Israel Law Review **46**(2) 2013, pp 207–231. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2013.
doi:10.1017/S0021223713000046

Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections

Harmen van der Wilt[*]

This article seeks to give an impression of the way in which domestic courts are contributing to the development of international criminal law. Have they predominantly followed the case law of international tribunals and, by doing so, have they corroborated those standards? Or have they rather ventured in new directions and, as a consequence, been involved in a creative process, establishing and refining international criminal law?

Four different approaches, reflecting the position of domestic courts vis à vis the standards and case law of international criminal tribunals, are identified and analysed: strict compliance, antagonism, judicial construction, and 'casuistry'. The author concludes that the most important contribution of domestic courts to the development of international criminal law consists of further interpretation of open-ended norms. While this is obviously inherent in the process of 'judicial creativity', the feature is reinforced by the non-hierarchical nature of international criminal law. As a consequence, international criminal tribunals lack the power and authority to impose their interpretation of international criminal law on domestic courts. The risk of fragmentation is mitigated, however, by the nature of criminal law, which requires strict and clear standards, and by the increasing interactions between courts at different levels.

Keywords: international crimes, domestic courts, complementarity, hierarchy, fragmentation

1. Introduction

The prosecution and trial of perpetrators of international crimes by domestic courts is widely considered to be problematic. As systematic criminality usually implies the involvement of public authorities – either through active participation, or by omission or connivance – national courts are often held to be incapable of conducting impartial trials and rendering fair and independent judgments. The 'epistemic community' of international lawyers professes a clear preference for international criminal law enforcement by international courts and tribunals.[1] The primacy of the ad hoc tribunals (International Criminal Tribunal for the former Yugoslavia (ICTY) Statute,

[*] Chair of International Criminal Law, University of Amsterdam. The author greatly benefited from the discussions with friends and colleagues, including Miri Gur-Arye, Fionnuala Ní Aoláin, Kai Ambos, George Fletcher, Oren Gross, Yoram Shachar and Yuval Shany, during a short visit to the Hebrew University of Jerusalem in October 2011. Other academic friends – André Nollkaemper, Sergey Vasiliev and Ingo Venzke – have made highly useful comments on a previous draft. H.G.vanderWilt@uva.nl.

[1] A clear representative of this position is Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1, and 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 2–3. The term 'epistemic community' is borrowed from José E Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365, 367.

https://doi.org/10.1017/S0021223713000046 Published online by Cambridge University Press

Article 9; International Criminal Tribunal for Rwanda (ICTR) Statute, Article 8) is predicated on this presumed superiority of international tribunals.[2]

While suspicion of the performance of domestic courts is particularly acute in the case of (international) criminal law, it transcends this context and is reflected in a certain apprehension of the potential of domestic courts to apply international law properly. It is argued that national courts, in spite of the renowned doctrine of separation of powers, are often reluctant to disentangle themselves from the executive.[3] Committed to parochial interests, national courts would thus not be able, or be inclined, to serve the common, international good.[4]

Such concerns strangely contrast with the huge practical importance of domestic courts as enforcers of international law. Focusing on international criminal law, we may draw attention to the well-known fact that 'primacy' has made way for 'complementarity' in the Rome Statute of the International Criminal Court (ICC Statute). This principle stipulates that national jurisdictions should have the first shot and that the International Criminal Court (ICC) is only allowed to intervene when national authorities do not move at all, or display 'inability' or 'unwillingness' in the conduct of investigations and prosecutions.[5] The jurisdictional primacy of domestic courts is, however, not only structurally embedded in the ICC Statute; it is also a fact of life. Even when a case or situation is admissible and the ICC is allowed to proceed, it is bound to leave the prosecution and trial of the large majority of mid-level and lower level perpetrators to national courts, as it has only the capacity to process a limited number of

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[2] UNSC Res 827(1993), 25 May 1993, UN Doc S/RES/827 (1993); UNSC Res 955(1994), 8 November 1994, UN Doc S/RES/955 (1994). The appeals chamber of the ICTY in the *Tadić* case made no secret of the legal-political underpinnings of the principle of primacy:

> Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as 'ordinary crimes' (Statute of the International Tribunal, art. 10, § 2(a)), or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, § 2 (b)).

ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber, 2 October 1995, [58]. On the principle of primacy, see Bartram S Brown 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383.

[3] Compare Wolfgang Gaston Friedmann, *The Changing Structure of International Law* (1964) 146–47 with Nollkaemper who, though not adhering to this point of view, observes that 'also in states with more of a rule-of-law tradition, in all too many instances national courts have sided with their government and refused to review acts by governments against the standards of international law': André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 6.

[4] See, for instance, Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 *European Journal of International Law* 159, and Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press 1964). More favourably disposed towards domestic courts as enforcers of international law are, amongst others, Richard B Lillich, 'The Role of Domestic Courts in Promoting International Human Rights Norms' (1978) 24 *New York Law School Law Review* 153; Christoph H Schreuer, 'The Authority of International Judicial Practice in Domestic Courts' (1974) 23 *International and Comparative Law Quarterly* 681; and Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policies* 501.

[5] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute). Compare the preamble and arts 1 and 17.

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cases.[6] In other words, whether one likes it or not, domestic courts apply international (criminal) law on a large scale, either directly or following implementation in their own legislation.

This article seeks to give an impression of the way in which domestic courts are contributing to the development of international criminal law. Have they predominantly followed the case law of international tribunals and, by doing so, corroborated those standards? Or have they rather ventured in new directions and, as a consequence, been involved in a creative process, establishing or refining international criminal law?

Four approaches may be identified, which will be addressed and analysed in the following sections. The first is the model of *strict compliance* in which courts have indeed faithfully internalised and applied the case law of the ad hoc tribunals. The second model (*antagonism*) is the exact mirror image of the previous approach in that it reveals judicial decisions which explicitly deviate from the standards and interpretations as expounded by the international tribunals. The third section discusses instances of courts charting new waters by discovering new standards of (customary) international law, while the fourth approach is, to a certain extent, a variation of the previous model, as it involves the application by domestic courts of open norms, leaving room for further interpretation.

These four sections comprise the core of this article. In the final section, I will reflect on the normative implications of the application of international law by domestic courts in general and of the distinct approaches in particular. In an earlier publication I addressed the question of whether – and, if so, to what extent – domestic courts are allowed to deviate from legal opinions and standards as expressed by international (criminal) tribunals.[7] I will revisit this topic and will defend the position – which was also reached as a conclusion in my earlier article – that some degree of 'pluralism' is inevitable. Domestic courts apply international law in different contexts and to new situations. By applying the law, they refine, interpret and therefore change the law, and they contribute to the further development of international (criminal) law. Furthermore, I will explore what the proliferation of standards and interpretations resulting from the decentralised application of international criminal law means for its coherence. On what authority do domestic courts render their interpretations of international criminal law? Do legal findings of international courts and tribunals on international law inherently have superior authority over decisions of domestic courts? Do the interpretations of domestic courts have legal validity only within the confines of their own legal system or do they have a wider purport? Is the proliferation of domestic interpretations conducive of the much dreaded fragmentation of international law?[8]

At this point some remarks on the choices and limitations of this article are apposite. First of all, this contribution focuses predominantly on the application of international criminal law by

[6] In the eight 'situations' in eight African countries which are currently under judicial scrutiny of the ICC, charges have been issued against 26 defendants.

[7] Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229.

[8] Similar questions are addressed by Nollkaemper (n 3) chs 9–11. The literature on fragmentation of international law is abundant. Suffice to mention here, Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

https://doi.org/10.1017/S0021223713000046 Published online by Cambridge University Press

Western courts, exercising universal jurisdiction. This focus has no principled reason, but is rather inspired by the fact that the two other contributions to this issue, also emanating from the DOMAC project, will explore the normative impact of international criminal tribunals on states of the *locus delicti.*[9] Secondly, the case law investigated involves mainly issues of substantive criminal law – (contextual) elements of crimes and concepts of criminal responsibility – rather than questions of criminal procedural law. This choice reflects the intellectual preferences and limited expertise of the author.

