

Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court

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Abstract

The Rome Statute contains a body of legal standards on elements of the offences, concepts of criminal responsibility and defences of unprecedented detail. Whereas these standards serve the International Criminal Court as normative framework, the principle of complementarity implies that domestic jurisdictions are to take the lead in the adjudication of international crimes.

This article addresses the question whether domestic legislators and courts are bound to meticulously apply the international standards, or whether they are left some leeway to apply their own (criminal) law. The article starts with a survey of the actual performance of national jurisdictions. Current international law does not explicitly compel states to copy the international standards; at most one might argue that the codification of international criminal law and the principle of complementarity encourage harmonization.

Capitalizing on the concept of ‘open texture of law’ and the methodology of casuistry, the present author argues that a certain measure of diversity in the interpretation and application of international standards is inevitable and even desirable. However, as a general rule, states have less freedom of interpretation in respect of the elements of crimes than in the application of concepts of responsibility and defences.

Keywords

International crimes; domestic jurisdictions; International Criminal Court; principle of complementarity; harmonization of international criminal law; open texture of law

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1. Introduction

The Rome Statute is crystal clear: national jurisdictions are supposed to have precedence in the prosecution of perpetrators of international crimes. The International Criminal Court is only allowed to step in if states are either ‘unwilling’ or ‘unable’ to do the job properly.¹ In order to accomplish this important task, states will have to improve their record in this respect, because their performance has not been impressive.² The reasons are not hard to grasp. Those states which would primarily qualify to start criminal proceedings, because the crimes have been committed on their territory or by their nationals, are often reluctant to do so, as they will be involved in those forms of system criminality. On the other hand, those states who would be perfectly willing to prosecute international crimes, face impediments of substantive or procedural criminal law. After all, each genuine and honest initiative to prosecute and try suspects of international crimes is doomed to fail, if the (elements of) core crimes are not properly incorporated in the national legal order, if the courts lack (universal) jurisdiction or if the prosecution is time-barred by statutes of limitation. Although at the international level the state as an entity is held accountable for any failure to comply with its international obligations – and its therefore irrelevant whether such failure can be attributed to the legislator or the courts-, it stands to reason that adequate legislation is a prerequisite for any effective and successful performance.

In the wake of the coming into force of the Rome Statute, a number of states parties have indeed – sometimes radically – transformed their legislation, in order to be able to comply with their obligations. Such statutes provide for (restrictive) universal jurisdiction in case of international crimes, introduce, where necessary, the definitions of those crimes in the legal order and abolish statutes of limitations. These initiatives have attracted wide coverage in legal literature.³

¹) This well-known ‘principle of complementarity’ is incorporated in the Preamble and in articles 1 and 17 of the Statute.

²) Compare for instance Christine Van den Wyngaert, ‘War Crimes, Genocide and Crimes Against Humanity- Are States Taking National Prosecutions Seriously?’, in: M. Cherif Bassiouni, *International Criminal Law, Part 3 Enforcement*, 1999, pp. 227–238 and Gerry J. Simpson, ‘War Crimes: A Critical Introduction’, in: Timothy L.H. McCormack & Gerry J. Simpson, *The Law of War Crimes*, The Hague/London/Boston 1997, pp. 1–30.

³) To mention just a number of these publications: M. Boot & R. Van Elst, ‘Key provisions of the International Crimes Act 2003’, in: Netherlands . Yearbook of International Law XXXV (2004), p. 251; H. Satzger, German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law, in: *International Criminal Law Review* 2 (2002), pp. 261–282; Mohammed M. El Zeidy, Egypt and Current Efforts to Criminalize International Crimes, in: *International Criminal Law Review* 5 (2005), pp. 247–265; G. Boas, An Overview of Implementation by Australia of the Statute of the International Criminal Court, in: *Journal of International Criminal Justice* 2 (2004), pp. 179–190 and Damien Vandermeersch, Prosecuting International Crimes in Belgium, in: *Journal of International Criminal Justice* 3 (2005), pp. 400–421.

But even if the national legislation is up-dated and matches the international standards, one should be careful not to harbour the highest expectations, at least not in the short run. The *nullum crimen*-principle precludes courts from applying new regulations retroactively, even if those regulations bear upon issues of a procedural nature, like jurisdiction or statutes of limitations.⁴ Moreover, universal jurisdiction is not easily applicable from a criminal law perspective. Each prosecutor will inevitably face the hardships of obtaining evidence from abroad and courts may have difficulties in properly assessing culturally influenced patterns of conduct which are foreign to them. In short: the quality of the administration of justice may suffer from the disconnection between the place of the trial and the *locus delicti*.⁵

In spite of all these (potential) obstacles, national prosecutions and trials of war crimes, crimes against humanity and genocide are on the rise, showing at least the earnest efforts of states to live up to their obligations.⁶ It will be highly interesting to scrutinize these developments, including any subsequent reactions of the International Criminal Court. It may just be that we are on the brink of entering a new stage in the administration of international criminal justice, in which the ICC will not (only) be confronted with blunt refusals or sheer impotence, but will rather be called upon to decide far more subtle legal issues. After all, some new national legislation and recent court decisions show slightly deviant opinions and standards in respect of definitions of crimes and concepts of criminal responsibility. This takes us to the core issue of this article: are states parties to the Rome Statute under an obligation to meticulously follow and apply the standards which have been crystallized in the Statute and have been developed in the case law of the international criminal tribunals? Or are domestic legislators and courts left some margin of discretion to adapt those standards to local legal tradition and circumstances?

The present author would like to argue that these questions not only have practical consequences, but are of paramount importance from a more general, theoretical point of view as well. It is by no means self-evident that the ICC will intervene on each and every occasion in which a court reaches a decision which only displays marginal differences of opinion in respect of the appropriate standards. The threshold of ‘inability’ – a total or substantial collapse of the domestic legal order – is rather high and may probably only be reached in case of constant

⁴ Dutch Supreme Court, 18 September 2001 (*In re-Bouterse*), NJ 2002, 559, § 6.3. In Germany the issue is contested, compare: Florian Jessberger, ‘Prosecuting International Crimes in Domestic Courts: A Look Back Ahead’, in: *Finnish Yearbook of International Law*, Volume XII, 2001, p. 301–302.

⁵ On these problems, compare the perceptive observations of George Fletcher, ‘Against Universal Jurisdiction’, in: *Journal of International Criminal Justice* 1 (2003), pp. 580–584.

⁶ William A. Schabas, ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’, in: *Journal of International Criminal Justice* 1 (2003), pp. 39–63; Jessberger, op. cit. (2001), pp. 281–304.

and blatant failures to comply with accepted standards.⁷ In the same vein, the ICC should not – and most probably will not – frivolously conclude that national proceedings ‘were made for the purpose of shielding the person concerned from criminal responsibility or were not being conducted independently or impartially’.⁸ The current German regulation of ‘superior responsibility’, which distinguishes between the military commander who intentionally omits to prevent his subordinates from committing crimes and the commander who is only negligent in performing his supervisory tasks, provides a case in point. Although the German law on this point intentionally deviates from the Rome Statute, the judgement of a German court which carefully and conscientiously reflects the difference in *mens rea* by meting out a comparatively mild sentence for the negligent commander, should not be considered as a sham trial to trump the ICC by creating a *ne bis in idem*-situation.⁹ If the ICC were to overhaul the German judgement in an overzealous attempt to impose complete uniformity, it would only give fuel to the understandable concerns of some American writers who fear that the Court will not be truly complementary but will rather serve as an international appellate court, intervening in national courts’ decisions whenever it sees fit.¹⁰ Moreover, whereas domestic jurisdictions’ failure to meet the standards of the Rome Statute may, at

⁷ Paola Gaeta points at the example of a State party who fails to incorporate Art. 29 of the Statute (on imprescriptibility) and suggests that ‘a crime falling under the statute of limitation under national law, can be prosecuted by the ICC by virtue of the principle of complementarity because the State in question is ‘unable’ to institute criminal proceedings for that crime or, at least, to punish it effectively.’ P. Gaeta, ‘War Crimes Before Italian Criminal Courts: New Trends’, in: H. Fischer/C. Kress/S.R. Lüder (eds), *International and National Prosecution of Crimes Under International Law; Current Developments*, 2001, p. 766. Compare also Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, PhD-thesis, Amsterdam 2007, p. 175, who presents the 1997 Penal Code of the Republic of Paraguay as an illustration of the way in which legal deficiencies can lead to an ‘unavailability’ of a State’s judicial system. Whereas this code provides for universal jurisdiction in case of ‘grave breaches’ of the Geneva Conventions, the Paraguayan law has failed to incorporate a number of those breaches. On the same issue: F. Lattanzi, ‘The International Criminal Court and National Jurisdictions’, in: M. Politi & G. Nesi (eds), *The Rome Statute of the International Criminal Court – A Challenge to Impunity*, Aldershot 2001, p. 181.

⁸ These are two of the three standards of ‘unwillingness’, the other being ‘an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’, article 17 (b) of the Rome Statute.

⁹ In the same vein Satzger, op. cit. (2002), p. 274: ‘In spite of the existing lack of clarity with regard to the exact criteria which are to be applied in this context, the difference between the German Code of Crimes against International Law and Article 28 of the Rome Statute can hardly be regarded as creating such a situation of abuse of the *ne bis in idem* principle.’

¹⁰ Compare, for instance, Jimmy Gurule, ‘United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?’, in: *35 Cornell International Law Journal* (2001), pp. 27–28: ‘The Court may override the complementarity principle, and trump the State proceedings if it concludes that they were not conducted “independently or impartially” because such proceedings were inconsistent with “principles of due process recognized by international law”. Thus, in essence, the Court functions as a super or supreme international appellate court, passing judgements on the decisions and proceedings of national judicial systems.’

least theoretically, trigger the jurisdiction of the ICC, in the reverse situation – of domestic law going beyond the international provisions it purports to implement – the ICC would have no reason whatsoever to interfere. Nonetheless, the general question whether states are under a duty to accept and apply international criminal law in a uniform manner involves both situations of ‘underinclusion’ and ‘overinclusion’.¹¹

This article will address the topic of ‘uniformity versus diversity’ in international criminal law from two perspectives. The first part will give an impression of the actual performance of domestic jurisdictions in the prosecution and trial of core crimes under the jurisdiction of the ICC. The emphasis will be on court decisions, although, in view of the shortage of relevant case law, examples of national legislation will be included as well.¹² Obviously, a comprehensive survey of topical case law would far extend beyond the scope of this article. The author has selected and identified a number of cases which either show faithful adherence to international standards or display some degree of divergence from the international ‘role model’. A distinction is made between case law and legislation on the elements of core crimes (§ 2), concepts of criminal responsibility: perpetration and participation (§ 3) and excluding criminal responsibility (§ 4).

In the second part, the focus shifts to a more normative perspective. Assuming that discrepancies in the application of international criminal law persist, the question arises whether we should deplore this situation and aspire after (complete) uniformity. § 5 starts with an investigation of the question whether states are bound under international law to comply with standards of international criminal law, decreed at the international level. § 6 continues to explore the arguments in favour of (some) diversity. The present author, though conceding that diversity in the application of international criminal law is not a virtue in itself, will argue that a certain degree of differentiation is inevitable and even desirable. The administration of criminal justice is by its nature a question of casuistry, taking into account the specific circumstances of each case within its historic, political and legal context. International crimes do not escape, nor are they immune from, such casuistry.

2. Elements of Core Crimes Under the Jurisdiction of the ICC

As is well known, the core crimes under the jurisdiction of the International Criminal Court – genocide, crimes against humanity and war crimes – are forms

¹¹) Compare for this terminology Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, The Hague 2006, p. 117.

¹²) The new Oxford University Press and Amsterdam Centre of International Law’s project on ‘International Law in Domestic Courts’ (hereafter: ILDC), in which the present author is involved as commentator, provides a rich source of national courts’ decisions. The author has greatly benefited from this data-base.

of system criminality which stand out for their contextual elements. Partially emanating from time-honoured international humanitarian law, partially the offspring of the atrocities, committed in the Second World War, these, generally very serious crimes are only 'elevated' to the level of international crimes if certain additional conditions are fulfilled. War crimes obviously presuppose the existence of an armed conflict and require a connection with this conflict. Crimes against humanity are part of a pattern of violence, a widespread or systematic attack against a civilian population, while the perpetrator has knowledge of this attack. Genocide entails the commission of very serious crimes like murder and mayhem with the specific intent to destroy a group in whole or in part.

Domestic courts have been called upon to interpret and apply the elements of these crimes in their own legal order. Usually they have closely followed the international standards, as expounded in the international instruments and in case law of the international tribunals, but sometimes their judgements exhibit prominent deviations. One of the nagging issues concerns the proper relationship between crimes against humanity and genocide. Should genocide be considered as a *specialis* of crimes against humanity? The definitions, shortly summarized above, clarify the distinction. While in case of crimes against humanity the perpetrator chooses civilians as his target, he need not have the intention to destroy a whole group on racial, ethnical or religious grounds. Yet, the relationship between the two categories causes confusion, as was exemplified by a judgement of the Estonian Supreme Court.¹³ The accused, an agent of the security organs of the Estonian Soviet Socialist Republic, was charged with having killed three members of a group resisting the Soviet occupying regime who hid in the forests and were colloquially called the 'forest brothers'. At first blush, the central legal issue was whether these victims had forfeited their status as civilians by joining the resistance. The Supreme Court held that, being a member of a resistance group did not automatically deprive the victims of their civilian status pursuant to paragraph 6 of the Charter of the Nuremberg International Military Tribunal.¹⁴ Next, the Court endeavoured to clarify the distinction between genocide and crimes against humanity, holding that:

Based on the characteristics of genocide (...), under 'group' only such a group can be understood, to which an individual belongs on the basis of objective criteria, and the membership of which members cannot change at their own discretion: first and foremost origin (nationality, race), or because the changing of membership is difficult or impossible for subjective reasons (faith).¹⁵

¹³ *Prosecutor v. Karl-Leonhard Paulov*, Estonian Supreme Court judgement of 21 March 2000, ILDC 198 (EE 2000).

