



Doktori értekezések 4.

RÉKA VARGA

CHALLENGES OF DOMESTIC  
PROSECUTION OF WAR CRIMES  
WITH SPECIAL ATTENTION  
TO CRIMINAL JUSTICE GUARANTEES

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Réka Varga

Challenges of Domestic Prosecution of War Crimes  
with Special Attention to Criminal Justice Guarantees

A PÁZMÁNY PÉTER KATOLIKUS EGYETEM  
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## LIST OF ABBREVIATIONS

CAT	Convention Against Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IAC	International armed conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
NIAC	Non-international armed conflict
OTP	Office of the Prosecutor of the International Criminal Court
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America



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## 1. INTRODUCTION

*“The enforcement of international humanitarian law cannot depend on international tribunals alone. They will never be a substitute for national courts. National systems of justice have a vital, indeed, the principal, role to play here.”<sup>1</sup>*

The number of wars has not decreased in recent history. Contrary to what the international community might have hoped after the Second World War, promising “never again”, we witnessed catastrophic events in Rwanda, the Balkan-War, Cambodia, Darfur, and the list could unfortunately go further along. There may be fewer international armed conflicts, but definitely not fewer conflicts in total, which gives rise to worry even more since the legal regime governing non-international armed conflicts is, although developing, still weaker than that governing international armed conflicts.

According to the development of international law after the Second World War and according to statements of states and international organizations, there seems to be a general determination of the international community to repress war crimes<sup>2</sup>. Several mechanisms have been established in international law after the Second World War to this effect: the Nuremberg and the Tokyo Tribunals, obligations related to repression in the 1949 Geneva Conventions and their 1977 Additional Protocols, the establishment of the *ad hoc* tribunals, the establishment

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<sup>1</sup> Theodor MERON: International criminalization of internal atrocities. *American Journal of International Law*, 1995/89. 555.

<sup>2</sup> Later on the study will clarify in Chapter 2.2.1. the difference between the notions ‘grave breaches’ and ‘war crimes’. At this point it may suffice to say that all grave breaches are also war crimes – and not the other way around – but not all violations of international humanitarian law amount to grave breaches or war crimes.



of the International Criminal Court, the forming of specialized and mixed courts and tribunals and the emerging activities of truth commissions. However, no matter how well the international mechanisms work, the primary responsibility, according to international law, remains with the states to punish these crimes. National procedures are also the most efficient and practical means to carry out prosecutions, as no international tribunal has the capacity to try all those responsible.

Many states have undertaken to respond to this international obligation and to the requirement of not letting the perpetrators go unpunished, but faced all kinds of problems, legal and other, when applying international law in their national mechanisms. Other states have not even endeavored to initiate proceedings, or have done so in a quite unsatisfactory manner.

The Geneva Conventions require the adoption of effective penal provisions for grave breaches and the adoption of measures necessary to suppress other breaches of the Conventions.<sup>3</sup> Therefore simply ratifying a treaty and adopting sleazy implementing legislation is far from being enough. The results of such reckless implementation measures clearly show when national courts are trying to apply the law. Therefore questions such as whether an international norm can be really directly applicable without the adoption of implementing legislation or whether ordinary crimes can sufficiently cover war crimes should have also preably dealt with by the states.

During the decades following the Second World War and the Nuremberg and Tokyo tribunals, many domestic war crime trials were initiated, most of them against Nazi criminals, but there were very few against crimes perpetrated in other contexts<sup>4</sup>. In the recent two decades we have seen an enormous boom in

<sup>3</sup> Common Article 1, Geneva Conventions: „The High Contracting Parties are under an obligation to respect and to ensure respect for the present Convention” and Article 49 Geneva Convention I. According to the Commentary, „[t]he use of the words «and to ensure respect» was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. (1) It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises.” S. Jean S PICTET: *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949*. Geneva, ICRC, 1952. 26.

<sup>4</sup> Worth to mention the special tribunals set up to examine the Novi Sad Raid. The raid took place in 1942, after Novi Sad was re-occupied by Hungarian forces. The majority of the local Serb population was reluctant to accept Hungarian leadership and organized Partizan forces to oppose the Hungarian Army. As a response, the Hungarian Army, on the order of Chief-of-Staff Ferenc Szombathelyi, organized a raid, initially against the Partizans, but the raid ended up in

both international and national prosecutions, the two having a catalyzing effect on each other: the establishment of the ICTY and ICTR, national prosecutions in Rwanda, South Africa, Croatia, Serbia, Macedonia, the procedure against Pinochet in Spain followed by indictments in the UK, procedures in Belgium, France and Switzerland; the Hissen Habré-case, Cambodia, Sierra Leone, Togo, East-Timor are a long but not exhaustive list of the national efforts.

Charney perfectly grabs this development by making the following remarks: "[t]hrough these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law, which in turn has facilitated domestic prosecutions of persons accused of these crimes [...]"<sup>5</sup> Furthermore, "[a]s prosecutions of the covered crimes increase internationally, before either the ICC or domestic courts, one can expect the barriers to domestic pursuit of such cases to continue to fall, as they did after the establishment of the ICTY and the ICTR[...]"<sup>6</sup> "I believe that the real and more effective success will reside in the active dockets of many domestic courts around the world, the ICC having served first as catalyst, and then as a monitoring and supporting institution[...]"<sup>7</sup> "Success will be realized when the aversion to impunity is internalized by the domestic legal systems of all states. The test

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the massacre of Serbian and Jewish civilians, resulting in cca. 3000 deaths. Due to international pressure, Governor Horthy ordered the setting up of a special tribunal to examine the case. The decision of a special tribunal was necessary due to fear that ordinary military tribunals would not be impartial, considering that the raid was ordered by high level military leaders. The special tribunal was only partially successful, because the main suspects, Ferenc Feketealmi-Czeydner, the organizer of the raid, and József Grassy, the commander responsible for its execution and others involved escaped to Germany. After the end of the Second World War they were again tried by the People's Court in Hungary in 1946 and sentenced to death, but the sentence was not executed, they were extradited to Yugoslavia where they were tried and finally executed. Politics attempted to intervene in the proceedings in 1943 through initiating an annulment of the decisions brought by the tribunal. Evenmore, the tribunal was headed by Chief-of-Staff Szombathelyi, who ordered the raid. The tribunal was often seen as fulfilling international expectations on carrying out criminal procedure in the Novi Sad Raid case, but not really attempting to bring the main responsible to justice. S. CSERES, Tibor: *Vérbosszú Bácskában (Vendetta in Bácska)*, [http://www.holokausztmagyarorszagon.hu/index.php?section=1&type=content&chapter=2\\_2\\_3](http://www.holokausztmagyarorszagon.hu/index.php?section=1&type=content&chapter=2_2_3) [last visited on 13 November 2012]), <http://www.hdke.hu/tudastar/enciklopedia/feketealmi-czeydner-ferenc> [last visited on 24 May 2012], <http://www.csendor.com/konyvtar/szepirodalom/viszaemlekezesek/magyar/Dr%20K%E9pir%F3%20S%E1ndor%20nyilatkozata.pdf> [last visited on 24 May 2012].

<sup>5</sup> Jonathan I. CHARNEY: *International Criminal Law and the Role of Domestic Courts*. *American Journal of International Law*, 2001/95/1. (January) 122.

<sup>6</sup> *Ibid.* 123.

<sup>7</sup> *Ibid.* 123.

of that success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide [...].<sup>8</sup>

Recognizing the importance of domestic prosecutions, it is necessary to examine the reasons for the relatively few number of such procedures which may be political, practical or legal. One has to note that in some cases national procedures may have a destabilizing effect<sup>9</sup>: they may result in incitement of a new or prolonged conflict, especially if there are suspicions as to the fairness of the trials.<sup>10</sup> Political causes may also arise when the crimes were committed as a result of state policy<sup>11</sup>, the perpetration of the crimes were overlooked by the

<sup>8</sup> Ibid. 124.

<sup>9</sup> This was the alleged reason for non-prosecution of the perpetrators of the Adreatine Massacres in Italy during World War II. As a retaliation for a partizan attack against German troops by Italian resistance, Hitler himself gave the order to kill 10 Italians for each German killed. The Italian victims, largely civilians, were collected randomly to make out the expected number, and were executed in the Adreatine caves by drunk soldiers. After the war, neither the German, nor the Italian authorities had any interest in bringing the responsible persons to justice. Italian authorities feared that in case they requested extradition of the suspects from Germany, it would open a wave of extradition requests towards Italy by other countries, and would undermine their good relations with Germany, a NATO ally, as well as with Chancellor Adenauer. Thus, the chief public prosecutor of Italy requested the German ambassador to Italy that it confirmed to the Italian public prosecutor's office that none of the suspects are alive or is there whereabouts known, to prevent proceedings in Italy. Evenmore, many of the persons sought were holding high position in the German government at the time, in the 1960s and were well known. Eventually, three persons were tried in Rome. A trial started against Priebke in 1946, but he managed to escape from the prison camp. The renewed proceedings against Priebke, together with Karl Hass, were initiated in 1994 after he talked about the event in ABC news. The first instance court relieved them of the charges due to elapse of time. The appeals proceedings resulted in life imprisonment for crimes against humanity in 1998 – they served the sentence in house arrest due to their age. Previously, Priebke lived in Argentina for 50 years as a free man. Argentina extradited Priebke to Italy, where his trial was held. Priebke excused himself by referring to Hitler's direct order. Herbert Kappler, the chief of police in Rome and commander in charge of the massacre, was sentenced to life in prison for multiple murder by a military court in Italy in 1948. No other person was held accountable for the massacres. Worth to mention that Germany requested the extradition of Priebke during the criminal procedure, but the Italian authorities denied the request since a criminal procedure was already in process for the same charges. S. <http://www.spiegel.de/international/germany/unpunished-massacre-in-italy-how-postwar-germany-let-war-criminals-go-free-a-809537.html> [last visited on 25 May 2012], [http://www.asser.nl/default.aspx?site\\_id=36&level1=15248&level2=&level3=&xtid=39887](http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&xtid=39887) [last visited on 25 May 2012], <http://www.cicr.org/ihl-nat.nsf/0/82529253E69A38C6C1256C8C00553A9A> [last visited on 25 May 2012], <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/579/action/show/controller/Profile/tab/legal-procedure.html> [last visited on 25 May 2012].

<sup>10</sup> See Ruth WEDGEWOOD: National courts and the Prosecution of War Crimes. In: Gabrielle Kirk McDONALD – Olivia SWAAK-GOLDMAN (eds.): *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts - Volume I*. The Hague, Kluwer Law International, 2000. 405.

<sup>11</sup> This was obviously the reason for the immunity of Party officials and those executing state or Party policy during the communist era. During the discussion about the legal ways justice

system, or if the state is reluctant to exercise universal jurisdiction for crimes allegedly committed by a friendly or a powerful nation<sup>12</sup>; practical causes could be resulting from the distance in time and place between the *loci delicti* and *loci arbitri* or the inadequacy of the judiciary system in dealing with war crimes cases; legal causes may be the lack of proper national legislation or confronting legal principles between international and national law.

The present monograph mainly concentrates on the legal problems mainly in the field of criminal justice guarantees that may account for the relatively small number of domestic trials and that may come up once a domestic procedure takes place; then it examines the possible answers to these problems. The monograph also shortly examines the practical and political hurdles that may have an effect.

Generally it must be mentioned that although the legal problems around the domestic application of crimes defined in international law may be mostly identical or similar in case of the different kinds of core international crimes – i.e. genocide, crimes against humanity and war crimes –, the present monograph mainly concentrates on war crimes, given the following factors: (i) war crimes embody the essence of international crimes in terms of variability of individual crimes and the quantity of different kinds of war crimes; (ii) international humanitarian law was the first set of rules leading to an adoption of international crimes; (iii) the crime of genocide was in most cases word by word implemented into national legislation, therefore problems to its implementation and application would not be that representative; (iv) the definition of crimes against humanity is still relatively undefined in international law, therefore its domestic implementation and application also represents a ‘political’ decision of the legislator as to which definition it applies; (v) as opposed to genocide and crimes against humanity, there are various and slightly differing obligations in international law as to the implementation and effective application of war crimes – for instance the obligations for repression and the list of grave breaches

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can be done after the political changes in 1990 in Hungary, one side of the arguments entailed that elapse of time cannot be counted for the time the political regime did not execute its prosecutorial powers for acts that were committed on behalf of, or in the interest in, of this very same political regime. S. BÉKÉS, Imre – BIHARI, Mihály – KIRÁLY, István – SCHLETT, András – VARGA, Csaba – VÉKÁS, Lajos: Szakvélemény az 1949 és 1990 között elkövetett, a társadalmi igazságérzetet sértő magatartások, illetve előnyök megítélésének, a felelősség megállapításának elveiről és jogi feltételeiről (Opinion on the principles and legal conditions of accountability for acts and judgment of benefits violating societal feeling of justice committed between 1949 and 1990). *Magyar Jog*, 1991/11.

<sup>12</sup> See the *Sharon* case in Belgium in Chapter 2.2.2. or the *Rumsfeld* case in France in Chapter 3.3.2.

in the Geneva Conventions and the list of war crimes in the Rome Statute – which require a particular approach.

Following the reasons outlined above, it was considered that for a demonstration of the legal problems around the domestic implementation and application of international crimes, the examination of war crimes seems to serve the best example.

Due to inherent limits of the work in length and thematic, it does not seek to identify possible drawbacks in domestic implementation of the elements of individual war crimes one-by-one, mainly because the leading line of the study is the determination of common elements, features and hurdles that could arise during the domestic implementation and application of war crimes, features that are mainly common in continental legal systems and seem to be a common characteristic of post-socialist states' legislation. However, the one-by-one analysis of certain war crimes and how they were implemented into domestic penal legislation may appear as a representation of one definite common problem.

The book concentrates on problems or hurdles of national implementation and application mainly from the viewpoint of criminal justice guarantees and thus does not elaborate in depth on other kinds of problems, such as general difficulties of enforcement, the complexity of international humanitarian law or difficulties of weighing the principles of IHL in domestic law. This explains the choice of national legislation and cases that are demonstrated: legislation is mainly cited from states that are lagging behind, shown as a contrast to instances of more advanced pieces of legislation; cases were selected based on the criteria that they demonstrate a problem of application arising from conflicting legal principles or possible infringement of legality principles during the domestic application of international law.

The overall aim of the work is therefore to examine the problems that usually occur or could emerge for national legislators and courts when implementing humanitarian law and trying war crimes cases and seeks to determine that effective application of the obligation to repress grave breaches goes much further than ratifying international treaties or simply adopting those crimes that the international community deems to be pursued.

Such an examination requires a thorough overview of the international obligations, the requirements necessary for implementing legislation to be effective and ready for application by national courts, and questions must be answered such as (i) how can basic legal principles like the principle of legality and foreseeable law become an impediment in a national war crime procedure and how implementing legislation can resolve eventual conflicts with these basic

principles, (ii) to what extent do political considerations play a role in the lust for national war crimes procedures and how these considerations may be minimized, and (iii) what factors may become practical hurdles, such as lack of the necessary training provided for prosecutors and judges or specialized needs required for the investigation of such crimes.

The book also gives an overview of the state of national legislation in certain Central European countries and provides examples of how national courts have hitherto dealt with war crimes cases. The present author does not wish to provide that national war crimes procedures are the best or the only solution to end impunity for war crimes<sup>13</sup>; nevertheless, one has to bear in mind that the primary obligation to prosecute – an obligation voluntarily accepted by all states – lies with states, and, in an international atmosphere that clearly stands for the unconditioned observation of human rights and humanitarian values, national procedures seem to be one of the least developed mechanisms in the complex system of repressing violations of international humanitarian law.

In the beginning, the monograph starts by discussing the development of international criminal jurisprudence, individual criminal responsibility in international law – including a discussion on why the notion of collective responsibility for war crimes is pointless – and the development of war crimes, followed by a brief summary of the international obligations to repress war crimes, the development of universal jurisdiction, as well as compliance or non-compliance with law as a strategy in armed conflicts. This chapter ends with the demonstration of a parallel example through introducing the main rules of the US Alien Tort Statute.

The next chapter deals with examining the legal problems that may arise during the application of international law in domestic fora. The chapter is divided into three sub-chapters according to where these problems are originated: in international law, in national law or in national jurisprudence.

The sub-chapter on hurdles inbuilt in international law discusses the effect of international penalization obligations on state sovereignty and how states can still influence their legislation adopting international crimes; it then goes on to discuss the effect of the Rome Statute of the International Criminal Court and its complementarity principle on domestic legislation – with separate discussions on the exact criteria of the complementarity principles, the way the ICC considers national laws as sources and the role of state cooperation in ICC proceedings –

<sup>13</sup> The role of truth and reconciliation commissions and *ad hoc*, permanent, mixed or special courts and tribunals has to be emphasized, however, these are not the subject of the present examination.

with a special attention on legislation on universal jurisdiction. This is followed by an analysis of the general problems of direct application of international law: what are the different approaches of monist and dualist states, whether direct applicability really works and whether self-executing norms can be automatically directly applied; finally, sub-chapter 3.1 is dealing with specific aspects of the general application of universal jurisdiction.

Sub-chapter 3.2 examines the hurdles inbuilt in national law from a topical perspective. Although a separate examination of continental and common law systems would seem obvious, most of the hurdles that are analyzed could arise in both kinds of legal systems. Therefore the examination is done first from a general perspective towards more specific angles: first, potential conflicts of national implementation with the principle of legality will be discussed, then the results of the two main approaches of implementation, notably reference to international law or the application of ordinary crimes will be analyzed, which is followed by other questions such as the domestic criminalization of acts that are not war crimes or the importance of the place of the implementing norm in the hierarchy of the internal legal system; finally, the sub-chapter is closed by a discussion on the specific aspects of implementation of universal jurisdiction and its possible conflict with the legality principle.

The third sub-chapter deals with the potential problems that may arise on the level of internal courts: first, the general question is outlined whether domestic courts are indeed prepared and ready to deal with war crimes cases and what may be the factors that are missing, then, given the sensitive nature of application of universal jurisdiction and the huge effect the judiciary has on its exercise, a detailed discussion follows on the different attitudes domestic courts have adopted towards universal jurisdiction, listing the main common questions and problems that have arisen in past case law.

Chapter 4 is seeking to find answers in national legislation and case law to the issues raised in the previous chapter. Consequently, this chapter is divided the same way as Chapter 3: answers or solutions that arose on the level of international jurisprudence, internal legislation and internal jurisprudence.

Sub-chapter 4.1 is discussing examples where international jurisprudence and the work of international tribunals presented solutions and had effects on domestic legislation or practice, both in substantive and procedural law and on their proceedings. Sub-chapter 4.2 starts with demonstrating general implementation mechanisms with a special attention on the Rome Statute, then turns attention on Central European countries, where it first identifies common elements of implementing legislation, then shows typical individual solutions

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through the demonstration of four states' legislation. Sub-chapter 4.3 finally turns to examples where domestic courts themselves served solutions and to techniques which make national authorities ready and prepared for war crimes trials. This sub-chapter, similarly to previous ones, discusses judicial responses to the challenge of dealing with universal jurisdiction under separate headings.





## 2. EVOLUTION OF INTERNATIONAL CRIMINAL JURISDICTION, INDIVIDUAL RESPONSIBILITY AND THE DEFINITION OF WAR CRIMES; INTERNATIONAL OBLIGATIONS ON REPRESSION OF GRAVE BREACHES AND WAR CRIMES

The following pages seek to provide an introduction to the development of international jurisdiction, the doctrinal evolution concerning individual criminal responsibility in international law and the development of the notion of war crimes. This chapter is structured to demonstrate the development in these three respective fields, and will guide the reader through mainly identical stages – the Hagenbach trial, the Treaty of Versailles, the Nuremberg Charter, the *ad hoc* tribunals and the ICC –, analyzing them from the point of view of respective development of international criminal jurisdiction, individual responsibility and the evolution of war crimes.

The Chapter also provides a brief introduction to the obligations related to the criminal repression of grave breaches and war crimes, and a discussion on why compliance with the law has become even more crucial in contemporary armed conflicts than it was before.

### 2.1. Evolution of international criminal jurisdiction

The first trial in front of an international tribunal concerning war crimes or crimes against humanity<sup>14</sup>, and actually the first international tribunal at all, is

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<sup>14</sup> It is still subject of debate whether the trial was based on crimes against humanity or war crimes. Those arguing for the latter state that there was no armed conflict at the time, therefore the charges could not have been war crimes; the other arguments, however, state that Burgundy's occupation of Breisach was hostile therefore the charges being defined as war crimes is well founded. Although this is indifferent from the perspective of the present chapter, the trial has commonly been accepted as the first international criminal tribunal, one that gave a historical perspective to the Nuremberg Tribunals. S. Gregory S. GORDON: The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law. February

believed to have been that of *Peter von Hagenbach*. Hagenbach was the governor of Upper Rhein, appointed by the Duke of Burgundy. The Duke directed him to keep order on the territories, which von Hagenbach fulfilled through terrorizing the population. Following a rebellion in Upper Rhein, he was tried by an *ad hoc* tribunal set up by the Archduke of Austria in 1474<sup>15</sup>. The tribunal involved 28 judges from different states in the Holy Roman Empire<sup>16</sup>.

The crimes were committed during a rebellion against von Hagenbach and involved murder, rape and perjury. He, as many war criminals later, argued that he was only following orders from the Duke of Burgundy. However, the tribunal held that he as a knight was deemed to have a duty to prevent the very crimes he was charged with, and sentenced him to beheading for “violating the laws of God and man”. This trial was the first that involved individual criminal responsibility in front of an international tribunal, as well as denying the defence of superior order.

It is remarkable that the Hagenbach-trial took place at a time before and 500 years after which no similar tribunal existed. As one writer notes, “[i]t is no coincidence that such a unique event took place between the erosion of medieval hegemony and the imminent establishment of Westphalian sovereignty. Not until the Westphalian veil was pierced by the Nuremberg trials nearly five hundred years later, did the subject of the Hagenbach trial take on contemporary relevance in the legal literature.”<sup>17</sup>

The significance of the Hagenbach trial therefore lies in that it was the only attempt at the time where acts regarded as violations of fundamental ethical and moral standards were tried by a body that had an international face. Since Hagenbach admitted to having perpetrated the acts, it would have been perfectly normal at the time to execute him right away. Still, the decision, unique at the time, was made that he should face an open court<sup>18</sup>. What was even more remarkable, is that he was not tried by a local judge, but by judges representing the Alliance. Many writers additionally stress that the trial was fair to the standards at the

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16, 2012: Social Science Research Network, Working Paper Series. 1–2. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2006370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006370) [last visited on 16 April 2012]

<sup>15</sup> William SCHABAS: *An Introduction to the International Criminal Court* (Second Edition). Cambridge, Cambridge University Press, 2005. 1–2.

<sup>16</sup> S. Linda GRANT: Exhibit highlights the first international war crimes tribunal, *Harvard Law Bulletin* [last visited on 16 April 2012]

<sup>17</sup> GORDON op. cit. 2.

<sup>18</sup> Ibid. 29.

time: he could have been summarily executed but was not, he was given means for his defence and he was given the opportunity to confront the witnesses<sup>19</sup>.

Therefore, although many historians and lawyers draw attention to the fact that the trial itself may well have been an attempt to undermine the territorial demands of the Duke of Burgundy, and also underlined that Hagenbach's testimony that served as a basis for his conviction were gained through torture<sup>20</sup>, notwithstanding the political factors which may very well have been the main motivation behind the trial itself, the legal significance of it remains uncontested.

The first reference to the Hagenbach case as a justifying factor for twentieth century international tribunals was made by Georg Schwarzenberger in an article published after the closing of the evidence proceedings in Nuremberg and during the deliberations of the judges. In this article<sup>21</sup>, Schwarzenberger compared the Hagenbach trial to that of Nuremberg as being the first international criminal tribunal, and was of the opinion that the crimes for which Hagenbach was convicted were the forerunners of crimes against humanity. Most probably due to this article, a reference to the Hagenbach trial found its way to the judgments of the *High Command Case* and the *Ministries Case*. From then on, reference to the Hagenbach trial became general, as the first international tribunal that ever took place<sup>22</sup>.

The next step in the history of international tribunals was measures foreseen by the *Treaty of Versailles* in 1919<sup>23</sup>. Before the Treaty was adopted, the Allied Powers set up a „Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties at the Preliminary Peace Conference” in January 1919 to study international law that can be applied to prosecute Germany and to investigate alleged war criminals. The investigations that were carried out by the Commission never had any practical consequences, first because the international tribunals were never set up, second because anyway there was no institutional link between the investigations and the to-be judicial body. However, the Commission did find in its report that a belligerent may try enemy persons

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<sup>19</sup> Ibid. 47–48.

<sup>20</sup> Ibid. 1.

<sup>21</sup> George SCHWARZENBERGER: A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474. *The Manchester Guardian*, 28 September 1946.

<sup>22</sup> GORDON op. cit. 5–9.

<sup>23</sup> S. also SÁNTHA, Ferenc: Az emberiség elleni bűncselekmények. (Crimes against humanity) *Miskolci Jogi Szemle*, 2008/3/1. 51.

for violations of laws and customs of war, and it may do so in its own courts and tribunals set-up for this purpose, under its own procedural law<sup>24</sup>.

The Peace Conference, however, did not fully accept the findings of the report, especially regarding the setting up of an international tribunal. The opposition mainly came from the United States and Japan, who stated that the creation of an international criminal court was lacking precedent and was unknown in the practice of nations<sup>25</sup>. Therefore the Treaty adopted a milder approach, and opened the possibility that an international 'special' tribunal, composed of the winning powers, tries William II of Hohenzollern "for a supreme offence against international morality and the sanctity of treaties."<sup>26</sup> However, the tribunal was never set up<sup>27</sup> and the trial of Wilhelm never happened<sup>28</sup> since he fled to the Netherlands who refused to extradite him<sup>29</sup>.

The treaty stated that the "German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law."<sup>30</sup> The Treaty gave priority to the jurisdiction of such military tribunals over German courts by adding that „[t]his provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies."<sup>31</sup> The text does not say much about the composition of the tribunals, only stating that in case the victims are citizens of several states, the tribunals will be composed of members of the military tribunals of the Powers concerned<sup>32</sup>, thus will have an international feature.

<sup>24</sup> S. What happened after the last war? Constructing a postwar world. The G.I. Roundtable Series in Context. <http://www.historians.org/projects/GIRoundtable/Criminals/Criminals3.htm> [last visited on 19 April 2012]

<sup>25</sup> Ibid.

<sup>26</sup> Peace Treaty of Versailles, 1919, Article 227, paras 1 and 2. S. also Malcolm N. SHAW: *International Law*. (Fifth Edition). Cambridge, Cambridge University Press, 2003. 234.

<sup>27</sup> S. Projects on International Courts and Tribunals. International Criminal Court. <http://www.pict-pecti.org/courts/ICC.html> [last visited on 17 April 2012]

<sup>28</sup> Vincent M. Creta: The search for justice in the Former Yugoslavia and beyond: analyzing the rights of the accused under the statute and the rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia. *Houston Journal of International Law*. Winter 1998. 1.

<sup>29</sup> S. Joris LARIK: International Criminal Law. International Security and the Global Order Public. 6. *Foundation Pierre du Bois Papiers d'actualité*, July 2009/6.

<sup>30</sup> Peace Treaty of Versailles, 1919, Article 228, para 1.

<sup>31</sup> Ibid. Article 228, para 1.

<sup>32</sup> Ibid. Article 229, para 2.

When the Allied Powers drew the list of persons they wished to try – a list of 900 persons –, serious demonstrations took place in Germany. Considering its obligation to hand over the persons to the Allied forces, nevertheless taking into account the strong feelings against the surrender of persons expressed by the German nation, Germany proposed, as a compromise, to try its own persons in *Leipzig*, at the Reich's Supreme Court. To stress how serious they were about trying their own people, Germany adopted a law on the prosecution of war offenders. The Allied Powers eventually agreed, and the trials began in May 1921, with substantially fewer numbers of defendants<sup>33</sup>, only twelve, as opposed to the originally proposed nine hundred. Therefore, following the Treaty of Versailles, finally neither an international tribunal, nor international military tribunals were set up.

A similar attempt was made at the *Treaty of Sèvres* to try those allegedly responsible for the Armenian genocide. The Treaty required Turkey to hand over to the Allied Powers alleged criminals who were found within its borders. Several persons were transferred to Malta and waited for the procedures to start, which, however, never started, and the accused were transferred back to Turkey. The procedures did not start because the treaty was never ratified, and the *Treaty of Lausanne*, which replaced it, did not include a corresponding provision.<sup>34</sup> Eventually, the Allies agreed that Turkey carries out the procedures herself; these were the so-called Istanbul trials, which were not more successful than the Leipzig trials: the defendants were either absent, or the sentences were light, or harsh sentences were announced mainly due to internal political reasons. In addition, Turkey has denied that crimes against humanity were committed against Armenians<sup>35</sup>.

The International Law Association prepared a draft statute of a permanent international criminal tribunal in 1926<sup>36</sup>, however, world politics were not favorable at the time for the setting up of such body<sup>37</sup>. Therefore it was not

<sup>33</sup> S. What happened after the last war? Constructing a postwar world. The G.I. Roundtable Series in Context. <http://www.historians.org/projects/GIRoundtable/Criminals/Criminals3.htm> [last visited on 19 April 2012]

<sup>34</sup> S. CRETA op. cit. 1.

<sup>35</sup> Theodor MERON: Reflections on the Prosecution of War Crimes by International Tribunals. *American Journal of International Law*, July 2006/100/3. 558.

<sup>36</sup> See Stephan HOBE: *Einführung in das Völkerrecht (Begründet von Otto Kimminich (9. Auflage))*. Tübingen und Basel, A. Francke Verlag, 2008. 263. See also Draft code of crimes against the peace and security of mankind (Part II) - including the draft statute for an international criminal court. *Extract from the Yearbook of the International Law Commission*, 1983/II/1. 139.

<sup>37</sup> CRETA op. cit. 1.

until after the Second World War that the idea of an international tribunal could materialize.

The *Nuremberg Tribunal* was set up following years of discussions and negotiations among the Allied Powers, and was finally established by the London Agreement. Whereas the American delegation opposed the setting up of an international court during the negotiations in 1919, it strongly argued in favor during the Second World War. While Churchill and Stalin initially argued for the summary execution of the major war criminals<sup>38</sup>, it was the American delegation that was the main supporter of the tribunal and argued that – learning from the experiences of the Leipzig trials – it should not be national courts of the perpetrators or the national courts of the victorious powers, but an international tribunal that should prosecute war criminals.

The *Tokyo Tribunal* – in its official name the International Military Tribunal for the Far East – was created by a charter issued as a military order by General Douglas MacArthur, the supreme commander for the Allied powers in Japan. However, it largely based itself on the London Charter, giving it some legitimacy<sup>39</sup>. It also followed the London Charter in terms of jurisdiction over crimes, the denial of immunity of officials and the defence of superior order.

Despite the criticisms about the Nuremberg Tribunal against it being set up solely by the victors of the war, the fact that there was a tribunal following due process and examining the individual actions and whether these constituted a violation of international law – instead of simply executing those perceived guilty, as many leading politicians and certainly a great part of the public opinion would have wished to –, represented a milestone in international criminal law and certainly set the basis for future international tribunals. Although discussions continued about the setting up of a permanent international criminal court after the Second World War, including the request in 1948 by the General Assembly for the International Law Commission to explore the possibility of establishing a criminal chamber of the International Court of Justice<sup>40</sup>, discussions of the

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<sup>38</sup> „At Yalta, Stalin suggested that fifty thousand people should simply be killed after the war, and Churchill ‘thought a list of the major criminals ... should be drawn up here ... [and] they should be shot once their identity is established’. Yet the American government forcefully advocated that trials be conducted not by national courts of the vanquished states or any victorious power, but by an international court.” S. MERON (2006) op. cit. 551.

<sup>39</sup> Ibid. 565.

<sup>40</sup> S. Question of International Criminal Jurisdiction. [http://untreaty.un.org/ilc/summaries/7\\_2.htm](http://untreaty.un.org/ilc/summaries/7_2.htm) [last visited on 4 October 2012]

question by the UN Secretariat in 1949, and subsequent specific reports on the issue in 1951 and 1953<sup>41</sup>, it could materialize only five decades later.<sup>42</sup>

The setting up of both the *ICTY* and *ICTR* were largely a result of a bad conscious from the part of the international community, failing to address probably the worst atrocities of the post-World War II world. Despite clear evidences of serious human rights violations and grave breaches of the Geneva Conventions, states failed in both conflicts to intervene in time. This gave, in both cases, green light to even graver violations and finally, when these situations could not be ignored, states decided to set up international tribunals within the framework of the UN<sup>43</sup>.

In the case of the *ICTY*, the proposal came initially from the French constitutional judge Robert Badinter, the head of the Commission of Experts nominated by the Security Council to analyze the situation. The General Assembly endorsed the idea in a Resolution in 1992, and the Security Council decided on the establishment of an *ad hoc* tribunal in another Resolution<sup>44</sup> in 1993<sup>45</sup>. Although the establishment of the *ICTY* was undoubtedly a landmark step for international criminal law and international criminal jurisdiction, it didn't have the deterring effect it wished to have: the Srebrenica massacres, probably the ugliest event of the whole war happened after its establishment. In the case of the *ICTR*, the initiative came from Rwanda, and the Security Council decided on the establishment of a second *ad hoc* tribunal<sup>46</sup>.

Although the analysis of the effects of the jurisprudence of both tribunals goes well beyond the limits of the present work, it must be mentioned that the first major judgment by the *ICTY* put down the frameworks in which the tribunal(s) later acted, most significantly for the purposes of the present study, by the acceptance of punishability of war crimes in non-international armed conflicts<sup>47</sup>. Therefore, although many states expressed during the establishment of the *ICTY* that it was an exceptional response for exceptional

<sup>41</sup> S. Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc. A/2645, GAOR (IX) Supplement No. 12, 1954.

<sup>42</sup> S. HOBE op. cit. 263.

<sup>43</sup> S. Andrea BIRDSALL: The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order? *Peace Conflict & Development*, January 2006/8. 6–7.

<sup>44</sup> Security Council Resolution 808 (1993). SC Resolution 827 (1993) provided the Statute of the Tribunal.

<sup>45</sup> SCHABAS op. cit. 11.

<sup>46</sup> Security Council Resolution 955 (1994).

<sup>47</sup> S. SCHABAS op. cit. 12.



circumstances and therefore it did not establish new norms and precedents, but “simply applies existing international humanitarian law”<sup>48</sup>, its precedent played a crucial role in clarifying existing customary law and developing international humanitarian law.

The two *ad hoc* tribunals doubtlessly had a huge influence on the establishment of the ICC. During the discussions on the setting up of the *ad hoc* tribunals, many states expressed their opinion that although the *ad hoc* tribunals may pave the way for a permanent international criminal court, that should not be established through a Security Council resolution<sup>49</sup>.

The UN General Assembly set up an Ad Hoc Committee in 1994, during which negotiations shifted from the idea of a court with primacy over domestic courts towards a court that is complementary to national jurisdictions. It had also already been decided relatively early on during the negotiations that the crimes would be defined in detail<sup>50</sup>. The result was, as well known, the Rome Statute of the *International Criminal Court*, a statute that lists crimes and defines their elements in a separate document, representing a great step towards clarity of war crimes law. Its specificity is its complementarity to national jurisdictions, which will be discussed later in Chapter 3.1.2.

Summing up the history of international tribunals and courts, the ‘using’ of international criminal law for – at least partially – political purposes continued to be a method used by states after the Hagenbach trial, establishing a mechanism that became more independent from political considerations and growing into one of the most applauded developments in the twentieth century in international law through the establishment of the International Criminal Court.

For one should not be too naïve as to the partial aim and purpose of such trials, at least in earlier times. Remarkable, that both the tribunals foreseen by the Treaty of Versailles and Sèvres and the Nuremberg and Tokyo Tribunals were instigated by the victors in the respective wars, and one of the main criticisms against the International Criminal Court today is that it only tries African cases, leaving alleged violations committed by strong powers untouched. Also remarkable but unsurprising, that, as shown in later pages of the present essay, states only exercised universal jurisdiction effectively in relation to contexts where there was no political inconvenience. Therefore we must admit that international tribunals

<sup>48</sup> S. BIRDSALL op. cit. 10.

<sup>49</sup> S. BIRDSALL op. cit. 9.

<sup>50</sup> SCHABAS op. cit. 13–14.

and courts are not entirely independent from political considerations, however, this does not diminish their huge role in international criminal justice.

At the same time, there are essential differences between the tribunals foreseen in Versailles and Sèvres, the Nuremberg and Tokyo systems and the ICC which make „victor’s justice” – understanding as „strong states’ justice” in the case of the ICC – arguments obsolete for the ICC. The main difference is notably the legal basis, which in the case of the planned Versailles-Sèvres, and the Nuremberg-Tokyo tribunals is highly debatable, is fairly well-founded in case of the Rome Statute being an international treaty. The two *ad hoc* bodies of the 1990s could be seen as a middle-way in that UN Security Council resolutions under Chapter VII are undoubtedly obligatory, an international treaty nevertheless demonstrates a firmer, wider consensus<sup>51</sup>.

Nonetheless, international law and especially developments related to criminal responsibility on the international level were never free of political considerations, yet they did contribute to an evolution of set of rules which even the mighty powers are bound to respect. As sub-Chapter 2.5. of the present book demonstrates, respect for the law of armed conflict, or a fear of being labeled as disrespectful for it, became a kind of weapon and thus bears much more significance than it did before. Therefore, even if the earlier attempts at establishing international criminal tribunals were at least partially driven by political motives, they did finally establish a mechanism that became more independent and less influenced by world politics.

Another interesting observation while comparing post-World War I prosecutions with Nuremberg, the ICTR and ICTY, is that the Leipzig trials mainly concentrated on violations of conduct of hostilities – Hague law –, while the majority of the Nuremberg cases were concerned with violations of protection of certain persons and objects – Geneva law. While the ICTY also had some cases related to means and methods of warfare, it was also mainly concentrating on protection issues, while in the case law of the ICTR, abuses against civilians were far the main issues<sup>52</sup>.

The development of international criminal jurisdiction was parallel to the evolution of *universal jurisdiction*. Although universal jurisdiction was already accepted in the 1949 Geneva Conventions, it was not until the 1990s that it was really applied. The observation about the influence of politics on early ideas of

<sup>51</sup> This is probably why many states expressed their opinion during the adoption of the ICTY Statute that a permanent court should not be based on a Security Council resolution, but should have a more solid legal basis.

<sup>52</sup> S. MERON (2006) op. cit. 559–560.

international tribunals is also valid for universal jurisdiction, notably because exercising such form of jurisdiction trumps on other states' sovereignty.

The relationship of international tribunals and *domestic courts* dealing with international crimes has always been of a complementary nature – not in terms of jurisdiction of course. While prosecution would be the obligation of domestic courts, in certain situations it proved impossible, difficult or not effective enough to leave it to domestic courts, hence the ideas of international bodies<sup>53</sup>.

History has also proved that even if international tribunals existed, domestic courts still had a role to play. There were many war crimes trials on the domestic fora after the Nuremberg Tribunals, and both the ICTY and the ICTR handed over trials to domestic systems. The ICC, in turn, starts from the point of seeing its own jurisdiction secondary to national jurisdictions. This balance, the result of decades of development, seems to be a fair share of work between national and international bodies – although it would be too early to talk about experiences related to the functioning of the ICC.

Since the essence of the examination is war crimes as applied by domestic courts, the next sub-chapter deals with the development of individual criminal responsibility and the development of war crimes in international law, as well as the effect these had on domestic legislation.

## **2.2. Evolution of individual criminal responsibility and development of war crimes in international law**

Individual criminal responsibility first appeared during the Nuremberg and Tokyo tribunals and was further developed in international criminal law. During these procedures the individual was holding criminal accountability for certain crimes, even if he carried out the acts in the name of the state or government. The essence of individual criminal responsibility was to avoid impunity of persons for the most heinous crimes, even those who were trying to apply defences like superior orders, official capacity or other similar circumstances.

Although the requirement to punish those violating the laws of war – crimes against peace, crimes against humanity and war crimes were understood under this term at that time – was raised universally only after the Second World

<sup>53</sup> „[...] la répression nationale reste la règle et la répression internationale l'exception.” S. Isabelle FICHET-BOYLE – Marc MOSSÉ: L'obligation de prendre des mesures internes nécessaires à la prévention et à la répression des infractions. In: H. ASCENSIO. – E. DECAUX – A. PELLET (eds.): *Droit International Pénal*. Paris, Editions A. Pedone, 2000. 871.

War, references appeared earlier in other sources as well. The *Lieber Code*, for example, does establish individual criminal responsibility for certain acts, and although only applicable in the United States, it did have an effect on other states as well<sup>54</sup>. The Treaty of Versailles<sup>55</sup> stated that Germany accepted the allied powers to bring to an allied military tribunal those who violated laws and customs of war, and Germany would be bound to hand over such persons. Even more, if the victims were of several nationality, a possibility for the setting up of an international tribunal was raised<sup>56</sup>.

The *Leipzig trials* conducted in the 1920s were a consequence of these provisions, and the first war crime trials conducted on the basis of international law. The trials involved German citizens, convicted for acts in violation of the laws and customs of war. The substantive basis for the trials was the Regulations annexed to the 1907 Hague Convention IV. Although, as Schabas notes, the Hague Regulations were not intended to provide a source for individual criminal responsibility, its norms were heavily relied on by the 1919 Commission which preceded the Versailles Treaty<sup>57</sup>.

The Leipzig trials had been criticized as being biased by Allied Forces, even before the proceedings started<sup>58</sup>. Indeed, the French and the Belgians were very disappointed with the outcome of the trials: the maximum penalty imposed was four years. The sentences were carried out in home detention instead of prison, and two of the six persons charged escaped soon after, under suspicious circumstances. However, some of the British observers stated that the tribunal had done a fairly good job given the circumstances<sup>59</sup>.

All in all, although international humanitarian law underwent substantial development from the middle of the nineteenth century until after World War I, its enforcement was lagging behind. The failures in establishing an international tribunal or international military tribunals after the Versailles Treaty and the serious shortcomings of holding those accountable during the Leipzig trials

<sup>54</sup> Instructions for the Government of Armies of the United States in the Field, General Order № 100, April 24, 1863. Articles 44 and 47.

<sup>55</sup> Treaty of Versailles, 28 June 1919. Article 228.

<sup>56</sup> S. Edoardo GREPPI: The evolution of individual criminal responsibility under international law. 835 *International Review of the Red Cross*, 1999/835. 533.

<sup>57</sup> SCHABAS op. cit. 52.

<sup>58</sup> „It is unlikely justice will be done where the judges have been lifelong supporters of Prussian militarism.” S. The Leipzig Trial – Unsatisfactory to Allies. *Times*, 21 February 1920.

<sup>59</sup> S. What happened after the last war? Constructing a postwar world. The G.I. Roundtable Series in Context. <http://www.historians.org/projects/GIRoundtable/Criminals/Criminals3.htm> [last visited on 19 April 2012]

indicate that “while the contours of war crimes law had been increasingly well established by World War II, persons violating that law faced only a hypothetical possibility of criminal sanction. In a sense, war crimes law had not yet truly become a form of criminal law.”<sup>60</sup>

The Charter of the *Nuremberg Tribunal* manifests individual criminal responsibility,<sup>61</sup> moreover, it states that official capacity of defendants does not free them from responsibility, and the defence of superior order cannot be applied as negating responsibility, only, at most, as a mitigating circumstance<sup>62</sup>. It was therefore the Nuremberg and Tokyo procedures that initiated the evolution of individual criminal responsibility in international law and produced important jurisprudence in this regard.

As a consequence, the International Law Commission (ILC) manifested individual criminal responsibility in its 1950 report, even in case the crime in question was not criminalized in national law<sup>63</sup>. The ILC understood international crimes as those coming under the jurisdiction of the Nuremberg Tribunal, and this is how eventually crimes defined in international law became “crimes under international law”.

During about this time, the “search for and prosecute” obligation appeared in the 1949 *Geneva Conventions*<sup>64</sup>. This was one of the novelties in the 1949 Conventions, as the 1929 Conventions entailed only a very weak reference to responsibility<sup>65</sup>. The 1949 Geneva Conventions expressly oblige states to punish perpetrators of grave violations in national law: the “ensure respect” and the repression obligations, moreover, the exercise of universal jurisdiction has now become binding on states<sup>66</sup>.

<sup>60</sup> MERON (2006) op. cit. 559.

<sup>61</sup> Charter of the International Military Tribunal. Article 6.

<sup>62</sup> Charter of the International Military Tribunal. Article 8.

<sup>63</sup> Principes du Droit International Consacrés par le Statut du Tribunal de Nuremberg et dans le Jugement de ce Tribunal, adopted by the UN International Law Commission on July 1950, Principle II. In: Dietrich SCHINDLE – Jiří TOMAN: *Droit des Conflicts Armés*. Genève, CICR, Institut Henry-Dunant, 1996. 1312.

<sup>64</sup> Geneva Conventions of 1949. Articles 49/50/129/146 respectively.

<sup>65</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929. Article 30: „On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.”

<sup>66</sup> The obligation to exercise universal jurisdiction is not *expressis verbis* entailed in the text, however, the *aut dedere aut judicare* obligation practically means the same. S. Jean S. PICTET (ed.): *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949* (First Reprint). Geneva, ICRC, 1995. 365–366.

In addition, the Geneva Conventions list the grave breaches, and the list is more comprehensive than the war crimes in the Nuremberg Charter. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts and its 1999 Protocol, as well as the 1977 Additional Protocol I all contain similar rules, extending the list of international crimes.

Based partially on the Geneva Conventions, the Statutes of the two *ad hoc* tribunals established to try violations committed in the ex-Yugoslavia and Rwanda<sup>67</sup> respectively do not only refer to the grave breaches of the Geneva Conventions, but also to other serious violations – including the serious violation of common Article 3 and Additional Protocol II – and the laws and customs of war, already referred to in the Nuremberg Charter.

The high peak of these developments was the further expansion of the list of international crimes in the Rome Statute of the International Criminal Court, probably the main merits of which is the enlarging of the list of crimes committed in non-international armed conflicts.

Summing up, international law today undoubtedly accepts individual criminal responsibility. The main enforcement body today, with the gradual closing down of the two *ad hoc* tribunals is the International Criminal Court, in case it has jurisdiction. The primary responsibility, however, still lies with states.

### 2.2.1. *Development of war crimes in international law*

According to the Encyclopedia Britannica, the term ‘war crime’ means “in international law, serious violation of the laws or customs of war as defined by international customary law and international treaties.” The definition pretty much covers the notion, and it can probably be agreed that it is due to the fast development of customary law that makes identification of the list of war crimes today rather difficult.

The first attempt to list war crimes was the *Lieber Code* of 1863, a set of regulations for the American army issued by President Abraham Lincoln. The Lieber Code listed wanton violence against persons in the invaded country,

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<sup>67</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993. Articles 2–3. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. Articles 1 and 4.

including rape and murder, and forcing enemy members to serve in the hostile army, as serious breaches of the law of war.

The *Versailles and Sèvres Treaties* did not list war crimes. *The Leipzig Trials*, conducted as a consequence of the Versailles Treaty, were based on the 1907 Hague Regulations, which, however, did not list war crimes either, instead, the Regulations concentrated on the payment of compensation by the state as the chief form of punishment – however, this obviously did not mean individual responsibility. At the same time, violations of the Hague Regulations had long been seen as violations for which members of the armed forces or civilians could be held individually responsible<sup>68</sup>, and thus the rules of the Hague Regulations served the basis for the determination of war crimes during the Leipzig Trials.

The 1919 Commission, in its report, drew up a list of war crimes<sup>69</sup>, including murder and massacre, torture of civilians, rape, and internment of civilians under inhuman conditions<sup>70</sup>. The list, however, and the justifications for including certain elements in the list indicate that it included both war crimes and what later became crimes against humanity. This last element was the main criticism of the United States against the findings of the Commission, indicating that violations of the “laws of humanity” were vague and not well established, therefore it would violate the principle of legality<sup>71</sup>. Obviously, the American opinion on this changed substantially by the time of the Nuremberg Tribunals.

The next instrument where war crimes appeared was the *Statute of the Nuremberg Tribunal* – lacking a list of war crimes in the 1929 Geneva Conventions. The antecedent event was the inauguration of the United Nations War Crimes Commission (UNWCC) on October 20, 1943 to investigate war crimes; many findings of which were adopted in the Nuremberg Charter. The Commission relied on the war crimes listed by the 1919 Commission, mainly to avoid criticism that it had invented new war crimes after they had been perpetrated, and also because Italy and Japan had also been part of the 1919 Commission, and Germany had not objected to its findings.

The text of the Statute of the Nuremberg Tribunal referred to laws and customs of war, laws meaning mainly the 1899 and 1907 Hague Treaties and the 1929 Geneva Conventions, none of which mentioned war crimes. Therefore it was the

<sup>68</sup> S. MERON (2006) op. cit. 554.

<sup>69</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, March 29, 1919. Reprinted: 14. American Journal of International Law, 1920/95/14. 98.

<sup>70</sup> S. MERON (2006) op. cit. 555.

<sup>71</sup> S. MERON (2006) op. cit. 556.

Nuremberg Statute that first operated with the term “war crime” and provided a definition to it. The Nuremberg Statute also relied heavily on customary law to overcome the problem of a lack of proper international regulation of prohibition of attacks against civilians in the international treaties in force at the time of the Second World War. Hence, the Nuremberg Statute did not only apply the term war crimes, but also filled it with precise meaning, basically codifying existing customary law.

The 1949 Geneva Conventions and their provisions on penal repression and grave breaches were obvious followers of the Nuremberg Statute. However, the Geneva Conventions used the term ‘grave breaches’ instead of ‘war crimes’, and for a reason. According to the ICRC Commentary, “[t]he actual expression »grave breaches« was discussed at considerable length. The USSR Delegation would have preferred the expression »grave breaches« or »war crimes«. The reason why the Conference preferred the words »grave breaches« was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word »crimes« had different legal meanings in different countries.”<sup>72</sup> More specifically, the idea was to emphasize the difference between these very serious crimes and ordinary crimes or infractions under national law<sup>73</sup>. The Geneva Conventions therefore concentrated on grave breaches of the Conventions, whether they were called crimes or not in specific domestic laws.

The lists of grave breaches in the Geneva Conventions are substantially longer than in the Nuremberg Statute. In addition, the 1949 Geneva Conventions made the obligation of the 1929 Convention I regarding national legislation more imperative. While the 1929 Convention I merely said that “[t]he Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.”<sup>74</sup>, the obligation of the 1949 Conventions „[...] has [...] been made considerably more imperative. The Contracting Parties are more strictly bound to enact the necessary legislation than in the past”<sup>75</sup>. The difference basically lies in the imperativeness: while the 1929 Convention I sounds more like a recommendation

<sup>72</sup> PICTET (1995) op. cit. 371.

<sup>73</sup> Gabrielle Kirk McDONALD – Olivia SWAAK-GOLDMAN (eds.): *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts, Commentary* (Volume I). The Hague, Kluwer Law International, 2000. 70.

<sup>74</sup> 1929 Geneva Convention. Article 29.

<sup>75</sup> PICTET (1995) op. cit. 363.



– ‘shall propose’ –, the 1949 text is clearly an obligation – ‘Parties undertake to enact’.

The 1977 Additional Protocol I made further developments. Article 11 lists prohibited acts, while Article 85 lists further grave breaches, making the list longer<sup>76</sup>. In addition, it makes grave breaches of the Geneva Conventions applicable to grave breaches of Additional Protocol I, if these are committed against persons or objects newly protected by Additional Protocol I<sup>77</sup>. Therefore Additional Protocol I extended the number of situations in which acts would become grave breaches, and added one more grave breach, notably the perfidious use of protective signs and signals.

Finally, Additional Protocol I adopted a text that was initially highly controversial, notably stating that grave breaches constitute war crimes<sup>78</sup>. As outlined below, the difference between the notions of grave breaches and war crimes lies in where they are regulated. ‘Grave breaches’ are terms used by the Geneva Conventions – Geneva law –, whereas the term ‘war crimes’ was used in the Nuremberg Charter, originated from Hague law. Therefore many

<sup>76</sup> Additional Protocol I substantially widens the area of protection and extends it to, among others, civilian medical personnel, transport and material and certain protected objects. It also includes specific rules on means and methods of warfare with providing more detailed provisions on the notion of combatants. According to Articles 11 and 85 of Additional Protocol I, acts considered as grave breaches in addition to those described in the Geneva Conventions include the following: physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation not justified by the state of health of the person; any willful act or omission which seriously endangers the physical or mental health or integrity of any person ; [when committed willfully, in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health] : making the civilian population or individual civilians the object of attack ; launching an indiscriminate attack violating the principle of proportionality ; launching an attack against works or installations containing dangerous forces ; making non-defended localities and demilitarized zones the object of attack ; the perfidious use of the protected emblems ; [when committed willfully and in violation of the Conventions or the Protocol] : the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Geneva Convention IV; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; [upon the existence of certain additional criteria] : making the clearly-recognized historic monuments, works of art or places of worship the object of attack, causing as a result extensive destruction; depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.

<sup>77</sup> Claude PILLOD – Yves SANDOZ – Bruno ZIMMERMANN: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva, International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987. 991, para 3460.

<sup>78</sup> „Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.” Article 85 para 5, Additional Protocol I.

regarded grave breaches as referring to violations of Geneva law, and war crimes as violations of Hague law.

This differentiation or grouping was made obsolete by the mentioned provision of Additional Protocol I<sup>79</sup>, and also by the fact that Additional Protocol I includes both Geneva law and Hague law-type regulations. What was clear however at the time was that grave breaches and war crimes – therefore international criminal responsibility – were not applicable to violations committed in non-international conflicts. This text in Additional Protocol I, finally adopted by consensus, merely confirms that there is only one concept, assuring however that “the affirmation contained in this paragraph will not affect the application of the Conventions and the Protocol”<sup>80</sup>.

However, this grouping is not entirely reflected in the ICC Rome Statute. Article 8 specifies only grave breaches in the understanding of the Geneva Conventions, but not in Additional Protocol I. This can be explained by the fact that Additional Protocol I was not ratified by many of the states negotiating the Rome Statute, including the United States which knowingly played an important role in the preparatory phase. Therefore these states were reluctant to incorporate grave breaches of AP I into the Rome Statute. The Rome Statute only works with the notion ‘war crimes’ and not grave breaches, however, one set of war crimes are grave breaches of the Geneva Conventions. Therefore with respect to the war crimes – grave breaches relation, we shall state that all grave breaches of the Geneva Conventions are war crimes, but not all war crimes are grave breaches of the Geneva Conventions.

### *2.2.2. Individual responsibility versus collective responsibility?*

As described above, one great achievement in international law is the recognition of individual criminal responsibility,<sup>81</sup> as opposed to notions of collective guilt,

<sup>79</sup> S. SCHABAS op. cit. 53.

<sup>80</sup> PILLOD, SANDOZ, ZIMMERMANN op. cit. 1000, para 3523.

<sup>81</sup> „We all celebrate the emergence of a human rights regime that recognizes the rights of the individual as distinct from, and sometimes even in opposition to, those of the state. We recognize and celebrate the emergence of a parallel system of personal legal accountability. And we should, therefore, agree that, in this modern age of individual rights and duties, it is untenable to blame an entire polis-the whole citizenry-for the wrongs committed either by individual criminals or by a criminal government.” S. Thomas FRANCK: Individual criminal liability and collective civil responsibility: do they reinforce or contradict one another? *Washington University Global Studies Law Review*, 2007/6. 569.

collective responsibility or any forms of collective retribution.<sup>82</sup> It seems that different fields of international law – international humanitarian law, international human rights law and international criminal law –, although originating from different times, concepts and attitudes, mutually work toward an effective and enforceable international system of individual criminal responsibility.

In such a system, international humanitarian law provides the rules, human rights law defining the frameworks of international and national accountability, and international criminal law, the ‘newest’ element, setting the conditions for international enforcement, should national efforts fail. Today we are still in a learning process of how to give effect to this principle in practice: the establishment and experiences gained from the activity of international tribunals and the International Criminal Court, as well as experiences achieved by national courts are all indicators of this learning process. Despite these achievements, discussions about collective guilt and collective responsibility are often on the agenda, even if only theoretically, with no apparent or direct practical results.<sup>83</sup> The following pages will seek to demonstrate why individual responsibility is the only way to determine accountability for violations of war crimes.

#### *Are wars collective in nature?*

One great advocate of the notion of collective guilt for the four crimes over which the ICC has jurisdiction is George P. Fletcher. His starting point is that aggression, crimes against humanity, genocide and war crimes are collective in their character. He argues for this view by saying that war is a collective

<sup>82</sup> Already after World War II, collective guilt was seen by many as primitive, irrational and bigoted. When the entire Dutch cabinet stepped down after failure to prevent or stop the Srebrenica massacres, this did not reflect negatively on the entire Dutch population. S. Therese O’DONNELL: Executioners, bystanders and victims: collective guilt, the legacy of denazification and the birth of twentieth-century transitional justice. *Legal Studies*, 2005/25. 632.

<sup>83</sup> In many writings collective responsibility means responsibility of a state or responsibility of criminal organizations or joint criminal enterprise. S. for example AINLEY KIRSTEN: Collective Responsibility for War Crimes: Politics and Possibilities. New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA (February 17, 2010): Annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners. [http://www.allacademic.com/meta/p416608\\_index.html](http://www.allacademic.com/meta/p416608_index.html) [last visited on 18 February]  
 Franck, however, makes a clear distinction between state responsibility and determination of people’s collective guilt. S. FRANCK op. cit. 570–571. In the present context, however, the notion of collective responsibility is not meant to indicate state responsibility, rather the abstract responsibility of a state, nation or a group. This examination does not seek to discuss the responsibility of (criminal) organizations either, although references to it are made below.

enterprise by its nature: as an example, the practice of taking and caring for prisoners testifies to the collective character of armed confrontation.