Finally, this article discusses only a specific aspect of the contribution of domestic courts to the development of international (criminal) law. Domestic courts may have their share in the creation of international law in different ways, as their interpretation of national law may produce evidence of their states' practice or opinion, and thus provide building blocks for customary international law or 'general principles'.[10] In this article I will address the question only of whether the application of international law by domestic courts may contribute to its elucidation and interpretation.

2. Compliance

National courts frequently invoke the case law of the international criminal tribunals in order to support their findings. They do this for several reasons. Sometimes they refer to decisions of international tribunals in search of clarification of a concept of international criminal law which features in an international instrument. A good example is a decision by the Dutch Administrative Law Division of the Council of State which was required to assess whether common Article 3 of the Geneva Conventions was part of an international agreement, defining 'war crimes' within the meaning of Article 1(F)(a) of the Geneva Refugee Convention.[11] The court held that in view of the dynamic nature of the reference in Article 1(F)(a), it was not enough to consult the text of the international convention but the case law relating to that convention also had to be taken into account. Subsequently, the court quoted the well-known finding of the ICTY in the *Tadić* case that common Article 3 should be regarded as a rule of customary international law and that violations thereof during an armed conflict give rise to war crimes, irrespective of whether the armed conflict is of an international or an internal character.[12] In other words, the reference to the case law of the ICTY served the purpose of clarifying the current

[9] See the contributions in this issue by Antonietta Trapani, 'Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Courts of the Democratic Republic of Congo' (2013) 46 *Israel Law Review* 233–48, and Dunia P Zongwe, 'Taking Leaves Out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo' (2013) 46 *Israel Law Review* 249–69.

[10] ICC Statute (n 5) art 38(1), mentions 'international custom, as evidence of a general practice accepted as law' and 'general principles of law recognized by civilized nations' as sources of international law under (b) and (c) respectively.

[11] *A v Minister of Immigration and Integration*, Highest Administrative Appeal, Administrative Law Division of the Council of State, 200408765/1; ILDC 848 (NL 2005). Geneva Convention Relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[12] ibid para 2.4.2.

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state of customary international law which, in its turn, was necessary to provide a progressive interpretation of the concept of war crimes in the Refugee Convention.

More frequently, domestic courts turn to judgments of the international tribunals in search of a proper interpretation of international crimes or concepts of criminal responsibility which they then apply, either directly or following implementation and transformation into domestic law, in criminal and asylum proceedings. An interesting example – because the interpretation was actually flawed – is provided by a judgment of a military court of the Democratic Republic of Congo, which referred to judgments of the ICTR in order to buttress its reading of crimes against humanity.[13] According to the military court, the contextual elements of crimes against humanity required that attacks be either widespread or systematic, never both – the difference being that widespread attacks required the violations to be committed on a massive, frequent and collective scale and to be indiscriminately directed against multiple victims.[14]

Where domestic legislation renders jurisdiction over 'clearly established international norms', as for instance the US Aliens Tort Claims Act, courts find it useful and appropriate to refer to case law of the tribunals in search of authority which may confirm that certain norms have indeed fully crystallised. A United States district court not only mentioned the Statutes of the ad hoc tribunals and the ICC in order to demonstrate that those who aid and abet an international crime could incur criminal responsibility, but extensively quoted case law of the ICTY which specified the *actus reus* and the *mens rea* of those who aid and abet.[15] The court rather complacently concluded that the international law of aiding and abetting liability closely parallels federal criminal law.

One can appreciate the efforts of domestic courts to clarify the content of international (criminal) law, but they do not always explain why they resort to the case law of international criminal tribunals as a source of great authority. Canadian courts have been in the vanguard in the advertising of the tribunals' legal findings, but they have not provided satisfactory answers either. In *Zazai v Minister of Citizenship and Immigration* the court candidly avowed its internationalist stance:[16]

> The question then becomes whether the 'accomplice' provisions are to be interpreted in accordance with domestic criminal law or in accordance with international law. The definition of 'crimes against humanity', in subsection 6(3) of the [Canadian] War Crimes Act, expressly requires that it be 'a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission'.

[13] *Ituri District Military Prosecutor v Kahwa Panga Mandro*, First Instance Decision, RMP No 227/PEN/2006; ILDC 524 (CD 2006).
[14] The military court referred to ICTR, *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, Trial Chamber II, 21 May 1999, [123], and ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, Trial Chamber I, 2 September 1998, [579], but apparently misunderstood the former judgment, as the chamber nowhere suggests that 'widespread' and 'systematic' are mutually exclusive.
[15] *Presbyterian Church of Sudan and Others v Talisman Energy Inc and Sudan* 453 F Supp 2d 633 (SDNY 2006).
[16] *Zazai v Minister of Citizenship and Immigration*, Redetermination of Deportation Order, 2004 FC 1356; ILDC 646 (CA 2005), para 49.

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It could be observed that the causal explanation does not fit the question. One might agree that the elements of crimes against humanity, being rooted in international law, are to be interpreted in line with the definition as determined by international law. It does not follow, however, that the mode of criminal responsibility, like 'complicity', should be equally governed by international law. The court referred to previous decisions of Canadian courts which had developed the notion of complicity in crimes against humanity through statutory interpretation of the Charter of the Nuremberg Tribunal.

Even more explicit in its embrace of international law, including the case law of the international criminal tribunals, was the Canadian Supreme Court in the *Mugesera* case.[17] The court found that, genocide being a crime originating in international law, international law was called upon to play a crucial role as an aid to interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide. It added that 'in this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis'.[18] Subsequently, the Supreme Court invoked decisions of both the ICTY and ICTR to sustain its conclusion that the instigation of crimes against humanity required the actual commission of the instigated offence, but that the inchoate offence of instigation could qualify as 'persecution as a crime against humanity'.[19]

It is interesting to ponder the question why Canadian courts in particular have been so vociferous and explicit in expressing their allegiance to international law and the case law of the tribunals. One partial explanation is that Canadian courts still suffer some trauma elicited by the highly controversial *Finta* decision.[20] In that case, the Supreme Court exhibited an unusually lenient disposition towards the defendant, a former Hungarian *gendarme* accused of confining, robbing and deporting Jews to Auschwitz. The court suggested that the defendant might have been intoxicated by the poisonous atmosphere of anti-Semitism, and added that crimes against humanity did not cover those who killed in the heat of the battle or in the defence of their country. The category rather concerned those who inflicted immense suffering with foresight and calculated malevolence.[21] The decision has been heavily criticised in that it turned anti-Semitism from an element of the crime into a defence.[22] Moreover, the subjective interpretation of the *mens rea* for crimes against humanity – the Supreme Court required a cruel disposition and discriminating motives – did not square with the opinion of the international counterparts.

[17] *Canada (Minister of Citizenship and Immigration) v Mugesera and Others*, Appeal to Supreme Court, (2005) 2 SCR 100; ILDC 180 (CA 2005).
[18] ibid para 82.
[19] The Canadian court referred to ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3-T, Trial Chamber I, 6 December 1999, [38]; ICTY, *Prosecutor v Kordič and Čerkez*, Judgment, IT-95-14/2-T, Trial Chamber, 26 February 2001, [387]; and ICTY, *Prosecutor v Kupreskič*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000, [621].
[20] *R v Finta* [1994] 1 SCR 701.
[21] ibid 817.
[22] See, for instance, Judith Hippler Bello and Irwin Cotler, 'International Decisions: Regina v. Finta' (1996) 90 *The American Journal of International Law* 460, 474; and Jules Deschênes, 'Toward International Criminal Justice' (1994) *5 Criminal Law Forum* 249, 265–66.

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It is suggested that the Canadian courts sought to distance themselves from the notorious *Finta* case and therefore adopted a highly loyal attitude towards the case law of the tribunals.[23]

National courts have not only invoked the case law of international criminal tribunals in order to support their findings on international criminal law elements and concepts, they have also referred to the decisions of human rights bodies for that purpose. The Argentinean Supreme Court of Justice quoted[24] from the famous *Velásquez Rodríguez* case of the Inter-American Court of Human Rights (IACtHR), holding that:

> although at the time of the acts in question there was no conventional text in force that used this classification applicable to the States Parties to the convention, international doctrine and practice have on numerous occasions described disappearances as crimes against humanity.