¹⁴ *Pros. v. Paulov*, § 4.

¹⁵ *Pros. v. Paulov*, § 3.

Obviously, the Supreme Court refers to the ‘objective approach’, as introduced by the ICTR in the Akayesu- case, which takes the ‘stable and unalterable’ composition of the group as point of departure, making the members of the group a particularly easy and vulnerable target for their persecutors.¹⁶ The implication of such an interpretation seems to be that members of a resistance group, which has a volatile character by nature, would not qualify as victims of genocide. However, the Court appears to contradict this opinion by emphasizing that ‘crimes against a group initiating resistance against an occupying regime (...) is a feature of an offence of genocide, not of a crime against humanity.’¹⁷

The whole confusion is actually caused by article 61 of the Estonian Criminal Code which mixes up crimes against humanity and genocide, adding ‘groups initiating resistance to the occupying regime or other groups (sic)’ to the realm of protected groups within the meaning of genocide. The commentator to the judgement concludes that the international crime of genocide could be interpreted more broadly in domestic courts.¹⁸

In the *Scilingo*- case of the Spanish *Audiencia Nacional* the relationship between crimes against humanity and genocide came even more poignantly to the fore.¹⁹ The accused, a member of the Argentinean armed forces during the so-called *guerra sucia* (dirty war) between 1976 and 1982, was charged and convicted for illegal detentions, torture and participation in the killing of 30 persons, which constituted a crime against humanity as the acts had been committed in the context of a generalized attack against the civilian population. Initially, the Spanish Court seemed to follow the mainstream – restrictive – approach on genocide, arguing that the definition did not cover groups that are not stable, thus specifically excluding political groups.²⁰ However, the Court made an important *caveat*, by suggesting that the act at the time of commission could be classified as genocide, according to the broader interpretation of the concept at that time. Apparently, the content of the crime in Spanish law had changed. How could this strange meandering be explained? The gist of the problem was that ‘crimes against humanity’ had only been recently introduced in the Spanish legal order, while it did not constitute a separate legal category at the time the act had been committed. Nevertheless, application of the current provision did not violate the *nullum crimen*- principle, because the High Court concluded, after protracted deliberations, that individual criminal responsibility for crimes against humanity qualified as international customary law which could be applied directly within the Spanish legal order. Prior to the implementation of

¹⁶ *Pros. v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 September 1998, § 511.

¹⁷ *Pros. v. Paulov*, § 5.

¹⁸ Commentary by Martin Roger, C6.

¹⁹ *Graciela P de L and Others v. Scilingo*, Spanish High Court (Audiencia Nacional), 19 April 2005, ILDC 136 (ES 2005).

²⁰ *Scilingo*- case, A, § 6.

crimes against humanity in Spanish law, a broader interpretation of genocide served to compensate the absence of the more appropriate category of ‘crimes against humanity’.²¹ After a short discussion of the political deliberations which preceded and influenced the enactment of the Genocide Convention, the High Court expressed the surprisingly candid opinion that the concept of genocide had no fixed content, but should be subject to flexible and dynamic interpretation:

In our opinion, there is scope for freedom of interpretation, and even freedom for change in the meaning itself of the description of the crime, according to the passing of time and changes of systems, as occurs with any other description of crime. We see no reason for this description to be tied down to a particular interpretation originally conditioned by a contextual world situation, determined by a particular correlation of forces but which may have even changed radically since.²²

One may wonder why the Court, after having discovered an appropriate basis for trial and conviction of crimes against humanity in customary international law, still bothered to search for a proper complement in written law. Perhaps it felt slightly insecure about the outcome of its bold reasoning and it intended to bolster its point of view by invoking more solid sources. Although one may applaud the final result – revealing Spain as an active and trustworthy forum for the trial and prosecution of international crimes-, the legal reasoning is at times somewhat contrived and arcane. Apart from the fact that customary international law remains a shaky ground for the administration of criminal law, it is difficult to understand why the more liberal and broader interpretation of the concept of genocide did not persist after the introduction of crimes against humanity in Spanish law.²³ Would the single availability of a, perhaps partly overlapping, category influence the content of such an important concept? Such a purely pragmatic and functionalist approach would deny the crime of genocide an autonomous meaning and would subject it to whimsical vacillations.

The Scilingo- case exemplifies a widely shared dissatisfaction with the limited scope of the Genocide Convention. Many states have introduced implementing legislation, extending protection to social groups, political groups or both.²⁴

²¹ *Scilingo*- case, B, § 3.2: ‘The lack of specific regulation on other types of crimes against humanity found in customary international law, and from a given point in time in conventional law as well, could in fact be alleviated by a broad interpretation of the crime of genocide, adjusting the primitive, super-strict, technical concept described in the Convention on Genocide to the change that had subsequently taken place in international society (...)’

²² *Ibidem*.

²³ For similar critical comments on the decision, compare the contributors to the Symposium on the Scilingo Case, in: *Journal of International Criminal Justice* 3 (2005), p. 1074 ff, especially Chr. Tomuschat, ‘Issues of Universal Jurisdiction in the Scilingo Case’ and A. Gil Gil, ‘The Flaws of the Scilingo Judgement’.

²⁴ For a useful survey, see Ferdinandusse, *supra* note 11, pp. 23–29.

In the *Mengistu-* case, the Ethiopian courts held that Article 281 of the 1957 Ethiopian Penal Code which indeed extends the concept of genocide to cover ‘political groups’, is not in violation of the Genocide Convention. The Ethiopian law serves to broaden, rather than to restrict, the protection afforded to human rights.²⁵ The commentator asserted, rather categorically, that ‘there is no principle of international law which holds that a national law that broadens the protection of an international treaty to which the State is a party, and does not contradict it, is void.’²⁶ We will return to this issue in § 5.

In the *Jelisić-* case, the ICTY left the door ajar to such a broader interpretation by following a subjective approach, rather than applying an objective test. Not the objectively measurable membership of a racial, religious, ethnical or national group would be decisive, but rather the perception of the perpetrator that people belonged to a specific group and, by implication, *not* to ‘the likes of us’.²⁷ On the other hand, the emergence and growing application of crimes against humanity may dampen the quest for a broader interpretation of genocide, as witnessed by the Scilingo case.

Not only has the concept of groups in the Genocide Convention been a matter of controversy; domestic jurisdictions have assumed some discretion in the interpretation of other elements as well. In their interesting analysis of German case law on war crimes and genocide in the Former Yugoslavia, Kai Ambos and Steffen Wirth discuss a number of ‘liberal’ and possible flawed applications of the Genocide Convention.²⁸ In the *Jorgić-* case, the OLG Düsseldorf, starting from the premise that ‘destruction’ not only implies ‘physical destruction’, but also the demolition of all social interaction between the group members, conflated expulsion of the Muslim population from Serbia with ‘destruction’.²⁹ This equation is reminiscent of the heated discussion whether ethnic cleansing would amount to genocide. In the meantime, both the ICTY (in the cases of *Krstić* and *Kupreskić*) and the International Court of Justice (in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*) have explicitly renounced the German courts’ position and have reiterated the strict

²⁵ *Special Prosecutor v. Colonel Mengistu Hailemariam and 173 others*, Federal High Court, 9 October 1995, ILDC 555 (ET 1995). The Federal Supreme Court confirmed the preliminary ruling on appeal in its judgment of 11 January 2007.

²⁶ Commentary of Sisay Alemahu Yesanew, ILDC 555 (ET 1995), C4.

²⁷ *Pros. v. Jelisić*, Judgement, Case No. IT-95-10-T, T. Ch. I, 14 December 1999, § 70: ‘Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community.’ However, the ICTR qualified and partially rejected this approach by holding that ‘a subjective definition alone is not sufficient to determine victim groups’. ICTR, *Pros. v. Musema*, Judgement and Sentence, Case No. ICTR-96-13-T, T. Ch., 27 January 2000, § 144.

²⁸ K. Ambos and S. Wirth, ‘Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts’, in: H. Fischer *et al.* (eds), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin 2001, pp. 769–797.

²⁹ OLG Düsseldorf, 26 September 1997. Judgement confirmed by the Federal Court of Justice, 30 April 1999.

interpretation under customary international law that limits the definition to acts seeking the physical or biological destruction of the group.³⁰ The European Court of Human Rights, which was seized to assess whether the German interpretation was in breach of the *nullum crimen*-principle, though noticing the discrepancy between the several opinions, considered the German courts' interpretation to be consistent with the essence of the offence of genocide.³¹

Another example, mentioned by Ambos and Wirth, is the improper translation in German law of the word *calculated* in the phrase 'Deliberately inflicting on the group conditions of life *calculated* to bring about its physical destruction in whole or in part', one of the concrete crimes that constitute genocide, if committed with the required specific intent. In both the former Article 220a(1), no. 3 of the German Criminal Code and in Article 6 of the new German Code on International Crimes, this word is substituted by the German word *geeignet*, which means 'apt' or 'likely'. Whereas 'calculated' implies a subjective purpose, the German substitute alludes to merely objective causality, thus lowering the threshold for finding the infliction of destructive conditions.³² At first blush one may be inclined to doubt whether the difference in phrasing would make much difference in practice. Should the word 'calculated' not be considered as a probably redundant reiteration of the specific intent, although now specifically directed at the choice of means to accomplish the intended destruction? On closer scrutiny, however, the relaxation in the German translation, in combination with the equation of 'expulsion' and 'destruction', may result in a dilution of the concept of genocide.

It is remarkable that the definition of *other* international crimes has prompted far less dissent and deviation amongst domestic jurisdictions. In the *Mugesera*-case, for instance, the Canadian Supreme Court explicitly acknowledged the importance of the decisions of the ICTY and the ICTR.³³ By virtue of this deference to international authority, the Court reversed its prior holding in the landmark case of *Finta*, which had suggested that discriminatory intent was required for all crimes against humanity.³⁴ This opinion obviously did not comport with

³⁰ *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001, § 580; Appeals Chamber: *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-A. Ch., 19 April 2004, § 25. The Trial Chamber in the *Kupreskić*-case (Case No. IT-95-16-T, 14 January 2000, § 751) explicitly held that the aim of expelling people from a village did not constitute genocide. Confirming: ICJ, 26 February 2007, Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), § 190.

³¹ ECHR, Judgement of 12 July 2007, *Case of Jorgić v. Germany*, § 114.

³² Ambos and Wirth, op. cit. (2001), pp. 784–786.

³³ S. Ct. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 28 June 2005, ILDC 180 (CA 2005), § 126: 'Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions (...) which expressly incorporate customary international law'.

³⁴ *R. v. Finta* [1994] 1 S.C.R. 701, 813.

recent case law of the ICTR and the ICTY which considered discriminatory intent only to be relevant to persecution as crime against humanity.³⁵ In the same vein, the Spanish High Court in the *Scilingo* case, mentioned before, meticulously enumerated the contextual elements of crimes against humanity as developed in the jurisprudence of the ad hoc Tribunals, with a view to testing the conduct of the accused against these accepted standards.³⁶

Similarly – and outside the scope of ‘core crimes’ under the jurisdiction of the ICC – courts are often inclined to rely strictly upon the international conventional sources. A rather extreme example of an internationalist approach is the case of *Michael Frudenthal v. Israel*, which concerned a charge of trafficking in persons for the purpose of employing them as prostitutes.³⁷ The Supreme Court held that the applicable terms of the Israeli statute should be interpreted in accordance with the spirit of the UN Convention Against Trans-national Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, even though Israel had not ratified these international instruments. By joining these instruments, the Court reasoned, ‘Israel had expressed its aspiration to take an active part in the norms that the family of nations has created around this issue.’³⁸

In other instances, courts have taken the opportunity to explore the limits of international conventions which were implemented in domestic legislation. An interesting example is the Dutch case of the Congolese Colonel, Sebastien N., who stood trial on a charge of complicity in torture. The accused had allegedly been involved in the ill-treatment of a custom official who had refused to clear the car of a friend of the accused who did not want to pay the shipping costs.³⁹ Apart from being the first successful conviction in the Netherlands on the basis of the principle of universal jurisdiction, the case reveals another interesting legal issue: does the UN Convention on Torture cover acts of torture which are predominantly committed for private reasons? After all, the Torture Convention requires the involvement of a public official, arguably implying that torture, to be qualified as an international crime, should serve an interest of public policy. Although the District Court did not explicitly address the issue, it implicitly opted for the wide interpretation by confirming the charges and convicting the accused to a prison sentence of two years and six months. The present author is inclined to agree with the Court’s dictum, as one could argue that the accused abused his

³⁵ *Mugusera v Canada*, §§ 143/144. The Court referred to the Akayesu case and the Tadić case, respectively.

³⁶ *Scilingo*- case, A, § 4.

³⁷ Supreme Court of Israel, *Michael Frudenthal v The State of Israel*, 3 August 2003, ILDC 364 (IL 2003).

³⁸ *Frudenthal*- case, § 5.

³⁹ District Court of Rotterdam, *Pros. v. Sebastien N.*, 7 April 2004, ILDC 145 (NL 2004).

position as a public official and that the torture took place in a climate where such acts were tolerated by state authority.⁴⁰

This case demonstrates that international conventions sometimes leave room for interpretation, inviting domestic jurisdictions to fill any gaps and contribute to the further development of international (criminal) law.

