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Coordinating concurrent legal orders in the prosecution of international crimes

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Abstract: International criminal law provides a particularly interesting case study for the proliferation of legal orders as it helps to understand the types of uncertainties their interaction may entail with respect to the position of the individual as well as the solutions that may be adopted in that respect. This article analyses a selected number of substantive and procedural uncertainties that originate in the relationship between international criminal law and domestic legal orders. The purpose of the discussion is to identify the particular legal devices that have been elaborated in order to ensure the coordination between these legal orders, and to suggest areas in which a better coordination is still to be achieved.

Keywords: immunities; international criminal law; interpretation; jurisdiction; legal pluralism

Introduction

When the conduct of individuals becomes the object of different legal systems both at the municipal and international level, their legal entitlements under each system and the relationship between entitlements arising from different legal systems are often unclear. International criminal law provides a particularly interesting case study for the proliferation of legal orders as it helps to understand the types of uncertainties their interaction may entail with respect to the position of the individual as well as the solutions that may be adopted in that respect.

According to Article 6 of the London Charter, the International Military Tribunal (IMT) sitting at Nuremberg had jurisdiction over crimes against humanity 'whether or not in violation of the domestic law of the country where perpetrated'. For the first time an international tribunal exercised the power to prosecute persons responsible for crimes prohibited under international law even though such conduct could have been regarded as lawful under the municipal law of the accused. In the words of the IMT,

international criminal law rested on the idea that 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.[1] The same general rule was recognized by the General Assembly in its 1950 Declaration on the Nuremberg Principles,[2] and more recently by the ILC in its 1996 Draft Code of Crimes against the Peace and Security of Mankind.[3]

Today, customary international law provides for the prohibition of certain conduct amounting to international crimes, and thus imposes duties *directly* on individuals (and independently of domestic criminal law).[4] The international legal order also establishes international criminal courts and tribunals and *directly* proceeds to punish those responsible for international crimes. In other words, international criminal law provides for an entire set of primary and secondary obligations.

Yet international criminal law *cannot* operate in complete isolation from domestic legal orders. Without the involvement of domestic legal orders, international criminal law could neither achieve the goal of prosecuting all those responsible for international crimes nor carry out complex and long proceedings that require the cooperation of domestic authorities. Prosecution for international crimes has always been conceived of, in a sense, as a *shared* task of international and domestic courts. Domestic courts are supposed to give a substantial – if not primary – contribution to the prosecution of international crimes.[5]

The basic goal of international criminal law is to put an end to impunity for the perpetrators of international crimes and to ensure their effective prosecution, both at the international and municipal level.[6] In this respect

[1] IMT, Nuremberg Judgment (1947) 41 *American Journal of International Law* 172, 221.

[2] '[I]nternational law may impose duties on individuals directly without any interposition of internal law' (1950) vol II *Yearbook of the International Law Commission* 374.

[3] '[I]nternational law applies to crimes against the peace and security of mankind irrespective of the existence of any corresponding national law. The result is the autonomy of international law in the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under part two', (1996) vol II(2) *Yearbook of the International Law Commission* 18, para 9.

[4] For the sake of simplicity, only crimes provided for under the Rome Statute of the International Criminal Court will be taken into account, namely, aggression, genocide, crimes against humanity and war crimes.

[5] See the Commentary on art 8 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, (1996) vol II(2) *Yearbook of the International Law Commission* 28, paras 4–5.

[6] See in particular the preamble of the International Criminal Court Statute, clauses 4 and 5. The same goal underlies the provisions of the 1948 Genocide Convention, the 1949 Geneva Conventions, the 1984 Torture Convention, the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, and the 2010 Proposed International Convention on the Prevention and Punishment of Crimes against Humanity, available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> accessed 27 January 2012.

two issues must be distinguished. With respect to the basis of criminalization, under international law individual criminal responsibility can be established under customary law or treaties with the contribution of general principles in the interpretation or application of international crimes.[7] Similarly, a legal basis in municipal law (which includes *renvoi* to international law) is required for prosecution before domestic courts.

A different issue relates to the implementation of international criminal law at the municipal level. Whereas international treaties increasingly include detailed provisions on the implementation of international criminal law inside domestic legal orders,[8] customary international law remains quite general in that respect. Arguably, the basic goal of international criminal law has transformed into a general duty of the international community *as a whole* to exercise criminal jurisdiction over the authors of international crimes. However, no rule of customary international law identifies with precision the state competent to prosecute international crimes or the legal order that should be accorded priority among a plurality of competent states.[9] Under customary international law, states have the power (but not the duty) to prosecute international crimes (unless specific obligations are provided under treaty law) and, if they are willing to do so, states can establish their jurisdiction over international crimes. Similarly, a number of conventions oblige states to enact the legislation necessary to exercise jurisdiction over international crimes, but it is generally recognized that customary international law does not require a rigid conformity to international criminal law standards.[10]

[7] See in general A Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2008) 13 ff. See below notes 49–53 and accompanying text.

[8] Compare, for instance, the very general obligations embodied in arts 4 to 6 of the 1948 Genocide Convention with the more precise obligations provided in arts 4 to 7 of the 1984 Torture Convention. See in this respect DF Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *The Yale Law Journal* 2537, 2562–7.

[9] International criminal law conventions generally provide for an *aut dedere aut judicare* obligation. See in particular R van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 *Journal of International Criminal Justice* 1089–1116.

[10] According to H van der Wilt, 'Equal Standards? On the Dialectics between Domestic Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229–72, states parties to the Rome Statute are not obliged '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'. A certain degree of diversity in the application of international criminal law is even desirable. However, this conclusion seems limited to gaps in treaty law (240) or still undefined rules of international criminal law (245), that is, the margin of appreciation of domestic courts seems confined to sectors in which international criminal law does not yet provide clear guidance. See also W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723, 729.

In any case, today domestic courts are increasingly involved in the prosecution of international crimes alongside international tribunals: many domestic criminal codes include provisions on the prohibition of international crimes as well as special grounds for exercising criminal jurisdiction over such crimes, and there is a growing body of national case law dealing with offences prohibited by international law. Thus, individuals come under the purview of a plurality of legal orders, i.e. international criminal law and the municipal criminal law of states. On the one hand, this plurality should improve the protection of individuals, rendering effective the prohibition of international crimes and providing for judicial remedies ensuring the prosecution of those who have perpetrated such crimes. On the other hand, this plurality can be at the origin of a number of legal uncertainties which might affect the position of the individual.

When international crimes are committed, the perpetrators may be tried before either international or domestic courts. They can be accused of international crimes as defined under international law or under domestic law provisions. Therefore, the main uncertainties connected to the prosecution of international crimes are both substantive and procedural. The former basically concern the definition of international crimes and the way in which domestic courts apply such notions. The latter mainly concern jurisdiction and the identification of the competent jurisdiction able to carry out effective prosecution. An evaluation of the benefits and the drawbacks of this legal pluralism largely depends on the way in which the international and municipal legal orders interact.

The traditional view is that the relationship between international criminal law and municipal legal systems is to be appraised through the lens of monism and dualism.[11] At first, this might appear problematic. While international and domestic practice shows that in the field of international criminal law there are significant interactions between legal orders and that particular mechanisms have been developed in order to secure a certain coordination and continuity between the legal orders engaged in the prosecution of international crimes, the positivist doctrines of monism and dualism basically focus on the criteria of validity of a given legal system and on the need to define rigorously the boundaries of legal

[11] See in particular D Anzilotti, *Il diritto internazionale nei giudizi interni* (Zanichelli, Bologna, 1905) and H Kelsen, 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 *Recueil des Cours de l'Académie de Droit International de La Haye* 227–331. This means accepting the assumption that in the end every state is free to accord the treatment it prefers to international criminal law in its legal order, and more generally that the choice between monism and dualism is not dictated by international law.

orders – what lies inside and outside – with the ultimate purpose of solving normative conflicts.[12]

The positivist approach underlying both monism and dualism, characterized by its focus on the principle of 'exclusivity' of the legal order,[13] appears to be rather at odds with the 'mixity' that seems to inspire the prosecution of international crimes in different legal orders.