Subsequently, the court investigated whether crimes against humanity and war crimes had become imprescriptible under customary international law and invoked the *Barrios Altos* judgment of the IACtHR that any contrary domestic legislation – still upholding the applicability of statutory limitations for those crimes – 'constitutes a violation of the obligation of the state to pursue and punish and, consequently, entails its international responsibility'.[25]

While it may be expected that national courts within the jurisdiction of states parties to the European or the Inter-American Convention on Human Rights refer to the case law of the European Court of Human Rights (ECtHR) and the IACtHR respectively, it is more surprising that some courts have also relied on case law of these human rights courts even where their state was not a party. The Constitutional Court of South Africa, for instance, was required to assess whether juvenile whipping constituted cruel, inhuman or degrading treatment or punishment. In doing so, it extensively probed the interpretation of these separate concepts by the ECtHR in the case of *United Kingdom v Tyler*.[26] The court censured South Africa for having failed to justify the violation of rights and freedoms and concluded by holding[27] that:

> [t]here is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the courts and legislatures of various countries and through international instruments. It is a clear trend which has been established.

National courts may have a natural proclivity to resort to international courts and tribunals in their search for a correct interpretation of international (criminal) law. Moreover such references may

[23] See also Joseph Rikhof, 'Hate Speech and International Criminal Law: The Mugesera Decision by the Supreme Court of Canada' (2005) 3 *Journal of International Criminal Justice* 1121, 1126–27.
[24] *Chile v Arancibia Clavel*, Appeal Judgment, Case No 259, A 533 XXXVIII; ILDC 1082 (AR 2004), para 13.
[25] ibid para 36.
[26] *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995), para 27.
[27] ibid para 39.

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serve a useful purpose in counteracting the process of fragmentation.[28] It is another question, however, whether they are *bound* to do so. In this respect, Justice Breyer expressed the rather sweeping opinion that, whereas national courts should interpret treaties to achieve uniformity, 'the ICJ's position as an international court specifically charged with the duty to interpret numerous international treaties (including the convention) provides a natural point of reference for national courts seeking that uniformity'.[29] Justice Breyer may have a point as far as more technical interpretative questions of international law are concerned, in the realm of which the International Court of Justice unquestionably has superior expertise and therefore a higher interpretative authority. The interesting question is whether this also holds true for international criminal law. Some national courts do not appear to share that opinion.

3. ANTAGONISM

Domestic courts have occasionally exhibited considerably less deference towards international law in general, and judgments of the international tribunals in particular. Overt dissent, however, is rather scarce. Generally, the issue boils down to the applicability of either international or national law, and the proper hierarchical relationship between the two.

In the case of *R v Jones*, for instance, the United Kingdom House of Lords decided that the crime of aggression, although a crime under customary international law, could not qualify as a crime under national law without statutory enactment by Parliament.[30] The Lords evinced the democratic principle that the applicability of (international) criminal law required the involvement of the people's representative body.

The outcome in *R v Jones* contrasts with the *Scilingo* case in which the Spanish Court of Appeal displayed a friendly attitude towards international law by holding that international custom was part of the Spanish legal order. In view of the *jus cogens* character of crimes against humanity, the direct application of the international norm to *Scilingo* did not violate the principle of *nullum crimen sine lege,* even though the Criminal Code did not penalise such crimes until October 2004.[31]

Domestic courts serve as gatekeepers, allowing or precluding the infusion of international law in the domestic legal order depending on the constitutional position of their home state. Sometimes they have to decide whether a fact pattern is exclusively governed by international law, or whether domestic (criminal) law still has normative validity.

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[28] In that sense, Nollkaemper (n 3) 239.
[29] *Sanchez-Llamas v Oregon*, Supreme Court Judgment, 548 US 331 (2006), Dissenting Opinion of Justice Breyer, para 101.
[30] *R v Jones and Others* [2006] UKHL 16, para 28.
[31] *Public Prosecutor's Office v Scilingo Manzorro*, Final Appeal Judgment, No 16/2005; ILDC 136 (ES 2005), B1–B4. The Appeal Court abundantly cited case law of the ICTY, exhibiting the allegiance to the views of international criminal tribunals, as analysed in the previous section. For a more critical view of the court's asserted violation of the *nullum crimen* principle, see Alicia Gil Gil, 'The Flaws of the Scilingo Judgment' (2005) 3 *Journal of International Criminal Justice* 1082, 1086–87.

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In the case of *Kesbir*, the Dutch Supreme Court had to assess whether the defendant, charged with membership of a terrorist organisation, could be extradited to Turkey. Counsel had contended that international humanitarian law exclusively governed the hostilities in an internal armed conflict, suggesting that the requested person, enjoying combatant status, would be immune from prosecution. The Supreme Court did not agree with counsel's point of view. The applicability of common Article 3 of the Geneva Conventions did not preclude the competence of a state to prosecute and punish activities of a non-state armed group in a non-internal armed conflict on the basis of its own national criminal law. Moreover, in particular, common Article 3 of the Geneva Conventions did not deprive others (other than non-combatants) from protection against assaults on their life.[32]

When courts refuse to apply international law directly, they do not interpret its content and therefore cannot challenge the interpretation as determined by international criminal tribunals. In a similar vein, courts which apply national law in addition to international law will usually leave the content of the latter untouched, in which case they challenge only the monopolist position of international law. It is only when they confer supremacy on national law to the detriment of international law, or when the application of national law affects the content of international law, that domestic courts are likely to collide with international criminal tribunals. As indicated earlier, however, explicit dissent is extremely rare.

In the case of *Van Anraat*, Dutch courts were required to assess the appropriate standard of *mens rea* for complicity in genocide. Earlier case law of the ad hoc tribunals had corroborated that the accomplice need not share the special intent of the main perpetrator to destroy a group in whole or in part, but that knowledge of the principal's special intent would suffice. The interesting issue was whether the *mens rea* could even be slightly expanded to cover *dolus eventualis* as well. The Court of Appeal adequately identified[33] the main question as:

> whether the accessory must have 'known' that the perpetrator acted with genocidal intention or that a lesser degree of intention is sufficient, compared to or similar to the conditional intention as accepted in the Dutch legal system, or in other words: willingly and knowingly accepting the reasonable chance that a certain consequence or a certain circumstance will occur.

The fundamental issue, looming in the background, was to what extent Dutch criminal courts were entitled to apply (only) Dutch law in judging the requirement of intention in the present case or whether they should also consider the application of international criminal law.

Intriguing as the major issue may be, the outcome was somewhat disappointing. The Dutch court concluded that international criminal law in respect of the question at hand was still at a stage of development and had not crystallised completely. Instead of occupying the void and delivering a ruling which, as the court candidly avowed, could possibly have made a

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[32] *Re Extradition Request of Republic of Turkey*, Judgment of Supreme Court, LJN: AF6988, 02853/02 U; ILDC 142 (NL 2004), para 3.3.7.

[33] *Public Prosecutor and Others v Van Anraat*, Judgment of the Hague Court of Appeal, LJN BA4676, 2200050906-2; ILDC 753 (NL 2007), para 7.

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contribution to the development of the law, the court circumvented the issue. The available evidence did not demonstrate that Van Anraat could in any way have been abreast of the genocidal intention of the perpetrators, which implied that he did not (even) meet the threshold of *dolus eventualis*.

The answer to the question whether the application of domestic law can deviate from international criminal law is often considered to be dependent on the issue of whether domestic law extends or restricts the protection of international law.[34] A clear-cut example of 'overinclusion' is provided by Ethiopian legislation and subsequent Ethiopian case law, which allows the inclusion of political groups as targets under the qualification of genocide. Apparently, this is in contravention of the Genocide Convention,[35] which enumerates the 'protected groups', and the case law of the ad hoc tribunals which has emphasised the 'stable and permanent' composition of such groups as a distinguishing feature.[36] The Ethiopian court, however, did not find foul in the domestic provision, as it broadened the definition of genocide, rather than contradicting the Genocide Convention or international law.[37] The opposition of 'broadening' and 'contravening' is somewhat contrived and not entirely convincing, as one cannot conclude that 'broadening' is not in violation of the treaty, without considering the intentions of the parties.