The Geneva Conventions instruct states parties to incorporate *grave breaches* of these conventions 'lock, stock and barrel' in their criminal legislation and even oblige them to establish and exercise universal jurisdiction on the basis of the *aut dedere, aut judicare*-principle.⁴¹ Recent case law does not challenge these uncontroversial bastions of international criminal law, but rather has investigated the scope of universal jurisdiction for other violations of the laws and customs of war, which still qualify as 'war crimes'. After all, it is well known that the 'grave breaches'-regime only applies in international armed conflicts. Would the Geneva Conventions also allow for or even prescribe the establishment and exercise of universal jurisdiction in respect of serious violations of Common Article 3 of the Geneva Conventions which also, and predominantly, applies in armed conflicts of a non-international character?

This issue was addressed in another recent Dutch case in which two Afghan generals who had occupied superior positions within the military intelligence service, stood trial on suspicion of complicity in torture as a war crime.⁴² The District Court had qualified the armed conflict in Afghanistan as non-international and had indeed assumed that Common Article 3 enjoined states parties to establish and exercise universal jurisdiction. However, the incorrect submission of the court was predicated on its confounding the duty to criminalize those provisions with the issue of jurisdiction.⁴³ The Court of Appeal chose a different track, by taking the Dutch legal provision, which indeed extends universal jurisdictions over war crimes in internal conflicts, as point of reference.⁴⁴ Counsel for the Defence had alluded to a rule of customary international law, prohibiting the establishment and

⁴⁰ In the same vein: H. Burgers and H. Danelius, *The United Nations Convention against Torture*, Dordrecht/Boston/London 1988, p. 119. For a discussion of the jurisdictional aspects of this case, see M.T.Kamminga, 'First Conviction under the Universal Jurisdiction of the UN Convention against Torture', in: *Netherlands International Law Review*, Vol. 51 (2004), p. 439 ff.

⁴¹ Geneva Convention (I), Article 49, Geneva Convention (II), Article 50, Geneva Convention (III), Article 129 and Geneva Convention (IV), Article 146. Compare also G. Werle, *Principles of International Criminal Law*, The Hague 2005, p. 278.

⁴² Court of Appeal of The Hague, *H. v. Public Prosecutor*, 29 January 2007, ILDC 636 (NL 2007).

⁴³ See on this question G. Mettraux, 'Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes', in: *Journal of International Criminal Justice* 4 (2006), pp. 362–371.

⁴⁴ The applicability of the principle of universal jurisdiction to war crimes in an internal conflict has been confirmed by the Dutch Supreme Court in the case of *Pros. v. Darko K.*, 11 November 1997, NJ 1998, No. 463; 30 *Netherlands Yearbook of International Law* (1999), 315.

exercise of extra-territorial jurisdiction without a proper mandate under international law. However, so the Court reasoned, as the Dutch Constitution precludes the review of a Dutch Statute on its compatibility with customary international law, the Dutch provision on jurisdiction prevailed. By opting for a rather technical solution, the Court of Appeals cleverly circumvented one of the most difficult and controversial problems of international law: whether the establishment and exercise of universal jurisdiction requires explicit authorisation under international law, or, conversely, states are at liberty to establish jurisdiction, unless expressly prohibited by international law.⁴⁵ The issue is far from being settled, which is witnessed by the divergent opinions of the judges in the Arrest Warrant- case of the International Court of Justice.⁴⁶ But as long as international law does not tighten the reigns, states have a large discretion in this respect. The trend seems towards expansion of universal jurisdiction in respect of war crimes in internal armed conflicts. Whereas Holland used to occupy a rather unique position, other states are following suit, as one commentator has observed correctly.⁴⁷

Not all courts are conscious of the intricacies of international criminal law, however. A rather peculiar example is the trial of a Bosnian Moslem by the Danish Supreme Court.⁴⁸ The Court took the obligation to exercise universal jurisdiction in case of war crimes, stemming from the Geneva Conventions, for granted, without bothering about any distinction between international and non-international armed conflicts.

3. Concepts of Individual and Superior Criminal Responsibility

The statutes of the International Criminal Court and the ad- hoc tribunals contain provisions on individual criminal responsibility and superior responsibility.⁴⁹ Basically, these provisions serve to extend criminal responsibility over those persons who do not ‘physically’ perpetrate the crime, but are in some other way implicated or related to the crime as accessories. Compared to the somewhat perfunctory provisions in the Statutes of the ad hoc-tribunals, articles 25 and 28 of the Rome

⁴⁵ The latter position has the eldest credentials in the famous *Lotus*-case of the Permanent Court of International Justice, 7 September 1927, Series A No. 10. p. 19.

⁴⁶ ICJ, 14 February 2002, Arrest Warrant of 11 April 2000 (*Dem. Republic of Congo v. Belgium*), 41 ILM 536 (2002)

⁴⁷ E. van Sliedregt, ‘Afghaanse Zaken – over 1F-beschikkingen en de vervolging van oorlogsmisdaden in Nederland’ (Afghan cases – on 1F-decisions and the prosecution of war crimes in the Netherlands), in: 32 *NJCM-Bulletin* (2007), no. 3, p. 337.

⁴⁸ Supreme Court, *The Government Prosecution Service (Rigsadvokaten) v. T*, 15 August 1995, ILDC 568 (DK 1995).

⁴⁹ Cf. Article 25 of the ICC-Statute, Articles 7(1) of the ICTY-Statute and Article 6(1) of the ICTR-Statute (‘Individual criminal responsibility’); Article 28 of the ICC-Statute, Articles 7(3) of the ICTY-Statute and Article 6(3) ICTR-Statute (‘command responsibility’).

Statute are more sophisticated and refined. One may point at the following differences.⁵⁰ Article 25, (3)(a) of the Rome Statute introduces the concepts of ‘co-perpetration’ and ‘perpetration by means’. Furthermore, article 25, (3)(d) addresses the responsibility of members of a group, acting with a common purpose. Finally, Article 28 makes a distinction between the superior responsibility of military commanders and civilian superiors, introducing a slightly higher threshold of *mens rea* for the latter category.⁵¹

Another striking difference between the statutes of the ad-hoc tribunals and the Rome Statute is that the former identify specific forms of perpetration and participation in relation to genocide, while the provisions of the Rome Statute with the notable exception of ‘direct and public incitement to commit genocide’ apply equally to all core crimes.⁵² Another important point is that complicity in genocide is criminalized under the Ad Hoc Tribunals’ statutes, in contrast to the Rome Statute which drops the concept of complicity altogether.

It is only fair to add, however, that the Rome Statute has greatly benefited from the case law of the ad-hoc tribunals. An elaborate discussion of this case law would obviously extend beyond the scope of this article. Suffice here to mention some landmark decisions on ‘aiding and abetting’ (*Furundžija*-case),⁵³ ‘superior responsibility’ (*Celibici*-case),⁵⁴ ‘complicity in genocide’ (*Akayesu*-case)⁵⁵ and ‘direct and public incitement to commit genocide’ (*Akayesu*-case and *Ruggiu*-case).⁵⁶ Furthermore, Article 25, (3)(d) is at least partially grafted on the famous ‘joint criminal enterprise’-doctrine, which, after having been introduced by the Appeals Chamber in the *Tadić*-case, has been lavishly used in the case law of the ICTY.⁵⁷

⁵⁰ See for an extensive analysis: Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague 2003, pp. 41–114 (on perpetration and participation) and pp. 118–222 (on superior responsibility).

⁵¹ Whereas the *mens rea* for military commanders is ‘knew or should have known’, the applicable standard for civilian superiors is knowledge or ‘consciously disregarding information which clearly indicated, that the subordinates were committing or about to commit such crimes’.

⁵² Articles 2(3) of the ICTR-Statute, respectively article 4(3) of the ICTY-Statute qualify as punishable offences: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

⁵³ *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, §§ 190–249.

⁵⁴ *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, §§ 330–401.

⁵⁵ *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 September 1998, §§ 525–548.

⁵⁶ *Pros. v. Akayesu*, §§ 549–562 and *Pros. v. Ruggiu*, Judgement, Case No. ICTR-97-32-I, T. Ch. I, 1 June 2000, §§ 14, 17 and 44.

⁵⁷ *Pros. v. Tadić*, Judgement, Case No. IT-94-1-A, A. Ch., 15 July 1999, §§ 185–229. Some important decisions on ‘joint criminal enterprise’ include: *Prosecutor v. Kvočka*, Judgement, Case No. IT-98-33-T, 2 November 2001 and (Appeals Chamber) 28 February 2005; *Prosecutor v. Brđanin*, Judgement, Case No. IT-99-36-T, 1 September 2004 and (Appeals Chamber) 7 April 2007; *Prosecutor v. Krajišnik*, Judgement, Case No. IT-00-39/40, 27 September 2006.

The application of concepts of individual and superior criminal responsibility in respect of international crimes by domestic jurisdictions shows (again) some variety. Some courts closely follow the standards of the international criminal tribunals, while others take divergent courses.

A perfect example of the former category is again the case of *Mugesera v. Canada*, mentioned in the previous paragraph. Mr. Mugesera had allegedly held an inflammatory speech at a meeting of a Hutu political party, in which he had advocated violence against the Tutsis. He had applied for asylum and had subsequently, his dark past having been discovered, faced deportation proceedings, which he contested before the Canadian Supreme Court. The Court proceeded to investigate whether Mr. Mugesera's speech could possibly qualify as 'incitement to commit genocide' or 'counselling a crime against humanity'. First, the Court professed its internationalist approach by holding that, as genocide is a crime originating in international law, 'international law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide'.⁵⁸ Next, the Court completely deferred to the findings of the Rwanda Tribunal. It pointed at the inchoate character of 'incitement to genocide', which entailed, as the ICTR had emphasized in the *Akayesu*- and *Media*-cases, that public incitement had to be punished as such, even where such incitement failed to produce the result expected by the perpetrator.⁵⁹ The Canadian Court coined the ICTR's interpretation of the elements 'direct and public',⁶⁰ and finally fully agreed with the ICTR that the guilty mind for the crime of genocide should be the 'specific intent'.

The outcome may not be very surprising, in view of the fact that 'incitement to commit genocide' is completely a construction of international law. What is perhaps more remarkable, is that the Supreme Court delineated the domestic concept of 'counselling' in full conformity with international criminal law as well. Although the statutes of the ICTY and ICTR do not use the word 'counselling', the Court considered the kindred concept of 'instigation' and concluded that both expressed the meaning of 'prompting, encouraging or actively inducing someone to commit a crime'. According to the ICTR in the *Rutaganda*-case, 'instigation to crimes against humanity' encompassed 'direct and public incitement' to the proscribed crime, but – contrary to genocide – *only* if that crime had actually materialized.⁶¹

⁵⁸) *Mugesera v. Canada*, § 82.

⁵⁹) *Pros. v. Akayesu*, § 562 and *Pros. v. Nahimana, Barayagwiza and Ngeze* (Media Case), Judgement, Case No. ICTR-99-52-T, 3 December 2003, §1029.

⁶⁰) In an eloquent *dictum* the ICTR had argued that the direct element should be viewed in the light of its cultural and linguistic element, adding that it was decisive whether the persons for whom the message was intended immediately grasped the implication thereof, *Pros. v. Akayesu*, §§ 557/558.

⁶¹) *Pros. v. Rutaganda*, Judgement, Case No. ICTR-96-3-T, T. Ch. I. 6 December 1999, § 38.

Transferring this finding to the domestic context and after having determined that there was insufficient evidence to substantiate that murders had actually occurred as a result of Mr. Mugesera's speech, the Court concluded that '*in light of international customary law* Mr. Mugesera's counselling of murder was not sufficient to satisfy the initial criminal act requirement for a crime against humanity.'⁶² Nevertheless, this outcome did not preclude the Court from finding that the hate speech itself constituted the separate crime of 'persecution' as a crime against humanity.

The message is clear: not only the elements of crimes, but also concepts of criminal responsibility should be interpreted in light of international criminal law, with the case law of the ad hoc tribunals as shining examples. Other domestic jurisdictions, however, have shown less deference towards the international standards.

In the Dutch *Van Anraat*-case, the Court of Appeal at least created an opening for the penetration of domestic criminal law.⁶³ The Dutch businessman Van Anraat had been prosecuted on the counts of 'complicity in genocide' and 'complicity in war crimes', as he had delivered huge quantities of the chemical thiodiglycol (TDG) to the regime of Saddam Hussein. TDG served as a precursor for the manufacture of chemical weapons, which was used both on the battlefield in the war against Iran and during the massacre in the Kurdish village of Halabja. The District Court of The Hague had acquitted Van Anraat for 'complicity in genocide', taking the case law of the ad hoc tribunals as point of reference for the assessment of the *mens rea* of the accomplice in genocide. Although international criminal law does not require the accomplice to share the specific intent of the main perpetrator, he should at least have 'positive knowledge' of his desire to destroy a group in whole or in part.⁶⁴ As insufficient evidence had been adduced to prove that Van Anraat did indeed have actual knowledge of Saddam's plans to destroy (part of) the Kurdish population, a conviction for complicity in genocide could not stand. An acquittal on the count of genocide did not rule out, however, a conviction for complicity in war crimes, as the District Court, applying the more lenient standard of 'conditional intent' (*dolus eventualis*), reasoned that Van Anraat must have been aware of the considerable chance that his merchandise would be converted into weapons of mass destruction, which would subsequently be employed against Iraqi's foes.⁶⁵

⁶² *Mugesera v. Canada*, § 136, emphasis added.