Thus, one might be tempted to have recourse to less outdated and more suitable theoretical frameworks which could better describe the recent developments of international and domestic practice. In particular, global legal pluralism might be taken into account due to its pluralistic theory of norm production, which erases the boundaries between legal orders.[14] However, this approach does not paint the whole picture. The following analysis will show that the separation of legal orders is still crucial and, even though it may represent an obstacle in the prosecution of international crimes it also constitutes a major protection for individual rights.

Admittedly, it is difficult to identify the appropriate theoretical framework that combines 'continuity' and 'separation' at the same time.[15] And it is not the purpose of this paper to develop a full-blown theory of the relationship between international and municipal law. But it will be maintained that the traditional positivist approach can be adapted in order to take into account the various forms of coordination between legal orders. A positivist pluralistic approach provides a valuable account of the developments of international practice, and at the same time avoids over-emphasizing phenomena of blurring normativity. In addition, a theoretical framework that secures, at least in principle, certainty of the law seems better equipped to protect the legal expectations and rights of individuals, which remain a crucial aspect in the field of international criminal law.

Accordingly, the core focus of the paper will be on international and domestic practice, and the particular relationship between international and municipal law in the prosecution of international crimes. The following analysis will discuss a selected number of legal uncertainties arising from

[12] BI Bonafé, 'International Law in Domestic and Supranational Settings' in J d'Aspremont and J Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, Cambridge, 2013) (forthcoming).

[13] Ibid.

[14] See in particular R Michaels, 'Global Legal Pluralism', (2009) *5 Annual Review of Law and Social Science* 243–62; G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law without a State* (Aldershot, Dartmouth, 1997) 3–28; PS Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155–1238. Global legal positivism is discussed in detail in Bonafé (n 12).

[15] A Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, Oxford, 2011) 299–300.

the interaction between international criminal law and domestic legal orders.[16] This analysis is meant to show the particular legal devices developed in order to ensure coordination between international criminal law and domestic legal orders, and to indicate areas in which better coordination is still to be achieved. Only after analysing the relevant practice will an attempt be made to explain the various forms of interactions according to a broader conceptual scheme.

Substantive uncertainties

Concerns have been raised about the prosecution of international crimes before a plurality of domestic courts. These concerns basically derive from the fact that the individual may not be ensured equal treatment in comparison with proceedings carried out at the international level. In particular, substantive uncertainties regard the definition of international crimes and consequently the uniform and consistent application of the elements of those crimes by both international and domestic courts.[17] If the prohibition of international crimes is not applied consistently at the international and municipal level, the major risk is a gap in prosecution and the possibility for perpetrators to escape punishment. This might seriously limit the chances for victims to obtain reparation.

No difficulty would arise if international crimes were defined, interpreted, and applied in the same manner under international and domestic criminal law. Unfortunately, this is not always the case. Certain domestic legal orders do not include some or any international crimes in national criminal codes; others do not define these crimes consistently with international criminal law. Thus, substantive uncertainties mainly arise with respect to two situations: a) when conduct that amounts to an international crime is not criminalized *as such* under domestic law, and b) when domestic provisions prohibiting international crimes provide definitions *diverging* from substantive international criminal law rules.

Failure to define international crimes

In the absence of a domestic definition of the relevant international crime, it seems straightforward to conclude that no prosecution can be initiated at the

[16] Therefore, it will not deal with the uncertainties that may arise *inside* a given legal system, whether it be a domestic legal order or international law. An example of the latter is provided below at notes 30 and 31.

[17] There may be similar uncertainties in the application at the domestic level of the modes of liability and defences provided under international criminal law. See, for example, below notes 30 and 31 and accompanying text.

national level. The *Jones* case decided in 2006 provides a good example of this situation. The House of Lords held that, *under international law* 'the elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime'.[18] However, this crime could not be regarded as a crime *under domestic law* due to the absence of any national legislation giving domestic effect to the prohibition of aggression:[19] 'It is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence.'[20]

Arguably, aggression is an international crime of a particular nature: it involves the determination of a state act of aggression, an act that most domestic courts would not regard as being justiciable.[21] According to the International Law Commission, jurisdiction over the crime of aggression 'shall rest with an international criminal court';[22] the only state that can try a person for aggression in its national courts is the state whose leaders participated in the act of aggression.[23]

However, the *Jones* case is not an isolated ruling. The absence of domestic criminal legislation has been regarded as an obstacle to prosecution also with respect to other international crimes. Among various cases, reference can be made to the *Nulyarimma* case decided by the Federal Court of Australia in 1999. According to Judge Wilcox, while genocide is undoubtedly prohibited under a peremptory norm of customary international law,[24] 'in the absence of enabling legislation, the offence of genocide is not cognisable in the courts of the Australian Capital Territory'.[25]

In a recent decision, the Special Tribunal for Lebanon has held that, 'as a general rule, international norms criminalising conduct are non-self-executing, for their implementation requires national legislation defining the crime and the relevant penalty'.[26]

[18] House of Lords, *R v Jones and Others*, Judgment of 29 March 2006, (2006) UKHL 16, Lord Bingham of Cornhill, para 19. See also Lord Hoffmann, ibid, para 59.

[19] Lord Bingham of Cornhill, ibid, para 28.

[20] Lord Hoffmann, ibid, para 60.

[21] Lord Bingham of Cornhill, ibid, para 30; Lord Hoffmann, ibid, paras 63–67. See the definition of the crime of aggression adopted in 2010 at the Kampala Review Conference (RC/Res.6) and introducing art 8 *bis* in the ICC Statute.

[22] See (1996) vol. II(2) *Yearbook of the International Law Commission* 27.

[23] Ibid 30.

[24] 1999 AUST FEDCT LEXIS 584, 14.

[25] Ibid 26.

[26] Special Tribunal for Lebanon, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para 76, available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010> accessed 22 May 2013.

The major obstacle to national prosecution in these cases seems to derive from a strict application of the *domestic principle of legality* according to which 'a person may only be held criminally liable and punished if at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order or, in other words, under the applicable law'.[27]

In 2000, reliance on the principle of legality precluded the prosecution of Habré, former President of Chad, for crimes against humanity before the Dakar Court of Appeals because, at that time, such crimes did not form part of Senegalese criminal law.[28] This conclusion was recently upheld by the Economic Community of West African States (ECOWAS) Court.[29] On similar grounds, the Extraordinary Chambers in the Courts of Cambodia recently excluded the application of a particular mode of liability, known as the third form of Joint Criminal Enterprise (JCE III),[30] which is routinely applied by international tribunals.[31]

[27] A Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003) 141. A different question is whether it may be said that a principle of legality today exists *under international law* and what its precise scope of application may be. See in general KS Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, Cambridge, 2009).

[28] See the Application by Belgium instituting proceedings before the International Court of Justice in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), 16 February 2009, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=5e&case=144&code=bs&p3=0> accessed 27 January 2012.

[29] ECOWAS Court, *Hissène Habré v Senegal*, 18 November 2010, available at <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaoecowas-ruling-hissein-habr-c-r-publique-du-s-n-gal> accessed 27 January 2012.

