the ICTs are bound by those human rights norms

¹⁷⁰ Simma and Pulkowski 2006, 488.

¹⁷¹ Ibid., see also, Brownlie 2008, 688, who states that 'In principle the relations of the organization with other persons of international law will be governed by international law, including general principles of law, with *the norms of the constituent treaty predominating when relations with member states of the organizations are concerned*' [emphasis added, KZ].

¹⁷² Similarly Morgenstern 1986, 32: a key element of the internal law of most organizations is itself an international treaty, which may call for a different hierarchy of legal norms, and possibly a distinction between the priority given to *ius cogens* and to other rules of international law; see also, on the ICTY specifically: ICTY, Appeals Judgement, Declaration of Judge Robinson, *Prosecutor v. Furundžija* (IT-95-17/1-A), 21 July 2000, 279, where Judge Robinson opined that the Statutes of the ICTs may 'derogate from customary international law' and cited the example of Article 29 of the ICTY Statute, which obliges states to provide assistance to the Tribunal, as a primary example of such derogation.

contained in the sources of general international law that may apply to the exercise of their functions. However, this does not imply that determining the actual human rights obligations of an ICT is a straightforward exercise. This is complicated by many factors, including the indeterminacy of general international law and the inherent flexibility of norms of IHRL, as has been shown in the above. Concluding that the ICTs are bound by human rights norms based on their status as subjects of international law ‘should mark not the end of the debate on those rules’ imperative character but the beginning of a discussion on what rules are meant and on their exact content’.¹⁷³ In addition, it has been shown that, from a formalist perspective, the legal instruments of the ICTs could create ‘special’ human rights law that deviates from existing general IHRL.

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¹⁷³ Vasiliev 2014, 106.

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