⁶³ Court of Appeal, The Hague, *Public Prosecutor v. Van Anraat*, 9 May 2007, ILDC 753 (NL 2007).

⁶⁴ District Court of The Hague, 23 December 2005, LJN: AU 8695, § 6.5.1. The Court quoted the judgements of the Appeals Chamber in *Krstić* (IT-98-33-A, 19 April 2004, § 144) and *Ntakirutimana* (ICTR-96-10-A, and ICTR-96-17-A, 13 December 2004, §§ 500/501) in support of its finding.

⁶⁵ District Court, Van Anraat-case, § 7. For a critical discussion of the Judgement, see: Harmen G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction; Reflections on the *van Anraat* Case' in: *Journal of International Criminal Justice* 4 (2006), pp. 239–257.

The Court of Appeal, though it did not reverse the acquittal, took a slightly different approach. It suggested that application of the *dolus eventualis*-standard in the assessment of the *mens rea* of the accomplice in genocide might be allowed, but it concluded that this would not influence the outcome of the judgement: even in view of this latter more lenient standard, the facts did not reveal ‘with a sufficient degree of certainty’ that Van Anraat disposed of the information from which he could have deduced the genocidal intent.⁶⁶

It requires some explanation why this finding is so important and strikes at the core of our central topic. In Dutch criminal law it is generally acknowledged that, in assessing the appropriate *mens rea* of the accomplice, *dolus eventualis* suffices, both in respect of furthering the crime and the crime itself.⁶⁷ Application of the Dutch standard would arguably bring about a result, different from application of the more stringent international standard.

The opinion of the Court of Appeal therefore raises the principal issue whether in such cases international law or domestic law should prevail.

In order to sustain its point of view that application of the *dolus eventualis* standard would theoretically be possible, the Court of Appeal adduced two arguments. First, it held that

(...) especially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystallized out completely.⁶⁸

Next, The Court pointed out that the legislative history of the Dutch Code on International Crimes did not provide an unambiguous answer on this issue either.⁶⁹ The passage to which the Court apparently refers, allows in general terms the application of Dutch criminal law in case of adjudication of international crimes.⁷⁰

In conjunction, both arguments unequivocally convey the Court’s opinion: although application of international standards is to be preferred, there is a residual function for Dutch criminal law, especially if the case law of international (criminal) tribunals fails to offer clear guidance.

⁶⁶ *Public Prosecutor v. Van Anraat*, 9 May 2007, § 7, under B.

⁶⁷ Dutch Supreme Court, 20 January 1998, NJ 1998, 226.

⁶⁸ *Public Prosecutor v. Van Anraat*, § 7, under (B). Possibly, the Court of Appeal referred to the *Akayesu*-case, in which the Trial Chamber indeed embraced the *dolus eventualis* standard. *Pros. v. Akayesu*, § 541: ‘However, if an accused knowingly aided and abetted in the commission of a such a murder while he knew *or had reason to know* that the principal was acting with genocidal intent, the accused would be an accomplice to genocide’. (Emphasis added).

⁶⁹ *Ibidem*.

⁷⁰ Explanatory Memorandum to the Code on International Crimes, Parliamentary Papers II, 2001/2002, 28 337. no. 3, p. 29: ‘It would be impractical and involve legal uncertainty if the Dutch courts were to apply provisions on participation, justification and excuses (i.e.: derived from the Rome Statute, add. HvdW) which only slightly deviate from the ones with which they are familiar’ (author’s translation).

Whereas the Van Anraat- case offers an interesting example of ‘overinclusion’, the regulation of the doctrine of superior responsibility in the German Code of Crimes against International Law, which was shortly mentioned in the introductory paragraph, possibly exhibits underinclusion. The relevant provisions of the German Code require some elucidation. Section 4 of the German Code reserves the notion of ‘superior responsibility’ for the *intentional* omission to prevent subordinates from committing international crimes, while the superior must also have intended the crimes themselves. In this case he is considered on the same par as the main perpetrator and deserves the same punishment.⁷¹ If, on the other hand, the superior only, intentionally or negligently, fails to exercise his duty of supervision, while the imminent commission of crimes is foreseeable, he risks punishment of either 5 years imprisonment (in case of intent) or 3 years imprisonment (in case of negligence) (section 13). Moreover, by virtue of the same provision, the superior may incur criminal responsibility for the separate offence of failing to report a crime, while he knows that a crime has been perpetrated and fails immediately to draw the attention of the agency responsible for the investigation or prosecution of the crime.

At first blush, the regulation in the German Code is in obvious contradiction to both the case law of the ad hoc- tribunals and Article 28 of the Rome Statute which do not make such refined distinctions between superiors who intend the crimes of their subordinates and superiors who are only negligent in the exercise of their duties, nor bother about the question whether responsibility derives from omission to prevent or failure to repress those crimes. Rather these sources tend to lump these situations together under the heading of ‘a dereliction of duty to exercise proper control’ which has furthered the commission of crimes, thus holding the superior accountable for the very crimes of their subordinates.⁷² On closer scrutiny, however, the German approach seems to square with a recent tendency in the case law of the ad hoc tribunals to consider the superior’s ‘dereliction of public duties’ as a separate crime of omission.⁷³ This dissociation between the responsibility of the superior and the actual crimes of his subordinates arguably better reflects the lesser reproach the superior should befall in case he is ignorant of and certainly not intends the crimes of his subordinates.

⁷¹ A. Cassese (*International Criminal Law*, Oxford 2003, pp. 206–207) correctly qualifies the superior as a co-perpetrator, although he points out that according to the Commentary to the Code he may also be classified as an accomplice (*bloße Beihilfe*).

⁷² Compare *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, 16 November 1998, § 333: ‘That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.’

⁷³ Compare *Prosecutor v. Halilović*, Judgement, case No. IT-01-48-T, 16 November 2005, §§ 54 and 78; *Prosecutor v. Hadžihasanović and Kubura*, Judgement, Case No. It-01-47-T, 15 March 2006, § 191 and *Prosecutor v. Orić*, Judgement, case No. IT-03-68-T, 30 June 2006, § 782. On this issue also: Chantal Meloni, ‘Command Responsibility; Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’, in: *Journal of International Criminal Justice* 5 (2007), pp. 619–637.

If this approach will persist and will gradually emerge as the prevailing view, we may witness a highly interesting development in which the international criminal tribunals are themselves influenced by evolving concepts of domestic criminal law, in addition to being the source of inspiration for the national courts.

4. Grounds for Excluding Criminal Responsibility

Articles 31 to 33 of the Rome Statute enumerate the grounds for excluding criminal responsibility. Starting with the proviso that the enumeration is not exhaustive, Article 31 mentions mental disease (section 1, sub a), intoxication (section 1, sub b), self-defence (section 1, sub c) and duress (section 1, sub d). In addition, Article 31(3) allows the Court to consider other grounds for excluding criminal responsibility, 'where such a ground is derived from applicable law as set forth in Article 21'. This last provision mentions, though in hierarchy inferior to ICC- law and sources of international law, 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime (...)'. Article 32 addresses the controversial issues of mistake of fact and mistake of law, whereas Article 33 introduces the 'superior orders' defence as a *specialis* of mistake of law. The provision takes the Nuremberg- principle that 'superior orders' should never serve as a complete defence as point of departure, but allows for an exception in case the accused was under a legal obligation to obey orders, he or she did not know that the order was unlawful and the order was not manifestly unlawful. Section 2 of this article contains an 'exception to the exception', by stipulating that orders to commit genocide or crimes against humanity are manifestly unlawful by nature.

The introduction of a catalogue of defences in the Rome Statute has been a groundbreaking event, as the statutes of the ad- hoc Tribunals only include the negatively-phrased provision that 'superior orders' 'shall not relieve the accused of criminal responsibility, but may be considered in mitigation of punishment' (Article 7(4) of the ICTY-Statute, respectively Article 6(4) of the ICTR- Statute).⁷⁴ The absence of specific provisions in the statutes has, however, not discouraged the Tribunals from freely and profoundly assessing defences whenever they were raised. In the *Erdemović*- case, the Appeals Chamber held, in a close split decision of 3 against 2, that, in case of international crimes, duress could never serve as a complete defence, but could only be considered in mitigation of punishment.⁷⁵ In the *Kordić*- case, the Trial Chamber evaluated the argument, propounded by the Defence, that the accused, as member of the Bosnian Croat forces, had acted

⁷⁴ In the same vein E. van Sliedregt, op. cit. (2003), p. 226.

⁷⁵ *Prosecutor v. Erdemović*, Judgement, Case No. IT-96-22-A, 7 October 1997, § 19.

in self-defence to repel the attack of the Serbs.⁷⁶ Referring to Article 31(1) c of the Rome Statute, which explicitly states that ‘the fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility’, the ICTY suggested that the Defence confounded the right to self-defence, pertaining to states or groups under international law, with the criminal law principle of self-defence as a ground for exclusion of criminal responsibility. The Trial Chamber therefore emphasised that ‘military operations in self-defence do not provide a justification for serious violations of international humanitarian law.’⁷⁷

For the purpose of this article it is necessary to investigate whether domestic jurisdictions, in the adjudication of international crimes, have observed the international standards expounded above, or whether they are inclined to apply either more lenient or stricter standards. A possible example of the former is the concept of ‘excess of self-defence’ which is recognized in civil law systems as an excuse. The concept features, amongst others, in German law (*Notwehr excess*),⁷⁸ in Dutch criminal law (*Noodweer excess*)⁷⁹ and in Spanish criminal law (*exceso en la defensa*).⁸⁰ The common condition for accepting this defence is that the excessive reaction is caused by an outburst of emotion which, in its turn, is the result of the unlawful attack. Application of this concept might cause disparities between the judgements of international tribunals and domestic courts, as the Rome Statute does not, at least not explicitly, mention ‘excess of self defence’. However, in such a situation Article 21 of the Rome Statute might bridge the gap, provided that the doctrine of ‘excess of self-defence’ can be qualified as a ‘general principle of law’ derived from national systems of law. The issue would require further investigation.

Case law of domestic courts on grounds for excluding criminal responsibility in respect of international crimes is rather scarce. However, in two recent Dutch cases, defences implying justifications were raised. Moreover, the famous *Priebke*-case exhibited simultaneously interesting examples of ‘underinclusion’ and ‘overinclusion’.

The Dutch *Kesbir*-case concerned an extradition request by Turkey of Mrs Kesbir, one of the major figures within the PKK (Kurdish Labour Party), on the charge

⁷⁶ *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, 26 February 2001, § 448.

⁷⁷ *Prosecutor v. Kordić and Čerkez*, § 452. Compare also G. Werle, op. cit. (2005), p. 143 and M. Scaliotti, ‘Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility, Part 1, 1 *International Criminal Law Review* (2001), p. 159.

⁷⁸ Section 33 of the German Criminal Code. See also A. Eser, Article 31, § 13, in: O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Baden-Baden 1999.

⁷⁹ Article 41, section 2 of the Dutch Penal Code.

⁸⁰ Compare article 59 of the Código Penal: ‘El exceso en la defensa no es punible cuando resulte del terror, o del arrebato y obcecación del momento, atendidas las circunstancias de hecho, las del lugar en que se efectúe y las personales del agresor y del agredido’. Source: J.M. Rodríguez Devesa y A. Serrano Gomez, *Derecho Penal Español*; Parte General, 17th ed., Madrid 1994, p. 555.

that she had been involved in several terrorist attacks, causing death and suffering among the civilian population.⁸¹ Counsel for the defence had challenged the extradition, arguing that the condition of double criminality had not been met, as the acts for which the extradition was requested were exclusively governed by international humanitarian law, as applicable in internal armed conflicts. This body of law, counsel continued, offers a licence to kill enemy combatants and only aims at protecting civilians and other vulnerable groups that do not, or no longer, take part in hostilities. Mrs. Kesbir and her confederates had only chosen Turkish military objects as their target, and assaults on enemy soldiers are allowed under international humanitarian law.⁸² Interestingly, counsel for the defence invoked international humanitarian law as a justification for conduct which would normally qualify as ‘criminal’.

The Supreme Court reversed the argument, by holding that, if counsel was inclined to invoke international humanitarian law as a possible justification, it should face the consequences of full application of the Geneva Conventions as well. Although common Article 3 of the Geneva Conventions does not oblige states parties to penalize certain activities, the provision neither preclude those state parties from offering protection to other persons than those who do not participate in armed conflict.⁸³

The Attorney General reached a similar conclusion, but adduced other grounds. In principle, he argued, international humanitarian law might have served the requested person as a justification, provided that she and her allies had chosen enemy soldiers as their exclusive targets. The animosities between Turkey and the PKK, however, did not meet the threshold of an internal armed conflict. As international humanitarian law was not applicable in this case, the acts were only to be judged on the basis of domestic criminal law.⁸⁴

The Supreme Court proceeded by holding that the condition of double criminality was satisfied, as both the participation in a criminal participation and the underlying crimes were punishable offences under Dutch law. Moreover, as the political aspect of the crimes did not prevail in view of their violent character, the Supreme Court concluded that no legal grounds impeded the extradition. Mrs. Kesbir, however, successfully challenged her actual surrender, arguing that she faced a real risk of violation of her rights under articles 3 and 13 of the European Convention on Human Rights. The District Court’s injunction was upheld by the Supreme Court.⁸⁵

What makes the Kesbir case of special interest to the central topic of this paper is that the Supreme Court explicitly acknowledged the right of domestic jurisdictions to exceed the (minimum) standards of international humanitarian law.

⁸¹ *Public Prosecutor v. Mrs. K*, Dutch Supreme Court, 7 May 2004, ILDC 142 (NL 2004).