[30] Joint criminal enterprise is a collective mode of liability according to which all participants in a common criminal action are equally responsible. Under the expanded form of joint criminal enterprise (JCE III), the accused can be held accountable for crimes committed by the participants in the JCE that were not part of the original common criminal design, provided that 1) the perpetration of such crimes was foreseeable, and 2) the accused willingly took that risk. See ICTY, *Prosecutor v Tadić*, Appeals Judgment, 15 July 1999, para 228. It must be recalled that a partially different notion of joint criminal enterprise in embodied in the ICC Statute (art 25(3)d). See in particular *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, P-TC I, 29 January 2007, paras 316–339; and *Prosecutor v Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07, P-TC I, 30 September 2008, paras 480–486.

[31] 'The Pre-Trial Chamber has not been able to identify in the Cambodian law, applicable at the relevant time, any provision that could have given notice to the Charged Persons that such extended form of responsibility was punishable as well. In such circumstances, the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings' (ECCC, *Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, para 87, available at <http://www.eccc.gov.kh/en/documents/court/decision-appeals-against-co-investigating-judges-order-joint-criminal-enterprise-jce> accessed 27 January 2012). Needless to say this approach differs from that of the ICTY put forward in *Tadić* (n 30) and upheld in the subsequent case law of the Tribunal.

However, it must be stressed that domestic courts have made considerable efforts in securing effective prosecution of those responsible for international crimes and in trying to overcome these obstacles arising under national law. In particular, they have been prepared to apply the domestic principle of legality in a manner more consistent with the international prohibition of international crimes and to apply the requirement of domestic enabling legislation in a more flexible way in order to exercise criminal jurisdiction even on the ground of general rules of reference to international criminal law.

An example of the first situation is provided by the *Scilingo* case decided by the Spanish Audiencia Nacional. Scilingo was a military officer charged with, among other, crimes against humanity committed in Argentina during the military junta's 'dirty war' between 1976 and 1983. Spanish jurisdiction could only be grounded on the 2003 Spanish law which inserted the prohibition of international crimes in the national criminal code. Thus, the Court had to justify the possibility of applying such provisions to crimes committed before their entry into force. In principle, it was admitted that 'por mucho que se reconozca la validez universal o *erga omnes* de dichas normas [criminal law], si no están expresamente recogidas en el derecho interno resultan de facto inaplicadas y posiblemente desde un punto de vista técnico inaplicables'.[32] (Translation: 'however widely recognized the universal validity or *erga omnes* of said law, if they are not expressly included in domestic law they are not in fact applied and possibly, from a technical point of view, they are not applicable'.) [ILDC 136 (ES 2005)] However, since international crimes are provided under peremptory international norms, the Court held that domestic law could not preclude the application of the new criminal code provisions to crimes committed *before* its enactment, provided that the conduct amounted to a crime *under international law* at the time of its commission.[33]

This principle has been affirmed by other domestic courts, and it was upheld by the Special Tribunal for Lebanon (STL) in its decision of 16 February 2011: while 'international criminalisation alone is not sufficient for domestic legal orders to punish' conduct amounting to an international crime, nonetheless the principle of legality allows 'that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed *before* its enactment without breaching the *nullum crimen* principle'.[34]

[32] Spanish Audencia Nacional, *Sentencia por los crímenes contra la humanidad en el caso Adolfo Scilingo*, 19 April 2005, para IIIB1, available at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html> accessed 27 January 2012.

[33] Ibid.

[34] See (n 26) para 133.

Human rights treaties confirm that prosecutions on the ground of international law are not in conflict with the principle of legality. Article 7 of the European Convention of Human Rights and Article 15 of the International Covenant on Civil and Political Rights prohibit the retrospective application of criminal law for conduct which did not constitute a criminal offence under national or *international law* at the time when it was committed, specifying that the trial and punishment of persons for conduct which, 'at the time when it was committed, was criminal according to the general principles' of international law is not prohibited. In *Kononov*, the European Court of Human Rights was asked to decide a case in which the applicant was convicted for war crimes committed in 1944 under Article 68(3) of the 1961 Latvian criminal code.[35] The Grand Chamber dismissed the claim of violation of Article 7 ECHR, and held that – despite the absence of enabling domestic legislation at the time when the crime was committed – 'international laws and customs of war were in 1944 sufficient, of themselves, to find individual criminal responsibility'.[36] Accordingly, international law allows domestic courts to prosecute those responsible for acts amounting to crimes under customary international law at the time when they were committed, even though such acts are not yet criminalized under domestic legislation, without breaching the principle of legality.[37]

While cases in which it was held that prosecution for international crimes could be carried out regardless of the lack of specific enabling legislation are still isolated,[38] more frequently domestic courts have relied

[35] ECtHR, *Kononov v Latvia*, Judgment of 17 May 2010, App No 36376/04. See also *Kolk and Kislyiy v Estonia*, Decision on Admissibility of 17 January 2006, App No 23052/04; *Jorgić v Germany*, Judgment of 12 July 2007, App No 74613/01; *Korbely v Hungary*, Grand Chamber, Judgment of 19 September 2008, App No 9174/02.

[36] ECtHR, *Kononov v Latvia* (n 35) para 237. At para 238, the Court further considered 'that, having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 (paras 15–20 above), even the most cursory reflection by the applicant, would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable'.

[37] See French Court of Cassation (criminal chamber), *Barbie*, 26 January 1984, (1998) 78 *ILR* 125.

[38] See, for example, Belgium, Tribunal of First Instance, *In Re Pinochet*, 6 November 1998. See also Supreme Court of Canada, *Finta*, 24 March 1994, where Justice Cory held that 'customary international law [could] form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place'.

on general rules of reference to international criminal law in order to bring to justice those responsible for international crimes. For example, in the absence of specific domestic provisions, Hungarian authorities instituted proceedings for war crimes on the basis of a 1993 law making a general reference to the Geneva Conventions.[39] Similarly, the Swiss Military Criminal Code makes a general reference in Article 109 to violations of 'international agreements governing the laws of war or the protection of persons and property' as well as violations of 'any other recognized law or custom of war'. On the basis of this provision, a number of convictions have been entered for war crimes.[40] Reference can also be made to the *Arklöv* case decided in 2006 by the Stockholm District Court. In this case the accused was prosecuted for crimes committed against Bosnian Muslim civilians during the Balkan conflict. The District Court accepted that, under customary law, certain grave breaches of the Geneva Conventions were also prohibited in internal armed conflicts, and that the accused could be convicted according to chapter 22, section 6, of the Swedish Penal Code, which criminalizes the violation of 'generally recognized principle[s] … relating to international humanitarian law concerning armed conflicts'.[41] It must be pointed out that in those cases the prosecution for international crimes was possible because domestic courts could nonetheless rely on national provisions making reference to international criminal law, although drafted in broad terms.

More generally, the approach of domestic courts described above undoubtedly confirms the separation of international law and domestic legal orders. On the other hand, the efforts made by domestic courts to overcome certain obstacles connected to this separation should be appreciated. In general, the courts show a willingness to carry out, as far as possible, effective prosecution for international crimes and to adapt domestic standards to the needs of international criminal law. Thus, when they adapt the domestic principle of legality in order to take into account the criminalization under international law of international crimes, domestic courts recognize the existence of a separate international legal order and its competence to establish individual criminal responsibility over conduct amounting to international crimes.

Still, there are situations in which the lack of enabling legislation is particularly problematic. When international criminal law imposes upon states a *duty* to exercise jurisdiction over the authors of international

[39] See the reports on *Yearbook of International Humanitarian Law* 1998, 1999, 2000.