One particularly interesting example of an explicit 'dissent' concerned the question of who could qualify as a perpetrator of war crimes under international humanitarian and criminal law. The issue was addressed by a Swiss court in the case of Mr Nyonteze, a Rwandan mayor (*bourgmestre*) who was accused of having gathered the population of his village and of inciting or even ordering them to kill Tutsis and moderate Hutus.[38] In this case the Swiss court openly censured the ICTR for limiting the scope of application of the Geneva Conventions to persons fulfilling functions either within the armed forces or within the civilian government.[39] The court admitted that a link was required between the offence and the armed conflict, but contested that the scope of perpetrators *ratione personae* was restricted to persons related to the armed forces. The Swiss Military Supreme Court disqualified the lower court's departure from the case law of the ICTR as 'clumsy', although it acknowledged that Swiss courts did not automatically have to coin the criteria of the ICTR to determine whether common Article 3 and Protocol II had been violated.[40] Interestingly, however, the appeals chamber of the ICTR itself in the *Akayesu* case adopted the lower Swiss court's position by finding that the trial chamber had

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[34] On this issue, see Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TCM Asser Press 2006) 126–33, who employs the concepts of 'underinclusion' and 'overinclusion'.

[35] Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res 260(III), 9 December 1948, UN Doc A/RES/260 (1948).

[36] Compare ICTR, *Prosecutor v Akayesu* (n 14) 515; ICTR, *Prosecutor v Rutaganda* (n 19) 57; ICTR, *Prosecutor v Musema*, Judgment, ICTR-96-13-T, Trial Chamber I, 27 January 2000, [162]; and ICTY, *Prosecutor v Jelisić*, Judgment, IT-95-10-T, Trial Chamber, 14 December 1999, [69].

[37] *Special Prosecutor v Col Hailemariam and Others*, Preliminary Objections, Criminal File No 1/87; Decision of Meskerem 29, 1988 EC (GC) (unreported); ILDC 555 (ET 1995).

[38] *N and Military Prosecutor of the Military Tribunal of First Instance 2 v Military Appeals Tribunal 1A*, Cassation Judgment, ILDC 349 (CH 2001); 12(21) Decisions of the Military Supreme Court.

[39] ibid para 9b.

[40] ibid para 9d.

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erred on a point of law in restricting the application of common Article 3 to a certain category of persons. Instead, the appeals chamber held that 'punishment (for violation of Common Article 3 of the Geneva Conventions) must be applicable to everyone without discrimination, as required by the principles governing individual responsibility as laid down by the Nuremberg Tribunal in particular'.[41]

The *Nyonteze* case is a perfect example of how the dialectics between international criminal tribunals and domestic courts can function. A 'dissent' by a national court is corroborated by the appellate court of an international tribunal and recycled into international criminal law, thus contributing to its further development.

4. Judicial Construction

The *Van Anraat* case demonstrates that national courts may have some leeway in determining standards and rules of international criminal law, although the Dutch courts missed the opportunity to do so. This stands to reason: with international criminal law being in an embryonic state, much of the terrain was left uncharted and the international criminal tribunals have only recently established a more or less comprehensive normative framework.

Gone are the days, however, when domestic courts single-handedly could decide that piracy was a crime under the law of nations. The landmark case deserves to be mentioned, as it epitomises the singular position of national courts as creators of international law. In *United States v Smith*, the US Supreme Court predicated its conclusion that piracy is a crime under the law of nations both on authoritative opinion and on legal practice, the classic building blocks of customary international law:[42]

> There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature, and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi*, is piracy … The common law, too, recognizes and punishes piracy as an offense not against its own municipal code, but as an offense against the law of nations (which is part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race … And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever with whom they are in amity is a conclusive proof that the offense is supposed to depend not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.

In the last century and until today international crimes have been codified with increasing precision, correspondingly limiting the space for domestic courts to determine their content on their own account. An interesting exception is, of course, the crime of terrorism, the definition of which still remains in abeyance. Italian courts have contributed to the further clarification

[41] ICTR, *Prosecutor v Akayesu*, Appeal Judgment, ICTR-96-4-A, Appeals Chamber, 1 June 2001, [443].
[42] *United States v Smith*, 18 US (5 Wheat) 153 (1820), para 5.

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of the crime. In the case of *Italy v Abdelaziz*, in particular, the court engaged in a thorough analysis of the relevant international instruments and revealed some conspicuous discrepancies.[43] Comparing the UN Convention for the Suppression of the Financing of Terrorism of 1999 with the EU Framework Decision of 2002, the court observed that the latter's definitional scope of terrorism was both more limited and greater than that of the UN Convention. On the one hand, and unlike the UN Convention, the Framework Decision excluded from its scope acts committed in wartime which are governed by international humanitarian law. On the other hand, the Framework Decision extended the concept of acts of terrorism by providing that they can also be characterised by destructive aims, namely the object of 'seriously destabilizing or destroying the fundamental, constitutional, economic or social political structures of a country or of an international organization', absent from the wording of the 1999 Convention.[44] According to the Italian court, the explicit and open-ended reference to definitions under conventions and other provisions of international law binding upon Italy in Italian legislation implied the incorporation of the provisions of the 1999 Convention also. As a consequence, terrorist offences included acts which are committed in the context of armed conflict and are committed not only against civilians but also against persons not actively engaged in hostilities. The court deduced from 'the "reasoning" of the international rules' that an act against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and physical well-being of the civilian population is inevitable, creating fear and panic amongst the local people.[45]

The pertinent question is whether this interpretation of the concept of terrorism is merely for 'local consumption' or has wider ramifications, possibly influencing the definition of the crime at the international level. After all, in view of the lingering controversies over the contextual scope of terrorism, it is by no means clear why the court opted for the UN Convention, rather than the Framework Decision, which excludes from its ambit terrorist offences committed in armed conflicts.[46] This is an important issue which will be discussed in greater length in the final section of this article.

Whereas the dust surrounding the (contextual) elements of crimes, with the exception of terrorism, has gradually settled, concepts of criminal responsibility are by nature more open, accordingly leaving more space for domestic courts to engage in judicial construction. The *Presbyterian Church of Sudan* case (mentioned in Section 2 in a different context) provides a good example. The defendant had been charged with joining a conspiracy to displace residents from an oil

[43] *Italy v Abdelaziz and Others*, Final Appeal Judgment, No 1072; ILDC 559 (IT 2007).
[44] ibid para 2.1. International Convention for the Suppression of the Financing of Terrorism (entered into force 10 April 2002) 2178 UNTS 197; Council Framework Decision on Combating Terrorism, [2002] OJ L 164, 3.
[45] *Abdelaziz* (n 43) para 4.1.
[46] That the question of whether terrorism deserves to be classified as such when committed in armed conflict is still highly contested is evidenced by the decision of the Appeals Chamber of the Special Tribunal for Lebanon (STL), denying that this is the current state of customary international law: STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, Appeals Chamber, 16 February 2011, [107]. For a critical appraisal of this point of view, see Matthew Gillett and Matthias Schuster, 'Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 *Journal of International Criminal Justice* 989, 1005–14.

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concession and its surrounding area which, according to the plaintiffs, amounted to a crime against humanity. Quoting extensively from the famous *Hamdan v Rumsfeld* case of the US Supreme Court,[47] the district court held that 'international law applies the charge of conspiracy in only two circumstances: "conspiracy to commit genocide and common plan to wage aggressive war"'.[48] Consequently, the charge of conspiracy to crimes against humanity could not be sustained. At first sight, the outcome of this case is not very spectacular. However, the court added an interesting afterthought, reacting on the plaintiffs' argument, that on the basis of the 'well-settled' *Pinkerton* doctrine, the defendant would incur criminal responsibility for the acts of all other conspirators taken in furtherance of the conspiracy, provided they had been reasonably foreseeable to the defendant as a consequence of the criminal agreement.[49] Again invoking the *Hamdan v Rumsfeld* decision, the district court found that 'the Anglo-American concept of conspiracy was not part of European legal systems at the time of the Nuremberg tribunals, and has never found acceptance in international law'.[50] Consequently, the defendant could not be held responsible for the conduct of a co-conspirator merely because that conduct was foreseeable.

