FAIR TREATMENT IN TRANSNATIONAL AND INTERNATIONAL CRIMINAL LAW

International Developments and National Relevance

This essay examines fair treatment developments in transnational and international criminal law at the international level, with the aim of analysing how national actors should approach these developments. It is important for national actors to remain aware of these international developments as they may be legally binding, and even when not so, they may be of important comparative value for national actors. This essay proposes how national actors can decide which international rules are legally binding through a careful analysis of the rule's juridical status, and how the national implementation of these binding international rules can be facilitated through the application of a principled margin of discretion. It then goes on to highlight how international developments that are non-binding in nature can be a comparative resource for national actors, and why it is important for national actors to engage with these developments and participate in the making of international law.

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I. Introduction

1 In the past decade or so, the international community has assumed increasing responsibility over crimes commonly referred to as transnational and core international crimes. Examples of offences falling within the former category of transnational crimes are piracy, terrorism and drug trafficking, while those falling within the latter category of core international crimes include war crimes, crimes against humanity, genocide and aggression.[1] The international community's involvement

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1 These categories are, however, not watertight or separate. This essay uses the terms transnational and core international crimes to refer to the specific offences criminalised. It uses the terms transnational criminal law and international criminal law to refer to the corpus of laws targeting transnational crimes and core

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in transnational crimes has remained largely "horizontal" in nature, with such efforts remaining dependent on state consent and domestic enforcement.[2] In contrast, the international community has intervened in a more "vertical" manner when dealing with core international crimes, through the building of institutions and implementation of processes not necessarily dependent on the consent of states.[3] Despite the international community's different approach to transnational and core international crimes, it has devoted much attention in both these areas to fair treatment issues of late, though more progress has been achieved in the latter through the evolving rules and practice of internationalised criminal courts.

2 The international community's development of fair treatment rules in transnational and international criminal law is admirable and deserving of much praise. However, despite the work done by the international community, the main burden of suppressing these crimes will continue to fall on national actors in the foreseeable future.[4] Existing international arrangements are of limited capacity and are not able to deal with these crimes in a comprehensive or long-term manner. National actors of territorial and extra-territorial states will need to play wide-ranging and sustained roles in the prosecution and prevention of transnational and core international crimes. Indeed, it may be more effective for national actors of the territorial state, where the crime occurred, to address the crime concerned. Many of these crimes have local causes, and their consequences are most experienced at the domestic level. Apart from territorial states, extraterritorial states may have an international legal duty or right to exercise jurisdiction over the crime concerned. These include states fortunate enough to experience political and social stability, such as Singapore. For example, an extraterritorial state may be called upon to exercise its jurisdictional

international crimes respectively. These crimes may be investigated and prosecuted at the domestic or international levels, with the criminal justice actors involved choosing to apply domestic law, international law or a mix of both.

2 Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at pp 18–19.

3 Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at p 19. Note that some commentators merge transnational and core international crimes into a single category of international crimes.

4 This essay uses the term "national actors" to refer to national judiciaries, executive and legislatures. As further described below, international arrangements established to combat transnational crimes largely depend on individual states for enforcement. With respect to internationalised courts established to adjudicate core international crimes, all of them – apart from the International Criminal Court – are intended to be temporary in nature and are to cease operating upon completing their limited mandates. Morten Bergsmo, "Complementarity and the Challenges of Equality and Empowerment" in *FICHL Policy Brief Series No 8* (Torkel Opsahl Academic EPublisher, 2011) at p 1.

powers over one of these crimes as part of its treaty obligations.[5] Many of these crimes are also subject to universal jurisdiction.[6] In other words, any state otherwise unconnected to the crime has the right to exercise jurisdictional powers over the crime concerned. In these circumstances, when national actors take jurisdiction over a particular transnational or core international crime, it may be obligatory or advisable for them to act consistently with fair treatment rules developed by the international community. Furthermore, depending on its content, a particular fair treatment rule may be generally applicable to the criminal legal process.

3 This essay argues that it is important for national actors to remain aware of fair treatment developments at the international level, especially those rules that have become binding as a matter of international law, and that an exchange of ideas on fair treatment between national and international actors is valuable. It does not call on national actors to adopt each and every one of the fair treatment rules developed by the international community. This would not be legally appropriate or practically feasible. While these fair treatment rules may be desirable for various reasons, not all of them have attained the status of international law. Also, many of these rules are complex and detailed, particularly those developed by internationalised criminal courts. National actors may not have the resources and expertise required for their effective implementation, especially if they are working in post-conflict societies or societies at a lower stage of economic development. There is, however, a tendency to treat fair treatment rules developed by internationalised criminal courts as ultimate benchmarks of legitimacy.[7]

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5 Many of these crimes are the subject of treaties that aim at universal membership, and require States Parties to exercise jurisdictional powers in some situations even when the crime did not take place within the State's territory. These treaties include UN Counter-terrorism Treaties, the UN Convention against Transnational Organised Crime and its accompanying protocols.

6 As observed by Crawford, the exercise of universal jurisdiction over these crimes is premised on the "character of the crime concerned" instead of "the presence of some kind of nexus to the prescribing state". James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) at p 467. Crimes commonly accepted as being subject to universal jurisdiction include piracy, war crimes, genocide and crimes against humanity.

7 Many commentators have suggested that internationalised courts should aim to serve as models for national courts. "The International Criminal Procedure Expert Framework: Towards the Codification of General Rules and Principles", available at <http://www.legal-tools.org/doc/245a90/> at p 4 (accessed 1 October 2013). Note that in the final published version, the author notes in a footnote that (Göran Sluiter *et al*, "Introduction" in *International Criminal Procedure: Principles and Rules* (Göran Sluiter *et al* eds) (Oxford University Press, 2013) at p 9):

> It is worth noting that a fully-fledged inquiry into the dynamics of demand in national legal systems for guidance which could possibly be matched by a respective offer from international criminal tribunals is yet to be undertaken. The same holds for the question of the actual, as opposed to the possible or

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National efforts that do not wholly comply with these rules may be criticised by international lawyers and activists, well-meaning as the latter may be. Indeed, national actors do not only operate within the domestic sphere when dealing with such crimes, as they are members of a broader global community that has deemed these crimes to be worthy of international attention and concern.

