Orbeliani Law Review ▸ 2022
Vol. 1, No. 1, 31-58
Received: Jan 6, 2022 | **Accepted:** Oct 24, 2022 | **Published:** Dec 22, 2022

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The Disciplinary Identity of International Criminal Law: Balancing Between Positivism and Multidisciplinarity

RESUME

This essay discusses how the character and nature of international criminal law influence the way it is studied. By providing a historical review of its intellectual origins, it shows why international criminal law's disciplinary identity remains under the influence of positivistic principles. In going beyond international criminal law, this essay also critically discusses why some hold a multidisciplinary analysis of international law in contempt and exposes the challenges of placing legal scholarship in distinct categories by labelling legal academics as positivists, doctrinalists, practice-oriented, policy-driven, or as multidisciplinarians. This piece will describe how international criminal law is being studied, how scholarship developed, and whether the value of the research lies in its relevance for the practice before international criminal courts. In discussing the pitfalls of pure doctrinal or multidisciplinary research, it weaves together theoretical considerations beyond the traditional positivistic paradigm with a plea to study international criminal law under different sensibilities and disciplinary protocols.

Keywords: International criminal law – legal positivism – multidisciplinarity – study of law – disciplinary identity.

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I. Introduction

The woman is wearing headscarf and ragged clothes. She is crouching on a dirt road. Wrapped on her back is a baby. The woman is covering her face with her hands. Although her facial expression is largely concealed by her hands, her despair and sorrow are palpable.[1]

The woman in the picture is a refugee of the genocide in Rwanda, where approximately 800,000 people were killed in a three-month period lasting from April to July 1994.[2] The crimes in Rwanda — and in Yugoslavia around the same time — led to the creation of two *ad hoc* international criminal tribunals that were mandated with the prosecution and punishment of individual perpetrators of international crimes. It was around that time that international criminal law experienced a remarkable rise as a separate sub-discipline of law.[3]

This essay discusses international criminal law's birth as a new legal discipline, the study and application of which remain under the strong influence of the theoretical framework of legal positivism. In providing a historical backdrop to the intellectual fathers of positivism – Austin, Oppenheim, Hart, and others – it shows why international criminal law's disciplinary identity is influenced by legal positivism and the related principles of legality, foreseeability, and specificity. This positivistic domination of the discipline has to a considerable degree prevented a multidisciplinary permeation.

Despite international criminal law's affinity towards legal positivism, this essay argues that it is important to look beyond the black letter of the law. It asks how international criminal law, as an object of legal study, determines the ways it is studied. It also enquires whether the legal rules themselves, for instance in the form of objective categories of crimes that the law puts at our disposal, influence the academic discipline of international criminal law. The discussion includes matters that are common to all legal disciplines and the legal profession, including how the law is taught, by whom, and with what aim.

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1 See the efforts of Tallgren to connect research on the power of images with international criminal justice: Tallgren I., Come and See? The Power of Images and International Criminal Justice, International Criminal Law Review, Vol. 17, 2016, 259-280.

2 The picture of a Rwandan refugee in Goma (Democratic Republic of Congo) was taken by Ulli Michel (Reuters) on July 28, 1994; <http://darkroom.baltimoresun.com/2014/04/in-memoriam-20-years-since-the-rwandan-genocide/file-photo-of-a-rwandan-woman-collapsing-with-her-baby-on-her-back-alongside-the-road-connecting-kibumba-refugee-camp-and-goma/> [30.05.2022].

3 Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 532; van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 1; Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 238; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 8, 18.

The essay ends with a pledge to increasingly integrate multidisciplinarity in the study and teaching of international criminal law. The so-called integrative approach advocates multidisciplinary approaches in the analysis of international criminal law to strengthen the legal understanding of the dynamics of genocide, crimes against humanity, and war crimes and, as such, also the normative analysis of the law itself. While it does not argue that a 'pure' legal analysis of international criminal law is obsolete, it holds that disciplines other than the law can and should assist in creating a complete picture of international criminal law. Although the crimes proscribed by international criminal law cannot — and should not — be interpreted beyond their wording, legal scholarship should include insights from other disciplines on the context in which the atrocities were committed, who the perpetrators and victims were, how they categorised each other, and why crimes are committed against other individuals or groups in a conflict or as part of a widespread or systematic policy. A strictly positivistic analysis of the law itself will preclude such a holistic understanding of the law.[4]

II. The Birth of a New Discipline

The study of international criminal law is certainly *en vogue*: the number of master's degrees and specialised courses bears witness to its unceasing popularity.[5] The study of this branch of law attracts students and scholars for a number of reasons, one of them being the setting in which such crimes are committed.[6] The crimes are perpetrated in a context that is characterised — although not necessarily by the law, but rather by the facts of the cases — by horrendous atrocities, wars, conflicts, and unimaginable human suffering. The story that international criminal law tells is one of gravity, threats to peace and security, despair, and, hopefully, justice. The recent invasion of Ukraine by Russia in February 2022 and ensuing pictures and reports emerging from Kharvik, Mariupol, and Bucha, among others, confirm this story.

Hand-in-hand with the education of lawyers in international criminal law came to the creation of a guild of international criminal law scholars. Claus Kress calls this guild a "universal invisible college of international criminal lawyers".[7] However, lat-

[4] Similar argument by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[5] For an overview of universities offering LL.M. in International Criminal Law or Justice, see e.g. <http://www.coalitionfortheicc.org/where-study-international-justice> [31.05.2022].

[6] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 3-4.