[40] See below note 51 and accompanying text.

[41] See M Klamberg, 'International Criminal Law in Swedish Courts: The Principle of Legality in the *Arklöv* Case' (2009) 9 *International Criminal Law Review* 395–409.

crimes, the absence of national criminalization precludes the exercise of domestic jurisdiction.[42] The duty to prosecute is certainly to be distinguished from the duty to criminalize. However, the former is generally imposed on states in conjunction with the latter. Moreover, even if the person could be charged with a corresponding domestic offence, a conviction for an ordinary crime is substantially different from a conviction for an international crime.

Indeed, in the absence of national enabling legislation, domestic courts could prosecute the accused for a domestic offence criminalizing the conduct amounting to an international crime. Just to give an example, under Norwegian law a person accused of genocide could be charged with 'homicide under especially aggravated circumstances'.[43] However, there is a considerable difference between charging the accused with homicide rather than genocide. As pointed out by the International Criminal Tribunal for Rwanda (ICTR), the ordinary offence of homicide has different legal requirements from the international crime of genocide, and genocide is characterized as a crime of particular gravity.[44] Accordingly, the Trial Chamber concluded that 'Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law'.[45]

[42] See e.g. arts 49/50/129/146 of the Four Geneva Conventions: 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.' In a recent case the ICJ has established that Senegal has breached the duty to prosecute enshrined in the 1984 Torture Convention (Case Concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), judgment of 20 July 2012 available at <http://www.icj-cij.org/docket/files/144/17065.pdf> accessed 11 September 2012).

[43] ICTR, *Prosecutor v Bagaragaza*, Amicus Curiae Brief filed by the Kingdom of Norway, 26 June 2006.

[44] ICTR, *Prosecutor v Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006, para 16. The Appeals Chamber upheld the decision on 30 August 2006. Similarly, a referral to the Netherlands of the same case was revoked by the Appeals Chamber because the Dutch judge had no jurisdiction over the crime of genocide (*Prosecutor v Bagaragaza*, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11 *bis* (F) and (G), 17 August 2007, para 11).

[45] Ibid. In this case, the different qualification of the underlying criminal conduct led to a dismissal of the request for the referral to the Kingdom of Norway. The ICC adopted a similar approach in *Prosecutor v Kony et al*., and declared the case admissible because of the absence of an adequate legislative framework which would have allowed prosecution before the domestic courts of Uganda (Decision on the Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber, 10 March 2009, especially para 48).

This is not to deny that prosecution of international crimes as ordinary offences can be efficient, provided that it reflects the gravity of the crime.[46] However, the qualification as a domestic offence rather than as an international crime can have significant consequences for the application of the principle of universal jurisdiction, immunity rules, statutes of limitation, amnesty laws, rules on interpretation, and so on.

Failure to define international crimes consistently with international law

Today, a large number of States do criminalize international crimes in their domestic legislation. However, it may happen that the domestic definition of an international crime is different from the definition provided under customary international law. This may be the source of considerable uncertainty in the application of the relevant criminal provisions.

A first situation that does not seem particularly problematic is where the domestic definition of a certain international crime is *broader* than that provided under international law. For example, under Ethiopian law, genocide includes prohibited acts aimed at the destruction of 'national, ethnical, racial, religious' (along the lines of Article 2 of the Genocide Convention) as well as 'political' groups.[47] The person charged with genocide against a political group is accused of having committed an offence labelled as an international crime, which in reality is an ordinary offence under domestic law. In this regard, the accused in the *Mengistu* trial claimed that the Ethiopian provision was in conflict with the international law definition of genocide (and was accordingly inapplicable), but the High Court rejected the claim. Indeed, it seems difficult to identify such a conflict. If the criminalization of a certain type of conduct is legitimately provided for under the domestic legal order (in particular with respect to the domestic principle of legality), 'political' genocide would undeniably constitute an ordinary crime under Ethiopian law,[48] with all the consequences that flow from its domestic nature.

[46] See Ferdinandusse (n 10) 730.

[47] See art 281 Ethiopian Criminal Code. Expanded definitions of the crime of genocide can also be found in the legislation (see e.g. art 61 of the Estonian Criminal Code) and case law (see e.g. the *Scilingo* case (n 32) para 3.2) of other States.

[48] For a similar case, see The Hague District Court, *Jalalzoy*, 14 October 2005. The Court held that 'the fact that the Netherlands has opted for applying criminal law when it concerns settlement of the less serious violations of the provisions included in four Geneva Conventions of 12 August 1949 is not in conflict with the law of nations, in view of the order given to the states on the one hand to act against it and on the other hand the freedom given to the states in that respect'.

More uncertainties may ensue when the domestic definition of an international crime is unclear or incomplete. This is quite a recurring situation. Domestic legal orders do not always transpose international crimes in a rigorous manner, and national lawmakers may decide to interpret, rephrase, simplify, or modify the definition of certain international crimes. Even a slight change in the wording of the definition of an international crime can have significant consequences in the establishment of individual criminal responsibility. In these cases the question is whether domestic courts can use international law to complete or make clearer domestic provisions.

In this respect, a particularly interesting trend is emerging in international practice according to which domestic criminal law should be interpreted in harmony with international law. In particular, domestic courts increasingly rely on well-established international case law in order to determine with precision the way in which the prohibition of international crimes should be applied at the national level. Thus, consistent interpretation means opening the domestic legal order to international law, recognizing the competence of international tribunals and adapting national law to increasingly refined international criminal law provisions.

A clear example of this trend is provided by the *Mugesera* case decided by the Supreme Court of Canada in 2005. The Supreme Court had already had the occasion to point out the importance of interpreting domestic law in harmony with customary international law.[49] In *Mugesera*, the Court put particular emphasis on the authority of *ad hoc* tribunals' case law in the interpretation of domestic criminal law transposing the prohibition of international crimes, and concluded that it was necessary to reconsider its previous case law on crimes against humanity.[50]

Another particularly interesting case is *Nyionteze*, decided by the Swiss Military Supreme Court in 2001. Although the Appeals Court affirmed that it adopted an interpretation of the nexus with the armed conflict required to establish the commission of war crimes which diverged from

[49] Supreme Court of Canada, *Baker v Canada*, 9 July 1999.

[50] Supreme Court of Canada, *Mugesera v Canada*, 28 June 2005, para 126: 'These tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law. 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, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law. Therefore, to the extent that *Finta* is in need of clarification and does not accord with the jurisprudence of the ICTY and the ICTR, it warrants reconsideration.'

that of the ICTR, the Supreme Court felt the need to insist on the absence of any conflict between the two interpretations, and tried to reconcile the approach of the Swiss court with that of the international tribunal.[51]

Other domestic courts opted for a different solution and recognized the direct applicability of international criminal law provisions. One may refer, for example, to the decisions of some military courts in the Democratic Republic of the Congo. Relying on constitutional provisions that provide for the primacy of duly ratified treaties over national law, these courts held that the ambiguity of the domestic legislation criminalizing international crimes justified the direct application of the Rome statute as interpreted by international judicial bodies.[52] The purpose of these decisions was to fill the gaps of domestic legislation and to ensure that international standards are applied uniformly, also including in proceedings before domestic courts exercising jurisdiction over international crimes.

To sum up, the emerging trend in the domestic case law of a number of States is to avoid conflicts as far as possible and to ensure a consistent interpretation and application of national criminal provisions concerning international crimes with the interpretation provided in the case law of international courts and tribunals. This marks a significant development in overcoming the uncertainties connected with domestic enabling legislation inconsistent with substantive rules of international criminal law.