The case offers an interesting example of judicial construction by domestic courts, albeit in a negative way, as the district court's decision indicates the kind of involvement that does *not* give rise to international criminal responsibility. The fact that a doctrine of Anglo-American pedigree was at stake gave additional authority to the court's decision, because it was familiar with the concept and could rely on precedents by the Supreme Court discussing the reception of the American legal artifact in international law.

In the *Sokolović* case, the German Federal Court of Justice addressed the question which also emerged in *Van Anraat* (discussed in Section 2) of whether those who aid and abet genocide need to share the special intent of the principal perpetrator or whether mere knowledge would suffice.[51] The court adopted the latter position. The striking aspect of the case, however, was that the question had been left in abeyance because of the contradictory decisions of the ICTY and the ICTR on the topic. While the ICTR initially required the aider and abettor to have the same *mens rea* as the main perpetrator, it later held that knowledge was sufficient.[52] The ICTY had not clearly expounded its position, although the trial chamber in *Prosecutor v Jelisić* had suggested that the specific intent requirement applied only in the case of 'commission' of the crime.[53] It was only in the *Krstić* case that the appeals chamber ended all uncertainty by explicitly holding that one who aids and abets need not share the specific intent of the principal.[54]

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[47] 126 S Ct 2749, 2784 (2006).
[48] *Presbyterian Church of Sudan v Talisman* (n 15) para 101.
[49] The *Pinkerton* doctrine has gained currency in American criminal law and was revitalised in *United States v Bruno* 383 F 3d 65 (2d Cir 2004), para 89.
[50] *Presbyterian Church of Sudan v Talisman* (n 15) para 105.
[51] *Sokolović*, *Complicity in Genocide Case*, Revision Judgment, 3 StR 372/00; ILDC 564 (DE 2001).
[52] See the commentary of ILDC reporter, Birgit Schlütter (ILDC 564 (DE 2001)), who refers to the decision of the trial chamber in *Prosecutor v Akayesu* and to the decisions of the appeals chamber in *Prosecutor v Akayesu* and the trial chamber in *Prosecutor v Bagilishema*, respectively.
[53] ICTY, *Prosecutor v Jelisić* (n 36).
[54] ICTY, *Prosecutor v Krstić*, Judgment, IT-98-33-A, Appeals Chamber, 19 April 2004, [140].

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The most remarkable element is, of course, that a domestic court took the lead and guided the course for the straying international tribunals, rather than the other way round.[55]

5. CASUISTRY

Where rules and standards of international criminal law are of a general and abstract nature and accordingly leave courts a margin of appreciation, domestic courts will step in, apply and interpret the law, and give it new shape. Contrary to the court decisions which were addressed in Section 3, the decisions in this category do not contest prior findings of the international criminal tribunals because they occupy the space which the tribunals leave open. Furthermore, unlike the innovative approach of the courts which featured in the previous section, the decisions which are analysed in this section do not invent new international law. The rule exists, but requires further elucidation and refinement.

Domestic courts have sometimes taken the opportunity to clarify the nature of international crimes. One of the legal issues which an Italian court had to decide in the case of *Lozano v Italy* was whether the tragic assault in Iraq by an American soldier of an Italian official who was mistaken for a terrorist would amount to a war crime.[56] The court pointed out[57] the

> evident disproportion of scale between the matter in question … and the subjective and objective characteristics of the 'war crime', with regard both to the definition of 'grave breaches' in the cited rules of humanitarian law, and to more recent case law of domestic tribunals.

The court sustained its point of view by identifying a number of factual elements: the approaching vehicle with the two Italian officials and the freed journalist on board, speedily nearing the road block in order to get to Baghdad's military airport; the location of the checkpoint at the intersection of two access routes to the airport, which had already been subject to repeated terrorist attacks; the objective situation of soldiers serving at the road block being on maximum alert, awaiting the cortege of the US Ambassador to Iraq; the fact that it was at night. The court concluded that these factual circumstances, in addition to *the isolated, individual nature*

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[55] See also Kai Ambos, 'Immer mehr Fragen im internationalen Strafrecht' ['Ever More Questions in International Criminal Law'] (2001) *Neue Zeitschrift fur Strafrecht* 628, 631–32, who proposes to differentiate as to the required *mens rea* between common 'aiders and abettors' and inciters to genocide:

> … in der Regel wird der Aufstachelnde die Zerstörungsabsicht selbst besitzen, ja er wird sie bei den von ihm aufgestachelten unmittelbaren Tätern sogar hervorrufen. Anders sieht es bei den allgemeinen Formen der Beteiligung, insbesondere der völkerrechtlich überaus relevanten Beihilfe, aus. Hier handelt der Teilnehmer in Abhängigkeit von Haupttäter und Haupttat und zwar in der Regel ohne eigenes Zerstörungsinteresse oder eine solche Absicht. [… as a rule, the inciter himself will have the intent to destroy; indeed, he will arouse this intent in the immediate perpetrator whom he incites. In case of the general forms of participation, in particular 'aiding and abetting' under public international law, the situation is different. Here the participant acts in dependence of the principal and the principal act, and generally he lacks an interest or intent to destroy.]

[56] *Lozano v Italy*, Appeal Judgment, Case No 31171/2008; ILDC 1085 (IT 2008).

[57] ibid para 7.

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of the acts, seemed in principle to stand in the way of this being considered an odious, inhuman hostile act against civilians and therefore a 'war crime'.[58]

The court provided an autonomous interpretation of the concept of 'war crimes' in light of the particular circumstances of the case. It is common ground that violations of international humanitarian law must reach a certain threshold of 'seriousness' in order to qualify as war crimes.[59] What makes a violation 'serious' must obviously be assessed on the basis of the facts. The novel aspect of the judgment was that, in the view of the court, the seriousness was at least partially mitigated by the isolated and individual nature of the acts, suggesting that war crimes must be part of a plan or large-scale commission. This interpretation, although not generally accepted, is not necessarily flawed. It puts the question of whether the opening sentence of Article 8 of the ICC Statute is 'merely' a limitation of the jurisdiction of the ICC or whether it has a more substantive 'bite' in sharp perspective.[60] The choice of the latter option will inevitably be conducive of a further blurring between the boundaries of war crimes and crimes against humanity.

In the *Jorgić* case, the German Constitutional Court addressed another topical and controversial issue – that of whether genocide implies that the biological and physical annihilation of a group could also encompass systematic deportation ('ethnic cleansing').[61] In analysing the relevant provision under German criminal law (Article 220a of the German Criminal Code, which implements the Genocide Convention), the Constitutional Court applied teleological, linguistic and systematic methods of interpretation. The court started by identifying the aim of the criminal provisions on genocide as the protection of a legal interest that lies beyond the individual, namely the social existence of a group, as evidenced by the wording of the provision that the intent to destroy must be directed at the 'group as such'. This intent to destroy included more than the mere physical-biological annihilation, as could be deduced from the separate paragraphs of Article 220a in their mutual connection:[62]

> § 220a.1, Number 3 of the German Criminal Code complements 'destruction' with the special attribute '*körperlich*' (bodily), thereby establishing that the criminalised actions must be combined with the physical annihilation of the group. § 220a.1, Number 4, on the other hand, establishes the special case of the biological annihilation of a group without having the effect of a physical annihilation of the presently living members of the group.

In other words, if biological extinction were to involve only physical annihilation, the final section of Article 220a.1 would have no separate meaning and would be redundant. Biological destruction could be achieved by other means.

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[58] ibid (emphasis added).

[59] All categories of war crimes in art 8 of the ICC Statute (n 5) require either a 'grave breach' (of the Geneva Conventions) or a 'serious violation' of the laws and customs applicable in armed conflict.

[60] Art 8(1) stipulates that the court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as a part of a large-scale commission of such crimes. See, however, Gerhard Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) para 685, who argues that 'the threshold clause (ICC Statute (n 5) art 8) is not a limitation on the substantive requirements for criminality'.

[61] *Jorgić Case,* Individual constitutional complaint, BVerfG, 2 BvR 1290/99; ILDC 132 (DE 2000).

[62] ibid para 22a.