⁸² *Kesbir*- case, § 3.3.3.

⁸³ *Kesbir* case, § 3.3.7.

⁸⁴ Conclusion Attorney General, *Kesbir* case, §§ 34–38.

⁸⁵ Supreme Court, Judgement of 15 September 2006, LJN: AV7387, case nr C05/120 HR.

The Court was cautious to restrict this possibility to the slightly elusive and immature body of standards applicable in non-international armed conflicts, as these do not contain explicit obligations to penalise certain acts. Arguably, such a lenient approach would not be warranted in case of ‘grave breaches’ of the Geneva Conventions, as those provisions precisely dictate state obligations in this respect and do not permit deviant state practice. The issue will be addressed in more detail in the final paragraphs of this paper.

Whereas the Kesbir- case concerned the intricate relationship between international humanitarian law and criminal law, in another recent Dutch case the District Court had to assess a claim of self-defence which bore a striking resemblance to the *Kordić*- case.⁸⁶ The Dutch businessman Van Kouwenhoven who allegedly had been involved in arms trade with the regime of Charles Taylor, stood trial on charges of both complicity in war crimes and violations of the Dutch Sanction Act. His acquittal for war crimes was predicated on the Court’s consideration that the available evidence did not reveal beyond a reasonable doubt Van Kouwenhoven’s involvement in, nor his intent and knowledge of the war crimes. In respect of the other charge, counsel for the defence claimed that Mr. Taylor was in dire need of the weaponry in order to defend himself against the attacks of rebel factions. Referring to relevant resolutions of the Security Council, the District Court rejected the defence, arguing that the facts did not meet the Article 51 of the UN-Charter’s standards for a legitimate claim of self-defence. One may deduce from the fact that the District Court took the trouble to assess the defence on material grounds, that Van Kouwenhoven’s defence was not entirely pointless in the Court’s opinion. The present author is inclined to agree with the Court’s view. The Dutch Sanction Act has a purport, different from regulations of international humanitarian law. Rather than protecting lives, bodily integrity and goods of non-combatants, the Act serves to prevent and repress aggressive war fare. If state organs can successfully invoke self-defence in order to counter charges of aggression, those persons assisting the state in its quest for self-preservation should be equally entitled to raise such a justification. Their claim derives from the initial justification under international law.

Although the District Court’s judgement in the Van Kouwenhoven- case does not contradict the findings of the ICTY in the *Kordić*- case, it at least shows that the legal validity of defences highly depends on the specific charges and the specific context in which they are raised.

Finally, the decision of the Military Court of Appeal in the famous *Priebke*-case sheds an interesting light on the approach taken by domestic jurisdictions on time-honoured defences like ‘obedience to superior orders’ and duress. On the one hand, the Court of Appeal made short shrift with Priebke’s defence that he

⁸⁶ *Public Prosecutor v. Van Kouwenhoven*, District Court of The Hague, 7 June 2006, LJN AX7098.

followed superior orders and was unaware of their illegality. Pointing at the absolute wording of Article 8 of the Statute establishing the Nuremberg Tribunal which rules out the defence completely, the Court of Appeal held that

(...) Article 8 of the Statute establishing the Nuremberg Tribunal did not derogate from Article 40 (of the 1940 Italian Military Code in Time of Peace). By providing that superior orders cannot amount to a defence, Article 8 simply took away from the Tribunal the task of ascertaining whether in a particular case superior orders were manifestly unlawful. Article 8 was based on the presumption that the manifest unlawfulness of the orders indisputably materialized whenever the ordered and executed act was a war crime, or at any rate one of the crimes under the Tribunal's jurisdiction. This rule was clearly grounded on the very essence of war crimes: the prohibition of these crimes is based on the protection of fundamental values of an absolute nature and safeguard the whole of humanity; hence they do not allow for any particular evaluation of their unlawfulness; they are inherently and manifestly contrary to law.⁸⁷

Obviously, the Italian Court of Appeal is more rigid than the Rome Statute which, as was expounded above, leaves room for a 'mistake of law'- defence in case of war crimes, thus suggesting that (orders to commit) war crimes are not always manifestly illegal. The Court revives the stricter and uncompromising Nuremberg principle and becomes involved in a disparity on the level of international law. After all, it has been suggested that the regulation of mistake of law in the Rome Statute does not comport with customary international law.⁸⁸

It is remarkable that the Rome Military Court in the very same case ventured a more lenient and liberal approach than the international standard in respect of duress. Although the Court rejected the defence on the facts, considering that a hypothetical threat of disciplinary sanctions did not match and was not proportionate to mass killings of innocent civilians, it held that the defence could in principle be accepted. If Priebke had been confronted with an imminent threat of death

he could have backed down from refusing to obey the order and participated in the executions only in order to save his own life, claiming the defence of the state of necessity, which is provided for in all legal orders, including German law; indeed, in this case, no person could have expected Priebke to act as a hero to sacrifice his own life in order to participate in the inhumane execution.⁸⁹

The decision of the Italian court preceded the (in)famous dictum of the ICTY Appeals Chamber in *Erdemović*, in which ultimately the common law point of

⁸⁷ Decision of the Rome Military Court of Appeal, 7 March 1998, partially published in *L'indice penale* (1999) 959, at 972. Translation by Paola Gaeta, 'War Crimes Trials Before Italian Criminal Courts: New Trends', in: H. Fischer, C. Kress, S.R. Lüder (eds) *International and National Prosecution of Crimes Under International Law; Current Developments*, Berlin 2001, pp. 759/760.

⁸⁸ P. Gaeta, 'The Defence of Superior Orders: the Statute of the International Criminal Court versus Customary International Law', *European Journal of International Law* 10 (1999), p. 172.

⁸⁹ *Priebke*- case, Decision of the Rome Military Tribunal, 1 August 1996; quoted and translated by P. Gaeta, op. cit. (2001), p. 34.

view prevailed that duress should never serve as a complete defence in case of capital crimes. In his dissenting opinion, Judge Cassese has rightly questioned the majority's view's conformity with international law. The other dissenter, Judge Stephen, argued that even under common law duress as a complete defence is acknowledged, if the sacrifice of life would not have influenced the outcome.⁹⁰

Paola Gaeta has exerted criticism on the judgement from another perspective. She has correctly pointed at the incongruity between the outcome of *Erdemović* and the law of state responsibility, which recognizes duress even if the unlawful act involves the killing of innocent people. The result of this inconsistency would be that the State might successfully invoke the plea of duress, while the individual – the State organ who acted under the auspices of the state and as its mouthpiece – would not escape criminal conviction.⁹¹

The Rome Statute which explicitly acknowledges duress as a complete defence in Article 31, (1) (d), has removed this paradox and has ironed out the wrinkles. The issue, however, again exemplifies that international criminal law is not static, but in constant development. Domestic jurisdictions take sides in the debates, may deviate from international legal authority, but simultaneously contribute to the further evolution of international criminal law.

5. A Plea for Uniform Application of International Criminal Law: Does it Hold?

The previous analysis of legal practice of domestic jurisdictions in respect of international crimes reveals a diverse picture. Whereas many national courts often follow and hardly deviate from international standards, as presented by the international criminal tribunals, there are a number of interesting examples in which domestic jurisdictions have either extended or restricted the scope of international crimes or criminal responsibility. Perhaps most conspicuous in the realm of definitions of international crimes is the proclivity of domestic jurisdictions to expand the concept of 'protected group' in the definition of genocide in order to cover political and social groups as well.⁹² On further consideration this need not surprise us. The Genocide Convention is a slightly outdated instrument, reflecting the balance of powers and political conflicts of the post-World War II world. Domestic jurisdictions may have

⁹⁰ After having reviewed and discussed numerous court decisions, Judge Stephen observes that 'Neither this concern nor this repugnance can have any application to a case in which nothing that an accused can do can save the life which the law seeks to protect, so that no question of choice concerning an innocent life is left to an accused.' Separate and Dissenting Opinion of Judge Stephen, *Pros. v. Erdemović*, Case No. IT-96-22-A, 7 October 1997, § 64.

⁹¹ Gaeta, *op. cit.* (2001), p. 763.

⁹² Compare for instance the *Mengistu-* case, [*supra*] footnote 25.

very good reasons to deviate from its rigid and arguably arbitrary terms. The pertinent question is whether the international community should not first decide and agree on expansion of the legal concept of genocide, before domestic jurisdictions are allowed to follow suit. This issue will soon be addressed in more detail.

By contrast, crimes against humanity have never been the subject-matter of a single international convention. The content of crimes against humanity has changed over time, ever since the Nuremberg Tribunal introduced those crimes as a separate legal category, as witness the provisions in the statutes of the *ad hoc*-Tribunals and the Rome Statute which significantly differ *inter se*. This belated ‘codification’ has enabled the international tribunals to take a flexible approach, adapting the concept to changing political and social realities.⁹³ Because of its dynamic and pliable character, states may simply not be tempted to challenge the concept, as developed and elaborated in the case law of the international tribunals.

War crimes are a matter to be discussed separately. Although the Geneva Conventions date from the same era as the Genocide Conventions, the relevant criminal law provisions have been updated in the Additional Protocols of 1977. The ‘grave breaches’- regime is only applicable in international armed conflicts and therefore, by definition, involves more than one state. Because the grave breaches regime is intended to enforce, by means of criminal law, provisions of international humanitarian law which regulates the proper conduct of the warring parties on the basis of reciprocity, there are strong arguments for considering these standards as being exclusive. Any unilateral expansion of those international standards would arguably trespass upon the other state’s sovereignty as it would expose foreign adversaries to a harsher regime than the one contemplated under international law.⁹⁴ Legal practice reveals that states have indeed, and rightly, been reluctant to embark on such a dauntless course.

More variety in the domestic implementation and application of international crimes is to be expected in the realm of war crimes committed in a non-international armed conflict, as this body of law has, until recently, been quite elusive and has arguably still not fully crystallized. Our previous analysis of case law confirms this conjecture. National courts have tentatively searched for answers to the questions whether war crimes committed in non-international armed conflicts would be subject to universal jurisdiction and whether the ‘serious violations’ of common Article 3 of the Geneva Conventions serves, like the ‘grave breaches regime’, as an exclusive frame of reference, outlawing any expansion of those provisions in

⁹³ On these developments, compare: G. Mettraux, ‘Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda’, in: 43 *Harvard International Law Journal* (2002), pp. 237–316.

⁹⁴ For a similar opinion, see Chr. Van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht in hooflijnen*, Antwerpen 2003, p. 661.

domestic law. Dutch courts have been in the vanguard in this discussion, holding that universal jurisdiction for war crimes in non-international armed conflicts is at least not prohibited under international law and that common Article 3 only sets a minimum-standard, from which domestic jurisdictions are allowed to deviate.⁹⁵

In a very important way, the application of concepts of criminal responsibility in respect of international crimes at the domestic level differs from the assessment of the elements of those crimes themselves. Whereas the international crimes owe their very existence to the efforts and determination of the international community, concepts of international criminal responsibility have to fit in the legal texture of domestic systems where they face the competition of tried and tested equals. It is by no means self-evident that time-honoured general parts of criminal law should yield to their international equivalents, as this would probably cause unwarranted differences in the administration of criminal justice within one legal system. The analysis of case law in the previous paragraphs has demonstrated that national courts have tried to accommodate by sometimes slightly adapting the domestic concepts to the international standards and vice versa.

After this short *tour d'horizon*, the present author would argue that none of the domestic deviations that have been identified is so dramatic or outrageous as to trigger the jurisdiction of the International Criminal Court. The examples of 'overinclusion' would certainly not qualify, because, rather than showing 'unwillingness' or 'inability', they display the over-zealous intent to cope with international crimes and end impunity.

The rare examples of 'underinclusion' do not connote incapacity or bad faith to shield nationals from criminal responsibility, but rather point to sincere and deep convictions as to how to mete out criminal justice, either anticipating on similar developments in international law, or taking advantage of reigning dissent at the international level as demonstrated by the German example regarding command responsibility.

The conclusion that application of the complementarity principle is not at stake, however, does by no means quench our inquiry into the topic. The broader question whether international law dictates uniform application of international criminal law standards subsists. I will explore this issue from four different perspectives: the principle of *pacta sunt servanda*, the equality-principle, the *nullum crimen sine lege*-principle and the principle of *lex mitior*.

5.1. *Pacta Sunt Servanda*

Articles 26 and 27 of the Vienna Convention on the Law of Treaties stipulate that states are under a duty to observe 'in good faith' their treaty obligations and hence

⁹⁵ *H. v. Public Prosecutor*, footnote 42; *Public Prosecutor v. Kesbir*, footnote 81.

are not allowed to invoke their national law to excuse any non-compliance.⁹⁶ These provisions constitute the bottom line. If we are able to identify conventions which explicitly enjoin states parties to penalize specific conduct, apply concepts of criminal responsibility and exercise (universal) jurisdiction, while simultaneously precluding those states from enacting any further reaching legislation, we may conclude that, at least in respect of those conventions and crimes, the issue is settled. However, conventions are never unequivocal in the way just mentioned. The Geneva Conventions of 1949 prescribe states parties to penalize the ‘grave breaches’ of those conventions and to exercise universal jurisdiction or, alternatively, surrender the suspect on the basis of the *aut dedere, aut judicare*-maxim.⁹⁷ The Additional Protocol (I) contains two provisions, Articles 86 and 87, on command responsibility. In the previous paragraph we have discussed the argument that the grave breaches regime should be considered exclusive. The fact that this rationale had to be deduced from the concept of state sovereignty already indicates that the ‘exclusiveness’ does not unambiguously follow from the explicit terms of the Conventions themselves.