[7] Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 1.

er discussions will show that the college is not as invisible as it might appear at first sight. Its members produce large amounts of academic publications that deal with international criminal law and the core crimes of genocide, crimes against humanity, and war crimes.[8] The research output demonstrates a continuously high scholarly interest in the discipline, which took its first careful steps after the establishment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) and its sister tribunal for Rwanda (ICTR). There was notably already some, albeit very limited, legal scholarship prior to the creation of these two institutions,[9] and numerous philosophers had theorised on legal positivism.[10] Although in the early 1990s, the idea of individual criminal liability and the establishment of an international forum to adjudicate crimes under international law was no longer controversial, legal research on international criminal law picked up pace only once the two tribunals started rendering their judgments. The production of legal scholarship was thus intrinsically connected to the activity of the international criminal judiciary.[11]

The creation of the first-ever permanent, treaty-based International Criminal Court, the ICC, is arguably the grand finale of this involvement with international criminal law. Yet, it has been pointed out that the ever-increasing scholarship on international criminal law stands in no positive correlation to the performance of the ICC.[12] It took ten years until the Court rendered its first judgement, and after almost twenty years of operation, the Court has managed to conclude by judgement only seven cases.[13] While the Rwandan and Yugoslavian tribunals have ceased to exist, and the ICC is producing decisions at a glacial speed, scholarship on international crimi-

[8] Ibid, 9.

[9] Also discussed: Ibid 2-5, Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, No8, 2016, 18.

[10] Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[11] Jordash W., The Role of Advocates in Developing International Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman and D. Amann, Oxford: Oxford University Press, 2018, 525; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 532; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 1-2; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 5-6.

[12] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 2. Similarly, Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 541. On the ICC that surrounded itself with academics, see Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 33.

[13] These are the Ongwen, Bosco Ntaganda, Al-Mahdi, Katanga, Lubanga, Bemba, and Ngudjolo Chui cases.

nal law is steaming ahead. Legal scholarship on international criminal law, although it is inspired by, is of course not restricted to the study of these three above-mentioned institutions. Rather, the creation of the new subdiscipline of international criminal law entailed a momentum in research, independent of the production of the judiciary.[14] This development begs the question of whether the birth of the new discipline and the ensuing scholarship is owed to the special nature of international criminal law, an issue that the next section will explore.

III. The Special Nature of International Criminal Law

International criminal law is part of a broader system of public international law that is based on the consent of states and, accordingly, regulates their behavior.[15] However, since international crimes are committed by and attributed to individuals and not states, international criminal law is not a matter of state responsibility, but rather of individual criminal liability.[16] To this extent, Art. 25(4) of the Rome Statute of the ICC explicitly holds that no provision of the Statute 'relating to individual criminal responsibility shall affect the responsibility of States under international law'.

International criminal law is prescribed in the primary legal sources of treaties, customary law, and general principles of law.[17] Each of these sources is based on the assumption of state consent, for instance, referring to 'international conventions (…) establishing rules expressly recognized by the contesting states' (Art. 38(1)(a) Statute of the International Court of Justice, hereafter ICJ Statute) or international custom 'as evidence of a general practice accepted as law' (Art. 38(1)(b) ICJ Statute).[18] Thus, public international law, and international criminal law as one of its

[14] Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533.

[15] Brown B., International Criminal Law: Nature, Origins and a Few Key Issues, Research Handbook on International Criminal Law, edited by B. Brown, Edward Elgar, 2011, 3.

[16] Ibid, 11; Werle G., Jessberger F., Principles of International Criminal Law, 3rd edition, Oxford University Press, 2014, 43; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 2,18. Note that most offences that international criminal law proscribes are also regarded as wrongful acts of states and can entail state responsibility for international wrongdoing. The breach of these norms can lead to a dual responsibility: individual criminal liability and state responsibility. For a detailed analysis, see Bianchi A., State Responsibility and Criminal Liability of Individuals, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford: Oxford University Press, 2009, 18-19.

[17] Statute of the International Court of Justice (ICJ) Article 38 (1) lit. (a)-(c). Legal scholarship and case law are not considered primary, but secondary, supplementary sources for the determination of international rules (Article 38 (1) (d) ICJ Statute).

[18] See discussion in Fournet C. The Universality of the Prohibition of the Crime of Genocide, 1948-2008, International Criminal Justice Review, Vol. 19, 2009, 133.

branches, is closely linked to states and their consent to the sources of law.[19] However, because of its special nature of potentially punishing individuals for their criminal behavior, international criminal law not only has to originate in one of the three primary sources, but it also must fulfill additional requirements regarding the design and content of these sources.

By definition, international criminal law is a positivistic branch of law, based on the principle of legality.[20] This principle requires that criminal prohibitions have to be as clear, detailed, and specific as possible.[21] The rationale of the principle and its maxim of *nullum crimen sine lege* (or, no crime without a law) is that anyone, before engaging in a particular conduct, is entitled to be aware of whether such conduct is criminally prohibited or not. Interconnected, nobody should be punished for conduct that was not considered a crime at the time when it was committed. This notion is embraced by the maxim of *nulla poena sine lege* (or no punishment without a law).[22]

At least three consequences emanate from the principle of legality: first, criminal statutes must cohere to the requirements of foreseeability and specificity. Second, the law cannot be applied *ex post facto*, namely to situations that occurred before the law even existed. Finally, the principle entails a strict interpretation of the criminal provisions, without any extension by analogy.[23] As an internationally recognised human right, the principle of legality has a twofold function: it restrains the arbitrary exercise of power by the judiciary and provides a normative guideline for the individual, in guaranteeing that he will not be punished as long as he abides by the law.[24] The prin-

[19] Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[20] Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 451; Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 239; Tallgren I., The Sensibility and Sense of International Criminal Law, European Journal of International Law, Vol. 13, 2002, 564; Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 106.

[21] Cassese A., Nullum Crimen Sine Lege, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford: Oxford University Press, 2009, 438.

[22] ICTR, The Prosecutor v. Kunarac, Case No IT-96-23A, Appeals Judgment (12 June 2002), para. 372.

[23] ICTR, The Prosecutor v. Delalić et al., Case No IT-96-21-T, Trial Judgment (16 November 1998), para. 402; Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 452-453; Shahabuddeen M., Does the Principle of Legality Stand in the Way of Progressive Development of Law?, Journal of International Criminal Justice, Vol. 2, 2004, 1008.