According to his opinion, the nature of war entails that “[t]he person who goes to war ceases being a citizen and becomes a soldier in a chain of command.” Additionally, “war suppresses the identity of the individual soldier and insulates him or her from criminal liability; on the other hand, the international legal order now holds individuals accountable for certain forms of immoral and indecent treatment of the enemy. When an individual commits a war crime, he or she breaks out, at least in part, from the collective order of war and emerges as an individual guilty of violating a prohibition adopted in the international legal community.”<sup>84</sup> Or, in other words, warfare transforms the whole population taking part in it and also its representation into one totality, of which the moral quality of individual behaviour is also a part.

To demonstrate this with the example of the Rwandan genocide, a great number of persons involved were tried for committing genocide, and in the public mind, it was the “Hutus” collectively who were massacring the Tutsis, therefore the war seemed to be a collective one between the Hutus against the Tutsis. This was a rare event where it was not only a military force or a militia carrying out the violations, but included a great part of the population themselves as perpetrators.

When we talk about the responsibility of the Hutus in general – which sounds like collective responsibility –, looking at the criminal procedures, we realize that responsibility of “the Hutus” means responsibility of those Hutus who actually took part in the massacres themselves: in the final outcome, individual responsibility. In this case therefore we are not talking about an abstract collective responsibility, but about a case where a big part of the population not only supported the crimes being committed, but also actively took part in it. This, in the end, is not collective responsibility, but the individual responsibility of a large number of a group: an add-up of individual responsibilities.<sup>85</sup>

<sup>84</sup> George P. FLETCHER: The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt. *Yale Law Journal*, May 2002. 1518.

<sup>85</sup> At the same time one has to acknowledge that genocide, *per definitionem*, often involves a whole group as perpetrators. Many writers therefore raise the question whether responsibility of criminal groups, such as the *Interahamwe*, would be the adequate response. “It is important to keep in mind that our claims apply to particular kinds of grave injustice, namely, those stemming from hatred of a group”. „[...] notions of criminal responsibility rooted in ideas of individual guilt do not provide good models for devising a sound legal and moral approach to genocide.” S. Thomas W. SIMON: *The laws of genocide: prescriptions for a just world*. Westport, Greenwood Publishing Group, 2007. 222 and 220 respectively. The responsibility of criminal organizations is, however, not the same notion as collective responsibility. Responsibility of

*A case study: the Polish farmer*

Fletcher illustrates the conflict of collective and individual responsibility arising from three factors – (i) war being an alternative legal order, (ii) international law as a source of individual criminal responsibility and (iii) domestic law as a source of individual criminal responsibility – through the following example.<sup>86</sup> It is this very example through which I seek to demonstrate that thinking in terms of collective responsibility in the case of war crimes is ill-founded.

A Polish farmer individually takes up arms against German troops invading his country and kills three German soldiers. In Fletcher's opinion, the farmer is guilty of murder under domestic law, because the farmer is acting alone, independently of the army, so the case falls outside the collective activity that defines the law of war. Fletcher's line of reasoning is that since an attack against a state is collective, a collective self-defence applies for the state that has been attacked, therefore the attacked state, acting through its army, has the right to fight back.

As the Polish farmer was not a representative of his army, he cannot invoke the collective right of self-defence and would have to rely, instead, on individual self-defence. As, let us suppose in the present example, the German troops did not pose a threat to his personal safety, there was no individual self-defence situation in the case. Fletcher therefore raises attention on the collective nature of the right to fight in order to lead to an understanding of the collective nature of the guilt that may appear once a war crime had been committed.

According to my consideration, however, the basic argument in the above reasoning does not correspond to the basic understanding and principles of the law of war. It may be true that war is collective by nature, notably an act or a series of acts of a single person representing no one but him/herself cannot be considered as war.

However, the underlying consideration behind rules applicable to armed conflicts is not the collective nature of the conflict, but humanitarian considerations, such as protection of those not participating in hostilities, therefore the very basic principle is the principle of distinction<sup>87</sup>. Therefore it is strictly prohibited for other persons than combatants to participate in the hostilities. Civilians taking

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organizations entail conditions such as active participation in the groups, the responsibility of its leaders, etc.

<sup>86</sup> FLETCHER (2002) op. cit. 1518.

<sup>87</sup> See Géza HERCZEGH: *Development of international humanitarian law*. Budapest, Akadémiai, 1984. 193–194.

part in the hostilities in civilian clothes, not being distinctable, would undermine the concept of distinction and consequently such acts are usually prohibited under both international and domestic law. This prohibition is therefore not founded on the lack of a self-defence situation, but on the consideration that it would be a feigning of protected status.

The point therefore that is missing from the example of the Polish farmer seems to be that international humanitarian law's (IHL) starting point, or underlying consideration, is the balance between military necessity *versus* humanitarian considerations, and not self-defence. IHL acknowledges that there is military necessity in an armed conflict, therefore makes acts permissible which are otherwise, in peacetime, not permissible. The balance between military necessity and humanitarian considerations, and therefore all the specific rules under IHL are therefore very different from the notion of self-defence, either collective or individual. Accordingly, to judge the legality of the soldier's act, it is not the existence of a self-defence situation that is to be examined, but other considerations, such as whether the civilian did take a direct part in the hostilities or not.

The rationale of this difference can be demonstrated through weighing the legality of an attack under the proportionality principle under IHL. Whereas the self-defence concept concentrates on an imminent threat to one's life and acknowledges proportionate reaction as legal; in addition, it also excuses disproportionate responses due to the understandable shock one experiences under such threat, the IHL logic concentrates on the prohibition of attacking civilians and the requirement of an attack – to be more precise, the civilian casualties – to be proportionate compared to the military advantage anticipated. Therefore not every legal attack under IHL would be legal under the self-defence concept<sup>88</sup>, and the other way around: not every legal or excusable act under self-defence would be legal under IHL<sup>89</sup>.

<sup>88</sup> For instance in case a proportionate attack is carried out, resulting in the death of two civilians. In such a case the soldiers may not be under imminent threat (as required by the self-defence concept), therefore they may not be in a self-defence situation, while their action may be legal under IHL under the proportionality principle.

<sup>89</sup> A soldier cannot argue for the excusability of an excessive response the same way as it would be acceptable under self-defence: if a soldier is attacked, he may defend himself, but the legality of his reaction will be judged under IHL terminology, and not under the self-defence concept. For instance he cannot claim that due to the psychological shock (excessive response being excusable in case of self-defence) he bombed an entire house because he was shot at from that house. However, as it will be discussed in Chapter 3.2.3., self-defence, be it proportionate or not, cannot be used as an excuse for acts constituting violation of IHL.

Given the strict provisions on distinction, the only exception in IHL<sup>90</sup> where a civilian becomes combatant if he/she participates in the hostilities without being member of the army (or militant group) is *levée en messe*<sup>91</sup>, which entails that the civilian population in unoccupied territories, on approach of the enemy, has the right to take up arms spontaneously and is not to be punished thereof, if they haven't had the time to organize themselves, provided that they carry their arms openly, hence, are distinctable, as required by international humanitarian law<sup>92, 93</sup>.

Concluding from all the above, in the case of the Polish farmer, if we regard self-defence and the collective nature of the attack/counter-attack as the decisive considerations, we have to examine whether the farmer was actually in a self-defence situation. As long as he was not, he was not entitled to fight back. Under IHL rules, however, we must examine whether the enemy was approaching, whether the farmers had time to organize themselves, whether the taking up of arms was spontaneous and whether they carried their arms openly. The soldiers threatening them personally is not an issue under *levée en messe*. In this case, since the farmer was acting alone, *levée en messe* cannot be applied to him<sup>94</sup>. The criteria are, obviously, very different.<sup>95</sup>

<sup>90</sup> Géza Herczegh warned that any exception or derivation from the main rule of combatants' obligation to make themselves distinctable from the civilian population would ultimately lead to a weakening of the protection of civilians. S. HERCZEGH op. cit. 270–274.

<sup>91</sup> Article 4 A (6) Geneva Convention III and Article 50 (1) Additional Protocol I.

<sup>92</sup> S. Article 4 A (6) of Geneva Convention III.

<sup>93</sup> Another interesting example of consideration of *levée en messe* is the status of Yugoslav partizans who opposed Hungary re-gaining control over Novi Sad in 1942, which was followed by the Novi Sad Raid carried out by the Hungarian armed forces. The partizan actions did not only take place during the re-occupation of the territories and were not spontaneous, therefore they cannot be qualified as *levée en messe*. This, however, did not justify the raid that was carried out in retaliation of the Partizan actions.

<sup>94</sup> According to the Commentary: „The provision is not applicable to inhabitants of a territory who take to the „maquis”, but only to mass movements which face the invading forces”. S. Jean S. PICTET (ed.): *Convention (III) Relative to the Treatment of Prisoners of War*. Geneva, ICRC, 1960. 67.

<sup>95</sup> A Hungarian parallel to the case could be that of Bishop Vilmos Apor. During the Second World War, under the German occupation of Hungary, the Bishop protected everyone, irrespective of religion or race, who sought refuge in his church. The occupation of Győr, the town of his seat, began on 29 March 1945. On 30 March, after having denied entry for Soviet soldiers seeking to rob the cellar and rape the women who were staying there, he was engaged in a fight by a Soviet soldier, during which he was shot. The wounds caused his death a few days later. (Source: <http://magazin.ujember.katolikus.hu/Archivum/2002.05/08.html> and <http://www.irodalmijelen.hu/?q=node/1384> [last visited on 8 May 2012]) The question could emerge whether he was acting in self-defence and whether his action could be regarded under *levée en messe*, considering the occupation of Győr. Since he was acting alone, his action cannot be seen as *levée en messe*; in addition, he was not acting to stop the invading forces

Where the failure of Fletcher's argumentation can be demonstrated is if we examine the case with a group of Polish farmers. In Fletcher's reasoning, if there was a group of Polish farmers instead of only one farmer, the situation would be the same. However, if we reason based on the IHL criteria, the group of farmers may satisfy the "levée" criteria, making the farmers' actions legal under IHL, therefore the two approaches would lead to two different solutions.

The conclusion therefore is that when deciding whether the Polish farmer acted rightfully, the decisive element should not be the existence of the threat to his personal security, i.e. the prevalence of an individual self-defence situation, but rather the conditions laid down by IHL.

Therefore Fletcher's examination falls, as a precondition, on the existence of a self-defence situation, while the IHL examination falls on the question of direct participation in hostilities. As a summary, although the result of the two examinations will be practically the same in case of one Polish farmer (self-defence – based: the farmer was not in a self-defence situation therefore attacking the soldiers was illegal; IHL – based: *levée en messe* can be applied only to "en messe": a group of persons, therefore attacking the soldiers was illegal since the farmer was acting alone), we may come to two different results if we regard a group of Polish farmers (self-defence – based: no self-defence situation therefore the act is illegal; IHL – based: if those criteria which we have specified above are fulfilled, the act could be legal).

Therefore reformulating the question, and changing the facts of the case to a group of Polish farmers: according to the Fletcher-reasoning, the Polish farmer still cannot raise the 'collective' argument because they were not acting as representatives of their armies; while according to the present author's reasoning, in this case they could justify their acts under *levée en messe* because there was a 'group' of them, *no matter* whether they were representing their armies or not.

Furthermore, looking at the consequences of the notion of collectivity with respect to war crimes, we have to note that the argument towards collective guilt can be turned to its reverse: making war crimes a collective action and therefore attaching collective guilt to it, one may come to the conclusion that if the nation cannot be held guilty of a crime than the persons acting on its behalf cannot be guilty either.

Lewis notes the danger in relying too heavily on collective responsibility: in his opinion, this is a way to the view that responsibility does not really exist, or

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but to protect the women in his residence. Nevertheless, the action of the Soviet soldiers was clearly illegal, given that the Bishop was not armed.



at least well on the way to finding it easier to ignore.<sup>96</sup> Albeit such a development is more psychological and sociological in substance than logically conclusive, it is remarkable indeed and is certainly not far from turns tacitly acknowledged by public opinion and press worldwide.

Another feature of collective responsibility would be that the burden of proof would be the reverse of individual responsibility. In case of individual responsibility, the burden of proof is on the prosecutor, based on the presumption of innocence; however, when considering the individual's accountability as a member of a group, it would be left to the individual to prove that for some reason he/she was not involved in the commission of the crimes.

The Sharon-case is one of the cited examples to demonstrate the effect of collective responsibility. In the *Sharon*-case, a complaint was filed in 2001 in Belgium against Ariel Sharon and others – Sharon Israeli Minister of Defence at the time of commission of the crimes and Prime Minister at the time of the proceedings – for alleged crimes (war crimes, crimes against humanity and genocide) committed against Palestinian refugees in Lebanese refugee camps in 1982. The case was filed by victims of the massacre based on universal jurisdiction. Eventually, the Belgian courts refused the case, as a consequence of strong Israeli and US pressure. The case brought huge attention because it was raised in a state that had no link with the alleged perpetrator, the scene of the crimes or with the victims, therefore was a case of 'pure' universal jurisdiction.<sup>97</sup>

Fletcher is of the opinion that „the worst part of this tendency toward universal jurisdiction is the belief that if Ariel Sharon had been guilty of a crime against humanity, he could have been judged and sentenced in abstraction from the nation in whose name he acted as military commander. Belgium was not in a position to judge or even to think about the complicity of the entire Israeli nation in any crime Sharon might have committed.”<sup>98</sup> Fletcher meant that the eventual responsibility of Sharon shall be shared by the responsibility of the Israeli nation for creating a culture in which Sharon did not understand the wrongfulness of his deeds.

<sup>96</sup> H. D. LEWIS: The Non-Moral Notion of Collective Responsibility. In: Peter A. FRENCH (ed.): *Individual and Collective Responsibility*. Michigan, Schenkman Books, 1972. 130.

<sup>97</sup> For an analysis of the case, s. Deena R. HURWITZ: Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium. In: D. HURWITZ – M. L. SATTERTHWAITHE – D. FORD (eds.): *Human Rights Advocacy Stories*. New York, Foundation Press, 2009. S. also: *Universal Jurisdiction: Belgian Court has Jurisdiction in Sharon Case to Investigate 1982 Sabra and Chatila Killings*. Amnesty International, 2002. <http://www.amnesty.org/en/library/info/IO53/001/2002/en> [last visited on 6 February 2012]

<sup>98</sup> George P FLETCHER: *Romantics at War*. New Jersey, Princeton University Press, 2002. 65.

We can come to two conclusions from such a statement: (i) if we cannot suppose that the entire Israeli nation was guilty than the individual responsibility of the agent vanishes, (ii) they share responsibility: the agent and the nation. Considering from a given distance, both conclusions can be dangerous and go directly opposite one of the greatest developments in international law: individual criminal responsibility.

If we were to accept that an agent of a state can only be responsible for an international crime if the nation as a whole can be held responsible, than this could be an easy way out for agents from responsibility. If we were to accept that responsibility is shared between the agent (individual) and the nation, then again we hit non-answerable questions such as how much the nation is guilty and what would be the proportion of guilt shared.

Fletcher further argues that whatever responsibility Sharon bore for the massacre in Lebanon, his responsibility is shared with that of his nation and therefore mitigated because he was acting as an agent of the state. But how can one be sure about this? Talking in general terms, what if it is the individual will of the agent to wipe out another group of people? What if this is his own personal belief and he only uses the state he is representing to execute his plan and it is exclusively through such a channel that eventually the plan allegedly transforms into state policy? How can we prove the difference?

And again, what result would such an approach have and where could and would such a theory lead? If we stick to individual responsibility in our example, the agent can escape responsibility only provided that he steps down from office before the acts are committed, but if he doesn't step down, it makes it his own individual responsibility.

While we may accept that in war a soldier is not acting on his or her own behalf but on behalf of the state, the point of the concept of individual criminal responsibility is exactly not to let such individuals hide behind the state's "will" or behind orders given by superiors in the name of the state. A state is only an abstract entity which cannot hold criminal liability<sup>99</sup>; therefore it is unacceptable that individuals could commit atrocities in the name of the abstract state without any consequences<sup>100</sup>.

<sup>99</sup> Considerations about the difference between government leaders committing genocide and the state itself being responsible for genocide are discussed by: Alina Ioana APREȚESEI: Genocide and Other Minority Related Issues in Cases before the International Criminal Court. *Miskolc Journal of International Law*, 2008/5/2. 23.

<sup>100</sup> S. Geoff GILBERT: The Criminal Responsibility of States. *International and Comparative Law Quarterly*, 1990/39. 345–369.

Fletcher argues that the crimes under the Rome Statute are collective, because the perpetrators are prosecuted for crimes committed by and in the name of the groups they represent. “[...] The individual offenders are liable *because they are members of the hostile groups* that engage in the commission of these crimes.”<sup>101</sup> If we look at the nature of war crimes, we may come to the conclusion that neither part of this statement is correct.

With respect to crimes against humanity or genocide, although this can also be the intent of one single person only (even though it is difficult to imagine such a case), the widespread or systematic nature of the act are constitutive elements of the crimes, therefore these elements could make them “collective” in nature.

War crimes, on the other hand, can easily be committed out of a purely individual motive: someone wanting to loot an enemy civilian for his own benefit or behaving in an inhumane way with detainees out of personal cruelty or an urge for revenge, personal or mediated. These acts can well be committed without a state intent being in the background. Naturally, state intent may be in the background for example in case of torturing of prisoners to gain information, but it would be all too simplistic to say that all war crimes are part of a state policy.

The ICC Rome Statute says that “[t]he Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>102</sup> (emphasis added). However, since this condition is not obligatory and considering that the collective element does not appear in the elements of the crimes, it can be attributed to the limited capacity of the Court and the will to deal with ‘big’ cases. McMahan also argues that the reason for the formulation “in particular” is not the collective nature of the crimes but rather the limited resources of the ICC. Would this be otherwise and would the collective (state) element be required for war crimes, it would include corresponding elements in the elements of war crimes.<sup>103</sup>

If we go through the elements of war crimes, it becomes apparent that none of them include any reference to the requirement of collectivity, systematic nature or anything similar. That is why it is easy to agree with McMahan, having to add that crimes committed and explained as state policy are particularly dangerous because the perpetrators are hiding behind the state policy so it is increasingly

<sup>101</sup> FLETCHER (2002) op. cit. 1525.

<sup>102</sup> Article 8 (1) of the Rome Statute of the International Criminal Court.

<sup>103</sup> Jeff McMAHAN: Collective Crime and Collective Punishment. *Criminal Justice Ethics, Institute for Criminal Justice Ethics, New Jersey*, Winter/Spring 2008. 5–6.

important to prosecute them individually for that one can be sure that everyone will think twice before executing or forming such state policy.

The argument that war crimes are prosecuted because of the collective element, that is because they are committed in the name of the group who the perpetrators represent is actually a reverse argument of the well-known defence of superior order. In the superior order defence, the subordinate is trying to defend himself from criminal liability by claiming that he was given orders by his superior. Such a defence has, rightly, not been accepted at and since the Nuremberg Tribunal.<sup>104</sup> So, in principle, it is out of the instrumentality of international law.

In the case of the “collective” defence, the leader (or superior) is defending himself by saying that he only executed the will of the group. As much as the law says in the superior order case that the subordinate shall not carry out illegal orders, the superior shall also not carry out an illegal “mandate” coming from the collective. In such a case the will of the collective, even if illegal, will remain to be a will without action. The justification is also similar: in the superior order case the soldier defends himself by saying he did not actually want to carry out that act, and in the “collective” defence case the superior may also say it was not his will, but the will of the collective. This is why it was so important not to accept the superior order defence and this is why, in my opinion, it is equally important not to accept the “collective defence” either.

Similar questions were raised when thinking about the forms of liability during the Nuremberg Tribunals. In order to overcome difficulties of proof, evidence and a big number of defendants, an attempt was made to determine criminal liability based on membership in *criminal organization*. However, due to the recognition that individual criminal responsibility requires personal culpability, it was accepted that membership in an organization was not enough in itself, it also requires knowledge of the criminal acts or purpose of the organization and that the person *voluntarily joined the group* or committed the acts himself. Even in this form, this solution remained to be strongly contested.<sup>105</sup>

It is worth to note that a further development of the notion of criminal organization was assured by the Prevention of Terrorism Acts in the United

<sup>104</sup> Nuremberg Charter, Article 8: „The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

<sup>105</sup> S. Machteld BOOT: *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Genocide, Crimes Against Humanity and War Crimes*. Utrecht, Intersentia, School of Human Rights Research, 2002. 300.

Kingdom<sup>106</sup>, which stipulated that law makes certain organizations illegal and thus making mere membership a criminal offence. Here, however, the criminal offence stands not for certain acts committed by the organization but for membership alone. In such cases knowledge of criminal purpose of the organization or the commission of criminal acts was obviously not a condition for criminal liability of the member. These measures against the Irish Republican Army were then further developed by subsequent other counter-terrorism acts throughout the world following the 9/11 attacks, the examination of which extends the framework of the present study.

This form of liability can be seen as similar to the collective responsibility of a group, but is based on completely different logic and is more a form of indirect responsibility, therefore, and on the final analysis, it can not be considered as a form of collective responsibility.<sup>107</sup> Namely, this form of responsibility requires that the person is free to decide whether to join a group or not, which is not a choice one can usually make with regard to being a citizen or national of a given country.<sup>108</sup>

The notion of responsibility of criminal organizations is therefore not to be confused with collective responsibility: in the case of responsibility of criminal organizations the member of the organization is supposed to have been aware of the criminal objective, joined voluntarily and was not simply a member of a group (not an organization) in the name of which persons or groups committed the atrocities.<sup>109</sup>

Simon argues for a need for responsibility of organizations by indicating that “participants belonged to organizations, whose structures proved critical to

<sup>106</sup> Prevention of Terrorism (Temporary Provisions) Act 1989 (repealed). <http://www.legislation.gov.uk/ukpga/1989/4/contents> [last visited on 6 February 2012]

<sup>107</sup> The ICTY Statute and the decision in the *Tadić* case also foresee the element of common design as a form of accomplice liability, however, these provisions „cannot be interpreted as including a concept of collective responsibility.” S. BOOT op. cit. 302.

<sup>108</sup> Significant discussions over conditions of holding an individual responsible for mere participation in a criminal organization unfolded exactly around this issue: whether there are escape routes for coerced and ignorant members of the organization. In the end, the Tribunal examined the criminality of the organizations and gave leeway for individuals on grounds of their role in the organization. As for background and discussions on the development of responsibility based on participation in criminal organizations at Nuremberg, s. SIMON op. cit. 227–234. Simon strongly criticizes the views that strongly stick to individual criminal responsibility and argues for the need to establish organizational responsibility. “[...] the failure even to consider organizations as criminal in contemporary debates over war crimes tribunals supports the claim that we have learned the wrong lessons from Nuremberg.” Ibid. 233.

<sup>109</sup> For a discussion on objective responsibility, s. GELLÉR, Balázs József: *Nemzetközi Büntetőjog Magyarországon. Adalékok egy vitához*. Budapest, Tullius, 2009. 192–193.

carrying out genocide or a grave injustice.”<sup>110</sup> This, however, requires that such participants were not simply members of the group but were active members of it, contributing to the commission of atrocities. This is an enormous difference between responsibility of organizations and collective responsibility in that in the latter case merely being a member of the group could be enough for the responsibility of the all the members involved.<sup>111</sup> To put it bluntly, the difference is between the responsibility of the SS and the responsibility of the entire German nation.<sup>112</sup>

In the case of collective responsibility, we therefore again come back to the question of how a citizen escapes collective responsibility if it was not his own will to be the part of the “group” at all. Obviously, renouncing citizenship is not an answer to this question. Therefore accepting the rationale of responsibility of criminal organizations or membership within such organizations is not the same as accepting the rationale of collective responsibility.

*There is no requirement of a collective element for war crimes*

Therefore we may conclude that although wars are indeed collective in nature, it does not follow that war crimes are also collective in nature. While it may be easy to imagine some war crimes as being an articulation of a collective will, neither the formulation of the grave breaches in the Geneva Conventions and their Additional Protocols, nor war crimes listed in the Rome Statute include any required elements of collectivity.<sup>113</sup>

The reason individuals were directly made subject to criminal liability under international law was to ensure that international law cannot be neglected through hiding behind the abstract’s will by persons responsible for states’ legislation or for government orders given to individuals. While Kelsen held that

<sup>110</sup> SIMON op. cit. 240.

<sup>111</sup> Mellema, on the other hand, argues that no one is a member of the collective unless he/she has done something or omitted to do something that warrants membership in the collective. S. Gregory MELLEMA: Collective Responsibility and Contributing to an Outcome. *Criminal Justice Ethics*, Summer/Fall 2006/25. 17.

<sup>112</sup> „Organization responsibility occupies a more realistic and more defensible middle position between [...] holding an entire nation morally responsible and Nuremberg Tribunal’s ultimately holding only a few leaders criminally guilty. Whatever the complicity of the nation’s population might be, atrocities on a mass scale are carried out, generally, not by the population as a whole but through organizations within a nation state.” S. SIMON op. cit. 242.

<sup>113</sup> S. also BOOT op. cit. 304.

international offences were attributable to the state only<sup>114</sup>, and in earlier times obeying government orders resulted in that individuals remained immune from criminal prosecutions, the Nuremberg Charter<sup>115</sup> and subsequent international instruments<sup>116</sup> expressly established that the official capacity of defendants was not an accepted ground to excuse them from criminal responsibility.<sup>117</sup> While the immunity of a person because of his official capacity is not exactly the same question as collective responsibility, it shall be realized that criminal responsibility was brought down to the individual's level precisely because acts, in the end, are committed by individuals.

Some experts argue that there is an excess of responsibility for war crimes as opposed to individual responsibility, in that not only the person who actually perpetrated the act should be held responsible, but also those who created an environment and scheme in the framework of which such atrocities had been committed.<sup>118</sup> One can fully agree with such an opinion in the case of certain kinds of war crimes, noting, that this does not establish collective responsibility as such, it rather places a responsibility on the individual in a different form or means a different mode of liability – be it command responsibility or responsibility based on the notion of joint criminal enterprise – to persons other than those who actually, directly carried out the acts.<sup>119</sup>

<sup>114</sup> Hans Kelsen: *Collective and Individual Responsibility for Acts of State in International Law*. *Jewish Yearbook of International Law*, 1948. 226 and 230–231.

<sup>115</sup> Nuremberg Charter, Article 7: „The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

<sup>116</sup> See Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR and Article 27(1) of the Rome Statute of the ICC.

<sup>117</sup> This being said, several peace treaties formulate some kind of 'collective' responsibility for the war or acts committed during war. The Paris peace treaty with Hungary entails for instance that Hungary is to pay compensation. See preamble of the Peace Treaty with Hungary, Paris, 10 February 1947, operative para 1: „Hungary, having become an ally of Hitlerite Germany and having participated on her side in the war against the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and other United Nations, bears her share of responsibility for this war [...]”

<sup>118</sup> See for example AINLEY op. cit. 6–7.

<sup>119</sup> The view that this is a specific form of liability was underlined in the *Tadić* case: „[The ICTY statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of his plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable.” See *Prosecutor v Tadić*, Appeals Chamber, Judgment of 15 July 1999, para 190.

“International criminal law has been regarded as controversial and innovative precisely because it makes individuals liable for infractions of international law’s most fundamental norms. At Nuremberg, the International Military Tribunal, in its final judgment, declared that the hideous crimes under investigation were committed «not by abstract entities but by men ».”<sup>120</sup> It was exactly the acknowledgement<sup>121</sup> of individual criminal responsibility<sup>122</sup> that was such a landmark step at the Nuremberg tribunals.<sup>123</sup> The International Law Commission in 1951 also foresaw individual criminal responsibility for offences against the peace and security of mankind, and it did so paradoxically exactly after the events in relation to which collective responsibility is most often cited.<sup>124</sup>

The Nuremberg Charter did not only accept individual criminal responsibility, but also negated the possibility of defence on the ground of having been acted as Head of State or a government official or under the orders of the government or a superior.<sup>125</sup> Principle IV adds: “provided a moral choice was in fact possible to him”. This means that if the person had no choice but to commit the acts (e.g. whether he had the possibility to refuse the order or he put his own life in imminent risk if he did so) he may escape liability. So then how can we talk about collective responsibility if in fact law recognizes that it is possible that certain individuals didn’t have another choice? This question can only be answered on the individual’s level by judging whether he had a choice or not to not commit the acts. But if we start looking at the motives and possibilities of individuals, we cannot talk about collective responsibility anymore.

### *What’s the point?*

So what’s the point in recognizing the notion of collective guilt and responsibility for war crimes? While individual criminal responsibility has a result in that an

<sup>120</sup> Gerry SIMPSON: *Law, War and Crime, War Crime Trials and the Reinvention of International Law*. Cambridge, Polity Press, 2007. 55.

<sup>121</sup> For the evolution of individual responsibility and the individual becoming a subject of international law, s. HOBE op. cit. 167–169.

<sup>122</sup> Eszter Kirs notes that during the Nuremberg trials after the Second World War, responsibility shifted from the entire German nation to those individuals who as leaders were responsible for the crimes. S. KIRS, Eszter: *Demokratikus átmenet a háborús bűntettek árnyékában*. (Democratic transition in the shadows of war crimes) Miskolc, Bíbor Kiadó, 2012. 18–19.

<sup>123</sup> For more on the Nuremberg and Tokyo Tribunals and their heritage, s. GREPPI op. cit. 533–536.

<sup>124</sup> Ibid. 539–540.

<sup>125</sup> Principles III and IV, „Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal”, adopted by the International Law Commission of the United Nations, 1950, s. also GREPPI op. cit. 535.



individual can be held criminally liable and be punished, a collective cannot bear criminal responsibility therefore collective responsibility would be a theoretic notion with no practical results or consequences, even more, it could divert attention from individual responsibility.<sup>126</sup> So what purpose would the acceptance of the notion of collective guilt or collective responsibility serve?

State policy is formed and executed by individuals and since the state is an abstract entity, the best solution there is, is to catch the individuals. If in the end there is not one individual willing to execute a cruel state policy fearing criminal punishment, we have reached our goal. Law and enforcement should work together and law can only be effective if it can be enforced. International law generally suffers from a lack of top-down enforceability. The measures available in international law to enforce its rules are weak, hazy and not effective. It is precisely individual responsibility under international criminal law that makes international norms enforceable. This notion is a rare but welcome constraint on national sovereignty.<sup>127</sup>

This question gets particular relevance today as the International Criminal Court starts functioning. It is concentrating on punishing individuals and it puts the primary responsibility of prosecution on national courts who are also dealing with individuals. This system is hoped to result in an increased activity of prosecution of war crimes around the world, both on the international and national level. Moreover, to look at a broader picture, collective responsibility would not help peace-processes either. To stigmatize a whole nation as guilty in committing a crime is a seed for further violence and hostilities.<sup>128</sup> Finally, it seems there is anyway too much mitigating factor for crimes committed in war and mostly only a small proportion of the real perpetrators are held responsible.<sup>129</sup>

<sup>126</sup> „Once a group is identified as collectively responsible for a harmful situation, we forget about the individual actions which lead to this situation.” Gregory F.MELLEMA: *Collective Responsibility*. Amsterdam–Atlanta, Editions Rodopi B.V., 1997. 37.

<sup>127</sup> S. SIMPSON op. cit. 55.

<sup>128</sup> „An important idea behind the notion of individual criminal responsibility for certain conduct is to avoid stigmatizing a particular group of people as criminal, including, for instance, a particular party to an armed conflict, as this may make future peace and reconciliation more difficult to achieve.” S. BOOT op. cit. 304.

<sup>129</sup> “There is already altogether too much mitigation of legal liability for criminal action in war. A single act of murder in domestic society is treated as a serious matter by the law. For a variety of reasons – retribution, social defense, deterrence, and so on – it is held to be of great importance to bring the murderer to account. When an unjust war is fought, the result may be the wrongful killing of many millions of innocent people – murder millions of times over – but who is ever brought to account?” S. McMAHAN op.cit. 11. See also: “when unjust wars are fought and vast numbers of innocent people are slaughtered, it usually turns out, by some sort of legal alchemy, that no one is responsible, no one is guilty, no one is liable, and no one is punished – a happy

Or is the notion of collective responsibility a term that could be used in its non-criminal sense? According to modern international law, criminal responsibility can only be individual, and this is, according to the present author's view, fair so, considering the problems raised above, notably the difficulties in proving level of involvement of the members of the collective's or their possibility of withstanding the 'collective will'. Eventual criminal responsibility of a 'collective', or a group of persons, should be tackled through different legal mechanisms, such as criminal enterprises, criminal organizations or new forms. However, arguments for the sharing of the collective in crimes that can to a certain extent be attributable to it could make sense in a non-criminal law, but rather moral, social or political sense, or through reparation according to the rules of international law.

Therefore the establishment of other forms or responsibility of the collective may be sensible, but shall not affect the criminal responsibility of the individual, except if these also constitute excuses from criminal responsibility according to the already established criminal dogmatics.

An attempt at sharing responsibility between individual and the collective had been done with respect to the responsibility of the German nation for the holocaust or through provisions in satellite peace treaties where the state recognizes its responsibility and agrees to pay compensation. The Genocide Convention stipulates that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."<sup>130</sup>

In modern times, political pressure and opinion of the general public can often constitute serious pressure. In everyday talk, Hutus were responsible for the Rwandan genocide, the US was responsible for torturing prisoners in Guantanamo or in Abu Ghraib, the US and UK were responsible for attacking Iraq on false grounds, the Serbs were responsible for the Srebrenica massacres, Afghanistan was responsible for harboring Al-Qaeda and indirectly for the terrorist attacks carried out by it, Palestinians are responsible for the suicide bombers and other terrorist attacks and Israelis are responsible for killing innocent civilians in Gaza.

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outcome for all those whose guilt is reciprocally diminished by the guilt of others until there is none left for anyone at all." Ibid. 11.

<sup>130</sup> Article 9 of the Genocide Convention.

But of course these are broad generalities and no one really thinks that every single Hutu, US and UK citizen, Afghani, Serb, Palestinian or Israeli is responsible even in the political or moral sense, because some, or even many of them may have opposed their government's actions. Of course we can claim that they elected their governments, but this does not seem to be a sound argument. Thomas Franck, who acted as counsel for Bosnia-Herzegovina in the 1996 ICJ case<sup>131</sup>, argued that state responsibility for genocide as examined by the ICJ and individual criminal responsibility as examined by the ICTY are not contradicting, but paralelly viable mechanisms<sup>132</sup>.

However, he also argues that “to blame an entire people, the population of the state, for the acts of the state would be to assert a discredited notion of ‘collective guilt.’ We all celebrate the emergence of a human rights regime that recognizes the rights of the individual as distinct from, and sometimes even in opposition to, those of the state.”<sup>133</sup> He adds: „[b]ut, just as obviously, even in the new era of individual rights and responsibilities, the state has not ceased to exist. It is, and it acts, and it must be held accountable. When the state commits a great evil, it cannot be allowed to escape responsibility by the punishment of a few leaders.”<sup>134</sup> However, state responsibility<sup>135</sup> does not represent holding every member of the state guilty under ‘collective guilt’, but rather sharing in remedying the consequences of violations by the state<sup>136</sup>.

Still, raising collective (social, moral or political) responsibility bears the great danger of simplifying and generalizing but could also motivate future groups to withstand wrongdoings committed in their name. An additional idea could be a way to at least identify the group and members of the group who were indeed responsible for violations, or to examine how the collective – the citizens, members of the group – could have prevented or stopped the violations. This should, however, not lead to diminishing the individual's criminal responsibility but rather identify the group's additional, non-criminal responsibility. All in all, different forms of responsibility, be it criminal, social, moral or political, may have a (non-legal) effect on each other, but, given the conclusions drawn above,

<sup>131</sup> Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), 1996 I.C.J., Judgment of 11 July 1996.

<sup>132</sup> FRANCK op. cit. 568–569.

<sup>133</sup> Ibid. 569.

<sup>134</sup> Ibid. 569.

<sup>135</sup> On state responsibility, s. SZABÓ, Marcel: *A jóvátételi cikkek kodifikációja az ENSZ Nemzetközi Jogi Bizottságában*. Budapest, Pázmány Egyetem Kiadó, 2007. 120–121.

<sup>136</sup> FRANCK op. cit. 571.

other forms of responsibility should not have an effect on individual criminal responsibility, unless these constitute any of the notions known in criminal law that could diminish or negate individual criminal responsibility.

In sum, it seems neither correct nor helpful to engage in a discussion over collective responsibility purely in the criminal term, because “[o]nly individualized justice could ensure the relevance and meaningfulness of international law. Abstract entities were out, flesh and blood human beings were in”.<sup>137</sup>

### 2.3. Overview of international obligations to repress war crimes

International humanitarian law and international criminal law include a variety of obligations on national repression. A common element of these obligations is that they direct states what to do but do not specify how they should do it. International treaties usually define an obligation to reach a certain result – the punishment of certain crimes –, which implies that states are bound to adopt internal legislation which satisfies this objective in any way they see fit<sup>138</sup>. This is obvious given considerations of state sovereignty<sup>139</sup>: such obligations usually mean a self-restriction of sovereignty on the side of states, the way they comply with such obligations has to be left to them so that it conforms to their legal culture, legal system and principles. An account of these obligations follows, including an early analysis of possible difficulties in their application.

The obligation of states to repress violations of international humanitarian law is very clearly detailed in various treaties. The Geneva Conventions / Additional Protocols obligations are based on a three-pillar system<sup>140</sup>: obligation to repress or suppress grave breaches and the two elements of the *aut dedere aut judicare* principle: the obligation to search for persons having committed grave breaches and an obligation to try them or hand them over to another state.<sup>141</sup> Contents of these elements have been further developed by customary law and

<sup>137</sup> SIMPSON op. cit. 56–57.

<sup>138</sup> S. FICHET-BOYLE – MOSSÉ op. cit. 879.

<sup>139</sup> Ibid. 879.

<sup>140</sup> PICTET (1995) op. cit. 362.

<sup>141</sup> Common Article 1 of the Geneva Conventions and the obligation to „ensure respect” for the provisions of the Convention also oblige States, although on a more general basis, to eventually repress violations. S. VARGA, Réka: Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt. (War crimes procedures in front of domestic courts) In: KIRS, Eszter (ed.): *Egységesedés és széttagolódás a nemzetközi büntetőjogban*. Studia Iuris Gentium Miskolcensis – Tomus IV. Miskolc, Miskolc University – Bíbor Press, 2009.

by international treaties, such as the statutes of international tribunals or the Rome Statute of the International Criminal Court.

Specific aspects of the above mentioned measures have been also developed or overwritten by states and international treaties, both due to practical considerations and following an urge to make such measures more effective. Such developments have been particularly significant in two fields: one field is the increasing acceptance of the grave breaches regime for violations committed in non-international armed conflicts<sup>142</sup>, the other is in the field of interpretation and application of the *aut dedere aut judicare* principle<sup>143</sup>.

The three-pillar system of the Geneva Conventions and Additional Protocol I bases itself on the differentiation between serious violations (grave breaches) and other violations, and on a practical necessity to have these violations punished by any state. The treaties themselves list grave breaches that states are obliged to punish<sup>144</sup>. For other violations, there is simply an obligation to suppress them, leaving the method of such suppression to states, which may, obviously, also include penal sanctions. The *aut dedere aut judicare principle* stems from the fear that perpetrators of serious offences would use conflicts between national jurisdictions to escape criminal liability and thus seeks to establish a global, universal solution.

In the understanding of the Geneva Conventions and Additional Protocol I, grave breaches are the most serious violations of the rules, committed in international armed conflicts; other violations committed in international armed conflicts and violations committed in non-international armed conflict are simply labeled as “violations”, “breaches” or “acts contrary” to the Conventions/Protocols. The difference, as noted above, lies partly in the obligation of sanctioning.

In addition, as already noted above, Additional Protocol I introduces the term “war crimes”<sup>145</sup> which mean grave breaches of the Conventions and Additional Protocol I. The relation between war crimes and grave breaches has often been confusing; except for the differentiation discussed above, the difference is

<sup>142</sup> Although it cannot be clearly stated that this became customary law. S. LINDSAY MOIR: Grave breaches and internal armed conflicts. *Journal of International Criminal Justice*, 2009/7/4. 763–787.

<sup>143</sup> Developments regarding the universal jurisdiction principle will be discussed in detail in Chapters 2. 4. and 3.3.2. of the present work.

<sup>144</sup> Some authors derive the obligation for repression also from *pacta sunt servanda*. S. FICHET-BOYLE – MOSSÉ op. cit. 871.

<sup>145</sup> Article 85 para 5 Additional Protocol I: „Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”

also said to be that war crimes are crimes committed in war and criminalized in international law - in other instruments than the Geneva Conventions and Additional Protocols, such as the Charter of the Nuremberg International Military Tribunal or in customary law-, and grave breaches are terms introduced by the Geneva Conventions and Additional Protocol I<sup>146</sup>.

Another difference between war crimes and grave breaches is that war crimes entailed international criminal responsibility, while grave breaches didn't, for the reason that the Geneva Conventions left it to states to punish these<sup>147</sup> – this is partially why the *aut dedere aut judicare* principle was adopted. Although the war crimes regime seems to be more advancing<sup>148</sup> to the detriment of the grave breaches regime, the undoubted advantage of the latter is the universal ratification of the Geneva Conventions as opposed to a much smaller number of parties to the ICC Rome Statute. However, war crimes and conditions of accountability in the Rome Statute are more articulate, elements of crimes are detailed, and with a growing number of case law of the ICC, important international jurisprudence will be attached to it as an important secondary source: all in all, it is frequently observed that the war crimes regime is more effective.

Moreover, the regime separating violations committed in the context of international and non-international armed conflicts was partially overwritten by the Statutes of the ICTY and ICTR and the Rome Statute of the ICC, in that many violations committed in non-international armed conflicts were also regarded as war crimes. This came parallel with the practice of an emerging number of states which, in their penal legislation, penalized violations committed in non-international armed conflicts the same way as those committed in international armed conflicts. Thus, the difference between crimes committed in international or non-international armed conflicts seems to be diminishing and the term “war crimes” includes both kinds of violations.

Other humanitarian law treaties, such as Protocol II to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict also define grave breaches with a similar penalizing obligation and the *aut dedere aut judicare* principle<sup>149</sup> as present in the Geneva Conventions / Additional Protocol

<sup>146</sup> S. Marko Divac ÖBERG: The absorption of grave breaches into war crimes law. *International Review of the Red Cross*, March 2009/873. 163–164.

<sup>147</sup> Ibid. 165.

<sup>148</sup> S. James G. STEWART: The Future of the Grave Breaches Regime Segregate, Assimilate or Abandon? *Journal of International Criminal Justice*, 2009/7/4. 855–877.

<sup>149</sup> S. DEÁK, Ildikó – VARGA, Réka: A kulturális javak fegyveres összeütközés esetén való védelméről szóló 1954. évi Hágai Egyezmény és jegyzőkönyvei. (The 1954 Hague Convention

I. Thus, the obligations for penalizing certain acts come from a number of treaties which states have to observe.

Due to the underlying understanding of the grave breaches regime that it is the states that are responsible to carry out penal procedures, the Geneva Conventions and Additional Protocol I did not detail the method how such violations shall be included in their penal legislation<sup>150</sup> nor did they give any guidance on the procedures themselves except for the requirement of fair trial guarantees<sup>151</sup>. The Commentary is also mainly silent on this issue, with only noting that legislation shall provide sanctions and it shall not be left to the judge to deal with these<sup>152</sup>.

Most probably the difficulties in adopting proper legislation and ensuring effective procedures were not foreseen by the drafters of the Geneva Conventions. While many states seemingly complied with the obligations, it only turned out during procedures in the prosecutorial phase or during trials how difficult such a task can be. Hence, the word “effective” received particular significance, although not specifically analyzed in the Commentary: legislation merely adopted to demonstrate a state’s compliance with international law but not enabling effective penal procedures is obviously not enough. Although this statement may seem to be just too obvious, states often carelessly satisfied themselves with the knowledge that legislation – any legislation - was in place without caring too much about their practical usefulness.

Customary law seemed to largely adopt the obligation to repress grave breaches, at least the ICRC Customary Law Study<sup>153</sup> states so, to which no substantial opposition was formed - to this relevant part. The Study affirms that states have an obligation to “ensure respect” for international humanitarian law<sup>154</sup>, that serious violations of international humanitarian law constitute war

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on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols) *Műemlékvédelem*, 2008/52/3. 200.

<sup>150</sup> S. GELLÉR, Balázs: A nemzetközi jog hatása a büntetőjogi felelősségre (Effects of international law on criminal responsibility). In: BÁRD, Károly – GELLÉR, Balázs – LIGETI, Katalin – MARGITÁN, Éva – WIENER, A. Imre: *Büntetőjog – Általános Rész*. Budapest, KJK-KERSZÖV, 2003. 302.

<sup>151</sup> S. common Article 3 to the Geneva Conventions or Article 75 of Additional Protocol I.

<sup>152</sup> S. PICTET (1995) op. cit. 363.

<sup>153</sup> The Study does not have any legal binding effect as to what may be considered as customary law or not, it represents the outcome of the ICRC’s research on the issue. Therefore the rules adopted in the ICRC Customary Law Study are not necessarily of a customary nature. Indeed, many criticism appeared after the publication of the study, mainly related to rules concerning weapons and methods of warfare. It seems, however, that no substantial criticism was made to the „Implementation” and „War Crimes” part of the Study.

<sup>154</sup> Louise DOSWALD-BECK – Jean-Marie HENCKAERTS: *Study on Customary International Humanitarian Law*. Cambridge, ICRC – Cambridge, 2005. Rule 139.

crimes<sup>155</sup> and that states must investigate war crimes and prosecute them<sup>156</sup>. The Study also has two specific rules as to the substance of prosecutions: states have a *right* to vest universal jurisdiction over war crimes<sup>157</sup>, and the non-application of statute of limitations<sup>158</sup>. Consequently, according to the Study, there is a customary obligation to repress war crimes, but not all aspects of the conventional obligations are reflected in customary law.

#### **2.4. Development of the concept of universal jurisdiction with respect to grave breaches**

Although the obligation to exercise universal jurisdiction could be seen as an inherent part of the repression obligation, the concept is rooted from different areas than international humanitarian law and its application is more controversial than the rest of the repression provisions. Since universal jurisdiction is discussed separately in several places below in the different chapters, a general introduction to its formation and exact meaning seems to be necessary.

Although to date there is no precise manifested definition accepted for universal jurisdiction in international law, it can best be described as jurisdiction over offences committed abroad by non-resident aliens, where such offences are not posing a threat to the interests of the state or give rise to effects within its territory. Although this definition probably stands its place, universal jurisdiction is more often defined in the negative: a ground of jurisdiction which does not require any link or nexus whatsoever with the forum state<sup>159</sup>, and the state is nevertheless permitted to exercise jurisdiction.<sup>160</sup> Another common element to grasp universal jurisdiction may be that it is linked to the nature of the crime<sup>161</sup>.

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<sup>155</sup> Ibid. Rule 156.

<sup>156</sup> Ibid. Rule 158.

<sup>157</sup> Ibid. Rule 157.

<sup>158</sup> Ibid. Rule 160.

<sup>159</sup> S. Roger O'KEEFE: Universal Jurisdiction, Clarifying the Basic Concept. *Journal of International Criminal Justice*, 2004/2. 745.

<sup>160</sup> S. MERON (1995) op. cit. 568. S. also Jean D'ASPREMONT: Multilateral versus Unilateral Exercises of Universal Criminal Jurisdiction. *Israel Law Review*, 2010/43. 303.

<sup>161</sup> S. Karinne COOMBES: Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations? *George Washington International Law Review*, 2011/43. 425.



In other words, universal jurisdiction is often also described as jurisdiction that ‘any’ or ‘every’ state can exercise<sup>162</sup>.

According to O’Keefe, universal jurisdiction is a form of jurisdiction to prescribe – or, in other terminology, legislative jurisdiction. Differentiating from the jurisdiction to enforce, namely the authority to arrest, detain, prosecute, try, sentence and punish, legislative jurisdiction means the states’ authority to criminalize a given conduct<sup>163</sup>. While jurisdiction to enforce is strictly territorial, ie. a state can only exercise its enforcement powers within its territory<sup>164</sup>, jurisdiction to prescribe can be extraterritorial. Jurisdiction based on nationality, passive personality or protective jurisdiction are all extraterritorial forms of jurisdiction, as is universal jurisdiction.

Certain authors separate a third category, jurisdiction to adjudicate, but acknowledge that “[s]ince the jurisdiction to adjudicate hinges on the legislator entrusting the judiciary with the power to prosecute crimes short of any link with the national public order, it could be said that universal jurisdiction simultaneously [to jurisdiction to adjudicate] involves a question of jurisdiction to prescribe.”<sup>165</sup>

Hence, in the case of universal jurisdiction, the state prescribes certain conducts as being under the criminal enforcement jurisdiction of the state – but, naturally, strictly on its territory. Still, as O’Keefe mentions, “while *jurisdiction* to prescribe and *jurisdiction* to enforce are mutually distinct, the act of prescription and the act of enforcement are, in practice, intertwined. A state’s assertion of the applicability of its criminal law to given conduct is actualized, as it were, when it is sought to be enforced in a given case.”<sup>166</sup>

The traditional example of universal jurisdiction is piracy. Irrespective of the crimes in question, be it piracy or war crimes, universal jurisdiction serves the interest of the community of states, although for different reasons. The rationale that any state can exercise jurisdiction over piracy primarily stems from the fact partly that pirates were enemies of humankind, and partially on that that the crimes were committed on the high seas against nationals of various states, making the exercise of jurisdiction based on the traditional jurisdictional

<sup>162</sup> O’KEEFE op. cit. 746. O’Keefe mentions that obviously ‘any’ or ‘every’ state would mean any or every state that had become party to the given treaty. In case universal jurisdiction is based on customary law, this would really mean any or every state as bound by customary law.

<sup>163</sup> Ibid. 736.

<sup>164</sup> Naturally, a state may exercise its enforcement powers on other state’s territory with its consent. International law accepts rare exceptions to this rule, but these are limited to armed conflicts. Ibid. 740.

<sup>165</sup> S. D’ASPREMONT op. cit. 304.

<sup>166</sup> O’KEEFE op. cit. 741.

principles often difficult, even if the concerned states were willing to exercise jurisdiction<sup>167</sup>.

Hence, universal jurisdiction was founded based on procedural necessity and it was rather a right than an obligation. Indeed, Grotius - whose formula '*aut dedere aut punire*' was the forerunner of the *aut dedere aut judicare* principle - thought that this principle should apply to piracy or crimes that later became war crimes on the basis of considerations of a *civitas maxima*.<sup>168</sup> As Grotius stated, "[t]he fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law [...] of nations in regard to any persons whatsoever."<sup>169</sup> Similar reasons led to the exercise of universal jurisdiction in the case of slave trading.<sup>170</sup>

However, with war crimes, the motives were somewhat different: the concerned states were either not willing to exercise jurisdiction (when for example the perpetrator was an acting functionaire of the standing government or the crimes were perpetrated as a result of government policy), or the state's judicial system simply collapsed. It was more the consciousness of the international community that led to the adoption of universal jurisdiction for war crimes, to ensure that perpetrators don't escape punishment; consequently, the exercise of universal jurisdiction became an obligation.<sup>171</sup> Hence, in the case of war crimes, it was not

<sup>167</sup> S. COOMBES op. cit. 427.

<sup>168</sup> For an analysis of the evolution of the *aut dedere aut judicare* principle, s. M. NYITRAI, Péter: Az „aut dedere aut judicare” elvének fejlődése a nemzetközi büntetőjogban. (Evolution of the „aut dedere aut judicare” principle in international criminal law). *Collega*, March 2001/V/1. 24–27.

<sup>169</sup> Referred to and cited by COOMBES op. cit. 426–427. Original quote from Hugo GROTIUS: *De Jure Belli Ac Pacis, Libri Tres* 504. Carnegie, trans. 1925, 1612.

<sup>170</sup> S. Bartram S. BROWN: The Evolving Concept of Universal Jurisdiction. *New England Law Review*, 2001/35/2. 391–392, and Georges ABI-SAAB: The Proper Role of Universal Jurisdiction. *Journal of International Criminal Justice*, 2003/1. 560.

<sup>171</sup> S. BROWN op. cit. 394. Brown also discusses whether universal jurisdiction can be *erga omnes*, considering that a treaty can only be binding on states-parties. The present author considers that due to the universal ratification of the Geneva Conventions, universal jurisdiction related to grave breaches can definitely be considered as an *erga omnes* obligation. However, it has to be noted, that the ICRC Customary Law Study, in its Rule 157 refers to universal jurisdiction as a right and not as an obligation: „States have the *right* to vest universal jurisdiction in their national courts over war crimes.” (emphasis by the author). This is reflecting, among others, the military manuals of states, which generally refer to universal jurisdiction as a possibility rather than an obligation, through the use of terms like „may”, „have the competence”, etc. S. [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule157](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule157) [last visited on 21 September 2010]. Regarding the relationship between *ius cogens*, *erga omnes* and universal jurisdiction,

that much the procedural necessity, but rather the morale of the world community that led to this concept.

This was also underlined by three judges in the *Finta* case in their dissenting opinion, when they said that “[...] following the cessation of hostilities or other conditions that fostered [...] commission [of war crimes or crimes against humanity], there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.”<sup>172</sup>

Universal jurisdiction was often seen as being recognized by post-World War II trials, including the Nuremberg trials, although the Nuremberg Charter did not refer to universal jurisdiction<sup>173</sup>. The 1949 Geneva Conventions were the first international instruments to accept universal jurisdiction and were followed by the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>174</sup>. The Genocide Convention is also often cited as providing basis for universal jurisdiction<sup>175</sup>, although it does not expressly say it.

However, the main source of universal jurisdiction remains customary international law<sup>176</sup>, although it is still debated, precisely which crimes fall under the notion. A general understanding seems to be that the following crimes

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s. Cherif M. BASSIOUNI: *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligations Erga Omnes. Law and Contemporary Problems*, 1996/59. 63 and 65.

<sup>172</sup> Supreme Court of Canada, the *Finta* case (*R. v. Finta* [1994] 1 S.C.R. 701), Judgment of 24 March 1994, Dissenting opinion of Judge La Forest, Judge L’Hereux-Dubé and Judge MacLachlin.

<sup>173</sup> S. COOMBES op. cit. 428.

<sup>174</sup> Article 5: „1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

<sup>175</sup> Article 6: „Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

<sup>176</sup> COOMBES op. cit. 432.

fall under universal jurisdiction: piracy, slavery, crimes against humanity, war crimes, genocide, apartheid and torture<sup>177</sup>.

Controversies around the notion, exact meaning and application of universal jurisdiction have prompted many organizations to deal with the issue. The numerous resolutions, guidelines, statements and other documents dealing with this question include the 1999 Amnesty International document „Universal jurisdiction: 14 Principles on the effective exercise of universal jurisdiction”<sup>178</sup>, the 2001 Princeton Principles on Universal Jurisdiction<sup>179</sup>, the 2005 Resolution of the *Institut de Droit International* (IDI) on universal jurisdiction<sup>180</sup>, REDRESS/FIDH Reports on universal jurisdiction<sup>181</sup>, the Cairo-Arusha Principles<sup>182</sup>, and the Report of the UN Secretary General<sup>183</sup> after deliberations by the General Assembly’s Sixth Committee with the working title „The scope and application of the principle of universal jurisdiction”.

As it will become clear from the sections below dealing with universal jurisdiction, by today, this form of jurisdiction became often, but perhaps not

<sup>177</sup> Ibid. 433.

<sup>178</sup> S. <http://www.amnesty.org/en/library/info/IO53/001/1999> [last visited on 31 October 2012]

<sup>179</sup> The Princeton Principles assert, among others, that national judges may rely on universal jurisdiction even in the absence of relevant national law (Principle 3), that the official position of a person may not relieve him/her of criminal accountability (Principle 5). The Princeton Principles provided ground for many subsequent documents or guidelines regarding universal jurisdiction.

<sup>180</sup> The Resolution states that states may exercise universal jurisdiction over crimes under international law. It subjects such exercise to a set of limitations including, in particular, the principle of subsidiarity and the observance of human rights. Regarding application of universal jurisdiction in absentia, the Resolution adopted a middle course by allowing investigative measures while excluding trials in absentia. For an analysis, s. Claus KRESS: Universal Jurisdiction over International Crimes and the Institut de Droit international. *Journal of International Criminal Justice*, 2006/4/3. 561–585.

<sup>181</sup> S. REDRESS-FIDH: *Universal Jurisdiction in Europe*. REDRESS-FIDH, 1999. REDRESS-FIDH: *Extraterritorial Jurisdiction in the 27 Member States of the EU*. REDRESS-FIDH, December 2010.

<sup>182</sup> The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective. S. [http://www.kituoachakatiba.org/index2.php?option=com\\_docman&task=doc\\_view&gid=116&Itemid=27](http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=116&Itemid=27) [last visited on 31 October 2012] The document is an outcome of two experts meeting held under the auspices of the Africa Legal Aid in Cairo (2001) and in Arusha (2002). For an analysis of the Principles, s. Evelyn A. ANKUMAH: *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective*. ASIL Proceedings of the 101st Annual Meeting (March 31-April 3, 2004). American Society of International Law 2004/98. 238–240.

<sup>183</sup> Report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/65/181).

enough used. However, it still raises important questions as to its exact contents and bears serious difficulties around its application both in the legal, practical and political sense<sup>184</sup>.