4 How then should national actors relate to these international developments?[8] With this in mind, this essay critically examines the international community's development of fair treatment rules in transnational and international criminal law, with the aim of assessing how national actors should relate to them. It first provides an overview of how these rules have evolved at the international level. It then examines the legal impact of these rules on national actors. Not all of these fair treatment rules have achieved the status of international law; rather, each individual rule should be subject to careful legal analysis before concluding that it is international law and legally binding on individual states.[9] Even when a fair treatment rule is legally binding on states, national actors should have a limited but meaningful margin of discretion when interpreting the rule concerned. It should be noted that this essay will only attempt a general explanation of how such a margin of discretion could be structured. Its aim is to emphasise the value of such a margin and the need for its further development as a tool that facilitates and regulates the implementation of international law at the domestic level. It then proceeds to examine the national relevance of fair treatment rules that have not yet attained the status of international law. Though these rules may not be legally binding on individual states, they have significant comparative value and should be considered by national actors. More importantly, by engaging with these international developments, national actors will be able to contribute actively to the formation of international law.

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likely, effects of international criminal procedure on the national criminal process, be it in respect of core crime cases or generally.

8 The phrase "national actors" refers to national judiciaries, executive and legislatures. The author recognises that different considerations will apply to these national actors' consideration of international norms, but this essay will focus on commonalities.

9 This essay does not deal with the question of how international law is received into the domestic legal system of states, such as whether the latter subscribes to a monist or dualist system. Rather it focuses on the decision that comes before deciding the said norm must be "received" into the system as international law, specifically, whether it amounts to international law.

II. The international community's evolving approach to fair treatment in transnational and international criminal law

5 For the ordinary person, the criminal process is one that brings with it far-reaching and serious consequences. Subjecting a person's conduct to the criminal process indicates that a serious harm has been committed. A conviction usually results in the deprivation of an accused person's liberty, may sometimes involve the taking of life itself, and subjects the individual to significant social stigma. Governing authorities throw their weight behind the criminal process and conviction, guaranteeing its reliability. Therefore, to maintain the legitimacy of the criminal process in the public's eye, it is important to treat the accused person with the respect due to all persons, and to ensure, as far as possible, the accuracy and reliability of convictions. The guarantee of fair treatment during the criminal process plays a significant role in achieving these aims.

6 Recognising the potential impact of the criminal process on the individual concerned, international law seeks to protect the individual through its recognition of specific human rights. The Universal Declaration of Human Rights ("UDHR") affirms everyone's "right to life, liberty and security of person" and states that "no one shall be subjected to arbitrary arrest, detention or exile".[10] Individuals have the right to "a fair and public hearing by an independent and impartial tribunal".[11] Among other rights, an individual should have the guarantees "necessary for his defence" and the benefit of the presumption of innocence.[12] Apart from protecting the accused person, the international community has also recognised the need to protect victims of crimes, especially those of serious crimes. In 2005, the United Nations General Assembly adopted a list of principles and guidelines calling for victims of gross violations of human rights law and serious violations of international humanitarian law to be given "equal and effective access to justice", and provided with "adequate, effective, and prompt" reparations.[13]

7 It should be noted that the concept of fair treatment discussed in this essay overlaps with, but is not the same as, human rights. The concept of fair treatment is broader than that of human rights as it considers the interests of all individuals affected by the criminal legal

10 Universal Declaration of Human Rights ("UDHR") Arts 3 and 9. See also Arts 6.1 and 9.1 of the International Covenant on Civil and Political Rights ("ICCPR").

11 UDHR Art 10; ICCPR Art 14.1.

12 UDHR Art 11(1); ICCPR Arts 14.3 and 14.2.

13 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA Resolution 60/147, 16 December 2005) VII 11(a) and (b).

process, apart from those whose human rights are affected. Some fair treatment rules and practices may be based on human rights, but some may not. For example, treating the Prosecution fairly during the trial process cannot be said to be based on any human right of the Prosecution.[14] Such a fair treatment approach which considers the interests of diverse actors may result in the overlooking or undervaluing of an accused person's rights. This is not necessarily so. When one is considering the interests and rights of multiple actors impacted by the criminal legal process, rights should be qualitatively distinguished from interests. If this is kept in mind, fair treatment can serve as a useful conceptual framework because it allows us to adopt a broader perspective when assessing criminal justice processes.

8 Employing the broader concept of fair treatment is particularly useful when studying recent developments in transnational and international criminal law. Domestic crimes are typically presented as pitting the individual against the State, though it should be noted that this depiction itself fails to capture all the actors and interests impacted by the process. In contrast, due to the cross-border nature and magnitude of transnational and core international crimes, numerous actors and entities may be seriously affected by the crimes concerned. A large number of victims may have suffered irreparable harm, entire societies may have had their way of life permanently changed, and neighbouring states may be affected by spill-over violence and refugee inflows. Due to their grave and widespread nature, these crimes may pose a threat to international peace and security. They engage the moral condemnation of the international community as a whole. In other words, diverse national and international actors may be impacted by these crimes and have legitimate interests in their suppression and prosecution. A fair treatment conceptual framework allows us to examine and evaluate these different rights and interests.

9 This section maps the international community's evolving approach to fair treatment in transnational and international criminal law, which is particularly interesting from an international law enforcement perspective. This is because the international community's engagement in these two areas has progressed rapidly beyond norm formation to norm implementation. Since the mid-1990s, international actors have established a variety of internationalised criminal courts to deal with core international crimes.[15] These courts have had to deal with a myriad of fair treatment issues in the course of their daily work. Also,

14 Yvonne McDermott, "Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law" <http://www.academia.edu/1091706/Rights_in_Reverse_A_Critical_Analysis_of_Fair_Trial_Rights_Under_International_Criminal_Law> (accessed 1 October 2013) at p 2.