[24] Van der Wilt H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test, Nordic Journal of International Law, Vol. 84, 2015, 518, 531; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, American Journal of International Law, Vol. 93, 1999, 303.

ciple of legality is considered so central to international criminal law that it has been compared to its heart that pumps blood to all organs of the body.[25]

Critical voices, however, have termed international criminal law's preoccupation with the principle of legality an 'obsessive exercise in legal positivism'.[26] Undoubtedly, criminal law endorses a highly positivistic approach in that the law must stipulate the prohibited acts as clearly as possible for an individual to foresee the consequences of such behavior. Some scholars claim that international criminal law, by internalising and formalising the rules of the principle of legality within itself, has absorbed some of the basic traits of legal positivism.[27] However, is the strict adherence to the principle of legality really an exercise of legal positivism? And how does the positivistic nature of international criminal law influence the scholarship on it? The next section discusses these matters and how international criminal law defies legal positivism, despite allegedly disclosing its basic traits.

IV. Defining Legal Positivism

1. The Road to Truth?

Legal positivism is a descriptive theory about the nature of law. It holds that legal knowledge needs to distinguish between law as it is and law as it ought to be.[28] The aim of legal positivism is the accurate, sober, and objective description of the law as it is. As such, legal positivism has been called 'the road to truth'.[29] Is international criminal law the vehicle, fueled by the principle of legality, on this road to truth? In claiming the status of truth, legal positivism organises itself from the viewpoint of the preservation of its objectification of the law.[30] Arguably, in international criminal trials, the goal of the judges in applying the law is the search for a – legal – truth.[31]

[25] Jacobs D., Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories, draft submitted for publication in International Legal Positivism in a Post-Modern World, edited by J. d'Aspremont, J., Kammerhofer, 2012, 6; <https://ssrn.com/abstract=2046311> [31.05.2022].

[26] Schabas W., Interpreting the Statutes of the ad hoc Tribunals, Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese, edited by L. Chand Vohrah et al., Leiden: Brill, 2003, 887.

[27] Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 454.

[28] Hart H. L. A., Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, 1958, 615-621; Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733.

[29] Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 734.

[30] Freely transposed from Bourdieu P., Homo Academicus, Stanford University Press, 1996, 7, 13.

[31] Mégret F., International Criminal Justice as a Peace Project, European Journal of International Law, Vol. 23, 2018, 835; Bilsky L., The Right to Truth in International Criminal Law, The Oxford Handbook of International Criminal Law, edited by K. J. Heller et al., Oxford: Oxford University Press 2020, 473-493.

Despite being considered a positivistic sub-discipline of law, international criminal law challenges legal positivism.

Legal positivism asserts that for the law to be valid, it must have been laid down in some authoritative source by a sovereign body. Morality is, according to this theory, not a necessary or essential condition of legal validity. As a consequence, something can be legal even if it is considered immoral — and what is morally unacceptable can still be valid law.[32] In extension, positivism would also deny any necessary connection between law and justice, since law as a human creation is identifiable by way of social sources of legislation, case law, custom, and doctrine.[33] Of course, there is always a risk in generalising the label 'legal positivism' because it really is a collection of theories and theorists, some with overlapping views, some with sharply diverging opinions.[34] A brief step back into history will show the origin and the development of this theory of law and reveal why, in the words of Stephan Hall, 'most international lawyers know or sense that legal positivism is an inadequate medium through which to engage their discipline'.[35] Whether legal positivism is in fact inadequate, or perhaps just needs assistance from non-legal disciplines, remains for now open to debate.

2. A Brief History of Time: Austin and Beyond

The most commonly referred to the definition of legal positivism originates from John Austin (1790–1859). He held that '[a] law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation', and moreover, '[t]he matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors'.[36] He thereby established the theory of legal positivism that remains largely

[32] Shaw M. International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Finnis J., Philosophy of Law, Oxford: Oxford University Press, 2011, 184; Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733; Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 271-273; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View, American Journal of International Law, Vol. 93, 1999, 303-304; Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[33] Bell J., Justice and the Law, Justice: Interdisciplinary Perspectives, edited by K. Scherer, Cambridge University Press, 1992, 116.

[34] Gardner J., Legal Positivism: 5 ½ Myths, American Journal of Jurisprudence, Vol. 46, 2001, 199-200.

[35] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 306.

[36] Austin J., The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, Hackett Publishing, 1832/1998, 18.

intact to this day. In its core, the theory proclaims that positive law, which finds its origins in the law-making of the legislative, is a valid source of law that regulates behaviour and stipulates the consequences of breaching it, to which individuals have to submit, irrespective of their acceptance of the law's content.[37]

Austin famously claimed that international law is not law as such, but at best 'positive morality', because 'every positive law is set by a given sovereign to (…) persons in a state of subjection to its author'.[38] In not emanating from a sovereign to a separate political community, international law, therefore, failed the test of strict law.[39] Austin's claim is grounded in what could be seen as a vertical understanding of sovereignty, with the superior sovereign decreeing the law of the people in a state. To this extent, it is incompatible with a more modern horizontal understanding of an international community with a collective authority to enact positive law. Such a horizontal approach is what Lassa Oppenheim (1858–1919) proclaimed. In considering the binding force of international law, he assumed an inherent sociability of states, a so-called 'family of nations', which was founded on the will of these states to consent because of their co-existence.[40] Therefore, instead of sovereignty, society dominated Oppenheim's understanding of legal positivism.

In contrast to Austin's theory, whereby law originates from one sovereign, H.L.A. Hart (1907–1992) in his seminal work *The Concept of Law* advocated a variety of rules: primary rules that were directed at citizens, and secondary rules that told officials how to identify and apply the primary rules. Unlike Austin, Hart believed that the acceptance of legal norms by officials, as manifested in their rule-following, was what distinguished a legal system from the mere imposition of law by force of dictators.[41] This requirement of acceptance is, in the view of other legal theorists, in fact, a demise of strict legal positivism. Acceptance gives law its social dimension and seems to suggest the prevalence of the social over the substantive dimension of law.[42]

[37] Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 104.

[38] Gardner J., Legal Positivism: 5 ½ Myths, American Journal of Jurisprudence, Vol. 46, 2001, 201.

[39] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 280-281.