[51] Supreme Military Court of Switzerland, *Nyionteze*, 27 April 2001, para 9(d): 'le TPIR a adopté une conception qui ne semble pas particulièrement restrictive … il convient donc de reprendre ces critères et de les interpreter en fonction de la situation concrète de l'accusé. C'est maladroitement que le Tribunal d'appel a affirmé s'écarter de l'actuelle jurisprudence du TPIR dès lors que, ce nonobstant, il a en definitive appliqué au cas particulier des critères correspondant à ceux que l'on vient d'exposer. Il n'y a donc pas lieu d'analyser de façon plus approfondie cette prétendue divergence dans l'interprétation des normes du droit international humanitaire.' Translation: 'the ICTR has adopted a view that does not appear to be too restrictive … In this specific case, it is sufficient therefore to recall the criteria and interpret them in accordance with the defendant's actual circumstances. The Court of Appeal clumsily decided to depart from the current case law of the ICTR.Notwithstanding this, in final instance it applied to this particular case the same criterion as that which has just been set out. Therefore there is no reason to analyse in more detail this supposed divergence in the interpretation of standards of international humanitarian law'. [ILDC 349 (CH 2001)]

[52] See in particular Military Tribunal of Ituri, *Bongi Massaba*, 24 March 2006, ILDC 387 (CD 2006) and *Kahwa Panga Mandro*, 2 August 2006, ILDC 524 (CD 2006). For an analysis of the prosecution of international crimes in the DRC, see A Trapani, 'Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC', Report DOMAC/12, November 2011, available at <http://www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf> accessed 27 January 2012.

Finally, domestic definitions of international crimes that are narrower than the corresponding international criminal law rules (generally because they provide for additional legal requirements) may be particularly problematic. For example, notwithstanding the recent modifications,[53] the French criminal code still provides for definitions of genocide and crimes against humanity which are in part divergent from international criminal law: in particular, in both cases a '*plan concerté*' is inserted as an additional requirement to be met. In this case one may wonder whether the conduct amounting to an international crime but not covered by the domestic legislation can nonetheless be the object of domestic prosecution.

The STL in the decision already mentioned affirmed a very broad duty of consistent interpretation that should also be applied to domestic provisions that include narrower definitions of international crimes when compared to customary international law. According to 'a general principle of interpretation common to most States of the world … one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State'.[54] However, it is unclear whether this principle also covers situations in which domestic law could be said to be in conflict with international criminal law. The Tribunal applied this principle and construed the Lebanese provision criminalizing terrorism so as to make it consistent with international law. In the end, Article 314 of the Lebanese criminal code could no longer be considered as being in conflict with international law, notwithstanding the Tribunal's acknowledgement that the well-settled case law of the Lebanese courts had adopted a conflicting view on the material element of the crime of terrorism.[55] It is difficult to apply the same principle when the domestic provision is clearly at variance with international criminal law.[56]

[53] On the adoption of the French law n. 2010-930 of 9 August 2010, see H Ascenscio, 'Une entrée mesurée dans la modernité du droit international pénal' (2010) *La semaine juridique* 1691–8.

[54] See (n 26) para 41.

[55] Ibid, para 40.

[56] This decision also seems ambiguous in another respect. It is not clear whether the duty of consistent interpretation only applies to international courts, or whether it is also binding on domestic courts. See *idem*, where the Tribunal considers that 'application of nation law *by an international court* is subject to some limitations by international law' (emphasis added), or para 125 where the Tribunal sets out the most congruous construction of art 314 and adds 'at least when Article 314 is applied *by the Tribunal*' (emphasis added).

Procedural uncertainties

Since international crimes can be prosecuted before both international and national courts, uncertainties can surround the determination of the competent jurisdiction. In certain cases even the existence of a plurality of competent jurisdictions has not been able to ensure effective prosecution of those responsible for international crimes. On the other hand, a number of procedural obstacles can preclude the exercise of jurisdiction at the municipal level and allow the perpetrators of international crimes to escape punishment.

Exercising jurisdiction over international crimes

Where there are various courts competent to exercise jurisdiction over a certain case the classical concern is that of conflicting decisions. With respect to the prosecution of international crimes, this issue has led to the elaboration of certain mechanisms for coordinating the exercise of criminal jurisdiction by different domestic courts or between international and domestic courts. However, we must not lose sight of the fact that the major concern in this particular field of international law remains the difficulty of bringing to justice those responsible for international crimes and of finding courts willing to prosecute the authors of international crimes.

The *Habré* case provides a good example of all the difficulties of bringing to trial in particular those most responsible for international crimes even when there is a plurality of potentially competent jurisdictions. The former President of Chad was indicted before a Senegalese court, but the domestic principle of legality precluded the exercise of criminal jurisdiction in Senegal.[57] Thus, criminal complaints were filed in Belgian courts, which tried to exercise jurisdiction on the ground of the passive personality principle. While Chadian authorities had lifted any immunity to which Habré might be entitled, the competent Belgian judge issued an international arrest warrant and requested Senegal to extradite Habré. The Dakar Court of Appeals refused extradition on various grounds and Senegal referred the matter to the African Union, which adopted a decision in 2006 concluding that Senegal should 'prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.[58] Senegal has not yet taken any step to bring Habré to justice. In 2009, Belgium instituted proceedings before the International Court of Justice against Senegal.

[57] See (n 28) and accompanying text.

[58] African Union, Decision of 2 August 2006, Doc Assembly/AU/3(VII).

In November 2010 the ECOWAS Court held that prosecuting Habré before Senegalese courts would run counter to the principle of legality and that

> la mise en œuvre du mandat de l'Union Africaine doit se faire selon la coutume internationale qui a pris l'habitude dans de telles situations de créer de juridictions *ad hoc* ou spéciales. L'expression « *juridiction compétente* » contenue dans ce mandat ne signifie rien d'autre que la mise en place d'un cadre judiciaire *ad hoc* dont la création et les attributions trouveraient leur bas relief dans les dispositions de l'article 15(2) du Pacte International sur les Droits Civils et Politiques et que le Sénégal est chargé de proposer au mandant les formes et modalités de mise en place d'une telle structure.
>
> the implementation of the mandate of the African Union should follow the international practice which has become customary in such situations courts to create *ad hoc* or special. The phrase '*jurisdiction*' contained in this term means nothing other than the establishment of a judicial *ad hoc* creation and powers find their low relief in the provisions of Article 15. 2 of the International Covenant on Civil and Political Rights and that Senegal is responsible for proposing the principal forms and modalities of implementation of such a structure. (Official English version, available at <www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf>.)

From a different perspective, this case shows the fundamental role that domestic courts can and should play in securing effective prosecution of international crimes, in particular when there is no competent international criminal tribunal.

In order to achieve the basic goal of international criminal law, domestic jurisdiction over international crimes should be established alongside international jurisdiction. Since Nuremberg, a considerable number of domestic legal orders have expanded their jurisdiction. Today, the prosecution of international crimes before domestic courts is possible on the ground of traditional principles of jurisdiction such as the territoriality principle, the active personality principle, the passive personality principle,[59] and the universality principle.[60] In this perspective, the creation of international criminal tribunals has played a fundamental role. It has

[59] See in general Cassese (n 27) 277 ff.

[60] See in particular R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735; and M Henzelin, *Le principe de l'universalité en droit pénal international* (Helbing & Lichtenhahn, Bâle, 2001).

stimulated domestic legal orders to enact the necessary legislation[61] and exercise jurisdiction when prosecution before international tribunals can be avoided.[62]

Once the prosecution of international crimes is rendered possible before a plurality of international and domestic courts, certain coordination may be desirable. In this regard, recent international practice shows interesting developments in attempting to coordinate the exercise of criminal jurisdiction both at the vertical level – between international and domestic courts – and at the horizontal level – between different domestic courts.