Although the list of documents dealing with universal jurisdiction mentioned above is not exhaustive, it demonstrates the value and level in which different aspects of universal jurisdiction were tackled. Eventhough these documents include important observations around the meaning and application of universal jurisdiction, a detailed discussion of the documents referred above would exceed the limits of the present work. However, certain points will be referred to in case they bear a direct significance with the topics discussed in the book. Specific questions of universal jurisdiction, such as its relation with the principle of legality, the restrictions applied to it or practical problems around its application will be discussed under the relevant chapters.

## 2.5. Law as a weapon

Enforcement of international law has always been difficult, although it has gone through a fast development in the past sixty years. Reference to violation of the law of war has probably never been as crucial and influential on warfare as today. Even superpowers were inclined to change their actions as a consequence of world pressure urging to respect international law. It may be observed that, even more now than before, considerations of avoidance of IHL violations are taken into account already during the strategic set-up of military operations, due to, in part, of the close and immediate media attention.

Considering the closure of the Guantanamo detention facility, the review of detention conditions, interrogations and procedures and the release of numerous prisoners by President Obama was doubtless largely the result of loud protests against interrogation techniques, the circumstances in which detainees were held and the fact that they had been held without any due legal procedures having been initiated against them. The need to respect the rules of armed conflicts has tied the hands of many financially and, as to the war machinery and equipment they had developed in organization and technology, technically strong states in the way they waged war and was therefore used as a 'shield' by their much weaker opponents.

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<sup>184</sup> S. Wolfgang KALECK: From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008. *Michigan Journal of International Law*, 2009/30/927. 931.

Playing with legal arguments therefore became a basic instrument – mainly in asymmetric conflicts – and has consequently a huge effect on how wars are waged in our days. This phenomenon, linked together with the recognition of individual criminal responsibility for violations under international law, may be decisive in influencing leaders of conflicting states and non-state actors in how to act.

Since the core subject of the present work is domestic war crime trials, the significance and power of respect for the law must be underlined; the present sub-chapter shortly deals with the phenomenon often labeled as ‘lawfare’.

„That this strategic military disaster [the detainee abuses in Abu Ghraib] did not involve force of arms, but rather centered on illegalities, indicates how law has evolved to become a decisive element – and sometimes the decisive element – of contemporary conflicts.”<sup>185</sup> This quote illustrates how much modern military forces realize that compliance with the law can be a tactical advantage – or disadvantage – to them. The consequence of which is that the possibility of sanctioning a wrongful act must be real: if the general feeling is that even if someone does something wrong he gets away with it, the theoretical presence of criminal sanctions does not have a deterring effect.

This was perfectly reflected in a change of approach of many states worldwide since the Second World War to the necessity to train soldiers on international humanitarian law. In Hungary for instance and in many other countries, a few years ago humanitarian law was seen as one of the ‘nice to have’ issues, but by today, the teaching of international humanitarian law has become a priority in both general and pre-deployment trainings, and the number one goal of the military commander – apart from fulfilling the mission – is to carry out the mission adopting all precautions possible in a way that there will be no legal hick-ups.

The term ‘lawfare’ is relatively new and primarily means that in today’s conflicts, law is used as a weapon. This phrase was first popularized in this meaning by the US Air-Force Colonel – now General – Charles J. Dunlap in a paper in 2001<sup>186</sup>. The questions Dunlap examined were situations in which relatively weak enemies of the United States used American values “dishonestly”

<sup>185</sup> Charles J. DUNLAP, Jr.: Lawfare – A Decisive Element of 21st-Century Conflicts? *Joint Force Quarterly*, 2009/54/3. 34.

<sup>186</sup> Colonel Charles J. DUNLAP, Jr. USAF: Law and military interventions: preserving humanitarian values in 21st century conflicts. S. <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> [last visited on 14 March 2012]

to undermine US military efforts. Dunlap notes that “[w]e must remind ourselves that our opponents are more than ready to exploit our values to defeat us, and they will do so without any concern about LOAC. Consider this disquieting statement from Chinese military leaders: «War has rules, but those rules are set by the West...if you use those rules, then weak countries have no chance...We are a weak country, so do we need to fight according to your rules? No.»<sup>187</sup>.

Later Dunlap extended the meaning of the expression to strategies of using the law as a substitute to traditional military means to achieve an operational objective<sup>188</sup>. The term today is understood both as a negative phrase and as a value-neutral term, in that the negative understanding would only incline that lawfare is solely a distort of legal principles to gain military advantage<sup>189</sup>; whereas the value-neutral understanding, more acceptable to the present author, would simply mean that contents and interpretations of the law of war are being questioned, discussed and analyzed by various players, including governments, international and non-governmental organizations, defence lawyers, courts and prosecutors – with all of them believing that they represent the true understanding of international law. Such discussions include the real meaning of “direct participation in hostilities”, the qualification of a conflict against terrorist groups or the legal frameworks of detaining and proceeding against so-called terrorists.

Since there is nothing new in the existence of legal discussions and different interpretations, this value-neutral understanding of lawfare simply inclines that – probably due to an enormous change of the features of today’s armed conflicts and consequently a difficulty in applying traditional legal frameworks to it – international law is widely debated among various players and the outcomes of such debates have a decisive effect on warfare – probably much more so than before.

According to all predictions and the common phenomena of today’s wars, 21<sup>st</sup> century wars are different from traditional conflicts<sup>190</sup>. Public opinion and

<sup>187</sup> DUNLAP (2009) op. cit. 36.

<sup>188</sup> For a summary of different issues of ‘lawfare’, s. <http://www.lawfareblog.com/about/> [last visited on 14 March 2012].

<sup>189</sup> S. for instance: The Lawfare Project, <http://www.thelawfareproject.org/> [last visited on 14 March 2012].

<sup>190</sup> Questions such as whether international humanitarian law applies to terrorist acts are also on the legal agenda. Although it has been generally accepted that those forms of terrorism that constitute armed conflict are consequently covered by international humanitarian law, an exact definition of terrorism has not been adopted yet. S. Elisabeth Kardos KAPONYI: *Fight Against Terrorism and Protecting Human Rights: Utopia or Challenge?* Budapest, Ad Librum Ltd, 2012. 13.

the opinion of the international community have a huge weight and can make a party to the conflict substantially weaker or stronger, both at home and at the international fora. Even super-powers cannot get away with serious breaches; the mistreatment of detainees in Abu Ghraib or in other detention facilities in Iraq<sup>191</sup> or the already mentioned questionable physical and legal treatment of detainees in Guantanamo had and still have a huge undermining effect on the US military, and this ultimately has a direct consequence on how to plan and execute their operations on the field.

A practical testimony to considerations of lawfare is the book “Unrestricted Warfare”<sup>192</sup>, written by two colonels in China’s People’s Liberation Army, discussing ways China can defeat technologically superior enemies such as the United States, and focusing on non-traditional military methods, such as the use of international law in order to avoid direct military action.

Interestingly, the application of universal jurisdiction is also often understood as part of modern lawfare. Henry Kissinger, after facing the possibility of prosecution in France, Chile, Brazil and England<sup>193</sup>, repeatedly warned of the ‘dangers’ of universal jurisdiction<sup>194</sup>. The danger of application of this extraordinary jurisdiction also prompted Israel to issue a travel ban on its commanders to certain countries for fear of prosecution for acts committed during the Gaza conflict in 2008/2009<sup>195</sup>.

What is more, as referred to by Dunlap, certain American scholars of military law even came to the conclusion that “a »new« kind of international law is emerging that is »profoundly undemocratic at its core« and »has the potential to undermine American leadership in the post-Cold War global system«. With respect to armed interventions, [such writers] insist that the »American military is particularly vulnerable« because of the »unrealistic norms« – especially

<sup>191</sup> Abu Ghraib was probably the most known but definitely not the only case of mistreatment of prisoners. Another well-covered case was the Baha Mussa case in the United Kingdom, s. <http://www.bahamousainquiry.org/> [last visited on 27 March 2012].

<sup>192</sup> Qiao LIANG – Wang XIANGSUI: *Unrestricted Warfare*. Beijing, PLA Literature and Arts Publishing House, 1999. In particular Chapter 5: New Methodology of War Games deals with the use of international law for technologically weaker states.

<sup>193</sup> S. Kissinger may face extradition to Chile, *The Guardian*, 12 June 2002 <http://www.guardian.co.uk/world/2002/jun/12/chile.pinochet> [last visited on 15 March 2013]

<sup>194</sup> Henry KISSINGER: The Pitfalls of Universal Jurisdiction. In: Henry KISSINGER: *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century*. New York, Simon and Schuster, 2001. 280.

<sup>195</sup> S. Travel advisory issued for top IDF officers, 19 January 2009, <http://www.ynetnews.com/articles/1,7340,L-3658823,00.html> [last visited on 15 March 2013].



in relation to collateral damage – propounded by the advocates of this new international law.» If the trends of international law are allowed to mature into binding rules,« they say, »international law may become one of the most potent weapons ever deployed against the United States.«<sup>196</sup>

Indeed, if the presence of international law – which is, it must be mentioned, in no way new and has always been binding –, sends such waves of shock in the world's most potent armed forces, it does mean that it has a significant effect on the operations of such forces. As Dunlap demonstrates, the influence of military legal advisers on operational planning and execution has greatly increased over the past few decades, in an attempt to avoid or minimize allegations of violation of law<sup>197</sup>.

Dunlap notes that in the US armed forces, since the early 1990s, military legal advisers played an increasing role in vetting targets, drafting rules of engagement, and advising on operational issues, to the satisfaction of their commanders. Since then, military legal advisers have been present in command posts and operational cells, to avoid legal “incidents”. The presence of military legal advisers in operations and the requirement that they review operation plans, rules of engagement, policies and directives has since been institutionalized<sup>198</sup>. Other states have also followed such procedures and thus training of commanders and military legal advisers in international humanitarian law has become more and more sophisticated.<sup>199</sup>

<sup>196</sup> Colonel Charles J. DUNLAP, JR.: Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts. Prepared for the Humanitarian Challenges in Military Intervention Conference Carr Center for Human Rights Policy Kennedy School of Government, Harvard University Washington, D.C., November 29, 2001. 1. Available at <http://people.duke.edu/~pfeaver/dunlap.pdf> [last visited on 25 March 2013]. The origin of the quote is: David B. RIVKIN, Jr. – Lee A CASEY: The Rocky Shoals of International Law. *The National Interest*, Winter 2000/01. 35.

<sup>197</sup> „[...] most senior U.S. military leaders, and certainly those in the Air Force, accept that the fact or perception of LOAC violations can frustrate mission accomplishment. [...] Consequently, savvy American commanders seldom go to war without their attorneys. [...] In short, the predominance of law and lawyers in U.S. military interventions is as much a concession to the verities of modern war as it is an altruistic commitment to human rights.” Ibid. 5–6. This statement particularly reveals the evolving influence of law on the waging of war, considering that not more than a decade ago military legal advisers often complained about commanders not taking them seriously and only regarding them as uncomfortable obstacles to them pursuing their military tactics.

<sup>198</sup> Ibid.

<sup>199</sup> In Austria for instance, a military legal adviser can only be deployed to operations if he/she has concluded a high-level 3-week course on international law (called the Vienna Course on International Law for Military Legal Advisers, where the present author is co-director of the course) – a major part of which is international humanitarian law.

It goes without saying that public opinion has a strong political influence which in turn may, and most probably will, result in military advantage or disadvantage: the enemy will not hesitate for a moment to use public hesitation or discontent either at home or at the international level to further its military goal. If a soldier is blamed for any act that could qualify as a war crime, the only way his/her state can escape or at least diminish the political and military consequences is bringing the perpetrator to justice. This seems to be the most effective way for the state to demonstrate that these persons were not executing illegal state policy, but the wrongful acts were one-off actions. Obviously, this was also used for its reverse: when soldiers were believed to be carrying out an illegal state policy through their illegal actions, prosecution of low-ranking soldiers was basically to shield the state policy and the responsibility of high level commanders.

The fact that law has become so paramountly important in today's warfare, more decisive in exerting genuine influence on warfare than it was before, calls for a special attention to respect for the law and makes it the ultimate interest of warring parties to demonstrate their willingness to abide by the rules in the form of enforcement. This is why punishment of violations of the law of war is so important and is, or should be, in the best interest of states themselves.

## **2.6. A parallel example of extraterritorial jurisdiction: the US Alien Tort Statute**

The Alien Tort Statute, or Alien Tort Claims Act, is a section of the United States Code, adopted in the United States in 1789, originally in the Judiciary Act. Para 1350 of the USC says: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>200</sup>

At that time the rationale was to make remedies available for foreign citizens in the United States for violations of customary international law.<sup>201</sup> However, until the 1980s only very few cases were carried out based on this provision. Beginning with the *Filartiga*-case, increasing international concerns over human rights violations brought litigants to seek redress from the Alien Tort Statute.<sup>202</sup>

<sup>200</sup> 28 USC § 1350 – Alien’s action for tort, available at <http://www.law.cornell.edu/uscode/text/28/1350> [last visited on 27 May 2012]

<sup>201</sup> John HABERSTROH: The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue. *Denver Journal of International Law and Policy*, 2004/32/2. 239–241.

<sup>202</sup> S. <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> [last visited on 27 May 2012]

The first case that paved the way for a more extensive application of the Statute was the *Filartiga v Pena-Irala*, in 1980. Pena was the Inspector General of Police in Asunción, Paraguay, and was allegedly responsible for torturing and murdering Filartiga's son in retaliation for his father's political activism and views. The Filartiga family had been living in the US and was informed of the presence of Pena in the territory of the United States and brought a case against him under the Alien Tort Statute.

The District Court dismissed the case for lack of jurisdiction, arguing mainly that the law of nations does not entail a states' treatment of its own citizens. However, the US Court of Appeals reversed the decision by saying that the law of nations does contain state-sanctioned torture, and being free from torture developed into a norm of customary international law.<sup>203</sup> Filartiga won the case and was awarded 10,4 million USD for damages.

The Statute has provided ground for cases that resemble universal jurisdiction cases and are obviously linked to international crimes, but on the level of civil law claims. A civil claim for instance was filed against *Taylor Jr.*, son of Charles Taylor after he was apprehended on US territory, tried for torture and sentenced for 97 years of imprisonment in 2009. After his conviction, civil organizations in the US brought a claim against him based on the Statute and won, courts awarding over 22 million USD for damages.<sup>204</sup>

In the case against *Karadzic*<sup>205</sup>, the court held that "the ATCA [Alien Tort Claims Act] reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties."<sup>206</sup>

As is stated in *Wiwa v. Royal Dutch Petroleum Co.*, the acknowledged aim of the Statute is to enable victims of torture to sue their tormentors, recognizing the difficulty in bringing claims. As it is noted, „[o]ne of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue

<sup>203</sup> *Dolly M. E. Filartiga and Joel Filartiga, Plaintiffs-Appellants, v. Americo Norberto Pena-Irala*, Defendant-Appellee, No. 191, Docket 79-6090, United States Court of Appeals, Second Circuit. Decided June 30, 1980, Paras 24 and 32. S. <http://openjurist.org/630/f2d/876/filartiga-v-pena-irala> [last visited on 27 May 2012].

<sup>204</sup> S. [http://www.humanrightsusa.org/index.php?option=com\\_content&task=view&id=167&Itemid=150](http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=167&Itemid=150) [last visited on 27 May 2012].

<sup>205</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995). The case concerns torture, rape, and other abuses orchestrated by Karadzic.

<sup>206</sup> S. <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> [last visited on 27 May 2012]

in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as «not our business»,<sup>207</sup>.

This intention was further strengthened through the Torture Victim Protection Act, passed in 1991. Notably, the Act „ convey[s] the message that torture committed under color of law of a foreign nation in violation of international law is «our business», as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses »provide[s] scant comfort« to the numerous victims of gross violations if they are without a forum to remedy the wrong. [...] This passage supports plaintiffs' contention that in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts. If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for forum non conveniens, we will have done little to enforce the standards of the law of nations.»<sup>208</sup>

Another interesting aspect of the Alien Tort Statute is the acceptance of corporate liability, although there is a split of opinion as to the scope of it. Important cases had been based on the notion of corporate liability, such as the *Bauman, et al. v. DaimlerChrysler, et al.*, in which twenty-two plaintiffs claimed the automaker cooperated with the Argentinean junta during the 1970s “Dirty War”, the above mentioned case against *Shell Oil*, or cases against national railway services for their alleged role in deportations, such as the case against the *Hungarian Railway Services* on behalf of victims of the Hungarian Holocaust for participating in the deportation of Jews during the Second World War and

<sup>207</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, F.3d, (2nd Cir. 2000), quote available at: <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> [last visited on 27 May 2012].

<sup>208</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, F.3d, (2d Cir. 2000), quote available at: <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> [last visited on 27 May 2012].

confiscation of their goods.<sup>209</sup> This latter case was largely criticized for its serious historical and legal mistakes.<sup>210</sup> The case is still ongoing and is presently in the appeals phase.<sup>211</sup>

Cases based on the Alien Tort Statute can thus be considered as the civil-law mirrors of universal jurisdiction cases. The rationale for the establishment of such jurisdiction in the US is very similar to the rationale of universal jurisdiction. Both establish jurisdiction for a domestic court to try cases that are not triggering ordinary jurisdictions: neither the victim, nor the offender or the place of the commission of the acts are linked to the forum state, however, the reasons are the same: to prevent offenders escape liability.

Interestingly, criticism against both basis of jurisdictions are also similar: there is an increasing number of legal literature in the US raising attention on the international implications of the Alien Tort Statute and to the fact that it harms US external relations.<sup>212</sup> Obviously, in both cases, the judgment can only be enforced in case the offender is on US territory, which is another similarity with universal jurisdiction cases.

The US Alien Tort Statute is thus another expression of the intention to provide jurisdictional possibility to initiate cases concerning serious violations of international law. Although this form of jurisdiction is presently only available in the United States and does not concern criminal liability, its message is clear and, even together with its noticeable downsides, obviously plausible. At the same time the exercise of such form of extra-territorial jurisdiction by a state that has for fear of involvement of its own nationals often viciously attacked and criticized universal jurisdiction and has not become party to the International Criminal Court, two instruments aimed at providing very similar goals to the Alien Tort Statute, could be seen rather anomalous. Evenmore, as many American writers noted, the scope of protection of human rights came under a different light after

<sup>209</sup> <http://zsidok.network.hu/blog/zsido-kozosseghirei/megkezdozott-a-mav-elleni-holokausztper-chicagoban> [last visited on 27 May 2012]

<sup>210</sup> [http://index.hu/belfold/2010/02/12/humbug\\_a\\_mav-ellen\\_inditott\\_holokauszt-per/](http://index.hu/belfold/2010/02/12/humbug_a_mav-ellen_inditott_holokauszt-per/) [last visited on 27 May 2012]

<sup>211</sup> <http://nepszava.com/2012/01/amerika/mav-per-megvoltage-fellebbezesi-meghallgatas.html> [last visited on 27 May 2012]

<sup>212</sup> See for instance Theresa (Maxi) ADAMSKI: The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations. *Fordham International Law Journal*, 2011/34/6.

the 9/11 attacks, meaning the United States has come to its limits in this respect.<sup>213</sup> Taking these opinions into account when it comes to interest of US citizens and notwithstanding the otherwise plausible message the Alien Tort Statute was intended to send, criticism of applying double-standards could easily be attached to this US practice.

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<sup>213</sup> „Stewart Baker, the former general counsel of the National Security Agency, concludes «[w]e have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that.» Consequently, in security matters contemporary American discourse is pervaded by the notion that «[t]he time for legal maneuverings, extraditions and trials is past.»” DUNLAP (2001) op. cit. 18.



### 3. LEGAL PROBLEMS AROUND THE APPLICATION OF INTERNATIONAL CRIMINAL LAW

The present chapter examines the common problems that may arise during domestic application of international law. These problems will be discussed from different perspectives: first, from the perspective of inherent dilemmas and issues of international law-making, then examining common denominators and features of national legislation that may be of relevance for the often problematic application of international law, and finally analyzing the inherent hurdles of domestic jurisprudence through examining approaches and attitudes of domestic courts towards international law during its application, as well as the interaction between jurisprudence of international and national judicial bodies.

#### **3.1. Problems inbuilt in international law**

As is well known, international law by definition bears certain shortcomings in terms of precisuity, common understanding of terms, discrepancies in legal definitions, non-concise solutions or compromises. These are mainly due to the very features of international law and the specific circumstances in which international rules are adopted.

As is also commonplace, international law is based on fundamentally different notions than domestic law. Sovereignty of states, the dynamics of international politics, the weaknesses in enforcement mechanisms all contribute to certain discrepancies in international norms. When it comes to rules related to armed conflicts, such inconsistencies or results of compromises among states are to be found at several instances. When we think of the rules related to non-international armed conflicts, the difficulties in adopting a definition for aggression, or, closer to our topic, of the issues of direct application of international law and all the problems arising from it, we witness the consequences of these political and



other features of international law in general and international lawmaking and jurisprudence in particular.

The following sub-chapter deals with such hurdles that are inbuilt in international law. It starts with effects of the sovereignty principle on domestic implementation and penalization of certain acts, continues with problems that are consequences of international lawmaking, with a separate discussion on the issues of international law-national law relationship and questions of direct application of international law. The discussion follows with analyzing the effects of uncertainties around the legal definitions of crimes on domestic application, and conditions of their punishment in the Rome Statute with special attention to the complementarity principle, and lastly by examining the role the existence of the ICC and international jurisprudence have on domestic legislation.

### *3.1.1. Sovereignty and penalization*

One of the main expressions of state sovereignty is the power to decide which acts should be criminalized. Usually it is the state's discretion to define such acts, and it is put in form in national penal laws. Exception from this usually exclusive state power is the case when an international treaty obliges states to penalize certain acts. "In fact, it is a central feature of core crimes law that it bypasses the national legislature in order to directly regulate the behaviour of individuals."<sup>214</sup> Consequently, in certain cases it is not left anymore to the discretion of the state to decide on the penalization of certain acts, but the state is bound by international law to do so<sup>215</sup>.

This is the case with certain human rights treaties as well. In the case law of the past decades of the European Court of Human Rights, it has been manifested that the state is not only responsible for the acts of its organs, but also for acts of its individuals. This is the so-called "*Drittwirkung*": although the ECHR is applicable between the individual-government vertical relationship, the state will eventually be responsible for an individual-individual horizontal relationship as well, since in case it does not ensure the enforcement of certain rules in penalizing

<sup>214</sup> Ward N. FERDINANDUSSE: *Direct Application of International Criminal Law in National Courts*. The Hague, TMC Asser Press, 2006. 101.

<sup>215</sup> The development of penalization of acts considered as violations by the international community rooted in international humanitarian law. S. M. NYITRAI, Péter: A nemzetközi bűncselekmény koncepciója. (Concept of international crimes) *Jog-Allam-Politika*, 2010/1. 3.

these acts and so cannot guarantee adequate remedy for a violation<sup>216</sup>, it in the end could raise the responsibility of the state for violation of the European Convention on Human Rights<sup>217</sup>. Obviously, what is examined by the Court in such cases is whether the state is responsible for not providing adequate protection to its citizen through legislation, and it does not examine the responsibility of the individual for the specific act committed.<sup>218</sup>

This tendency is somewhat similar to the direct effect of certain international treaties to individuals, making individuals the subject of international law. Consequently, certain treaties not only oblige states to behave in a certain way, but they also oblige individuals through obligations to criminalize acts in order to protect persons from the actions of other persons.

The obligation of international humanitarian law treaties is an example. States are not always keen about such obligations, as they usually like to keep their influence and control over criminal legislation as an expression of their sovereignty, either for political or for legal reasons or both. The obligation to penalize certain acts does not only mean that the penalization of certain acts as criminal is decided on the platform of international law, but additional questions are also decided on the international level, such as their elements, the grounds for excluding criminal responsibility, the possibilities of amnesty, immunities or time-barring.

In the case of internationally formulated crimes, these questions are not left to the discretion of state authorities and so cannot be influenced by them. For this reason it is not uncommon that a state deliberately implements international crimes in a way that it still tries to exert certain influence over it, even if this is not in compliance with international law. Or else, the state chooses not to ratify the treaty, or to ratify it with reservations.<sup>219</sup> Eventhough, if the state fails to implement internationally defined crimes in its penal legislation manifested

<sup>216</sup> S. Pieter van DIJK – G.J.H. van HOOF: *Theory and Practice of the European Convention on Human Rights*. The Hague, London, Kluwer Law International, 1998. 74.

<sup>217</sup> The first appearance of *Drittwirkung* in the case law of the European Court of Human Rights was in *X and Y v. the Netherlands*, s. *X and Y v. the Netherlands*, A. 91, European Court of Human Rights, 26 March 1985.

<sup>218</sup> Regarding '*Drittwirkung*', s. GELLÉR, Balázs József: A legfőbb bírói fórum három végzésének margójára. *Fundamentum*, 2000/I. 115–116. <http://157.181.181.13/dokuk/00-1-07.PDF> [last visited on 27 January 2012]

<sup>219</sup> The provisions in the Rome Statute of the International Criminal Court on immunities and surrender of nationals to the Court have prompted many states to be hesitant to ratify it. The most reluctant state in this regard in Europe was the Czech Republic, which only ratified the Rome Statute in 2009, after considerable pressure put on it by the European Union.

in treaties ratified by it, the international provisions may, and shall be directly applied by domestic courts to avoid non-compliance with international law.

The direct application of an international treaty may raise questions of state sovereignty, especially in the criminal law field. However, through the ratification and promulgation of the treaty, and by the common reference in certain constitutions on recognizing the ratified international treaties as part of national law, the question may be solved. Still, for the benefit of certainty and clarity of the domestic legal system, and to ease the work of the prosecutors and judges, states, especially in continental legal systems, may choose to implement all international obligations thoroughly and then apply these national norms when actually complying with the international treaty. This question comes up not only in relation to direct application of international treaties, but also in relation to the self-executing rules: although such rules may be indeed self-executing, the question is how much the application of self-executing international rules serve the certainty and clarity of the domestic legal system.

To base legal procedures on national laws also safeguards the feeling of sovereignty of the state in forming its own criminal justice system. Therefore, apart from the binding international obligation, it is in the state's own interest to implement as best as it can the obligations arising from humanitarian law treaties. Ferdinandusse adds, that "[...] States' powers to shape their criminal laws are restricted primarily by the very fact that international law contains obligations for both States and individuals regarding the core crimes, rather than by the direct application of that body of law. After all, implementing legislation may give the States some opportunity to adapt core crimes law, but the substantial choices have already been made at the international level. Therefore, the extent to which State sovereignty can be protected by rejecting direct application and requiring implementing legislation is rather limited."<sup>220</sup>

The certainty and clarity of national law is also an important factor for judges and prosecutors. National law is more familiar, more defined, the judges know the background of the rules, are familiar with the legal system in which the rules have crystallized, hence the effects of the rule and the possible challenges are also more familiar and predictable. In addition, there are well-known national precedents to rely on. For these reasons it is no wonder that judges and prosecutors are more comfortable working with national law rather than international law. Even in the case of self-executing norms, the legislator has to bear this in mind

<sup>220</sup> FERDINANDUSSE (2006) op. cit. 100.

and has to find a solution for national implementation that is not only legally correct, but also workable.

Therefore the easiest solution may not be the most effective. Although it is true that in a monist state international law becomes part of national law without transformation and in dualist states this transformation is done by promulgation, and while it is correct that international treaties may have a large number of self-executing rules, however, this does not mean that judges and prosecutors will be willing to apply the norms, even if they legally could.

This argument, in the end, calls for an effective implementing legislation, taking into account not only the legal correctness, but also practical considerations, the preparedness of judges and prosecutors to resort directly to international norms, the avoidance of potential collisions with national law safeguards such as principle of legality, and a number of other factors. This, however, requires ample work by the government to prepare all the necessary implementing norms and by the legislator to adopt them, still, such a broad thinking over what is needed to ensure effective implementation of the treaties is inevitable.

At the same time, experience shows that states are usually quite fast in ratifying a treaty to look good in the eyes of the international community – this is especially true for small states such as most of the Central European ones -, but can be rather lazy in properly implementing them and in thinking about the consequences of ratification on national law. In many cases implementation comes years after ratification and even when implementation is done, it is often lagging far behind from what would be really necessary.

Also, it may be the state's own interest to express its legislative sovereignty to properly implement the international treaty instead of leaving it to direct application by judges and prosecutors. If the legislator implements the treaty provisions in national law, it still has a minimal possibility to influence it, whereas if the judges directly apply the international provisions, the legislator has absolutely no influence to regulate penal matters.

This could be seen as contradictory to the *separation of powers*, according to which it is the legislator's task to regulate criminal matters through the adoption of laws.<sup>221</sup> "(...) while the direct application of core crimes law does not provide national courts with unchecked powers to create new crimes, it can give them considerable leeway to shape the legal framework for the prosecution of existing ones."<sup>222</sup>

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<sup>221</sup> Ibid. 102.

<sup>222</sup> Ibid. 103.

Having stated this, it has to be noted that the argument of sovereignty cannot be used for non-compliance with an international treaty<sup>223</sup>. Therefore if the state does not implement its international obligations, direct application of the treaty is still possible and should be pursued for the sake of compliance with the treaty.

Finally, it must be mentioned that a trend towards the recognition of the rule of law principle to international law itself seems to be forming, which will ultimately also lead to a restriction of state sovereignty. Several pieces of literature suggest that numerous international treaties, among others, the 1907 Hague Conventions and the 1949 Geneva Conventions, testify to the acceptance of the principle of rule of law to international lawmaking and observance of international law by states<sup>224</sup>.

The effect of this on state sovereignty would be that international lawmaking would in itself be subject to rule of law principles, therefore international norms bind states accordingly. Moreover, the recognition of the rule of law in international law does not only concern the norms themselves, but also mean that the subjects of international law abide by them and act accordingly<sup>225</sup>.

As it had been mentioned by numerous authors, the treatment of the Guantanamo detainees by the United States does not only violate and discredit US legislation, but also infringes the rule of law concept through accepting the disregard of human rights in the name of security<sup>226</sup>. Therefore, as the concept would incline, states are not only obliged to respect international treaties and custom, but more generally and more broadly, the rule of law concept with respect to international law as well.<sup>227</sup>

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<sup>223</sup> International law often leaves way for the expression of state sovereignty in certain questions, for instance, typically in letting states define the sanctions. This issue, however, is still somehow controlled by international law, because adopting a sanction for an international crime that is clearly too weak compared to the gravity of the international crime would constitute a violation of the international obligation to repress those crimes. S. FICHET-BOYLE – MOSSÉ op. cit. 885.

<sup>224</sup> LAMM, Vanda: Adalékok a Rule of Law érvényesüléséről a nemzetközi jogban. (Additional comments to the application of Rule of Law in international law) *Jog, Állam, Politika*, 2009/1. 5.

<sup>225</sup> Ibid. 25.

<sup>226</sup> Ibid. 26.

<sup>227</sup> Lamm also mentions that UN Resolution 1422 (2002) is also inconsistent with the rule of law concept, because requesting the ICC to suspend investigations related to cases of members of international peacekeeping missions who are citizens of states that are not parties to the Rome Statute is incompatible with the requirement that they should also bear responsibility for any serious violations committed during their operations. Ibid. 26.

### 3.1.2. *Effects of international law on national lawmaking and national jurisprudence: the ICC complementarity principle*

The Rome Statute of the ICC and the complementarity provision provide an excellent example to the issues that may arise as a consequence of the difference in international and national lawmaking.

The obligation of states to adopt proper legislation in order to allow their courts to punish perpetrators of war crimes is important not only from the viewpoint of obligations on repression and effective application of the Geneva Conventions and Additional Protocol I. The Rome Statute complementarity provision<sup>228</sup> also focuses on national courts' actual investigations or prosecutions and the eventual ability/willingness<sup>229</sup> to prosecute war crimes<sup>230</sup>.

Whereas in the repression provisions of the Geneva Conventions there is no clear "standard" as to the forms of such implementation, the provision only stating that legislation has to be in place, furthermore, there is no direct "consequence" built in the Convention if the state fails to comply with this obligation, the Rome Statute complementarity provision bears a more tangible effect if the state omits to prosecute: the ICC could take the case from the state.

The dialectics therefore is interesting between the Geneva Convention obligation and the Rome Statute complementarity provision: the Geneva Convention expresses an obligation on the states, but accords no direct consequence for

<sup>228</sup> ICC Rome Statute, Article 17: „1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; [...]"

<sup>229</sup> The ICTY and the ICTR established, contrary to the ICC, concurrent jurisdictions to national jurisdictions, with giving primacy to the Tribunals in case of conflict of jurisdiction. The reason was that whereas the national courts of former Yugoslav and successor states would have been able to carry out proceedings but were not willing to, or there was a fear that any proceedings would be attempts to shield individuals from ICTY's jurisdiction, in the case of Rwanda, the state was unable to carry out proceedings due to the collapse of its judicial system as a consequence of the conflict. S. John T. HOLMES: Complementarity: National Courts *versus* the ICC. In: Antonio CASSESE – Paola GAETA – John R.W. D. JONES (eds.): *The Rome Statute of the International Criminal Court: a Commentary*. New York, Oxford University Press, 2002. 668.

<sup>230</sup> In fact, the complementarity principle was one of the main reasons why states examined whether their national laws were adequate to apply international criminal law. For Hungary, s. BÁRD, Károly: Nemzetközi Büntetőbíráskodás. (International criminal jurisdiction) In: BÁRD, Károly – GELLÉR, Balázs – LIGETI, Katalin – MARGITÁN, Éva – WIENER, A. Imre: *Büntetőjog – Általános Rész*. Budapest, KJK-Kerszöv, 2003. 320.

failure to comply with the obligation<sup>231</sup>, whereas the Rome Statute does not as such oblige states to put implementing legislation in place but attaches a direct consequence: the ICC gaining jurisdiction if the state does not proceed.<sup>232</sup> In this way the two instruments complement each other and the Rome Statute gives weight to the Geneva Conventions' obligation.

It will be interesting to see in the practice of the ICC what kinds of procedures will be considered as demonstrating an inability or unwillingness of the state in the given proceeding to punish war criminals, as it seems that so far the ICC has avoided the question. Here two remarks must be made. First, the standard of inability and unwillingness is probably high,<sup>233</sup> and was most likely not meant to lead to a total standardization of states' war crimes procedures and a standard understanding of all the legal elements of such procedures in all the states. This can not be the case, if for nothing else, because there are no such international standards in international law.

Although there are procedural standards in human rights instruments, in the fair trial guarantees of Additional Protocol I, there are also binding procedural rules in the convention on the non-application of statutes of limitation, substantial elements are to be found in the list of grave breaches in the Geneva Conventions and Additional Protocol I and the list of war crimes and elements of war crimes of the Rome Statute, these do not, however, cover all the procedural and substantive aspects of a war crime prosecution that could serve the state with an overall international standard on the prosecution of war crimes<sup>234</sup>. However, it is obvious

<sup>231</sup> S. Réka VARGA: Implementing and enforcing international humanitarian law – the role of the International Criminal Court. In: *Zborník z medzinárodnej konferencie – Collection of papers from international conference: Medzinárodný trestný súd na zaciatku 21. storočia*. (The international criminal court at the beginning of the 21st century) Bratislava, Slovak International Law Association at the Slovak Academy of Sciences, 2007.

<sup>232</sup> Indeed, the „threat“ that the ICC could get a case and thereby boosting jurisdictional states to proceed was seen as one of the great achievements of the Rome Statute. S. for example Darryl ROBINSON: The Mysterious Mysteriousness of Complementarity. *Criminal Law Forum*, February 2010/21/1. 25.; Réka VARGA: A Római Statútum jelentősége a nemzetközi jogban és a nemzetközi büntetőjogban. (The significance of the Rome Statute in international law and international criminal law) *Iustum, Aequum, Salutare*, 2006/11/1–2. 95–98.

<sup>233</sup> A similar conclusion was reached by ROBINSON op. cit. 22: „The standards set in the exceptions [exceptions for Article 17 (1) first parts of the sentences of (a), (b) and c)] were deliberately very high 'to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases.' “ (quoting John T. HOLMES: Complementarity: National Courts Versus the ICC. In: Antonio CASSESE et al. (eds.): *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I. New York, Oxford University Press, 2002.

<sup>234</sup> For a detailed discussion on international standards, s. Harmen van der WILT: Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court. *International Criminal Law Review*, 2008/8. 252–254.

and just logical that in case an international treaty obliges states to punish certain crimes, the realization of this obligation should be in compliance with basic human rights as accepted in international law<sup>235</sup>.

Second, the ICC should not be seen as an appellate court<sup>236</sup> where it can take cases from national courts on its free consideration<sup>237</sup>. Although the inability and unwillingness criteria clearly will make good sense in many cases, these should not be used and considered as a joker in the hands of the ICC to freely grab cases.<sup>238</sup> How much certain “western” procedural rights can be transferred to different legal systems has been the subject of debate concerning transfer of cases from the ICTR to Rwandese authorities and the scope of the ICTR requiring Rwandese authorities to adopt such rights and guarantees. Critics of ‘legal imperialism’ claim that certain due process rights are Western legal constructs and are thus foreign to certain countries, such as Rwanda. Evenmore, as is argued, specific procedures required by the ICTR are foreign to common law systems as well. Counter-arguments say that a non-adherence to certain fundamental due process rights may lead to ‘victor’s justice’ and serious violations of basic non-derogable rights<sup>239</sup>. Whether similar arguments will be raised with respect to the ICC’s practice is still a question. There are fundamental differences between the ICC’s and the Tribunals’ approaches to jurisdiction – complementarity versus primacy – and most of the literature and statements made on behalf of the ICC make it clear that the ICC seeks to abstain from engaging in detailed ‘revision’ of domestic proceedings and will restrict itself to the most basic questions.

Worth to note therefore, that the *ad hoc* Tribunals are stricter than the ICC in regard to weighing national procedures. Both the ICTY and the ICTR statute provide that they may re-try a case even if the same case was tried in front of a national court, if the act was considered an ordinary crime and not an international crime<sup>240</sup>, eventhough the elements of the crime in domestic law

<sup>235</sup> S. FICHET-BOYLE – MOSSÉ op. cit. 881.

<sup>236</sup> S. Van der WILT op. cit. 232. and 257: „The International Criminal Court is not expected to repair unfair trials, as it is not meant to be a human rights court, nor is it in a position to mitigate or aggravate sentences, imposed by domestic courts.”

<sup>237</sup> „[...] the ICC was not envisaged as an appellate body to review decisions of domestic courts.” S. HOLMES op. cit. 673

<sup>238</sup> S. ABI-SAAB op. cit. 598–599. (a reply to George P. Fletcher’s opinion).

<sup>239</sup> S. Jesse MELMAN: The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda’s Rule 11bis To Permit Transfer to Rwandan Domestic Courts. *Fordham Law Review*, 2011/79/3. 1321 and 1327.

<sup>240</sup> S. Article 10 para 2 (a) and Article 9 para 2 (a) of the ICTY and ICTR Statutes respectively. For corresponding case law, s. *Prosecutor v. Munyeshyaka*, Case No. ICTR-2005-87-I, Decision on the



need not be exactly identical, but “similar in substance”<sup>241</sup>. This solution in fact means that the ICTY and ICTR can, to a certain extent, „criticize” the national procedures<sup>242</sup> and, indirectly, the implementing legislation.

In addition, the Tribunals, through Rule 11*bis* of their Rules of Procedure and Evidence, have also established a kind of ‘ability1 test if they wanted to refer a case to national authorities. Rule 11*bis* states that the President of the Tribunal may appoint a bench of three judges (or Trial Chamber in the case of ICTR) to determine whether the case should be referred to the authorities of a State<sup>243</sup>. Such a State could be the one on whose territory the crime was committed, the one in which the accused was arrested or one having jurisdiction and being willing and *adequately prepared* to accept such a case<sup>244</sup>. The standard applied by the Tribunals when judging on the appropriateness of national procedures for the purposes of 11*bis* referrals may provide interesting examples but not necessarily a ground for similar examination of national mechanisms by the ICC.

In a summary, the ICTY and ICTR, during such assessments, had to consider under Rule 11*bis* whether the requirements set forth in Article 20/21 of the Statutes listing defendant’s rights were met<sup>245</sup>, especially regulations on the presumption of innocence, to be tried without undue delay, to be tried in one’s own presence,

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Prosecutor’s Request for the Referral of Wenceslas Munyeshyaka’s Indictment to France (Nov. 20, 2007), para 8: “A case can be referred to the national courts of a State only where the State concerned will charge and convict the persons responsible for those international crimes listed in the Statute as opposed to ordinary law crimes.”)

<sup>241</sup> *Prosecutor v. Gatete*, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, (Nov. 17, 2008), para 21.

<sup>242</sup> The non-effective functioning of national procedures was partially the reason for the adoption of the „Rules of the Road” program preceding Rule 11*bis*, signed by the parties of the Dayton Peace Accords in 1996. According to the program, national authorities could only arrest a person charged with one of the crimes of the ICTY statute and not prosecuted by the ICTY if the ICTY prosecutor granted permission. This procedure was meant to prevent arbitrary use of powers by the national authorities and ensure that arrests are only carried out based on reasonable grounds. It must be noted that the circumstances in which the Rules of the Road program was adopted were specific to the region at the time. On the development of the relation between the ICTY and domestic authorities, s. Eszter KIRS: Limits of the Impact of the International Criminal Tribunal for the former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina. *Goettingen Journal of International Law*, 2011/3/1. 397–417.

<sup>243</sup> On Rule 11*bis* procedures s. Olympia BEKOU: Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence. *Fordham International Law Journal*, 2009/33/3. 723–791.

<sup>244</sup> See Rules of Procedure and Evidence of the ICTY and ICTR, Rule 11*bis*.

<sup>245</sup> See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*, (Dec. 4, 2008), Appeals Chamber Transfer Decision, para 4.

the right to an attorney, the right to examine and cross examine witnesses for the prosecution and defense under the same conditions. In practice, this meant examining among others whether right to a fair and public hearing, adequate time to prepare a defense, right to counsel and equal access to witnesses were guaranteed<sup>246</sup>, or, in the case of ICTR, a factual examination of the availability of witness protection<sup>247</sup>.

A comparative analysis showed that the ICTY was more lenient in applying Rule 11*bis* than ICTR (in referring cases to Rwanda), in that the ICTY merely conducted a purely legal analysis to see whether these comply with 11*bis* requirements, while the ICTR conducted both a legal analysis and a factual review of many factors<sup>248</sup>. This may be due to the increased concerns over the Rwandese authorities' ability to keep up the due process guarantees, and due to the involvement of the ICTY and international experts with the courts of Bosnia-Herzegovina through training programs and other measures.

The situation was therefore a bit different concerning transfer of cases to Rwandan authorities. Since the fairness of trials and the readiness and capability of Rwandese courts to carry out fair and independent procedures were repeatedly questioned – so much so that a number of 11*bis* requests had been turned down –, Rwanda adopted a law in 2007 concerning transfer of cases<sup>249</sup>, guaranteeing the elements of fair trials and adequate procedural rights. Still, serious considerations were raised about the quality of the procedures, despite the law<sup>250</sup>. It must also be noted that corresponding literature criticized the different approach of the Tribunals when examining Rwandese national legislation and procedures as

<sup>246</sup> *Prosecutor v. Rasevic & Todovic*, Case Nos. IT-97-25/1-AR11bis.1 and IT-97-25/1-AR11bis.2, Decision on Savo Todovic's Appeals Against Decisions on Referral Under Rule 11bis, (September 4, 2006), paras 49–84.

<sup>247</sup> See *Hategekimana*, ICTR, Appeals Chamber Transfer Decision, paras 22 and 26. Witness protection was such a crucial element that it provided ground for refusing to transfer cases to Rwanda. S. MELMAN op. cit. 1304.

<sup>248</sup> *Ibid.* 1298.

<sup>249</sup> Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, March 19, 2007.

<sup>250</sup> It is considered that although the law provides fair trial guarantees for cases falling within its scope of application (ICTR defendants), cases falling outside its scope are still dealt with amongst questionable circumstances. Notably, numerous high-level genocide cases are tried in front of 'ordinary' justice system, which were harshly criticized for its lack of impartiality, due process, protection of witnesses, etc.

opposed to examining European systems, judging the Rwandese system more harshly<sup>251</sup>.

Today, due to the completion strategy of the ICTY, primacy in the case of ICTY cannot be invoked anymore and the Rule 11*bis* procedures have also been finished in front of the national authorities. Cases however are still transferred from the ICTR to national jurisdictions<sup>252</sup>.

Coming back to the ICC, different approaches to the Court's consideration of national systems was nicely demonstrated in a discussion between Georges Abi-Saab and George Fletcher. Fletcher argues that such a provision provides the ICC with the possibility to „decide on a case-by-case basis whether the judgments of other courts are worthy of its respect”, while Abi-Saab argues that should a national procedure be inadequate and reflect the unwillingness of the state, „this is not [...] a legitimate interest of the state, but an abuse of prosecutorial and judicial power for purposes of political protection from international criminal responsibility”.<sup>253</sup>

#### *Complementarity: contents of unwillingness and inability*

During the negotiations of the Rome Statute, “the difficult aspect of the negotiations was to develop criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred.”<sup>254</sup> Within these criteria, obviously the unwillingness criteria was more contested, being a more subjective element. The term “genuinely” was chosen to attempt to counterbalance the subjectivity<sup>255</sup>, in order to give guidance for the ICC to serve as a basis against which the national procedure has to be tested.

According to the Triffterer commentary, the criteria for unwillingness as described in the Rome Statute – shielding the person, unjustifiable delay and lack of impartiality – are exhaustive<sup>256</sup>. The unavailability of national

<sup>251</sup> S. MELMAN op. cit. 1298.

<sup>252</sup> See ICTR official website: <http://www.unict.org/Cases/tabid/77/Default.aspx?id=7&mnid=7> [last visited 26 September 2012]

<sup>253</sup> ABI-SAAB op. cit. 598–599.

<sup>254</sup> HOLMES op. cit. 673.

<sup>255</sup> Otto TRIFFTERER (ed.): *Commentary on the Rome Statute of the International Criminal Court; Observers' Notes, Article by Article*. Baden-Baden, Nomos, 1999.

<sup>256</sup> TRIFFTERER op. cit. 393. and HOLMES op. cit. 675. This has been confirmed in subsequent literature, s. for instance Mohamed M. EL ZEIDY: *The Ugandan Government Triggers the First*

legislation is not mentioned under any of the criteria as such. Under ‘shielding’ and ‘unjustifiable delay’, the prosecutor is bound to examine whether the state carried out proceedings in good faith, ie. whether there is an intent by the state to bring the persons concerned to justice.

Under ‘lack of impartiality’, the prosecutor examines whether the proceedings are in fact being conducted in a manner, which in the circumstances, is inconsistent with an intent to bring the person to justice<sup>257</sup>. Generally, the “critical factor [...] was whether there was a defect in the approach taken by the State which inevitably, if left to its conclusion, would result in travesty for justice.”<sup>258</sup>

The ICC should, and probably will, take into consideration states’ legislative traditions, framework and legal context, and should examine the unwillingness criteria against this background. Being sure the arbitrary criticism by the ICC of national procedures was not the intention of the Rome Statute, this point has to be made when discussing the unwillingness criteria.<sup>259</sup>

Indeed, the Office of the Prosecutor of the ICC stated that “[...] the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action. [...] In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures.”<sup>260</sup>

This being said, states should always bear in mind when forming national legislation whether in the end they are able to carry out prosecutions of war crimes in a way that corresponds to the international legal obligations. Even states that have not ratified the Rome Statute and expressed clear and strong opposition to it are inevitably somewhat influenced by these rules.

When it comes to inability, Schabas reminds that “inability will arise when a State cannot obtain the accused or necessary evidence and testimony or is otherwise unable to carry out its proceedings. The Statute makes this conditional on ‘a total or substantial collapse or unavailability of its national judicial system’ [...]. Thus, a developed and functional justice system that is unable to obtain

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Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC. *International Criminal Law Review*, 2005/5. 102.

<sup>257</sup> TRIFFTERER op. cit. 394.

<sup>258</sup> HOLMES (2002) op. cit. 674.

<sup>259</sup> Schabas warns of the dangers of Article 17 „as becoming a tool for overly harsh assessments of the judicial machinery in developing countries.” S. SCHABAS op. cit. 86–87.

<sup>260</sup> See *Paper on Some Policy Issues Before the Office of the Prosecutor*, ICC, September 2003. 5, available at: [www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) [last visited on 10 January 2012]

custody of an offender because of lack of extradition treaties, for example, would still be able to resist prosecution by the Court on the ground of complementarity.<sup>261</sup> However, if in such a case the lack of extradition treaties results in non-action by the state, this would still be a ground of admissibility for the ICC, since in the end no national procedure was initiated.<sup>262</sup> At the same time, the lack of reference to international crimes in the national penal code does not raise inability<sup>263</sup>, since the Rome Statute does not oblige states to exactly implement the crimes formulated therein.<sup>264</sup>

Initially, on the request of the start-up team of the Office of the Prosecutor (OTP), a group of experts examined the question of how the ICC should approach the complementarity question and were invited “to prepare a reflection paper on the potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute.”<sup>265</sup> In this paper, the experts identified certain elements that should be viewed, among others, when assessing unwillingness and inability.

The group stated that generally, the examination “may relate to the legislative framework, the powers attributed to institutions of the criminal justice system, degrees of independence, jurisdictional territorial divisions”<sup>266</sup>. Regarding unwillingness, the group raised attention to the following factors: (i) different authorities within a country may demonstrate different determination regarding genuine procedures; (ii) the examination shall be based on an assessment of the procedure, not the outcome, because an indication that a person ‘should have been found guilty based on those evidences’ would violate the presumption of innocence while tried in front of the ICC; (iii) the assessment should search

<sup>261</sup> SCHABAS op. cit. 86.

<sup>262</sup> For a discussion on the link between the requirement of „genuine” procedure and inability/unwillingness, s. ÁDÁNY, Tamás Vince: Érdemi eljárás: a komplementaritás Achilles-sarka. In: KIRS, Eszter (ed.): *Egységesezés és széttagolódás a nemzetközi büntetőjogban*. Studia Iuris Gentium Miskolcensis. Miskolc, Bíbor Press, 2009. 66–68. Tamás Ádány argues that jurisdiction of the ICC cannot be closed out in case the state proceeded on the basis of an ordinary crime which does not include the elements demonstrating the international criminal law relevance of the act in question.

<sup>263</sup> John T. HOLMES: The Principle of Complementarity. In: Roy S. Lee (ed.): *The international Criminal Court: the Making of the Rome Statute. Issues, Negotiations, Results*. The Hague, Kluwer Law International, 1999. Section 3.2.2.

<sup>264</sup> Jakob PICHON: The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court. *International Criminal Law Review*, 2008/8. 223.

<sup>265</sup> ICC-OTP: *Informal expert paper: The principle of complementarity in practice*. 2003. 2.

<sup>266</sup> Ibid. 13.

for an *indicia* of the purpose of shielding the person from justice, such as proofs of political interference, general institutional deficiencies (such as lack of independence of judiciary) or procedural irregularities demonstrating unwillingness.<sup>267</sup> The report raises attention that examining unwillingness may be more complex and politically more sensitive.

Regarding inability, the paper generally notes that “ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards. The focus of the complementarity regime is on the more basic question of whether the State is unable to genuinely carry out a proceeding”<sup>268</sup>. *In concreto*, it notes the following factors regarding collapse or unavailability of the national judicial system: (i) unavailability of necessary expert personnel; (ii) unavailability of infrastructure; (iii) lack of substantive or procedural criminal legislation or access rendering the system unavailable; (iv) obstruction of uncontrolled elements or presence of immunities or amnesties rendering the system unavailable.<sup>269</sup>

Whether or not the ICC’s actual assessments correspond to the elements listed in the Expert Paper is yet to be seen. In fact it seems that in the judgments adopted so far, the ICC has avoided the question of the exact contents of inability and unwillingness by determining lack of actual investigations or prosecutions, therefore making examination of inability/unwillingness unnecessary.

The difference between inability and unwillingness and elements of the two terms was at first a part of the issue in the *Katanga*-case, however, the Court did not take a stand on their elements. The appellant argued that the non-objection of the DRC to the ICC’s assertion of the admissibility of the case cannot be seen as unwillingness, therefore this should have been examined under inability by the ICC. Inability, in turn, can be invoked only in very exceptional circumstances, evenmore, argues the appellant, it is for the ICC to determine the inability of the state, and not for the state<sup>270</sup>. The Appeals Chamber did not examine the question in merits. It argued that since the DRC authorities did not initiate investigations, the examination of inability or unwillingness is irrelevant (for subsequent arguments see below).

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<sup>267</sup> Ibid. 14.

<sup>268</sup> Ibid. 15.

<sup>269</sup> Ibid. 15.

<sup>270</sup> Situation in the Democratic Republic of the Congo, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment of the Appeals Chamber, ICC-01/04-01/07 OA 8, 25 September 2009, paras 89–90.

Complementarity was the issue in the admissibility challenge filed by Kenya in the *Muthaura, Kenyatta and Ali* case<sup>271</sup> as well, however, the Court did not elaborate in this decision either on the exact contents of unwillingness and inability. The debate was rather around the ability of Kenya to prove that it had conducted investigations over the same persons for the same conducts<sup>272</sup>, which it did not succeed to do so.

Similarly, in the *Ahmad Harun-Ali Kushayb* case the ICC determined that since no investigations or prosecutions took place in Sudan related to the conducts which the Court is dealing with, the case is *ab ovo* admissible, therefore inability or unwillingness were not examined.<sup>273</sup>

While we had been discussing above the substantial elements of the criminal proceedings and their effects on a state to prosecute from the point of view of the ICC complementarity principle, the *procedural elements* should also be considered. Could the non-existence of certain procedural elements or guarantees in national legislation or in the actual case lead to the non-action of the state in investigating or prosecuting a person for ICC crimes?

As is the case with the substantial elements, the Rome Statute does not prescribe procedural elements that are to be observed by the national courts. Other instruments of international law, however, contain such rules: first and foremost international human rights treaties, but also humanitarian law treaties which have transferred the basic fair trial elements and made them binding on states, even in the case of war crime trials.

Worth to note that although states often adapt their substantive legislation, they tend to forget about adopting elements in procedural law that are unique to extraterritorial investigations and prosecutions of extraterritorial crimes. Such considerations include ensuring adequate rights for defence in the absence of the suspect, difficulties for the defence to carry out own investigations abroad,

<sup>271</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, No. ICC-01/09-02/11 O A, 30 August 2011.

<sup>272</sup> Muthaura Judgment on the appeal, para 36: „under article 17 (1) (a), first alternative, the question is not merely a question of ‘investigation’ in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction.”

<sup>273</sup> Situation in Darfur, Sudan, *Prosecutor v. Ahmad Muhammad Harun („Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman („Au Kushayb”)*, Decision on the Prosecution Application under Article 58(7) of the Statute, No.: ICC-02/05-01/07, 27 April 2007, paras 18–25.

or hearing witnesses abroad.<sup>274</sup> Other aspects of criminal procedural law will be discussed in Chapter 4.1.

In certain cases inadequacy of procedural elements could also lead to admissibility of the case to the ICC. For instance, if functional immunity hinders national prosecution, this may also give way to ICC jurisdiction. This has been confirmed in the *Jean-Pierre Bemba* case in front of the ICC, where the Pre-Trial Chamber stated that since “the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor’s Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC”,<sup>275</sup> the case is considered admissible in front of the ICC. However, while it is acknowledged that functional immunity is not a defence in front of international tribunals, this has not been acknowledged for national courts. The *Arrest Warrant* case in front of the International Court of Justice, as well as the *Rumsfeld*-case in France have also stated this<sup>276</sup>.

While states that ratified the Rome Statute amended national legislation to allow acting heads of states to be surrendered to the ICC, they have in most cases not amended national legislation to terminate the defence of immunity in national proceedings<sup>277</sup>. Should such a case not be tried in front of domestic courts due to the immunity, it could fall under ICC jurisdiction due to inability of the state to prosecute. The comparative table in the Annex shows that several states omitted to adopt the necessary changes in their national legislation.

#### *Complementarity: the ‘inaction’ criteria*

Talking about the relation between the state of national legislation and its relation to the admissibility of a case in front of the ICC, an interesting debate has unfolded around the exact meaning of Article 17 forming the rule of complementarity. While many writers concentrated on the one-step inability/unwillingness test – examining simply whether the state is unable or unwilling to prosecute –, Darryl Robinson, one of the authors of the text that became Article 17, clearly indicates that the inability/unwillingness of the state is only an exception to the rule – the

<sup>274</sup> S. FIDH/REDRESS: *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units*. December 2010. 24.

<sup>275</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, PTC-III, ICC-01/05-01/08, 10 June 2008, para 21.

<sup>276</sup> Both cases are discussed under Chapter 3.3.2.

<sup>277</sup> See the comparative table in the Annex.



text says “unless” – according to which the case is inadmissible before the ICC if the jurisdictional state is investigating or prosecuting the case.<sup>278</sup>

This means that *if* the state is investigating or prosecuting (which would lead to inadmissibility), it has to be examined whether the state is unable or unwilling to proceed – if yes, this would lead to admissibility of the case. Therefore, according to Robinson, this is a two-step process, whereby it is first examined whether the state is *actually* investigating or prosecuting, and then it is examined whether it is *unable/unwilling* to genuinely carry out the investigation.<sup>279</sup>

Correspondingly, the ICC Appeals Chamber said in the *Katanga* case that “[u]nder article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability has to be considered only (1) when there are, at the time of the proceedings in respect of an admissibility challenge, domestic investigations or prosecutions that could render the case inadmissible before the Court, or (2) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned. Inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.”<sup>280</sup> Thus, in case the state having jurisdiction initiates investigations or prosecutions during the admissibility procedure, the case will become inadmissible, since new facts have arisen<sup>281</sup>.