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The Constitutional Court emphatically held that the lower courts should not deviate from the prescripts of international law, but that they had not done so:[63]

> It is clear that the non-constitutional courts' interpretation of § 220a of the German Criminal Code lies within the margins of the *possible* interpretation of the international law elements of the crime of genocide and conforms to the relevant jurisprudence and practice of the United Nations.

The problem was, however, that the international criminal tribunals never had explicitly agreed that ethnic cleansing could constitute genocide. The German court cleverly gathered their 'silent approval' from a number of their findings. First, the court referred to the Rule 61 decision in the case of *Karadzić and Mladić*, in which the trial chamber of the ICTY had held that the special intent to destroy a group could be deduced from political speeches and plans. The policy of mass deportation without the assignment of new dwellings could produce the destruction of the group and testify to the schemers 'special intent'.[64] Next, the German court quoted the decision of the ICTY in *Prosecutor v Jelisić* in which the trial chamber had found that genocide could also involve the physical annihilation of a limited number of a group in a geographically limited area. The destruction of the group could, according to the German court, be accomplished by a combination of the annihilation of a substantial part of the group and other punitive measures against the other members. Ethnic cleansing could thus amount to the separate count of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[65]

A final judgment that exhibits an interesting example of casuistry, which may be conducive to the further development of international criminal law, concerns the investigation into the requirement of a 'nexus' between a war crime and an armed conflict, as conducted by a Dutch court in the case of *Joseph M*.[66] The defendant, brother of the infamous Ruzindana who was convicted by the ICTR in 1999, stood trial on charges of genocide, war crimes and torture, as he allegedly had committed multiple rapes and inflicted severe bodily harm on Tutsis. As the Dutch legal system did not provide for universal jurisdiction at the time of commission, the court's attention focused on the question of whether the defendant's actions could qualify as war crimes.[67] To that purpose the court naturally had to assess whether Mpambara's alleged crimes bore a sufficient connection with the internal armed conflict. The court meticulously explored the case law of both the ICTY and the ICTR on the topic.

In the *Tadić* case, the ICTY had put in general terms that the alleged offences had to be closely related to the armed conflict, adding that[68]

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[63] ibid para 27.
[64] ibid para 32.
[65] ibid para 33.
[66] District Court of The Hague, 23 March 2009, LJN:BK050 (*Joseph M*) (in Dutch). English translation available at http://www.rechtspraak.nl, LJN BK0520.
[67] The 2003 International Crimes Act provides for universal jurisdiction in case of genocide, but the Act could not be applied retroactively to the case at hand.
[68] ICTY, *Prosecutor v Tadić*, Opinion and Judgment, IT-94-1-T, Trial Chamber, 7 May 1997, [573].

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> [i]t is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, … nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.

The appeals chamber in *Akayesu* had opined that the close nexus generally would imply that the perpetrator of the crime would have a special relationship with one party to the conflict, but that such a special relationship was not a condition for qualifying the offence as a war crime.[69]

Whereas these early judgments were rather general in nature and phrased in negative terms, the appeals chamber in *Kunarac* made some efforts to provide more tangible criteria. It corroborated earlier findings that war crimes could be committed temporally and geographically remote from the actual fighting, but added that the armed conflict should have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[70] Furthermore, the appeals chamber offered a number of factors which should be taken into account: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[71]

In *Rutaganda*, the appeals chamber largely agreed with the criteria as developed in the *Kunarac* case, but specified that the determination of a close relationship between particular offences and an armed conflict would usually require consideration of several factors, not just one, and added that 'particular care is needed when the accused is a non-combatant'.[72]

What was the value of these judgments as authoritative precedents? According to the Dutch court, the judgments 'did not offer a framework for assessment based upon which the present case can be assessed in a simple way – following the rules of deduction, as in mathematics – to be able to say whether or not there is a nexus'.[73] The tribunals had rather followed a 'casuistic approach, whereby the answer to the question whether the nexus requirement has been satisfied really depends on the evaluation of all relevant facts and circumstances'.[74]

At first sight, the court itself also (only) engaged in casuistry. Contrasting the case at hand with previous cases before the ICTR, it pointed out that the accused was a civilian and that the roadblock, which had preceded and facilitated the commission of atrocities, had not served a special military goal. The connection between the crimes and the armed conflict existed solely

[69] ICTR, *Prosecutor v Akayesu* (n 41) [444].
[70] ICTY, *Prosecutor v Kunarac, Kovač and Vuković*, Judgment, IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, [58].
[71] ibid [59].
[72] ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3-A, Appeals Chamber, 26 May 2003, [570].
[73] *Joseph M* (n 66) para 45.
[74] ibid para 47.

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on an equation between all Tutsi and the Rwanda Patriotic Front, serving as a pretext to justify the genocide, and this was insufficient to sustain proof of a nexus.[75]

On closer look, however, the court's opinion had wider – and probably intended – ramifications. It took great pains to separate the armed conflict from the genocide, explicitly endorsing judgments of the ICTR which had reached a similar conclusion.[76] A deeper motive for the strict separation between genocide and the war probably was that by lumping together genocide and war crimes, the court might inadvertently have added fuel to the *génocidaires* who adduced the war as a pretext to kill Tutsis randomly.[77] The court hardly concealed the wider purpose of its findings, by holding that '[i]f only this equation [between the Rwanda Patriotic Front and Tutsis] would be enough to assume a nexus, this would mean that almost all crimes committed against the Tutsi in that period … should be regarded as war crimes'.[78]

In sum, the district court aspired to transcend the confines of the particular case before it by engaging in the wider – and politically rather sensitive! – discussion of the proper relationship between the armed conflict and the genocide in Rwanda. It thus could have contributed to the legal developments in this respect. Whatever the merits of the court's opinions might have been, its hopes on eternal glory were soon dashed as the Court of Appeal did not share the district court's findings. The appellate court held that the genocide and the armed conflict in Rwanda had historically been closely related and decided that Mpambara's crimes bore the required nexus with the war. Not only had the armed conflict facilitated these crimes, the crimes had been part and parcel of the war.[79]

6. Some Final Reflections

The previous sections have revealed some distinct approaches of domestic courts towards international (criminal) law in general and their allegiance to the opinions and standards of international tribunals in particular. Many domestic courts invoke the case law of the international tribunals in order to support their own judgments. Much fewer are the instances in which courts take contrary positions or explore new grounds in a legal *terra incognita*. However, they do apply

[75] ibid paras 60–65.

[76] In *Akayesu*, the trial chamber concluded that 'although the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict' (ICTR, *Prosecutor v Akayesu* (n 14) para 128) and in ICTR, *Prosecutor v Kayishema and Ruzindana* (n 14) para 621, the trial chamber held that '[the crimes] were committed by the civilian authorities of this country against their own civilian population of a certain ethnicity…were committed as part of a distinct policy of genocide; they were committed parallel to, and not as a result of, the armed conflict'. The district court quoted both findings with approval: *Joseph M* (n 66) para 59.

[77] In a similar vein, Larissa van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts' (2009) 7 *Journal of International Criminal Justice* 1117.

[78] *Joseph M* (n 66) para 64.

[79] Court of Appeal, The Hague, 7 July 2011, LJN: BR0686 (in Dutch, no English translation, http://www.rechtspraak.nl), § 17.3. Author's translation of: 'Niet alleen waren de afzonderlijke tenlastegelegde feitelijkheden mogelijk geworden door het gewapende conflict, ze waren ook onderdeel van dat conflict'.

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and interpret the law, employing the margins of appreciation left open by general norms, and thereby contribute to the further development of international criminal law.

From the perspective of legal certainty, a large measure of consensus on the basic tenets and standards of international criminal law is undoubtedly recommendable. A normative patchwork, leaving each and every domestic jurisdiction to harbour its own private assessment and interpretation of international criminal law, would not only be undesirable but would fundamentally subvert the very pretensions of international law.[80] This body of law by its nature requires a concerted application and interpretation. One technique to achieve this homogeneity is for domestic courts to take the case law of international tribunals as a frame of reference, or at least as normative guidelines.