In addition to enumerating the acts which constitute genocide, if committed with the specific intent to destroy a group, the Genocide Convention mentions a number of accessories which should incur criminal responsibility on the same par as the main perpetrator. Again, the Convention itself is silent whether these provisions only contain minimum-standards, or whether states parties should abstain from qualifying the destruction of, for instance, political groups as genocide.

Some international conventions, notably the UN- Convention against Torture, explicitly allow states parties to exceed the conventional framework.⁹⁸ Should we deduce from the silence of the other treaties, *per argumentum a contrario*, that they preclude states parties from expanding on the international provisions? The present author is not convinced that we should. Apart from the questionable status of *a contrario* arguments in logical discourse, the proposition does not meet the rigid test that states parties are violating the explicit terms of the treaty.

A related question is which court(s) would qualify to give an authoritative interpretation of these international conventions. After all, a genuine ‘criminal law’ equivalent to the European Court of Justice which indeed has the power to give binding interpretations of the primary and secondary European law, is lacking at the supra national level. It would amount to a misunderstanding and exaggeration

⁹⁶ Vienna Convention on the Law of Treaties, 8 *Int. Legal Mat.* (1969), 679.

⁹⁷ Geneva Convention (I), Articles 49 and 50; Geneva Convention (II), Articles 50 and 51; Geneva Convention (III), Articles 129 and 130; Geneva Convention (IV), Articles 146 and 147.

⁹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York 10 December 1984, 1456 UNTS 85: 33, Article 1, s. 2: ‘This article is without prejudice to any international instrument or national legislation which does or may contain provisions of a wider application’. See also Article 5, s. 3 in respect of jurisdiction: ‘This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.’

of the position of the International Criminal Court, if one were to consider this court as such, because the ICC has only the rather marginal authority to supersede and correct grossly inadequate performance of states parties to the Rome Statute. While the Court indeed is entitled to apply international conventional and customary law beyond the scope of its own Statute, nothing in Article 21 of the Rome Statute suggests that its interpretation should be binding on the states parties. In the same vein, while the frequent references in domestic court decisions to the case law of the ad hoc tribunals as authoritative source have some cogency from a moral point of view, strictly legally speaking, they are even less convincing. After all, the ad hoc tribunals have a limited – temporal and spatial – jurisdiction and are mainly expected to apply the provisions of their own statutes.

The intermittent conclusion must be that international conventions set minimum standards which states parties are obliged to observe, but do not preclude those states from enacting further reaching legislation. In that sense, international law does not, at least not explicitly, dictate uniform application of international standards by the national jurisdictions that, in the implementation of those standards, have gone beyond of what is required under international law.

5.2. *The Quest for Legal Equality*

Uniform application of international criminal law is pursued in order to guarantee equal treatment of similar cases and even-handed justice for the perpetrators.⁹⁹ Obviously, this argument belongs to the realm of *de lege ferenda*. It would be far-fetched, if not ludicrous, to consider equal treatment as a *right* of the accused, because recognition of this right is contingent upon the proper institution of the legal system. At the very least it would presuppose a hierarchical organisation of the judiciary, with an appellate or supreme court, guaranteeing the uniform application of law, at the apex. The International Criminal Court cannot and should not serve this function, as we argued before. Under the current international system, consisting of sovereign states, differential legal treatment is the norm, conveying the patchwork of cultural and moral values.

Of course states are at liberty to agree on certain fundamental criminal law principles and they may attune their legislation and legal practice to this purpose, but at the end of the day the extent to which they are prepared to do so depends

⁹⁹ D. Vandermeersch, 'Prosecuting International Crimes in Belgium', *Journal of International Criminal Justice* 3 (2005), 416/417: 'A measure of harmonization between different legislations on substantive and procedural criminal law is (therefore) necessary, particularly concerning prohibitions themselves, modes of participation, defences and excuses, and procedural safeguards. The Statutes and case law of the International Tribunals should play a fundamental part in this respect. Concerning sentences, it is also essential to establish a certain homogeneity, *to respect the principle of equality* by eliminating discrepancies and to avoid any forum shopping aimed at finding a more favourable system.' (our italics).

on their sovereign decision.¹⁰⁰ On the other hand, however, there is nothing wrong with the aspiration of legal equality, which emerges from the dismay at the fact that some perpetrators of international crimes get away with it and remain unpunished, while others are sacrificed as scapegoats and face harsh, or unfair punishment.

The quest for harmonization of international criminal law is reminiscent of the time-honoured ideal of a *civitas maxima*, which postulates that all human beings, as members of the international community, share at least some basic moral values and would agree that all gross violations of those values require a fair and vigorous response, without fear or favour.¹⁰¹ There are indications that this *civitas maxima* is indeed gradually burgeoning, at least in respect of the limited framework of very serious international crimes, the establishment of the International Criminal Court being the strongest and most visible evidence for this development. At the same time, however, the rather coarse and one-handed – as capable of reacting exclusively to underinclusion – correction mechanism, as envisaged by the principle of complementarity, reflects the very limits of the project. The International Criminal Court is not expected to repair unfair trials, as it is not meant to be a human rights court, nor is it in a position to mitigate or aggravate sentences, imposed by domestic courts. In the same vein, as we discussed before, relatively minor differences in the application of substantive criminal law will probably escape the censorship of the Court's assessment whether a state is genuinely willing or able to prosecute a case.

One may of course argue that it would be *preferable* that states would proceed to further reaching harmonization, but that does not prove that they are under a *duty* to do so. The scope of 'equal treatment' is determined by and under the guardianship of the principle of complementarity. In other words: the quest for legal equality does not provide an autonomous argument for the thesis that states are under a duty to follow the case law and standards of the international criminal tribunals, in order to accomplish uniform application of international criminal law.

5.3. *Nullum Crimen Sine Lege*

As is well known, the principle of *nullum crimen, nulla poena sine lege* entails that a person should only be convicted and punished on the basis of law. Its logic corollaries encompass the stipulation that criminal law should not be applied retroactively

¹⁰⁰ Vandermeersch acknowledges this by writing that 'such harmonization still being a long way off, an accused may be treated very differently according to whether he is tried by the territorial state, by an international tribunal or by a third state', *ibidem*.

¹⁰¹ On the historical precedents of the concept of *civitas maxima* and its relevance for international criminal law, see M. Cherif Bassiouni & Edward M. Wise, '*Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law*' Dordrecht/Boston/London 1995, in particular Chapter 4: 'The Principle *Aut Dedere, Aut Judicare* and the Hypothesis of a *Civitas Maxima*'. pp. 26–42.

(prohibition of *ex post facto* law) and the *lex certa* rule, implying that the elements of crimes must be as clearly expressed as possible. The principle is incorporated in Article 7 of the European Convention on Human Rights and in Article 15 of the UN Covenant on Civil and Political Rights. Moreover, the principle features in Article 22 of the Rome Statute.¹⁰² Apparently, the principle is also relevant and acknowledged at the international level, although its content and meaning are slightly different.¹⁰³ Although the Trial Chamber in the *Celibici*-case recognized that the principle of *nullum crimen* is a general principle of law, it pointed at some specific factors, like the nature of international law, the absence of an international legislator and the assumption that international norms will be implemented in national legislation, to buttress its opinion that ‘the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.’¹⁰⁴

At first sight, it may not be entirely clear how the legality principle might serve as an argument for uniform application of international criminal law. After all, from the viewpoint of legality, enforcement of international criminal law by domestic jurisdictions would be preferable to adjudication at the international level, even if the standards in the national legal system would appear to be more austere, because domestic jurisdictions are simply better equipped to abide by the principle – and therefore have a better record – than international tribunals. States have the sovereign power to decide which acts and omissions, ranging from obnoxious conduct to atrocities, they wish to penalize and prosecute on their territory.¹⁰⁵ They will have to observe fundamental human rights and should refrain from discrimination, but as long as the state takes care that – in the terminology of the European Court of Human Rights – the law is sufficiently accessible and the legal consequences of one’s conduct are foreseeable, a violation of the legality principle is not at order.¹⁰⁶

¹⁰²⁾ Article 22 *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

¹⁰³⁾ Compare the landmark- study of Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerpen-Oxford-New York 2002.

¹⁰⁴⁾ *Prosecutor v. Delalić et al.* Judgement, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, § 431. On this topic also: Fabían O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Amsterdam 2007, pp. 111–114.

¹⁰⁵⁾ It is another question whether criminal repression of conduct is always permissible from a moral point of view. On this issue: Joel Feinberg, *The Moral Limits of the Criminal Law, Volume I: Harm to Others*, New York/ Oxford 1984, pp. 3–27.

¹⁰⁶⁾ ECHR, *Sunday Times v. United Kingdom*, Judgement of 26 April 1979, Ser. A–30 (1979), § 49.

The situation is different, however, in case of extra-territorial jurisdiction in general and universal jurisdiction in particular. Here the suspect of an international crime may face the unpleasant surprise of being exposed, without fair warning, to more rigid standards than the ones he could contemplate as being applied by international criminal tribunals or by the state *loci delicti*.¹⁰⁷ This argument is not without merit and seems hard to refute. Moreover, it offers a strong rationale for endorsing the anti-Lotus position that the establishment and exercise of universal jurisdiction requires an explicit basis in international law, rather than the opposite view that universal jurisdiction is allowed unless precluded under international law. Finally, it appears to have wider repercussions, because it seems to be unwarranted, both from the point of fairness and legal taxonomy, to introduce separate regimes for extra-territorial and territorial crimes.

There is indeed some support for the point of view that the *nullum crimen*-principle would militate against domestic jurisdictions extending the scope of international crimes. In the *Jorgić*-case, mentioned above, the European Court of Human Rights held that the applicant could not rely on the (stricter) interpretation of genocide by the ICTY and the ICJ, as these judgements were delivered subsequent to the commission of his offences.¹⁰⁸ By implication, so one could argue *a contrario*, the applicant could have invoked the international judgements, if they had preceded the crimes. On the other hand, however, the Court emphasizes the right of the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt, provided that such interpretation would be consistent with the essence of the offence and could reasonably have been foreseen by the applicant at the material time.¹⁰⁹

By stressing the fact that the proper content of crimes is (still) a matter of controversy, the Court alludes to a general feature of international criminal law which we highlighted before. International criminal law is a relatively new and immature body of law. Its further development benefits and draws inspiration from both international and national sources. The relative weight which is attributed to these sources will depend on the concept under scrutiny and the purpose for which these concepts are assessed. As we observed before, compared to the entrenched principles of criminal responsibility and defences in national law, the equivalents under international law which have only recently been divulged in the Rome Statute, are far less elaborated. It is therefore not self-evident that an

¹⁰⁷ Compare Ambos and Wirtz, op. cit. (2001), p. 786: 'In other words: if universal jurisdiction is attached to a certain crime as defined by international law, a change in the definition could also change the scope of jurisdiction attached to this crime.' Advocating an interpretation of the German legal provision in line with the Genocide Convention, they add: 'Such an interpretation would considerably narrow the scope of this alternative of genocide and avoid any problem with the principle of *nullum crimen sine lege* would arise.'

¹⁰⁸ *Jorgić v. Germany*, § 112.

¹⁰⁹ *Jorgić v. Germany*, § 114.

accused will have better access to international standards than to well-established concepts of national law, even if he is foreign to that domestic jurisdiction.

Furthermore, it is contested whether the *nullum crimen*-principle applies similarly to concepts of criminal responsibility and defences.¹¹⁰ This final argument serves to qualify the assertion that the *nullum crimen* principle outlaws any deviant practice under jurisdictions as well, at least as far as the general parts of criminal law are concerned.

5.4. *The Lex Mitior-Principle*

A final argument which is sometimes adduced in order to propagate uniform application of international criminal law in general and to counter ‘over inclusion’ in particular is the *lex mitior*-principle. This principle stipulates that the suspect should benefit from the mildest criminal law provision. A derivative of this principle surfaces in the exception to the prohibition of *ex post facto* law in the final sentence of Article 15 (1) of the International Covenant on Civil and Political Rights, which reads: ‘If, after commission of an offence a change in the law provides for a more lenient sentence, the suspect shall reap the benefits of this change.’

For two reasons, the argument is not very convincing. First of all, the principle serves as a double edged sword, as it would advocate the application of national law, if this would turn out to be less demanding. Secondly – and far more importantly – the *lex mitior*-principle functions only within the parameters of one legal system. In assessing Article 24 (1) of the ICTY Statute and Rule 101(B) (iii), which provide that, in determining sentence, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, the ICTY made it perfectly clear that it would not be bound by any maximum terms of imprisonment applied in a national system.¹¹¹ More generally, the ICTY considers the *lex mitior*-principle not to be applicable in such cases, as ‘different criminal laws are relevant and applicable to the law governing the sentencing consideration of the International Tribunal.’¹¹²

¹¹⁰ George Fletcher, *Basic Concepts of Criminal Law*, Oxford/ New York 1998, p. 107, commenting on the famous case of the German Schiess-Befehle, in which a justification was abolished retroactively: ‘But it is not so clear that courts may not retroactively tamper with claims of defense.’

¹¹¹ *Prosecutor v. Tadić*, Judgement in Sentencing Appeals, Case No. IT-94-1-A and IT-94-1-Abis, A. Ch., 26 January 2000, §21.

¹¹² *Prosecutor v. Nikolić*, Judgment in Sentencing Appeals, Case No. IT-94-2-A, A. Ch., 4 February 2005, §§ 80/81: ‘It is an inherent element of this principle [of *lex mitior*] that the relevant law must be binding upon the court. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to more favourable law by which the International Tribunal is obliged to abide.’ I am indebted to Mr. Denis Abels, LL.M, for drawing my attention to this point.