The same was declared earlier on by the Pre-Trial Chamber in the *Lubanga* case: “[t]he first part of the [admissibility] test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable [...]”<sup>282</sup>; and identical statements

<sup>278</sup> ROBINSON (2010) op. cit., available at <http://ssrn.com/abstract=1559403> [last visited on 26 October 2011]

<sup>279</sup> Ibid. 2.

<sup>280</sup> ICC, *Prosecutor v. Ahmad Muhammad Harun („Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman („Au Kushayb”)*, para 24.

<sup>281</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, para 56.

<sup>282</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, PTC-I, ICC-01/04-01/06, 10 February 2006, para 29.

were made in the *Ahmad-Harun* case<sup>283</sup>, in the *Al Bashir* case<sup>284</sup>, in the *Jean-Pierre Bemba* case<sup>285</sup> and in the *Kony* case<sup>286</sup>.

It is probably worth to note that the admissibility test has to encompass both the person and the conduct which is the subject of the case before the ICC<sup>287</sup>; within this question it was this momentum that made the *Lubanga* case admissible, as certain national steps had been taken against the same accused, but related to different conducts.

It is worth to note that the above quoted judgment in the *Katanga* case arose from exactly the same considerations as was discussed above. The question was whether the self-referral of the case by the DRC demonstrated an unwillingness in the interpretation of the complementarity principles. The Trial Chamber argued that although self-referral was not mentioned under 'unwillingness' in the Rome Statute, it could be understood as a second form of unwillingness. While the Appellant argued that Article 17 (2) contains an exhaustive list and therefore the Trial Chamber erred in inventing a new form of unwillingness, the Prosecutor noted, later backed up by the Appeals Chamber, that unwillingness did not need to be examined at all, since the first sentence of Article 17 makes inadmissibility dependent on investigations or prosecutions. Since no investigations or prosecutions took place in the DRC, the case, in the Prosecutor's view, is admissible<sup>288</sup>.

At the same time, El Zeidy notes that it seems the Chamber did not consider the mere self-referral as a ground for admissibility, but sees a need to examine self-referral on a case-by-case basis. Admissibility can thus only be manifested if other reasons are also present, notably the clear inability of the state to proceed<sup>289</sup>,

<sup>283</sup> *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, Decision on the Prosecution Application under Article 58(7) of the Statute, PTC-I, ICC-02/05-01/07, 27 April 2007, paras 19–25.

<sup>284</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC-I, ICC02/05-0/09, 4 March 2009, para 49.

<sup>285</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, PTC-III, ICC-01/05-01/08, 10 June 2008, para 21.

<sup>286</sup> *Prosecutor v. Joseph Kony*, Warrant of Arrest for Joseph Kony issued on 8 July 2003, as amended on 27 September 2005, PTC-II, ICC-02/04-53, para 37.

<sup>287</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, para 38.

<sup>288</sup> ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, paras 62, 65 and 75 respectively.

<sup>289</sup> Mohamed M. EL ZEIDY: *The Principle of Complementarity in International Criminal Law, Origin, Development and Practice*. The Hague, Martinus Nijhoff Publishers, 2008. 229.

or, as stated by the Appeals Chamber, the non-existence of domestic procedures. At the same time it is difficult to imagine a state referring a case to the ICC while simultaneously investigating or prosecuting it.

Here another question also appears. Notably, if we would not consider the first sentence of Article 17 (1), we would be inclined to think that unwillingness or inability would not be linked to actual proceedings, but would be a mere demonstration of general unwillingness or inability from the state. However, if we consider the first part of the sentence and regard the second part as an exception to it, this means that unwillingness or inability are linked to *actual* investigations or prosecutions that are *already* taking place.

In other words, the state did initiate proceedings but those proceedings demonstrate the unwillingness or inability of the state. This view is strengthened by para (2) of the Article, which refers to investigations that 'were' or 'are' taking place. This is confirmed by the Appeals Chamber's argument in the *Katanga* case<sup>290</sup> and the Pre-Trial Chambers' findings in the *Lubanga* case: „The Chamber [...] notes that when a State with jurisdiction over a case is investigating, prosecuting or trying it, or has done so, it is not sufficient to declare such a case inadmissible. The Chamber observes on the contrary that a declaration of inadmissibility is subject to a finding that the relevant State is not unwilling or unable to genuinely conduct its national proceedings in relation to that case within the meaning of article 17 (1) (a) to (c), (2) and (3) of the Statute.”<sup>291</sup>The ICC thus made clear that the examination of unwillingness and inability are linked to actual investigations or prosecutions.

The Appeals Chamber sums this up in saying the following: „[...] in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.”<sup>292</sup>

<sup>290</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, paras 76–77.

<sup>291</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, para 32.

<sup>292</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, para 78. The Appeals Chamber quotes several pieces of literature to support its argument: Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', 7 Max Planck Yearbook of United

Although it is easy to imagine a case where the state initiated investigations *in order to* shield the person from ICC jurisdiction, it is more difficult to imagine a case where the state initiated investigations but is not able to carry out the proceedings – why would the state initiate the proceedings in such a case at all? The state may want to demonstrate its capability of dealing with its own matters, especially in cases of newly formed states or states where the regime or government had changed.

Finally, the Office of the Prosecutor also confirmed the ‘inability’ requirement in saying that „[...] in deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act, or are not ‘genuinely’ investigating or prosecuting, as described in article 17 of the Rome Statute.”<sup>293</sup> To look at it from a different point of view: if there is no investigation or prosecution (step 1), *no matter whether* the state is able and willing or not (step 2), the case is admissible. If we would only look at the inability/unwillingness requirement in one step, it would be enough to determine whether the state is theoretically willing or able to carry out the prosecutions to bar the ICC jurisdiction.

To sum up, three cases are possible:

- (i) the state is investigating or prosecuting *and* is also (willing)/able to genuinely carry out the prosecution: the case is inadmissible,
- (ii) the state would be investigating or prosecuting *but* is not (willing)/able to genuinely carry out the prosecution: the case is admissible (*or*: the state is investigating *but* is not able to prosecute: the case is admissible<sup>294</sup>),

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Nations Law (2003), 601; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 91; William W. Burke-White, Scott Kaplan, ‘Shaping the Contours of Domestic Justice/The International Criminal Court and the Admissibility Challenge in the Ugandan Situation’, 7 *Journal of International Criminal Justice* (2009), 260; Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 221 and 230; John T. Holmes, ‘Complementarity: National Courts versus the ICC’, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (2002), 673; Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 103 ff; Claus Kress, ‘“Self-Referrals” and “Waivers of Complementarity” - Some Considerations in Law and Policy’, 2 *Journal of International Justice* (2004), 946; Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (2005); Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions/ The Principle of Complementarity* (2008), 199 ff.

<sup>293</sup> S. ICC: Paper on Some Policy Issues Before the Office of the Prosecutor. September 2003. 4.

<sup>294</sup> See Article 17, para 1 (b) of the Rome Statute.

(iii) the state is not investigating or prosecuting *no matter* if it would be willing/able to genuinely carry out the prosecution: the case is admissible.<sup>295</sup>

This differentiation becomes practically important when a state is not investigating or prosecuting for reasons other than those listed under unwillingness or inability. If we accept that these lists are exhaustive, a different interpretation of the Statute would mean that in case a state is not investigating or prosecuting for other reasons, the case would still be inadmissible. In other words, mere theoretical ability and willingness to investigate would be enough to bar ICC jurisdiction. As the Appeals Chamber noted, “The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so.”<sup>296</sup>

This was exactly the question in the *Katanga* case, where the reason for inaction was a simple lack of intention (other than any of the reasons listed under unwillingness) from the side of the DRC, which ultimately lead to non-investigation/prosecution. Had the ICC considered this only under the unwillingness criteria, it would have judged for inadmissibility because lack of intention is not listed under unwillingness. However, since the first sentence of Article 17 (1) makes it clear that non-investigation already makes the case admissible, the Court found that it had jurisdiction over the case.

It must be mentioned that what the present author finds a more arguable reasoning in the *Katanga* appeals judgment is the reasoning with respect to Article 17 (1) (b), where the Chamber notes that although the *Auditeur Général* decided to terminate proceedings, he did so precisely to initiate ICC proceedings. The other line of reasoning by the Chamber referring to the overall purpose of the Statute being to end impunity seems more convincing<sup>297</sup>. However, this part of Article 17 is not relevant for our discussion. It also has to be noted that the entire issue raises questions about the relationship of self-referrals to the complementarity principle, the discussion of which would go beyond the frameworks of the present thesis.

The consequence of the analysis above on the appropriateness of national legislation is therefore also in points (ii) and (iii): even if the state would want to and even if it starts to investigate and prosecute but cannot carry out proper proceedings due to inappropriate domestic legislation or application of the law

<sup>295</sup> For a similar analysis see ROBINSON *op. cit.* 5. and Section 4 from 15.

<sup>296</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, para 79.

<sup>297</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, para 83.

– reasons not listed under unwillingness or inability –, the case would still be admissible before the ICC due to the first sentence of Article 17 (1) (a).

Reading this conclusion together with William Schabas' explanation on what unwillingness and inability exactly mean, we may conclude that even if the state is willing and able to proceed – for example a state with developed judicial system but inadequate domestic legislation –, but the investigation or prosecution could not even be launched due to the lack of relevant domestic provisions, the case would be admissible before the ICC.

The great difference therefore between examining existing procedure first and inability/unwillingness second, as opposed to only examining inability/unwillingness is that if we would consider only willingness/ability, the manifestation that a state is willing/able to proceed would in itself be enough to bar ICC jurisdiction, even if it actually does not proceed. Whereas if we read the text of the Statute closely, actual investigation or prosecution is necessary to render the case inadmissible before the ICC: therefore it is not enough if the state wants and – theoretically – can proceed, it also actually has to proceed; ability and willingness apply not generally to the procedural capabilities of the state but to the actual proceedings. If amnesty laws inconsistent with the Rome Statute or lack of relevant crimes in the criminal code or any other legislative or non-legislative reasons finally lead to a non-investigation, the case is admissible because finally no proceedings take place.

If we think of the practical consequences of the above described interpretation of the Rome Statute, one could point to the case of self-referral of the Ugandan situation to the ICC. El Zeidy in his article analyzing the effects of self-referral on the interpretation of the complementarity principle asserts the following: “[...] an effective practical interpretation should apply to article 17(1)(a)-(c), where paragraph 1(a) states that the Court «shall determine that a case is inadmissible where ...[t]he case is being investigated ... by a State.» Thus, if a State did not initiate an investigation, or if it acknowledged that it is not going to initiate proceedings, the case should be de facto admissible, since none of the criteria set out in paragraph 1 (a)-(c) are satisfied. It follows that there is no need to delve into the question whether the state is unwilling or unable within the meaning of article 17(2), (3).”<sup>298</sup>

The situation El Zeidy examines is similar to a case when a state cannot proceed lacking adequate national legislation in that in both cases the reason for non-prosecution falls outside the exhaustive reasons for inability/unwillingness

<sup>298</sup> EL ZEIDY (2005) op. cit. 104.

listed in Article 17 (2) and (3), however, in both cases this results in non-prosecution by the state. Consequently, following the Robinson-interpretation, both cases would be admissible since the case is not investigated or prosecuted by a State (Article 17 (1) a) first sentence); however, following the other interpretation, these cases could be seen as inadmissible, because the reason for non-investigation or non-prosecution are different from Article 17 (2) and (3).

At the same time it must be acknowledged that in the Ugandan case one could easily argue that the fact of the referral itself indicates to unwillingness – this is the conclusion to which El Zeidy also arrives at<sup>299</sup> –, this argument would not stand in the case of non-action due to inadequate national legislation. Notably, the state can demonstrate ability (adequate judicial system) and willingness (no attempt at shielding the person from justice, unjustified delay, etc.) and still not proceed. Such a situation could end up in two different decisions on admissibility resulting from the two different interpretations of the Rome Statute.

Interestingly, some states examined the complementarity provision from the side of state sovereignty. The French Constitutional Council examined whether the complementarity provision infringes France's sovereignty. The Court ruled that complementarity, where it results from a state evading its responsibility and not carrying out proper procedures comes from the *pacta sunt servanda* principle and thus does not violate state sovereignty.<sup>300</sup>

Although it falls outside the temporal jurisdiction of the ICC, it is theoretically interesting that the recent *Biszku* case in Hungary – which brought a huge media attention and strong protest from the part of numerous international lawyers – could eventually fall under inactivity or unwillingness in the understanding of the complementarity principle: it could either be stated that the state failed to adopt proper implementing legislation or that the prosecutors were not applying international law, thereby ignoring Hungary's international legal obligations.

In the *Biszku* case, the Prosecutor General's Office rejected a criminal complaint against former Minister of Interior Béla Biszku for alleged crimes against humanity committed after the 1956 revolution. The Prosecutor General's Office handled the acts as ordinary crimes and referred in its rejection to time-barring as prescribed for ordinary crimes, and basically refused to genuinely

<sup>299</sup> „[...] the state-invoking waiver should be treated on the same basis as a state, which is unwilling or unable”, Ibid. 104.

<sup>300</sup> Décision 98-408 DC du 22 janvier 1999 (Traité portant statut de la Cour pénale internationale), Journal officiel, 24 January 1999, 1317. (source from Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State, ICRC Advisory Service on International Humanitarian Law, January 2003, available at [www.icrc.org](http://www.icrc.org) [last visited on 12 September 2012])

examine whether the acts in question could qualify as crimes against humanity, to which no time barring applies<sup>301</sup>.

The problematic issue here was not so much the application of an ordinary crime to the case in itself, but the fact that the prosecutor applied an ordinary crime to the case without thoroughly examining and giving satisfactory explanation to it. As it will be demonstrated in Chapter 3.2.3., the application of ordinary crimes in a war crimes case does not *in itself* raise the jurisdiction of the ICC, but if such application leads to neglecting the elements of the war crime in question, and consequently leads to the fulfillment of any of the criteria of the complementarity principle (inaction or unwillingness, for instance the purpose of shielding the accused), this may raise ICC jurisdiction.

It must also be taken into consideration that it is the margin of appreciation of the domestic prosecutor or judge to decide on the qualification of the act and decide whether it falls under an ordinary crime or constitutes an international crime, but such a decision making shall not be arbitrary and shall be in conformity with the Rome Statute in order to avoid ICC jurisdiction.

These considerations lead us to believe that the threshold of national procedures for the purposes of complementarity is to be found somewhere between the express prohibitions of the Rome Statute as a minimum requirement and the states' legal features as the maximum aspect, the Rome Statute providing no clear guidance, but offering some clues. The practical consequence is that the domestic judge, when dealing with a war crime case, should better take the Rome Statute minimum requirements into account if it wants to avoid the ICC gaining jurisdiction over the case, to the extent, of course, of the possibilities provided by national law.

Hence, although the Rome Statute entails no obligation to implement its provisions, these should be taken into account in national law and practice.<sup>302</sup> Some national courts have gone so far as referring directly to international law or even international customary law in their decisions, others were not reaching back to international law but rather applied their domestic law exclusively. In the

<sup>301</sup> Decision NF 27942/2010/1 (29 October 2010) of the Municipal Prosecutor's Office and Decision NF 10718/2010/5-I (17 December 2010) of the Prosecutor General's Office, maintaining the decision of the Municipal Prosecutor's Office.

<sup>302</sup> Van der Wilt reaches a similar conclusion: „Courts will have to gear (...) standards to the specific political and social context in which they operate – and this will inevitably lead to some variety in application. But neither they nor the legislator are allowed to alter the context of those crimes substantially. The decisive bench-mark is that the underlying *rationale* of those crimes should not be changed unilaterally.” S. Van der WILT op. cit. 271–272.



*Mugesera* case<sup>303</sup>, the case of deportation of Hutu political leader Léon Mugesera from Canada on grounds of incitement to commit genocide, the Canadian courts reached back to international law when interpreting elements of crimes against humanity. However, the Dutch courts in the *Van Anraat* case<sup>304</sup> had differing opinions: while the District Court took the ICTY case law as a reference for the assessment of *mens rea*, the Court of Appeal took the opinion that although there should be a preference for the application of international law, if the case law of international tribunals is not clear, Dutch national law should be applied exclusively<sup>305</sup>. A discussion on the application of international law by domestic courts will follow in more detail in Chapter 3.1.3.

#### *National laws as sources for the ICC*

It is noteworthy that the Rome Statute acknowledges the relevance of national legal systems in some other aspects as well. Notably, according to Articles 21 (1) c) and 31 (3) of the Rome Statute, the Court may consider – in general or as a ground for excluding criminal responsibility other than those specifically referred to in previous paragraphs – deriving from the general principles of law, national laws of legal systems of the world, including the national laws of States that would normally exercise jurisdiction over the crime, provided that such principles are not inconsistent with the Statute, with international law and with internationally recognized norms and standards.<sup>306</sup>

<sup>303</sup> See *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, H (3). After 15 years of procedures, Canada finally deported Mugesera to Rwanda in January 2012. See Superior Court order Nr. 500-17-069028-120 of 12 January 2012.

<sup>304</sup> Van Anraat was charged with complicity in war crimes and genocide perpetrated by selling material used for chemical weapons to Iraq, which Saddam Hussein used as mustard gas against the Kurdish population. Van Anraat was found guilty of complicity in war crimes and sentenced for 16,5 years imprisonment.

<sup>305</sup> See *Public Prosecutor v Van Anraat*, LJN: AX6406, Rechtbank's-Gravenhage, 09/751003-04 (District Court of the Hague) and LJN: BG4822, Hoge Raad, 07/10742 (Court of Appeal) (exclusive application of domestic law). For a detailed analysis of the Van Anraat case, s. Van der WILT op. cit. 244–245.

<sup>306</sup> Rome Statute of the International Criminal Court, Articles 21 (1) c): “1. The Court shall apply: (...) (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.” and 31 (3): “At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.”

While drawing from national laws is only a supplementary means of construction to fill any lacuna in the first two sources mentioned by the Statute – the Statute itself and treaties and principles of international law<sup>307</sup> –, this link is an important aspect when analyzing the Court’s willingness to consider national law elements. Although this particular article is relevant for the Court’s own proceedings, it demonstrates that the Court is not deaf to what national law has to say.

If we look at the question of national procedures and whether these reach the threshold for the purpose of the complementary jurisdiction of the ICC, the mentioned article of the Rome Statute may indicate that in case the national court, based on national law, applies defences that are not expressly mentioned in the Rome Statute but are consistent with international law and internationally recognized norms and standards, the application of such defence would not, in itself, lead to a consideration of “inability” by the International Criminal Court, as long as such defence does not contradict express rules of the Rome Statute.

As a conclusion it can be stated that creating a tension within domestic jurisdictions is not the aim of the Court, acknowledging that “whereas the international crimes owe their very existence to the efforts and determination of the international community, concepts of international criminal responsibility have to fit in the legal texture of domestic systems where they face the competition of tried and tested equals. It is by no means self-evident that time-honoured general parts of criminal law should yield to their international equivalents, as this would probably cause unwarranted difference in the administration of criminal justice within one legal system.”<sup>308</sup> At the same time, the Statute expressly closes out certain defences, such as defence of official capacity, lack of knowledge in the case of command responsibility, or superior orders.<sup>309</sup> The application of such defences in national criminal proceedings may lead to non-investigation by the state and ultimately to the jurisdiction of the ICC.

The question of comparability of national legislation with the Statute is not only relevant to see whether a defence in national legislation is acceptable or not, but also to examine the different features of ordinary crimes and international

<sup>307</sup> S. Kriangsak KITTICHAISAREE: *International Criminal Law*. New York, Oxford University Press, 2002. 52. For an analysis of general principles being a subsidiary source of international criminal law, s. Fabián O. RAIMONDO: *General Principles of Law as Applied by International Criminal Courts and Tribunals*. *Law and Practice of International Courts and Tribunals*, 2007/6. 394–396.

<sup>308</sup> Van der WILT op. cit. 254.

<sup>309</sup> See these defences respectively in Articles 27, 28 and 33 of the Rome Statute.

crimes. Another interesting example is the question of self-defence. While self-defence in national law is a well-known and crystallized concept, it is more difficult to apply the very same concept with respect to international crimes.

The question is then, would the defence of self-defence as applied for ordinary crimes be applicable in a domestic procedure for international crimes the same way? And if self-defence would be applied for a war crime, what would be the acceptable, proportionate reaction under the terms of self-defence? Clearly, a combatant has the right to kill a combatant, irrespective of the self-defence concept as it is understood in ordinary criminal law. But would an act constituting a violation of IHL be justified under self-defence if the threat was proportionately big? And should a national court acknowledge a situation of self-defence in such a case as ground for excluding responsibility, would that mean the state was inactive in trying the person for the purposes of complementarity?

The answer will most probably depend on whether the acceptance of self-defence in a given case would go counter the rules of IHL and the ICC Statute, especially its rules on grounds for excluding criminal responsibility. As the Statute expressly states among its rules on the acceptance of self-defence as a ground for excluding criminal responsibility: “[t]he fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph”<sup>310</sup>. In other words, defensive operations as such cannot provide ground for excluding criminal responsibility based on self-defence, while individual actions could be weighed against this principle. It still remains a question to be seen in ICC jurisprudence, what action would be „proportionate to the degree of danger”<sup>311</sup>.

What seems certain is that violations of IHL cannot be tolerated on any legal grounds, including the self-defence concept. In such a case acceptance of justification of self-defence in front of a domestic court would probably raise the jurisdiction of the ICC. Similar findings were stated in a case by the ICTY, where the defence stated that the accused acted in self-defence to repeal the attack of enemy forces. The Trial Chamber, however, underlined that being in a military operation in a self-defence situation does not justify serious violations of IHL.<sup>312</sup> What is more, we may even conclude that a proportionate reaction

<sup>310</sup> Rome Statute, Article 31.1. c.

<sup>311</sup> Ibid.

<sup>312</sup> “Of particular relevance to this case is the last sentence of the above provision to the effect that the involvement of a person in a “defensive operation” does not “in itself” constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge.

under the self-defence concept may not be used as an excuse in any case to justify serious violations of IHL, logically since a proportionate reaction to an imminent threat would not be a violation of IHL according to the IHL rules either<sup>313</sup>. Consequently, one cannot state that he/she violated IHL because he was in a self-defence situation.

As there is no sufficient ICC jurisprudence as yet on the way how the ICC will assess general principles of law derived from the practice of national courts to its own proceedings, we may try to draw some examples from the practice of international tribunals. Raimondo points out that although general principles of law should be derived from national laws in force, one has to bear in mind that because of the prohibition of the application of retroactive laws *in mala partem*, the law to be looked at is the law in force at the time of the commission of the crime. However, one cannot be sure what law the tribunals looked at, because they nearly never indicated it, and the danger exists that the data they obtained and thus the law they were referring to was the law in force at the time of the proceedings, and not at the time of the commission of the act.<sup>314</sup>

Tribunals have observed both substantial and procedural elements in general principles of law. Substantial elements, such as individual criminal responsibility or duress as a mitigating factor in sentencing have been observed in the ICTR's and ICTY's *Akayesu*<sup>315</sup> and *Erdemović*<sup>316</sup> cases, while procedural elements, such as the burden of proof being on the Prosecutor have been mentioned in the *Delalić*<sup>317</sup> judgment.

A further question is how the international tribunals ascertain whether a rule is a general principle recognized in national law. To verify this, tribunals had obviously a tendency to reach to national laws and other sources of certain "leading" countries such as Germany, France, Australia, UK, USA and Canada

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The Trial Chamber will have regard to this condition when deciding whether the defence of self-defence applies to any of the charges. The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law." S. ICTY, *Prosecutor v Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-T, 26 February 2001, para 452.

<sup>313</sup> In case for instance a soldier is directly attacked by a civilian, he may defend himself without committing a violation of IHL, since the civilian person lost his protection.

<sup>314</sup> RAIMONDO op. cit. 398.

<sup>315</sup> ICTR, *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, para 471.

<sup>316</sup> ICTY, *Prosecutor v Erdemović*, Judgment, Joint Separate Opinion of Judge McDonald and judge Ohrah, Case No. IT-96-22-A, App. Ch. 7 October 1997, para 40, 55-72.

<sup>317</sup> ICTY, *Prosecutor v Delalić et al.*, Judgment, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, para 599-604.

or to reach to the national legal system of the country where normally the procedure would have taken place. This approach is plausible because it gives full satisfaction to the principle of foreseeability of the law by the accused and the *nullum crimen nulla poena* principles.<sup>318</sup> Moreover, as Raimondo points out, “recourse to comparative law as a method for ascertaining general principles of law would be a safeguard against legal imperialism”.<sup>319</sup>

Accordingly, the ICTY stated in the *Furundžija* case that “[in order to arrive at an accurate definition of rape], [...] it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.”<sup>320</sup> The modes of “all due caution” were elaborated mainly in the *Kupreškić-case*, where the Tribunal examined what degree of caution was required by national courts to sentence a person based on eyewitness identification made under difficult circumstances. During this examination of domestic practice, the Tribunal cited examples from several common law and continental law states and concluded that it will turn down conviction if it was based on evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous<sup>321</sup>. It then generally stated in the *Tadić-case* that the threshold of identification of general principles of law is high, in the sense that it needs to be shown that the principle is part of most, if not all, national legal systems<sup>322</sup>.<sup>323</sup>

As stressed in the *Furundžija* and *Kupreškić* cases, when applying or resorting to general principles of law as applied by national courts, the correctness of such analogy and transforming national law concepts in the international tribunal has to be justified. Judge Cassese also warned about the risks of such transposition:

“To my mind notions, legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal

<sup>318</sup> S. RAIMONDO op. cit. 399 and 402.

<sup>319</sup> Ibid. 403.

<sup>320</sup> ICTY, *Prosecutor v Furundžija*, Judgment, Case No. IT-95-17, 10 December 1998, para 177.

<sup>321</sup> ICTY, *Prosecutor v Kupreškić et al.*, Judgment, Case No. IT-95-16-A, 23 October 2001, paras 38 and 41.

<sup>322</sup> ICTY, *Prosecutor v Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, para 225.

<sup>323</sup> For an analysis of the ICTY’s resort to domestic cases, s. André NOLLKAEMPER: Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY. In: Gideon BOAS – William A. SCHABAS (eds.): *International Criminal Law Developments in the Case Law of the ICTY*. International Humanitarian Law Series. Leiden/Boston, Martinus Nijhoff Publishers, 2003. 277–297, s. especially 288.

proceedings. (...) Reliance on legal notions or concepts as laid down in a national legal system can only be justified if international rules make explicit reference to national law or if such reference is necessarily implied by the very content and nature of the concept. (...) However, this historical spilling over from one set of legal systems into the law of nations does not detract from these legal systems (those of States on the one side, and international law, on the other) being radically different: their structure is different, their subjects are different, as are their sources and enforcement mechanisms. It follows that normally it would prove incongruous and inappropriate to apply in an inter-State legal setting a national law concept as such, that is, with its original scope and purport. The body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law.”<sup>324</sup>

Coming to the conclusions, one can state that general principles of law in national systems have played a significant role in international criminal law by filling the gaps. However, the transposition of such rules was effectuated without any adjustment, or the rules have been adjusted so they are compatible with international law and applicable to the given case.<sup>325</sup> Should the ICC continue such a practice, this would ensure a broad observance and respect for general rules established on the national level.

#### *Role of state cooperation in ICC proceedings*

We have to briefly mention that national courts may play an additional role while the ICC is proceeding in a case. Since the ICC does not have its own police force, it is largely dependent on national authorities regarding arrest and surrender of

<sup>324</sup> ICTY, *Prosecutor v Erdemovic*, Judgment, Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22, App. Ch., 7 October 1997, paras 2-3.

<sup>325</sup> S. Raimondo op. cit. 406. For a comprehensive assessment on general principles of law in the practice of international courts, s. SZABÓ, Marcel: Általános jogelvek a nemzetközi bíróságok és az Európai Bíróság joggyakorlatában. (General principles of law in the practice of international courts and the EU Court) *Európai Jog*, 2012/XII/2. 26–34.

persons, taking and collecting evidence, questioning, searches and seizures, examining places, etcetera.<sup>326</sup>

Although not the same concepts, most states treat surrender requests from the ICC similar to extradition requests coming from another state, therefore national courts will hold a preliminary hearing or examination before the surrender, according to their own national law, to examine whether the standard of proof reaches the standard necessary for surrender. Eventually, some judges may come up with a negative answer. Furthermore, when collecting evidence, freezing assets, giving authorization for searches and seizures, the national investigating authority will need to have an authorization from a court and the judge will have its own discretion in the decision within the framework of national law.

Although the requirement of double incrimination should not – and cannot – be an obstacle to fulfilling surrender requests, partly due to the fact that with the ratification of the Rome Statute the state already accepted the penalization of the crimes included, difficulties may still arise during the specification of the crime and difference in elements of crimes especially if the state did not implement the Rome Statute crimes in its penal legislation<sup>327</sup>. Consequently, even if a state itself does not conduct prosecutions, its authorities may have a word in international procedures.<sup>328</sup>

### *Complementarity versus universal jurisdiction?*

Some authors have argued that the ICC can be seen as “the final substitute for universal jurisdiction”.<sup>329</sup> In fact, the ICC’s jurisdiction is not based on a concept similar to universal jurisdiction, but it is closer to traditional jurisdictions.<sup>330</sup> The ICC has jurisdiction to prosecute crimes committed in the territory of a State Party or by a national of a state party – two traditional basis of jurisdiction. Therefore the coverage of universal jurisdiction is wider than that of the ICC’s

<sup>326</sup> Rome Statute of the International Criminal Court, Article 93.

<sup>327</sup> For an examination of the specificities of surrender, s. M. NYITRAI, Péter: A kiadatási jog sajátosságai a nemzetközi büntetőbíróságokkal folytatott együttműködés rendszerében. In: *Ünnepi Tanulmányok Wiener A. Imre tiszteletére*. Budapest, KJK-Kerszöv, 2005.

<sup>328</sup> For example, in the US a magistrate freed a suspect requested by the ICTR, because, in his view, the proof did not measure up to the federal standard for a surrender. S. WEDGEWOOD op. cit. 409.

<sup>329</sup> See reference in Cedric RYNGAERT: Universal Jurisdiction in an ICC era – A Role to Play for EU Members States with the Support of the European Union. *European Journal of Crime, Criminal Law and Criminal Justice*, 2006/14/I. 46.

<sup>330</sup> Ibid. 48.

jurisdiction: while according to universal jurisdiction every state has the right and is in fact obliged to search for and prosecute offenders, the ICC is basically tied to the nationals and territories of States Parties.<sup>331</sup>

Therefore it is no way desirable and would go counter the international efforts of ending impunity for war crimes if states would see the ICC as a substitute for universal jurisdiction, even considering that states are often applying certain restrictions to universal jurisdiction (see Chapter 3.3.2). In fact, as many see it, the “adoption of the Rome Statute may thus prove a catalyst for universal jurisdiction”.<sup>332</sup> Moreover, the Court may even assist states in exercising universal jurisdiction, because the Rome Statute provides that “[t]he Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.”<sup>333</sup>

Even in cases where the ICC could in fact exercise jurisdiction, national procedures may be more welcome. Considering that the ICC can only deal with a limited number of cases, national courts still have a huge role to play. Evenmore, the ultimate success of the ICC could be measured by the small number of cases in which it has to proceed.<sup>334</sup> However, the ICC may be used as a substitute for national procedures when prosecution of a certain high-ranking individual would pose problems for the state or because of the links of the custodial state with the state of nationality or the territorial state.<sup>335</sup>

Universal jurisdiction is therefore seen as an exceptional form of jurisdiction. Many also see it as a form of jurisdiction that operates only in the absence of other grounds, including the international jurisdiction of international courts. According to such opinion, and due to the fact that these crimes are regarded as crimes against the whole international community, universal jurisdiction is a tool for the benefit of the international community to help out in case states with ordinary jurisdiction are not conducting proceedings.

Hence, the state is exercising universal jurisdiction not in its own name, but in the name of the international community, lacking other mechanisms. However, if another mechanism exists on the international level, such as an international

<sup>331</sup> Although the Rome Statute foresees prosecution based on the referral of the Security Council, this could be regarded as an extraordinary basis of jurisdiction in the case of the ICC.

<sup>332</sup> RYNGAERT op. cit. 51.

<sup>333</sup> ICC Rome Statute, Article 93 (10) a)

<sup>334</sup> ICC: *Paper on Some Policy Issues Before the Office of the Prosecutor*. September 2003. 4.

<sup>335</sup> S. RYNGAERT op. cit. 53.



tribunal or court, the rationale of universal jurisdiction could vanish.<sup>336</sup> According to this view, therefore, universal jurisdiction is not accorded priority over other forms of jurisdiction.<sup>337</sup>

Therefore the question arises, which prevails in case of conflict: the jurisdiction of the ICC or universal jurisdiction. If a case is not tried by the state having ordinary jurisdiction but if another state is willing to exercise jurisdiction, does it curtail the jurisdiction of the ICC based on the complementarity principle? According to the Rome Statute,

“the Court shall determine that a case is inadmissible where:  
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;”<sup>338</sup>

The Rome Statute does not expressly identify or exclude a specific ground of jurisdiction, therefore one may conclude that it could include universal jurisdiction. Therefore if any state would be willing and able to exercise universal jurisdiction over a case, this would deprive the ICC of its jurisdiction. In the *Lubanga* case, the ICC Pre-Trial Chamber noted that “such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case”<sup>339</sup>. Further case law of the ICC is yet to confirm this. In any event, certain states already tackled this question by closing out the exercise of jurisdiction if an international tribunal/court is proceeding in the case<sup>340</sup>.

Moreover, some States argued during the negotiations leading up to the adoption of the Rome Statute that the existence of universal jurisdiction obviates the need that any state consents to prosecution by the ICC. Germany, for example, specifically argued that since based on universal jurisdiction any state has the right to prosecute without consent of the concerned state, the ICC should have the same right. This argument actually bases the jurisdiction of the International Criminal Court on the existing concept of universal jurisdiction.

<sup>336</sup> S. for example ABI-SAAB op. cit. 601–602.

<sup>337</sup> S. Statement of Orrega VICUÑA: *Institute de droit international, Annuaire*. Volume 71, Tome II, Session de Cracovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 212–213.

<sup>338</sup> ICC Rome Statute, Article 17, para 1.

<sup>339</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, para 29.

<sup>340</sup> S. for example Spain, Law of 1985 as amended by Law of 2009. According to the amendment, Spain cannot exercise jurisdiction if another competent court or international tribunal has begun proceedings.

This would, in their view, mean, that should the ICC want to prosecute a case, it could do so, regardless whether the concerned state (custodial, territorial or national) accepts jurisdiction of the ICC.<sup>341</sup> Although this concept obviously had many strong opponents and a corresponding provision did not eventually find its way to the Rome Statute, it is interesting to see that certain states interpret universal jurisdiction as a very broad general authorization for any state or international body to exercise jurisdiction.

It also has to be mentioned that as recognized in international law, the primary responsibility to punish perpetrators of the most serious international crimes lies with states. Which states, is the question of the share of jurisdiction among them: obviously sovereignty requires the primacy of the territorial/nationality states. Still, international tribunals and courts were and are established because states were not able or willing to carry out this task.

This is also demonstrated in the chronology of adopted treaty obligations: after the Nuremberg Tribunal states agreed on the establishment of universal jurisdiction over grave breaches of the Geneva Convention, expressing their opinion that it is the task of states to deal with such perpetrators. Since this mechanism did not work sufficiently, *ad hoc* tribunals, and then the ICC were established. The Yugoslav and Rwanda Tribunals, being *ad hoc* bodies, did not deal with this issue, simply taking over all such cases, but the ICC is based on the principle of complementarity, in other words, on the obligation of states to proceed.

A further argument against the subsidization of universal jurisdiction to the jurisdiction of international tribunals in general and the ICC in particular would be the very practical consideration of the (un)availability of the ICC to handle a large number of cases. It is perfectly clear from the experience of the ICTY and ICTR that such tribunals are not able to deal with many cases and are only taking cases of high value and gravity. Since the ICC also connects its jurisdiction to sufficient gravity of the crimes, it is obviously not expected from the ICC to take up all international criminal cases – this task should be fulfilled by domestic courts, be it on the basis of ordinary or universal jurisdiction.

The Geneva Conventions are also silent on the issue of eventual conflict of universal jurisdiction with jurisdiction of international tribunals, not only because the International Criminal Court had not existed at the time the Geneva Conventions were adopted, but it was also deliberately silent not to hamper any future developments of the law. The Commentary indicates that „there is nothing

<sup>341</sup> S. BROWN op. cit. 385–386.

in the paragraph to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties.<sup>342</sup>

To sum up, in the present author's view, an order of jurisdictions can be established based on the corresponding international treaties and the above mentioned arguments, according to the following:<sup>343</sup>

- (i) ordinary jurisdiction – because the national/territorial state is in the best place to carry out the proceedings;
- (ii) universal jurisdiction – should the national/territorial state not proceed for this or that reason<sup>344</sup>;
- (iii) ICC – should none of the domestic courts proceed<sup>345</sup>.

### 3.1.3. Problems of direct applicability of international law

The transformation of legal solutions from one state to another and the inherent dangers, problems and difficulties are not only a subject for implementation of international law to domestic criminal legislation but are also discussed in other fields, such as transformation of constitutional or civil law solutions from one state to another. The limits of the present examination do not allow for an extensive discussion on legal transformation in general, therefore the following chapter will concentrate on the problematics of the transformation of obligations on repression into national legislation.

<sup>342</sup> Commentary to GC I, Article 49 para 2, para 4.

<sup>343</sup> It is important to underline that this order is in no way based on international obligations. According to international law, there is no mandatory order of jurisdictions when it comes to bases of jurisdiction of states. On the other hand, jurisdiction of a State *versus* jurisdiction of the ICC is guided by the complementarity principle. The order described by the present author rather refers to a rationale order.

<sup>344</sup> S. for example: Douglass CASSEL: Universal Criminal Jurisdiction. *Human Rights: Journal of the Section of Individual Rights and Responsibilities*, Winter 2004/31/1.

<sup>345</sup> Universal jurisdiction is often seen as a transitional system between national – ordinary – jurisdiction and international jurisdiction: this sustains the theory of order of jurisdictions as described above. S. de la PRADELLE op. cit. 917. Note that this order of jurisdictions of states *vis-à-vis* the ICC presents a profound difference from the same relation *vis-à-vis* the ICTY and ICTR. Namely, according to their Statutes, the ICTY and ICTR originally had primary jurisdiction over national jurisdictions and they did exercise this primacy on numerous occasions mainly at the beginning of their functioning – for instance in the Tadić, Mrkšić, Musema and Bagošora cases. S. Mohamed M. EL ZEIDY: From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11*bis* of the Ad Hoc Tribunals. *International and Comparative Law Quarterly*, 2008/57. 407.

*International law – national law relationship generally*

The relationship between international law and national law has an extensive literature written by both international and Hungarian scholars. Therefore only those aspects will be briefly mentioned below that have a direct effect on the domestic procedures concerning war crimes.

Primacy of international law over national law is a concept that had been contested for a long time, however, by today, it has been generally accepted that a state cannot excuse its actions by pointing to inadequate national implementing legislation to justify non-compliance with international obligations<sup>346</sup>. Therefore, if international law and national law contradict each other, international law prevails<sup>347</sup>, even if it contradicts the constitution<sup>348</sup> of a state.<sup>349</sup>

<sup>346</sup> The state of international law within national law or concepts related thereto are also largely influenced by a state's political system. S. Péter KOVÁCS: The effect of the change of political regime on the Hungarian doctrine of international law. In: András JAKAB – Péter TAKÁCS – Allan F. TATHAM (eds.): *The Transformation of the Hungarian Legal Order 1985-2005- Transition to the Rule of Law and Accession to the European Union*. Alphen aan den Rijn: Kluwer Law International, 2007. 453–463. As Kardos points out, the Hungarian attitude towards international law during the socialist era was characterized by the „sacred cow” concept. This approach, however, changed after the changes. S. Gábor KARDOS: The Changing face of international law in Hungary. In: András JAKAB – Péter TAKÁCS – Allan F. TATHAM (eds.): *The Transformation of the Hungarian Legal Order 1985-2005- Transition to the Rule of Law and Accession to the European Union*. Alphen aan den Rijn, Kluwer Law International, 2007. 464–467.

<sup>347</sup> S. FICHET-BOYLE – MOSSÉ op. cit. 872.

<sup>348</sup> The Hungarian Constitutional Court stated that it had to interpret the Constitution in compliance with obligations under international law. For an analysis of the role of international law in constitutional interpretation, s. László BLUTMAN: A nemzetközi jog használata az Alkotmány értelmezésénél. (The Use of International Law in Constitutional Interpretation) *Jogtudományi Közlemény*, Július-Augusztus 2009. 301–315. Blutman refers to a differentiation made by the Constitutional Court between 3 categories of international law binding on Hungary: (i) international *ius cogens* norms: these prevail over the Constitution, (ii) generally accepted rules of international law: these do not prevail over the Constitution but may complement it, (iii) international treaty rules: these do not prevail over the Constitution. The Constitutional Court eventually formed the doctrine that interpretation of the Constitution shall be done in compliance with binding international rules, including obligations arising from international treaties. Ibid. 304–305. The Hungarian Constitutional Court also ruled that it had jurisdiction to examine the amendment of the Hungarian constitution from a procedural perspective, but not from a substantive perspective. This means that from a substantive point of view, both the constitution and the amendment of the constitution are the basis for examination of the constitutionality of other legislation. The Constitution has to be in compliance with *ius cogens* and obligations of international treaties to which Hungary is a party. S. Constitutional Court decision 61/2011 (VII.13), para V.2.2.

<sup>349</sup> The Belgian Council of State, for instance, opined that if Belgium ratified the Rome Statute while its Constitution contravened its norms, the Rome Statute's provisions would prevail. See Rapport fait au nom de la Commission des relations extérieures et de la défense, Exposé

However, when it comes to obligations of individuals under international law, what effect does this primacy have on the individual's obligation? If international law has not been incorporated into national law, is the individual directly obliged to comply with international law? Can obedience to national law be a defence for perpetrating acts that constitute war crimes?

The defence of inadequate national legislation may seem similar to that of superior orders in referring to a higher command or authorization – through a lack of national prohibition of that act – to excuse the act. However, in case of superior orders the defendant has committed an illegal act, while in the case of reference to national law, the defendant did not commit an illegal act according to national law, but the act was criminal based on international law. Such a situation could result from two circumstances: either the state simply did not implement international law, or national law contradicts international law.

Whether obedience to national law could serve as a defence for violation of international obligations was one of the key issues during the Nuremberg trials, considering that many of the offences with which Nazi criminals were charged with were not illegal under German law.<sup>350</sup> Apart from the philosophical question this and other issues raised<sup>351</sup>, it is also a question of relationship between international and national law, and the obligations of individuals under international law.<sup>352</sup> Principle II of the Nuremberg Principles deals with this question in saying that “[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”<sup>353</sup>

However, the consequence of national law contradicting international law (as opposed to simply not having been implemented) tends to be more complicated.

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introduction du Vice-premier Ministre et Ministre des Affaires étrangères, Doc. Parl. 2-329/2 (1999/2000), 1–5. Available at [www.icrc.org](http://www.icrc.org) [last visited on 12 September 2012].

<sup>350</sup> Before and during the Nazi regime, if a law was enacted legally, the judiciary had basically no power to challenge them. German judges were obliged to apply German law only, even if it collided with international law. S. reference in the Justice trials: <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> [last visited on 29 March 2010].

<sup>351</sup> N.b. the Radbruch-formula about unbearably unjust laws, s. Gustav RADBRUCH: Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristenzeitung*, 1946/1. 107.

<sup>352</sup> The individual being direct subject of international law is a relatively new achievement of international law, originating primarily from the notion of international crimes – the passive side – and human rights law – the active side of the individual being a subject of international law. S. KOVÁCS, Péter: *Nemzetközi jog*. Budapest, Osiris Kiadó, 2006. 298–299.

<sup>353</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Principle II, Report of the International Law Commission covering its Second Session, 5 June–29 July 1950. Document A/1316.

The answer depends on the constitutional framework of the state and whether there is a hierarchy between international and national law according to national law. While generally it is clear that the state has to bear responsibility for not bringing its national legislation in line with international law<sup>354</sup>, the individual is bound in the first place by national law. However, if international law incurs direct rights and obligations on the individual, international law overrules national law.<sup>355</sup>

This viewpoint was supported by the US Military Tribunal in Nuremberg in the *Justice* trial: “It is, therefore, clear that the intent of the statute [...] is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. The intent was to provide that compliance with German law should be no defense.”<sup>356</sup> In other words, when national law, contrary to international law, obliges the individual to commit acts, the very enactment of that law is complicity with the crime.<sup>357</sup>

If the legislator failed to implement a treaty, can a judge make do and directly apply it, even if it is in contradiction with national law but in compliance with international law? The state cannot refer to national law to excuse itself from not complying with international law, as it is established in Article 27 of the Vienna Convention on the Law of Treaties. If a state ratified an international treaty, it is applicable even lacking national implementation, although in this case application is more difficult. Therefore to apply an international norm directly in the absence of implementing legislation would not violate national law, as the treaty had been promulgated in the state, therefore it is in force. Therefore it seems that the state is free to decide on the implementation of an international treaty only as far as this freedom of implementation is compatible with *pacta sunt servanda*.<sup>358</sup>

This limitation on the freedom in national implementation becomes more relevant as international law increasingly confers rights and obligations directly *vis-à-vis* individuals. Therefore state control over the implementation of

<sup>354</sup> Yoram DIENSTEIN: Defences. In: Gabrielle Kirk McDONALD and Olivia SWAAK-GOLDMAN (eds.): *Substantive and procedural Aspects of International Criminal Law – The Experience of International and National Courts*. Volume I. The Hague, Kluwer Law International, 2000. 382.

<sup>355</sup> Ibid. 382.

<sup>356</sup> U.S.A. v. Alstoetter et al (The Justice Cases), 3 CCL No. 10 Cases 954 (1947), available on <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> [last visited on 29 March 2010]

<sup>357</sup> The Justice Case 3 T.W.C. 1 (1948), also s. DIENSTEIN (2000) op. cit. 383.

<sup>358</sup> S. FERDINANDUSSE (2006) op. cit. 170.

international treaties goes only so far that it has to make the rights and obligations in relation to the individuals workable within national law. Whether this is done through the direct application of international law by the national courts or through comprehensive implementing legislation is up to the State to decide, as long as it works.

Therefore the specific state organs that are responsible for making international law work – the legislature in the first hand, but also the judiciary and the executive powers – are bound by international law to this effect.<sup>359</sup> This obligation also means that national courts are also bound to observe the rules of international law, even lacking adequate national legislation. It is incorrect for national courts to look at only and exclusively national law. The inadequacy of national law compared to the rules of international law does not give any exemption for the national courts from observing international law. This also follows from the internal hierarchy of norms, constitutions giving way to international rules if they are in collision with national law, and this also follows, again, from *pacta sunt servanda*.<sup>360</sup>

In addition, rules of a humanitarian character are in a special position here: because of a constant reference to the “basic dictates of humanity” or “the civilized nations”, humanitarian rules seem to be put on a higher ground than other international rules. The fact that many humanitarian rules are *ius cogens* and *erga omnes* and that many have become customary rules backs up this argument. The question is, whether this particular position also stands for the national implementation of humanitarian rules. Fact is, many international and national courts have called for effective domestic implementation and application of the humanitarian rules.<sup>361</sup> Truly, it is difficult to imagine how a State could comply with the “ensure respect” obligation of the Geneva Conventions if it does not make it possible for its national courts to enforce these rules.

Ferdinandusse notes that “[i]f some international norms are so fundamental that they bind States *per se* regardless of their consent, while proceedings on the national level provide the most, or even only, effective means of enforcement it is difficult to accept that the applicability of those norms in national courts is

<sup>359</sup> „Should one accept the view that international law confers rights and obligations on individuals, it seems reasonable to hold that international law may also impose obligations on specific State organs.”, quoted by FERDINANDUSSE (2006) op. cit. footnote 935.

<sup>360</sup> Ibid. 170.

<sup>361</sup> See Hungarian Constitutional Court decision 93/1993; UN Human Rights Committee, Concluding Observations on Nepal, Doc. CCPR/C/79/Add.41, 10 November 1994, para 12.

subject to the discretion of the State”<sup>362</sup>. It is, furthermore, even more difficult to imagine how a State could comply with *pacta sunt servanda* without ensuring the domestic enforcement of the said international norms.

However, there are examples to the contrary. The *Vermeire* case in Belgium<sup>363</sup>, although not related to war crimes, discussed whether choice of implementation of a norm was to be done by the legislative or judiciary power. The case concerned the rights of an illegitimate child to her heritage. Vermeire was a recognized illegitimate child who was denied her heritage based on the Belgian Civil Code which closes out illegitimate children from heritage. Vermeire argued, however, that the Belgian Civil Code manifested discrimination between legitimate and illegitimate children which was in violation of the European Convention on Human Rights. The Brussels Court of First Instance recognized this controversy between the Convention and the Belgian Civil Code and directly applied the norm of the European Convention on Human Rights, lacking implementing legislation. However, the Brussels Court of Appeal quashed the decision<sup>364</sup>, and this was upheld by the Court of Cassation, saying that the choice of means of implementing the rule is the choice of the legislature and not the judiciary.<sup>365</sup>

Vermeire brought the case to Strasbourg. In its decision, the European Court of Human Rights said that “[t]he freedom of choice allowed to a State as to the means of fulfilling its obligations under Article 53 of the Convention could not allow it to suspend the application of the Convention while waiting for such reform to be completed”.<sup>366</sup>

### *Monism - dualism*<sup>367</sup>

Implementation of international law means that the state includes the norms of international law into its own laws. Transformation of international rules

<sup>362</sup> FERDINANDUSSE (2006) op. cit. 163.

<sup>363</sup> Judgment of the Brussels Court of First Instance of 3 June 1983.

<sup>364</sup> Judgment of the Brussels Court of Appeal of 23 May 1985.

<sup>365</sup> Judgment of the Court of Cassation, para 11, of 12 February 1987.

<sup>366</sup> Case of *Vermeire v Belgium* (Article 50), Application no. 12849/87, Judgment of 29 November 1991, para 26.

<sup>367</sup> The question of monism-dualism will not be discussed in detail in the present book due to its rich literature. S. for instance BODNÁR, László: *Nemzetközi szerződések és az állam*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1987. Karl Josef PARTSCH: International law and municipal law. In: Rudolf BERNHARDT (ed): *Encyclopedia of Public International Law, Volume 10: States, Responsibility of States, International Law and Municipal Law*. New York-London, North-Holland – Collier Macmillan, 1987.



means the way a state makes international law in force in its national law. While transformation is absolutely necessary for the international treaty being in force in a state, implementation is a tool to make domestic application easier. Transformation mechanisms of certain states depend on the legal system of the states and the relationship between international and national law. Basically two kinds of relationships exist: monist and dualist; in practice, mostly a mixture<sup>368</sup> of the two appears<sup>369</sup>. From the viewpoint of the international treaties it doesn't matter which solution is chosen, important is that the state is able to enforce the rules of international law within its national law.

If a state violates the rules of international law, it cannot refer to its internal laws<sup>370</sup>. The difference between a monist and a dualist approach has not been very important until individuals also became subjects of international law. With individuals as subjects, it became crucial that rights and obligations stipulated directly on them by international treaties can be really enforced<sup>371</sup>. In the constitutions of Central European states one can usually find reference to acceptance of general rules or principles of international law and that international law prevails over national law. Certain constitutions even declare that international treaties accepted by the state become part of national law.

In a monist state international law becomes part of national law without transformation. This, however, does not mean that there is no need for any legal measure – implementation – to enforce the rules.

This is where we must make a difference between directly applicable and non-directly applicable rules. In theory, a directly applicable rule is for instance the prohibition of torturing prisoners-of-war, because there is no need for any legal measure to comply with this rule. It must not be forgotten, however, that the state has further obligations, such as dissemination of the rules, incorporation into military manuals, enforcement, etcetera. In order to comply with such obligations it is necessary to adopt certain measures, such as determining

<sup>368</sup> Gábor SÜLYÖK: Comments on 'The relationship of international law and the Hungarian legal system 1985-2005' by Tamás Molnár. In: András JAKAB – Péter TAKÁCS – Allan F. TATHAM (eds.): *The Transformation of the Hungarian Legal Order 1985-2005- Transition to the Rule of Law and Accession to the European Union*. Alphen aan den Rijn, Kluwer Law International, 2007. 485–486.

<sup>369</sup> For an analysis of international law – national law relationship, s. BODNÁR (1987) op. cit., and BODNÁR, László: A nemzetközi szerződések államon belüli alkalmazásának fő kérdései. (Main questions of domestic application of international treaties) *Acta Humana*, 1994/15–16. 6–19.

<sup>370</sup> S. Malcolm N. SHAW: *International Law*. Fifth Edition. Cambridge, Cambridge University Press, 2003. 124. S. also KARDOS, Gábor – LATTMANN, Tamás (eds.): *Nemzetközi Jog*. Budapest, ELTE Eötvös Kiadó, 2010. 59–60.

<sup>371</sup> S. BODNÁR (1994) op. cit. 9.

which authority is responsible for dissemination, incorporation into the manual, providing punishment and so forth.

Non-directly applicable rules are, for instance, rules related to the use of the protected emblems; these rules cannot be enforced without internal legal regulations determining for instance which authority is responsible for painting the red cross on vehicles, who is responsible for giving identity cards for medical personnel, and so on.

A dualist state transforms international treaties into its internal law<sup>372</sup>. Transformation is usually done by promulgation<sup>373</sup>. Promulgation<sup>374</sup> needs to be done in a way compatible with national regulations relating to enactment of laws, consequently an international treaty will only be in force in internal law if its promulgation was done in compliance with national law. The question of directly and not directly applicable norms<sup>375</sup> is present here as well: directly applicable norms are enforceable after the transformation without any further legislation, while non-directly applicable norms are in need of further implementing legislation<sup>376</sup>. The adoption of such further legislation is best done at the same time as the promulgation (or publication in monist states) of the treaty.

Whether criminalization of grave breaches is done through adoption into the domestic criminal code or directly through the published/promulgated international treaty is really dependent on the legal system of the state. Even if the state decides to adopt the crimes in the criminal code, it is a further question whether it would be enough to describe the act and refer to international law for

<sup>372</sup> Difference shall be made between general transformation and special transformation, in that general transformation means the transforming of international law generally into the national legal order (most often understood as the transformation of customary law into the national legal order); special means that a specific treaty is transformed in national law. Bodnár argues that this differentiation is artificial because customary norms can typically not be transformed. *Ibid.* 10.

<sup>373</sup> Bodnár argues that promulgation as such is not necessary in case of ratified treaties: in this case promulgation is a duplication of the ratification, because ratification in itself invokes the rights and obligations on the state institutions, hence, publication of the treaty would be enough. *Ibid.* 13.

<sup>374</sup> As for a confusion between the concepts of transformation and promulgation, s. BLUTMAN, László: A nemzetközi szerződések törvénybe iktatása: homokszemek a gépezetben. *Közjogi Szemle*, 2010/1. 8–9.

<sup>375</sup> In the present monograph, the question of directly or non-directly applicable norms indicates the question whether norms stipulated in international treaties can indeed be effectively enforced without further national legislation. This issue is not to be confused with the question whether international law as such is directly applicable within a state.

<sup>376</sup> This action, however, cannot be labeled as transformation: it only means that the enforcement of the norms of the treaty is effectuated by an internal law. S. BODNÁR (1994) op. cit.12.

the elements of the crime or whether all elements of the crime need to be listed in the criminal code. In the practice of states with continental legal systems it seemed to be a more secure solution – and many states chose to – if national law contained everything: elements of the crime, sanctions, defences and other issues, although even in such a case the prosecutor or judge would have to apply international law. This will be further discussed in Chapter 3.2.

Deducting from what had been said above, it becomes clear that during enforcement of humanitarian law it is not the monism-dualism issue that is problematic but rather the question of directly and not directly applicable norms: although there are numerous directly applicable humanitarian law rules, in the end it comes clear that even most of these are not really directly applicable because their effective enforcement may depend on internal legal measures.

*Can international law be really directly applicable?*

The easiest excuse to escape full implementation of international humanitarian law treaties is to argue that according to many states' constitutions and internal legislation, international law becomes part of domestic law as soon as it is duly promulgated (dualist systems) or published (monist systems). Although this may be theoretically correct,<sup>377</sup> this provision does not solve all the problems a state may face when it applies humanitarian law treaties. In fact, it seems in most cases it does not solve any of the problems.

The question of direct application of international law by national judges could seem to be a non-issue at first blink.<sup>378</sup> However, if a state becomes party to a

<sup>377</sup> Constitutions of Bosnia-Herzegovina, Estonia and Hungary recognize general principles of international law. The Constitutions of Macedonia, Poland, Slovakia and Slovenia say that self-executing treaties are directly applicable. The Croatian, Lithuania, Estonian and Slovak systems (although the Slovak Constitution mentions promulgation of international treaties, many Slovak authors argue that the Slovak system is monist) seem to be monist or have monist elements in their Constitutions. The Bulgarian, Czech, Hungarian and Polish Constitutions are dualists or have dualist elements: the Bulgarian Constitution says that ratified, promulgated and in-force treaties are part of national law, the Czech Constitution refers to promulgated treaties, the Hungarian and Polish Constitutions mention publication of international treaties. It has to be noted that in many cases there are no clear monist-dualist solutions but a mixture of the two.

<sup>378</sup> By 'direct application of international law by domestic courts', the present study means application by domestic courts of rules of international treaties that were ratified by the given state but its provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but did not implement that specific grave breach into its penal code. Similarly, direct application could also mean an application of a customary rule without it having been implemented into national legislation.

treaty and does not bother with adopting implementing legislation, as we will see from following examples, the promulgation of the treaty would not necessarily be enough for a judge to try someone for war crimes “directly” based on these treaties.