15 See n 27 below.

though the international community's response to transnational crimes continues to be based on national enforcement, it has put in place interstate arrangements in select cases to facilitate co-operation or enforcement. In undertaking such implementation, the international actors involved have had to formulate fair treatment rules and practices in a more detailed manner and in response to concrete problems. Nevertheless, all of this remains a work in progress, and many commentators argue that much more should be done to secure the rights of those affected.[16]

A. Transnational criminal law: Addressing emerging fair treatment concerns

10 Much of the international community's work in the area of transnational crimes has focused on the conclusion of criminal law treaties. These treaties set out the definitions of offences and oblige States Parties to criminalise them. They require States Parties to exercise jurisdiction over these offences in certain circumstances.[17] It has also become customary for these treaties to include provisions that give some protection to the suspect or accused person. However, such provisions are usually vague or not mandatory. For example, it is common for contemporary treaties to have a non-discrimination clause which states that the treaty is not intended to mandate state co-operation in cases where the action requested is motivated by discrimination on certain grounds.[18] It should be noted that this non-discrimination clause is not phrased as an absolute prohibition on co-operation. As such, such protective treaty provisions are not sufficiently detailed to guide or regulate state action, and much is left to the national laws and policies of States Parties.[19]

16 Margueritte notes that the internationalised criminal courts have been able to "pick and choose" which provisions of human rights law they conform to, and it therefore "remains difficult to assert that the international tribunals afford the highest standard of protection for the accused". Thomas Margueritte, "International Criminal Law and Human Rights" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013) at p 441.

17 The treaties also provide for varying degrees of jurisdictional obligations. They set out mandatory grounds of jurisdiction as well as permissible grounds of jurisdiction.

18 International Convention for the Suppression of the Financing of Terrorism (9 December 1999), UN Doc A/RES/54/109, Annex, Art 15; UN Convention against Transnational Organized Crime (GA Resolution 55/25, 15 November 2000) Art 16.14.

19 Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at p 22. There have been progressive, if gradual, developments in recognising the protection of rights and restricting state discretion in these treaties. See Cheah Wui Ling, "Maritime Crimes and the Problem of Cross-border Enforcement: Making the Most of Existing Multilateral Instruments" in *Piracy and International*

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11 Apart from the conclusion of criminal law treaties, the international community has put in place a number of formal and semi-formal arrangements to deal with certain transnational crimes. These are far from the international institutions and courts established to deal with core international crimes; rather, international arrangements targeting transnational crimes primarily aim at facilitating interstate co-operation and domestic enforcement. These arrangements nevertheless impact individuals and organisations, and have been criticised for failing to treat them fairly. Many of the international actors involved have taken steps to address such criticism. This is particularly so when the international arrangement concerned is established under the auspices of an international organisation which is bound to comply with international law, including human rights law, and may be held responsible for any violation of its international legal obligations.

12 One such arrangement established by the international community is the listing mechanism established by the United Nations ("UN") Security Council in response to Al-Qaeda bombings. This mechanism lists individuals and entities subject to UN Security Council sanctions.[20] States are required, in their role as UN members, to enforce sanctions against listed individuals and entities. The UN Security Council, when it first established this listing mechanism, did not have a procedure by which those listed could challenge their listing and apply for their delisting. However, in response to criticism and court cases initiated at the domestic and regional level, the UN Security Council eventually put into place such a procedure and appointed an independent ombudsman.[21] This has resulted in a significant number of individuals and entities being eventually removed from the lists.[22]

Maritime Crimes in ASEAN (Robert Beckman & J Ashley Roach eds) (Edward Elgar Publishing, 2012).

20 Pursuant to Security Council Resolution 1267, the Security Council established the 1267 Committee charged with the listing and application of sanctions, such as travel bans and the freezing of assets, to entities and individuals. These are nominated by UN Member States. S/Res/1267 (1999).

21 For information on the 1267 Committee's current delisting procedure and ombudsman institution, see <http://www.un.org/sc/committees/1267/delisting.shtml> (accessed 1 October 2013). For an account of the development of human rights debates and litigation brought regarding the UN Security Council's listing procedures, see Rosemary Foot, "The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas" (2007) 29 *Human Rights Quarterly* 489.

22 For a summary of delisting requests, see <http://www.un.org/sc/committees/1267/delisting.shtml> (accessed 1 October 2013). Note that such data protection and access concerns also broadly apply to international organisations involved in the processing of police data for crimes, such as Interpol and Europol.

B. Prosecuting core international crimes: The elaboration of a sui generis *procedural justice*

13 Compared with its approach to transnational crimes, the international community's response to core international crimes has been more formal and centralised in nature, characterised by the establishment of internationalised criminal courts or courts with varying international elements.[23] Earlier internationalised criminal courts had rudimentary and flexible procedural rules. For example, the charters and rules of procedure of the post-World War II international military tribunals established in Nuremberg and Tokyo only had several provisions dedicated to procedure and due process, though its substantive provisions were equally brief.[24] In contrast, Art 67 of the Statute of the International Criminal Court ("ICC") sets out a list of the accused person's rights.[25] The ICC and its Assembly of States Parties have adopted complex procedural rules, many of which deal with fair treatment issues.[26] At times, today's internationalised courts appear to have bent over backwards to accommodate the demands of the accused person, resulting in lengthy and costly trials.[27] Agreeing on the

23 This essay uses the term "internationalised criminal courts" to refer to courts that are international or have certain international elements in terms of the law applied and the staff employed. These are contrasted with domestic courts that are empowered under domestic law to try core international crimes, which would include the International Crimes Tribunal of Bangladesh and courts exercising universal jurisdiction under their respective domestic laws. Internationalised criminal courts that may be said to be purely international include the post-World War II Nuremberg and Tokyo Tribunals as well as the *ad hoc* international criminal tribunals of Yugoslavia and Rwanda and the permanent International Criminal Court. Some commentators have used the term "internationalised tribunals" to refer to "hybrid tribunals", which are courts having a mix of international and domestic elements. These would include the Special Panels for Serious Crimes in East Timor, Regulation 64 Panels in the courts of Kosovo, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the War Crimes Chamber of Bosnia and Herzegovina, and the Supreme Iraqi Tribunal. For an overview of these hybrid tribunals, see Fidelma Donlon, "Hybrid Tribunals" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013).

24 Charter of the International Military Tribunal, Rules of Procedure of International Military Tribunal, Charter of the International Military Tribunal for the Far East and Rules of Procedure of the International Military Tribunal for the Far East.

25 Rome Statute of the International Criminal Court Art 67. Schabas argues that Art 67 should be accorded a "hierarchically superior status" within the Statute, in the event that it conflicts with other provisions. William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) at p 796.