As regards the coordination of international and domestic courts, precise legal obligations can be found in the statutes of international courts and tribunals. The well-known principles of primacy and complementarity govern the relationship between *ad hoc* tribunals and domestic courts,[63] and the relationship between the International Criminal Court and domestic courts respectively.[64] Notwithstanding certain differences, both principles pursue a twofold purpose. On the one hand, they aim to ensure that the prosecution is carried out at the international level when domestic courts prove unwilling or unable to proceed. On the other hand, they imply that prosecution should be carried out at the national level every time a domestic jurisdiction has the appropriate means to exercise jurisdiction over international crimes. In this sense, they constitute a strong incentive to carry out prosecution before domestic courts and indirectly to adopt the necessary enabling legislation. In particular, as the mission of the *ad hoc* tribunals is coming to an end, and with the establishment of the ICC, international prosecution is increasingly assuming a subsidiary role with respect to domestic courts. As in the field of human rights,[65] putting

[61] It is generally acknowledged that the adoption of the Rome Statute, despite the absence of any specific obligation requiring the States Parties to adopt domestic legislation criminalizing and ensuring the prosecution of the suspects at the domestic level, had the indirect effect of stimulating States to enact the necessary legislation to that end.

[62] For example, the procedure under Rule 11 *bis* of the ICTY and ICTR Rules of Procedure and Evidence gives the *ad hoc* tribunals the power to transfer cases to domestic authorities. By transferring accused persons charged with less serious crimes to domestic jurisdictions, the *ad hoc* tribunals can concentrate on the most serious cases. But the transfer requires the state to have an appropriate legislation on the prosecution of international crimes. See above notes 51 and 42 and accompanying text.

[63] See art 9 ICTY Statute and art 8 ICTR Statute.

[64] See arts 1 and 17 ICC Statute. See in general C Stahn and MM El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, Cambridge, 2011).

[65] The European Court of Human Rights has repeatedly emphasized that the protection of human rights provided by the European Convention is subsidiary to the protection afforded by national legal systems. See e.g. Grand Chamber, *Markovic v Italy*, 14 December 2006, App No 1398/03, para 109.

the emphasis on the subsidiary character of the prosecution of international crimes by international courts is meant to ensure compliance with international criminal law by domestic legal orders and to stress their primary role in the fight against impunity.

From a more general perspective, what must be pointed out is the *joint task* that international and domestic courts have always carried out in bringing to justice those responsible for international crimes. According to what has been called the 'Nuremberg scheme',[66] international prosecution should in principle focus on those chiefly responsible for international crimes, while minor players should be left to domestic courts. This scheme was applied after WWII and a special tool – the crime of membership – was designed in order to coordinate the work of the IMT and domestic courts.[67] The same 'division of labour' has inspired the completion strategies of the ICTY[68] and ICTR.[69] It has also been adopted to coordinate the work of the ICC with that of domestic courts.[70] In other words, the relationship between international and domestic courts has always been characterized by the common endeavour to ensure an effective prosecution of international crimes.[71]

Thus, complementarity in a technical sense is used to indicate the procedural mechanism according to which the prosecution of international crimes is carried out either at the international or at the municipal level. Rule 11 *bis* in the Rules of Evidence and Procedure of the *ad hoc* tribunals and Article 17 in the ICC Statute govern this 'division of labour' and

[66] See Cassese (n 27) 353.

[67] See respectively art 1 of the London Charter and art 1 of Control Council Law No 10.

[68] See in particular Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, annexed to UN Doc. S/2002/678. The subsequent completion strategy reports are available at <http://www.icty.org/tabs/14/2> accessed 11 September 2012.

[69] UN Doc. E/CN.4/1996/7, 28 June 1995. The subsequent completion strategy reports are available at <http://www.unictr.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx> accessed 11 September 2012.

[70] ICC, Paper on some policy issues before the Office of the Prosecutor (ICC Policy Paper), September 2003.

[71] According to the ICC: 'the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity"' (*Prosecutor v Katanga*, ICC-01/04-01/07 OA 8, Appeals Chamber, *Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 September 2009, para 85). This complementarity, clearly stated in the Statutes of international courts and tribunals, is also recognized in the case law of domestic courts: 'The underlying assumption is that the crimes are offences against the law of nations or against humanity and that the prosecuting nation is acting for all nations' (US Court of Appeals, Sixth Circuit, *Demjanjuk v Petrovsky*, 31 October 1985, 776 F.2d 571 (6th Cir. 1985)).

provide the criteria to accord priority to either international or domestic jurisdictions.

From a different perspective, complementarity can be seen as a tool stimulating the carrying out of investigations or prosecutions at the national level. The notion of 'positive complementarity' or 'proactive complementarity'[72] has been widely explored by international legal scholarship. The fact that an international tribunal has the power to step in constitutes a significant incentive to the prosecution at the municipal level of those responsible for international crimes. For example, the case law of the *ad hoc* tribunals applying Rule 11 *bis* shows that Balkan States and Rwanda have made clear legislative improvements and are now able to prosecute crimes potentially falling under the jurisdiction of the ICTY and ICTR.[73] The case law of the ICC has raised more criticism since the Court has declared the admissibility of cases on the basis of a broad notion of 'inaction' by domestic courts without adopting an active role in promoting national prosecutions.[74] However, some positive developments can be appreciated both at the municipal level[75] and at the regional level.[76]

[72] See in particular WW Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53; WW Burke-White, 'Reframing Positive Complementarity: Reflections on the First Decade and Insights from the US Federal Criminal Justice System' in C Stahn and MM El Zeidy, (n 64) 341.

[73] The ICTY had the occasion to appreciate the improvements in Bosnia, Croatia and Serbia. The relevant case law concerning the transfer of cases is available at <http://www.icty.org/sid/8934> accessed 11 September 2012. The ICTR has recently accepted that accused could be transferred for trial to the courts of Rwanda thanks to the improvements in substantive law and procedural guarantees. See in particular *Prosecutor v Uwinkindi*, Decision on Rule 11 *bis*, Trial Chamber, 28 June 2011, upheld by the Appeals Chamber 16 December 2011.

[74] See among others *Prosecutor v Kony et al*., Admissibility Decision, Pre-Trial Chamber, 10 March 2009, and Appeals Chamber Decision, 16 September 2009; *Prosecutor v Katanga*, Admissibility Decision, Trial Chamber, 12 June 2009, and Appeals Chamber Decision, 25 September 2009; *Prosecutor v Ruto et al*., Admissibility Decision, Pre-Trial Chamber, 30 May 2011, and Appeals Chamber Decision, 30 August 2011. See in particular C Ryngaert, 'The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice' in C Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia, Antwerp, 2009) 145.

[75] For example, Libya requested the ICC to declare the case concerning Gaddafi and Al-Senussi inadmissible on the ground that its national judicial system is investigating the crimes committed from 15 February 2011 until the liberation of Libya, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, 1 May 2012.

[76] See the proposal for the establishment of an international criminal law section at the African Union level, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 15 May 2012, available at <www.africa-union.org> accessed 11 September 2012.