[40] Discussed in Schmoeckel M., The Internationalist as a Scientist and Herald: Lassa Oppenheim, European Journal of International Law, Vol. 11, 2000, 699-712.

[41] Hart H. L. A., The Concept of Law, Oxford: Oxford University Press, 2nd ed. 1994, 255. See discussion in Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta;
<https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[42] Perry S., Hart's Methodological Positivism, University of Pennsylvania Law School, Faculty Scholarship Paper 1136, 1998, 435-436;
<http://scholarshiplaw.upenn.edu/faculty_scholarship/1136> [31.05.2022].

Obviously, the historical setting influenced these legal theories. Austin, for example, created a theory of legal positivism based on the wish to study the nature of law, separated from how legal practice should be maintained or reformed. It was also a reaction to the theories of natural law.[43] The Enlightenment period enhanced such naturalist theories with the aim to reform feudal society and to replace sovereign authority with a conception of a social contract between the individuals and the state.[44]

The position of classic legal positivism was further augmented by the progress of natural sciences into increasingly specialised fields. Jurisprudence equally demanded to be a 'proper' science, comparable to the natural sciences. Here, legal positivism as a theory to understand law-making, based on an act of a sovereign's will, provided an observable and measurable object. In setting clear boundaries for its analysis, it thereby turned law into a research discipline.[45] It is not difficult to see why legal positivism as a theory based on observable, value-neutral, and verifiable facts was, and still is, particularly attractive in the field of international criminal law.[46] Recall the principle of legality and its demand for foreseeable and strictly constructed positive law. Criminal courts seek to establish the truth, in determining whether the accused has committed a crime by fulfilling the requirements of pre-defined categories of crimes, while legal scholars analyse the courts' decisions rendered on positive law. The reaction against classic legal positivism and the increasing interest between law and practice led to a new school of legal positivism: legal realism. Alf Ross (1899–1979), as a prominent member of the Scandinavian branch of this school, urged that law be considered valid law if it is (or can be) applied in the practice of courts. Legal realism, therefore, postulated the connection of legal scholarship with legal practice.[47] It also brought attention to the socio-political influences that shape law and its application.[48] Another reaction against classic legal positivism was a turn to a more pragmatic, sociological approach to law. The counter-reaction against this

[43] Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 103-104.

[44] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 273, 275-276; Shaw M. International Law, 7th edition, Cambridge University Press, 2014, 19.

[45] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 277, 281.

[46] Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733 on the continuing appeal of legal positivism due to its promise of descriptive accuracy.

[47] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 10.

[48] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398.

sociology of law[49] led to yet another school of legal theory, namely scientific, normative positivism. The main proponent of this branch was Hans Kelsen (1881–1973) who advocated that law should be studied 'as such', in a pure version, free from constraints of history, social theory, and other disciplines.[50] In discarding natural law or conceptions of justice, which he considered tainted by values and influenced by emotional factors, Kelsen's pure theory is one of positive law.[51] His idea is commonly criticised for being naive, misguided, and impracticable. However, on a more abstract level, Kelsen's suggestion is simply the *separate* study of law, separate from questions of politics, morality, humanity, and justice.[52]

The positivist top-down theory of law describes laws as commands backed by sanctions and issued by an uncontrolled commander, the sovereign. Judges, in the view of legal positivist theorists, are simply strict enforcers of the law: what matters is that the law has been enacted by an authority that has the power to do so.[53] But what if the law is not imposed by an identifiable sovereign? Or rephrased, in the case of international criminal law, who is the sovereign? The next sections will discuss norms that have not been issued by a sovereign, namely *jus cogens*, customary law, and general principles of law.

V. Customary Law and *Jus Cogens*

As one of the primary sources, customary law is evidence of law as manifested in state practice and supported by *opinio juris*.[54] It is, as such, precisely only the evidence of an existing phenomenon, without requiring any sovereign legislative act for its creation. Moreover, customary law is often not foreseeable and specific enough to comply with the requirements of the principle of legality.[55] Customary law, therefore,

[49] For a discussion on the sociology of law, see Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 114-122.

[50] For a detailed analysis, see Kammerhofer J., Hans Kelsen's Place in International Legal Theory, Research Handbook on the Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 143-167; Friedmann W., Legal Theory, 5th edition, London, 1967, 275-291.

[51] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 300; Bell J., Justice and the Law, Justice: Interdisciplinary Perspectives, edited by K. Scherer, Cambridge University Press, 1992, 117.

[52] Friedmann W., Legal Theory, London: Stevens & Sons, 5th ed. 1967, 283-287; Gümplová P., Law, Sovereignty, and Democracy: Hans Kelsen's Critique of Sovereignty, 2; <https://pdfs.semanticscholar.org/6a75/bcc4ed737b662a0c8f7e324732a132e635a4.pdf> [31.05.2022].

[53] Shaw M., International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398.

[54] ICJ Statute Article 38 (1)(b). See above Section III on the sources of law.

[55] See discussion in Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 458-462.

challenges legal positivism at its core.[56] These issues reveal that legal positivism struggles in cases where the law does not directly derive from the 'will' of an identifiable lawmaker, but rather from 'reason'.

The same is also valid for cases of peremptory norms, or *jus cogens*, that are considered non-derogable and obligatory for the reason of their gravity. They prevail over other inconsistent legal obligations.[57] The existence of *jus cogens* is assumed and recognised in Art. 53 of the Vienna Convention on the Law of Treaties that links these norms to the will of states:

> "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

While states accept and recognise these peremptory norms, they do not emanate from the consent of the state through a legislative act or a voluntary agreement like a treaty. Indeed, international lawyers do not agree on the conceptual foundation of *jus cogens* other than the acknowledgment that it exists.[58] *Jus cogens* can be described as reflecting natural law since it is not posited by human beings and therefore runs counter to the concept of man-made rules.

Thus, not all rules of international criminal law, especially those that have been created throughout centuries of practice on the conduct in armed conflicts, are stipulated in positive law. In the *Kupreškić* case, the ICTY expressly acknowledged that '[m]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character'.[59] The Trial Chamber thereby confirmed that international criminal law consists primarily of *jus cogens* norms. For the purpose of the adjudication of interna-

[56] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 287, 289, 291. Jacobs advocates that the principle of legality should lead to the exclusion of customary international law as a source of international criminal law (Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 470).