Conversely, an accused cannot challenge the charges of a domestic jurisdiction by simply pointing at or invoking the – milder – international standards. Whether he will stand a chance of success depends on the question of whether both conflicting standards – the national and international – are readily available to the court and this is predicated on the monist or dualist signature of the legal system in question. As is well known, international law does not require states to follow a monist approach and even states with monist inclinations are reluctant to consider criminal law provisions as ‘self-executing’. The only relevant provision of international law is Article 27 of the Vienna Convention on the Law of Treaties which precludes states from invoking their national law as an excuse to disregard their treaty obligations. However, one cannot proclaim the applicability of the *lex mitior*-principle by postulating that domestic jurisdictions are under a duty to faithfully abide by the international criminal law standards, as determined at the international level, because this begs the question whether they are indeed compelled to do so. And this is precisely the topic of our investigation.

In sum: just as little as the equality- principle, the *lex mitior*- principle provides an autonomous argument – *id est* independent from the axiom that domestic jurisdictions should take the international standards as point of reference and should not depart from these standards – to sustain the central thesis, we have been discussing in this paragraph.

5.5. *Evaluation*

After having reviewed some of the most frequent raised arguments in favour of unified application of international criminal law, we are capable of drawing up the balance.

The *pacta sunt servanda*- principle precludes states parties from undercutting the obligations they freely engaged and thus militates against underinclusive implementation. With the exception of the ‘grave breaches’ regime of the Geneva Conventions, treaties on international criminal law only contain minimum standards and therefore do not explicitly impede states parties to exceed beyond the accepted standards. This entails that the arguments and considerations relating to the overinclusive implementation models should be sought outside of the domain of the legal obligations of states to implement certain international standards.

Next, we have concluded that neither the equality principle, nor the *lex mitior*-principle serve as autonomous arguments which provide additional ammunition for the correctness of the suit for the uniform application of international criminal law.

At first blush, the *nullum crimen*-principle militates against ‘over-inclusion’, because foreigners would be exposed, without fair warning, to a harsher regime than they would face if they were to be tried by international tribunals. Especially

in case of exercise of universal jurisdiction, this situation would not meet the accepted standards of ‘accessibility’ and ‘foreseeability’. Indeed, the *nullum crimen* principle, if taken seriously, provides a strong incentive against extension of the concept of genocide to cover (non-stable) political and social groups, at least if this extended concept involves the exercise of universal jurisdiction. States should first agree on the redrafting of the concept at the international level, and should refrain from unilaterally changing the terms of the crime.

One should, however, be careful not to overrate the weight of the *nullum crimen*-argument. The principle works out differently at the international level. In the absence of an international legislator and a supra national criminal court that could impose its authoritative understanding of crimes and concepts, the content of international criminal law is often contested. According to the European Court of Human Rights, domestic courts can at least take advantage of this legal confusion by rendering their own interpretation, provided they do not deviate from the essential core of those concepts.

But it is possible to go one step further. One may wonder whether the comprehensive codification of international crimes and concepts – and the parallel quest for uniform application – do not rob international criminal law of its dynamic character. Pellet has argued that ‘by freezing customary definitions in a process of evolution’, under the pretext that this exercise was required by the *nullum crimen* principle, the drafters of the Rome Statute have fundamentally misunderstood how much international criminal law is indebted to customary law.¹¹³ And he quotes with full approval Professor Condorelli’s opinion that

[F]or the *nullum crimen principle* to be observed scrupulously, it is not absolutely necessary that the international norm providing for and/or organising the repression of the crime should define the *figura criminis* and the applicable penalty down to the last detail. It suffices to observe, for this purpose, that the author of the act in question was subject, at the *tempus delicti*, to clear, accessible legal norms – internal and/or international – establishing such a definition *ante factum*.¹¹⁴

The emphasis on the customary credentials and background of international criminal law sheds a different light on the position of domestic jurisdictions and their room to manoeuvre. Not only are they allowed to plug the loopholes which are left open at the international level or on which the international community has still not reached consensus, but they are supposed to contribute more actively to the formation of international criminal law. How this can be accomplished is the subject of the final paragraph.

¹¹³ Alain Pellet, ‘Chapter 25: Applicable Law’, in : A. Cassese, P. Gaeta, J. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 1056.

¹¹⁴ Pellet, op. cit. (2002), p. 1058. Translation by David Boyle.

6. On ‘Open Texture’ and Casuistry

In this final paragraph I will address the question whether there are any good arguments for (some measure of) variety in the application of international criminal law by domestic jurisdictions. This discussion should start with a short *excursus* on the ‘open texture’ of legal and moral concepts.¹¹⁵ The open texture of moral and legal concepts means that they can never be reduced to concrete situations or actions.¹¹⁶ Now open texture is a general feature of human language:

uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.¹¹⁷

However, it is important to understand why moral and legal concepts which share the common quality that they aim at regulating human conduct, are open-textured from a normative point of view as well. According to Hart, this essentially stems from our human condition: we are men, not gods. We are relatively ignorant of the facts and are unable to preconceive all eventualities which might pop up and would have to be assessed in light of our moral or legal concepts. And because we are not able to anticipate on all possible combinations and circumstances, our aims which we pursue by framing moral or legal rules remain relatively indeterminate as well. Hart describes the utopian world in which man as legislator would be omniscient:

If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, the provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for ‘mechanical’ jurisprudence.¹¹⁸

Hart attributes the unrealistic nature of such a world to the limited cognitive capacities of mankind. He warns against legal formalism with its presumptuous claim that it can anticipate on unforeseen situations by, for instance, ‘freezing the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question’.¹¹⁹

¹¹⁵ This part draws heavily upon the work of J.M. Brennan, *The Open Texture of Moral Concepts*, London 1977 and H.L.A. Hart, *The Concept of Law*, 2nd ed., Oxford 1994, pp. 124–136. Although legal and ethical concepts are obviously different epistemological categories, they share this ‘open texture’ character.

¹¹⁶ Brennan, *op. cit.* (1977), p. 121: ‘empirical descriptions can never exhaustively describe the moral type. Moral terms are open-textured in that their explication is an incompletable process.’

¹¹⁷ Hart, *op. cit.* (1994), p. 128.

¹¹⁸ Hart, *op. cit.* (1994), p. 128.

¹¹⁹ Hart, *op. cit.* (1994), p. 129.

At a more fundamental, epistemological level, Brennan explains the human predicament in terms of ‘bridging the logical gap’ between observable objects or actions and concepts which have unobservable purposes and needs. These purposes and needs constitute the *rationale* of the concept. The concept, and thus its rationale which constitutes the core of it, requires explication, if we ever are to bridge the logical gap:

“Murder” (and similar moral concepts) (...) needs explication if we are to be able to identify the actions which it designates and, therefore, to be able to use it in the guidance of our own actions and as a tool of moral criticism.

Next, he points at the conceptual and semantic leaps which inevitably accompany this process of elucidation:

Because the actions of a type designated by a moral term are similar to one another only from the moral point of view, these types cannot be defined in morally neutral terms. On the other hand, the particular actions can be described in morally neutral terms; indeed, they *must* be so describable if moral concepts are to have any relevance to actual behaviour – one cannot imagine for example, how moral instruction could be given using only moral terms.¹²⁰

The message which Brennan intends to convey is that, in case of moral concepts, their open texture- quality reveals itself – and is therefore raised to the square – at different levels of analysis.

Because, in framing our moral and legal concepts, we can never anticipate on and regulate all eventualities, legal and moral judgements are particularly amenable to ‘casuistry’ which, methodologically, takes the concrete situation as point of departure. In other words: the open texture of law and ethics is conducive to casuistry.¹²¹

In their illuminating book ‘The Abuse of Casuistry’, Jonsen and Toulmin explore the historical, political and philosophical roots of casuistry as a method of moral reasoning.¹²² They trace the method back to the well-known dichotomy between the epistemological approaches of Plato and Aristotle. Whereas Plato favoured theoretical argument and rigid deductive reasoning from universal laws

¹²⁰ Brennan, op. cit. (1977), p. 119.

¹²¹ In the words of Hart: ‘we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives.’ (Hart, op. cit. (1994), p. 128).

¹²² Albert R. Jonsen & Stephen Toulmin, *The Abuse of Casuistry; A History of Moral Reasoning*, Berkeley/ Los Angeles/ London, 1988. I am obliged to my colleague Klaas Rozemond who drew my attention to this book and wrote an interesting article on the relevance of casuistry for Dutch substantive criminal law: K. Rozemond, ‘De casuïstische grenzen van het materiële strafrecht’, in: *37 Delikt en Delinkwent* (May 2007), pp. 465–495.

and principles, Aristotle emphasized the value of practical wisdom (*phronesis*) in resolving particular concrete problems.¹²³ The method of casuistry consists of comparing concrete situations and cases, in order to decide, by inductive reasoning, whether they are governed by the same moral or legal principle. The process starts with the identification of scholarly examples (paradigmatic cases) which incontrovertibly meet the standards of the principle and comparing these with a more contested case. The proper way to proceed is to return to the principle which resolved the paradigmatic precedents in the first place and next to assess whether the contested case resembles those precedents, in the light of this principle.

A good example is the question whether problematic ‘border line’ cases, like ‘judges who impose the death penalty’ or ‘killing someone to defend one’s family’ would be governed by the Fifth Commandment “Thou shall not kill”. The paradigm cases of ‘homicide for reasons of profit’ and ‘the unprovoked attack which results in the death of another person’ reveal the underlying principle of the Fifth Commandment that the taking of human life requires a special justification. Casuistry intends to inquire to what extent the contested cases resemble or are different from the paradigm cases, in the light of the underlying principle.¹²⁴ Jonsen and Toulmin convincingly show how and why the method flourished in medieval times, as it provided the lower clergy with an indispensable tool in the practice of confession. They equally relate how the method came under the devastating attack from the famous philosopher and Jansenist, Blaise Pascal, who in his *Lettres Provinciales* repudiated the proponents of casuistry for their moral laxity, as crafty Jesuit reasoning could condone nearly every conduct. Casuistry never fully recovered from Pascal’s criticism and the authors, although acknowledging that the method may be conducive of unfair results, aim at its rehabilitation. Casuistry, so they claim, can serve useful purposes, provided that those who apply the method, follow rigid procedures by explicating the relevant criteria and precisely explaining why they consider a case to be governed by a concept or not.

Now one of the central premises of casuistry is that the particular circumstances of a case will modify moral and legal judgments.¹²⁵ Legal and moral concepts and their rationales are not rigid and unalterable. Their content is affected by their very application in a concrete situation.¹²⁶ Rozemond offers a simple illustration of this process, in view of the current discussion in Dutch criminal law on the proper boundaries of ‘criminal preparation of offences’. Let us imagine the case in which a man intends to kill his wife and for this purpose conceals the knife in the kitchen cupboard. In view of the general standards of Dutch criminal law which

¹²³ Jonsen & Toulmin, op. cit. (1988), p. 59.

¹²⁴ The examples are derived from Jonsen and Toulmin, op. cit. (1988), p. 252.

¹²⁵ Jonsen & Toulmin, op. cit. (1988), p. 254.

¹²⁶ Rozemond, op. cit. (2007) p. 488: ‘The meaning of general legal concepts is partially determined by the way these concepts are applied in particular circumstances.’

require ‘actual preparation’ and prove of ‘firmness of intent’, it seems obvious that this situation does not yet qualify as ‘criminal preparation’. If we are to change the factual circumstances of the case only marginally – the man has removed the knife from the cupboard to the bedside table –, the outcome of the legal assessment is already less certain. The court has to judge the case in light of the rationale of the penalisation of preparatory acts – prevention of serious crimes – and should balance this against counter-arguments, like the general reluctance to criminalize bad intentions and the practical problem that intentions cannot be easily revealed to third parties, especially not if they are performed in the private realm.¹²⁷ Of course, the actual result of this judgment is immaterial for our purpose. Each outcome sheds a light on the required interpretation of ‘preparatory acts’ and changes the concept, because the border line case had not been envisaged. Moreover, in the future it will serve as a guide-line for the assessment of new cases which still have to emerge.

The implication of the contention that legal and moral concepts are context bound at the macro level is that they are susceptible to social, political, historical and economical changes. Brennan considers this aspect as another – and one of the most important – reasons for their open-texture:

One of the chief factors, contributing to open-texture is that concepts are inter-related within a system of concepts and that any modification of the system (by the introduction of new concepts or by changing the old) brings about a modification of the concepts themselves; concepts are not like the individual stones in a pile which remain unchanged except in their external relations when the pile is disturbed – a change in the conceptual scheme always entails a modification of the existing concepts.¹²⁸

Now what interests us here is not so much the perhaps rather obvious fact that legal and moral principles are susceptible to political or social changes, but rather whether casuistry as a method of moral reasoning has proved to be resilient against the wear and tear of time. Jonsen and Toulmin assert that casuistry has indeed been flexible and responsive to the changing times. They give some striking examples how rigid strongholds of moral conviction had to be adapted in view of the new – economical and political - demands of a swiftly changing world. I will discuss two of their examples.

The rigid prohibition of ‘raising interest on loans’ which was disqualified as ‘usury’ and was predicated on the paradigm of taking profit on a loan to one in distress, could not longer be maintained in an era of capitalist development which required investments and credit opportunities. It took, however, some mental acrobatics to reach the modern point of view which equals ‘usury’ to ‘excessive interest’. First, interest was only warranted if real damage could be demonstrated

¹²⁷⁾ Rozemond, *op. cit.* (2007), p. 491.