This is what the present study understands under direct applicability of international norms: the judge would formally have to apply national law – that is, the promulgated treaty, because due to the ratification the international treaty became part of national law – , but if the rules were not implemented into the already existing internal norms (for example in the Criminal Code), the judge, in fact, would have to directly apply the Geneva Conventions / Additional Protocols or other treaties, which are creatures and part of international law. The reason for the complexity of the question is the difference between the features, systems and rules of international law and national law<sup>379</sup>.

In addition, in many cases international law does not regulate issues as detailed as it would be necessary for a judge for its effective application.<sup>380</sup> Questions arise such as what could be a reference for the elements of such crimes, what sanctions would the judge impose if the concerned act was not in the domestic criminal code, how could international case law be taken into account, what about relevant customary law, etc. Depending on the state’s legal system and culture, the judge could either solve these issues through direct application, or, lacking properly clear domestic legislation, he/she may not be in a position to properly apply the law and thus would be bound to drop charges due to problems inbuilt in national legislation.

This, however, would mean that the state is not able to effectively enforce the international treaty. As Wiener puts it: “In case we accept criminal responsibility based on international law, from the view point of legal guarantees of criminal law, the adoption of domestic laws is not necessary for holding the individual

<sup>379</sup> One of the reasons for the adoption of the German *Völkerstrafgesetzbuch* was it being a link between international law and national criminal legislation which is required for German courts to adjudicate in a concise manner acts violating international law, and to consolidate international criminal law into the German legal order, in order to ease the work of adjudicators. S. KIS, Norbert – GELLÉR, Balázs: A nemzetközi bűncselekmények hazai kodifikációja de lege ferenda. In: *Wiener A. Imre Ünnepi Kötet*. Budapest, KJK-Kerszöv, 2005. 364; and the ministerial explanation to the German *Völkerstrafgesetzbuch*.

<sup>380</sup> As for collision of direct application of the Rome Statute with the principle of legality, s. Michael COTTIER: Die „Umsetzung“ des Römer Statuts hinsichtlich der Kriegsverbrechen. *Jusletter*, 14 Maerz 2005. 4. [http://www.trial-ch.org/fileadmin/user\\_upload/documents/jusletter\\_michael\\_cottier.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/jusletter_michael_cottier.pdf) [last visited on 11 October 2010]. In this article, Cottier asks whether it is compatible with the principle of legality that the Swiss military penal code refers to crimes defined in international treaties and it does not define the elements of crimes in the national penal code.

accountable, however, a sovereign state decision must be made in order that the internal jurisdiction works, because criminal prosecution is an expression of state sovereignty. It is then an internal constitutional question, what kind of measure is adopted to express this sovereign decision.<sup>381</sup>

Can a state refer to a lack of national implementation measures when it comes to the application of an international obligation? As is well known, and as Shaw also points out, although in case a state does not act in accordance with its obligations as laid down in international law, the domestic position is unaffected (and is not overruled by the contrary rule of international law), the state as it operates internationally has broken a rule of international law and the remedy will lie in the international field<sup>382</sup>. “A state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws.”<sup>383</sup> Therefore, a state cannot argue effectively that it can not or not properly try the perpetrators of war crimes because it is lacking adequate implementing legislation. Moreover, should the state consider that the implementing legislation is sufficient, but at the same time should a judge not find the domestic legislation sufficient to try the accused, the question arises whether this would amount to a breach of the international obligations of the state.

Degan states that “unlike international judges and arbitrators who gave direct effect to international obligations, a national judge could not do that unless authorized by national law.”<sup>384</sup> But what does authorization by national law mean? Does it suffice if the state simply ratifies the relevant treaty or does it require further authorization in national law? This depends on both national legislation and the willingness and self-confidence of judges to apply a foreign field of law.

In theory, if international law had become part of the national legal order, it becomes a part of national law therefore directly applicable: in fact, the judge applies national law. If some elements of crimes are not to be found in the treaty which the judge is dealing with but in other treaties, the issue is similar. However, if some elements necessary for adjudicating the case are to be drawn from other sources, such as texts or documents not adopted in treaties, then it could be really

<sup>381</sup> WIENER, A. Imre: Büntető joghatóság és nemzetközi jog (Criminal jurisdiction and international law). *Állam-és Jogtudomány*, 1993/35. 203.

<sup>382</sup> SHAW op. cit. 123.

<sup>383</sup> Ibid. 124.

<sup>384</sup> Statement of Vladimir-Djuro DEGAN: Institut de droit international, *Annuaire*, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie. Paris, Editions A. Pedone, Paris. 212.

problematic whether the judge could and would refer to these “international” cases and documents, and if so, on what basis.

For example, the elements of war crimes are listed in a separate document to the ICC Rome Statute. Although the Elements of Crimes are not binding on ICC judges, they are to be used as an interpretative aid during ICC proceedings<sup>385</sup> and thus could be guiding for national courts as well. If national criminal codes include crimes based on the ICC Rome Statute and when a national judge is applying these crimes, could he also directly apply the elements of war crimes? On what legal basis?

In Hungary, an ‘Information’ had been issued in 2004 by the Minister of Justice<sup>386</sup>, referring to the acceptance of the force of foreign court decisions, including decisions of international tribunals established based on an international treaty or the decision of the Security Council of the United Nations. Since the new law on the adoption of laws annulled all Informations based on a decision of the Constitutional Court<sup>387</sup>, the Information is not valid anymore, it provided an interesting example of how national legislation is trying to deal with the effect of foreign court decisions.

The Information generally stated that with the widening of international relations, development of the law was pointing towards the acceptance of the force of foreign court decisions in criminal cases. The Information then noted that the Hungarian courts considered the force of foreign court decisions and international court decisions equal to Hungarian court decisions if the act was punishable under both the foreign and Hungarian law and the punishment was in compliance with the Hungarian legal order. This rule meant that (i) the case was considered *res judicata* in Hungary and (ii) the foreign or international court/tribunal decision could be referred to with the same force as a Hungarian court decision. It is worth to mention that although the Information itself was annulled, it may still provide as a guidance for judges and prosecutors.

The Hungarian Constitutional Court held in 1993, examining a law that was the partial basis for the *Korbély* case (see next paragraph), that “[a] typical feature of war crimes and crimes against humanity is that they are punishable irrespective of whether they were committed in breach of domestic law. [...] It is therefore

<sup>385</sup> Knut DÖRMANN: *Elements of War Crimes under the Rome Statute of the International Criminal Court*. Cambridge, ICRC-Cambridge University Press, 2003. 8.

<sup>386</sup> Information of the Minister of Justice nr 8001/2004 . (IK.4.) on the administration of criminal cases with of an international concern (8001/2004. (IK. 4.) IM tájékoztató a nemzetközi vonatkozású büntető ügyek intézéséről).

<sup>387</sup> Constitutional Court decision 121/2009. (XII. 17).

immaterial whether the Geneva Conventions were properly promulgated or whether the Hungarian State fulfilled its obligation to implement them [...]. Independently [of these issues], the responsibility of the perpetrators existed under international law, and potential subsequent domestic legislation may give effect to this responsibility in its original scope<sup>388</sup>.

The “direct” application of ratified international treaties got therefore particular importance at *Korbely v. Hungary* in front of the European Court of Human Rights.<sup>389</sup> Korbély was a Hungarian captain who was found guilty in Hungary for attack against protected persons during the 1956 revolution. The debate of the case was particularly around one victim, Tamás Kaszás, a member of the insurgents, who, among others, intruded into the compound where Korbély was serving. The incident in question involved Korbély negotiating with Kaszás and his company about their surrender to which they eventually agreed. Kaszás drew a handgun from his pocket – a movement which was interpreted differently and became the essence of the case: according to Korbély, under the circumstances it could be believed that he was reaching for his handgun to attack, and Korbély ordered his men to open fire, simultaneously shot at Kaszás himself who died immediately. According to the other party, however, Kaszás drew his handgun to hand it over to surrender, in which they previously agreed. The Hungarian Supreme Court found Korbély guilty for intentional murder constituting a crime against humanity based on Article 3 of the Geneva Conventions.

Korbély brought the case to the European Court of Human Rights, arguing, *inter alia*, that the Hungarian courts have violated the principle of legality, because the Hungarian translation of the Geneva Conventions, ratified in 1953 by Hungary, was not promulgated in the official state gazette, but in a separate annex to it. According to Hungarian law, a precondition for entry into force of any legal act is the publication in the official state gazette. Although the ECHR did not accept this argument in the given case – arguing that these rules were well known to the claimant which proved in that the rules were incorporated in the military manuals at the time for the training of which the claimant was responsible –, this defence could have eventually brought about difficulties for the state in terms of fulfilling of international obligations.

The question of direct application of international law gets even more complicated when it comes to *customary law*. This problem usually comes up with regard to universal jurisdiction where it is not accepted in treaty but in

<sup>388</sup> Hungarian Constitutional Court, case nr. 53/1993, para 4.d.

<sup>389</sup> *Korbely v Hungary* [GC], no. 9174/02, European Court of Human Rights (19.9.08).

customary international law. According to Degan, “[u]nless otherwise authorised by national law, the principle of *nullum crimen sine lege* would prevent the national judge from giving effect to the *aut dedere aut judicare* principle in a treaty or universal jurisdiction based on customary international law.” The only solution can be a general transformation of accepted customary law into the national legal order. Such a solution can be found in the Hungarian constitution: “Hungary shall accept the generally recognised rules of international law”.<sup>390</sup> While it is a topic of debate whether this refers to *ius cogens* or customary international law or both, such a general transformation may ease the way for judges to apply non-written binding rules of international law.

Certain states find customary law too elusive and vague to be able to be directly referred to. The Dutch Supreme Court in the *Bouterse* case<sup>391</sup> (a more in-depth analysis follows in Chapter 3.2.1.) did not accept reliance on customary law if it collided with national law. Van der Wilt mentions that “[r]ules of international customary law may by their very nature lack sufficient precision. Moreover, it may be rather difficult for a court to assess whether a certain standard has matured into international customary law. However, these considerations can be countered by other arguments. [...] If [the prohibition of torture as *ius cogens*] entailed that States are under an obligation to prosecute perpetrators, it might be questioned whether they would be permitted to invoke *any* domestic legal impediments as an excuse to neglect such obligation.”<sup>392</sup>

The elusiveness of customary law shall not be an obstacle to its application. In the end, customary norms are equally binding as treaty law. Whether it is the task of the legislator or the judge to decide whether a norm is customary or not, shall be the decision of the state. It should, however, be considered that it would be unrealistic to expect the legislature to implement customary law into its national legislation in a systematic way. Therefore it will remain to be the task of the judge to decide on the customary nature of a given norm. The only consequence its elusiveness could then have would be an utmost caution on the side of the judges in such determination and consequently a restrictive rather than a broad approach.

Regarding the direct application of universal jurisdiction, some argue that a judge can apply universal jurisdiction only based on an express authorization in domestic law, others argue that the treaty provision to extradite or prosecute is

<sup>390</sup> The Fundamental Law of Hungary, 25 April 2011, Article Q para 3.

<sup>391</sup> Supreme Court of the Netherlands, nr. HR 00749/01 CW 2323 LJN: AB1471, NJ 2002, 559.

<sup>392</sup> Comment of Harmen van der Wilt, *Bouterse*-case, ILDC 80 (NL 2001), C5.



enough.<sup>393</sup> While the treaty provision clearly establishes an obligation, judges are reluctant especially in the field of criminal law to act without an express provision in their own domestic criminal legislation.

Ferdinandusse poses the question whether „general rules of reference to international law or a part thereof [...] also incorporate international offences [...] in the national legal order [...]. In other words, is ICL subject to the same constitutional rules on incorporation and transformation as international law in general, or does it take up a special position?”<sup>394</sup> Ferdinandusse further suggests that the explicit mentioning of international law does not in itself fulfill the requirements of the principle of legality, and to decide whether international law can be directly applied. It all depends on the national provisions relating to the adoption of legislation: if such provisions foresee that punishment has to be based on national law, it is still an open question whether national law in this sense includes international law - because of its inclusion in national law through a general reference.<sup>395</sup>

Therefore considerations of the principle of legality do not fix the question alone: other issues have to be looked at, such as the status of international law in national law and the question of direct applicability of international law provisions. Many constitutions say that international law shall be directly applied. However, there may be difficulties as to the direct application of international customary law, as most of the constitutions define international treaties as being part of the national legal order, and only some constitutions name “generally accepted principles of international law”<sup>396</sup>.

In practice, after ratification of a treaty, two solutions are possible:

- (i) it is a monist state therefore no need to promulgate the international treaty, it becomes part of national law without any transforming legislation;
- (ii) it is a dualist state, therefore the state promulgates the treaty in its national law.

In both cases direct application should be theoretically no problem, because the treaty became part of the legal order, either as effect of the treaty’s ratification and it being published (monist state), or as effect of the promulgation (dualist state).

Can then this treaty be directly applied by the judge? The elements of the crimes are more or less specified in the Geneva Conventions and other treaties

<sup>393</sup> Statement of Orrega VICUÑA: Institute de droit international, *Annuaire*, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 213.

<sup>394</sup> FERDINANDUSSE (2006) *op. cit.* 36.

<sup>395</sup> *Ibid.* 36.

<sup>396</sup> *Ibid.* 170.

containing serious violations, but a number of other questions are not: the penalty, the defences, forms of participation and so forth. Consequently, it is not enough for the judge that direct application is theoretically possible and constitutional, the judge needs further elements for his judgment. These further elements can be provided in national law in two typical ways:

- (i) for instance a Geneva Convention Implementation Act: the implementation act should solve these issues, either by referring to the applicability of the ordinary criminal code in these aspects, or by containing the answers in the implementation act itself (e.g. United Kingdom);
- (ii) implementing the crimes in the criminal code (e.g. Hungary) or in a separate legislation (e.g. international crimes code as in Germany).

In addition, an official translation of the treaty should be provided in such acts/legislation. These kinds of national laws will finally give all the elements for the judge to be able to adjudicate the case. However, lacking any of these elements – the translation, the penalty or a reference to the applicable penalty, the forms of participation or other general criminal law issues – would result in that the judge would either not be able to apply the law, or he would have to make an inventive application, and it depends on the states' legal system, how far a judge can go.

#### *Relationship between self-executing norms and direct applicability*

Direct applicability is often confused with self-executing rules. Self-executing rules are rules which don't require specific national legislation to be applied. Whether a rule is self-executing or not, depends on the nature of the rule. Prohibition of a certain act as such is, for example, self-executing, because for a person not to commit an act there is no need to have national legislation. If, however, the application of a rule requires the action of a state authority, there is need for national legislation to appoint which authority is responsible to make that action. The fact that a rule itself is self-executing does not necessarily mean that there is no need for national legislation to effectively enforce that rule in national law; enforcement obligations are therefore usually not self-executing.

The prohibition of acts considered as war crimes could be said to be self-executing, i.e. soldiers who are holding prisoners in custody shall not treat the prisoners inhumanely – there is no need for specific legislation so that soldiers can follow this rule. However, in order to effectively enforce this rule, the state may have to criminalize the act in the penal code, unless international law can be directly applied by the courts. Therefore if a state would like to effectively apply international rules it must examine whether despite the self-executing

nature it needs national legislation. The question of self-executiveness does not only concern the question whether the rule can be enforced directly by national courts, but also whether the rule can be applied without the adoption of national laws.<sup>397</sup> There is no authority or treaty rule to say which rules are self-executing. It is up to the state to consider whether a rule is considered self-executing or not. However, states have to be careful not to rely too heavily on the self-executing nature of certain rules in the field of criminal repression, because it may go contrary to the legality principle<sup>398</sup>.

As the US District Court said in the *Baptist Churches* case, “Article 1 of the Geneva Conventions is not a self-executing treaty provision. The language used does not impose any specific obligations on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement [...]. The treaty provision is »phrased in broad generalities« [...] and contains no rules by which private rights may be determined’.”<sup>399</sup>

Usually the problem that arises around self-executing norms is not that much their denial, but rather an excessive reliance on them. States, not wanting to engage in often lengthy process of adopting implementing legislation tend to rely on norms as being self-executing even when they are actually not, or when the rule itself may be self-executing, but its national enforcement would require national legislation.

The difference between direct applicability and the question of self-executiveness therefore lies in their features: direct applicability is the question of the position or “availability” of international law generally during application of the law, while self-executiveness is a feature of a specific norm. Variations are possible in all directions: a norm may be self-executive but the treaty may not be directly applicable by a judge in a given legal system; or even if a treaty is directly applicable, many norms may not be self-executive.

To demonstrate with examples, in the first case prohibition to attack medical staff is a self-executive norm, but if no such crime is to be found in the domestic

<sup>397</sup> According to Bodnár, self-executing treaties are treaties where (i) national law does not exclude the possibility of self-executiveness of the treaty, (ii) the addressee of the treaty can be concretely defined, (iii) the contents of the treaty are well determined rights and obligations. S BODNÁR (1994) op.cit. 17.

<sup>398</sup> S. FICHET-BOYLE – MOSSÉ op. cit. 872.

<sup>399</sup> United States, District Court for the Northern District of California, *Baptist Churches case*, Judgment of 24 March 1989, para 12. Source: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule144#\\_VNaCa](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule144#_VNaCa) [last visited on 30 March 2012]. The case involved consideration over deportation of Salvadoran and Guatemalan nationals to their home country where Article 3 violations are occurring, and whether their deportation would violate the „ensure respect” obligation of the Geneva Conventions.

criminal code, the judge may have difficulties punishing it in certain legal systems. On the other hand, one may also say that prohibition to attack medical staff is not fully a self-executing norm, especially because its enforcement needs special legislation, but the judge could and should directly apply the treaty if the domestic criminal code does not provide such crime. As for the second example, some states may very well accept direct applicability of international treaties, however, obligations to mark protected cultural property with the blue shield is obviously not self-executing in that national law needs to specify which authority decides on the list of cultural property to be marked. It is thus clear that direct applicability and self-executiveness concern different legal questions, eventhough in a given case they may mean the same thing.

#### *3.1.4. Specific problems related to universal jurisdiction*

Whether States have the power to establish universal jurisdiction for crimes committed in a non-international armed conflict has been the subject of a long debate and is a perfect demonstration of problems inbuilt in international law and the role of jurisprudence on how international law evolves.<sup>400</sup> This is even more so, because the exercise of universal jurisdiction is an obligation that is surrounded by political considerations, however, as is shown below, judicial practice has, at least partially, overcome the political concerns and stepped largely over the treaty law frameworks.

The Geneva Conventions have clearly developed an obligation to search for and prosecute persons having committed grave breaches in international armed conflicts.<sup>401</sup> As far as violations committed in a non-international armed conflict are concerned, the Geneva Conventions merely establish an obligation to “suppress” such violations<sup>402</sup>, without specifying the method, be it criminal or other means. The text itself does not exclude the possibility of a State deciding to establish its own universal jurisdiction for crimes committed in non-international armed conflicts.

However, to exercise universal jurisdiction without authorization from treaty or customary international law would be exceeding the jurisdiction of the state

<sup>400</sup> For arguments for applicability of universal jurisdiction to non-international armed conflicts, s. WEDGEWOOD op. cit. 398.; MERON (1995) op. cit. 569.; Yoram DINSTEIN: The Universality Principle and War Crimes. In: Michael N. SCHMITT and Leslie C. GREEN (eds.): *The Law of Armed Conflict: Into the Next Millenium*. Newport, RI, Naval War College, 1998. 17 and 21.

<sup>401</sup> Articles 49/50/129/146 Geneva Conventions.

<sup>402</sup> Articles 50/51/130/147 Geneva Conventions.

and would infringe the sovereignty of other states.<sup>403</sup> If a crime has no link with the state and there is no international authorization for exercising extra-territorial jurisdiction, the state has no ground to exercise its judicial powers.<sup>404</sup> This may also be the case if the court bases universal jurisdiction applying an ordinary crime from the criminal code to an international crime: for example if the court applies ordinary murder for an unlawful attack against a civilian, without any legislative link to international law, the state steps over its limits of exercising extra-territorial jurisdiction.

The question of sovereignty with relation to universal jurisdiction appeared in the *Guatemalan Generals* case in Spain. The Supreme Court held that the principle of universal jurisdiction, as acknowledged by Spanish laws, must be understood in a way that it doesn't infringe the sovereignty of other states: if a state would prosecute a crime that was perpetrated on the territory of another state on the basis of domestic law, without any limitations, this would infringe sovereignty of the other state. Therefore, the Court required the existence of national interest for Spain in order to have jurisdiction. Later, this decision was annulled by the Spanish Constitutional Court, which stated that imposing additional restrictions on the exercise of universal jurisdiction is a *contra legem* reduction of the conditions laid down in the Spanish law and is inconsistent with the concept of universal jurisdiction as laid down in international law.<sup>405</sup>

Many writers point out that although at the time of the drafting of the Geneva Conventions universal jurisdiction was meant to apply for crimes committed in international armed conflicts, development of the reality and law has resulted in broad acceptance of universal jurisdiction for crimes committed in non-international armed conflicts as well. Customary law seems to support this<sup>406</sup>, strengthened by the fact that certain international tribunals (Rwanda, Sierra Leone, Cambodia) also have jurisdiction over crimes committed in such conflicts.

The ICRC study on customary international humanitarian law also indicates a similar tendency.<sup>407</sup> Indeed, the Resolution adopted by the Institute of

<sup>403</sup> The same conclusion was drawn by the American Bar Association, s. its Recommendation 103A on universal criminal jurisdiction.

<sup>404</sup> S. Kenneth C. RANDALL: Universal Jurisdiction Under International Law. *Texas Law Review*, 1988/66/785. 785–786.

<sup>405</sup> *Rigoberta Menchu and Others v Guatemalan Government Officials*, Judgment of the Constitutional Court, 26 September 2005, para 8 (translation by the author).

<sup>406</sup> S. Institute de droit international, *Annuaire*, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 210.

<sup>407</sup> S. DOSWALD-BECK – HENCKAERTS op. cit. Rule 157. „States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]”.

International Law in 2005 states that “universal jurisdiction may be exercised over [...] other serious violations of international humanitarian law committed in international or non-international armed conflict.”<sup>408</sup>

Other authors argue, however, that this concept only applies to international armed conflicts. Wedgewood has a remarkable explanation: she argues that prosecutions in such cases based on universal jurisdiction are “escaping on the technical ground that the victim was not ‘protected by’ the Treaties. The Geneva Conventions’ class of ‘protected persons’ has generally been limited to include only the non-national of the belligerent, and, by definition, civil wars are fratricidal.”<sup>409</sup> While one may agree with the outcome of the argument, it is difficult to see why in this analysis the application of the grave breaches/universal jurisdiction provisions is restricted only for protected persons in the understanding of Geneva Convention IV and not the other Conventions.

The Hague Supreme Court reached the conclusion in *Prosecutor v Darko* that the obligation of universal jurisdiction is applicable to war crimes committed in a non-international armed conflict.<sup>410</sup> Later, the Hague District Court in *H v Netherlands* also ruled that it had universal jurisdiction over violations of common Article 3, directly based on the Geneva Conventions. The court said that although universal jurisdiction is expressly mentioned only in relation to grave breaches of the Convention, it does not mean that it is closed out for other breaches, given that states are given a free hand how to ‘suppress’ other breaches, and this could include universal jurisdiction.<sup>411</sup> The Appeals Court then softened this position by saying that Dutch courts had jurisdiction in this case based on Dutch national laws, and so the Court largely circumvented the essence of the question.<sup>412</sup>

In Belgium, the first cases based on universal jurisdiction were in connection with crimes committed in a non-international armed conflict, such as the case

<sup>408</sup> Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes (seventeenth commission: rapporteur, Mr. Christina Tomuschat), Resolution. [http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf) [last visited on 27 May 2010]

<sup>409</sup> WEDGEWOOD op. cit. 397–398.

<sup>410</sup> S. Dutch Supreme Court, *Prosecutor v Darko*, 11 November 1997, NJ 1998, No. 463, 30 Netherlands Yearbook of International Law (1999). 315.

<sup>411</sup> The Hague District Court, 14 October 2005, LJN AU 4373. For an analysis of the decision, s. Guénaél METTRAUX: Dutch Courts’ Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes. *Journal of International Criminal Justice*, 2006/4. 362–371.

<sup>412</sup> *H. v. Public Prosecutor*, Decision of the Court of Appeal of The Hague, LJN: AZ7143, 29 January 2007, ILDC 636 (NL 2007). F3 and H4-H5.

concerning Rwanda, *Public Prosecutor v Higaniro et al.*<sup>413</sup> for genocide crimes. The first case based on universal jurisdiction for grave breaches was *Public Prosecutor v Saric*, in Denmark.<sup>414</sup>

The heart of the question really is, whether universal jurisdiction can be exercised only if there is express authorization or rather, obligation, in international law (such as the case with grave breaches of the Geneva Conventions) or whether states are authorized to apply universal jurisdiction in other cases as well.<sup>415</sup>

While the Dutch court in *H v Netherlands* may have been right in saying that states are free to decide how they suppress violations, be it with criminal or other means, it does not give *carte blanche* for the application of universal jurisdiction: this is another matter.<sup>416</sup> Since exercising such jurisdiction touches on other states' sovereignty, it requires international authorization. While states are free to criminalize any act they wish within the borders of international law as this represents the margin of appreciation deriving from their sovereignty, states are not free to establish jurisdiction outside their sovereignty, except especially authorized by international law or by other states. Even if an act is seen as a crime under international law, it does not automatically follow that every state has jurisdiction over it. The criminal nature of an act and jurisdiction are, therefore, two different issues and have to be regarded separately.

What follows is that domestic courts, lacking national legislation, have to review whether a certain act was criminal in international law at the time of the commission, and, if the case does not fall under ordinary jurisdiction, they additionally have to examine whether authorization exists, either in treaty or in customary law, for the exercise of universal jurisdiction. Only in case of the presence of both criteria can a state exercise universal jurisdiction over an act that was not criminalized in its national law (in case it was, the first criteria has to be viewed differently: it has to be examined whether the criminalization existed in national law at the time of the commission).

<sup>413</sup> Assize Court of Brussels 8 June 2001. For a detailed discussion on Belgium's law on universal jurisdiction and the case, s. Luc REYDAMS: *Universal Jurisdiction, International and Municipal Legal Perspectives. Oxford Monographs in International Law*. New York, Oxford University Press, 2003. 102–118.

<sup>414</sup> Østre Landsret, 25 November 1994 (Trial judgment); Højesteret, 15 August 1995 (Appeals judgment), reprinted in *Ugeskrift for Retsvæsen* 1995, 838 H. S. REYDAMS op. cit. 128–129. As for a summary of the Trial judgment, s. <http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/9d9d5f3c500edb73c1256b51003bbf44!OpenDocument> [last visited on 4 November 2011]

<sup>415</sup> S. Van der WILT op. cit. 240–241 and 254.

<sup>416</sup> S. METTRAUX op. cit. 367.

There is also a wide interpretation of the ICC Rome Statute's complementarity principle, where authors argue that all crimes subject to ICC jurisdiction may also be subject to universal jurisdiction.<sup>417</sup> An argument supporting this view says that war crimes, crimes against humanity and genocide – *ius cogens* - are subject to universal jurisdiction.<sup>418</sup>

Some authors, however, argue that universal jurisdiction for non-international conflicts is not customary law. Van der Wilt for instance says that „[a]lthough the ICJ did not pronounce on the scope of universal jurisdiction the judges in their separate and dissenting opinions displayed a wide array of diverging views on the issue. Some of them adhered to the well-known Lotus-judgment, allowing states a wide margin of discretion to define the range of their jurisdiction, while others took a stricter stance, requiring indeed an explicit basis in international law. In view of this disparity, it is unlikely that a hard and fast rule of international customary law has solidified.”<sup>419</sup>

Certain authors, on the contrary, claim that universal jurisdiction for non-international armed conflicts as such is now customary law and states are free to exercise it to punish violations of IHL: “all states have the right to punish such [common Article 3] breaches. In this sense, non-grave breaches may fall within universal jurisdiction.”<sup>420</sup> Furthermore, “[j]ust because the Geneva Conventions created the obligation of *aut dedere aut iudicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions. [...] Even if there is no clear obligation to punish or extradite authors of violations of the Geneva Conventions that are not encompassed by the grave breaches provisions, such as common Article 3, all state have the right to punish those guilty of such breaches. In this sense, nongrave breaches may fall within universal jurisdiction.”<sup>421</sup>

Wedgewood deducts the applicability of universal jurisdiction to non-international armed conflicts from the ICTY's decision in *Tadić*: according to her reasoning, since the ICTY ruled that the denial of diplomatic protection to its own national makes that national protected under the Fourth Convention

<sup>417</sup> RYNGAERT op. cit. 59.

<sup>418</sup> S. for example *Prosecutor v Furundzija*, ICTY Case No IT-95-17/1-T (10 December 1998), Judgment para 156: „It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”

<sup>419</sup> S. ILDC 636 (NL 2007) for the case *H v Netherlands*, The Hague District Court, 14 October 2005, LJN AU 4373, C4.

<sup>420</sup> MERON (1995) op. cit. 569.

<sup>421</sup> Ibid.



(irrespective of the nationality criteria described in Article 4), the provisions on universal jurisdiction, Wedgewood argues, are also applicable to violations of common Article 3. Furthermore, the ICTY avoided the limitation by prosecuting violations of laws and customs of war, and given its power through the Security Council's Chapter VII plenary power, "any doubt about the applicability of universal jurisdiction to the prosecution of such violations of customary law was set aside".<sup>422</sup>

A further question emerges when the domestic court bases its procedure on an ordinary crime concerning an act that is otherwise an international crime – can universal jurisdiction be exercised in this case? If namely there is no link with the crime to be repressed as obliged by international law, then many authors argue<sup>423</sup> that in this case there is no basis for universal jurisdiction.<sup>424</sup>

Taking all the above noted considerations into account, especially the fact that universal jurisdiction may infringe the sovereignty of other states in case exercised without due authorization by international law, and considering that there is no treaty-based rule authorizing universal jurisdiction for crimes committed in non-international armed conflicts, it must be examined whether customary law provides a clear ground for the exercise of such jurisdiction. Notwithstanding several domestic court decisions and writers quoted above, it does not yet seem confirmed to the present author that universal jurisdiction for non-international armed conflicts is a well-established rule of customary international law. This can be sustained by the clear objection of certain states to the existence of such customary rule<sup>425</sup>, as well as by the lack of a uniform state practice.

This is not to say that such international legal authorization would not be desirable or logical, or that a tendency has started, considering that for victims and for international justice in general it is irrelevant whether the atrocities were committed in the framework of an international or non-international armed conflict. At the same time, witnessing all the sensitive issues the exercise of universal jurisdiction (in international conflicts) raises, it is, realistically speaking, no wonder that many states hesitate in extending such rule to non-international armed conflicts.

<sup>422</sup> WEDGEWOOD *op. cit.* 398–399.

<sup>423</sup> S. Van der WILT *op. cit.* 241.

<sup>424</sup> This was discussed in more detail previously.

<sup>425</sup> Such objections were, among others, expressed in relation to the relevant rule of the ICRC's Customary Law Study.

## 3.2. Hurdles inbuilt in national law

The present chapter lists potential problems inbuilt in national law that may arise as constraining factors for the domestic application of international law generally and international crimes specifically. The chapter starts with general questions such as the eventual conflict of national implementation and application with the legality principle, and follows by an analysis of consequences of different approaches of national implementation on the domestic war crimes procedures. The chapter discusses issues related to the application of universal jurisdiction separately, due to specific aspects linked to it.

It must be noted here that the classic division of practice of common law – continental law solutions does not necessarily make sense here. Although most of the problems tackled in the following pages are issues more for continental systems, general questions of legality may also come up in common law states. Therefore the division of sub-chapters follows the topical problems rather than the approaches of states from different legal traditions.

### 3.2.1. *Implementation: a conflict with the legality principle?*<sup>426</sup>

In the *Korbély* case, already discussed above, the argument was raised by the complainant that the Geneva Conventions were not in force because the text with the official Hungarian translation had not been promulgated in the Official Gazette, but it was published in a separate document. According to Hungarian law, a condition for the entry into force of a law is promulgation in the official state gazette. The ECtHR did not accept this position, arguing that Korbély, who was in charge of military training, obviously knew about the obligations of the Geneva Conventions as these formed part of the training material available to him.

Arguments related to accessibility of international norms sporadically come up in criminal procedures. However, as Ryngaert also argues, “no sensible person can still assert that he or she was not informed of the international criminality of acts such as genocide, indiscriminate firing on crowds or wanton destruction of property in times of war, acts that are, especially since Nuremberg, crimes against international law the criminality of which is believed to be known

<sup>426</sup> Here, the followings are understood under the principle of legality: *nullum crimen sine lege*, *nulla poena sine lege*, foreseeability of the law, accessibility of the law.

by all.<sup>427</sup> The ICCPR, similarly, requires the non-applicability of principle of non-retroactivity with respect to crimes that were criminal according to the general principles of law recognized by the community of nations at the time these were committed – a demonstration that arguing for not knowing that the said acts are criminal cannot be accepted.<sup>428</sup>

The US Military Tribunal in Nuremberg had an orthodox opinion on the application of the prohibition of *ex post facto* law in international law in the *Justice Cases*, whereby stating that „[u]nder written constitutions the ex post facto rule condemns statutes which define as criminal, acts committed before the law was passed, but the ex post facto rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth [...]”<sup>429</sup>

Indeed, lack of implementing legislation or adoption of national legislation later than the perpetration of the act would not be a violation of the *ex post facto* rule, since the international rule, which is the source of the individual responsibility, already existed at the time of the commission of the act<sup>430</sup>. This should not, however, deprive the national legislator of its intention to correspond as best as possible to requirements of foreseeability of the law<sup>431</sup>. Lacking such domestic implementation, clarification of the contents and elements of the rules,

<sup>427</sup> RYNGAERT op. cit. 58.

<sup>428</sup> ICCPR, Article 15(2).

<sup>429</sup> U.S.A. v. ALSTOETTER et al (The Justice Cases), available on <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> [last visited on 29 March 2010]

<sup>430</sup> When manifesting that in case of international crimes, accountability flows directly from international law, WIENER refers to the legality principle when saying that in a continental system, the condition of accountability is presence of the offence in national criminal law prior to the offence. S. WIENER (1993) op. cit. 197.

<sup>431</sup> S. GELLÉR (2005) op. cit. 368.

and determination of conditions of punishability according to international law, its application corresponding to – often contradictory – national legal requirements would all be left to the national judge. Implementation of international crimes is therefore an important contribution to this goal.

Retroactive effect and the consequences of non-compliance of national legislation with international law was, *inter alia*, the subject of debate in the *Bouterse* case as well in the Netherlands. Desi Bouterse was commander-in-chief – now President – of Suriname who was allegedly responsible for the torture and execution of 13 Suriname civilians and 2 soldiers for opposing the Suriname government in 1982. Two relatives of the victims filed criminal complaints in the Netherlands, and the Amsterdam Court of Appeal ordered Bouterse's prosecution<sup>432</sup>.

The Court of Appeal of Amsterdam held<sup>433</sup> that international crimes under customary international law were not *time-barred*, and that at the time of the commission of the act, in 1982, customary law already allowed for extra-territorial jurisdiction in the case of a crime against humanity. It also held that prosecution was possible based on the Torture Convention, because although the CAT was ratified by the Netherlands only in 1988, it was only declaratory of pre-existing international customary law, i.e. customary law that already existed in 1982. Therefore, the Dutch Act implementing the CAT could be applied retroactively<sup>434</sup>.

However, the Supreme Court<sup>435</sup> twisted the issue, reversed the decision of the Court of Appeal and said that as written international law at the time of the commission of the act did not provide for their application with retroactive effect, therefore the procedure was time-barred. It also said that the Dutch Constitution and Criminal Code provided for the principle of legality, including the prohibition of retroactive application, and the decision of the Court of Appeal was incompatible with it.

This led to the conclusion that the Dutch Act implementing the CAT could not have a retroactive effect, therefore could not be applied to the case at hand. Therefore the Supreme Court was of the opinion that even if customary international law accepted the non-application of time-barring for crimes against humanity, but conventional international law did not, the Dutch courts were still bound to apply their own national law implementing the Torture Convention.

<sup>432</sup> Source: <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/07c5aeb4a999f1cc1256da200518c91!OpenDocument> [last visited on 31 March 2012]

<sup>433</sup> Source: *Bouterse* case, ILDC 80 (NL 2001).

<sup>434</sup> Court of Appeal of Amsterdam, judgment of 20 November 2000.

<sup>435</sup> Supreme Court, Criminal Chamber, judgment of 18 September 2001, nr. 00749/01 (CW 2323).

This judgment is of dubious wisdom. It clearly says that Dutch courts cannot base themselves directly on international law – in this case, the corresponding customary law –, but have to apply their implementing legislation. The Dutch Constitution says, that “statutory regulations in force within the Kingdom are not applicable if such application is in conflict with binding provisions of generally applicable treaties or of resolutions of international organizations. [...] [T]his provision should be interpreted as stipulating that the courts should test the prohibition on granting retroactive effect, as contained in Article 16 of the Constitution and Article 1(1) of the Criminal Code, against treaties and resolutions of international organizations, but that they may not do so against customary international law”<sup>436</sup>.

Consequently, if the Dutch legislature omitted to implement *all* international norms, including customary law – the implementation of which is rather difficult –, the Netherlands would be in violation of its obligations under international law in not being able to enforce them. Indeed, the Supreme Court said that “[i]t follows that, even if the obligation to declare offences as punishable retroactively were to result from customary international law, Dutch courts are nonetheless obliged to apply the Torture Convention Implementation Act. Article 94 of the Constitution does not accept the application of unwritten international law if such application conflicts with national legal regulations.”<sup>437</sup> This last statement basically acknowledges that the Dutch Supreme Court found that national law enjoyed primacy over international law in case of collision.

Criticisms against the so-called *Lex Biszku*, also formulated by the present author, included similar arguments<sup>438</sup>. *Lex Biszku* was prepared after the failure of initiating investigations against Béla Biszku as a result of the prosecutorial

<sup>436</sup> See Court of Appeal of The Hague, *H. v Public Prosecutor*, 29 January 2007, ILDC 636 (NL 2007) para 4.4.1. of the Judgment.

<sup>437</sup> Ibid. Paras 4.5. and 4.6. of the judgment.

<sup>438</sup> S. VARGA, Csaba: Nehézségek az alkotmányos átmenetben – Belső ellentmondások az elévületlenség és elévülhetetlenség törvényi megerősítésében. (Difficulties in constitutional transition – Contradictions Built in the Statutory Confirmation of that a Crime has not Passed and/or cannot Ever Pass Statutory Limitations) *Iustum, Aequum, Salutare*, 2011/VII/4. 9–18.; VARGA, Réka: A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára). (Application of international crimes in Hungary – Notes on the Biszku-case) *Iustum, Aequum, Salutare*, 2011/VII/4. 19–24.; and comments by GELLÉR, Balázs at <http://www.origo.hu/itthon/20110127-penzbirsaggal-vegzodhet-a-biszku-elleni-vademeles.html> and at <http://www.origo.hu/itthon/20101125-nem-csak-biszkut-vadoltak-a-nemzetkozi-jog-alapjan.html> [last visited on 6 November 2012]. The present author provided a document containing legal concerns about the the draft law and its effects on future application of international law in Hungary, unfortunately however the draft was not amended.

decision. Lex Biszku basically copy-pasted the relevant chapters of the Nuremberg Charter – the formulation of crimes against humanity – and the 1968 UN Convention on the non-applicability of statute of limitations. The law manifested that war crimes, crimes against humanity and genocide are not time-barred. Although the law solved the particular problem with respect to the Biszku-case – investigation was initiated shortly after the law entered into force –, it is feared to result in an unfortunate interpretation by prosecutors and judges. The problem notably is that the law in its effect constituted the non-application of time-barring instead of having just declared the already existing international norm. This could mean for the future that from now on prosecutors would expect that all international norms would be re-constituted in a piece of national legislation and would not apply international law lacking such national legislation<sup>439</sup>.

The application of the *nullum crimen sine lege* principle to international crimes under domestic procedure is an often cited problem. The difficulty lies in the determination of ‘*lex*’, ie. whether the act must be criminalized in international law or national law at the time of its perpetration. Wiener gives a very clear explanation citing human rights instruments which understand not only domestic law, but also international law under ‘*lege*’. Since the individual’s accountability is rested directly on international law in case of international crimes, the direct application of international law does not violate the legal guarantees of the individual.<sup>440</sup>

On the other hand, the imprecision of international crimes as formulated in international law may raise concerns in respect of the *nullum crimen sine lege certa* principle, since domestic criminal laws, especially in continental legal

<sup>439</sup> As Cs. Varga demonstrates, the question whether a norm is declarative or constitutive is not necessarily decided by the text of the norm, but rather by its doctrinal interpretation. In the case of the acts committed by the Communist regime and the 1968 New York Convention, Hungarian authorities remained inactive, therefore violating international law, in effectuating the rules of the Convention. Thereby the adoption of Lex Biszku would entail that the non-action of the Hungarian authorities – in not prosecuting Communist crimes based on international law – was legitimate: indeed, a specific piece of legislation is necessary to make the rules of the Convention work. This cannot be the objective. Consequently, the ‘message’ of Lex Biszku is that an already ratified and promulgated international treaty, that would in itself not require specific implementation, would need that adoption of a special law, decades later, to make it effective. S. Cs. VARGA (2011) op. cit. 14–16. It is this last instance that the present author finds worrying. This problematic would not stand should the state decide to implement the norms of an international treaty it has just ratified/promulgated, due to the specificities of continental-type legal systems as described in Chapter 3.1.3. In such a case, implementation would be a mere legal action to assist judicial application, but it would be clear that it is the treaty that is the source of the obligation.

<sup>440</sup> WIENER (1993) op. cit. 210.

systems, have a higher standard requirement of the legality principle<sup>441</sup>. It follows therefore that it should be the task of implementing national law to conform international crimes to the internal legality requirements. Such a conformation would not establish new crimes – the accountability is still rested on international law –, it would only be a declarative measure by the national legislator<sup>442</sup>, in line with basic criminal justice guarantees.

This would serve the security of the rule of law, however, its absence could not necessarily be a basis for a lack of domestic procedure in a given case. Especially considering crimes based on customary law, implementation into national law cannot be the condition for prosecution, but it could be a strongly suggested measure for the purposes of stability of the internal legal system.

These considerations are more of an urging nature for crimes established under customary law or in earlier international treaties, such as the Nuremberg Charter or the Geneva Conventions/Additional Protocols, because more recent instruments, such as the Rome Statute, determine the crimes with more precision. The Rome Statute is therefore much more exhaustive in both the general part provisions – material and mental elements, conditions of culpability and punishability – and the special part provisions – in the Elements of Crimes, however, the sanctions are still missing, although certain frameworks are laid down in the Rome Statute<sup>443</sup>. In addition, general part elements in the Rome Statute are largely based on common law traditions which cannot entirely be translated into continental legal terms<sup>444</sup>. Worth to mention that although the Rome Statute includes all of the grave breaches of the Geneva Conventions and most of the war crimes stipulated in Additional Protocol I, there is no complete overlap<sup>445</sup>.

As is well known, the Court of Cassation of France stated in the *Klaus Barbie* case that *statute of limitation* is not applicable to crimes against humanity – deducting from Article 6 of the Charter of the Nuremberg Tribunal, whereas it is applicable to war crimes, thus making conviction of Barbie possible only for

<sup>441</sup> S. ERICH KUSSBACH: *Nemzetközi és Európai büntetőjog*. Budapest, Szent István Társulat, 2005. 83–85.

<sup>442</sup> S. M. NYITRAI (2010) op. cit. 17–18.

<sup>443</sup> S. PÉTER KOVÁCS: *Prononcé de la Peine*. In: H. ASCENSIO – E. DECAUX – A. PELLET (eds.): *Droit International Pénal*. Paris, Editions A. Pedone, 2000.

<sup>444</sup> For an analysis of the difference between general part elements of the Rome Statute and of ordinary crimes in continental systems, s. M. NYITRAI (2010) op. cit. 18–19.

<sup>445</sup> For a comparative table of war crimes defined in the Geneva Conventions and Additional Protocol I and in the Rome Statute, s. [http://www.icrc.org/eng/assets/files/other/en\\_-\\_war\\_crimes\\_comparative\\_table.pdf](http://www.icrc.org/eng/assets/files/other/en_-_war_crimes_comparative_table.pdf) [last visited on 31 March 2012].

crimes against humanity. The Court held that “[f]ollowing the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which might have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity” and that there was no international rule superior the French rules providing for the non-application of statutory limitations for war crimes<sup>446</sup>.

Worth to note here that France had not ratified neither the 1968 UN Convention on the non-application of statutory limitations, nor the 1974 European Convention on the non-applicability of statutory limitations to crimes against humanity and war crimes, due to fear that it would weaken its policy concerning non-repression of war crimes committed during the wars in Algeria and Indochina. Eventhough, the Barbie-ruling was later much criticized for causing a confusion between war crimes and crimes against humanity<sup>447</sup>, which was particularly important for France, given that it did accept statute of limitations for war crimes but did not accept its applicability for crimes against humanity<sup>448</sup>.

Many of the questions raised above were also dealt with in the case *Kononov v. Latvia*<sup>449</sup>, in front of the European Court of Human Rights. The case included the alleged commission of war crimes by the applicant through killing protected persons. Kononov was born in Latvia, holding Latvian nationality until he received Russian nationality in 2000. He joined a Soviet commando unit in 1943. In 1944 he participated in an operation behind enemy lines, with the purpose of sabotaging Nazi military installations. In May 1944 he was said to be responsible for the execution of nine persons, who he allegedly believed to be Nazi sympathizers. The Latvian Court of Appeal convicted him for violation of the laws and customs of war, as set out in the Hague Conventions of 1907, Geneva Conventions of 1949, Additional Protocol I of 1977 and the Charter of the International Military Tribunal for Nuremberg of 1945. As to the complaint about retrospective application by the complainant, the Supreme Court found that the application of the Geneva Conventions and Additional Protocol I, irrespective of when they entered into force, was consistent with the Convention

<sup>446</sup> France, Cour de Cassation, 20 December 1985, source: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_fr\\_rule160](http://www.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule160) [last visited on 1 April 2012]

<sup>447</sup> S. Pierrette PONCELA: L'Imprescriptibilité. In: H. ASCENSIO – E. DECAUX – A. PELLET (eds.): *Droit International Pénal*. Paris, Editions A. Pedone, 2000. 888.

<sup>448</sup> Ibid. 893.

<sup>449</sup> Application no. 36376/04, Judgment of the Grand Chamber of 17 May 2010.



on Non-Application of Statute of Limitations for War Crimes and Crimes Against Humanity.

The Chamber of the ECtHR held that the Latvian Criminal Code was based on international law. The relevant treaty was the 1907 Hague Convention, but not the Geneva Conventions and Additional Protocol I, because they were adopted after the perpetration of the act and had no retroactive effect. Then the Chamber examined whether the victims had been combatants and civilians, and with dubious wisdom, found that “even if they did not satisfy all of the elements of the definition of combatant, *jus in bello* did not *a contrario* automatically consider them to be ‘civilians’,<sup>450</sup>. Consequently, the Chamber held that Kononov was not responsible for violating laws and customs of war.

It seems that the Chamber, instead of dealing with the question of retroactive application of the law, undertook to analyze facts and evidences, which should be the task of domestic courts. This was similarly done as in the *Korbely* case, and is, in the opinion of the present author, an unfounded extension of the jurisdiction of the ECtHR. The Latvian government also made a note to this issue: „the respondent Government considered that the Chamber exceeded its subsidiary role in altering the factual determinations of domestic courts [...]”<sup>451</sup>.

In this regard, the Grand Chamber made things right in saying that „[the Grand Chamber] is not therein called upon to rule on the applicant’s individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. Rather its function under Article 7 § 1 is twofold: in the first place, to examine whether there was a sufficiently clear legal basis, having regard to the state of the law on 27 May 1944, for the applicant’s conviction of war crimes offences; and, secondly, it must examine whether those offences were defined by law with sufficient accessibility and foreseeability”<sup>452</sup>. It goes on to say that „it is not the Court’s function to deal with alleged errors of fact committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention [...] and unless that domestic assessment is manifestly arbitrary”<sup>453</sup>.

The Grand Chamber noted, that „[a]s regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial

<sup>450</sup> Ibid. Para 146.

<sup>451</sup> Ibid. Para 151.

<sup>452</sup> Ibid. Para 187.

<sup>453</sup> Ibid. Para 189.

interpretation.<sup>7454</sup> It added that in case national law did not include specificities of a war crime, the domestic courts could rely on international law, without infringing the *nullum crimen* and *nulla poena sine lege* principles<sup>455</sup>. The Grand Chamber also held that „where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law<sup>7456</sup>.

As to the foreseeability of the actions to be considered criminal, the Grand Chamber argued that although international laws and customs were not formally published in the USSR or in the Latvian SSR – similarly to the Korbely case –, this was not relevant, because international laws and customs of war were in itself enough to base his criminal responsibility<sup>457</sup>. Therefore the Grand Chamber found that the law was foreseeable and accessible at the time of perpetration of the acts, consequently, conviction of the applicant did not violate Article 7 (1) of the ECHR.

Such a heavy reliance on the findings of the Grand Chamber in this issue can be explained by that it gives an answer to many questions we have raised before. Namely, the ECtHR finds it non-problematic for domestic courts to directly rely on international law in the absence of relevant domestic legislation, and it also said that domestic courts could attach sanctions to crimes formulated under international law and not having a corresponding crime in domestic law, and still be in compliance with the *nulla poena sine lege* principle. It also states that international law was foreseeable and accessible in 1944 – and it has only crystallized since then -, therefore direct reliance on it did not violate principle of legality either. This should comfort states and domestic courts, at least in Europe.

### 3.2.2. *Consequences of basing the case directly on the international treaty – direct application*

Basically there are two ways of complying with the penalization obligation: either adopting the crimes through incorporation, or adopting the crimes through reference to international law<sup>458</sup>. In reality there could be mixed solutions, whereby

<sup>454</sup> Ibid. Para 185.

<sup>455</sup> Ibid. Para 208

<sup>456</sup> Ibid. Para 212.

<sup>457</sup> Ibid. Para 237.

<sup>458</sup> S. FICHET-BOYLE – MOSSÉ op. cit. 881. The same categorization is reached by Yokaris, he names them direct or indirect incrimination, where direct incrimination would mean a reference to international law. S. Angelos YOKARIS: Les critères de compétence des juridictions nationales.

some parts of the crime are incorporated while other elements are referred to (for instance “who carries out an attack against civilian population in a way contrary to international law...”), or the crime itself is incorporated but for jurisdictional questions there is a reference to international law (for instance when universal jurisdiction is defined for cases “as international treaties stipulate”).

In case of any of these solutions, the result has to be an effective penalization. In case of direct incrimination, the elements of the crime are defined by international law, and the state only has to establish its competence<sup>459</sup>.

Many states chose a middle way in arguing for the applicability of ordinary crimes for the punishment of international crimes. Thereby these states argue that they actually incorporate the crimes and thus punish international crimes through judicial application of ordinary crimes to international crimes. Often these same states argue that in case the ordinary crime would not entirely cover the international crime, the judge could make a direct reference to international law – as it happened many times<sup>460</sup>.

As it turned out, such states adopted this approach more because of convenience than it being a result of a careful examination of the issue. As we will see from the following pages, this approach seems to fail in most cases and as soon as states following such an approach had to deal with war crimes cases, they were inclined to re-examine their legislation and adopt a more workable solution.

The following two sub-chapters will thus analyze the advantages and drawbacks of basing criminal responsibility directly on international law and basing responsibility for violation of international crimes on ordinary crimes.

The drawback of basing a case directly on the provisions of an international treaty is a lack of clarity in many aspects that are necessary for the adjudication of a case. Such aspects may include the elements of the crime, the sanctions or the applicability of the general part of the criminal code to the international crimes. This is the instance where the question of legality may also be raised. Namely, if the case is based directly on the international treaty, it may be questionable, whether this is in line with the legality principle: does the state’s legal system allow that a criminal charge is based on anything else than a crime specified in its own penal code, and if yes, was the treaty accessible and foreseeable for the citizen? Was it clear for the citizen at the time of commission of the crime

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In: H. ASCENSIO – E. DECAUX – A. PELLET (eds.): *Droit International Pénal*. Paris, Editions A. Pedone, 2000. 897.

<sup>459</sup> Ibid. 897.

<sup>460</sup> Direct application by the judge could be problematic from many viewpoints. S. FICHET-BOYLE – MOSSÉ op. cit. 882.

whether the common grounds for excluding criminal responsibility are applicable to the specific crime he/she perpetrated?

Was the sanction clear for the perpetrator or were any sanctions attached to the crime at all? The wrongful application of sentences may raise violation of the *nulla poena sine lege* principle. International law does not define the sanctions attached to the certain crimes, but leaves it to states to do that.

Consequently, if a procedure is based directly on international law, the question of sanctions arises. The judge, in this case, has two alternatives:

- (i) in case the international crime has an equivalent in domestic legislation – for example unlawful attack against civilians and murder – the judge may use the sanction of the equivalent ordinary crime<sup>461</sup>. Whether this can be done depends on the legal system;
- (ii) the judge may choose to examine the guilt of the perpetrator but could not attach a sanction to it.

An argument for direct application of international law by domestic courts is mentioned by Wiener, saying that the determination of specific features of international crimes requires such a detailed and well-founded interpretation that it can be done more precisely on the level of application than on the level of the legislator that is only capable of an abstract formulation.<sup>462</sup>

In case the state decides to define sanctions later on in legislation, this should not be determined for crimes that were perpetrated before the adoption of such legislation because that would have a retroactive effect and could be seen as being in violation of the *nulla poena sine lege* principle. These questions call for an implementation of the international crimes in a way that sanctions are made clear. This is the only way that is in full compliance with the *nulla poena sine lege* principle. As Balázs Gellér notes, since the Hungarian Constitutional Court stated that the principle of legality must also be complied with by international crimes, codification is the best means to ensure compliance with that principle. He further states that the *nulla poena* principle is a constraint to the direct application of international law by domestic courts<sup>463</sup>.

However, there are only a few cases where the legislator's right to refer to criminalization in international law, instead of criminalizing in internal law, was

<sup>461</sup> This is what happened in Hungary at the volley – cases, where the Hungarian courts applied the sanctions of the conventional crimes that corresponded to the international crime, without its „international” content.

<sup>462</sup> S. WIENER (1993) op. cit. 205.

<sup>463</sup> S. GELLÉR (2009) op. cit. 58–60.

questioned. Such a case was *US v Smith*,<sup>464</sup> where the procedure was based on a rule prohibiting piracy as defined by the law of the nations. Defence argued that according to the Constitution, the Congress should define and criminalize piracy, and since the law of the nations does not include a precise enough definition, it becomes a task of the Congress. The Supreme Court finally turned down this defence, saying that a reference to an international crime is as constitutional as listing the prohibited acts. The Supreme Court did not, however, answer the most interesting question, whether in case international law does not define precisely the elements of a crime, and internal law refers to this international law, would that comply with the legality principle and the requirement of foreseeability of the law.

### 3.2.3. *Consequences of basing the case on ordinary crimes*

If the drawback of basing the case on international law was the lack of clarity, then the drawback of basing the case on ordinary crimes is the potential loss of many instances of the international crime<sup>465</sup>. The reason being that war crimes are so specific, committed in a special situation under special circumstances, that ordinary crimes can not adequately represent its features. Many states, wanting to save energy on implementing legislation, are inclined to believe that grave breaches are all covered by ordinary crimes. While this may seem to be true at first look for crimes such as unlawful killing or torture, if we take a second look, it becomes apparent that this may not be correct, neither for the “simpler” crimes, such as murder / attacking civilian population, nor for other, more specific crimes, such as delay in repatriation of prisoners of war.

One also has to bear in mind that the fact that all municipal laws penalize murder does not make murder an international crime. What makes killing of protected persons, genocide or crime against humanity an international crime, in addition to the international legal background, are additional elements, such as the context, intention, other circumstances or large scale, and the intention of

<sup>464</sup> U.S. Supreme Court, *United States v. Smith*, 1820, 18 U.S. 153. Quoted by FERDINANDUSSE (2006) op. cit. 35.

<sup>465</sup> Fichet-Boyle and Mossé raise attention that in case of incorporation of the crime into national legislation, the legislator is under the obligation to mirror the international crime in its entirety in domestic legislation. S. FICHET-BOYLE – MOSSÉ op. cit. 882. This means that in case the ordinary crime does not cover all elements of the international crime, the state has not fulfilled its international obligation.

the international community to make these acts punishable everywhere.<sup>466</sup> It is these specific acts committed in special circumstances that make certain crimes international crimes, and it is these specific acts that the international community seeks to punish. In the end, it is precisely these additional elements that make the act an international crime as opposed to an ordinary crime.<sup>467</sup>

In addition, there is a certain stigmatization attached to both grave breaches/war crimes<sup>468</sup> (and other serious international crimes) and war crimes prosecutions<sup>469</sup>. As Cassese put it, war crimes procedures (or other procedures related to serious international crimes) also have the important indication of “the international community’s purpose [...] [of] stigmatization of the deviant behaviour, in the hope that this will have a deterrent effect.”<sup>470</sup> Although this particular quote refers to international trials, they are undoubtedly also true for domestic trials, considering, as we had already discussed, that domestic war crimes prosecutions are carried out representing the international community.

Thus, even in case a similar or same sanction would be applied as for an ordinary crime, the recognition that a serious international crime had been committed may contribute to the feeling of justice done.