26 Rules of Procedure and Evidence, adopted by the Assembly of States Parties, ICC-ASP/1/3; Regulations of the Court, adopted by the judges of the Court, ICC-BD/01-0311.

27 The crimes addressed by these internationalised criminal courts usually result from political conflict and involve high-ranking leaders. Their highly politicised nature

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appropriate trial procedure at the international level has often been difficult due to the differing, and often conflicting, positions taken by common law and civil law traditions.[28] A resulting irony is that though these procedural rules aim to ensure, among others, the fair treatment of the accused person, they have also been criticised for contributing to lengthy trials and prolonged pre-trial detentions that compromise on the accused person's right to a speedy trial.[29]

14 The fair treatment rules and practices employed by these internationalised criminal courts continue to remain in a state of flux. Many were developed in response to actual problems encountered during the criminal legal process, such as the need to ensure a level playing field between the Prosecution and Defence. One issue that attracted judicial scrutiny was the ICC prosecutor's practice of using intermediaries located in the field to overcome problems of gathering evidence in unfamiliar territory. In the ICC's first trial, *Lubanga*, the Trial Chamber stayed the trial due to the Prosecution's unwillingness to reveal the identity of an intermediary.[30] However, such judicial interventions do not always favour the accused person. In the *Katanga* case, the ICC Trial Chamber gave notice to the parties that it was considering the significant amendment of the mode of liability indicated in the Prosecution's charge after the trial had closed.[31] As the mode of liability addresses the question of how the accused was involved in the crime concerned, and as the accused person would have tailored his case and defence to respond to the original mode of liability in the Prosecution's charge, it would disadvantage the accused person to have it changed after the trial had closed. The dissenting judge noted that amending the charge at this stage would compromise the accused

makes fair treatment of the accused all the more important so as to avoid criticisms of discriminatory or selective justice. The trials do seem to be excessively lengthy. The accused person, in the ICC's first trial, spent six years in custody. The judgment is over 600 pages long.

28 Due to predominant Anglo-American influence in post-World War II trials as well as the *ad hoc* international criminal tribunals for Yugoslavia and Rwanda, these trials were conducted largely according to an adversarial and common law model. The Rome Statute of the International Criminal Court draws elements from both traditions.

29 Thomas Margueritte, "International Criminal Law and Human Rights" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013) at pp 441–443.

30 Christian M De Vos, "'Someone Who Comes Between One Person and Another': *Lubanga*, Local Cooperation and the Right to a Fair Trial" (2011) 23 Mlb J Int'l L 217 at 224–228.

31 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Trial Chamber II, ICC-01/04-01/07, 21 November 2012, at para 12.

person's rights. The legality of the Trial Chamber's decision has been affirmed by the Appeals Chamber.[32]

15 Apart from considering the rights of the accused person, internationalised criminal courts have addressed the rights and interests of other actors involved in the criminal legal process. For example, they have placed much emphasis on securing the protection of vulnerable witnesses and victims. Witness protection is particularly important as the accused persons in these trials may continue to wield significant political power in societies where the witnesses reside, and may be in the position to threaten or harm them. The ICC Statute recognises a range of protective measures for victims and witnesses.[33] Also, apart from having victims serve as witnesses, some of these courts recognise additional rights for victims. The Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the ICC recognise the right of victims to be informed of developments, their right to participate in trial proceedings, and their right to apply for reparations. The scope of these rights has evolved over time. For example, the question of how much victim participation should be permitted during the criminal legal process has been subject to much adjustment before the ECCC and the ICC.[34] The ECCC had initially adopted a generous approach towards victim participation, permitting civil parties to directly participate in trial proceedings.[35] As the ECCC encountered problematic instances of civil party trial participation and an increasing number of civil parties, it amended its Internal Rules in favour of a more restrictive approach: the participation and views of civil parties from the trial stage onwards is now to be co-ordinated and represented by Civil Party Lead

32 For a summary of trial judge Christine van den Wyngaert's dissent in English, see *The Prosecutor v Germain Katanga*, Judgment on the appeal of Mr German Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", Appeals Chamber, ICC-01/04-01/07 OA 13, 27 March 2013, at para 65.

33 Rome Statute of the International Criminal Court Art 68.

34 At the ICC, as long as victims have their "personal interests" affected, they are allowed to participate in proceedings before the ICC. Based on the rules of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), a victim may only participate in the trials as a civil party if he or she has suffered a "physical, material or psychological" injury which is "the direct consequence of the offence, personal and have actually come into being". Carla Ferstman, "International Criminal Law and Victims' Rights" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013) at p 410.

35 Carla Ferstman, "International Criminal Law and Victims' Rights" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013) at p 412. Brianne McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles" (2009) 22 *Leiden Journal of International Law* 127 at 141–143.

Co-Lawyers.[36] Another interesting development in this area is the judicial recognition of prosecutorial "rights" or interests which may conflict with that of the accused person.[37]

III. Fair treatment rules and practices of internationalised criminal courts: Their juridical status and domestic implementation

16 While the international community's consideration of fair treatment issues in the area of transnational crimes remains at a relatively embryonic stage, the work of internationalised criminal courts has led to the rapid development of fair treatment rules in the area of core international crimes. The rest of this essay will therefore focus on the latter. Since the 1990s, nine internationalised criminal courts have been established with the involvement of the international community, each with its own set of fair treatment guarantees. There has been some convergence in these guarantees, and academic efforts have been made to extrapolate common principles and rules.[38] However, as the prosecution of core international crimes becomes more established and accepted at the national level, as reflected in the adoption of domestic laws criminalising such crimes and the promotion of domestic prosecutions, the question of how national actors should relate to the experience and knowledge of internationalised criminal courts becomes increasingly relevant.

17 At first sight, the international community's rapid development of fair treatment rules seems to sit uncomfortably with the fact that national actors are expected to be mainly responsible for the adjudication of core international crimes. The ICC is intended to complement national criminal jurisdictions, and a case will be deemed inadmissible, *inter alia*, if it is being investigated or prosecuted by a State

36 For a description of problematic civil party participation, see Brianne McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles" (2009) 22 *Leiden Journal of International Law* 127 at 143. Rule 12 *ter*, ECCC Internal Rules, Rev 8, 3 August 2011.