[57] Ohlin J. D., In Praise of Jus Cogens' Conceptual Incoherence, McGill Law Journal, Vol. 63, 2018, 3.

[58] Ibid, 4; Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[59] ICTY, The Prosecutor v. Kupreškić et al., Case No IT-95-16-T, Trial Judgment (14 January 2000), para. 520.

tional crimes, most of these norms are codified in the statutes of the international criminal courts and tribunals.

In sum, certain norms of international (criminal) law exist independently of state consent and, as such, contest a positivistic approach.[60]

VI. General Principles of Law

General principles of law, such as the much-discussed principle of legality, equally challenge legal positivism. '[P]articularly positivists', Malcolm Shaw pointedly remarks, treat general principles of law as a 'subheading under treaty and customary law', since they apparently are 'incapable of adding anything new to international law unless it reflects the consent of states'.[61] Art. 38(1)(c) ICJ Statute explicitly states that the general principles are merely 'recognized by civilised nations', hence neither enacted nor consented to by them. Therefore, the principles seem to pre-exist as some form of 'law common to all peoples'.[62] As to their nature, Judge Tanaka in the ICJ *South West Africa* case observed that 'it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent'.[63] It remains unclear which general principles of law, as opposed to general principles of *international* law and of international *criminal* law, are recognized. The contours of the latter have yet to be established and agreed upon over time.[64]

As a general principle of law, the principle of legality was challenged during the Nuremberg Trials after the Second World War. For the first time in history, an international criminal tribunal prosecuted individuals for international crimes. Its Charter was enacted after the actual crimes had been committed, and the Nuremberg Tribunal applied the law retroactively. Hence, it breached the prohibition of *ex post facto* legislation.[65] The defence claimed that prosecuting the newly created categories of crimes against humanity and crimes against peace, both arguably not of a customary nature,

[60] See also Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 283.

[61] Shaw M., International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Finnis J., Philosophy of Law, Oxford: Oxford University Press, 2011, 70.

[62] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 293.

[63] ICJ, South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase, Judgment (18 July 1966), Dissenting Opinion of Judge Tanaka, 298.

[64] Brown B., International Criminal Law: Nature, Origins and a Few Key Issues, Research Handbook on International Criminal Law, edited by B. Brown, Edward Elgar, 2011, 10-11.

[65] Ireland G., Ex post facto from Rome to Tokyo, Temple Law Quarterly, Vol. 21, 1947-1948, 27-61; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 20.

contradicted the principle of legality.[66] The Chief Prosecutor, Robert Jackson, tried to bypass this issue in his opening statement: 'When I say that we do not ask for convictions unless we prove a crime, I do not mean a mere technical or incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves moral as well as legal wrong'.[67] The judgment followed up on Jackson's claim and agreed that each Nazi perpetrator 'must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished'.[68] The judgement refers to notions of justice and wrongdoing rather than the illegality of the acts. It thereby clearly brings in a moral evaluation.[69]

Legal theorists of natural law commended this legal decision. Quite surprisingly, also hard-liner legal positivists like Hans Kelsen agreed that 'the persons who committed these acts were certainly aware of their immoral character'. Therefore, he argued:

> "The retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts".[70]

Kelsen sets aside the principle of legality and its maxim of *nullum crimen sine lege* in favour of justice and morality.[71] For a normative legal positivist like Kelsen,

[66] On the issue of crimes against peace, the French representative, Professor Gros, explicitly stated that "[t]hose acts have been known for years before and have not been declared criminal violations of international law. It is ex post facto legislation" (cited in Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford University Press, 2018, 207-208). See also Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 3.

[67] Opening address by Robert H. Jackson (Nuremberg, 21 November 1945), <https://www.cvce.eu/content/publication/1999/1/1/9a50a158-f2f7-468b-9613-b2ba13da7758/publishable_en.pdf> [31.05.2022].

[68] France et al. v. Göring et al., Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 – 1 October 1946 (1948), 462.

[69] See discussion in Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford University Press, 2018, 209; Van der Wilt H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test, Nordic Journal of International Law, Vol. 84, 2015, 517, 526; Cryer R., The Philosophy of International Criminal Law, Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 241.

[70] Kelsen H., Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, International Law Quarterly, Vol. 1, 1947, 165.

[71] Confirmed by Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford: Oxford University Press, 2018, 209.

who advocated the study of law separate from morality and justice,[72] it seems remarkable to rescind the notion of law in exchange for the vague(r) notion of justice, with the consequence that individuals can be punished — and in the case of the Nuremberg trials even executed — based on a sense of wrongdoing rather than violations of positively prescribed legal norms.

Due to its punitive function, international criminal law has been said to be the branch of law most closely associated with sovereignty and, as such, the most legally positivistic.[73] However, the examples discussed reveal that legal positivism as a theory of law, and the principle of legality as one of its strongest suits, cannot fully and cohe rently explain international criminal law. Thus, in its result, even the 'pure' study of the law, as theorised by Kelsen, seems to involve considerations from beyond the positive law. The next section discusses these considerations and brings in other disciplines.

VII. Bringing in Other Disciplines

Legal positivism is set in a much larger system of social institutions and practices — and has no ambition to construct a purely descriptive or conceptual theory.[74] Critical voices suggest that legal positivism should allow other disciplines to discuss the normative, historical, and sociological aspects of these very same social institutions and practices. In being constituted by and through different social orders in society, law is plural and integral to society, leading to a dynamic and constantly changing interrelationship between them.[75] Immi Tallgren, for example, asks how positivistic, rational, and utilitarian international criminal justice can be, considering that international crimes involve the suffering of victims that calls not for a value-neutral, but rather an intuitive-moralistic assessment.[76] This brings me to the other main topic of this essay: the multidisciplinary analysis in the study of inter-

[72] See discussion in Section IV, above.