States are bound to acknowledge this difference and reflect it in their national legislation. As Judge Brennan opined in the *Polyukhovich* case, “[t]heir Lordships’ statement that recognition of crimes as defined by international law is ‘left to the municipal law of each country’ should not be understood to mean that international law accepts whatever definition of an international crime the municipal law may contain. Rather, what is left to municipal law is the adoption of international law as the governing law of what is an international crime.”<sup>471</sup>

<sup>466</sup> Nyitrai notes that an international crime becomes an autonomous, abstract term when the elements of the crime – as opposed to an ordinary crime - directly include international elements and/or the relevant sources are international. S. NYITRAI (2010) op. cit. 14.

<sup>467</sup> S. ABI-SAAB op. cit. 598. „It is understandable that, in such a case, the trial and even the conviction of the accused in a national court for the municipal crime does not subsume or exhaust the international crime.” This is why, states Abi-Saab, international tribunals (see ICTY Statute Article 10 para 2 (a) and ICTR Statute Article 9 para 2 (a)) may re-try cases where the act was characterized as an ordinary crime.

<sup>468</sup> S. for instance EVE LA HAYE: *War Crimes in Internal Armed Conflicts*. Cambridge, Cambridge University Press, 2008. 152.

<sup>469</sup> S. FERDINANDUSSE (2009) op. cit. 739.

<sup>470</sup> ANTONIO CASSESE: *International Criminal Justice: Is it Really so Needed in the Present World Community?* Public lecture delivered at The London School of Economics and Political Science on 13 November 2000. [www2.lse.ac.uk/humanRights/.../Casseselse.doc](http://www2.lse.ac.uk/humanRights/.../Casseselse.doc) [last visited on 1 November 2012]. Point 5.

<sup>471</sup> *Polyukhovich v Commonwealth* (“*War Crimes Act case*”) [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991), High Court of Australia, opinion of Judge Brennan, para 37. *Polyukhovich*

Therefore the state misses the point if it sees killing of protected persons as simple murder, and such confusion also raises practical questions during the qualification of the crime, attaching sanctions or applying mitigating circumstances.

On the other hand, determination of the presence of necessary elements required by international law is very demanding. Taking wilful killing of a protected person as an example, according to international humanitarian law, this is a grave breach, if:

- (i) the person was *protected*. If the question arises whether the person was directly participating in hostilities, in other words, whether he lost his protection, we may face a question that is currently being discussed among experts around the world and is very difficult to answer, especially since ordinary national law is not serving any support in providing the solution.
- (ii) if the killing was *wilful and illegal*. This concept is also different from ordinary crimes: in national penal codes, wilfulness usually has two forms: *dolus directus* and *dolus eventualis*. The latter means that the perpetrator acquiesces to the consequences of his conduct. It can be rather difficult to squeeze the international crime of wilful killing into these frameworks<sup>472</sup>.

Let's think of an example where an important legal military target is attacked, the attacker knows that a few civilians are around, but considers that the military target is so important that he carries out the attack, making every precaution possible in the choice of means and methods of the attack. Finally, the civilians will also be victims of the attack.

In such case, the attacker knew that protected persons were around, he knew that he could not avoid their death, but still considered his action proportionate because of the importance of the military target. Based on all these factors, the act was not illegal according to international law, therefore it was not a crime.

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was an Australian citizen, who was alleged to have committed war crimes in the Ukraine in 1942-1943, at the time when the Ukraine was under German occupation. The War Crimes Acts of 1945 provided that any person who committed a war crime between 1939 and 1945 was guilty of an indictable offence. Polyukhovich argued that making a past conduct criminal in a legislation was an usurpation of judicial authority and constituted *ex post facto* law. The text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/1991/32.html> [last visited on 22 May 2012].

<sup>472</sup> Kis and Gellér warn that definition of crime and the notion and forms of perpetrators are so different in international criminal law and national criminal law (especially in continental legal systems) that implementing domestic criminal law requires special measures as a minimum or implementation shall be done in a separate code – like the *Völkerstrafgesetzbuch* in Germany – as an optimal solution. S. KIS–GELLÉR (2005) op. cit. 376–379.

Thinking in terms of an ordinary crime, the act would be difficult to be grouped under either *dolus directus* or *dolus eventualis*, and the analysis may lead to a different outcome. The intention could be qualified as *dolus eventualis*, because the perpetrator acquiesced to the consequences of his conduct, therefore it was a crime. Or else it could be seen as negligence, where the perpetrator foresees the possible consequences of his conduct but carelessly trusts in their non-occurrence. However, the problem here is that the attacker does not trust in the non-occurrence, but knows exactly that the civilians will be killed, although he does not wish to kill them. So if the prosecution is based on ordinary crimes, which form of perpetration should the judge choose if he wants to be in conformity with international law?

Moreover, not only forms of perpetration of the crime, but the usual obstacles for the preclusion of accountability as occurring in national criminal codes could be confusing with respect to war crimes. In most of the cases, the closest obstacle could be justified defence. However, in the case of justified defence the attack that is prevented should be direct; in a military operation if the attack was a well-planned surprise attack, the condition of directness simply does not stand.<sup>473</sup>

The *Military Prosecution Service v Captain T1 et al.* case<sup>474</sup> in Denmark provides an excellent example as to the dangers in basing a case on ordinary crimes. The case involved the interrogation of Iraqi detainees by Danish service members stationed in Iraq, during which the detainees were made to sit in stress-provoking positions and the defendants talked to them in a defamatory manner. As a background, it must be mentioned that although the Geneva Conventions were ratified by Denmark, its provisions were not implemented. Violations of the Geneva Conventions are seen as violations of the Danish Military Penal Code (MPC), according to which it constitutes a criminal offence if a military person commits a grave violation of his official duties.

The court held that based on the evidence presented, the treatment of prisoners might not have been in accordance with the protection of Geneva Convention IV. However, according to the court, it was not up to it to further evaluate compliance with Geneva Convention IV, but rather to evaluate whether the accused had been

<sup>473</sup> For possible inconsistencies between ordinary crimes and international crimes, s. VARGA, Réka: Az egyén humanitárius nemzetközi jog megsértéséért viselt büntetőjogi felelőssége (Individual criminal responsibility for violation of international humanitarian law). *Föld-rész Nemzetközi és Európai Jogi Szemle*, 2010/III/1–2. 93.

<sup>474</sup> *Military Prosecution Service v Captain T1, Sergeants T2, T3, T4, T5*, Appeal judgment of 6 July 2006, U 2006 2927 Ø; ILDC 567 (DK 2006).



in grave violation of their official duties and thus were subject to punishment under the MPC<sup>475</sup>.

This case presents a typical problem of national implementation. As the Geneva Conventions were not implemented, the court applied the Military Penal Code, which, however, did not match the international rules but reflected an inadequate implementation. Therefore a genuine examination of the acts in light of the Geneva Conventions did not take place.

The determination of an international crime as an ordinary crime in national law does not deprive that crime of its international feature<sup>476</sup>. In case the ordinary crime cannot reflect all necessary aspects of the corresponding international crime, it should not be applied or it should be applied in a way corresponding to international rules. Although nothing prevents states from adopting national criminal legislation<sup>477</sup>, states may do this only so far as they are not restricting international treaty or customary obligations. Even if domestic law restricts international obligations, this does not change the presence or contents of the international obligations, neither does it change the responsibility of the state or the individual *vis-à-vis* international law<sup>478</sup>.

It is not only the definition of the crime that could become problematic if we base the case on ordinary crimes, but the sanctions linked to ordinary crimes may not always be satisfactorily corresponding to the gravity of the war crime. Although international criminal law typically does not attach sanctions to crimes it defines and leaves it to states to determine, numerous literature highlight that war crimes being among the most serious international crimes, their gravity cannot be compared to that of ordinary crimes, therefore their sanctions should also be graver.

Because of the often lack of precise elements of international crimes defined in national law, as discussed above, national courts often reach back to international law for clarification. This was the case in *Mugesera v Canada*,<sup>479</sup> where the Court, searching for clarification on the elements of genocide, drew back to

<sup>475</sup> Ibid. Source: ILDC reports, A1.

<sup>476</sup> S. WIENER (1992) op. cit. 53.

<sup>477</sup> This was confirmed in a decision of the Hungarian Constitutional Court, see Constitutional Court decision 53/1993 (X.13.) and s. Kis–Gellér op. cit. 367.

<sup>478</sup> KIS–GELLÉR op. cit. 368.

<sup>479</sup> Mugesera, a hard-line Hutu politician, was charged in Rwanda with inciting hatred and thereby committing crimes against humanity during a speech he held in 1992 in Rwanda. The Minister of Citizenship and Immigration ordered his deportation to Rwanda in 1995 which was contested by the appellant and finally upheld by the Supreme Court of Canada. The decision is available at: <http://scc.lexum.org/en/2005/2005scc40/2005scc40.html> [last visited on 22 May 2012].

international law: “international law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide”<sup>480</sup>. We may therefore conclude that although basing cases on ordinary crimes may be a back-up solution it is in no way a satisfactory solution.

The Hungarian courts had to deal with this challenge in the *Korbély* case as well. Since the relevant crime was not included in the criminal code, the court could either choose to try Korbély based on homicide, or based on a direct reference to international law. The approach of the Hungarian courts was following a middle way: lacking provisions on crimes against humanity, it referred to customary law binding on Hungary and convicted Korbély based on the customary rule of individual responsibility for crime against humanity, and used only the penalty provisions of homicide but not its elements. Taking into consideration the international legal framework, when discussing the elements of the crime, the court referred to the elements of Article 3 (whether Kaszás, the victim, was a protected person under Article 3 or not), and did not refer to the ordinary criminal law exemption of self-defence<sup>481</sup>.

#### 3.2.4. *Are there any controversies if national law punishes acts that are not war crimes?*

The answer to this question depends on what acts are punished and with what effect. The Geneva Conventions and their Additional Protocols only oblige states to criminalize the grave breaches: the most serious breaches of these instruments. However, if the state decides to criminalize other violations as well, it means that the national laws are stricter than they are necessary obliged by international law.

A problem may arise if a foreign national commits such a non-grave breach against an own national of the state. In this case the perpetrator, although the act is not criminalized in his own country, may face criminal prosecution in the state of the victim. Van der Wilt suggests that such an exercise would “arguably trespass upon the other state’s sovereignty as it would expose foreign adversaries to a harsher regime than the one contemplated under international law.”<sup>482</sup>

<sup>480</sup> *Mugesera v Canada*, para 82.

<sup>481</sup> A more detailed analysis of the *Korbély* case was undertaken in Chapter 3.1.3.

<sup>482</sup> Van der WILT op. cit. 253. For a similar opinion, see Chris Van den WYNGAERT: *Strafrecht, strafprocesrecht and internationaal strafrecht*. Antwerpen, Maklu, 2003. 661.

However, Van der Wilt starts from the assumption that “provisions of international humanitarian law [...] regulate the proper conduct of the warring parties on the basis of reciprocity”.<sup>483</sup> We have to point down that nothing in international humanitarian law, neither the rules themselves, nor the repression provisions are built on reciprocity. Therefore there is nothing preventing states from adopting stricter criminal provisions to non-grave breaches than as absolutely obligatory by the Geneva Conventions. The Geneva Conventions themselves allow for such a free consideration, as they clearly give a free hand to the states when it comes to suppression of other breaches than grave breaches.<sup>484</sup> Therefore a state criminalizing acts in cases where it is not bound by international law does not infringe the sovereignty of other states, it simply adopts a stricter regime than as obliged.<sup>485</sup> This is the same kind of risk as we face with ordinary crimes, if a foreigner travels to another country where drinking and driving may meet a harsher punishment than at his home country.

Van der Wilt further suggests that there is no national practice which would be stricter than the grave breaches regime.<sup>486</sup> Examining the national laws discussed earlier in the present chapter, it may be easy to state that this statement is erroneous: many states have adopted stricter regimes than as obliged by international law, either by also criminalizing acts committed in non-international armed conflicts or by including non-grave breaches committed in international armed conflicts in their criminal codes.

Where Van der Wilt is right, however, is the case where the state wants to criminalize an act that is not a violation of the Conventions or the Protocols, and so the act is in conformity with international humanitarian law. In this case the state is breaching international law, because its national legislation contradicts the international treaty by prohibiting an act which is not prohibited

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<sup>483</sup> Ibid. 253.

<sup>484</sup> Geneva Conventions, Articles 49/50/129/146, para 3: „Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article”. The ICRC Commentary states that „There can, however, be no doubt that the primary purpose of the paragraph is the *repression* of infractions other than ‘grave breaches’, and that the administrative measures which may be taken to ensure respect for the provision of the Convention on the part of the armed forces and the civilian population are only a secondary consideration. [...] It is thus clear that *all* breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, [...] must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention.” S. Pictet (1995) op. cit. 367–368.

<sup>485</sup> S. FERDINANDUSSE (2009) op. cit. 734.

<sup>486</sup> Van der WILT op. cit. 253.

in international law.<sup>487</sup> This is indeed not allowed, because national law cannot be called upon to justify non-compliance with international law.

Another case of “overinclusion”,<sup>488</sup> where national law breaches international law is where the state bases universal jurisdiction on an act that is not a grave breach. As universal jurisdiction bites hardly in the sovereignty of other states and the very concept of universal jurisdiction comes from the fact that the crimes in question are offensive to the international community as a whole,<sup>489</sup> the exercise of universal jurisdiction can only be established by international law.

Consequently, states are not free to define the list of crimes for which they can exercise such jurisdiction. Therefore if a state establishes universal jurisdiction for an act that is not a grave breach or a crime for which international law authorizes universal jurisdiction, it would be a breach of international law.<sup>490</sup>

Some national courts, however, have taken a more lenient view in this regard. In *H. v Public Prosecutor*<sup>491</sup> and *Public Prosecutor v Kesbir*<sup>492</sup>, Dutch courts thought that establishing universal jurisdiction for crimes committed in non-international armed conflicts is not prohibited under international law and, as it further stated, Article 3 only sets minimum standard from which national jurisdictions can deviate.<sup>493</sup> The obligation to repress crimes committed in non-international armed conflicts and whether the provisions on universal jurisdiction can also be applicable to such crimes has been debated and it cannot be stated with certainty that a well-established and accepted result has been reached on the subject. This has been broadly discussed in Chapter 3.1.4.

From the above statements, we can draw the following consequences:

- i) states are obliged to repress grave breaches;

<sup>487</sup> For a further, similar analysis s. FERDINANDUSSE (2006) op. cit. 121–122: „[...] [States] may not unilaterally impose stricter rules of warfare on their adversaries by prosecuting acts under national criminal law that are considered to be legitimate acts of warfare under international humanitarian law.” Ferdinandusse points out that international humanitarian law has a legitimizing function for lawful combatants and national law cannot, therefore, annul this legitimization. Thus Ferdinandusse also makes a distinction between criminalizing acts that are legitimate under IHL to criminalizing acts that are prohibited, even if non-grave breaches.

<sup>488</sup> The notion „overinclusion” has been used by Ferdinandusse to mean national legislation that covers acts that are not „core crimes”. S. FERDINANDUSSE (2006) op. cit. 117.

<sup>489</sup> S. SHAW op. cit. 592.

<sup>490</sup> S. FERDINANDUSSE (2006) op. cit. 123.

<sup>491</sup> Court of Appeal of The Hague, *H. v Public Prosecutor*, 29 January 2007, ILDC 636 (NL 2007). The case concerned alleged violations of the laws and customs of war and torture perpetrated in Afghanistan in the 80es. H, charged with these crimes, was a high-ranking officer in charge of military intelligence, later seeking asylum in the Netherlands.

<sup>492</sup> *Public Prosecutor v Mrs. K*, Dutch Supreme Court, 7 May 2004, ILDC 142 (NL 2004).

<sup>493</sup> S. Van der WILT op. cit. 254.

- ii) states are free to decide on the criminalization of acts that are (non-grave) violations of the Conventions and Protocols, as long as these acts are contrary to the rules of international humanitarian law;<sup>494</sup>
- iii) states must not repress acts that are in conformity with the Conventions and Protocols;
- iv) states can only establish universal jurisdiction over acts where international law allows so.

A similar question arose with regard to the wording of the Convention Against Torture (CAT), in the case of *Charles Taylor Jr.* in the USA. The son of the former President of Liberia was sentenced for 97 years for torture based on the US Torture Act. Taylor Jr. argued that the Torture Act, which implemented the CAT, was unconstitutional, because, among others, its wording did not exactly represent the wording of CAT.

Taylor Jr. (often referred to as Emmanuel during the proceedings) argued that the US Torture Act differed from the CAT in three instances: (i) the definition of torture in the CAT specifies “such purposes as”, meaning that the CAT requires the proscribed purpose as an element of torture, namely obtaining information, punishing, intimidating, or coercing a person, or for “any reason based on discrimination of any kind”, whereas the US Torture Act does not require a motive; (ii) the CAT requires that actually harm is inflicted, whereas the US Act requires only that the act is committed with the specific intent of inflicting pain or suffering; and (iii) the CAT describes the perpetrator being under official capacity, whereas the US Act mentions “under the color of law”<sup>495</sup>.

Eventually, “[t]he district court specifically rejected Emmanuel’s argument that the Torture Act was unconstitutional because its language did not precisely mirror the definition of torture contained in the CAT; the court explained that Congress needed “flexibility” in performing its “delegated responsibilities,” and concluded that the Torture Act “plainly bears a rational relationship” to the CAT.”<sup>496</sup> This opinion was confirmed by the Court of Appeals, by saying that „the existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identity

<sup>494</sup> Finally, Van der Wilt reaches a similar conclusion: „international conventions set minimum standards which states parties are obliged to observe, but do not preclude those states from enacting further reaching legislation.” S. Van der WILT op. cit. 256.

<sup>495</sup> US Court of Appeals in the Eleventh Circuit, No. 09-10461, *USA v Roy M. Belfast, Jr, a.k.a. Charles Taylor, jr.*, pp.19., 33-34. 19–22. Available on: <http://www.ca11.uscourts.gov/opinions/ops/200910461.pdf> [last visited on 22 July 2010]) 28–29.

<sup>496</sup> Ibid.

is not required. Rather, [...], legislation implementing a treaty bears a ‘rational relationship’ to that treaty where the legislation “tracks the language of the [treaty] in all material respects.”<sup>497</sup>

The Court of Appeals specifically demonstrated that none of the three instances where altering the wording of the CAT but included merely different wording. It pointed out that the list provided in the CAT (ie. the name purposes of torture) are not integral to the definition of torture, since it only provides an illustration of the common motivations. This is, in the view of the Court, reflected in the US Act’s language in that it requires that the acts must have been specifically intended to result in torture<sup>498</sup>. Second, the Court pointed out that the CAT obliged states to criminalize attempts to commit torture, and the attempt of torture is exactly the same as acts done with the specific intent to commit torture. Third, the Court stated that according to the Senate Executive Committee opinion, charged with evaluation the CAT, the phrases “in an official capacity” and “under the color of law” mean exactly the same. In sum, the Court of Appeals, which upheld the decision of the District Court, stated that “the CAT created a floor, not a ceiling, for its signatories in their efforts to combat torture”<sup>499</sup>.

Although the debate in the Taylor Jr. case mainly surrounded constitutional questions around the implementation of a treaty and how far Congress is authorized during such implementation, the international law aspect of the debate indicate the same considerations as we have discussed before. Although the US Court of Appeals argued that in substance it did not include a wider variation of torture than as stipulated in the CAT, it also stated that a wider definition would only reinforce the aims of the Convention in fighting torture. In addition, the CAT itself states that its provisions are without prejudice to any national legislation that may include a wider definition.<sup>500</sup>

From an international law perspective there would be nothing illegal about a state formulating stricter conditions for criminal responsibility than international law as long as it is not criminalizing acts that are expressly permitted under international law – in this case, obviously, criminal responsibility is based on national law solely. Such a stricter formulation would be a natural exercise of state sovereignty through expressing the penal powers of the state.

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<sup>497</sup> Ibid. 33–34.

<sup>498</sup> Ibid. 36–37.

<sup>499</sup> Ibid. 35.

<sup>500</sup> Convention Against Torture, Article 1 (2). Ibid. 35.

### 3.2.5. *Place of the norm in the hierarchy of national laws*

Another side of the question posed in Chapter 3.2.3. is whether basing the crime simply on national law as opposed to international law has any consequence due to the high place taken by international law in the hierarchy of norms<sup>501</sup>. A consequence could be the applicability of amnesty, time-barring or existence of immunities with respect to the crime. Statute of limitations is excluded for war crimes, immunities are excluded for war crimes and amnesties may not be compatible with the obligation to prosecute. If we base the criminality on ordinary crimes, how are these considerations applied?

If we base the criminality on implementing provisions in the criminal code, usually criminal codes prescribe the non-applicability of time-barring and immunities for such crimes. If we base the criminality on international treaty or custom, if applicable, the other rules of international law also apply, so the non-applicability of time-barring and immunities is not a problem. At the same time, if we base criminality on ordinary crimes, how are restrictions to the application of time-barring or amnesties given effect?

This was the issue with the above-mentioned *Biszku* case in Hungary. Since the prosecutors were not applying crimes against humanity to the acts in question, they regarded the acts as ordinary crimes and referred to time-barring when rejecting the criminal complaint. What would be important in determining whether ordinary or international crimes shall be applied, is that exclusively the features of the act should be looked at. Even lacking the corresponding crimes in national codes and thus having to apply ordinary crimes, the framework provided by international law shall be applied.

### 3.2.6. *Could the application of universal jurisdiction be contrary to the principle of legality?*

It could be argued that foreigners tried on the basis of universal jurisdiction are not aware of the acts that are criminalized in domestic codes therefore are in a disadvantageous position. If we therefore consider the question of the legality principle in light of exercising universal jurisdiction where the perpetrator may well be a foreigner, we can determine that while it may be true that foreign

<sup>501</sup> For a discussion on the place of international law in the hierarchy of norms in Hungary, s. MOLNÁR op. cit. 474–479.

perpetrators are not aware of the procedure under which their acts are judged, they cannot allege that they were not aware of the criminality of their acts.<sup>502</sup>

Grave breaches are criminalized in the Geneva Conventions which enjoy universal ratification; therefore no one can allege that he/she was not aware of the criminal nature of such acts, nor of the list of crimes which were subject to universal jurisdiction. Besides, unfamiliarity with a foreign criminal procedure is not a specific phenomenon attached to war crimes. If we travel to another country, we may more or less be aware of what acts are criminal, but we may not be familiar with the procedure at all – this, however, does not pose any problems from the viewpoint of the legality principle.

As regards the *nullum crimen sine lege* principle, difference must be made between how to apply this principle for national criminal offences defined in national criminal codes and for international offences not defined in national criminal codes but being under the proceedings of domestic courts.<sup>503</sup>

While compatibility of criminal offences defined in the national criminal code with the *nullum crimen sine lege* principle can be determined relatively easy by checking whether the act was criminalized in national law at the time it was committed, punishment of international offences directly applied by domestic courts comply with the *nullum crimen sine lege* principle if (i) the international treaty establishing the international crime has been made part of national law<sup>504</sup> according to the way required by national legislation at the time the offence was committed<sup>505</sup>, or (ii) if it can be asserted that at the time the offence was

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<sup>502</sup> S. RYNGAERT op. cit. 58.: „I believe that this objection to universal jurisdiction, which elaborates on the principle of legality, is a rearguard action argument that international law has long since unmasked, an objection that equally applies to the ICC, or an objection that the entry into force of the Rome Statute has precisely deprived of its force.”

<sup>503</sup> As to the general difficulties in applying the *nullum crimen/nulla poena sine lege* principles in international criminal law, s. GELLÉR (2009) op. cit. 50–52 and 54.

<sup>504</sup> This is not to be confused with the crime having been implemented in the domestic criminal code, which this is not a requirement for the punishability of the act in compliance with the *nullum crimen sine lege* principle.

<sup>505</sup> It must be noted that several domestic legislation authorized its courts to proceed in cases concerning serious violations of international humanitarian law. This may be seen as a specific interpretation to be in compliance of the *nullum crimen sine lege* principle, in that the authorization happened after the crimes had been committed, although the referred acts were already seen as crimes in international law at the time of their perpetration. S. GELLÉR (2009) op. cit. 53.



committed the act was considered an international crime<sup>506</sup> under customary law.<sup>507</sup>

Therefore, in the first case, the exercise of universal jurisdiction in a manner compatible with *nullum crimen sine lege* is closely linked to the state of the international crime in national law<sup>508</sup>. In addition, the authorization of national courts to exercise universal jurisdiction must be in force in the state at the time the offence was committed<sup>509</sup> (for instance by promulgation of a treaty including such authorization) or it must be a general principle in customary law at the time the offence was committed. This means that even if the conduct was prohibited at the time of commission in the national law but the legal ground for exercising universal jurisdiction was not existent, the state could not exercise jurisdiction on the basis of the universality principle since this would infringe the *nullum crimen* principle.<sup>510</sup>

The technique of how to make this effective in national law is indifferent from the point of view of international law: if the international treaty is in force in the state, the international obligation is present and can, theoretically, be applied by the courts. Furthermore, problems may arise for the prosecutors/judges if their

<sup>506</sup> In the understanding of the ICTR and ICTY, the notion of the *nullum crimen sine lege* principle is even broader. The ICTY stated in the *Tadic* case that prohibition of retroactive law is not violated only because common Article 3 of the Geneva Conventions does not include and explicit obligation to repress. S. Prosecutor v. *Dusko Tadic A/K/A "Dule"*, Decision on the Defence motion on jurisdiction, 10 August 1995, paras 70–71: „The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. [...] A further indication that the acts proscribed by common Article 3 constitute criminal offences under international law is that, assuming *arguendo* that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators. Therefore, individuals can be prosecuted for the violations of the acts listed and thus prosecution by the International Tribunal based on primacy does not violate the *ex post facto* prohibition.”

<sup>507</sup> The European Convention on Human Rights also expressly makes this distinction in its Article 7 para 2: „This article [Article 7 para 1 on *nullum crimen sine lege* and *nulla poena sine lege*] shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.”

<sup>508</sup> „Unless otherwise authorized by national law, the principle of *nullum crimen sine lege* would prevent the national judge from giving effect to the *aut dedere aut judicare* principle in a treaty or universal jurisdiction based on customary international law.” S. statement of Vladimir-Djuro DEGAN: Institut de droit international, Annuaire, Volume 71, Tome II, Session de Cracovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 212.

<sup>509</sup> O’Keefe comes to the same conclusion: „the nexus relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed” S. O’KEEFE op. cit. 742.

<sup>510</sup> Ibid. 743.

national criminal code lists the crimes for which universal jurisdiction applies, but the list in the criminal code is not complete. Theoretically, punishment even in this case would be possible based directly on international law, but practical application would definitely be tricky. The question whether domestic judges can apply international law directly is dealt with in Chapter 3.1.3. of the present book.

A further question is whether *nullum crimen sine lege* applies only for substantive elements, or also for jurisdiction and statute of limitation. Of course, the question additionally is whether jurisdiction and statute of limitation are seen as substantive or procedural elements; different legal systems think differently about it. Enough to say that the *nullum crimen sine lege* principle was usually understood as applying both to substantive and procedural features. This was also the outcome of the *Bouterse* case<sup>511</sup> in the Netherlands (the case was discussed in more depth in Chapter 3.2.1).

Van der Wilt, the commentator of the *Bouterse* case in ‘International Law in Domestic Courts’, noted that “[i]n the opinion of the Supreme Court, the ramifications of the *nullum crimen* principle did not only bear upon the substantive issue of qualification, but affected the jurisdiction and the statute of limitations as well. [...] This point of view seems reasonable. After all, it would be inconsistent to deny the retroactive applicability of substantive provisions while upholding the retroactive application of procedural features which derive their existence from the very status that torture holds under international law.”<sup>512</sup>

### 3.3. Hurdles inbuilt in national jurisprudence / national application

*“Even with the creation of new international tribunals in this decade, national tribunals remain essential in deterring and remedying violations of the laws of war.”*<sup>513</sup>

However exhaustive national implementation may be, enforcement cannot be effective without the proper input of domestic courts. Many examples below show that courts may, even in the presence of adequate implementation, block effective procedures. First, the general attitude of domestic courts will be

<sup>511</sup> Supreme Court, Criminal Chamber, judgment of 18 September 2001, nr. 00749/01 (CW 2323).

<sup>512</sup> The *Bouterse*-case, ILDC 80 (NL 2001), C4.

<sup>513</sup> WEDGEWOOD op. cit. 393.

analyzed with an attempt to determine the reasons for their approach. A separate assessment of application of universal jurisdiction also seems necessary due to its unique features within war crimes procedures. Therefore as a second step, a more specific examination of domestic courts' approach towards universal jurisdiction will follow.

### *3.3.1. Are domestic courts ready to try war crimes cases?*

A common characteristic of repression of war crimes is the relatively meager number of national procedures. In fact, there are few other international obligations that are so poorly complied with as the obligations on repression and effective application through judicial enforcement.<sup>514</sup> At the same time, effective prosecution of the perpetrators of the most serious crimes cannot be achieved without the input of domestic courts<sup>515</sup>. As the Office of the Prosecutor of the ICC put it, there is a risk of “an ‘impunity gap’ unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used”<sup>516</sup>

This may have several causes. First, war crimes are usually not isolated, therefore with one case there are several accused which leads to loads of cases to be tried<sup>517</sup>. Second, war crimes procedures require special knowledge of international law, international jurisprudence and special application of national law in conjunction with international law. In addition, the primary and secondary sources may be difficult to access, either because physically they are hardly available (with internet this obstacle seems to be gradually decreasing) or because of language problems.

Third, war crimes procedures tend to be expensive and time-consuming: because of the distance in place and time between the place of the procedure and where the crime was committed, evidence is difficult to reach, witnesses live far away and often don't speak the language of the place of the procedure, for more than one reason cooperation with other states' authorities is necessary

<sup>514</sup> S. FERDINANDUSSE (2006) op. cit. 95.

<sup>515</sup> S. also KIRS (2012) op. cit. 19.

<sup>516</sup> S. ICC: Paper on Some Policy Issues Before the Office of the Prosecutor. September 2003. 3. Available at: [www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) [last visited on 10 January 2012]

<sup>517</sup> Domestic procedures also allow for trying lower ranking perpetrators as well. S. KIRS (2012) op.cit. 19. and Eszter KIRS: Challenges in the post-genocide Rwanda regarding criminal accountability. *Miskolc Journal of International Law*, 2008/5/2. 31.

and thus the proceedings are dependent on the cooperation of the state of *locus delicti*. Due to especially such and similar reasons it is not difficult to imagine why a judge would be hesitant to have a war crime case.

Although, due to the acceptance of international treaties in the national legal order, prosecutors and judges are technically applying national law during the procedure, they are, in the end, in need of specialized knowledge of international law. It is not enough to find one's way around the Geneva Conventions or other relevant international treaty only, the prosecutor/judge also needs to know the corresponding literature, international jurisprudence and other related international norms in order to effectively deal with war crimes cases or international crimes in general.

Coming back to an earlier example, in order for a prosecutor/judge to understand the principle of proportionality in humanitarian law, it is not enough to read Additional Protocol I, but he/she needs to know the development of the law, the existence or non-existence of corresponding customary law, etc. Therefore, prosecutors/judges require specialized training in international humanitarian law and international criminal law in order to conduct effective and high standard national criminal proceedings in such matters.<sup>518</sup>

Moreover, trying a war crime case is not necessarily a motivating factor for the judge. It usually does not assist in his/her career, and because of the legal specificities and the length of the procedure, it does not help much the statistics of judged cases. Being an expert in international law or war crimes cases does not bring the judge further in his career path nor is he/she compensated in any other way for taking up such a difficult task.

The question gets even more complicated when it comes to trying own nationals or nationals of a friendly or powerful nation. In such cases political considerations also come in, and the prosecutor may well decide to drop the charges, or the judge may try to find reasons for excluding the criminality of the accused. Even democratic states have these considerations, and, as history has shown, they are not better in prosecution their own people than non-democratic countries.<sup>519</sup>

<sup>518</sup> Regarding a need for international law training for judges/prosecutors, s. METTRAUX op. cit. 371.

<sup>519</sup> For an analysis of „minimalism and selectivity” of war crimes cases by national judicial authorities, s. FERDINANDUSSE (2006) op. cit. 89–98.

A comparative analysis<sup>520</sup> of behavior of national judges has shown that judges are reluctant to apply international law if they consider that this would injure national interests<sup>521</sup>. Recognizing the problem of independence of national courts when dealing with international law, the Institute of International Law adopted a Resolution calling on national courts to maintain their independence while interpreting and applying international law, determining the existence and content of international law, both treaty and customary or when deciding about the adjudication of a question related to the exercise of the executive power.<sup>522</sup>

The consideration of prosecutors and judges is important, because the success of a national process depends on them. Prosecutors may tend to drop charges based on alleged lack of jurisdiction, the denial of the international law character of the crime<sup>523</sup> or simply trying to extradite the person instead of prosecuting him domestically, and judges by putting restrictive interpretation on jurisdictional issues, or applying ordinary crimes instead of the international crime.

Some states acknowledge these difficulties and take measures to overcome them. Many states concentrate war crimes procedures to one bench or one specific court, hire experts to advise them on international law matters and systematically collect material and documents on international law for their own consultation and use. Unfortunately, none of these measures have been taken in Central European countries, leaving prosecutors and judges with a difficult task which they have to sort out themselves.

<sup>520</sup> Eyal BENVENISTI: Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts. *European Journal of International Law*, 1993/4. 159. (Quoted by: Eyal BENVENISTI: Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'. *European Journal of International Law*, 1994/5. 424.)

<sup>521</sup> Unfortunately this is also true in the EU law *versus* domestic law relationship. For the relationship between domestic courts and the Court of Justice of the EU, s. VARGA, Csaba: *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában – Magyar körkép Európai Unió összefüggésben.* (Legal systems, legal mentalities in the perspectives of the European Unification – Hungarian overview – in a European Union context) Budapest, Szent István Társulat, 2009. 148–150.

<sup>522</sup> Institute of International Law, Resolution adopted at the 66th session in 1993 in Milan: „The Activities of National Judges and the International Relations of their State”. [http://www.idi-ii.org/idiE/resolutionsE/1993\\_mil\\_01\\_en.PDF](http://www.idi-ii.org/idiE/resolutionsE/1993_mil_01_en.PDF) [last visited on 27 January 2010]

<sup>523</sup> This is exactly what happened in Hungary at the *Biszku* case, where Prosecution did not raise charges arguing that the acts in question did not constitute crimes against humanity therefore prosecution is time-barred. Remarkable, that the prosecution did not examine nor did it explain why it had come to the conclusion that the acts were not crimes against humanity, it simply stated so. S. Municipal Prosecutor's Office, NF 27942/2010/1 and Public Prosecutor's Office, NF. 10718/2010/5-I. For an analysis, s. VARGA, R. (2011) op. cit.

Nonetheless, when confronted with the issue of lack of preparedness of the judiciary to try war crimes cases, states simply shrug their shoulders and refer to the independence of the judiciary saying there is nothing they can do. While no one questions the independence of the judiciary, it has to be noted that preparing and training judges to stand the difficult test of trying war crimes requires state intervention in many fields and is also state responsibility. It needs money for training, determination and funds to allocate personnel for these special cases, adoption of internal measures to assign such cases to specifically trained judges and forming an environment that makes it motivating for a judge to try such cases.

States which have a more responsible attitude and are thus more experienced in such trials have established exclusive competence for such cases. In Germany, it is the office of the federal prosecutor that is competent for prosecution, in Belgium the federal prosecutor, in Netherlands a special unit was established for prosecution. It is not enough to assign one specific body but it must also be ensured that trained personnel are ready to accept the assignment. This is what is mostly lacking in Central European states. While in Hungary the Metropolitan Court and the General Public Prosecutor has exclusive jurisdiction, in many cases there has been no judge or prosecutor who would have felt trained enough even to speak at an IHL conference. This negligence obviously tells us something about the system, not the individual judges or prosecutors. And this brings us back to the responsibility of the states to ensure effective prosecution of grave breaches, an obligation under international law.

Judges are often reluctant to apply international law directly, because they feel that it is a body of law that is distant from them, and over which they have absolutely no influence through their precedents or interpretative decisions. Although it may well be understood that it is more convenient to move in the framework of well-known domestic laws, on the other hand it has to be noticed that national judges do bear significance for international criminal law through their cases. It must be noted that national jurisprudence can count as a factor in the formation of customary law, and international tribunals may also draw examples from national cases. The ICTY has, for example, referred to national cases several times.<sup>524</sup> Furthermore, courts that do apply international law can be part of a dialogue on experiences and lessons learnt and can thus contribute to each others' efforts.

<sup>524</sup> ICTY, Trial Chamber, *Tadic*, 7 May 1997, para 642., refers to the judgment of the French Cour de Cassation in the *Barbie* case, and ICTY, Trial Chamber, *Furundzija*, 10 December 1998, para 194, refers to British military courts. S. FERDINANDUSSE (2006) op. cit. 111.

Effective implementation also requires that courts interpret national law in conformity with international law. This is the so-called principle of consistent interpretation, and it has become, it seems, a general principle of law.<sup>525</sup> This principle assists in reaching that national law does not put obstacles on the application of international law. The Hungarian Constitutional Court in its decision of 1993 also acknowledged this rule by saying that “the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect.”<sup>526</sup> In order to exercise this rule, however, judges have to be aware of the rules of international law.

Serious errors in domestic procedures can most probably be cited from many countries. In Hungary, the Supreme Court<sup>527</sup> thought in the *Korbély* case<sup>528</sup> that the interpretation of common Article 3 of the Geneva Conventions should be drawn directly from Additional Protocol II<sup>529</sup>. What makes this already serious misinterpretation worse is that this was opined in connection with events that happened in 1956, before Additional Protocol II was adopted. Eventhough it does occasionally occur that a treaty is interpreted or clarified in light of documents adopted later, confusing the scope of application of Additional Protocol II and Common Article 3 is a serious mistake given that both the Commentary to the Geneva Conventions<sup>530</sup>, and both legal literature and state practice have repeatedly manifested that the scope of application of the two instruments are different. Although the Supreme Court later corrected this reasoning<sup>531</sup>, it gives us an insight on how much judges in certain cases understand international law<sup>532</sup>.

<sup>525</sup> S. more on the principle of consistent interpretation at FERDINANDUSSE (2006) op. cit. 146–153.

<sup>526</sup> Hungarian Constitutional Court, Decision 53/1993 (13 October 1993).

<sup>527</sup> For an analysis of the 1956 volley cases, s. Tamás HOFFMANN: Individual criminal responsibility for crimes committed in non-international armed conflicts – The Hungarian jurisprudence on the 1956 volley cases. In: Stefano MANACORDA – Adán NIETO (eds.): *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*. Cuenca, Castilla la Mancha, 2009. 735–753.

<sup>528</sup> Decision of the Supreme Court in the case of *János Korbély*, BfV. 1344/1998/3.

<sup>529</sup> The qualification of the 1956 revolution was seriously discussed within the Hungarian legal literature. S. BRUHÁCS, János: 1956 a nemzetközi jogban. In: ANTAL, Ádám – CSERESNYÉS, Ferenc – KAJTÁR, István (eds.): *Tanulmányok az 1956. évi forradalom és szabadságharc 50. évfordulójára*. Pécs, PTE Állam-és Jogtudományi Kara, 2006.

<sup>530</sup> „[...] the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict.” PILLOD–SANDOZ–ZIMMERMANN op. cit. 1348, para 4447.

<sup>531</sup> Decision of the Supreme Court, Revision Panel, BfV. X. 207/1999/5.

<sup>532</sup> For an analysis of the *Korbély* case and the legal error made by the Supreme Court, s. comment of Péter KOVÁCS: *Yearbook of International Humanitarian Law 1999*. Vol. 2. The Hague, T.M.C. Asser Press, 2000. 375–377.

As Péter Kovács notes, “the interpretation of an *anterior* treaty on the basis of a *posterior* treaty is hardly reconcilable with the principle of *effet intertemporel*.”<sup>533</sup>

Evenmore, the European Court of Human Rights raised attention that the Hungarian courts interpreted the notion of crimes against humanity with a retroactive effect in that they referred to, among others, the ICTY Statute and the ICC Statute for a definition of crimes against humanity – documents that did not exist in 1956. In addition, Hungarian courts did not consider all elements of crimes against humanity applicable in 1956, specifically whether the attack formed part of State action or policy or of a widespread and systematic attack on the civilian population. Therefore, in addition to other reasons, the Court held that Hungary was in violation of Article 7 of the Convention.

In Estonia for instance, there is hardly any case-law, the only ones existing are related to genocide and crime against humanity committed by the Stalinist regime. Here retroactivity questions appeared, because the acts were committed between 1941 and 1949, however, the question whether these acts were considered criminal according to general international law at the time was not analyzed by the national courts. A common characteristic in Estonian national courts typically seems to be a lack of knowledge of international law and international case law, which resulted in that the judgments are “loftily worded and open to attack”.<sup>534</sup>

Finally, legal correctness is only one aspect of proceedings in international crimes, but „[n]ot only legislators and authors of constitutions need to be culturally open, given that they formulate the human rights and the criminal law subject thereto. Criminal judges must also be culturally open so that they can assess the perpetrators and victims in criminal proceedings arising from typical cultural conflicts equally.”<sup>535</sup>

Although it can be argued that the “insertion of an *aut dedere aut judicare* principle into these treaties testifies to the strongly held belief of the international community that States are sufficiently equipped to adequately address international crimes through the exercise of universal jurisdiction”<sup>536</sup>, it must also be examined whether those applying the law are equipped enough to proceed in a case concerning war crimes, especially in Central Europe.

<sup>533</sup> Ibid. 376.

<sup>534</sup> See Estonian participant at the conference „The Role of the Judiciary in the Implementation of International Humanitarian Law”, Budapest, 2007. Presentation on file with the author.

<sup>535</sup> Otfried HÖFFE: Moral Reasons for an Intercultural Criminal Law. A Philosophical Attempt. *Ratio Juris*, September 1998/11/3. 216.

<sup>536</sup> RYNGAERT op. cit. 53.



Namely, effective war crimes procedures also require the knowledge, experience and often the language skills of the members of the judiciary. Extensive literature and legal commentaries are regularly only available in languages foreign to the prosecutors and judges.<sup>537</sup> This is an important aspect since lacking such resources one cannot really talk about effective application.

In Central Europe, although international humanitarian law and international criminal law are often taught as an optional subject, neither of these appears in the training of judges in the region. The basic sources are not to be found in the library of the courts or only in foreign languages. Therefore it would be illusory to say that prosecuting war crimes is not dependent on the will of the state and its sacrifice in terms of financing, personnel and training.

In addition, the question is always raised, especially by judicial training institutions, whether this is a relevant topic today. There may be two answers. First, repression of grave breaches and war crimes is an international obligation, irrespective of the present political context or other considerations. States taking their international obligations seriously cannot be accepted to neglect their obligations for considerations of comfort or short-sightedness.

The whole point in the system of obligation to repress is on the one hand that states adopt such measures already in peacetime, on the other hand, that all states comply with it, because only this could lead to an end of impunity. This does not mean that a state “prepares for war”, as many government functionaries put it, but it signals a comprehension of the internationally accepted belief that war crimes violate the basic principles of civilized nations to such an extent that no state can turn a blind eye on it. One way to do it is making our own system capable of sanctioning war criminals.

In addition, it is far from true that punishing war crimes is an irrelevant question today. Soldiers of all Central European states participated in multinational missions in Afghanistan, Iraq, Kosovo and other similar contexts, in situations where international humanitarian law was applicable. This makes it even timelier to be ready to proceed in cases of violations. It is also known

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<sup>537</sup> The commentaries to the Geneva Conventions and the Additional Protocols, and commentaries to the Rome Statute of the International Criminal Court are available only in French and English, and some other languages, such as Spanish, Russian or Chinese. As many of the judges and prosecutors in Central Europe do not master any of these languages, they have a very limited resource they can work with. The same is true for the jurisprudence of international tribunals. When the author as legal adviser of the ICRC Regional Delegation in Budapest organized a meeting for judges and prosecutors from Central European countries in 2007, it was already a difficult task to find participants who speak English or French, and those who finally attended the meeting admitted that the prosecutors or judges who would be assigned such cases do not speak any other language than their mother language.

that many states already had problems, such as looting, seizure of cultural property and illegal trade with cultural property. It can thus not be closed out that procedures related to war crimes may arise.

### 3.3.2. *Domestic courts' attitude towards universal jurisdiction*

*"Imperfect justice may be preferable to no justice at all."*<sup>538</sup>

As already outlined above, international law generally lacks effective enforcement mechanisms. One of the few mechanisms that do work is criminal prosecution. When an international crime is prosecuted in the name of the international community, we first think of international tribunals as the forum. At the same time, prosecution by national courts can also represent prosecution in the name of the international community. A tool to make this work is universal jurisdiction, where, although prosecution is carried out in a national forum, it is done representing the interests of society at the international level<sup>539</sup>.

At the same time, one of the obligations least complied with in the Geneva Conventions is the obligation to prosecute and punish perpetrators of serious violations of international humanitarian law, irrespective of the nationality of the offender. Although the obligation to exercise universal jurisdiction is not expressly named, it is clear that the obligation to search for and prosecute in fact means that states are obliged to exercise universal jurisdiction<sup>540</sup>.

We must admit, however, that it may not be entirely clear at first glance what the text of the Geneva Conventions exactly means:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed,

<sup>538</sup> RYNGAERT op. cit. 65.

<sup>539</sup> S. ABI-SAAB op. cit. 597.

<sup>540</sup> S. PICTET (1995) op. cit. Comment to Article 49 para 2. S. also WEDGEWOOD op. cit. 396. or s. Report of the United Nations Fact Finding Mission on the Gaza Conflict: *Human Rights in Palestine and Other Occupied Arab Territories*. A/HRC/12/48 of 15 September 2009. 514, at 1648. It must be added that despite the clear wording of the Geneva Conventions, some authors still question or hold it debatable whether universal jurisdiction for grave breaches is an option or an obligation. The vast majority of writers argue that this is a clear obligation. S. BROWN op. cit. 385; RANDALL op. cit. 790, or Géraud de la PRADELLE: *La compétence universelle*. In: H. ASCENSIO – E. DECAUX – A. PELLET (eds.): *Droit International Pénal*. Paris, Editions A. Pedone, 2000. 914. The confusion around the obligatory nature of universal jurisdiction for war crimes may stem from the fact that in case of certain other crimes, universal jurisdiction is offered as a possibility by international law. This is the case for instance with piracy.

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.”<sup>541</sup>

To be more precise: what does „search for” exactly cover:<sup>542</sup> does it cover the requirement to search in the territory of the state or does it cover the whole world?<sup>543</sup> The first approach seems logical and realistic, as supported by many writers,<sup>544</sup> moreover, this approach is the one corresponding to the aim of universal jurisdiction: not to let perpetrators hide between state borders. This approach would then mean that in case such a person is present on a state’s territory, the state is bound to search for this person and bring him before its own courts. The ICRC Commentary to the Geneva Conventions clearly states that „[a]s soon as one of them [i.e. a state] is aware that a person on its territory has committed such an offence, it is its duty to see that such person is arrested and prosecuted without delay.”<sup>545</sup> Neither the text of the Conventions, nor the Commentary attaches further conditions to the exercise of universal jurisdiction, therefore the obvious conclusion is that the drafters of the Conventions did not actually want to attach any more conditions.

<sup>541</sup> Geneva Conventions, Articles 49/50/129/146 respectively.

<sup>542</sup> Although the *aut dedere aut judicare* obligation could be seen as equal to the obligation of exercising universal jurisdiction, many writers make a difference between the two: „[*aut dedere aut judicare*] should be seen as a second layer that could be added to universal jurisdiction. The treaty rule of *aut dedere aut judicare* would transform it [universal jurisdiction] into an obligation to prosecute or extradite. Thus, the role of *aut dedere aut judicare* found in treaties was not *per se* universal jurisdiction. Indeed, *aut dedere aut judicare*, as a conventional arrangement, could be created by a limited number of States over a crime that did not qualify as an international crime under general international law, and hence was not subject to universal jurisdiction.” Opinion of Georges ABI-SAAB: Institute de droit international, Annuaire. Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 209–210. M. Nyitrai also makes a difference and suggests that for an effective application of the *aut dedere aut judicare* principle, international crimes to which the afore mentioned principle applies, should also have universal jurisdiction. S. M. NYITRAI (2001) op. cit. 27.

<sup>543</sup> To demonstrate differences of opinions, s. also: Institut de droit international, Annuaire, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie. Paris, Editions A. Pedone. 208.

<sup>544</sup> WEDGEWOOD op. cit. 396.

<sup>545</sup> PICTET (1995) op. cit. 365–366.

Universal jurisdiction is, at the same time, often seen as a dangerous phenomenon interfering with state sovereignty<sup>546</sup> and politics, threatening politicians and developing a tyranny of judges. Henry Kissinger warns that “[t]he danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts. [...] When discretion on what crimes are subject to universal jurisdiction and who to prosecute is left to national prosecutors, the scope for arbitrariness is wide indeed. [...] The doctrine of universal jurisdiction is based on the proposition that the individuals or cases subject to it have been clearly identified. [...] But many issues are much vaguer and depend on an understanding of the historical and political context. It is this fuzziness that risks arbitrariness on the part of prosecutors and judges years after the event and that became apparent with respect to existing tribunals.”<sup>547</sup> Belgium, for example, stated in 1990 in its observation to the *Draft code of crimes against the peace and security of mankind*, that “it must be recognized that the principle of universal punishment is not the ideal solution in respect of international crime; that is so for the two following reasons. [...] Firstly, there has always been some opposition to universal punishment because it makes national tribunals responsible for judging the conduct of foreign Governments.”<sup>548</sup>

Another danger usually seen in universal jurisdiction is the risk that it becomes an instrument in the hands of developed countries to exercise a modern form of colonialism over developing countries.

The neo-colonialism argument was also raised in the debate between the European Union and the African Union, which is described in the AU-EU Expert Report on the Principle of Universal Jurisdiction.<sup>549</sup> Since the points raised by both sides perfectly demonstrate the usual arguments – counter-arguments raised around universal jurisdiction, and many of the findings of the Report provide a general overview of the state of proceedings based on universal jurisdiction in European and African countries, an introduction to the main points seems useful.

<sup>546</sup> For a discussion on the relationship of universal jurisdiction with the principle of sovereignty, s. Bernhard GRAEFRAETH: Universal Criminal Jurisdiction and an International Criminal Court. *European Journal of International Law*, 1990/1. 72–75.

<sup>547</sup> KISSINGER (2001) op. cit. 280–281.

<sup>548</sup> S. Belgium, UN Doc A/43/525. p. 24. It is now known that it was this very state which became one of the pioneers in applying universal jurisdiction and the first state which had to revise its legislation on universal jurisdiction after realizing the political unsustainability of applying such jurisdiction without any link with the forum state.

<sup>549</sup> Report of the AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Council of the European Union, 8672/1/09 REV1, 16 April 2009 (hereafter AU-EU Report).

The roots of the debate were the practice of European states in investigating and prosecuting war crimes, crimes against humanity and genocide based on universal jurisdiction against numerous accused of African origin – many of the cases mentioned in the present study. The African Union, acknowledging the need to end impunity, feared the abusive application of universal jurisdiction which could endanger international law.<sup>550</sup> Hence, the African Union's Commission on the Abuse of Universal Jurisdiction requested that a meeting is arranged between the AU and EU to discuss the matter. Consequently, two meetings were held in 2008 which resulted in the issuance of the Expert Report. The Report was prepared by independent experts tasked by the AU and EU and reflected the outcome of the experts' analysis and not those of the AU or EU.

The Report seeks to strike a balance between the widely accepted rationale of universal jurisdiction and its allegedly abusive application. First, it clarifies the link between the concept of universal jurisdiction and the *aut dedere aut judicare* principle by indicating that the obligation to empower states' organs with universal jurisdiction is a logically earlier step than exercising the *aut dedere aut judicare* principle. Hence, says the Report, "[i]t is only once [...] competence [to exercise universal jurisdiction] has been established that the question whether to prosecute the relevant conduct, or to extradite persons suspected of it, arises."<sup>551</sup> As the Report points out, the *aut dedere aut judicare* principle can not only be applied for universal jurisdiction, but to other forms of jurisdiction as well. Finally, the Report notes that due to these two obligations, States are not only obliged to vest their authorities with universal jurisdiction, but once this is done, they are also obliged to exercise this jurisdiction by either prosecuting or extraditing the given case.<sup>552</sup>

The Report also highlighted that African states were also making serious efforts in exercising universal or other forms of jurisdiction or alternative systems to fight impunity. Although no universal jurisdiction case had taken place in the African Continent, numerous states tried persons for serious international crimes based on ordinary jurisdictions, using alternative systems like truth and reconciliation commissions or the *gacaca* system, or referred cases to the ICC – all in an effort that perpetrators face criminal justice.<sup>553</sup>

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<sup>550</sup> Ibid. Background, para 2.

<sup>551</sup> Ibid. para 11.

<sup>552</sup> Ibid. para 11.

<sup>553</sup> Ibid. para 20.

On the side of EU practice, the Report underlined that as of the time of the report, only eight states had initiated proceedings based on universal jurisdiction, involving suspects from various states and geographic regions, out of which only less than half are African<sup>554</sup>. At the same time, the majority of the cases had been discontinued based on various reasons, including immunity.<sup>555</sup>

Regarding the specific AU and EU concerns, the findings of the Report held that although African states supported the notion of universal jurisdiction, they would need institutional capacity-building to be able to exercise it. African states find that universal jurisdiction exercised by European states are targeted mainly against African accused, and already the public issuance of indictments and warrants of arrest are intimidating against those states, evenmore, the fact that officials of African states are tried by European jurisdictions evokes memories of colonialism. At the same time, the writers of the Report raise attention to the fact that the number of African suspects is only a part of the overall cases of universal jurisdiction, and the number of cases which resulted in an indictment, let alone trial and conviction, are exceptional, in most cases because of immunity.

They also point out the independence of the judiciary, the limited EU competence in matters of universal jurisdiction, the need that criticism against application of universal jurisdiction by European states be backed up by an expression of real willingness from African states to exercise jurisdiction – with European states having proposed their technical assistance. The Report also reminds that although in many cases African states requested extradition of their nationals from European states, such requests had been denied due to uncertainty about humane treatment and the availability of fair trial in the given state.<sup>556</sup>

The recommendations formulated by the experts basically reflect the answers to the concerns raised by the African Union and European Union respectively. They call on AU member states to adopt legislation to allow them to try persons accused of serious international crimes, to ensure adequate treatment of detainees and fair trial guarantees, and to appoint judicial contact points with Eurojust. However, most of the recommendations are addressed to European states. These include the observance of friendly relations during decisions on proceedings, the

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<sup>554</sup> These cases are concerning events that had happened in Afghanistan, Argentina, Bosnia-Herzegovina, China, Chile, Cuba, El Salvador, Iran, Iraq, Israel, Guatemala, Mexico, Peru the United States of America, Uzbekistan, Mauritania, Morocco, Democratic Republic of the Congo, Equatorial Guinea, Central African Republic, Côte d'Ivoire, the Republic of Congo, Rwanda, Suriname Tunisia and Zimbabwe. *Ibid.* para 26.

<sup>555</sup> *Ibid.* para 26.

<sup>556</sup> *Ibid.* paras 39–45.

need to refraining from public discreditation and stigmatization and to respect the presumption of innocence, the need to observe immunities as prescribed by international law, the need to give primacy to the territorial state to prosecute as a matter of policy.

Last, certain recommendations are institutional in nature, namely the recommendation to appoint a minimum level of judges to deal with universal jurisdiction cases and to adequately train prosecutors and judges, the need for further dialogue between the EU and AU on the question and the need for furthering capacity-building measures of African states with the assistance of the EU and its member states.<sup>557</sup>

Summarizing the present author's reflections on the findings of the Report, the Report seeks to respond to the concerns and criticisms of both sides. Neither of the arguments raised are new, nor are the responses. What comes clear is that it would be unfair to say that European states are concentrating on African cases. At the same time, considering that European states are also struggling with the technical, legal and financial difficulties of universal jurisdiction cases, it is easy to understand why African states cannot effectively deal with such procedures.

Since, as the Report also pointed out, such crimes primarily cause harm in the state or area where they had been committed, the best forum for the process would be the territorial state. Therefore the most desirable goal would be to reach that the territorial state proceeds, and the cooperation of the AU and the EU should concentrate on this through cooperation, assistance in capacity-building, sharing of information, and other similar measures.

At the same time, until this goal can be achieved, the second-best option is proceedings based on universal jurisdiction, which African states also acknowledged. Although this undoubtedly has political consequences, it is still a better solution than impunity. What is certain is that states cannot rely on the ICC as a solution, given the very limited number of cases the ICC can deal with.

As the Report also pointed out, the competence of the European Union is very limited with respect to influencing the exercise of universal jurisdiction by European States. As a matter of fact, taking judicial independence as a starting point, the influence of the states themselves is also rather limited in this respect, namely on how prosecutors and courts apply universal jurisdiction. Although politics has clearly influenced certain decisions on prosecution, our belief should still be that the prosecutors and judges are primarily weighing legal considerations

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<sup>557</sup> Ibid. 40–45.

when assessing the cases. This being said, it is clear that prosecutors and judges will probably not want to stir up a hornet's nest.

Certain considerations, however, could be taken into account to decrease the perception of an abusive use of the principle. The recommendation of keeping a low profile during investigations in order to avoid stigmatization of the accused and the nation especially in case of an accused holding office merits attention. The upholding of communication on diplomatic and other channels between the forum state and the territoriality/nationality state also deserves consideration. Although these measures are rather procedural and may not substantially tackle the problem.

A substantial solution can probably only result from a multifaceted approach. Notably, we must admit that the ideal solution would be if the territorial states could deal with the cases. However, as the African Union also mentioned, many of these states would need capacity-building so that they can address such a challenge. European and other states and organizations should assist and continue to assist in this endeavor, it being a common interest.