37 For example, the International Criminal Tribunal for Rwanda in *Prosecutor v Karemera et al*, Decision on Prosecution's Request on Severance of Andre Rwamakuba and Amendments to the Indictment, ICTR Trial Chamber III, ICTR-98-44-PT, 7 December 2004, at para 26. For a critique of this, see Yvonne McDermott, "Rights in Reverse" <http://www.academia.edu/1091706/Rights_in_Reverse_A_Critical_Analysis_of_Fair_Trial_Rights_Under_International_Criminal_Law> (accessed 1 October 2013).

38 For example, see the work done by the International Criminal Procedure Expert Framework. "The International Criminal Procedure Expert Framework: Towards the Codification of General Rules and Principles", available at <http://www.legal-tools.org/doc/245a90/> at p 4 (accessed 1 October 2013).

unless the State is determined to be "unwilling or unable to genuinely carry out the investigation or prosecution".[39] On the one hand, based on the arguments of some international activists and lawyers, national actors should meticulously adopt the rules and practices of internationalised criminal courts.[40] On the other hand, national actors may respond by arguing that the "domestic" nature of the investigations and trials exempts them from following any of the rules and practices of internationalised criminal courts.[41] These two extreme positions need to be avoided. In this section, this essay explains why distinguishing between the legal and non-legal can avoid such extreme positions, and why national actors should not hesitate to consider the fair treatment rules and practices developed by the international community.

18 Not every fair treatment rule adopted by the international community is legally binding on national actors, and this distinction between law and non-law continues to be an important one in international law, though its foundations and boundaries continue to be scrutinised and challenged.[42] As observed by Shelton, state actors consciously choose between binding and non-binding normative forms when designing their obligations.[43] These actors need to know which international rules should be received and implemented at the national

39 Preamble and Art 17.1(a) of the Rome Statute of the International Criminal Court.

40 For example, see the list of changes proposed by Human Rights Watch to the Bangladesh government regarding the Bangladesh International Crimes Tribunal. While some of the observations made are relevant and important, it is not clearly explained how some of the suggested changes, such as the right to appeal an interlocutory order, have achieved the status of international law, Human Rights Watch (18 May 2011) <http://www.hrw.org/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act> (accessed 1 October 2013).

41 There have been numerous criticisms made by international lawyers and activists about the prosecution of core international crimes before the Bangladesh International Crimes Tribunal. D'Costa insightfully observes that some of this has been due to "highly organised lobbying from the Defence strategists" but also "a lack of transparency" on the part of the Government regarding trial proceedings. Further, the Bangladesh government has also given "signals" that have been taken to communicate "this is our domestic process, stay out of our business". Bina D'Costa, "Of Trials and Errors: International *vs* National – Challenges and Opportunities" *bdnews24.com* (17 February 2013) <http://opinion.bdnews24.com/2013/02/17/of-trials-and-errors-international-vs-national-challenges-and-opportunities/> (accessed 1 October 2013).

42 See, for example, discussions about the rationale and legitimacy of the sources of international law by Besson and Lefkowitz: Samantha Besson, "Theorizing the Sources of International Law" in *The Philosophy of International Law* (Samantha Besson & John Tasioulas eds) (Oxford University Press, 2010) at p 163 and David Lefkowitz, "The Sources of International Law: Some Philosophical Reflections" in *The Philosophy of International Law* (Samantha Besson & John Tasioulas eds) (Oxford University Press, 2010) at p 187.

43 Dinah Shelton, "International Law and 'Relative Normativity'" in *International Law* (Malcolm Evans ed) (Oxford University Press, 2003) p 145, at p 168.

level, so as to comply with their international legal obligations. The rules of an internationalised criminal court may bind the court concerned and other actors subject to the court's legal regime, but these rules do not necessarily apply to other international legal actors unless they have attained the status of general international law. This is even when the said rules are arguably more progressive and attractive. Instead, careful legal analysis is required to identify rules that have attained the status of international law. This is difficult because, unlike domestic legal systems, the international legal system does not have a designated and centralised law-making institution.[44]

19 It is therefore difficult to identify what is law and non-law at the international level. The classical approach to this question is to refer to Art 38 of the Statute of the International Court of Justice ("ICJ"), which lists what the ICJ should apply when deciding disputes submitted to it.[45] Strictly speaking, Art 38 only binds the ICJ, but it has come to be accepted as a general statement on the sources of international law.[46] Still, as further explained below, the rules and practices of internationalised criminal courts do not fit comfortably into any one of

44 Shaw observes that there is "no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law": Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 70. Besson observes that unlike national legal orders that are "centralized and unitary with a hierarchy among sources and even among various areas of national law", the international legal order is "vertically pluralistic in the absence of a hierarchy among legal sources" and "horizontally pluralistic or fragmented in many parallel legal regimes": Samantha Besson, "Theorizing the Sources of International Law" in *The Philosophy of International Law* (Samantha Besson & John Tasioulas eds) (Oxford University Press, 2010) at p 164.

45 Crawford astutely points out that though Art 38 of the Statute of the International Court of Justice is commonly referred to as listing the sources of international law, it does not even use the term "sources" and "cannot be regarded as a straightforward enumeration". He notes that though Art 38 has been criticised as being out of date and restrictive, it is "in practice" "malleable enough" to serve its purpose. James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) at pp 22 and 23.

46 Article 38 of the Statute of the International Court of Justice sets out the following categories: "international conventions"; "international custom"; "general principles of law recognized by civilized nations", "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations" as subsidiary means. The sources listed in Art 38 have been described as "now largely obsolete but still venerated". Samantha Besson, "Theorizing the Sources of International Law" in *The Philosophy of International Law* (Samantha Besson & John Tasioulas eds) (Oxford University Press, 2010) at p 164. Thirlway observes that the Art 38 approach "presents some anomalies and difficulties", but notes that "it has so far proved the most workable method of analysing the way in which rules and principles develop that States in practice accept as governing their actions". Hugh Thirlway, "The Sources of International Law" in *International Law* (Malcolm Evans ed) (Oxford University Press, 2003) p 117, at p 120.