¹²⁸⁾ Brennan, *op. cit.* (1977), p. 123.

at the end of the loan. The opinion that interest on loans was morally and legally acceptable even if no real damage had been suffered, materialized in insurance contracts in which the investor was insured against loss of his capital, on the condition that he accepted a lower percentage of the total profits than normally would accrue to him. These contracts epitomized the idea of risk sharing. The next step in the development of commercial loans was the acknowledgment of the idea that the lender, for the duration of the loan, lost the opportunity to employ his money for other, more lucrative, purposes (*lucrum cessans*). Gradually, the awareness emerged that money had no fixed value, but was subject to the fluctuations of the market. Like all commodities, the value of money was determined by supply and demand.¹²⁹ The intellectual developments on the concept of money obviously coincided with and were propelled by powerful economic interests. Meanwhile, the Church had to keep up by squeezing these new arrangements into their moral framework. Starting from the basic assumption that interest on loans amounted to theft or extortion, they had to face the question to what extent these new cases fitted the ancient paradigm, or whether the new circumstances justified the use of interest on loans, so that they had to relinquish their former condemnation of the practice. In the end, neither the categorical rejection nor the paradigm could be sustained. As Jonsen and Toulmin comment:

No longer does the paradigm of the distress loan preside, even remotely, over the analysis; no longer does interest fall under the prohibition of theft. The new paradigm, reflecting the emerging science of economics, viewed money as a commodity, and the moral question asked how one could determine a “just price” for its use.

And they conclude: ‘So new circumstances pressed the casuists, as the economists of their time, to set new doctrines.’¹³⁰

In the same vein, the categorical imperative to speak the truth was qualified in casuistry under the pressure of political and religious circumstances. The discussion centred around the question of whether ‘equivocation’ and ‘mental restriction’ always amounted to the mortal sin of lying, or whether they were sometimes justified in view of the specific circumstances of the case. The paradigmatic case was the priest who was forced by worldly authorities to divulge secrets which were confided to him during confession. The moral quandary was obvious: either he faced the wrath of his interrogators or he was exposed to severe penalties, like loss of his priesthood and solitary confinement. Casuists agreed that the priest could invoke the argument that, as a direct representative of God, he had been imparted the confessant’s deepest secrets which were only meant for God, and not for men’s ears. In that case he was either allowed to use the tactic of ‘equivocation’ which

¹²⁹ Jonsen & Toulmin, op. cit. (1988), p. 192.

¹³⁰ Jonsen & Toulmin, op. cit. (1988), p. 193.

implied that he took advantage of the ambiguities of language, or make a mental restriction – ‘an unexpressed condition that would save a statement known by the speaker to be contrary to fact from being a “lie”’.¹³¹ During a short period, casuists turned the argument upside down by defending ‘mental restriction’ in general on the basis that, as God knew the internal intent, ‘mental restriction’ was never a lie before His eyes and ears. This perverse reversal of the Augustinian belief that humans are bound to speak the truth in the presence of the God of Truth, contributed to the bad reputation of casuistry and was grist to the mill of Pascal.¹³²

The protracted and vicious religious conflicts between Catholics and Protestants during the 16th and 17th centuries put the whole moral issue into a new perspective. Frequently, civil servants were expected to swear an oath and pay allegiance to the King or Queen and his or her religion. For the adherents of another denomination, the quandary was again apparent: should they refuse and face mortal danger for heresy or disloyalty? Or should they feign by making use of the tested tactics of equivocation or mental restriction, thereby forsaking their faith in the presence of the religious adversary? Although some casuists indeed favoured those tactics, the accusation that Catholics were unscrupulous equivocators who could never be trusted prompted the far more radical view that an ‘unjust judge’ does not deserve to be told the truth. This opinion presaged, in the words of Jonsen and Toulmin, ‘a doctrine that was to be formally enunciated by Hugo Grotius a century later, that the obligation to tell the truth was correlative to the right of the questioner to know the truth.’¹³³

Of course, Jonsen and Toulmin do not present these examples because they always agree with the outcomes of the casuistic approach. They merely intend to show that once unshakeable tenets of moral conviction may slightly erode and change under the pressure of economic, political and cultural developments. Moreover, they succeed, at least in the opinion of the present author, in demonstrating that casuistry, by faithfully investigating the rationales of moral concepts and comparing newly emerging situations with paradigmatic cases, is a flexible method of moral reasoning which often produces equitable results.

7. Concluding Observations

The major question we should address at the end of this essay is whether international crimes and their concomitant concepts of criminal responsibility are relatively

¹³¹ Jonsen & Toulmin, p. 202. The authors give simple examples of both tactics. A physician who is asked by someone, hoping to discover whether the person is the physician’s patient, whether he cares for this person, is employing the tactic of ‘equivocation’, if he answers in the negative, meaning that he does not care for him in the sense of being fond of him. Mental restriction is involved when the woman who is asked by the unwelcome caller whether her husband is at home, answers ‘no’, reserving in mind the unexpressed condition ‘not for you’.

¹³² Jonsen & Toulmin, op. cit. (1988), p. 201.

¹³³ Jonsen & Toulmin, op., cit. (1988), p. 211.

‘context-neutral’ and (therefore) exempt from casuistry. In other words: do they constitute a special, elevated category which cannot only claim universal validity, but also uniform applicability? The previous analysis already suggests that this is not the case, but doctrine and case law themselves present the strongest evidence for a negative answer to the question. Standards of international criminal law have shifted over time, reflecting changes in political and social situations or moral perceptions. There is evidence that the categorical rejection of the defence of ‘superior orders’ was inspired by the odious practice of invoking the *Führerprinzip* – by the major war criminals at Nuremberg – and ‘*Befehl ist Befehl*’ – by the lower ranked soldiers during the subsequent trials under Control Council No. 10.¹³⁴ New intellectual insights, partially spurred by developments on the battlefield, have procured a more refined approach which recognizes the dual aspects of the defence (duress and mistake of law).¹³⁵ The current regulation of these defences in the Rome Statute is the temporary apex of this development. As far as the concept of ‘mistake of law’ itself is concerned, one may expect that the margins of availability will become gradually smaller, as the dissemination of the relevant standards progresses. The judgement of the Italian court in the Priebke- case anticipates this development.¹³⁶

The ceaseless discussions on the proper scope of genocide provide another example. Although most will agree that the Holocaust is the paradigmatic case of genocide, there may be good reasons, in view of the radically changed political constellations, to extend the scope of ‘protected groups’ to cover political and social groups as well. The fear for dilution or trivialisation of the concept seems largely unwarranted. As was shown before, both international tribunals and domestic jurisdictions have taken initiatives to this purpose, but there are strong arguments for a prior redrafting of the concept at the international level.

A final – and particularly telling – example is the changing attitude towards the concept of superior responsibility. The current opinion, which is gradually becoming prevalent, that superiors should not always be held responsible for the crimes themselves, but that they are to be held accountable for a separate crime of omission may well be prompted by the ‘transformation of war’. Armed conflicts increasingly become cluttered and obscure.¹³⁷ Military commanders

¹³⁴ *Einsatzgruppen* case, Judgement, Trials of War Criminals before the Nuremberg Military Tribunal under Control Council No.10, 1946–1949 (1950), vol. 4, p. 470: ‘The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery.’

¹³⁵ Y. Dinstein, *The Defence of ‘Obedience to Superior Orders’ in International Law*, Leiden 1965, pp. 49–57.

¹³⁶ *Supra*, footnote 87.

¹³⁷ On this changing character of war see: M. van Creveld, *The Transformation of War*, New York 1991, pp. 197/198.

may not have the faintest idea over whom they actually exercise command.¹³⁸ The reproach shifts to an earlier moment, when they incur responsibility for not having organized their armies in such a way as to prevent the disarray in the first place.¹³⁹

The previous examples emphatically demonstrate that concepts of international criminal law are by no means petrified, but are subject to change. Moreover, in adjusting the prior legal concepts to changing circumstances, courts must inevitably have made use of the method of casuistry. One may, however, argue that these examples only demonstrate that those concepts may change in time. This does not exclude the temporary settlement of standards at the international level, for all states to follow faithfully. There is indeed some evidence that international criminal law aspires to accomplish such conformity. The ICTY and ICTR, while obviously operating in highly different political and cultural contexts, share a common Appeals Chamber which takes care that the Trial Chambers observe and equally apply the common standards.

I would like to make two observations on this point. First of all, it remains to be seen to what extent an international court, exercising quasi-legislative powers, could indeed impose uniform application of a concept. We may recall the judgement of the ICTR in the Akayesu- case, in which the Trial Chamber elaborated on the concept of ‘public incitement to commit genocide’. The Chamber considered decisive whether the persons for whom the message was intended immediately grasped the implication thereof.¹⁴⁰ Obviously, the Trial Chamber, by venting this opinion, acknowledged that the assessment of the crime was dependant on the context, as the question whether Akayesu had indeed been guilty of public incitement was predicated on culturally determined patterns of communication between messenger and audience. Being a cultural-sensitive concept, application of ‘public incitement to commit genocide’ in the Balkan- context will probably produce rather different outcomes. One may retort that application in different situations does not affect the normative core of the concept, but that begs of course the previously raised question whether ‘casuistry’ does not influence the concept itself. In short: each rather abstract formulation of a normative concept

¹³⁸ *Pros. v. Hadžihasanović/ Kubura*, Judgement, Case No. IT-01-47-T, 15 March 2006. In considering mitigating circumstances the Trial Chamber observed (§ 2081): ‘Enfin, les conditions d’exercice du commandement de l’Accusé Hadžihasanović ont encore été rendues plus difficiles par l’afflux massif de réfugiés en Bosnie centrale et par le problème des combattants étrangers. Ce contexte particulier, sans en justifier ni les causes ni les conséquences, présente les manquements de l’Accusé Hadžihasanović sous un jour qui amène la Chambre à faire preuve d’ingulgence.’

¹³⁹ *Pros. v. Hadžihasanović*, § 2075: L’accusé condamné ne le sera pas pour les crimes commis par ses subordonnés mais pour le manquement à l’obligation qui lui incombait de prévenir la commission desdits crimes ou d’en punir les auteurs.’

¹⁴⁰ *Supra*, footnote 60.

does not obviate the need of fine tuning this concept to specific circumstances, a need which is particularly pregnant in a pluralist world.

The international criminal tribunals have acknowledged the need for ‘casuistry’, by time and again reiterating that certain legal questions should be assessed on a ‘case-by-case’ basis. Moreover, the European Court of Human Rights, in its previously mentioned *Jorgić*-judgement, has eloquently emphasized that ‘casuistry’ is part and parcel of the legal tradition itself. The relevant passage deserves full quotation:

In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.¹⁴¹

My second observation bears upon the proper – hierarchical - relationship between international tribunals and domestic courts. The ‘open texture’ of international criminal law entails that concepts and standards will always need to be attuned and adapted to changing circumstances and contexts. There is no convincing reason why this ‘work in progress’ should be the monopoly of international criminal courts. On the contrary, the complementary principle presupposes that domestic jurisdictions will be in the frontline and take the lead, while the ICC has only the residual function of taking care that they perform this task with due diligence.

It has been claimed from the outset in this article that, irrespective of the niceties of the complementarity principle, the question whether states are allowed to deviate (slightly) from the standards, put at the international level, has a wider purport. It should be clear by now – and this is perhaps the slightly jolting conclusion of this essay – that any precise indications cannot be given, in view of law’s open texture. In the light of the object and purpose of the project of international criminal justice, some rough guidelines, however, can be given. This project does not bear wide variety of application of international standards. International crimes are embedded in the international legal order and the parties to the Rome Statute have the solemn obligation to implement the elements of those crimes in their domestic legal order. Courts will have to gear those standards to the specific political and social context in which they operate – and this will inevitably lead to some variety in application. But neither they nor the legislator are allowed to alter the content of those crimes substantially. The decisive bench-mark

¹⁴¹ ECHR, Judgement of 12 July 2007 (*Case of Jorgić v. Germany*), § 101.

is that the underlying *rationale* of those crimes should not be changed unilaterally. The discussion on the proper content of ‘genocide’ provides a case in point. The intention to limit the scope of this concept to ‘stable’ groups was originally inspired by the concern for the plight of those people who, as prisoners of their identity, could not evade being targeted. There may be perfectly good reasons, in view of the changed political and legal circumstances, to extend the protection to more volatile groups, but any change in the content of this international crime should first be approved by the international community.

As far as concepts of criminal responsibility are concerned, both domestic legislators and courts have more leeway to apply these concepts as they see fit. The reasons for this distinction have been explained in § 5, but the present paragraph presents an additional argument. Concepts of criminal responsibility are more ‘open textured’ than the substantive crimes themselves. Obviously, it is possible to delineate criminal law concepts like ‘complicity’, ‘attempt’ and ‘duress’ more precisely, but at the end of the day they refer to an infinite number of situations, as they belong to the realm of general criminal law and apply to all specific offences. Domestic jurisdictions have some margin of appreciation in the interpretation of these concepts and may be able, capitalizing on their own national doctrines, to enrich international criminal law. Again, the underlying rationale is the guiding principle which delimits the freedom of interpretation. A single illustration will suffice. The rationale for ‘superior responsibility’ is that the superior should incur responsibility for the crimes of his subordinates, as his hierarchical position in the organisation enables him to control and correct their behaviour, but that the sentence and reproach should be commensurate to his guilt as well. The present German regulation of the doctrine – confirmed by recent case law of the ICTY - is perfectly in line with this rationale.

If these guidelines are observed, a vigorous and flexible system of international criminal justice, based on the dialectics between international and national law, is indeed feasible.

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