In many cases the territorial state could still not handle the cases due to an ongoing conflict or its very involvement in the commission of the atrocities. In an ideal situation, the application of universal jurisdiction should only come into play in such instances, and not necessarily by European states. Feelings of neocolonialism may be less intensive if other African states would also proceed based on universal jurisdiction. This could also be practical due to their proximity to the territorial states and their better understanding of the political, cultural and other contexts of the area where the crimes had been committed.

Whether an international body should monitor such procedures could be questionable. Such an idea was raised at the Assembly of the African Union in July 2009. The States adopting the Decision felt the „need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the Principle of Universal Jurisdiction by individual States”<sup>558</sup> The existence of an international body reviewing the decisions of domestic prosecutors or judges could seem to be an intrusion into their independence and could raise issues of state sovereignty. In case such decisions are violating international law, they can be handled in front of already existing bodies, such as the International Court of Justice or, less likely, in case the

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<sup>558</sup> Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/11(XIII), para 5.



violations would constitute violations of human rights, in front of regional human rights bodies.

Regional international bodies, such as the European Union or the African Union, could play a role – with limited competence, however – in assisting cooperation among states, exchanging best practices and common problems and continuing a dialogue among each other. Such role would be restricted to enhancing cooperation rather than having a say in substantial issues, these being state competences.

An interesting recent development could be the newly initiated trial against Chadian dictator Hissène Habré in Senegal. Habré was indicted in 2000 as a result of criminal complaints brought against him by victims in 2000 in Senegal for the thousands of political killings and other acts committed under his rule between 1982 and 1990, but the case was dismissed on appeals based on lack of jurisdiction.<sup>559</sup> At the same time, a Belgian judge indicted him in 2005 on counts of crimes against humanity, war crimes and torture, and thus Belgium requested his extradition for trial<sup>560</sup>, but this had been denied by Senegal. In the meanwhile, Chadian courts sentenced Habré for death *in absentia* for events that had happened in 2008.<sup>561</sup> Although the Senegalese government considered his extradition to Chad, they halted the extradition because of the death sentence.

The International Court of Justice, as a consequence of the complaint brought before it by Belgium, ruled in July 2012 in the case *Belgium v. Senegal*<sup>562</sup> that Senegal had violated its obligations 'to prosecute or to extradite' under the UN Convention Against Torture and found that Senegal must prosecute Habré without further delay if it does not extradite him to Belgium.

The Senegalese government swiftly reacted by affirming its commitment to start the proceedings soon.<sup>563</sup> Indeed, after years of legal maneuvering and solving constitutional issues, the Senegalese government had set up an Extraordinary

<sup>559</sup> S. Human Rights Watch: Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, available at: <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#8> [last visited on: 10 April 2013].

<sup>560</sup> Human Rights Watch: Ex-Chad Dictator Indicted in Belgium, available at: <http://www.hrw.org/news/2005/09/29/ex-chad-dictator-indicted-belgium-0> [last visited on: 10 April 2013].

<sup>561</sup> S. Human Rights Watch: Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, available at: <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#8> [last visited on: 10 April 2013].

<sup>562</sup> Questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*), Judgment of 20 July 2012.

<sup>563</sup> S. Human Rights Watch: Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, available at: <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#8> [last visited on: 10 April 2013].

African Chambers within the existing Senegalese court structure early 2013 to try Habré. This special tribunal had been set up with the support of the African Union and financial assistance of the European Union and the United States.<sup>564</sup>

Although the commencement of proceedings against Habré has taken painfully long, the outcome may serve as a guidance for future similar cases. As it had been noted in the AU-EU debate, the 'colonisation' argument may lose its ground if African courts take on the task of prosecutions, but this, for the time being, requires the input, assistance and support of, among others, the European Union and the African Union.

Coming back to the AU-EU debate and viewing its main points, and considering the possibility of bias of domestic judges and the neo-colonialism argument, many consider that the ICC is in a better position to handle such cases. However, as we will see below, neither of these arguments is convincing enough to make universal jurisdiction obsolete.<sup>565</sup> Considering the freedom of the judiciary from the executive powers in all civilized states, the judges, even if exercising universal jurisdiction, will have to carry out these proceedings within the strict framework provided by international and national law. Therefore raising the possibility that foreign judges will be driven by political motives is questioning their independence.<sup>566</sup> At the same time, to see the ICC as a solution to this problem is an approach that completely loses the point of the concept of universal jurisdiction.

Bringing this in connection with the colonialism argument, we discover that while universal jurisdiction gives a possibility to all states, including developing countries, to exercise jurisdiction, the ICC may be more influenced by developed countries through funding, the election of judges, substantive and procedural rules and in many other ways. Moreover, there may be situations where the ICC is not willing to prosecute certain crimes – either due to the “insignificance” of the case or due to political considerations –, consequently exercising universal jurisdiction may be the right and only choice.<sup>567</sup> Finally, it must be noted that

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<sup>564</sup> Jurist: Senegal opens court to try former Chad dictator, available at: <http://jurist.org/paperchase/2013/02/senegal-opens-court-to-try-former-chad-dictator.php> [last visited on: 10 April 2013]

<sup>565</sup> For arguments against the „colonialism” approach, s. BROWN op. cit. 391.

<sup>566</sup> A discussion on the possibility of eventual political influence on judges will be discussed in Chapter 4.3.4.

<sup>567</sup> S. Report of the United Nations Fact Finding Mission on the Gaza Conflict: „Human Rights in Palestine and Other Occupied Arab Territories”, A/HRC/12/48 of 15 September 2009. 515. at 1654.

universal jurisdiction is a generally accepted legal concept laid down in various international treaties, among them the universally ratified Geneva Conventions.

Similarly to how prosecution by the ICC is complementary to prosecutions of national courts, prosecution based on universal jurisdiction is often seen as complementary to ordinary jurisdictions.<sup>568</sup> This means that states with an ordinary jurisdictional link would be required and practical to exercise jurisdiction in the first place, while prosecutions by other states based on universal jurisdiction would only step in should the state primarily concerned not be able or willing to exercise its prosecutorial powers. This also means that should the concerned state later decide to take on the case and with the prerequisite that a fair and impartial trial can be expected, an extradition by the state exercising universal jurisdiction would be desirable to the concerned state. This mechanism may serve a similar purpose as the complementarity principle of the ICC: the possibility of another state punishing based on universal jurisdiction may have the effect that the concerned state rather chooses to initiate prosecution itself than letting another state do it.

At the same time, states usually prefer to proceed based on traditional jurisdictions as opposed to universal jurisdiction. To see advantages and disadvantages of certain jurisdictional bases, it is worth going through the grounds of jurisdiction possible in case of a domestic procedure:

- (i) jurisdiction based on the *nationality of the offender*. In this case the state may prosecute because the object is to defer future violations, or because in the long run it is advantageous to show that the state is committed to bringing perpetrators to justice. In addition, since the offender is a national of the state, probably no extradition issues arise. On the other hand, the trial may be easily bias towards the offender;
- (ii) jurisdiction based on the *nationality of the victim*. The presence of the victim and easy availability of his/her testimony makes such trials easier, and it is a reassurance for the victim to see justice done so close and most probably in a way that is sympathetic to him;
- (iii) jurisdiction based on the *territory where the act was perpetrated*: the trial at the *locus delicti* makes the collection of evidence, testimonies easy;
- (iv) jurisdiction based on the *protective principle*, i.e. when the act endangers national security or basic state/government function. In this case collection of evidence may be difficult given that the crime was committed abroad

<sup>568</sup> S. opinions of Georges ABI-SAAB and Theodor MERON: *Institute de droit international, Annuaire, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie*. Paris, Editions A. Pedone. 207 and 211.

(otherwise it would be the territoriality principle), but it would be important for the state in its own interest to prosecute the case and also to show to its citizens that it is capable of defending state security from hostile acts. Difficulty may arise if the state of the perpetrator also has an interest in the case;

- (v) jurisdiction based on *universal jurisdiction*: this is where the trial procedure meets the biggest hurdles: collecting evidence is difficult and costly, it is often politically difficult for the state; here the motive is to not let anyone who had committed such acts be unpunished.<sup>569</sup> Although it is demanding for a state to exercise universal jurisdiction, this is the “last resort” in the circle of domestic prosecutions, before international prosecutions would take place.

Since universal jurisdiction is one of the most contested and least complied with obligation, its examination deserves a detailed analysis. The following pages elaborate on different aspects of universal jurisdiction and how states and international tribunals interpret and apply the treaty provisions and the corresponding customary rules. Certain procedural elements are also examined due to their direct consequence on a wide application of universal jurisdiction or on a restrictive interpretation. The sub-chapter follows on to discuss eventual conflicts with basic guarantees and certain practical hurdles during its application.

#### *Conditions often linked to the exercise of universal jurisdiction*

State law and practice usually reflects two understandings of universal jurisdiction: one applies universal jurisdiction without restrictions, the other puts some kinds of restrictions to it. In the verbatim interpretation of the Geneva Conventions, it is an obligation on all states to exercise jurisdiction if a grave breach of the Conventions has been committed, irrespective of the offender, the place of the act and the victim, hence, such a jurisdiction is fully universal. A narrower / more restrictive application of the obligation stipulated in the Geneva Conventions, although at times legally questionable, is to link a state’s jurisdiction to certain conditions: such as the perpetrator having legal residence in the state or the act having a link with the given state’s interest<sup>570</sup>.

<sup>569</sup> S. WEDGEWOOD *op. cit.* 394.

<sup>570</sup> Such legislation is to be found for example in Belgium (Law of 1993 amended on 1 August 2003) and in Spain (Article 23 of the Law on Judicial Powers of 1985, application of universal jurisdiction restricted by Law of 4 November 2009. The amendment limits the law’s application to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish

Many states, however, establish their own jurisdiction without conditions, the jurisdiction being fully universal. Interestingly but logically, Central European states mainly do not apply any restrictions. This is logical because these states have not yet tested their legislation in practice and have not met the practical or political hurdles that go with trying cases based on universal jurisdiction.<sup>571</sup> Obviously typically those states have restricted their jurisdiction based on either of the conditions mentioned above where criminal procedures were initiated based on universal jurisdiction. It remains a question whether the constrained application of universal jurisdiction in national law fully conforms to the Geneva Conventions.

A non-restrictive approach was taken first by Spain and Belgium as well, however, as soon as they started handling cases, the courts started including restrictions which were later reflected in national legislation. The Spanish High Court in 2003 placed restrictions on the application of universal jurisdiction for genocide in the *Guatemalan General* case, whereby stating that universal jurisdiction could only be exercised as a subsidiary principle and the Spanish courts could only have jurisdiction if there was a link with Spain, i.e. the victim is of Spanish nationality or the perpetrator is in custody in Spain. The case was brought to the Constitutional Court by the claimants arguing that a restrictive interpretation of universal jurisdiction under the law of 1985 violates the right of access to justice and the right of due process in the Spanish Constitution. The Spanish Constitutional Court held that “[t]he basic aim of the principle of universal jurisdiction is to achieve ‘the universal extension of the jurisdiction of states and their organs to deal with facts of interest to all, the logic consequence of which is the competition between jurisdictions, or in other words, the competition between competent states’”, hence, „the sole limitation being the principle of *res judicata*. Article 23(4) [of the Spanish Law on Judicial Powers of 1985] establishes an absolute principle of universal jurisdiction based on the particular nature (gravity) of the crimes prosecuted.”<sup>572</sup> The Constitutional Court thus established that the restriction of the High Court on the application of the universal jurisdiction contradicts the principle of universal jurisdiction, annulled

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nationality, or (iii) there is some relevant link to Spanish interests; furthermore, Spain can have no jurisdiction if (iv) another ‘competent court or international Tribunal has begun proceedings that constitute an effective investigation and prosecution of the punishable acts’. S. <http://www.cja.org/article.php?id=740> [last visited on 27 October 2011]

<sup>571</sup> This is the case for example in Hungary, Lithuania, Estonia, Poland, Bulgaria or the Czech Republic.

<sup>572</sup> *Rigoberta Menchu and Others v Guatemalan Government Officials*, Judgment of the Constitutional Court, 26 September 2005.

the decision of the Supreme Court and sent it back to the investigating judge. The new law of 2009, however, reflected the opinion of the Spanish High Court.

The ICJ also dealt with the question of restrictions in the *Arrest Warrant case*<sup>573</sup>. Although the judgment itself was highly contested, separate and dissenting opinions involved interesting lines of thought. Judge Guillaume expressed in his separate opinion that international treaties allow for subsidiary universal jurisdiction in case the accused lives on the territory of the state in question. Judge Van den Wyngaert, however, thought that Belgium did not violate international law by issuing an international arrest warrant against the minister of foreign affairs of Congo at the time.

Cassese reminds that “one should not be unmindful of the risk of abuse which reliance upon the broader conception of universality may involve. This in particular holds true for cases where the accused is a senior official, who, because of the possible exercise by a foreign court of the universality principle, may end up being hindered in the exercise of his functions abroad [...]. Nonetheless, it would be judicious for prosecutors, investigating judges, and courts of countries whose legislation upholds this broad notion of universality to invoke it with great caution, and only if they are fully satisfied that compelling evidence is available against the accused.”<sup>574</sup> However, it is also true that in most cases universal jurisdiction was applied in relation to “small fishes” who were present on the territory of the state as refugees or asylum-seekers so their prosecution did not really raise issues for the foreign relations of the state.<sup>575</sup>

Generally the aim of introducing restrictions is to avoid that states are bound – due to a flood of cases filed by the victims – to proceed in a series of cases which have absolutely no relation to the given state, to proceed in cases where the relevant (territorial or nationality) state is a friendly state or given the relevant state’s economic or political power, it would be highly inconvenient for the forum state to proceed. Since there is no international legal basis for the introduction of such conditions or restrictions, these factors seem to be the driving force behind introducing them in national legislation.

At the same time, many writers agree that restrictions other than presence of the accused in the forum state (a restriction which the Commentary to the Geneva

<sup>573</sup> See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002.

<sup>574</sup> Antonio CASSESE: *International Law*. Second Edition. New York, Oxford University Press, 2005. 452.

<sup>575</sup> S. RYNGAERT op. cit. 53.

Conventions also acknowledges<sup>576</sup>) would go right against the aim of universal jurisdiction, the aim of which is exactly that somewhere a procedure be carried out against perpetrators trying to hide among states. Any other approach would be contradictory to the *raison d'être* of universal jurisdiction and would link it to “ordinary” conditions.<sup>577</sup>

### *Trials in absentia*

The exercise of universal jurisdiction *in absentia* is also a critical question partly because not all states accept trials *in absentia* in general, and partly because restricting exercise of universal jurisdiction to cases where the state is holding the accused in custody is a principle accepted by many national laws and many writers. The issue raised in Belgium was whether it was legal to exercise universal jurisdiction *in absentia*. Exactly this question was raised in the *Sharon and Yaron case*<sup>578</sup>, where relatives of victims of the Lebanese refugee camp filed reports for ordering the commission of grave breaches of international humanitarian law. The Court of Appeals in Brussels in its pre-trial session stated that Belgian courts did not have jurisdiction because the accused were not present in Belgium at the commencement of the proceedings. The Court of Cassation found, on the other hand, that the absence of the accused was not an obstacle to the proceedings, arguing that the Belgian law referred to by the Court of Appeals, the Preliminary Title of the Code of Criminal Procedure, relates to ordinary crimes, while it is not applicable to grave breaches of humanitarian law, as such crimes are dealt with by a separate law. Still, the Court of Cassation denied the case based on an absence of nexus of the case with Belgium and an additional obstacle of immunity in the case of Sharon. Belgium finally amended its law in 2003 making at least three years of legal presence of the accused in Belgium a requirement for the exercise of universal jurisdiction.

Many of the Central European states' legislation do not hold absence of the accused as an obstacle to the proceedings.<sup>579</sup> These states, however, have not yet

<sup>576</sup> Pictet (1995) op. cit. 365–366.

<sup>577</sup> S. for example ABI-SAAB op. cit. 601.

<sup>578</sup> S. *Sharon, Ariel, Yaron, Amos et Autres* 26/06/02 (Ct App Brussels), 12/02/03 (Ct Cass), *Procureur contre Ariel Sharon et Consorts*, 24/09/03 (Ct Cass).

<sup>579</sup> Trials *in absentia* are legally acknowledged in Hungary, Poland, Romania, Czech Republic and Latvia. Absence of the accused during the proceedings is or may be an obstacle in Bulgaria, Slovenia, Lithuania and Estonia.

carried out trials based on universal jurisdiction so no practical experience is at hand yet.

### *Immunities*

Another widely contested legal problem is the question of immunity of persons holding official functions in universal jurisdiction cases<sup>580</sup>.

The International Court of Justice in the *Arrest Warrant case*<sup>581</sup> manifested that international law ensures absolute functional immunity to the minister of foreign affairs currently holding office, even in the case of an international crime. The Rome Statute of the International Criminal Court, however, expressly closes out the immunity of state officials. Article 27 of the Rome Statute states that even heads of state, members of government or members of parliament are not immune from its jurisdiction, and neither national nor international immunities can be obstacles to the jurisdiction of the ICC.<sup>582</sup> This is an obvious rule in the Rome Statute, as it is mostly exactly such “big fishes” that the Court intends to try.

Although, given the principle of complementarity, this rule in itself does not oblige national authorities in any way in their national procedures, if states provide immunity to such functionaries either while exercising ordinary or universal jurisdiction, the ICC could gain jurisdiction over the case. Although the ICJ also made a difference between immunity in front of foreign domestic courts and international courts, whereby saying that immunity does not bar prosecutions in front of an international tribunal/court<sup>583</sup>, in light of the complementarity principle this differentiation may have a different aspect in the future.

The approach of national courts varied with respect to the question of immunity. The national court decisions rounded around the issues of different

<sup>580</sup> For a discussion on immunities linked to the Pinochet case, s. David TURNS: Pinochet’s Fallout: Jurisdiction and Immunity for Criminal Violations of International Law. *Legal Studies*, November 2000/20/4. 566–591.

<sup>581</sup> International Court of Justice, *The Democratic Republic of the Congo v Belgium*, Judgment, 14 February 2002.

<sup>582</sup> Article 27 of the Rome Statute: „1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

<sup>583</sup> ICJ, *The Democratic Republic of the Congo v Belgium*, Judgment, 14 February 2002. Para 61.



handling of immunity *rationae materiae* and *rationae personae* and with respect to former functionaires and acting functionaires.

Perhaps the most well-known and most cited decision with respect to immunity was the Pinochet-proceedings. Although the Pinochet-case is not strictly a universal jurisdiction case since Spain was rather relying on passive personality jurisdiction<sup>584</sup>, the findings of the House of Lords in their decisions merit attention.

Briefly, the House of Lords first found that Pinochet was not entitled to immunity. Lord Nicholls stated in this decision often named ‘Pinochet 1’, that “international law has made plain that certain types of conduct, including torture and hostage-taking are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law”<sup>585</sup>.

This was previously also stated by Lord Steyn: “the development of international law since the 1939–45 war justifies the conclusion that by the time of the 173 coup d’état, and certainly ever since, international law condemned genocide, torture, hostage-taking and crimes against humanity [...] as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.”<sup>586</sup>

Although the subsequent decision commonly referred to as ‘Pinochet 3’ also dealt with questions of double criminality, the most controversial issue was still immunity. Certain Lords held that unless the Torture Convention included an explicit exception from immunity – which it had not –, Pinochet could claim immunity as head of state<sup>587</sup>. Other Lords held that Pinochet could not claim immunity, but they differed in how they reasoned for this. The first group, consisting of Lord Browne-Wilkinson, Lord Saville and Lord Phillips, basically argued that immunity is contradictory to the purposes of applicable international law, notably saying that the prime suspects for torture are state officials and

<sup>584</sup> David Turns argues that although one of the significance of the Pinochet-decision in the UK was that immunity was not applied to a former head of state, it must be remembered that Spain did not apply true universal jurisdiction, but rather passive personality jurisdiction in the case. S. TURNS *op. cit.* 588–589.

<sup>585</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex part Pinochet Ugarte* [2000] 1 AC 61, p. 109.

<sup>586</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex part Pinochet Ugarte* [1998] 4 All ER 89, p. 945.

<sup>587</sup> See *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex part Pinochet Ugarte* [1999] 2 All ER 97 at 111 and at 122–130.

international law cannot provide immunity to commissions of the very crimes it punishes<sup>588</sup>.

The other group, consisting of Lord Hope and Lord Hutton, concentrated on the argument that the prohibition of torture was customary law, overriding any other rules, and the Torture Convention prohibited torture under any circumstances, allowing no justification whatsoever, and consequently torture cannot be the official function of a head of state<sup>589</sup>. Finally, the House of Lords removed Pinochet's immunity. However, as a consequence of subsequent developments, based on the observance of Pinochet being unfit to stand trial, he left UK territory and was released back to Chile.

As David Turns noted, the heart of Pinochet's case was that "if international law condemns certain acts as criminal, how in logic can it then also extend immunity for certain persons who commit those same acts? Since many international crimes are virtually by definition committed expressly or implicitly by state authority, the upholding of immunity for state officials subsequently charged with those crimes would render the law toothless."<sup>590</sup> Besides, it must not be forgotten that "the doctrine of personal immunity for heads of state did not conceive of such persons being charged with crimes against international law committed in their own states, but was aimed more at shielding them from prosecution for 'common crimes'."<sup>591</sup>

The Pinochet-case, although the House of Lords decision binding only on the United Kingdom, has had an important effect on legal thinking regarding the application of immunity. It did raise important questions of the different sides of immunity and the extension to which it could be applied to certain conducts prohibited by international law. Several opinions expressed during the House of Lords proceedings contested an absolute understanding of immunity and undeniable had an effect on subsequent domestic decisions. As it was clearly summarized: "Whatever the restrictions in the reasoning used by the Lords, it seemed that what emerged is that "international crimes in the highest sense' cannot per se be considered as official acts"<sup>592</sup>.

<sup>588</sup> Ibid. 114 and 169.

<sup>589</sup> Ibid. 165.

<sup>590</sup> TURNS op. cit. 577.

<sup>591</sup> TURNS op. cit. 576.

<sup>592</sup> Brigitte STERN: Immunities for Head of State: Where Do We Stand? In: Mark LATTIMER – Philippe SANDS (eds.): *Justice for Crimes Against Humanity*. Oregon, Hart Publishing, 2003. 103.

Although the Pinochet-case is the most widely known, there were several other cases that raised the immunity issue. The French prosecutor came to a similar conclusion in the *Rumsfeld*-case as the International Court of Justice. The prosecutor closed the file and rejected the criminal complaint filed by several human rights NGOs against the then former US Secretary of Defence Donald Rumsfeld for alleged torture committed in Guantanamo Bay and in Abu Ghraib detention facility, reasoning that the Ministry of Foreign Affairs claimed regarding diplomatic immunity, that “in application of the rules of customary international law, approved by the International Court of Justice, the immunity from criminal jurisdiction of heads of State, heads of government and ministers of foreign affairs continues, after the end of their functions, for acts carried out in their official function, and that, as former secretary of defense, Mister Rumsfeld must benefit, by extension, from the same immunity, for acts carried out in the exercise of his functions.”<sup>593</sup>

The *Branković* case in Bulgaria also demonstrated the controversies of immunity during the exercise of universal jurisdiction. Branković was a Serbian colonel, later general of the Yugoslav National Army, who entered Bulgaria in 2005 as part of a Serb military delegation on official visit. He was eventually arrested based on the request of the Interpol, for accusations of war crimes committed in Croatia in 1991, and for which he was convicted in Croatia<sup>594</sup>. The Sofia Court of Appeals ordered the release of the colonel referring to immunity under the 1969 Convention on Special Missions<sup>595</sup>.

A Dutch court in the first instance in the *Bouterse* case held that international immunities posed no bar to prosecution for international crimes.<sup>596</sup> In Italy, the highest court of appeal has held that state immunity, an immunity *rationae materiae*, is unavailable in respect of international crimes that violate *jus cogens*, such as war crimes.<sup>597</sup> In both cases the case involved former state functionaries.

<sup>593</sup> France, Prosecutor of the Republic at the Tribunal de Grande Instance of Paris, letter to lawyer of authors of criminal complaint, 16 November 2007. The source of the quote is: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule157#\\_VNaCa](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule157#_VNaCa) [last visited on 29 March 2012].

<sup>594</sup> [http://www.novinite.com/view\\_news.php?id=47274](http://www.novinite.com/view_news.php?id=47274) [last visited on 30 March 2012]

<sup>595</sup> S. AMNESTY INTERNATIONAL: *Bulgaria – End Impunity through Universal Jurisdiction*. Issued on 2009, available at: <http://www.amnesty.org/en/library/asset/EUR15/001/2009/en/2a3dec3a-e4df-49db-96b3-dbf962400f9f/eurl50012009en.pdf> [last visited on 28 November 2010]

<sup>596</sup> *Wijngaarde et al. v Bouterse*, order of 20 November 2000, District Court of Amsterdam. The order was quashed on other grounds by the Supreme Court on 18 September 2001.

<sup>597</sup> *Lozano*, ILDC 1085 (IT 2008), 24 July 2008, Court of Cassation (passive personality jurisdiction).

At the same time, other courts upheld immunities. Such decisions included the already mentioned *Sharon* case and various other cases in Belgium<sup>598</sup>, the *Kadhafi* case in France<sup>599</sup> and cases concerning Rwandese suspects in Spain<sup>600</sup>. The Danish prosecutor rejected a file for prosecution of *Carmi Gillon*, Israeli Ambassador to Denmark, former Head of Shin Bet, for alleged torture carried out under his assignment with the Security Services, saying that diplomatic immunity overruled the obligation of the Torture Convention.

The German prosecutor also rejected similar complaints. It rejected an application for investigation against former head of state of China, Jian Zemin for crimes against humanity allegedly committed while in office<sup>601</sup>, as well as against Ramzan Kadyrov, Vice-President of Chechnya<sup>602</sup>.

Accepting such immunities in front of international courts/tribunals can also be contested in light of recent legal history. Immunity of state functionaries was not accepted in the Nuremberg tribunals, the very procedures that are seen as the basis of today's international tribunals and courts. Article 7 of the Nuremberg Charter states that the fact that the perpetrator of the international offence was a head of state or held government functions at the time of the commission of the offence does not relieve him of responsibility under international law.<sup>603</sup>

The central argument against accepting immunity for serious international crimes was the fact that if international law prohibits acts that are typically carried out by state officials, it would be controversial to accept immunity of the very same state officials.

<sup>598</sup> S. complaints against Cuban President Fidel Castro, Iraqi President Saddam Hussein, Ivorian President Laurent Gbagbo, Mauritanian President Maaouya Ould Sid'Ahmed Taya, Rwandan President Paul Kagame, President of the Central African Republic Ange-Félix Patasse and President of the Republic of Congo Denis Sassou Nguesso. A complaint filed against Yasser Arafat, President of the Palestinian Authority, was dismissed on analogous grounds. S. also AU-EU Expert Report op. cit. 25.

<sup>599</sup> *SOS Attentats et Béatrice Castelnau d'Esnault c. Gadafy*, 125 ILR 490, 508, 13 March 2001, Court of Cassation.

<sup>600</sup> *Hassan II (Morocco)*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate No 5); *Obiang Nguema et al.*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate No 5); *Castro*, 4 March 1999, Audiencia Nacional (Plenary) and 13 December 2007, Audiencia Nacional (Plenary); *Rwanda*, 6 February 2008, Audiencia Nacional (Central Examining Magistrate No 4) (immunity of President Paul Kagame).

<sup>601</sup> S. Decision of the German Federal Prosecutor of 24 June 2005.

<sup>602</sup> S. Decision of the German Federal Prosecutor of 28 April 2005.

<sup>603</sup> Nuremberg Charter, Article 7: „The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”.

Examining national jurisprudence regarding immunity, it may be stated that an absolute acceptance of immunity of state officials begins to be undermined. The decision in the Pinochet-case and emerging arguments stating that the commission of war crimes, crimes against humanity and genocide cannot be the functions of a state functionaire indicate an emerging, although still not clearly accepted view that in case of the most serious international crimes, immunity would not be an obstacle to proceedings on the national fora either.

The question whether this non-acceptance of immunity in front of national courts would also be applicable for acting state officials is still an open one. A compromise seems to be that state functionaires could be brought to justice after they had left their office, however, this solution still leaves the question unresolved in cases a head of state guarantees himself/herself a protocollar function for life, thereby relying on immunity and escaping criminal prosecution. The submissions of the amicus curiae by Philippe Sands and Alison Macdonald on head of state immunity to the Special Court for Sierra Leone<sup>604</sup> also stress that the Yerodia judgment discusses acting state functionaries<sup>605</sup>. This question deserves further examination, since immunity is the most serious obstacle to the exercise of universal jurisdiction, however, a further analysis would exceed the limits of the present monograph.

### *Subsidiarity in the exercise of universal jurisdiction*

Is universal jurisdiction a subsidiary ground of jurisdiction *vis-à-vis* ordinary jurisdictions?<sup>606</sup> The rationale of universal jurisdiction is ending impunity, at the same time not weakening the jurisdictional grounds of the territorial/nationality states. The text of the Geneva Conventions does not provide for such subsidiarity, it simply puts extradition to other party as an opportunity:

“Each contracting party shall be under the obligation to search for [...], and shall bring such persons, regardless of their nationality, before its own courts. It *may* also, *if it prefers*, [...] hand such persons over for

<sup>604</sup> Special Court for Sierra Leone, The Appeal Chamber, *The Prosecutor v. Charles Gankay Taylor*, Case SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity, 23 October 2003.

<sup>605</sup> Ibid. Para 53.

<sup>606</sup> Ordinary jurisdiction here means jurisdiction exercised based on the territory where the crime was committed or the nationality of the offender.

trial [...] provided such High Contracting Party has made out a *prima facie* case.”<sup>607</sup>

The Commentary sets out a kind of order of jurisdictions: first, the jurisdiction of the state where the accused is, then, subject to the extradition laws of the first state, another state that made out a *prima facie* case and which furnishes evidence that the charges against the accused are “sufficient”. However, since “most laws and international treaties refuse to extradite accused persons who are national of the country holding them”<sup>608</sup>, if it is the nationality state which is holding the accused, it will probably not extradite him, but at the same time “the spirit of Article 49 clearly demands that the State holding them should bring them before its own courts.”<sup>609</sup> Since extradition is dependent on the extradition laws of the state which is holding the accused, and, following the wording of the Geneva Conventions, the state may, if it prefers, extradite the person, therefore extradition is left to the discretion of the state, the conclusion would be that the strongest plea for jurisdiction would be that of the state holding the accused.

Universal jurisdiction was not developed to contest or challenge the jurisdiction of nationality/territorial states. It was developed as a last resort, in case nationality/territorial states fail to exercise their duties to repress, in the interest of the community of states. In case the state with ordinary jurisdiction does proceed in an adequate way, no state will likely challenge its jurisdiction with arguments of universal jurisdiction.<sup>610</sup> Therefore the question around universal jurisdiction is not that much of a question of competition; rather it is a back-up solution in case no state with ordinary jurisdiction would want to carry out the proceedings.<sup>611</sup> In such a sense, universal jurisdiction is complementary to ordinary jurisdictions, similarly as the ICC is complementary to domestic jurisdictions<sup>612</sup>, even though no subsidiarity is legally required. As *Abi-Saab* mentions: “[t]he great danger here, in terms of probability calculus, is not of a positive, but of a passive conflict of jurisdiction, leaving the fundamental interests and values of the international

<sup>607</sup> Geneva Conventions, Articles 49/50/129/146 respectively. Emphasis added.

<sup>608</sup> PICTET (1995) op.cit. Comments to Article 49 para 2, para 3.

<sup>609</sup> Ibid.

<sup>610</sup> See a similar conclusion of the American Bar Association in CASSEL op.cit. 4. and in the corresponding Recommendation 103A of the American Bar Association.

<sup>611</sup> ABI-SAAB op. cit. 599.

<sup>612</sup> S. CASSEL op. cit. 3.

community unprotected most of the time. This is a danger for which universal jurisdiction purports to provide a modest and partial antidote<sup>613</sup>.

Obviously, denial of extradition by a state holding the accused but not having any link with the accused or with the crime would seem odd if the territorial/nationality state would want to do the proceedings, and it would also seem unrealistic. At the same time, such requests from states with ordinary jurisdiction should not aim to bar prosecution all in all, since this would go contrary the aim of universal jurisdiction<sup>614</sup> and such states would also be in violation of their obligations to repress violations.

Therefore state practice has shown that states are sensitive to pleas by states having ordinary jurisdiction and they only exercise universal jurisdiction if the state with ordinary jurisdiction is not requesting extradition. The Spanish court in the *Pinochet* case said with respect to genocide that a state should abstain from exercising jurisdiction where the territorial state is trying the case.<sup>615</sup>

The Spanish Supreme Court furthermore formed the principle of ‘necessity of jurisdictional intervention’ in the 2003 *Peruvian Genocide Case*. The Court stated that “the criterion for the application of the principle of necessity of jurisdictional intervention was the absence of an effective prosecution by the territorial State. It held that such a principle would not imply a judgment as to the reasons of the political, social or material conditions of impunity. Apparently, as long as the territorial State is dealing with the case, albeit inefficiently, another State should defer to it.”<sup>616</sup>

In a few years, the Spanish Constitutional Court in the *Rigoberta Menchu* case<sup>617</sup> gave a more precise explanation of the subsidiarity requirement, stating that a demand that the applicant proves the legal impossibility or prolonged inaction of the judges of the territorial state would contradict the principle of universal jurisdiction and thus the Spanish Constitution. Rigoberta Menchú

<sup>613</sup> ABI-SAAB op. cit. 600–601.

<sup>614</sup> Ibid. 560.: „(...) the doctrine of universal jurisdiction has to neutralize the effects of any claims of priority based on those traditional connecting factors that other states, although unwilling or unable to exercise jurisdiction themselves, could use to block the prosecution. This outcome would go against the common interest.”

<sup>615</sup> Auto del Juzgado de Instrucción número cinco de la Audiencia Nacional Española, en el caso de los ciudadanos españoles desaparecidos en la República Argentina, Ruling of 4-5 November 1998 at the Pinochet-case, available at: <http://www.derechos.org/nizkor/arg/espana/juri.html> [last visited on 13 January 2011].

<sup>616</sup> RYNGAERT op. cit. 61.

<sup>617</sup> *Menchu and Others v Guatemalan Government Officials*, Judgment of the Constitutional Court, 26 September 2005.

was an indigenous leader and Nobel Peace Prize Winner who initiated a case against former Guatemalan leaders for an assault on the Spanish Embassy in 1980 resulting in 37 deaths, several of whom were Spanish nationals.

The amended Spanish law reflected the findings of the Constitutional Court in saying that proceedings based on universal jurisdiction must be suspended in case a state with nexus to the crime has started to carry out proceedings.<sup>618</sup> The Belgian law of 2003 on universal jurisdiction gives the power to the federal prosecutor to refuse to initiate proceedings if the needs of justice or the international obligations of Belgium require that the case be brought before the court of a state with ordinary jurisdiction.<sup>619</sup>

It will probably not be contested that territorial/national states are in the best place to hold the proceedings. It will also probably not be met by opposition to hand over such sensitive and mostly expensive cases to the states with ordinary jurisdictions. Resulting from a general reluctance to interfere with other states' matters, "a number of States appear to have legitimately adopted a stricter variant of the subsidiarity/complementarity principle. It is walking a fine line for these States though, since too strict a variant may rob the principle of its core function of ensuring that international crimes are prosecuted by bystander States in case other States fail to adequately do so."<sup>620</sup>

It cannot be stated that international law requires subsidiarity as a prerequisite for exercising universal jurisdiction.<sup>621</sup> Contrary to this, some authors argue that the principle of subsidiarity is in the process of becoming a customary norm.<sup>622</sup> Others, however, expressly state that universality is not subsidiary to other forms of jurisdiction.<sup>623</sup> It therefore seems that the reason some states do require subsidiarity is because of practical considerations – either to get rid of the difficult task of trying a war crime case or wanting to avoid infringement of

<sup>618</sup> Common Law 1/2009, concerning reformation of legislation for the implementation of the new judicial office, amending Common Law 6/1985 concerning Judicial Power, Article VI.1.

<sup>619</sup> S. Stefaan SMIS and Kim Van der BORGHT: Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives. *ASIL Insights*, July 2003. Available at: [http://www.asil.org/insigh112.cfm#\\_edn6](http://www.asil.org/insigh112.cfm#_edn6) [last visited on 28 October 2011]

<sup>620</sup> RYNGAERT op. cit. 63.

<sup>621</sup> S. REDRESS-FIDH: *Extraterritorial Jurisdiction in the European Union – A Study of the Laws and Practice in the 27 Member States of the European Union*. December 2010. 25.

<sup>622</sup> RYNGAERT op. cit. 61.

<sup>623</sup> S. Report of the United Nations Fact Finding Mission on the Gaza Conflict: *Human Rights in Palestine and Other Occupied Arab Territories*. A/HRC/12/48 of 15 September 2009. 513 at 1646.



sovereignty with the other state - rather than seeing it as an international legal obligation.

At the same time, such consideration may oblige the prosecutor to examine whether the state with ordinary jurisdiction has carried out good faith proceedings, which may at times also be a very sensitive exercise. This inconvenience, notably the checking of another sovereign state's criminal proceeding may easily lead to a situation where the prosecutor or judge refuses to proceed without thorough examination of the proceedings of the state with ordinary jurisdiction.<sup>624</sup> In addition, depending on the wording of national legislation requiring subsidiarity, the mere filing of a complaint in a state with ordinary jurisdiction may lead to a halt in proceedings in the universal jurisdiction state for years without eventually any genuine attempt to proceed with the case in the state of ordinary jurisdiction. This, in the end, leads to a way of bypassing universal jurisdiction.

Hence, we can conclude that although the principle of subsidiarity has no basis in international law, some states apply this principle, and application of subsidiarity could lead to a discreditation of the very aim of universal jurisdiction. At the same time we may understand the uneasiness of national courts to judge on the appropriateness of other states' national procedures. The question, however, as we have mentioned above, will probably not be whether states are exercising the subsidiarity principle, but whether states will be willing to exercise their jurisdiction at all, therefore the subsidiarity question seems to remain a mainly theoretical issue for now.

#### *Private prosecutor or substitute private prosecutor*

Although it is relatively common in the case of universal jurisdiction that states' law make private prosecution or substitute private prosecution possible, the final decision whether to carry on with a case ultimately usually stays with the public prosecutor or the court. The advantage of the possibility of participation of the private or substitute private prosecutor in the criminal proceedings lies in that it could, to a certain extent, distance the proceedings from legal politics: the decision regarding initiation of the criminal proceeding would not only lie with the prosecutor.

Additionally, the prosecutor may reject the starting of investigation or initiation of a case due to the inherent difficulties of a war crimes case. The availability of private prosecution may be a cure for this phenomenon as well. Of course,

<sup>624</sup> REDRESS-FIDH Report (2010) op. cit. 25.

even in case of the presence of private or substitute private prosecutor, the state prosecutor could, eventually, block proceedings. In the UK, private prosecution is possible with respect to crimes under universal jurisdiction; still, the agreement of the Attorney General is necessary so that the prosecution goes ahead.<sup>625</sup> In Poland, the injured person may act as substitute private prosecutor, but finally the prosecutor decides on the initiation of proceedings. Should the substitute prosecutor not agree with the Prosecutor's decision, it can file an indictment at the court.<sup>626</sup> Hungary has a similar approach, the victim may, under certain circumstances, act as substitute private prosecutor, although the final decision still lies with the public prosecutor.<sup>627</sup>

### *Practical hurdles during the exercise of universal jurisdiction*

Although it can be argued that the "insertion of an *aut dedere aut judicare* principle into these treaties testifies to the strongly held belief of the international community that States are sufficiently equipped to adequately address international crimes through the exercise of universal jurisdiction"<sup>628</sup>, it must also be considered that in addition to immunity or other legal limits of exercising universal jurisdiction, its application has many practical obstacles as well.

Due to the characteristics of the crimes, such acts have been mostly committed in far-away countries leaving evidence, victims, the scene of the crimes and witnesses difficult and costly to reach. Although high costs are often brought as an excuse for non-compliance with this international obligation, topped with a usual lack of support from the public to spend so much money on crimes having no link with their states, this may sound controversial in light of how much money is spent on international military missions for the purpose of protecting international peace and security, the aim of universal jurisdiction being similar, but from a different approach. No one would disagree that the repression of the crimes labeled as the gravest by the international community is not least important, still, many countries neglect this obligation.

<sup>625</sup> However, absence of the content does not prevent the issue of a warrant. S. Prosecution of Offences Act, 1985, Article 25 and Arrest warrants – universal jurisdiction, Note by the Ministry of Justice, 17 March 2010, p.2, available at <http://www.justice.gov.uk/publications/docs/arrests-warrants.pdf> [last visited on 29 October 2011].

<sup>626</sup> Polish Penal Procedure Code of 1997, amended in 2009, Article 53 and Article 55 para 1.

<sup>627</sup> Hungarian Penal Procedure Code, Law nr. 19 of 1998, Article 53.

<sup>628</sup> RYNGAERT op. cit. 53.

Cassese states rightfully that repression of international crimes can be most successfully regarded if we consider the “individual” or “systematic” commission of such crimes: in the first case the perpetrator commits the crime from his own motive – for example looting –, whereas in the latter case the crimes are perpetrated on a wide scale, encouraged by the regime or at least the regime is keeping a closed eye on it, to reach mainly military or political aims – for example the killing of civilians in order to spread terror among them.<sup>629</sup> Crimes committed on an individual motive are often tried by national courts, while systematic crimes are usually tried by international courts or courts of the hostile country. However, „[t]he paradox is that noninvolved countries are more likely to deliver impartial justice if there is ever a fair trial, but they are at the same time less likely to want to have such a trial in the first place.”<sup>630</sup>

It must be noted here that exercising universal jurisdiction over individual crimes will most probably be far less inconvenient politically than over systematic crimes. This is so because in the latter case a whole regime or government would be condemned by the state trying the case, however, such inconvenience would be much diminished if the vast majority of the international community had already condemned the acts and political power relations would also be favorable. A case linked with the Rwandan genocide would probably not be too unacceptable for any state, whereas a case concerning an Israeli soldier having allegedly committed a crime against Palestinians would be most likely too inconvenient. The absence of such procedures can thus probably be lead to political causes; at the same time we can witness legal problems as well, and we should also examine the role of domestic courts in establishing relevant practice. At the same time, “the real life limits of politics do not change the radical theory of this legal framework”.<sup>631</sup> As confirmed in the *Eichmann* case, “so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.”<sup>632</sup>

<sup>629</sup> CASSESE op. cit. 452–453.

<sup>630</sup> Gary J. BASS: The Adolf Eichmann Case: Universal and National Jurisdiction. In: Stephen MACEDO (ed.): *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes*. Philadelphia, University of Pennsylvania Press, 2004. 78.

<sup>631</sup> WEDGEWOOD op. cit. 396.

<sup>632</sup> *Attorney-General of the Government of Israel v Eichmann*, 12 December 1961. Para 12.

## 4. POSSIBLE WAYS OF OVERCOMING THE HURDLES

### 4.1. On the level of international jurisprudence: effects of jurisprudence of international tribunals on domestic war crimes procedures

While discussing war crimes procedures in front of domestic courts, we must also examine whether statutes, rules of procedure and case law of international tribunals have an effect of clarifying international rules and whether they ultimately have an effect on procedures of domestic courts<sup>633</sup>.

International law contains far more obligations related to substantive criminal law than to procedural law. Taking international legal obligations for war crimes (grave breaches) as an example, discussed in Chapter 2.3. of the present study, or similar obligations for genocide or crimes against humanity, we may observe that the relevant international treaties formulate numerous obligations that affect states' criminal codes or that put obligations on the legislator to criminalize certain acts by the way of criminal law. Many of such obligations are *ius cogens*.

At the same time, if we examine procedural obligations at the international sphere, we may conclude that it is really only the human rights treaties that contain procedural constraints or conditions binding on states procedures, and humanitarian law obligations, if any, have basically copied the obligations stipulated in human rights treaties. Summing up, normally humanitarian law treaties tell states which acts to criminalize, but they don't tell how to try them, apart from repeating the human rights obligations.

When examining substantive criminal law, it is undeniable that case law of international tribunals has an important influence on both the evolution of

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<sup>633</sup> The interaction or cross-reference of international courts and tribunals to each others' judgments is an equally interesting topic, but steps over the limits of the present work. In this topic s. Kovács, Péter: Szemtől szembe... Avagy, hogyan kölcsönöznek egymástól a nemzetközi bíróságok, különös tekintettel az emberi jogi vonatkozású ügyekre. (Face to face... Or how do international courts borrow from each other, especially in the field of human rights) *Acta Humana*, 2002/49. 3–12.

international criminal law and on domestic procedures. In the case of violations committed in non-international armed conflicts it is obvious that case law of international tribunals played an important role in that the ICC Rome Statute accepted violations of non-international conflicts as war crimes, and thus, this case law also frequently formulates national case law. Referring to a rule as customary law by international courts and tribunals may also contribute to how national courts view that certain rule. The effect of their case law is also important in how domestic courts determine elements of grave breaches/war crimes or the qualification of conflicts<sup>634</sup>.

When it comes to procedural law, however, it is more difficult to make a link, as the procedural rules of international tribunals have been formed on a completely different foundation than those of state procedures. Procedural rules of states have, namely, been formulated as a result of an organic historical and legal development, while in the case of international tribunals, political considerations have often played an important role.

As an example, procedural rules of international tribunals are based on the contradictorial system mainly as a result of the huge influence of the United States during the formulation of statutes and rules of procedures of such tribunals, however, many inquisitorial elements have also been included. The result is a mixed system, which raises many difficulties in practice and cannot be said to be the result of an organic development.

Other important differences between procedural rules of international tribunals and national courts may be the consequence of the fact that international tribunals are subjects of international law. Therefore the effect the procedural rules of international tribunals can have on domestic procedures depends largely on whether the rule is independent from the international legal personality or the international feature of the tribunal/court. Where, as an example, the rule relies on the international feature of the tribunal, such rule cannot be embodied in a national system, or will have to be relying on international cooperation in criminal matters.<sup>635</sup>

At the same time, international and national procedural law have common elements, namely those deriving from human rights obligations as the minimum

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<sup>634</sup> For example, the ICTY's Tadić judgment has been quoted by numerous state courts as a guide to the qualification of conflicts and thus the determination of the applicable law.

<sup>635</sup> Such examples are the deferral of investigations (ICTY, ICTR), the effects of the principle of complementarity (ICC), the possibility to conduct on-site investigation, etc. S. Göran SLUITER: The Law of International Criminal Procedure and Domestic War Crimes Trials. *International Criminal Law Review*, 2006/6. 628.

common standard. Although the exact application of human rights in international procedures is debated, it is surely the human rights standards that provide the basis and framework of international criminal procedures.<sup>636</sup> What is certain is that apart from the human rights obligations (fair trial, equality of arms, etc.) there are no general obligatory international rules for war crimes procedures of domestic courts.

Despite the differences of international and national procedures there are important aspects where the influence of rules relevant to and jurisdiction of international tribunals can be observed. As examples we can mention the protection of witnesses in international procedures. Although such rules already existed in domestic procedures, international tribunals have given it such a specific dimension which can serve “as a point of departure, or international standard, which is capable of influencing domestic war crimes trials. At least, one could say that the rules also have relevance in relation to national prosecutions of war crimes.”<sup>637</sup>

We may also mention as an example the case where Dutch authorities carried out a procedure against Afghan nationals for war crimes.<sup>638</sup> In this case the accused argued for the equality of arms referring to the ICTY’s fair trial rules. The Dutch court in the *Van Anraat* case<sup>639</sup> took ICTY rules *proprio motu* as a basis, despite that the ICTY statute does not have any binding effect in this respect on the Netherlands.<sup>640</sup>

There is evidence that national courts consider the jurisprudence of international tribunals as a source in their proceedings in the Canadian practice as well. In *Mugesera v Canada*, the Canadian Supreme court stated that „[t]hrough the decisions of the ICTY and 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 legislation provisions [...] which expressly incorporate customary international law.”<sup>641</sup>

<sup>636</sup> Ibid. 610.

<sup>637</sup> Ibid. 627.

<sup>638</sup> Case of *Habibullah Jalalzoy*, LJN: AV1489, Rechtbank ‘s-Gravenhage, 09/751005-04, The Hague District Court.

<sup>639</sup> *Public Prosecutor v Van Anraat*, LJN: AX6406, Rechtbank ‘s-Gravenhage, 09/751003-04 (District Court of the Hague).

<sup>640</sup> S. SLUITER op. cit. 629.

<sup>641</sup> Supreme Court of Canada, *Mugesera v Canada* (Minister of Citizenship and Immigration), 28 June 2005, ILDC 180 (CA 2005). Para 126.

In the following lines the subject of examination will be the ways law, jurisprudence and proceedings of international tribunals specifically can effect domestic war crimes trials as regards substantive and criminal procedure law.

#### *4.1.1. Substantive criminal law aspects*

Definition of the contents of customary rules and reference to a certain rule as customary are typical fields where domestic courts rely on or refer to judgments and decisions of international tribunals. Especially if we look at the development of jurisprudence on crimes committed in non-international armed conflicts, an eventual obligation to prosecute these crimes, the elements of such crimes or universal jurisdiction applicable to such crimes, we may witness the important influence of international case law on national case law.

The same is true with the definition of crimes or elements of crimes. Since the treaties usually do not describe the elements of the crimes with the same precision as national law often does, state courts are left with elements of crimes formulated in annexes to statutes of international tribunals and with the case law of such tribunals. In fact, this is the only source national courts can reach to, to define elements of war crimes or grave breaches.

Certain criminal law principles may have different interpretations on the national and the international level. The question is whether these two interpretations have any effect on each other. The ICTY, for example, pointed out that although *nullum crimen sine lege* is a general principle of law, some factors, such as the specific nature of international law, the fact that there is not one authority as legislator in international law and the supposition that the norms of international law will be implemented leads to the fact that the legality principle is different in international law than in national law when it comes to their application and standards.<sup>642</sup>

The applicability of the *nullum crimen sine lege* principle to the interpretation of crimes is also an interesting issue and has partially been discussed in Chapter 3.2.1. The European Court of Human Rights in the *Jorgić* case found that a stricter interpretation of genocide by the ICTY and ICJ can not be relied on in front of domestic courts, because these judgments were delivered after the commission of the offence. If, however, an interpretation was consistent with

<sup>642</sup> *Prosecutor v Delalic et al.*, Judgment, Case No. IT-96-21-T, Trial Chamber II, 16 November 1998. Para 431.

the essence of the offence in question and was reasonably foreseeable, such an interpretation was legal.<sup>643</sup>

Questions of interpretation of war crimes seem to be another issue, however. As a comparison, whereas a wider interpretation of the crime of genocide by a national court may result in that the accused would face a harsher regime in certain states, the only limits to interpretation of war crimes are the rules of international humanitarian law: states are free to criminalize violations that are not war crimes, but are not free to criminalize acts that are not violations at all. This cannot be said about the crime of genocide, because the Genocide Convention, which makes it obligatory for states to criminalize genocide, is not a convention setting up a whole set of legal rules, such as the Geneva Conventions, rather defines one particular crime and obliges states to punish it in national law. Still, obviously states remain free to include a stricter variant of genocide, in this case this stricter variant can only be applied if it was adopted before the commission of the offence.

The effect of *nullum crimen sine lege* on concepts of criminal responsibility and defences is also contested.<sup>644</sup> In the end, it seems that “the *nullum crimen* principle outlaws any deviant practice under jurisdictions as well, at least as far as the general parts of criminal law are concerned.”<sup>645</sup> Boot explains the differences of the application of the *nullum crimen sine lege* to international tribunals and domestic courts by the following features:

- (i) international treaties were meant to be implemented by domestic legislation and were not meant to be directly implemented by international tribunals;
- (ii) therefore definitions are not as elaborated as they would be in national criminal codes or in the Rome Statute – which was, from the beginning, intended to be directly applied by the ICC -;
- (iii) therefore the Tribunals developed the elements of crimes and conditions of responsibility adapted to their own procedures and the features of an international tribunal<sup>646</sup>.

From the above we may conclude that there is no standardized understanding, universally and formally approved, of the basic criminal law principles which

<sup>643</sup> *Jorgić v Germany*, Application no. 74613/01, European Court of Human Rights, Judgment of 12 July 2007, paras 112 and 114.

<sup>644</sup> S. George P. FLETCHER: *Basic Concepts of Criminal Law*. Oxford/New York, Oxford University Press, 1998. 107.

<sup>645</sup> Van der Wilt (2008), p. 260.

<sup>646</sup> BOOT op. cit. 306–307.



could lead to a uniform application of international criminal law by domestic courts.

#### 4.1.2. *Criminal procedural law aspects*

As seen above, the only procedural frameworks relevant to international criminal law tribunals are provided by human rights treaties<sup>647</sup>. However, some derivations are necessary, even though not uncontested. A perfect example of an attempt at reduced applicability of human rights law by an international tribunal due to the particularity of international criminal trials is demonstrated by the following opinion: „[t]he fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”<sup>648</sup>

Although this decision received strong criticism and its finding was not followed by subsequent case law as such, it provides a good example when an international tribunal is struggling with human rights law in its procedure.<sup>649</sup>

When considering whether there are international standards, apart from human rights law, for international war crimes prosecutions, Sluiter notes that in determining whether such international standards exist, the following factors play an important role:

- a. the complexity and volume of war crimes prosecutions;
- b. security risks in countries concerned;
- c. consequences of investigations for national security;
- d. high level leaders as accused;

<sup>647</sup> S. KOVÁCS, Péter: Emberi jogok és humanitárius nemzetközi jog: versengés vagy kiegészítés? (Human rights and humanitarian international law: competing or complementing notions?) *Föld-rész, Nemzetközi és Európai Jogi Szemle*, 201/III/1–2. 63.

<sup>648</sup> ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadic*, Case No. IT-94-1-T, T. Ch. II, 10 August 1995.

<sup>649</sup> S. SLUITER op. cit. 620.

- e. the truth-finding and reconciliatory functions of international criminal tribunals;
- f. the great dependency on national jurisdictions and law enforcement officials.<sup>650</sup>

The next question is, to what extent are international criminal procedure rules to be applied by domestic courts in war crimes trials. In the *Van Anraat* case in the Netherlands<sup>651</sup>, the Dutch court considered *proprio motu* the ICTY law in relation to this question, although the ICTY jurisprudence having no binding effect on the Netherlands.<sup>652</sup> This makes sense, as domestic war crimes procedures are also in need of specific procedural rules for war crimes trials, and they gain inspiration from international cases, even if these are not binding on them.

One has to bear in mind that when applying international criminal procedure in domestic war crimes trials, the judges also have to consider conforming a foreign system to their own: as for example the ICTY procedural rules are mainly following common law procedures, it would be difficult to apply typically these rules in an inquisitorial procedure. However, some rules may have developed in international criminal procedure from practical considerations, irrespective of common law or continental law traditions, such as the rules related to protection of witnesses – in such cases it may be useful and less difficult to use international procedure as reference for the national judge in a war crimes case.

These thoughts cannot be better expressed than as Sluiter formulated: “[i]f one acknowledges possible shortcomings of the domestic law of criminal procedure in respect of war crimes investigations and prosecutions this may change views as to the incompatibility between the law of international criminal procedure and domestic law of criminal procedure. Especially, if one adopts the legitimate position that domestic law of criminal procedure has not been developed for and is to a certain degree ill-suited to deal with war crimes investigations and prosecutions there is from a national perspective a vacuum, where international criminal procedure can fulfill a useful gap-filling function, in spite of possible conflicting models of criminal procedure.”<sup>653</sup>

Furthermore, “International criminal procedure may in spite of all its flaws fulfill an important gap-filling function and serve as important point of reference

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<sup>650</sup> Ibid. 626.

<sup>651</sup> S. Chapter 3.1.2. for a description of the case.

<sup>652</sup> SLUITER op. cit. 629.

<sup>653</sup> Ibid. 634.

for participants in domestic war crimes trials with an open eye and mind for procedural solutions and approaches coined in other systems. In this light, the ‘legislator’ in the field of international criminal procedure should become aware of its relevance and impact beyond the scope of international criminal trials.<sup>7654</sup>

#### *4.1.3. Effects of the functioning of international tribunals on national justice systems*

Finally, we must mention the important effects the functioning of international tribunals, especially the ICTY, but also the ICTR, have had on the respective national justice systems. These effects had been a logical result of the completion strategy of both Tribunals, acknowledging that the need to define a timeframe for the closing of proceedings of both Tribunals go parallel with increasing the capacities of domestic authorities, including the need to adjust the quality of such proceedings to international standards, which also meant adjusting national legislation enabling such changes and procedures.

In the case of the ICTY, the *Rules of the Road* program, signed by the participants of the Dayton Peace Agreement in 1996, stipulated that national authorities could only arrest suspects – not indicted by the ICTY – with the authorization of the Prosecutor. This method was expected to prevent arbitrary arrests, arrests made without reasonable ground or steps motivated by political grounds.

The OTP has given green light in more than half of the cases: the ICTY has reviewed 1419 documents concerning 4985 suspects, and gave its authorization for indictment in case of 848 persons.<sup>655</sup> This review mechanism inevitably had an improving effect on domestic mechanisms.

One year later, in 1997, Rule 11*bis* was added to the Rules of Procedure and Evidence of the ICTY and ICTR. Rule 11*bis*, amended four times since 1997, basically makes it possible that the Tribunals refer cases to domestic jurisdictions. The reason for the adoption of Rule 11*bis* was similar to the Rule of the Road program: on one hand to ease the workload of the Tribunals by handing over cases of mid-to low level suspects, and, on the other hand, to progressively involve domestic authorities in the procedures<sup>656</sup>.