Art 38's categories.[47] This is because Art 38 was drafted at a time when international organisations, such as internationalised criminal courts, were far less active than they are today.[48]

A. Ascertaining international norms that bind

20 There are a number of ways by which the rules and practices of internationalised criminal courts could contribute to the formation of international law. A completely new norm could be introduced into international law based on the rule or practice adopted by an internationalised criminal court. In addition, a rule or practice of an internationalised criminal court could elaborate on existing international legal rules. For example, various internationalised criminal courts have affirmed that the principle of "equality of arms" is part of, and guaranteed by, the "wider concept of a fair trial", though this principle is arguably more applicable for trials applying an adversarial approach.[49] Internationalised criminal courts may have the occasion to address scenarios less likely to arise in a domestic setting or in ordinary criminal cases and are therefore able to refine their findings on the question, such as when the right to self-representation surfaced repeatedly before the International Criminal Tribunal for the Former Yugoslavia ("ICTY") because several defendants refused legal counsel.[50]

21 However, to qualify as international law, the relevant rule or practice must attain the status of an international convention, international custom, or a general principle of law recognised by civilised nations, as listed in Art 38 of the ICJ Statute. Article 38.1.a of the ICJ Statute expressly recognises the category of "international

47 Weil observes how the problem of identifying normative force is particularly problematic when dealing with resolutions of international organisations due to the erosion of the distinction between decisions and recommendations. Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77(3) AJIL 413 at 416.

48 Besson observes that there has been an increase in the number of international legal subjects over the years, leading to an increased number of potential law-makers and a shift in favour of international organisations as law-makers over states. Samantha Besson, "Theorizing the Sources of International Law" in *The Philosophy of International Law* (Samantha Besson & John Tasioulas eds) (Oxford University Press, 2010) at p 164. See also José E Alvarez, "Governing the Word: International Organizations as Lawmakers" (2007–2008) 31(3) *Suffolk Transnational Law Review* 591 at 593.

49 *Prosecutor v Dario Kordic and Mario Cerkez*, Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief, ICTY Appeals Chamber, IT-95-14/2-A, at para 5.

50 For an account of these cases and the different judgments arrived at by the ICTY Trial and Appeals Chambers, see William Schabas, "Article 67 Rights of the Accused" in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed) (CH Beck, Hart, Nomos, 2008) at pp 1260–1262.

conventions". The constituent documents of international organisations would fall within this category of treaties. An example would be the Statute of the ICC. Such treaties only bind States Parties that have ratified them.[51] However, a particular norm expressed in the treaty may have attained the status of "international custom" or customary international law, a category listed by Art 38.1.b of the ICJ Statute.[52] If a norm has achieved the status of customary international law, it binds all states, regardless of whether the State is a State Party to the treaty concerned.

22 In order for a norm to attain customary international law status, it must be shown that its observance is reflected in state practice and *opino juris*.[53] Such state practice should be consistent and widespread, though it does not have to be rigorously uniform in nature.[54] International courts seeking to ascertain a norm's customary status have referred to a wide range of material as evidence of state practice, including treaty provisions and the "practice of international organizations".[55] Such "practice of international organizations" would include the rules and practices of internationalised criminal courts. In addition, for a norm to qualify as customary international law, the relevant state practice must be accompanied by *opinio juris*, namely, a belief that compliance with the norm concerned is legally required.[56] Compliance should not be motivated by non-legal reasons, such as politics or convenience. The determination of such subjective belief on the part of states may seem difficult, if not impossible. However, in practice, courts have been relatively flexible in their search for *opinio juris*, referring to varied evidential materials, including the resolutions and decisions of international organisations.[57] Such resolutions and decisions would include that of internationalised criminal courts and their related organs.

23 In addition to Art 38's reference to treaties and custom, Art 38.1.d of the ICJ Statute recognises "judicial decisions and the

51 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 95.

52 On the different ways treaties and customary international law relate to each other, see Hugh Thirlway, "The Sources of International Law" in *International Law* (Malcolm Evans ed) (Oxford University Press, 2003) p 117 at pp 134–135.

53 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 74.

54 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at pp 77–78.

55 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 84.

56 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 74.

57 See, *eg*, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ, Judgment, 27 June 1986, at paras 188 and 189.

teachings of the most highly qualified publicists" as a "subsidiary means for the determination of rules of law".[58] This category of "judicial decisions" refers to the decisions of international courts, arbitration tribunals, as well as national courts. Though judicial decisions are to function not as independent sources of international law but as subsidiary means of determining its existence, they nevertheless exert considerable influence on the content of international law. International judicial bodies often refer to each other's decisions when determining the content of international law. For example, in *MC v Bulgaria*, the European Court of Human Rights ("ECHR") referred to the ICTY's jurisprudence on the definition of rape.[59] Though the ECHR noted that the rape addressed by the ICTY was perpetrated in the specific context of armed conflict, it considered ICTY cases on this issue as being indicative of a "universal trend".[60] Though this case dealt with the substantive definition of a crime, in a similar manner, the judicial decisions of internationalised criminal courts on fair treatment may exert an influence beyond the individual case.[61]

B. Bridging the international and the national: The potential and limits of a margin of discretion

24 Even when a fair treatment rule is determined to have attained the status of international law, do national authorities have any discretion in implementing the rule concerned? Recognising such a discretion gives national actors some flexibility in implementing their international legal obligations, permitting them to consider available resources, competing priorities, and local needs or expectations. However, allowing too much or an unlimited discretion may lead to a relativism that dilutes the authority and integrity of the international legal norm concerned. The consequences of this is particularly serious when dealing with the fair treatment of the accused person in criminal proceedings, as the individual has much to lose and crime-control politics may assert considerable pressure on criminal justice agencies to secure a conviction. The vulnerable position of the accused person as well as the serious consequences he or she faces if convicted requires the criminal legal process to adhere to rigorous fair treatment rules.

58 Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 111.

59 *Case of MC v Bulgaria*, Judgment, ECHR, 4 December 2003, at paras 102–107 and 163.

60 *Case of MC v Bulgaria*, Judgment, ECHR, 4 December 2003, at para 163.

61 Nevertheless, there are international judicial bodies that have chosen to refer to but depart from decisions issued by other courts. The ICTY, in *Prosecutor v Dusko Tadic*, Judgment, ICTY, IT-94-1-A, at para 115, considered but chose not to follow a particular holding of the ICJ in *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ, Judgment, 27 June 1986.