[73] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 6. Conversely, Mégret, argues that the specificity of international criminal justice as a legal field is that it cannot easily draw on some sovereign authority (Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 11).

[74] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[75] Ibid, 404.

[76] Tallgren I., The Sensibility and Sense of International Criminal Law, European Journal of International Law, Vol. 13, 2002, 564. Similarly, Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 4.

national criminal law. Multidisciplinarity is here understood as a setting in which several disciplines are present, yet they preserve their own distinct identities, means, and methods of doing things. Conversely, research is interdisciplinary when scholars operate between, across, and at the edge of their disciplines and, in doing so, question the ways they usually work.[77] Interdisciplinary research has even been compared to a shared dormitory space whereby the disciplines raid each other's closets and borrow each other's clothes.[78]

Traditionally, law was a mono-disciplinary discipline.[79] Its disciplinary identity was, and generally still is, characterised by the use of interpretive tools to systemise and evaluate legal rules and generate recommendations as to what these rules should be. Legal scholars usually begin their analysis of the law without considering how these rules emerged, how they relate to broader social or political settings, and what challenges their definition could entail.[80] Researchers of law tend to focus narrowly on the normativity of law, which they presume as a given. This approach that analyses the law in its black-letter form or the corresponding case law, and takes a clearly positivistic orientation.[81] The next section explores the question of whether this positivistic approach in the study of the law is owed to the way in law is taught in universities. This question connects to the aim of legal faculties.

VIII. Law: An Academic or Professional Discipline?

The call for a separate and pure study of law is arguably not as exigent today as it was two hundred years ago. When the legal philosophy of positivism first emerged, the sole purpose of law schools was the education of lawyers — professionals — trained and able to practice the law in courts and elsewhere as barristers, solicitors,

[77] Rendell J. The Transitional Space of Interdisciplinarity, Speculative Strategies in Interdisciplinary Arts Practice, edited by D. Hinchcliffe, J. Calow, L. Mansfield, Underwing Press, 2014, 1. For other definitions of multi- and interdisciplinarity see Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 228; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 163.

[78] Jacobs J., Defense of Disciplines: Interdisciplinarity and Specialization in the Research University, University of Chicago Press, 2014, 35.

[79] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 291.

[80] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 229.

[81] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 180.

judges, and the like. University teachers of law were, almost without exception, practitioners themselves.[82] Also today, the primary objective of most faculties of law is to provide a professional education that will enable students to practice law.[83] Students are arguably educated to think more like advocates than like scientists.[84] As such, lawyers who studied and analysed the law from a more theoretical side were the exception. Correspondingly, teaching insights from beyond the law was considered unnecessary and distracting in legal education, leading to what has been termed 'professional autism'.[85]

This leads some scholars to assert that law is less an academic than a professional discipline.[86] International criminal law, more than most other branches of law, confirms this claim: in the early years of its creation as its own sub-discipline of international law, the study of international criminal law almost exclusively produced knowledge that was of relevance to the practice of criminal courts.[87] The reason for this one-sided knowledge production is found in the discipline's past. As discussed above, international criminal law originated, as a legal specialisation of its own, in the establishment of the international tribunals for the Former Yugosla-

[82] Ibid. 174, 176.

[83] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 243; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 952; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533, 543; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398. See also discussion in Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 74, 79.

[84] Fuller L., On Teaching Law, Stanford Law Review, Vol. 3, 1950, 35; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 303, with reference to Spitzer R.J., Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning, 2008, 29-30.

[85] Halvorsen M., Anmeldelse av Lars Skjold Wilhelmsen and Asbjørn Strandbakken (eds.), Juristutdanningens faglige og pedagogiske utfordringer, Tidsskrift for Rettsvitenskap, Vol. 01/02, 2012, 250.

[86] Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 76; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 952, 964; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 175; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 278.

[87] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 2; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533. According to Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 730, this claim is valid for all of law: legal knowledge is largely descriptive, technical, and deferential in relation to courts. It lacks the courage to challenge taboos.

via and Rwanda. From the very beginning, the sub-discipline and the study of the law were therefore linked to institutions.[88] The history of international criminal law hence reveals an intrinsic connection of academic scholars with legal practitioners at the courts. According to Mikkel Jarle Christensen, who builds his analysis on the sociologist John Hagan's studies of the ICTY, the interplay between scholarship and practice was crucial for the genesis of international criminal law as a new sub-discipline.[89] Two academics who produced legal scholarship on international crimes already prior to the establishment of the tribunals were central for the development of international criminal law as a separate academic discipline of law. Already in the early 1980s, the professor of law M. Cherif Bassiouni had a pivotal role in the development of international criminal law. Not only did he present a draft code of international criminal law, he later also headed the United Nations Commission of Inquiry that led to the creation of the Yugoslavia tribunal.[90] The other academic was the professor of law Antonio Cassese who served as the Tribunal's first president. Both men had direct personal ties to the ICTY where they tested their own scholarship in the embryonic case law.[91] These two accomplished scholars on the inside of the institutions provided the required legitimacy of international criminal law as a new scholarly discipline. Other legal scholars joined the newly created guild.[92] Such porosity between the practice (at the tribunals) and the research (Bassiouni and Cassese), however, is not specific to international criminal law. A permeability is also apparent in other legal fora. The recently deceased Antônio Cançado Trin-

[88] Stewart J., Kiyani A., The Ahistoricism of Legal Pluralism in International Criminal Law, American Journal of Comparative Law, Vol. 65, 2017, 393-449; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Jordash W., The Role of Advocates in Developing International Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman and D. Amann, Oxford: Oxford University Press, 2018, 525; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 2, 5, 43.

[89] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 246; Christensen M. J., The Professional Market of International Criminal Justice, Journal of International Criminal Justice, Vol. 19, 2021, 783-802.

[90] Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 5.

[91] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 246-247; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 31-32; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 6-7. Cryer R., The Philosophy of International Criminal Law, Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 245-249 discussing Tadić and Kupreškić as examples of Cassese's influence.