Generally, domestic courts have not elaborated on the reasons *why* they adopt the case law of international tribunals as guidelines for their own assessment of international criminal law, presumably because they have considered such a position to be self-evident.[81] In the case of *Joseph M*, the Dutch district court at least made an effort to elucidate its approach.[82] The court candidly avowed that it considered the case law of the ICTR, the ICTY, the ICC and the Special Court for Sierra Leone to set the guidelines for its own judgment. It explained that these courts are responsible for bringing to trial defendants who have allegedly committed international crimes. The court then singled out the ICTR as 'specifically in charge of the trials of defendants who (allegedly) committed international crimes in Rwanda'. Finally, the court alluded to the legal history of the Dutch International Crimes Act, which encourages the national courts to use international case law as a legal guideline.

The judgment of the district court in this particular case, however, demonstrates the limits of international guidelines. They simply may not be sufficient for the domestic courts to find a reasonable and fair solution in the case at hand, prompting them to explore other avenues and reach their own conclusions. In other words, between strict and docile compliance (compare Section 2) and an obstinate flouting of international standards (with Section 3), there is the slightly foggy space of 'margin of appreciation' in which domestic courts must gropingly find their own way.

It is very difficult, if not impossible, to determine the scope and nature of this intermediate space. Obviously, its dimensions are influenced by the nature of the legal rule: open-textured standards leave more leeway, while stricter norms correspondingly confine the scope for interpretation. But the normative and cultural contexts from which these standards have emerged and in which they must be applied play their part as well. One way to tackle this problem is to distinguish sharply between the application and interpretation of legal rules. Nollkaemper asserts that there is an essential distinction between a different application of a norm to particular facts,

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[80] In a similar vein, Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907, 913, who argues that '[p]erpetuating normative ambiguity in these and other areas of the law might encourage states to evade inconvenient legal obligations and render such obligations meaningless'.

[81] See the Canadian cases of *Zazai* and *Mugesera*, (nn 16–19) and accompanying text.

[82] *Joseph M* (n 66) 30.

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and the interpretation and meaning of the norm as such.[83] In order to buttress his point of view, he refers to a perceptive essay by Karen Knop, who coins the term 'disembeddedness' as a qualification of international treaty law, resulting from the efforts to reach some common ground between different legal cultures.[84] It is, however, highly questionable whether Knop endorses such a sharp distinction herself when she observes that 'the critique that international law is not neutral gains in importance from the assumption that international law can be imposed exactly as intended because this means its hegemony is complete'. She adds: 'If the domestic interpretation and application of international law prove instead to be more complex, then there may be space to mediate the relationship between global and local.' As an alternative to the 'imposition of meaning', Knop suggests comparative law as a methodology from which international law can learn, if one is prepared to acknowledge their shared challenge to translate norms from 'elsewhere'.[85]

Apart from such criticism which derives from different appreciations of hierarchy and power, Nollkaemper's approach faces an epistemological problem as well, in that application and interpretation cannot easily be separated. This conclusion was recently confirmed by the appeals chamber of the Special Tribunal for Lebanon when it held that '[i]nterpretation is an operation that always proves necessary when applying a legal rule'.[86] The apodictic position that a text or rule is clear and can be applied straightforwardly, without interpretation, is a logical fallacy, as it is itself the conclusion of an interpretation.[87] Besides, this position fails to appreciate that context determines meaning.

The pertinent question is whether an interpretation of a legal rule also changes its content. From a strictly logical point of view, this is undoubtedly true – unless the case to be adjudicated is exactly the same as a previous one – but obviously it is a matter of degree, depending on the specific context. Knop vividly paints a provincial production of a famous play with a 'cast of awkward amateurs and bungled bits of stage business' as a metaphor of the way in which traditional international lawyers regard domestic courts. She concludes that 'every local production might be seen to change the meaning of the play'.[88]

The message that Knop intends to convey – with which I fully and heartily agree – is that domestic courts, by applying and interpreting international law to specific contexts, inevitably influence and change the content of international law. The topic of the relationship between

[83] Nollkaemper (n 3) 222–23.
[84] Knop (n 4) 527: 'Since this disembeddedness lends the resulting norm an air of neutrality and thus legitimacy, its domestic application is *assumed* to be straightforward. While an international legal norm may leave room for culture – the concept of the "margin of appreciation" in European human rights law is often presented as such – this does not affect the interpretation of the obligation as far as it goes. This particularization is structured as jurisdictional, confining culture to a narrow domain of choice, as opposed to a particularization that permeates the entirety of the interpretation' (emphasis added).
[85] ibid 535.
[86] STL, *Interlocutory Decision on the Applicable Law* (n 46) 19.
[87] The appeals chamber quotes with approval Ronald Dworkin, *Law's Empire* (Belknap Press; Harvard University Press 1986) 352, and PM Dupuy, *Droit International Public* (9th edn, Dalloz 2008) 448.
[88] Knop (n 4) 533.

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the application, interpretation and development of the law by courts has been eloquently expounded by Jennings:[89]

> Of course we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it.

But after 'stating the obvious', he adds a word of caution:

> Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation.

This acute observation obviously begs the question what those 'parameters of permissible interpretation' are. While this question cannot be answered in the abstract, I will tentatively make some suggestions by identifying and distinguishing three categories within the normative framework of international criminal law. The first category consists of those rules and standards which have explicitly been incorporated in the Statutes of the ICC and the international criminal tribunals. It is carved in stone that crimes against humanity are acts which are committed as 'part of a widespread or systematic attack against a civilian population', that the 'declaration that no quarter will be given' is a war crime in both international and non-international armed conflicts, and that those who 'directly and publicly incite others to commit genocide' incur individual criminal responsibility under international law.[90] Although each Article of the ICC Statute on the substantive crimes under the jurisdiction of the ICC starts with the qualifier that the definition is limited to the purposes of the Statute, the norms just mentioned are uncontrovertibly part and parcel of customary international law. They are inviolable in that courts and national judges – and international judges, for that matter – are not allowed to tamper with them by, for instance, holding that isolated events could also amount to crimes against humanity, or by finding that inducing someone privately might also constitute incitement to genocide.

The same holds true for those norms which, though not codified in the Statutes, have been authoritatively qualified by international tribunals as belonging to the realm of customary international law. A good example is the assessment of the *actus reus* of aiding and abetting in general, and the required effect of the assistance on the main crime in particular. After a thorough examination of international and national case law, the trial chamber in the *Furundžija* case came to the conclusion that 'the position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime'.[91] As soon as an international tribunal has determined that a rule belongs to

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[89] RY Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1, 3.
[90] Compare ICC Statute (n 5) art 7(1), art 8(2)(b)(xii) and 8(2)(e)(x), and art 25(3)(e).
[91] ICTY, *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, Trial Chamber, 10 December 1998, [234].

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customary international law, it is sacrosanct for both international and domestic courts in the sense that they cannot change it at will and single-handedly. It bears emphasis, though, that domestic courts, at least in principle, would equally be authorised to assess and determine the content of customary international law. Above, in Section 4, I have discussed a number of striking examples. The equality of international tribunals and municipal courts in this respect has been confirmed by great international lawyers such as Jennings and Lauterpacht, who have observed[92] that:

> instead of thinking of municipal decisions as a source by analogy for the development of international law, those decisions have become a direct source of international law; a source, moreover, of both custom and of the interpretation of treaties.

It should be highlighted that this observation is made in the context of a discussion of the interpretation of international law by municipal courts, and not in the context of decisions by national courts as evidence of state practice.

The third category involves those (open-ended) norms which require further interpretation. We may all agree that a war crime must have some connection with an armed conflict, but what does a 'nexus' exactly entail? We know from the law on the books that those who incite others to genocide incur criminal responsibility, but what does 'incitement' actually mean? An answer to the latter question requires a deeper investigation into a specific context, including an assessment of shared understandings of semantics between the source of the inflammatory message and his audience, rooted in common culture and history.[93] It would, of course, be naïve and flawed to portray the ensuing judicial findings as 'mere' cultural particularities, leaving the essence of the legal norm intact. The application of the legal concept to such a situation implies its interpretation, is conducive of its further elucidation and perforce changes its content, although perhaps marginally. In my view, these contextual forms of 'casuistry' constitute the major contribution to the development of international criminal law by domestic courts.