This aims to prevent wrongful convictions and treats the accused with respect.

25 States should be permitted a margin of discretion when implementing their international legal obligations, but this margin should be limited and its application should be based on clear principles. This essay does not aim to set out comprehensively the scope or contents of this margin, but limits itself to underscoring its value and the need for its content to be more deeply theorised and articulated. Thus far, this idea of a margin of discretion is most commonly associated with the margin of appreciation doctrine developed by the ECHR.[62] Commentators have discussed the value of applying the concept of a margin of discretion to other areas of international law.[63] Indeed, many other international judicial bodies have employed similar rationales or methodologies, even if these are not expressly described as applications of a margin of discretion.[64] Also, though this concept of a margin of discretion has been primarily applied by international judicial bodies sitting in judgment over the decisions of national actors, it can serve as a guide for national actors when implementing their international legal obligations at the national level.[65]

26 Permitting national authorities such discretion in matters impacting the rights of the accused may appear to be fundamentally inconsistent with the universal claim of human rights law.[66] Indeed, this tension between the pursuit of universal values and their contextual implementation has been much discussed in human rights law, resulting in debates over the universalism or relativism of human rights. Universalism, however, does not require complete uniformity.[67] At its most basic and fundamental, the claim of human rights to universality

62 Commentators have been critical of the ECHR's application of this doctrine, arguing among others that it is insufficiently coherent and does not give sufficient protection to universal values. Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1999) 31 *International Law and Politics* 843.

63 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907.

64 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907 at 929–931.

65 The Singapore High Court has recognised the importance of context in its decisions, even referring to "margins of appreciation" though this was applied in a manner different from that suggested here. In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [132], Justice Rajah noted that "standards" of public conduct and "margins of appreciation for public conduct" differ from country to country. Standards applying elsewhere cannot be automatically transplanted. See the discussion of this case in Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at p 617.

66 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907 at 923.

67 James A Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era" (2005) 54(2) ICLQ 459 at 469.

is an application of the "principle of non-exclusivity" which insists that the human rights regime applies to all individuals.[68] The 1993 Vienna Declaration and Programme of Action not only recognises that all human rights are "universal, indivisible and interdependent and interrelated", but also that "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".[69] The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights ("ICCPR") by States Parties, has recognised the relevance of local context when interpreting rights restrictions and protective measures.[70]

27 Though such references to "context" has been frequently made to justify differences in interpretation, we need a clearer framework that can guide decision-makers as well as hold them accountable. The ECHR itself has been criticised for its unclear and inconsistent theorisation of the margin of appreciation.[71] To avoid any descent into relativism and to provide national actors with principled guidance, the rationale underlying such a margin of discretion needs to be identified, and sufficiently rigorous guidelines put in place to clearly delimit the scope of this margin. For example, an important limit that has been suggested is that the application of such a margin of discretion be rule-based rather than discretionary.[72] This means that a margin of discretion is only permitted when the international legal rule itself requires discretion to be exercised. Such rules have been described as inherently ambiguous by nature, and may take three normative forms: standard-type norms, discretionary norms, and result-oriented norms.[73] These are to be distinguished from international legal rules that have crystallised

68 Michael Freeman, "Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values'" (1998) 16(1) *Netherlands Quarterly of Human Rights* 25 at 38.

69 I.5, 1993 Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993.

70 In *Shirin Aumeeruddy-Cziffra v Mauritius* Communication No 35/1978, UN Doc CCPR/C/OP/1 at 67 (1984), the Human Rights Committee ("HRC"), in interpreting a state's obligations under Art 23(1) of the ICCPR to protect the "family", recognised that "the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions". In *Leo Hertzberg et al v Finland* Communication No 61/1979, UN Doc CCPR/C/OP/1 at 124 (1985), which involved the restriction of the right to freedom of expression on the basis of "public morals" as permitted by Art 19(b) of the ICCPR, the HRC recognised that because public morals "differ widely", "a certain margin of discretion must be accorded to the responsible national authorities".

71 George Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) OJLS 705.

72 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907 at 914–917.

73 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907 at 914–917.

to a sufficiently certain level and therefore permit no margin of discretion. That said, an international legal rule that was once inherently ambiguous may evolve over time and assume a more certain form that forecloses the exercise of discretion.[74] More discussion by national and international actors is needed on this question, which may lead to the margin of discretion's crystallisation at international law as a conceptual tool that facilitates the domestic implementation of international law and mediates between international and domestic legal systems.

IV. Non-binding international developments as a comparative resource

28 The aforementioned divide between law and non-law may not be clear or uncontested, but it is one that is increasingly important given the proliferation of norms at the international level and international law's claim to legitimacy. It has become easier to identify and select international norms that support one's argument. Presenting the same argument in international legal terms often enhances its appeal and apparent strength. By advancing their criticism of national actors in international legal terms, well-meaning lawyers and activists have the power to significantly undermine or delegitimise national efforts. This does not mean that international legal arguments cannot or should never play a role in improving national efforts. What should be avoided are indiscriminate or overly broad arguments which fail to pay attention to the distinction between the legal and non-legal. To constructively engage national actors, it is necessary to have a starting point that clearly and transparently distinguishes between what is legally required and what is merely desirable.

29 Nevertheless, national actors should be open to considering non-binding international norms as these can be of important comparative value. This would be similar to how many national courts consider foreign judgments without considering the latter as binding in nature.[75] National courts could take such a comparative law approach towards international normative developments. National policy-makers and legislatures could consider these developments as they offer different perspectives or solutions to a particular issue. In doing so, national actors participate in the making of international law by contributing to state practice and *opinion juris*.[76] And through such

74 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 EJIL 907 at 923.

75 Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Int'L & Pol 501.

76 Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) Tel Aviv University Law Faculty

(*cont'd on the next page*)

participation, national actors may influence the reshaping, delimitation, or crystallisation of these international norms. This section examines different types of non-binding fair treatment rules, and highlights how they may be of comparative value to national actors.