[92] Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 3.

dade, for example, acted as a judge before the ICJ and through his legal publications discussed and influenced the Court's legal course.[93]

Claus Kress emphasises that during the Cassese-years, the ICTY possessed a scholarly self-confidence that manifested itself in heavy scholarly and far-reaching *obiter dicta* judgments.[94] The tribunal exported its legal problems to the recently established scholarship that seemingly saw its primary purpose in resolving legal issues that could be reintroduced into the tribunal's case law.[95] Legal scholars published articles immediately relevant to practice and thereby impacted the application of international criminal law.[96] In researching the law from a perspective relevant to the tribunal, legal scholarship had to take a positivistic approach and adhere to the theoretical foundation of the discipline. As such, scholarship applied a strictly doctrinal methodology that the tribunal could easily adopt and implement in its jurisprudence.[97] Thus, the early years of international criminal law were clearly characterised by a mutual dependency between scholarship and practice.[98] The revitalised interest in international criminal law had a lasting effect: in the last twenty years, there has been a 600% increase in scholarly publications on the topic of international criminal law.[99]

Before moving to more recent developments of the past two decades, the relationship between international criminal law and legal positivism merits further examination. Despite being a positivistic discipline that is framed and guided by the principle of legality, international criminal law challenges legal positivism on several levels. These are the topics of the following section. Thereafter, the issue of multidisciplinarity will be added to the discussion – and how, in turn, multidisciplinarity challenges the study of international criminal law.

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93 See for example: Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 98-136.

94 Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 7.

95 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 247-248, mentioning modes of liability and Joint Criminal Enterprise.

96 Ibid, 249.

97 Confirmed by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533-534.

98 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 249.

99 Ibid, 252-253.

IX. Readjusting the Imbalance

Criminologists, philosophers, political scientists, historians, sociologists, anthropologists, and other scholars from non-legal disciplines have also taken an interest in international criminal law.[100] Myriad varied and multifaceted studies of international criminal law have emerged examining international criminal law through different disciplinary lenses.[101] Conversely, legal scholars of international criminal law have long been remarkably hesitant to revert to non-legal research.[102] Nowadays, however, there is an undisputable trend toward stretching and expanding the borders of legal doctrine to include empirical, sociological, political, criminological, and other analyses.[103]

On a general level, this development has not always been appreciated. In the United States, for instance, concerns have been raised that legal research is drifting away from legal practice, leading to a renewed push for traditional legal doctrinalism.[104] Interdisciplinarity, leading to an erosion of the pure law, is considered a threat to the disciplinary monopoly.[105] It is held that the purpose of legal scholarship is solely to extract a doctrine, which has the aim to prescribe a better outcome to judges. At the same time, legal research has been criticised for being 'case law journalism'[106]

[100] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 228; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 537; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 4.

[101] See scholarship by M. Drumbl, T. Kelsall, P. Clark, K. Lohne, S. Straus, M. Kersten, B. Holá, M. J. Christensen, L. May, and others.

[102] Also recognized by Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 238; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[103] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 20; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 951; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022.
See scholarship by C. Fournet, M. Osiel, F. Mégret, C. Schöbel, S. Nouwen, N. Palmer, R. A. Wilson, I. Tallgren, C. Lingaas, and others.

[104] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 293; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vol. 53, 1996, 950.

[105] Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 280; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 537.

[106] Schlag P. Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art), Georgetown Law Journal, Vol. 97, 2009, 821.

only, because a staggering 95% of research was commentaries of judgments.[107] This puts the practitioners in the lead position – and turns the legal scholars into their followers. Because of these developments, some have suggested re-adjusting the imbalance between scholarship and practitioners in favour of academia. In this regard, one scholar notes that '[c]courts have dockets. Legal academics have time. Given this asymmetry, the academics could always outdo the courts in the intricacy of their analysis'.[108]

The trend toward multidisciplinary legal scholarship seems to be irreversible and unstoppable. The positions between the different groups of scholars, however, remain static: multidisciplinarians criticise doctrinalists for being formalistic, intellectually rigid, and 'the dinosaurs of legal scholarship'.[109] Instead of repeating existing knowledge, doctrinalists should rather focus on important topics and real-world consequences of doctrinal theories, voices from the multidisciplinarian camp claim.[110] Fact remains, however, that most legal academics, including scholars of international criminal law, define themselves against the benchmark of doctrinalism.[111] By contrast, legal doctrinal scholars consider multidisciplinarians as esoteric, romantic rebels who, by transgressing their own discipline's borders, sacrifice themselves as some kind of intellectual martyrs.[112] They are also seen as amateur social scientists with little ties to legal scholarship as a normative 'science', fiddling with theories and methods they do not fully grasp.[113]

[107] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12.

[108] Schlag P. Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art), Georgetown Law Journal, Vol. 97, 2009, 822. The claim is contentious.

[109] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 295.

[110] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 164, 181; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 293; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 15; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View, American Journal of International Law, Vol. 93, 1999, 302.

[111] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 188; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[112] Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996,957, 960; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 294, referring to RA Posner, R.A. How Judges Think, 2008, 211.

[113] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 295; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 14; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 164.

Why would it seem that lawyers have difficulties to conduct multidisciplinary analyses of international criminal law? There are several reasons. First, any move towards multidisciplinarity is perceived as a threat to the discipline's identity.[114] The discipline of law is considered a self-contained, closed, and isolated domain. It is a distinct social community of experts, the legal guild, who share (or at least claim to share) goals, concepts, skills, and methodologies.[115] By placing the legal part alongside other disciplines, law is bereft of its identity. What then happens to the uniqueness of law as a disciplinary education, which is a prerequisite to enter the professional career of a lawyer?[116] The identity of legal scholarship is bound by the profession; replacing a doctrinal legal education with a compilation of other disciplines is not considered useful. These considerations feed into the ongoing debate of social closure, meaning a strategy which claims that the (legal) profession's service requires expert knowledge that no other profession can offer, thereby increasing the competitiveness and marking the boundaries between the disciplines.[117]

Furthermore, legal scholars are usually only trained in doctrinal legal methodology. If they attempt to incorporate other disciplines into their study, they risk applying flawed methodologies. As such, universities firmly establish static disciplinary boundaries — the faculties — perpetuated by each their exclusive *modus operandi*.[118] Such academic specialisation also leads to a fossilisation and fragmentation of knowledge.[119] There is, however, a distinct trend toward dismantling the disciplinary

[114] Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 950; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 165, 173, 186. Similarly: Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 77-78.