A final issue that needs to be addressed is whether the decisions of municipal courts on international law have only local currency, or whether they may have a further reach. The rule of thumb is that the more specific and context-driven the judicial finding is, the less will be its claim to global validity, while more general and less specific decisions may have wider ramifications.[94] The factual and normative findings of the ICTR and local courts on the insidious role of Radio Télévision Libre des Mille Collines in the inducement of the genocide may indeed have

[92] Jennings (n 89) 2–3. Jennings refers to a 'classic' article by Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law (1929) X *British Yearbook of International Law* 65, in which Lauterpacht displays a change of opinion.

[93] As is well known, such an extensive investigation was conducted by the trial chamber of the ICTR in the Media case: ICTR, *Prosecutor v Nahimana, Barayagwiza and Ngeze*, Judgment, ICTR-99-52-T, Trial Chamber I, 3 December 2003.

[94] In a similar vein, Nollkaemper (n 3) 245: 'It is a plausible presumption that in certain respects the legal relevance of decisions of domestic courts in regard to international claims may extend, beyond the legal order of the forum state, to the international legal order'.

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only specific significance for the assessment of international crimes and responsibility in Rwanda, while the more general assessment by the Dutch district court of the nexus requirement, including its observations on the relationship between the armed conflict and the genocide, may have a wider application.

The crucial point that I wish to make is that the answer to the question depends on the topic under consideration and the quality of the legal argumentation, not on the place of the court within a presupposed hierarchical order. Whereas there are no good reasons to assume that, compared with domestic courts, international criminal tribunals have superior authority and skills in ascertaining whether a rule belongs to the realm of customary international law, it is equally unclear why a legal finding of an international tribunal, given in a specific context, should exceed that context simply because it emanates from an international tribunal. It is by no means self-evident that international tribunals have stronger claims to a correct and authoritative interpretation of international (criminal) law.[95] International law may not even be a coherent entity in this respect. Whether international tribunals or rather domestic courts have superior claims in the realm of the interpretation of international law may depend on the level of international integration and the transfer of state powers, criminal law traditionally being strongly wedded to the concept of sovereignty.

The establishment of an international criminal court has not changed the situation that international criminal law enforcement is essentially non-hierarchical in nature.[96] Notwithstanding the qualms of its critics, the ICC is not meant to serve as a supranational court, entrusted with the power to trump and revise the judgments of national courts whenever it deems those decisions to be in contravention of the mainstream interpretation of international criminal law.[97] The complementarity principle requires a more marginal test, arguably allowing national jurisdictions ample leeway in the *modus quo* of criminal prosecution and trial, as long as they display both 'willingness' and 'ability'. Nor does the ICC Statute envisage a preliminary rulings procedure, modelled on Article 267 of the EC Treaty, which enables national courts to obtain an authoritative interpretation of a point of (international) law from a supranational or international court.[98] Such a

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[95] Compare the diverging opinions of Alvarez (n 1) 462 ('Moreover … local judges may be less politically constrained innovators of international law and more familiar with domestic criminal law that might usefully fill gaps in international humanitarian law') with Theodor Meron, 'War Crimes Law Comes of Age' (1998) 92 *The American Journal of International Law* 462, 468 ('It is … in the development and clarification of the applicable law that a standing international criminal court's contribution will be particularly valuable'). A subtle balance is struck by Shany (n 80) 913, 937, who admits the superiority of international courts in 'law-intensive' determinations, while acknowledging the capacities of domestic courts in 'fact-intensive' determinations.

[96] Compare William W Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 *Michigan Journal of International Law* 1, 3.

[97] On the fear of the ICC arrogating 'overruling' powers, see Jimmy Gurule, 'United States Opposition to the 1998 ICC Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdiction?' (2001–02) 35 *Cornell International Law Journal* 1, 28: 'Thus, in essence, the Court functions as a super or supreme international appellate court, passing judgments on the decisions and proceedings of national judicial systems'.

[98] art 267 (in the pre-Lisbon era, art 234) of the Consolidated Version of the Treaty on the Functioning of the European Union, 51 *Official Journal of the European Union*, 2008/C 115/01, gives the European Court of Justice (ECJ) jurisdiction to give preliminary rulings concerning the interpretation of the Treaties (of the

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mechanism pre-eminently serves the function of streamlining the application and interpretation of international law.[99]

The last observation raises the question of how at least a certain degree of coherence in the application and interpretation of international criminal law can be achieved. After all, in view of the aspirations of legal certainty and equality expressed at the beginning of this section, decentralised and non-hierarchical enforcement of international criminal law may be conducive to widely divergent outcomes. Fragmentation is a liability in a system of dispersed enforcement of international law.[100]

In my view, the risk of fragmentation should not be exaggerated. For one thing, as argued above, the Statutes of the ICC and ad hoc tribunals, as codifications of international criminal law, serve as a solid normative framework. These elements of crimes, concepts of criminal responsibility and defences bear the rubber stamp of international norms, exhorting domestic courts and international tribunals alike to abide by their content on penalty of losing international legitimacy. Secondly, the nature of (international) criminal law itself contributes to its coherent application and interpretation. The *nullum crimen sine lege* principle requires criminal provisions to be as precisely drafted and detailed as possible, because more open and ambiguous norms would militate against the idea of *lex certa*. By implication, courts have less freedom in interpreting those norms to their own liking. The point is recognised by Burke-White, who argues[101] that:

> These hard obligations and an extraordinarily narrow zone of acceptable compliance suggest a *convergence* around a precise set of rules that various judicial mechanisms will *uniformly* enforce against individual transgressors.

Although Burke-White, in my view, slightly overstates the point by failing to appreciate that international criminal law harbours many open-ended concepts which leave room for interpretation – see the examples presented above – there is certainly some truth and merit in his observation.

Finally, courts are increasingly inclined to interact and refer to each other's decisions to reach a common understanding of international law. Sections 2 and 5 of this article provide examples of domestic courts alluding to case law of international tribunals, but domestic courts have also

European Union) and on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Courts and tribunals of Member States are allowed – or even obliged if there is no judicial remedy under national law – to seek such rulings from the ECJ whenever such questions are raised in a case before them.

[99] Compare the ECJ in Case C-244/80 *Pasquale Foglia v Mariella Novello* [1981] ECR-I 3047, [14], in which it held that the preliminary rulings procedure is 'in the interest of the proper application and uniform interpretation of Community law throughout all the Member States'. See also Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397, 406, observing that such instruments are non-existent in order to guarantee legal equality in applying World Trade Organisation law to competitors from different jurisdictions.

[100] The problem is well put by Nollkaemper (n 3) 222, who observes that 'as international law becomes more meaningful and decisive for national legal systems, and increasingly prescribes and supervises national law with a view to achieving common aims, that process will trigger processes of divergent interpretations'.

[101] Burke-White (n 96) 79 (emphasis added).

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consulted the decisions of their peers, at the horizontal level.[102] Moreover, the international criminal tribunals have expressed interest in national case law. Occasionally, they have examined national case law in search of 'general principles'.[103] For the purpose of this article it is more interesting that the ICTY has apparently attached special relevance to the application by domestic courts of international (criminal) law.[104]

Such frequent interactions and mutual references, indicating the gradual emergence of a 'community of courts', will probably be conducive to a further approximation and harmonisation of international criminal law.[105] As indicated above, there are limits to a fully fledged unification of international criminal law because legal concepts require different application and interpretations in different contexts. A fair and effective system of international criminal law enforcement may well be best served by consensus on the core and flexibility at the fringes.

[102] For interesting examples, see Nollkaemper (n 3) 239–41.

[103] See, by way of example, the extensive examination of national legislation and case law for the purpose of identifying the elements of rape as an international crime in ICTY, *Prosecutor v Kunarac, Kovač and Vuković*, Judgment, IT-96-23-T & IT-96-23/1-T, Trial Chamber, 22 February 2001, [439–460], and Harmen van der Wilt, 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10 *International Criminal Law Review* 209.

[104] Referring to case law from the British military courts for the trials of war criminals after the Second World War, the trial chamber in the *Furundžija* case observed that the 'law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue': ICTY, *Prosecutor v Furundžija* (n 91) para 196.

[105] The term 'community of courts' is coined by Anne-Marie Slaughter: see Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 372, and Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183, 187.

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