30 A proliferation of norms at the international level is not unique to the area of international criminal law, and has led to the coining of the phrase "soft law". Though there has been much academic work on the phenomenon of "soft law", there appears to be no single authoritative definition of this phenomenon, and the term "soft law" is generally taken to refer to "principles, norms, standards or other statements of expected behavior" in any international instrument apart from a treaty.[77] Another interesting category of norms is *lex ferenda*, as opposed to *lex lata*.[78] Simply put, the former refers to norms that should be law for particular reasons, while the latter simply refers to existing law. Thus, *lex ferenda* includes a positive evaluative element and does not include all norms that are not law. It only refers to norms deemed desirable as law.[79] An example of this would be the International Law Commission's progressive development of law through codification. A norm may be said to be *lex ferenda* because it is ethically or morally superior to existing law.[80] Because of the morally charged nature of core international crimes, it is common for commentators and policy-makers alike to make references to *lex ferenda* and how the law should be further developed. Nevertheless, *lex lata* needs to be distinguished from *lex ferenda* to facilitate transparent and rational discussion.

31 "Soft law" or *lex ferenda* should not be ignored by national actors.[81] Many national courts, such as the Singapore courts in recent judgments, consider foreign jurisprudence without considering such

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Papers, Paper 59 at pp 12–13. Benvenisti notes how such participation would be most effective with national actors acting "in concert" with each other.

77 Dinah Shelton, "International Law and 'Relative Normativity'" in *International Law* (Malcolm Evans ed) (Oxford University Press, 2003) p 145, at p 166.

78 Hugh Thirlway, "Reflections on *lex ferenda*" (2001) 32 *Netherlands Yearbook of International Law* 3.

79 Hugh Thirlway, "Reflections on *lex ferenda*" (2001) 32 *Netherlands Yearbook of International Law* 3 at 7–8.

80 Hugh Thirlway, "Reflections on *lex ferenda*" (2001) 32 *Netherlands Yearbook of International Law* 3 at 10.

81 Shelton notes that non-binding instruments play a role in developing international law as they may "(1) precede and help form international custom and treaty law; (2) fill in gaps in international legal instruments and further define existing custom; (3) form part of the subsequent State practice that can be distilled to interpret treaties; and (4) substitute for legal obligation when on-going relations make formal treaties too costly and time- consuming or otherwise unnecessary." Dinah Shelton, "International Law and 'Relative Normativity'" in *International Law* (Malcolm Evans ed) (Oxford University Press, 2003) at p 169.

jurisprudence as binding in nature.[82] A similar approach could be taken towards non-binding international norms on fair treatment in transnational and international criminal law. Among others, reference to non-binding international normative developments could shed light on how similar concepts have been interpreted.[83] This is especially so if the moral or ethical concerns driving the *lex ferenda* concerned are explicitly stated or ascertained. If these moral and ethical reasons can be identified, they may be independently evaluated by national actors who can then decide whether they should be incorporated or received into domestic law. Alternatively, these non-binding norms may be viewed as being representative of the international community's coalescing opinion on a particular issue. International developments could also demonstrate the "empirical consequences" of adopting a particular approach to a shared problem.[84] The fair treatment rules and practices developed by internationalised criminal courts may provide national actors with innovative ideas and solutions. For example, the rules and practices of internationalised criminal courts regarding witness protection may give national actors much insight into how to manage cases with large numbers of vulnerable witnesses.[85] The ICC and ECCC's experiences with victim participation demonstrate the potential and limits of victim trial participation.[86] Clear rules explaining when final judgments may be revised, such as when new and previously unavailable evidence has been discovered, highlight how the balance between ensuring finality and avoiding miscarriages of justice may be struck.[87]

82 For example, see the Court of Appeal's consideration of case law from different jurisdictions on the question of qualified privilege in relation to defamation. *Review Publishing v Lee Hsien Loong* [2010] 1 SLR 52. For an overview of the Singapore courts approach to foreign jurisprudence, see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at pp 82–93.

83 Harold Hongju Koh, "International Law as Part of Our Law" (2004) 98 Am J Int'l L 43 at 45–46. See also Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) Tel Aviv University Law Faculty Papers, Paper 59 at pp 28–31. Asian and Commonwealth courts have increasingly done so. South Asian courts have been particularly active in this area.

84 Harold Hongju Koh, "International Law as Part of Our Law" (2004) 98 Am J Int'l L 43.

85 See, for example, Rome Statute of the International Criminal Court (UN Doc A/CONF 183/9) Art 68.

86 Carla Ferstman, "International Criminal Law and Victims' Rights" in *Routledge Handbook on International Criminal Law* (William Schabas & Nadia Bernaz eds) (Routledge, 2013).

87 See, for example, Rome Statute of the International Criminal Court (UN Doc A/CONF 183/9) Art 84.

V. Conclusion

32 The international community's development of fair treatment rules and practices in international criminal law has been bold and innovative. It has drawn from different legal traditions and dealt with a variety of complex and unexpected issues. There is much that national actors can learn from this work of the international community. This essay has explained why and how national actors should approach the corpus of fair treatment rules created by the international community, highlighting some considerations that will assist national actors in navigating these diverse and numerous rules. It suggests the continued relevance of the distinction between law and non-law, noting that while many of these rules are progressive and desirable for various moral or political reasons, not all of them have achieved the status of international law. They are only binding on national actors if they have attained the latter status. Even if a rule has attained the status of international law, national actors should be permitted a limited margin of discretion when implementing their legal obligations. It emphasises the need for such a margin to be fully theorised and based on clear principles to avoid any lapse into relativity or any dilution of the rule concerned. This will enable decisions based on such a margin to be assessed in a transparent and accountable manner.

33 Even if an international rule is not yet international law, this essay argues that it can be of great comparative value to national actors. Just as how national courts discuss foreign judgments without considering them binding, national actors should be open to deliberating these non-binding rules. The international community's work in this area serves not only as a source of legal obligation, but also as a rich source of inspiration. National actors need to be aware not only of their international legal obligations, but also of the potential of international normative developments. Just as how these international developments have drawn on the legal traditions and practices of states, so too can they serve as a rich and valuable resource for national actors. More importantly, by engaging and discussing these international developments, national actors are able to contribute actively to the making of international law. As international law-making becomes more pervasive and important in the solving of problems that transcend borders and the achieving of common goals beyond domestic interests, it is important for both national and international actors to be aware that they are part of a larger, if overlapping and mutually distinct, interpretive community.