[115] Nissani M., Fruits, Salads, and Smoothies: a Working Definition of Interdisciplinarity, Journal of Educational Thought, Vol. 29, 1999; <http://drnissani.net/MNISSANI/PAGEPUB/SMOOTHIE.htm> [31.05.2022]; Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 233; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2017, 400.

[116] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 167; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 276.

[117] Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274. Similarly, Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 400; Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 79.

[118] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 167.

[119] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University

boundaries between the faculties.[120] This gradual change seems to coincide with the postulate by the legal philosopher Lon Fuller, who as far back as 1950 stated that 'whatever it is we want the student to get, it is something more durable, more versatile and muscular, than a mere knowledge of rules of law'.[121]

Studies that are conducted across faculties, or grants that are allocated to multidisciplinary projects, are quite recent phenomena. Despite its novelty, external funding demands ever more project proposals with multi- and interdisciplinary approaches, requiring from legal scholars an understanding and knowledge of disciplines other than law.[122] Yet, for law, whose main task is the study of legal rules, words and language become tantamount to the discipline's identity itself.[123] Lawyers simply do not speak the language of other disciplines, nor do they understand the legal jargon. The result is a disciplinary talk at cross purposes.[124] International criminal lawyers are programmed with the software of the sub-discipline and need reprogramming to understand the languages of other disciplines.[125] At the same time, international criminal law scholars will be taken seriously only if they retain the ability to communicate to their audience by speaking in the vernacular of the law.[126] Hence, legal scholars seemingly have to become bi- or multilingual by acquiring knowledge of the languages of other disciplines, while maintaining our own mother tongue of law.

Another point of critique is that the outcome of multidisciplinary analysis often has no relevance to positive law. If the analysis cannot be translated into positive

Press, 2nd ed. 2017, 397, 400; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 170.

120 Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 273, 276, 279.

121 Fuller L., On Teaching Law, Stanford Law Review, Vol. 3, 1950, 36.

122 Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 276, 278.

123 Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 93.

124 Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2nd ed. 2017, 400; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 168.

125 Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 956. Similarly van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 14.

126 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 257.

law, the research will have only limited value for legal practice.[127] It seems we are back to square one: legal scholarship is only deemed relevant and useful if attorneys and judges can directly benefit from it. Is legal research only a service provider for the legal profession?[128] Law is concerned with the interpretation of rules, for scholars as much as for practitioners. If, however, in inter- or multidisciplinary work the commitment to the particular normativity of law vanishes, then the research can no longer be considered 'legal'.[129] Once the research of international crimes, mass atrocities, accountability mechanisms, and the like foregrounds ethical rather than normative questions, we have left the field of international criminal *law* and stepped into the area of international criminal *justice*. Yet even a normative inquiry into international crimes will profoundly benefit from an interdisciplinary inquiry that provides insight into the setting the crimes are perpetrated in. This will enable a better understanding and legal analyses. Perhaps international criminal lawyers must reconcile themselves with the fact that their discipline is in transition and might merge with the larger discipline of international criminal justice.[130]

X. Instead of a Conclusion: A Plea

In bringing this essay to an end, I would now like to take you back to the context in which international crimes are perpetrated. They are set on an absolutely horrific stage, where neighbours kill each other, where states persecute their own inhabitants, where hospitals are bombed, prisoners tortured, women raped, children

[127] Ibid, 256; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 3, 14.

[128] Inspired by Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274. Similarly, Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[129] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 237.

[130] Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 6-8, discussing international criminal justice. Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 230, 237 argues that the interdisciplinary potential of international criminal law is best captured by characterising it as 'international criminal justice' rather than 'interdisciplinary international criminal law'. Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vol. 53, 1996, 960, 964, talks about the colonisation of disciplines, the expansion of their empires and the susceptibility of law for invasion.

forcefully recruited as soldiers, and civilians are forced to leave their homes and belongings behind. Where the world, as it was previously understood and known, simply no longer exists.

The core international crimes are never committed in a political or socio-economic vacuum. Rather, they are caused by structural forms of violence and inequality, which might originate in historical factors like colonialism. The context, history, politics, and biases must be considered to understand the crimes committed.[131] For research of the crime of genocide, for instance, the insight into group relations and hierarchies and not least, ideology, are crucial – also legally – to understand and define the perpetrator's intent to destroy a certain group. Ideologies relate to what we believe, to our values, attitudes, and ideas, and will be revealed in how we behave. The perpetrator will manifest this understanding in his behavior. If the behavior results in the commission of atrocity crimes, international criminal lawyers are on their home turf. Research from other disciplines, like criminology, sociology, and psychology, will therefore not threaten, but rather strengthen legal research of international criminal law. The research that integrates these multidisciplinary approaches will then change the way that international criminal law is taught to students and how they practice law.

Precisely for a field like international criminal law, it is of utmost importance to look beyond the black letter and the objective categories of crimes that the law puts at our disposal. The late Judge Cançado Trindade correctly states that 'it is not possible to assess and decide cases of grave violations of rights of the human person without a careful attention to fundamental human values'. He is therefore critical toward legal positivism that rejects a consideration of values and, instead, asks for law and ethics to be taken into consideration for the realisation of justice.[132] We must consider why and against which historical, ideological, political, and social backdrop the atrocities were committed.[133] Who the perpetrators, the victims, and the bystanders were – and,

[131] Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 541-542; Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 135; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology,The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[132] Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 133. His arguments resemble critical legal studies and the claim that law and its application are shaped by politics, no matter how these cases subsequently are rationalised by judges' decisions, see Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[133] Similar argument made by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

most of all, why people turned against each other. I am deeply convinced that this insight into the context will assist in understanding the dynamics of core international crimes and, as such, also the normative analysis of the law itself.

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