From the standpoint of the present analysis, the most interesting aspect of complementarity is the particular mechanism of interaction that it establishes between international and domestic law. First of all, complementarity implies the recognition of the existence of other, different legal orders having the power to exercise jurisdiction over international crimes. This assumption – that there is a plurality of competent legal orders – is essential in order to accept the competence of a different legal order and even accord it a priority in prosecution. Second, complementarity includes the control, at the international level, that municipal law is genuinely capable of prosecuting international crimes. In this sense it represents a protection for the accused, since the standards applied by the domestic courts are equivalent to international standards that would have been applied by international courts. Third, the basic condition for the application of the complementarity principle is precisely the correspondence of (substantive and procedural) standards at the international and municipal level (which are not necessarily identical) as they reflect the common purpose of the various legal orders of putting an end to impunity. Therefore, complementarity rests on the separation of legal orders but at the same time constitutes a mechanism to ensure the continuity between legal orders.

The effort to ensure horizontal coordination between the various domestic jurisdictions that might be concurrently competent to prosecute international crimes is one of the most interesting developments of recent international practice. As already mentioned, under customary international law there are no precise obligations in this respect.[77] For example, the application of the *res judicata* or *litis pendens* principles to regulation of competition between separate and independent legal orders is highly controversial.[78] While it is difficult to say that there are clear rules governing the matter, practice shows a growing reliance on some general criteria according to which the exercise of jurisdiction over international crimes by different legal orders can be coordinated.

According to the Resolution on 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' adopted by the *Institut de droit international*:

[77] According to the ICTY, in international law there is no established priority in favour of the State in whose territory the crime was committed (*Prosecutor v Mejakić*, Decision on Prosecutor's motion for referral of case pursuant to Rule 11 *bis*, Trial Chamber, 20 July 2005, para 41) or in favour of the State of nationality of the accused (*Prosecutor v Ljubičić*, Decision to refer the case to Bosnia and Herzegovina pursuant to Rule 11 *bis*, Trial Chamber, 12 April 2006, para 28).

[78] See in particular Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, Oxford, 2007) 159–63.

c) Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.
d) Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.[79]

Certain jurisdictions accord a similar priority to the state having a close connection with the relevant international crime. For instance, in the *Guatemala Generals* case the Spanish Constitutional Court held that universal jurisdiction should be excluded where the territorial jurisdiction effectively prosecutes the crime, and that Spanish jurisdiction should be subsidiary to that of the territorial State.[80] Under the German International Crimes Code this priority takes the particular form of an alternation between mandatory and discretionary prosecution. The Federal Prosecutor has the duty to initiate proceedings when there is a specific link to Germany, whereas prosecutorial discretion (including the power to refrain from initiating criminal proceedings) applies to cases in which there is no domestic link to the crime or where another state is exercising jurisdiction over the crime. Thus, the German legal order ensures both a vertical and a horizontal complementarity in the prosecution of international crimes.[81] Finally, the Report of the AU-EU Expert Group on the Principle of Universal Jurisdiction recommends an analogous subsidiarity of the principle of

[79] *Institut de droit international*, Resolution on 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes', Krakow Session, 2005, paras 3(c) and 3(d).

[80] Spain, Constitutional Court, *Guatemala Generals*, 26 September 2005, 20: 'Since the prosecution of such atrocious crimes is a common interest (at least on the level of principles) of all States because of their effect on the International Community, a reasonable and basic political-criminal process must grant priority to the jurisdiction of the State where the crime took place'. See in this respect H Ascensio, 'The Spanish Constitutional Tribunal's Decision in *Guatemala Generals*' (2006) 4 *Journal of International Criminal Justice* 586. See also the *Scilingo* case (n 19).

[81] See J Geneuss, 'Interplay of National and International Jurisdictions: The German Code of Crimes against International Law' in C Burchard, O Triffterer and J Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Kluwer Law International, Alphen aan den Rijn, 2010) 263–75.

universal jurisdiction and invites States to accord priority to territoriality as a basis for jurisdiction over international crimes.[82]

On the one hand, practice shows increasing attempts to identify those jurisdictions that have a particularly close connection with a certain international crime and therefore deserve priority in the exercise of criminal jurisdiction.[83] On the other hand, the priority accorded to a state with a closer link to the international offence does not exclude the exercise of jurisdiction by other States. States more remotely connected with international crimes do have the power under customary law to prosecute the suspects, but this possibility seems increasingly regarded as a default mechanism.[84] In other words, a sort of complementarity gradually appears as a guiding principle also in the horizontal coordination of concurrent domestic jurisdictions competent to prosecute international crimes. The emergence of criteria allowing the coordination of the prosecution for international crimes before different domestic courts would reduce the interstate tensions that can accompany the exercise of pure universal jurisdiction.[85] More generally, this trend shows a growing acceptance of the proposition that there is no exclusive jurisdiction over international crimes, that there are other 'external' legal orders competent to try the perpetrators, and that prosecution of international crimes is a matter of common concern for the entire international community.

Immunities as a bar to prosecution

Among a variety of procedural obstacles to prosecution for international crimes, immunities are particularly interesting because they can constitute a lawful bar to jurisdiction under international law and domestic courts are required to act accordingly. From this perspective, legal pluralism seems to entail a diminished level of protection when international crimes are committed by certain categories of state agents, and at the end of the day what remains is a loophole in the law. However, international and

[82] The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, 42.

[83] When there is a plurality of States available for transfer, the ICTY has relied on the criterion of the 'closer nexus' with the crime taking into account, among other factors, the location of the crime, and the nationality of the accused and of the victims. See e.g. *Prosecutor v Rašević and Todović*, Decision on Referral of Case under Rule 11 *bis*, Trial Chamber, 8 July 2005, para 32; *Prosecutor v Janković*, Decision on Referral of Case under Rule 11 *bis*, Trial Chamber, 22 July 2005, para 26.

[84] See H van der Wilt, 'Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States' (2011) 9 *Journal of International Criminal Justice* 1043, 1051.

[85] See in particular SR Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888.

domestic case law show a consistent trend in excluding the possibility for the accused of relying on functional immunity while limiting the applicability of personal immunity.

According to the rule on functional immunity or immunity *ratione materiae*, domestic courts are prevented from pronouncing on the acts of foreign state organs performed in the exercise of official functions since state conduct is the exclusive province of international law. However, today it is no longer disputed that functional immunity cannot shield state agents from prosecution when they are charged with international crimes either before international or domestic courts.[86] This principle has been constantly affirmed in domestic case law[87] and has been recently restated in the Resolution on 'the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes', adopted by the *Institut de droit international* in 2009.[88]

On the other hand, personal immunity or immunity *ratione personae* can be a significant obstacle in the prosecution of certain state organs before foreign domestic courts. Personal immunity is a procedural bar to jurisdiction, a special protection accorded under international law to a limited number of state agents who represent the state in order to secure the peaceful development of international relations among states (such as heads of state, prime ministers, ministers for foreign affairs, diplomatic agents, and, to a limited extent, consular agents). While it constitutes a complete shield from prosecution, as it covers both acts performed in the exercise of official functions and acts performed in a private capacity, personal immunity is limited in time to the duration of the mandate of the state organ.

Since personal immunity cannot be invoked at the international level,[89] its application may be problematic in particular when there are no competent international courts because prosecution of the suspect is barred before domestic courts (with the sole exception of the courts of the state of nationality). It is true that, technically speaking, personal immunity is a procedural rule and individual criminal responsibility for international

[86] On the rule on functional immunity and its relation to the prohibition of international crimes, see more extensively BI Bonafé, 'Imputazione all'individuo di crimini internazionali e immunità dell'organo' (2004) 87 *Rivista di diritto internazionale* 393.

[87] For two recent cases see Italian Court of Cassation, *Lozano*, 24 July 2008, no 31171, (2008) 91 *Rivista di diritto internazionale* 1223; French Court of Cassation, *Joola*, 19 January 2010.

[88] *Institut de droit international*, Resolution on 'the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes', Naples Session, 2009, art III(1).

[89] ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, *ICJ Reports* 2002, para 61.

crimes is a substantive rule.[90] Thus, no direct conflict can be envisaged between these rules. As the ICJ held in the *Arrest Warrant* case, these are 'quite separate concepts' and personal immunity 'can bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.[91] However, in practice it cannot be excluded that, under exceptional circumstances, personal immunity could turn out to be a complete shield from prosecution and consequently would indirectly be in contrast with the rule on individual criminal responsibility. Such extreme situations do not create proper normative conflicts; rather, they entail an 'occasional collision'[92] in which the application of the immunity rule frustrates the basic goal of international criminal law and the domestic right of the victims to reparation. A domestic court confronted with the solution of a similar 'collision' will not apply a strict primacy of one rule over the other but will arguably have the difficult task to strike a balance between the different interests at stake, that is, the protection of the state and the fight against impunity.[93] Thus, while in most cases the international regime of state agents' immunities can be reconciled quite easily with the prosecution of international crimes, under exceptional circumstances a particular logic of coordination – a logic distinct from the classical logic of conflict – could be called into question.

Coordinating the efforts to bring to justice the authors of international crimes

International criminal law is a relatively young part of international law, and it has undergone a striking refinement in recent years. States have made considerable efforts in this area, and an increasing number of domestic legal orders are demonstrating their ability to prosecute those responsible for international crimes.

[90] Another distinction to be kept in mind is that between jurisdiction and immunity. Jurisdiction is preliminary: under municipal law a domestic court must have the power to exercise jurisdiction over international crimes. Assuming that a certain court is competent, it is nonetheless prevented from exercising jurisdiction if immunity (that is, a procedural bar to prosecution) applies.

[91] ICJ, *Case Concerning the Arrest Warrant* (n 89) para 60.

[92] The expression is borrowed from E Cannizzaro, 'A Higher Law for Treaties?' in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, Oxford, 2011) 425–41, examining the various conflicts between treaties and *jus cogens* rules

[93] For a more detailed discussion of similar cases, see E Cannizzaro and BI Bonafé, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights' in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, Oxford, 2012) 825–42.

This is not to deny that national prosecution of international crimes is 'still minimal'[94] and that, in a number of cases, perpetrators of international crimes actually escape punishment. The major obstacles to effective prosecution at the municipal level are connected to the lack of competent fora, of national enabling legislation, specific constraints of domestic law, or more generally the unwillingness of some states to exercise jurisdiction over international crimes.

From the viewpoint of the interaction between international and municipal legal orders, this state of affairs entails a first remark: it confirms the separation and autonomy of international law and domestic legal orders in bringing to justice the authors of international crimes. If specific legislation and grounds of jurisdiction are necessary to that end, this means that the principle of exclusivity is upheld and there is no need to abandon the traditional positivist approach to the relationship between international and municipal law.

On the other hand, the foregoing analysis shows that increasing efforts are made in order to ensure the effective coordination of international and national jurisdictions in the prosecution of international crimes. The main tools that render possible such coordination are the consistent interpretation of domestic criminal law, the direct applicability of international criminal law standards, the flexible application of domestic legal constraints, such as the legality principle, the principle of complementarity, and more generally the due consideration accorded to the existence of other competent jurisdictions which might constitute more appropriate fora. In other words, a certain 'continuity' of legal orders characterizes the prosecution of international crimes. Domestic courts have tried to adapt domestic law to the needs of international criminal law; they have opened their domestic legal order to the authority of the case law of international tribunals and allow not only specific rules but also entire sets of international normativity to operate inside national law. International courts have been prepared to recognize the competence of national fora and the primary role they can play in the prosecution of international crimes.

This justifies a second remark. It is in this respect that the traditional positivist approach seems ill-equipped to explain the new trends emerging in international and domestic practice. Monism, which is premised on the existence of a unique (today one might be tempted to say 'global') legal order having its legal foundation in international law, cannot account for

[94] See WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, The Hague, 2006) 91 ff.

the separation of legal orders, even though it would take for granted the existence of forms of 'continuity'. Dualism, which perfectly fits a picture of separated and autonomous legal orders, apparently struggles to explain the 'openness' to external normativity. However, both positivist frameworks can be adapted to take into account the new trends described above. Admittedly, it is a matter of choice and emphasis on the elements of 'separation' rather than of 'continuity'.[95] But a dualist approach seems to describe more accurately the basic features of the current state of affairs, which is still characterized by a plurality of legal orders. If duly adapted, dualism can account for the forms of coordination that are emerging between legal orders.

Therefore, a few final remarks should be dedicated to the 'coordination' of legal orders and its theoretical appraisal. A broad concept of coordination has been used in the foregoing sections in order to include a variety of mechanisms aimed at opening a given legal order to 'external' normativity.[96] What all these mechanisms have in common is, first, the fact that they imply the recognition of external normativity, that is, the existence of a separate legal order that has jurisdiction in relation to the prosecution of international crimes. When a domestic court relies on consistent interpretation, or when jurisdiction is declined in favour of a more appropriate forum, this implies the recognition that an external legal order has the competence to interpret international criminal law provisions or to try the accused. Second, the mechanisms that make it possible to coordinate different legal orders translate the acceptance of and even 'confidence' (a recurring term in Rule 11 *bis* case law) in external normativity so that it can operate in conjunction with the internal legal order. For example, when the domestic principle of legality is adapted to the criminalization of international crimes or an international court transfers a case for trial before a national court, the door is open to the application of an external legal system.

These mechanisms of coordination can be explained with a traditional dualist (or better yet, pluralist) approach provided that the mechanisms of coordination between legal orders are integrated into this theoretical framework. Now it seems that the exclusivity principle does not preclude the recognition of the existence of other separate legal orders (on the contrary, internal exclusivity can only be established against the existence

[95] A neo-monist approach has been elaborated by E Cannizzaro, 'The Neo-Monism of the European Legal Order' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden, 2012). See, more generally, E Cannizzaro, *Diritto internazionale* (Giappichelli, Torino, 2012) 492–6.

[96] The traditional mechanism of *renvoi* or of direct effect is different because it has its legal foundation on a specific provision of the forum.

of external normativity). In particular, it has never excluded the application of foreign law when it is required under the internal legal system. If grounded on the law of the forum, the mechanisms ensuring coordination between legal orders are also perfectly acceptable, the difference being that the principle of consistent interpretation or that of complementarity[97] open the 'internal' legal order to entire sets of 'external' law. The principle of exclusivity also explains that the ultimate decision rests on the 'internal' legal order. Thus, for example, it is for the domestic court to decide whether it can rely on international case law, or it is for the international tribunal to supervise and even revoke the transferral of a case.

The increasingly broad reliance on external normativity that emerges from the analysis of the relationship between international criminal law and municipal law basically derives from the application of equivalent standards in the pursuit of common goals. It is this common 'mission' that makes it possible to abandon the logic of conflict and replace it with a logic of cooperation and effective prosecution of international crimes. The foregoing analysis seems to justify the limited conclusion that, at present, a revisited positivist approach still is capable of providing a general framework for the reciprocal interactions and dialogue between legal orders that characterize the prosecution of international crimes. It is possible that this mutual confidence between legal orders is part of a broader phenomenon of global constitutionalization.[98]

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[97] But one may suggest a similar functioning of the margin of appreciation or of the equivalent protection doctrines.

[98] See the Editorial in the first edition of *Global Constitutionalism*, A Wiener, AF Lang, J Tully, M Poiares Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.