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<sup>654</sup> Ibid. 635.

<sup>655</sup> KIRS (2011) op. cit. 400.

<sup>656</sup> BEKOU op. cit. 726.

According to Rule 11*bis*, which is basically identical for both Tribunals, the Tribunal, after confirming the indictment, but before the start of actual proceedings, irrespective whether the accused is in its custody, may decide, through a special bench consisting of three judges (an ordinary bench in case of ICTR) whether to refer a case to the domestic courts. Such court may be the court of the territorial state, the custodial state or any state that has jurisdiction and is willing and able to proceed.

The question to which domestic court the case should be referred is to be decided by the bench;<sup>657</sup> usually the principle of 'significantly greater nexus' was applied.<sup>658</sup> Generally it can be stated that the benches referred the cases to the territorial state, therefore, in case of the ICTY, most of the 11*bis* procedures had been conducted in front of the War Crimes Chamber of the State Court of Bosnia-Herzegovina.

During the assessment of referral, the bench had to consider the gravity of the crime and the level of responsibility of the accused. It also had to assess whether the accused would receive a fair trial and would not be subject to death penalty. The bench could refer a case based on its own initiative or on the request of the Prosecutor based on Rule 11*bis*.

The accused and the Prosecutor of the ICTY may appeal the decision. The concerned state was to be heard during the decision-making process, in order that the bench may satisfy itself of the guarantees for a fair trial and of the non-imposition of the death penalty.

The ICTY maintained the right to monitor the domestic procedure. This had been exercised through OSCE missions, based on an agreement between the ICTY and OSCE in 2005. A further important rule implied that before the final judgment of the domestic court, the ICTY had the right to request that the case is deferred to it; in such a case the domestic court was obliged to defer the case the same way as it was when the ICTY wanted to proceed initially.

Based on the rules of 11*bis* and the practice of the Tribunal, some authors considered that the primacy of the Tribunal had changed to a modified form of complementarity. This means that the ICTY would refer cases to the Bosnian (or other) state authorities until they demonstrated an inability to proceed such as the non-observance of fair trial guarantees<sup>659</sup>.

<sup>657</sup> Ibid. 754.

<sup>658</sup> *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 bis Referral, 15 November 2005). Para 37.

<sup>659</sup> S. William W. BURKE-WHITE: *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court*

The legitimacy of Rule 11*bis* has been questioned in the *Stanković* case<sup>660</sup>. The accused questioned the decision of the bench, arguing that Rule 11*bis* was not in the Statute of the Tribunal, therefore the bench had no authorization to refer cases to domestic courts. According to the accused, neither the completion strategy formulated in the Security Council Resolution provided any ground for such a procedure, nor did the Statute give any legal ground for the adoption of Rule 11*bis*. The bench did not accept the arguments of the accused, referring to the concurrent jurisdiction of the Tribunal. The judges found that the rationale of concurrent jurisdiction was precisely to give way to alternative, notably national jurisdictions.

According to various authors, the above referred argument of the Court did not stand its place, since the meaning of concurrent jurisdiction under Article 9(1) of the Statute is that the Tribunal may proceed instead of national courts, but does not wish to entirely take their place. At the same time, Rule 11*bis* does not deny concurrent jurisdiction either, since it does not rule on referring every single case to national courts, it merely provides a possibility of sharing between international and national jurisdiction.<sup>661</sup> Usually Security Council Resolution 1503 is mentioned as a legal ground for procedures under Rule 11*bis*, which expressly accepts the completion strategy of the ICTY, an important part of which, although not expressly mentioned, is Rule 11*bis*.

The ICTY has eventually referred 13 persons to national courts under Rule 11*bis*, out of which 10 persons were referred to Bosnia-Herzegovina, one to Serbia and one to Croatia<sup>662</sup>.

National courts had more and more case pressure because of the developments described above and, due to the 11*bis* procedures, they were dealing with many cases in which the ICTY carried out investigations but did not issue an indictment. Therefore, the ICTY gave importance to referring documents and evidence to the respective national courts. In order to ensure adequate, impartial and fair procedures, the ICTY provided, with the consent of the given state, judges and other experts experienced in international law and relevant procedures for the

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of Bosnia & Herzegovina. *Columbia Journal of Transnational Law*, 2008/46/279. 328–335. S. also EL ZEIDY (2008) op. cit. 405–406.

<sup>660</sup> *Prosecutor v. Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11 *bis* Referral, 1 September 2005.

<sup>661</sup> BEKOU op. cit. 733.

<sup>662</sup> ICTY website, [http://www.icty.org/x/file/Cases/keyfigures/key\\_figures\\_120820\\_en.pdf](http://www.icty.org/x/file/Cases/keyfigures/key_figures_120820_en.pdf) (last visited 12 September 2012).

national courts. This meant that although the processes were national in character, they also bore considerable international participation.

Obviously, since most of the *11bis* procedures were carried out in Bosnia-Herzegovina, the most substantial changes had been done in this country. A new court was established in 2003, which was tasked to try cases taken from the ICTY. Cases tried by this special court were also those where the ICTY initiated investigations but did not issue an indictment, new cases initiated by the court itself, and cases left from the Rules of the Road program. Beside this new court, a special department had been established in the office of the Prosecutor General to deal with war crimes cases. Evenmore, a new penal code and a new penal procedure code had been adopted in 2003. These developments enabled the authorities of Bosnia-Herzegovina to deal with war crimes cases that came under its jurisdiction either from the ICTY or otherwise.<sup>663</sup>

Even with the developments described, many *11bis* procedures were subject to serious criticism. Such examples are the *Ademi and Norac* case, where the Croatian prosecution could not adequately extend the forms of command responsibility to the accused which resulted in the acquittal of one of the accused and the very lenient punishment of the other<sup>664</sup>. Another case was the *Kovačević* case in Serbia, where the ICTY referred the case to Serbia eventhough it was clear that the accused cannot appear before the court and consequently the case did not even start.<sup>665</sup>

Still, the mixed system of national and international judges had many beneficial effects: on one hand it eased the case-load of the ICTY, on the other hand it enriched national authorities with considerable knowledge and experience in trying war crimes cases. As time went by, international presence in the procedures decreased and national experts and judges became dominant.

According to the completion strategy of the ICTY, the emphasis was more and more on national procedures. Although the ICTY is determined to finish the trials of Radovan Karadžić, Ratko Mladić and Goran Hadžić, irrespective of the time frames defined in the completion strategy, the ICTY is not initiating any new cases and is otherwise determined to stick to its original and frequently modified deadlines.

Therefore, although there are still procedures ongoing in front of the Tribunals, the *Rules of the Road* program and Rule *11bis*, or more generally, its primacy

<sup>663</sup> KIRS (2011) op. cit. 401–403.

<sup>664</sup> BEKOU op. cit. 724–725.

<sup>665</sup> Ibid. 725.

cannot be invoked anymore. New cases are thus entirely left to national authorities. Due to all the investment the ICTY put in national expertise, the national authorities should be primarily able to carry out adequate procedures.

The War Crimes Chamber, however, has its difficulties in dealing with the taskload. Amnesty International's annual report found that the biggest impediment to effective and timely procedures were the slow functioning of the court<sup>666</sup>, the inadequacy of witness support and protection measures and lack of access to reparation for victims.<sup>667</sup>

Despite the fact that a National Strategy for War Crimes Processing was adopted in 2008, recognizing the need to address issues of shortage of capacities, allocation and prioritization of cases and cooperation among state authorities, according to the OSCE's report on developments between 2005 and 2010, the speed and efficiency of procedures has unfortunately not increased.<sup>668</sup>

11bis procedures had a quite different character and different hurdles in case of the ICTR. Its Rules of Procedure and Evidence contains a nearly fully identical Rule. However, since the readiness of the Rwandese justice system was severely questioned, many 11bis requests had been turned down, especially due to references of lack of fair trial guarantees.

In order to remedy the situation, Rwanda adopted laws to respond to the concerns of the ICTR. As a first step, the Rwandese legislature adopted in 2007 a law related to cases taken from the ICTR, which regulated the procedures in such cases and detailed fair trial guarantees for such cases. The law ensures the ICTR's right to monitor the procedures.<sup>669</sup>

Since in most cases the obstacle or referral was the eventual possibility of the death penalty, another legislation adopted in 2007<sup>670</sup> eliminated the death penalty for cases referred by the ICTR. Due to the Tribunal's further concerns related to whether life sentence in isolation could be carried out with relation to

<sup>666</sup> According to the report of Amnesty International, there was still a backlog of 10 000 untried war crimes suspects.

<sup>667</sup> Amnesty International, Annual Report 2011. <http://www.amnesty.org/en/region/bosnia-herzegovina/report-2011> [last visited on: 27 March 2013].

<sup>668</sup> OSCE: Delivering Justice in Bosnia and Herzegovina. An Overview of War Crimes Processing from 2005 to 2010. OSCE, May 2011. [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2011051909500706eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf) [last visited on 27 March 2013].

<sup>669</sup> Law No. 11/2007 of March 16, 2007, Official Gazette of the Republic of Rwanda, March 19, 2007 (Transfer Law).

<sup>670</sup> Law No. 31/2007 of July 25, 2007, Official Gazette of the Republic of Rwanda, July 25, 2007, available at [http://www.amategeko.net/display\\_rubrique.php?Information\\_ID=2088](http://www.amategeko.net/display_rubrique.php?Information_ID=2088) [last visited on 16 October 2012].

referred cases<sup>671</sup>, Rwanda adopted a further legislation to eliminate this form of punishment<sup>672</sup>.

Although the legislation seemingly solved the problem for cases taken over from the ICTR, it did not apply to other genocide cases<sup>673</sup>, therefore fair trial guarantees for such cases were still missing. These 'ordinary' procedures, where several high profile cases had been tried, therefore received serious criticism. They demonstrated serious problems related to rights of defence, protection of witnesses or execution of the sentences. In light of the above, until today, there is serious debate over whether the ICTR should refer cases to local authorities, considering on one side the lack of fair trial guarantees and, on the other side, the need that states with closest nexus to the crimes are proceeding, as well as the need to comply with the completion strategy of the ICTR.

Many authors mentioned that procedural guarantees adopted in the Western world are expected in countries with different legal culture, and the ICTR does not take Rwandese legal traditions and legal environment into consideration<sup>674</sup>. The fact that more than fifty cases were referred to Rwanda in which no indictment had been made, while only four cases were referred where the ICTR had already issued an indictment (two to France and two to Rwanda) may be a result of the consideration mentioned above<sup>675</sup>.

It can be stated that assessments carried out with respect to ICTR cases to be referred to Rwanda were different from ICTR cases to be referred to European jurisdictions of ICTY cases. In the latter cases notably the ICTR/ICTY merely carried out an analysis only of the relevant legislation, while in the former cases

<sup>671</sup> S. for instance *Prosecutor v. Hategemimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, (4 December 2008). Paras 31–38.

<sup>672</sup> Law No. 31/2007 of July 25, 2007, Official Gazette of the Republic of Rwanda, July 25, 2007, art. 3, modified and complemented by Law No. 66/2008 of 21/11/2008, Official Gazette of the Republic of Rwanda, Dec. 1, 2008, available at [http://www.amategeko.net/display\\_rubrique.php?Information\\_ID=2088&Parent\\_ID=30698444&type=public&Langue\\_ID=An#a30698445](http://www.amategeko.net/display_rubrique.php?Information_ID=2088&Parent_ID=30698444&type=public&Langue_ID=An#a30698445) [last visited on 16 October 2012].

<sup>673</sup> The 2004 Gacaca Law categorized genocide crimes into three categories. S. Law No. 16/2004 of June 19, 2004, Official Gazette of the Republic of Rwanda, June 19, 2004, art. 51, modified and complemented by Law No. 13/2008 of 19/05/2008. All cases except those involving people who planned and organized the genocide or those who held significant leadership positions and participated in or encouraged others to participate in the genocide (the first two subsections of the first category) are heard in the *gacaca* courts. Those aforementioned exceptions are heard by ordinary or military courts. S. MELMAN op. cit. Footnote 154.

<sup>674</sup> S. references in MELMAN op. cit. 1321.

<sup>675</sup> <http://www.unict.org/Cases/tabid/77/Default.aspx?id=7&mnid=7> [last visited on 26 September 2012]



the ICTR also examined the practical application of the legislation. The reason probably was on one side the serious concerns related to procedures carried out in Rwanda, on the other side the fact that the ICTY put serious efforts in rebuilding national systems in Bosnia-Herzegovina in the first place, therefore the trust in fair procedures was considerably higher in cases of the post-Yugoslav states and Western states<sup>676</sup>.

The examples demonstrated above testify to the uncontested effects of the Tribunals on domestic justice systems and legislation. Although these effects are restricted to the states concerned, those experiences may be, at least to a certain extent, transferred to other states as well. The difficulties of Rwanda in adjusting to fair trial guarantees expected by the ICTR and the 'legal imperialism' argument may provide some food for thoughts for other African states when dealing with universal jurisdiction cases and their relation with European states who are proceeding against accused of African origin based on universal jurisdiction.

## **4.2. On the level of internal legislation**

The following pages will see ways domestic legislation dealt with the difficulties of international crimes. First, a general analysis of the specificities of implementation of the Rome Statute is made, followed by an examination of common features of universal jurisdiction-related domestic legislation in Central Europe. These two general discussions are followed by a detailed introduction of criminalization techniques in four selected Central European states.

### *4.2.1. The importance of effective implementation techniques*

Effective implementation may prevent possible conflicts with the legality principle or other guarantees during the application of international law by the courts. Actually a thorough implementation would be the key to effective application: conflicts between international law and national law, the difference in legal cultures, the difficulties arising from the unique features of international rules should not be left to be addressed by the judges alone.

Therefore the state of implementing legislation already predicts the successful or non-successful application of international law by the courts and partly determines whether the state will be able to comply with its international

<sup>676</sup> MELMAN op. cit. 1298.

obligations. In the following chapter a selection of domestic solutions follows, concentrating on Central European states, which have numerous common characteristics: similar legal cultures, all of them revised their criminal legislation after the changes in the 1990s, have only had very few war crimes trials – most of these in connection with the Soviet regime but non linked to “modern” conflicts – and are therefore relatively inexperienced in war crimes trials.

These examples may demonstrate the inbuilt dangers in national implementation that may have serious effects during their application. After the analysis of the legislation of certain countries, an examination of common features follows, with indications as to their effects on war crimes trials. In addition, the Annex to the book contains a comparative table indicating the most important aspects of Central European states’ attitudes towards serious international crimes and the application of universal jurisdiction.

#### *4.2.2. Specific aspects of implementation of the Rome Statute of the International Criminal Court*

Ratification of the Rome Statute of the ICC urged states to overview their national legislation implementing IHL treaties and usually resulted in conceptual changes in domestic legislation *vis-à-vis* grave breaches and war crimes. This task forced states to consider the specific hurdles discussed in Chapter 3.2. However, certain specificities of the implementation of the Rome Statute need to be addressed in order to get a full picture of the frameworks of national legislation.

To start with, it must be noted that in certain continental legal systems, the idea of adopting a specific code for international crimes came only with the Rome Statute. Anglo-Saxon systems had in many cases adopted specific codes implementing all kinds of obligations arising from the Geneva Conventions and Additional Protocols<sup>677</sup>, mainly concentrating on listing the grave breaches and other violations. This special approach can be probably attributed to the complex nature of the war crimes listed in the Rome Statute, a few of which will be mentioned here.

First, the list of war crimes in the Rome Statute is rather long and is divided into sections according to the situation in which the crimes were perpetrated: in international or non-international armed conflicts. This may be difficult to translate in an ordinary criminal code. In many cases, states chose to include

<sup>677</sup> S. for instance: Canada, Geneva Conventions Act (R.S.C., 1985, c. G-3); United Kingdom, Geneva Conventions Act 1957; Ireland, Geneva Conventions Act, 1962; United States, War Crimes Act of 1996.

both kinds of conflicts into the term “war” or “armed conflict”, providing a simple solution to the problem. In this case, the list of crimes can be substantially shortened, due to the fact that there are many overlappings between the crimes committed in international and in non-international armed conflicts.

Second, although there seems to be an overlap between certain crimes, simply merging them could be counterproductive resulting in that specific acts would fall out from the coverage of such a merge<sup>678</sup>.

Third, although the Rome Statute is much more elaborate than the Geneva Conventions and Additional Protocol I on certain general part elements, such as modes of liability, forms of perpetration or the mental elements, as already mentioned above, these do not fully comply with the logic of criminal law elements applied in continental legal systems. For the states to translate the Rome Statute rules into their criminal law language is not only demanding, but also bears a certain danger during their application.

Evenmore, States that choose to include the Rome Statute crimes into their ordinary criminal code also face the problem of having different kinds of general part elements for ordinary crimes and for international crimes; or, eventually, not establishing specific elements for the Rome Statute crimes but applying their ordinary elements, in which case full compliance with the Rome Statute could be questionable.

Either ways, generally, states either chose to adopt a separate code (this is more rare), or to include the crimes in their ordinary criminal code. Both solutions can provide adequate answers to the need to implement the Rome Statute crimes. As for Hungary, Gellér argues that there are three theoretic possibilities of incorporating its crimes, finding the third possibility the best solution:

- 1) the national legislator does not do anything arguing that international criminal law is part of national law;
- 2) no further legislative action is necessary if the Geneva Conventions and Additional Protocols are part of national law;

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<sup>678</sup> For instance, the Ministerial explanations attached to the draft of the Hungarian Criminal Code – which are expected to reflect the Rome Statute – expressly say that the intention is to simplify and merge the crimes of the Rome Statute. This intention resulted at certain occasions in formulations that eventually left out important crimes, such as prohibition of attack on peacekeeping personnel. The draft law, including the explanations are available at: <http://www.kormany.hu/download/5/53/50000/egyes%20b%C3%BCntet%C5%91%20t%C3%A1rgy%C3%BA%20t%C3%B6rv%C3%A9nyek%20honlapra.pdf> [last visited on 26 March 2012].

- 3) there is need for further legislative action either in the form of amending the criminal code or through adopting a code on international crimes<sup>679</sup>.

If we compare the measures adopted by Central European countries, all states of this region chose to implement the crimes in their ordinary criminal code. This can probably be led to a general lack of comfort with having crimes established anywhere else than in *the* criminal code. The comparison shows that most states understand both international and non-international armed conflicts under “conflict”, and most states merged most or some of the Rome Statute crimes to arrive to a smaller number of crimes. Most states believe that they have fully complied with the Rome Statute, and no state in the region<sup>680</sup> has ever had a case to test it<sup>681</sup>. Therefore it would be too early to judge whether states in the region really successfully implemented the Rome Statute.

#### *4.2.3. Common characteristics of national legislation on universal jurisdiction in Central Europe*

All criminal codes in Central Europe establish universal jurisdiction for international crimes<sup>682</sup>. Although this provides for a legal possibility of procedures, the number of universal jurisdiction cases in this region is zero.

There are usually two techniques of implementing universal jurisdiction: (i) the criminal code refers to the part where war crimes are covered or lists the war crimes and other crimes to which it attaches universal jurisdiction,<sup>683</sup> or (ii) it simply says that universal jurisdiction shall be exercised in cases international law so demands<sup>684</sup>.

<sup>679</sup> S. GELLÉR (2009) op. cit. 81. Concerning point 2, it could be debatable whether the incorporation of Geneva Conventions and Additional Protocols is enough to cover the crimes of the Rome Statute. Although a large part of the crimes are identical, there are many „new” crimes in the Rome Statute. Concerning points 1 and 2, the question would obviously arise what sanctions the judge would have to apply. This was discussed in Chapter 3.2.2.

<sup>680</sup> The case against Polish soldiers for acts committed in Afghanistan is unique in the region, however, it was not based on legislation mirroring the Rome Statute, because Poland only amended its criminal code in 2009, implementing the Rome Statute. The procedures related to the events in Afghanistan started in 2007.

<sup>681</sup> This is not true for war crimes in general, since many of the Central European states had cases concerning war crimes (or crimes against humanity) committed during the Second World War or events happened during the Communist regime. These procedures, however, had been based on earlier legislation that did not reflect the Rome Statute.

<sup>682</sup> A comparative table of Central European states’ legislation on universal jurisdiction and other implementation measures is attached in the Annex.

<sup>683</sup> For instance Czech Republic.

<sup>684</sup> For instance Poland.

The crimes themselves are to be punished in both cases based on domestic law, but with two solutions: (i) the crimes are fully integrated in the criminal code without any mention of international law, or (ii) war crimes are specifically listed, but they refer to international law (e.g. attack against persons protected by international law, or use of a weapon prohibited by international law), and (iii) the criminal code defines “war” or “armed conflict” referring to international law – or, in less fortunate cases, the legislator forgot to define armed conflict.

In such cases the court would have to examine whether the act in question (i) can be attached to the relevant crimes: this is done based on national law, (ii) is an act that is to be punished based on international law: the court would have to examine international law and see whether such an obligation exists. In both cases the procedure is based on national law.

In case (i), however, if the criminal code does not contain all crimes for the punishment of which an international obligation exists, then there is a lacuna in domestic legislation and so the state may be in violation of international law by not making enforcement of international law possible. In this case does the court have the possibility to make this wrong do, can it directly apply international law? If so, what sanction would the court apply?

What happens if the law calls the crimes by wrong names, for instance name a war crime as crime against humanity? For instance, the attack to be widespread or systematic is an element of crimes against humanity, but not an element of war crimes. What should, in this case, be the basis for the judge to qualify the act: the erroneous national law, or international law that is contradicting national law? In case the court chooses to proceed based on international law, could the defence argue for violation of the principle of legality – saying that the perpetrator could not have foreseen the exact elements of the crime? These questions will be discussed in Chapter 3.2.

All these small issues illustrate the real question: what is more effective: to implement everything in national law or to directly apply international law? Although the answer largely depends on the state’s legal system and culture, it will be demonstrated further down that no “clear” solution exists and usually neither of the ways can be pursued alone. Namely, if a state implements all international obligations, the prosecutors and judges will still be bound to apply international law to a certain extent, whereas if the state is not implementing, prosecutors and judges would, with most probability, not be able to proceed.

#### 4.2.4. Criminalization techniques in Central Europe

Implementation of war crimes into national law has often been discussed in legal literature, including the question whether war crimes are different from ordinary crimes, i.e. whether for instance an unlawful attack against protected persons can be effectively punished on the basis of murder and whether this crime committed in armed conflict is graver than murder. The Canadian Supreme Court in the *Finta* case<sup>685</sup> was of the majority opinion that war crimes and crimes against humanity are not only different from ordinary crimes in their elements, but are also much graver crimes<sup>686</sup>. The case involved a Hungarian captain who was involved in persecution and deportation of Jews in Szeged, Hungary during the Second World War.

Judge Cory's majority opinion interpreted war crimes and crimes against humanity as crimes created by international law which, in their essence, are not linked to ordinary crimes defined in national criminal codes. These crimes have been adopted by the community of nations due to their horroristic and cruel features.

In some cases the judiciary also has a possibility to choose between proceeding based on international law or national law: either if the legislator decided to implement the crimes but did not do it satisfactorily, or if the legislator forgot or omitted to implement the crimes in the national penal code. In both cases the prosecutor and judge still have a possibility to either directly apply the international crime, or to base the charges and the decision on ordinary crimes.

As Ferdinandusse states, "It is generally the imperfect state of national legislation on core crimes that prompts the question whether general direct application can provide an alternative basis for a prosecution that can not otherwise take place."<sup>687</sup> Therefore, it is the legislator's responsibility to make sure that the national legal framework is satisfactory, because if it is not, the judge would have to base himself either on the international treaty or on ordinary crimes, and problems may arise with both solutions.

Most of the Central European states have chosen to criminalize these acts separately. The most common solution was to include a separate chapter in the

<sup>685</sup> Supreme Court of Canada, *R. v. Finta*, [1994] 1 S.C.R. 701.

<sup>686</sup> S. also: Anne-Marie SLAUGHTER: Defining the Limits: Universal Jurisdiction and National Courts. In: Stephen MACEDO (ed.): *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia, Penn, University of Pennsylvania Press, 2006. 175.

<sup>687</sup> FERDINANDUSSE (2006) op. cit. 96.

criminal code for war crimes and other international crimes. However, it often created problems that definition of “war” or “armed conflict” was either forgotten by the legislator or was done in a rather clumsy way. Such a hiatus could cause serious difficulties during the qualification of an act or while deciding whether a certain crime can be applied to the act.

Here it has to be noted again that although the Geneva Conventions bind states to criminalize grave breaches committed in international armed conflicts, the state may decide, and customary law also seems to develop this way, that crimes committed in non-international armed conflicts are criminalized the same way. A vast majority of national laws followed this tendency; it has also been strengthened by Article 8 of the Rome Statute, which punishes war crimes committed in both kinds of conflicts<sup>688</sup>.

Although many states intend to incorporate grave breaches/war crimes defined in the Geneva Conventions and Additional Protocols in their national legislation, they mostly tend to forget about similar obligations contained in other humanitarian law treaties. Such treaties are the Hague Convention for the Protection of Cultural Property<sup>689</sup> and its Second Protocol<sup>690</sup>, the Amended Protocol II to the Convention on Certain Conventional Weapons<sup>691</sup> and the Ottawa Convention on Anti-Personnel Mines<sup>692</sup>.

After a general analysis of the different approaches to criminalization of war crimes in the region, the following pages will provide specific examples of techniques chosen by four Central European states that together could provide an overall picture of different solutions.

### *Hungary*

Hungary adopted a new Criminal Code which enters into force on 1 July 2013<sup>693</sup>. The Code contains provisions relevant to the punishment of war crimes in both its General Part and Special Part. The closing provisions include the definition

<sup>688</sup> S. LATTMANN, Tamás: Nemzetközi és nem nemzetközi fegyveres konfliktusok (International and non-international armed conflicts). *Föld-rész, Nemzetközi és Európai Jogi Szemle*, 2010/III/1–2. 22.

<sup>689</sup> Article 28.

<sup>690</sup> Articles 15 and 22.

<sup>691</sup> Article 14.

<sup>692</sup> Article 9.

<sup>693</sup> A draft international crimes code was prepared by Norbert Kis and Balázs Gellér for the Hungarian government, with the view to adopt all international crimes and conditions of their punishment within that code in a solution close to the German *Völkerstrafgesetzbuch*. However,

of armed conflict. The term “armed conflict” includes conflicts described in Articles 2 and 3 of the Geneva Conventions, Article 1 (4) of Additional Protocol I and Article 1 of Additional Protocol II. “Armed conflict” also covers state of emergency with extraordinary measures, state of emergency, and, in case of war crimes and crimes committed by members of the armed forces, operations (according to the terminology of the Code: “use of Defence Forces”) carried out by the Hungarian Defence Forces abroad.

The inclusion of non-international armed conflicts – including situations defined by common Article 3 of the Geneva Conventions – into the definition of armed conflicts is plausible. This is one of the important developments of the new Code compared to the previous regulations, which only referred to Additional Protocol II. With this new, extended rule, Hungary stepped in line with most states in Europe that consider crimes committed in both kinds of conflicts the same way. At the same time it may be worth to mention that the extension of the definition of armed conflict to operations of the Hungarian Defence Forces abroad may be at times controversial. Foreign missions may also include peace-keeping missions or missions that accomplish merely training tasks; application of the law of armed conflict to such situations is questionable.

Provisions in the General Part include the provision confirming the *nullum crimen sine lege* principle, making an exception to crimes that are to be punished based on generally accepted rules of international law, ie. customary law<sup>694</sup>. This provision makes it possible that procedures based on customary law are not in violation of the *nullum crimen* principle as stipulated in the Code, since they were punishable at the time by customary law.

At the same time, the subsequent paragraph of the Code confirms the *nulla poena sine lege* principle, without any special rule for crimes to be punished under international law. The question then would raise, what sanction could the judge apply in case of a crime to be punished under international law, but not punishable under Hungarian law. The answer is to be found in the next paragraph, which states that “the new criminal code shall be applied with a retroactive effect in case of crimes to be punished based on generally accepted rules of international law, in case the act was not punishable by the Criminal Code at the

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the government did not adopt the draft code and chose to leave these crimes in the Criminal Code. S. KIS – GELLÉR op. cit. and GELLÉR (2009) op. cit.

<sup>694</sup> Law nr. 100 of 2012, Article 1. § (1):,Criminal responsibility of the perpetrator may only be confirmed for acts – excluding acts that are punishable based on generally accepted rules of international law – that were punishable by law at the time of commission of the act.”.



time of commission of the act.<sup>695</sup> This means that in case of an act perpetrated before entry into force of the Code, the judge will apply the Code retroactively, including the sanctions. However, if the judge is confronted with a case involving a crime under international law that is not stipulated in the Code, he/she would have to rely on the text of the international treaty or on customary law.

Regarding jurisdiction, the Code states that it shall be applied for an act committed by a non-Hungarian citizen abroad “in case of crimes formulated in Chapters XIII or XIV, or any other crime whose prosecution is prescribed by an international treaty promulgated in law.” Chapter XIII of the Code includes crimes against humanity – a form of which is genocide, while Chapter XIV includes war crimes. In such cases the criminal procedure shall be initiated by the Prosecutor General.<sup>696</sup> Although this provision seeks to provide for universal jurisdiction in case of international crimes, it may not be complete. First, not all international crimes are covered in Chapters XIII and XIV (see comments below). Second, this does not seem to cover universal jurisdiction based on customary law. While the Constitution says that “Hungary accepts generally recognized rules of international law”, the Code specifically says “international *treaty* promulgated in law”, and customary law is clearly not an international treaty. Although we may argue that in case of contradiction, international law prevails, this could cause problems in individual cases.

Regarding statute of limitations, the Code makes an exception from the general rule in several cases out of which two exceptions are relevant for the prosecution of war crimes: (i) in case of exceptions stipulated by the law closing out statute of limitations for certain crimes, (ii) crimes defined in Chapters XIII and XIV.<sup>697</sup> Evidently the objective was to close out statute of limitations for war crimes and other international crimes. In case international law provides for the non-application of statute of limitations for a crime that is not included in the Criminal Code, the first exception should be applicable, because the international treaty must have been promulgated in law. The theoretical question again stands if non-applicability of statute of limitations would be based on customary law, this international provision could not be applied based on the Criminal Code. At the same time, the formulation of the relevant sentence: “exceptions stipulated by *the* law closing out statute of limitations...”, instead of by *a* law, may refer to one specific law, probably *Lex Biszku*, which, as previously discussed, basically

<sup>695</sup> Ibid. Article 2. § (3).

<sup>696</sup> Ibid. Article 3. § (2) a) ac) and 3. § (3).

<sup>697</sup> Ibid. Article 26. § (1) and (3).

repeated the provisions of the 1968 Convention on the non-application of statute of limitations.

The Criminal Code does contain the non-applicability of defence of superior order: Article 130. § (1) stipulates that “The soldier is not punishable for an act executed based on an order, except if he knew that he committed a crime through executing that order.” Although the law does not expressly say that in case of international crimes the soldier may not claim that he did not know he was committing a crime, this interpretation is widely accepted.

Regarding specific crimes, the new Code includes important developments in order to cover all grave breaches and war crimes, however, the list is still not comprehensive. Article 149 deals with attacks on protected persons, but left out the following crimes: prohibition of starvation of the civilian population, prohibition of inhumane and degrading treatment and punishment, and prohibition of deporting own citizens to occupied territories and unlawful deportation or displacement of the population of occupied territories.

Article 153 provides for the prohibition of attacks against protected objects. The provision confuses protection of non-defended localities with protection of objects and is also not clear on proportionality. The provision suggests that only those attacks are prohibited that are directed against objects that are not military objectives *and* are non-defended, and it only prohibits attacks that are not in conformity with the proportionality principle in case of non-defended localities. It is important to note that as in case of installations or buildings designed for the treatment of sick and wounded, belonging to the armed forces, they can be defended, and the proportionality principle does not only apply for non-defended localities. It seems that the legislator confused the notion of protected objects (or non-military targets) with non-defended localities.<sup>698</sup>

At the same time, the provision correctly included protection of cultural property, including property under special and enhanced protection. It also stipulates prohibition of use of cultural property for hostile purposes and looting and destruction of cultural property. It also provides for the protection of the natural environment.

<sup>698</sup> The controversies mentioned in the present pages have all been raised in a joint document submitted to the government for consideration prepared by the International Law Department of the Pázmány Catholic University, of which the present author drafted many of the recommendations related to the section on war crimes. The document also included several recommendations which were eventually adopted in the final text, such as inclusion of common Article 3 in the definition of armed conflict.

Article 157 prohibits abuse of emblems protected by international law. The provision states that abuse of the red cross, red crescent, red crystal or other emblems serving a similar purpose and protected by international law are punishable, in case a more serious crime had not been committed. This text was adopted based on the recommendation formulated by the present author, but the Code left out the further recommendation to prohibit the abuse of the white flag, and emblems or uniforms of hostile forces or the UN; and a more severe punishment in case abuse results in death or serious injury.

The other plausible and important improvement of the new Code is the manifestation of command responsibility. Article 159 basically adopted the text of the Rome Statute regarding responsibility of the military commander. Regarding responsibility of a civilian leader, the Code uses the term “official person or foreign official person in a leadership position”, providing an even more comprehensive definition.

In addition to the new Criminal Code, recognizing the difficulties in dealing with past international crimes cases on the level of application as a lesson learnt from the *Biszku* case<sup>699</sup>, the Hungarian Parliament adopted a law in 2011<sup>700</sup>, copy-pasting the Nuremberg Statute to affirm the definition of the crimes included therein and stating that crimes listed in the UN Convention on the Non-Application of Statute of Limitations, and in Articles 2 and 3 of the Geneva Conventions are not subject to statute of limitations – basically repeating the rules of international law (which is questionable in the case of Article 3 of the Geneva Conventions). The acknowledged direct aim of the legislation was to make punishment of Béla Biszku possible<sup>701</sup> and the less direct, or long-term, aim was to make the rules of the Nuremberg Charter and the UN Convention applicable by prosecutors and judges.

However, according to the present author, this piece of legislation, although plausible in its aims, may prove to be counter-effective and demonstrates the main dilemma of the present monograph: whether direct application of international law or implementation of international norms into national legislation is the more effective way. The rules of international law – both the Nuremberg Charter and

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<sup>699</sup> S. Chapter 3.1.2.

<sup>700</sup> Law nr CCX of 2011.

<sup>701</sup> [http://nol.hu/belfold/20111107-eddig\\_is\\_indithattak\\_volna\\_eljarast](http://nol.hu/belfold/20111107-eddig_is_indithattak_volna_eljarast) [last visited on 25 May 2012]

the UN Convention are parts of Hungarian legislation due to their promulgation – are applicable without further implementing legislation in Hungary<sup>702</sup>.

However, for all the reasons outlined in the previous chapters, the Hungarian legislator may find it more effective and easier to apply international law if implementing legislation is in place. *Lex Biszku*, however, only touches on a very small part of the various rules of international law with respect to the punishment of international crimes, furthermore, it gives the impression that statutes of limitation is non-applicable for certain crimes because it has been said so in *Lex Biszku*, and not because it has been so stated in an international treaty which is in force in Hungary.

Indeed, various other criminal complaints were initiated since *Lex Biszku* entered into force, for instance against Yugoslav partisans involved in the massacre of Hungarian and German civilians in 1944-1945, because, according to the complainant, now, according to Hungarian law in force, genocide is not subject to statutes of limitations<sup>703</sup>. Hence, the fear that *Lex Biszku* created an incorrect precedent, notably that it is because of Hungarian implementing legislation that the rules of international law are to be applied – thereby giving the implementing law a constitutive meaning instead of it clearly being declarative<sup>704</sup> – seems to be unfortunately well-founded.

Consequently, the Hungarian prosecutor or judge may now justifiably expect, pointing to *Lex Biszku*, that all international norms are included in implementing legislation, otherwise they will not apply international norms. As outlined above, although there are important merits of adopting implementing legislation, this is not a legal requirement for the application of international treaties in front of domestic courts but should rather be seen as a tool to ease application<sup>705</sup>. In addition, usually implementing legislation is expected to be adopted once an international treaty comes into force in the given state and not in an ad hoc manner, intended to solve one specific case.

Summarizing the observations above, it must be stated that Hungarian legislation is now considerably more in line with international treaties in terms

<sup>702</sup> S. corresponding opinion of GELLÉR, Balázs József in:

[http://mno.hu/migr\\_1834/uj\\_feljelentes\\_keszulhet\\_a\\_biszku-ugyben-191445](http://mno.hu/migr_1834/uj_feljelentes_keszulhet_a_biszku-ugyben-191445) [last visited on 25 May 2012].

<sup>703</sup> [http://index.hu/belfold/2012/01/28/nyomozas\\_indult\\_az\\_1944-45-os\\_delvideki\\_meszarlas\\_miatt/](http://index.hu/belfold/2012/01/28/nyomozas_indult_az_1944-45-os_delvideki_meszarlas_miatt/) [last visited on 25 May 2012]

<sup>704</sup> For the significance of declarative versus constitutive effect of the law, s. VARGA, Cs. (2011) op. cit.

<sup>705</sup> For a detailed criticism of *Lex Biszku* s. VARGA, R. (2011) op. cit.

of national implementation of the *greva* breaches/war crimes regime, it still lacks certain instances due to the lack of certain crimes and, more importantly, the fact that the Rome Statute has still not been promulgated.

The *Korbely* case in front of the European Court of Human Rights<sup>706</sup> made many aspects apparent related to problems of implementation and dialectics between international and national law. A short assessment of the judgment of the Court follows, demonstrating shortcomings in national legislation, in the domestic judgments as well as the surprising failures in the evaluation of the case and related international law by the ECtHR.

To begin with, the Court stated that “[i]n order to verify whether Article 7 was complied with in the present case, the Court must determine whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity. [...] Thus, the Court will examine (1) whether this act was capable of amounting to “a crime against humanity” as that concept was understood in 1956 and (2) whether it can reasonably be said that, at the relevant time, Tamás Kaszás [the victim] [...] was a person who was ‘taking no active part in the hostilities’ within the meaning of common Article 3.”<sup>707</sup>

In the present case the ECtHR had to consider whether it was foreseeable that the act qualified as a crime against humanity, but it had no reason to examine whether Tamás Kaszás, the victim, was *hors de combat*. Because if applicability of Article 3 is confirmed – and it is confirmed that such an act amounted to a crime against humanity at the time when it was committed and provided an armed conflict took place –, then the case has to be viewed under the rules of international law. The alternative question therefore is simply whether a crime against humanity was committed or not.

It must also be mentioned that in 1956, at the time of the commission of the act, the Hungarian Criminal Code did not have a provision for crime against humanity. There was a chapter on war crimes, including the punishment of those who violated the international laws applicable to war through the treatment of the population of occupied territories or treatment of prisoners of war. Consequently, the act had to be qualified under homicide, meaning only that the penalty was identified based on the provision of homicide, but the elements of the crime were qualified based on the elements of crimes against humanity. The significance of charging with homicide or crime against humanity lies in that criminal

<sup>706</sup> Case of *Korbely v. Hungary*, no. 9174/02 – (19.9.08).

<sup>707</sup> *Ibid.* Grand Chamber judgment, paras 76–77.

responsibility for crimes against humanity is not statute barred – and this has to be regarded by courts *ex officio*.

Since the Hungarian courts were referring to international law when establishing the criminal liability of Korbély, his criminal responsibility should be viewed from an IHL point of view, that is, the question whether Tamás Kaszás was *hors de combat* or not will decide whether Korbély committed a crime against humanity or not. If Tamás Kaszás was *hors de combat*, Korbély committed a crime against humanity; whereas if he was not *hors de combat*, Korbély's act was legal under international humanitarian law. Therefore it is wrong for the ECtHR to examine whether Tamás Kaszás was *hors de combat* or not, because this is a question to be decided by the domestic court and has in itself no effect on the question of whether the act should be qualified as crime against humanity or homicide.

An interesting question is why the Hungarian courts examined the crime as a crime against humanity and not as a war crime. The Hungarian Constitutional Court held that the crimes committed in 1956 could amount to crimes against humanity for the following reasons. For the crimes committed until 4 November 1956 (when the conflict became international), such acts could not be qualified as war crimes, because in 1956 in international law the concept of war crimes was only to be understood for the context of international armed conflict. Therefore such acts would amount to crimes against humanity,<sup>708</sup> to which, similarly to war crimes, statutory limitations are not applicable, according to the 1968 New York Convention on the Non-Application of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>709</sup>.

Furthermore, the ECtHR said that “[i]n the Court’s view, one of these criteria – a link or nexus with an armed conflict – may no longer have been relevant by 1956 [...]. However, it would appear that others still were relevant, notably the requirement that the crime in question should not be an isolated or sporadic act but should form part of »State action or policy « or of a widespread and systematic attack on the civilian population”.<sup>710</sup> Why does the Court come to the

<sup>708</sup> Definition of crimes against humanity in the Nuremberg Charter: „(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”, S. Charter of the International Military Tribunal annexed to the London Agreement (8 August 1945), Article 6 (c).

<sup>709</sup> Adopted in New York, 26 November 1968.

<sup>710</sup> ECtHR judgment in *Korbely*, para 83.

conclusion that a link or nexus with an armed conflict is not relevant if the act was committed in an armed conflict and it is this very consideration why the Hungarian courts regard this question as a crime against humanity?

The Court goes on to say after an analysis of the particular events: "[t]he Court therefore is of the opinion that Tamás Kaszás did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time."<sup>711</sup>

First, it must be highlighted that there is no notion of combatant or non-combatant in a non international armed conflict. If Tamás Kaszás was indeed not a protected person under Article 3, then Korbély did not commit any crime at all, as killing a person directly participating in hostilities is not a crime under international law. It is even more confusing that the Court earlier indicated that a nexus with war was not relevant in this case. A nexus with war is indeed relevant, otherwise Article 3 could not be applied at all.

Second, and more importantly, the ECtHR has no jurisdiction to examine and evaluate evidence. This is the task of domestic courts. The ECtHR's jurisdiction extends to examining whether domestic courts proceeded in accordance with the European Convention on Human Rights.<sup>712</sup> Therefore, it seems that the ECtHR went too far with the above statement in intruding into national proceedings, thereby violating the "no fourth instance" doctrine<sup>713</sup>. This view has also been expressed in the dissenting opinion of five judges by saying that although the judgment rightly reiterated that it was not the task of the Court to substitute itself for the domestic courts, "the majority, without any explanation, head off in a

<sup>711</sup> ECtHR judgment in *Korbely*, para 94.

<sup>712</sup> As Károly Bárd points out, „It is clearly in the exclusive competence of national courts to examine and assess the evidence and, by this, to ascertain the facts of the case and to apply and interpret the relevant laws. What the ECtHR is expected to do is to review if the Convention rights were observed. [...] Thus the ECtHR, as a general

rule, accepts the findings of fact as they were determined in the national arena [...] Of course, the ECtHR is authorized and obligated to assess if domestic courts when applying the law have observed the rights enshrined in the Convention. Formulated from the perspective of the ECtHR, the subsidiarity principle calls for self-constraint: the ECtHR cannot assume the functions of national courts, its judgments cannot serve to replace the decisions rendered by domestic courts." S. Károly BÁRD: The difficulties of writing the past through law – historical trials revisited at the European Court of Human Rights. *International Review of Penal Law* (Review of the ICC Statute – Best Practices and Future Challenges), 2010/81/1–2. 29–30.

<sup>713</sup> As for the subsidiarity of the ECtHR, s. BÁRD, Károly: Igazság, igazságosság és tisztességes eljárás. (Truth, Justice and Fair Trial) *Fundamentum*, 2004/1. 44–50.

different direction and, on a flimsy, uncertain basis, quite simply substitute their own findings of fact for those of the Hungarian judicial authorities.” Therefore, the authors of the dissenting opinion “see no reason to place more reliance on the conclusions reached by the Court than on those of the domestic courts.”<sup>714</sup>

This is even more alarming, because, as Károly Bárd notes, trials of international crimes also often require a wider examination of the socio-historical concept in which the crimes had taken place and therefore are to produce a reliable historical context. Thus, “the ECtHR should be even more cautious in observing the subsidiarity principle and what follows thereof since it seems to be beyond doubt that domestic instances are much better positioned for collective history-making.”<sup>715</sup> At the same time Bárd noted that since the events had taken place decades ago and the national courts relied primarily on documentary evidence, then it is not so obvious that national courts are better placed to assess evidence. This is even more so when national courts also apply international law in addition to national law.<sup>716</sup>

Third, it must also be taken into consideration that although the task of the Strasbourg Court is simply to evaluate whether the proceedings of the domestic courts violated the rights manifested in the ECHR and not to evaluate evidence<sup>717</sup>, in this case the findings of the Hungarian courts were so contradictory, confusing and at some instances even legally wrong, that it in itself may have raised the question of arbitrariness. Consequently, the Court found that the Hungarian courts did not evaluate evidence that were so crucial that it affected the whole procedure – through not establishing convincingly that the acts in question constituted crimes against humanity –<sup>718</sup>, thereby leaving evaluation of certain facts to the Human Rights Court<sup>719</sup>. However, the Strasbourg Court examined solely violation of Article 7 instead of Article 6 of the ECHR. One reason for

<sup>714</sup> ECtHR judgment in *Korbely*. Joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović, para 2.

<sup>715</sup> BÁRD (2010) op. cit. 34.

<sup>716</sup> Ibid. 34–35.

<sup>717</sup> „The Court’s role is confined to ascertaining whether the effects of interpretation [by domestic courts] are compatible with the Convention” ECtHR judgment in *Korbely*. Joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović. para 72.

<sup>718</sup> BÁRD (2010) op. cit. 42–43.

<sup>719</sup> „The Court notes that the national courts confined their examination to the question whether Tamás Kaszás and János Senkár came under the protection of common Article 3 and did not examine the further question whether the killing of the two insurgents met the additional criteria necessary to constitute a crime against humanity and, in particular, whether it was to be seen as forming part of a widespread and systematic attack on the civilian population”. Consequently, “[i]n the Court’s opinion it is thus open to question whether the constituent



this may have been the uneasiness of the Court to judge on the capabilities of the Hungarian authorities as regards the entire procedure<sup>720</sup> and thus evaluating the whole Hungarian judicial system<sup>721</sup>.

### *Poland*

The Polish Criminal Code<sup>722</sup> has certain similarities with that of the Hungarian. Although there is a special chapter on „Offences against peace and humanity, and war crimes”, it is not complete either. The following crimes are missing: removing tissues or organs for the purpose of transplantation, the definition of the crime of attack against cultural property is not corresponding with international law, and the Polish penal legislation also has drawbacks in integrating command responsibility as well.

The Polish penal code makes the same mistake as the Hungarian, to omit to exactly define armed conflict. It is not clear either whether violations committed in a non-international armed conflict are to be qualified under ordinary crimes. Giving a definition of armed conflict should not be very complicated. Many states give the definition in a specific article providing for definitions for the whole code (like in Hungary in the Criminal Code in force, although not satisfactorily for the time being), or at the beginning or end of the relevant chapter dealing with international crimes or list of the crimes, with a formulation such as ‘who, in an international armed conflict, ...’ (a similar formulation can be found in the German *Völkerstrafgesetzbuch*). For the sake of clarity, it could be advisable even in such cases to define international armed conflict. This could either be done through a reference to Article 2 of the Geneva Conventions and Article 1 (4) of Additional Protocol I, or through an integration of the text of these treaty provisions.

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elements of a crime against humanity were satisfied in the present case.” ECtHR judgment in *Korbely*. para 84–85.

<sup>720</sup> BÅRD (2010) op. cit. 39.

<sup>721</sup> The Court itself provided a very simple explanation as to why it had not examined violation of Article 6 in merits: „in the light of its finding of a violation of Article 7 of the Convention [...], it concludes that in the circumstances of the present case it is unnecessary to examine the applicant’s complaint under Article 6 § 1 of the Convention (fairness of the proceedings).” Ibid. para 98.

<sup>722</sup> Criminal Code of 6 June 1997, Ustawa z dnia 6 czerwca 1997 r. Kodeks karny. (Dz. U. z dnia 2 sierpnia 1997 r. Nr 88, poz.553), Chapter XVI. The Polish Parliament adopted important amendments to the Criminal Code in 2009 mainly to reflect obligations of the Rome Statute.

*Estonia*

Estonia adopted a new criminal code in 2001<sup>723</sup>. Chapter 4, titled “War crimes” includes the grave breaches with respectable details and in a systematic manner. It also adopted a unique but useful provision, saying that violations committed in armed conflicts that cannot be found in Chapter 4 shall be qualified based on ordinary crimes. This, on one side, is self-evident: acts that have been committed in an armed conflict, but not related to it (for instance burglary), are obviously not to be judged as war crimes. On the other hand, it may also mean that acts which were committed in relation to an armed conflict but for one reason or another cannot be qualified as war crimes, are to be applied under ordinary crimes, or, as a third interpretation, it could mean that with respect to violations to be repressed under international law where there is a lacuna in Estonian legislation, ordinary crimes serve as a back-up (an example could be the crime of damage or unlawful seizure of property of the enemy, which only qualifies as a war crime if committed in a large scale, in other cases, it would be an ordinary crime.<sup>724</sup>

The Estonian Criminal Code does not define war either, but the Commentary states that “war” is a situation that is described in Article 2 of the Geneva Conventions, Article 1 (4) of Additional Protocol I and Article 1 of Additional Protocol II.<sup>725</sup> This means that Estonia has included non-international armed conflicts, but only in the understanding of Additional Protocol II. Here the question arises, whether common Article 3 was forgotten, or was left out with intention. It must be mentioned here that a reason why national criminal codes are reluctant to include non-international armed conflicts in the understanding of Article 3 may be that its exact scope of application is difficult to define. One obvious omission in Estonian penal legislation is the crime of endangering the physical or mental health of a person under the power of a party; otherwise, the Estonian law covers grave breaches and war crimes quite extensively<sup>726</sup>.

<sup>723</sup> RT I 2001, 61, 364 (consolidated text RT I 2002, 86, 504), last amended 24.01.2007, entered into force 15.03.2007.

<sup>724</sup> See the presentation of Estonian participant at the Conference „The role of the judiciary in the implementation of international humanitarian law”, held in Budapest, 29-30 October 2007. Presentation on file with the author.

<sup>725</sup> Ibid.

<sup>726</sup> Other *lacunae*: ICC Art 8IIb(xxvi) and e(viii): Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively; ICC Art 8 IIb(xi) and art 8IIe(ix) of the ICC Statute: Killing or wounding treacherously a combatant adversary; ICC Art 8IIb(xxiii): Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; Art 85III(e)

*Lithuania*

The Lithuanian criminal code<sup>727</sup> has dealt with the incorporation of grave breaches and war crimes into national legislation with similar depth. The criminal code adopted in 2000 lists grave breaches and war crimes in a systematic and exhaustive way. This piece of legislation is also clear in regard to the scope of application: the crimes start with the following formulation: “who, in international armed conflict, occupation or annexation...”. Lithuania can generally be called an eminent in taking its international obligations serious and incorporating even those treaty obligations into its legislation that most other countries of the region usually forget.

It becomes clear from the examples above that national legislation is still not complete. These faults and inaccuracies in national laws may cause major hiccups in domestic application, because although reference to international law can always be made, it caused in most cases problems: either the judges could not interpret international law correctly or issues of legality arose.

### 4.3. On the level of internal jurisprudence

Domestic courts are often fighting hard to apply international law, carry out war crimes procedures, conform different legal regimes in cases of extradition requests concerning war crimes or to withstand political pressure. This daring task demands a concerted effort from judges and prosecutors and can only be really successful in case adequate mechanism are at place, both in preparing judges for these challenges and in making adequate resources available.

The present sub-chapter first lists some cases which demonstrate the difficult circumstances in which courts have to operate, often pressurized by politics, the media or public opinion, it then gives an overview of mechanisms that may enhance courts' work, followed by specific recommendations for Hungary. The sub-chapter then concentrates on domestic courts' role in exercising universal jurisdiction, followed by a presentation of domestic cases in this field.

The separate discussion of domestic practice on universal jurisdiction is again necessitated on one hand by the fact that given the uncertain legal definitions in

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of the AP I: Killing or wounding a combatant hors de combat who has not yet surrendered at discretion. S. presentation of Estonian participant op.cit. footnote 44.

<sup>727</sup> Baudžiamojo Kodekso Patvirtinimo Ir Įsigaliojimo, Įstatymas, 2000 m. rugsėjo 26 d. Nr. VIII-1968.

international law, domestic practice has greatly contributed to an understanding of the application of universal jurisdiction, and on the other hand because domestic practice on universal jurisdiction is a field where the national jurisprudence' role is probably greater than in other fields in further developing questions arising from not sufficiently clear or controversial international obligations.

#### *4.3.1. When domestic courts are trying to solve the problem...*

Although we have argued in most of the above pages for the legislator to solve the problems and questions of application of international law in national legal systems, in many cases it was precisely the domestic courts who were seeking to find a solution to the emerging problem and were fighting their way out of political and other pressure. These efforts did not always come up with comforting solutions, but are good indicators that it is not only the legislator that is responsible for the body of international law to be regarded in national systems.

In the already cited *Klaus Barbie* case, French courts faced the problem of making a difference between crimes against humanity and war crimes. This problem, notably the difficulty in differentiating between these two groups of crimes is a typical drawback of international law and its lack of precise definitions. This was even more a crucial question for France, since it did allow statute of limitations for crimes against humanity, but not for war crimes. In the *Barbie*-case, the Court of Appeal and the Criminal Chamber disagreed in the interpretation of the Nuremberg Charter in this question: while the Chamber adopted a strict interpretation of crimes against humanity, the Appeals opted for an extensive application, therefore allowing for the punishment of the acts concerned as crimes against humanity<sup>728</sup>.

The root of the question was political, as it was due to fear of the French government that war crimes cases could be opened regarding acts of torture carried out by the French army in Algeria in the 1950s that it did not accept the non-application of statute of limitations for war crimes, as stipulated by the 1968 New York Convention. Since the attempt to shield France's own criminals backfired, the judges had to make do and concentrate on charges of crimes against humanity against *Barbie* in order that he cannot get away from justice. Even with this solution, the fact that he could not be tried for war crimes was seen as a major failure of the procedure.

<sup>728</sup> S. PONCELA op. cit. 893–894.

Similarly, difficult issues had to be counterbalanced by the judges in the *Eichmann* case. Here the whole procedure could have been corrupted due to the questionable way and legality of apprehension of Eichmann<sup>729</sup>, had it not been the insistence of the Israeli courts arguing for the right and interest of Israel to proceed in the case.<sup>730</sup>

Another interesting example was the *Képiró* case<sup>731</sup>. Képiró was a lieutenant in the Hungarian gendarm, who participated in the Novi Sad raid in 1942, later called as the “cold days”, an infamous series of events during which, as a response to Yugoslav partisan attacks against Hungarian forces who re-occupied Novi Sad, a raid was held resulting in the death of cca. 3000 Serb and Jew civilians. Képiró was sentenced in 1944 for 10 years imprisonment for his role in the raid, however, he did not have to serve the sentence and was soon replaced into the gendarmerie service, due to a decision of Governor Horthy annulling the judgment. His exact and direct role was never cleared, and Képiró has always denied charges of directly participating in the events. After Képiró moved back to Hungary from Buenos Aires, in 2006 the Simon Wiesenthal Center made a criminal complaint against Képiró in front of the Hungarian authorities for charges of war crimes. The court proceedings started in May 2011, followed by a huge media attention.

<sup>729</sup> As is well known, Eichmann had been living in Argentina under an alias name. He was apprehended and actually kidnapped by the Mossad, without the knowing of the Argentinean authorities. The apprehension was clearly in violation of international law infringing the sovereignty of Argentina.

<sup>730</sup> The same issue was discussed by the ICTY in the *Nikolic*-case, where the accused alleged that he was in fact kidnapped, since he was apprehended by individuals not related to the Stabilization Force (SFOR). The Trials Chamber first established that there had not been a violation of state sovereignty, because the FRY had been under an obligation to surrender the accused to the Tribunal. The Trials Chamber then, referring back to the decision of the Appeals Chamber in the *Barayagwiza*-case, stated that “in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused”. However, as the Trial Chamber found, the treatment of the accused by the individuals who had apprehended him was not so egregious that the Chamber could establish that his human rights were violated. In fact, the Trial Chamber did not address in substance the issue of *male captus bene detentus* and its application to the proceedings of the Tribunal. What can be concluded from the decision as a matter of principle is that the release of the accused due to violations of human rights and state sovereignty – circumstances arising around the way the accused was apprehended – can only come to question if the violations had been so serious that it would jeopardize the integrity of the whole procedure and the Tribunal itself. S. *The Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002. Para 114.

<sup>731</sup> Sources on the Képiró case: [http://index.hu/belfold/2011/07/18/kepiro\\_itelet/](http://index.hu/belfold/2011/07/18/kepiro_itelet/) [last visited on 23 May 2012], the judgment is available at: <http://nja.hu/hirek/kepiro-sandor-csendor-ugye/> [last visited on 23 May 2012].

The Metropolitan Court raised Képiró from the charges on first instance in July 2011, due to lack of evidence. The Court did not find that the case was violating the *ne bis in idem* principle, since the decision of the Governor annulling the judgment applied to the judgment itself and not the facts determined in it. Since the judgment was in fact sent back to the Chief of Staff who, in his discretionary role did not initiate new proceedings, the case cannot be considered as inadmissible under the *ne bis in idem* rule.<sup>732</sup>

Since Képiró died in September 2011, no appeal process could take place. Although the Wiesenthal Centre, as well as the Serbian authorities expressed their discontent with the judgment, the case remained highly controversial in Hungary due to it having been very badly prepared and from the first minute lacking any convincing evidence, many seeing it as a makeshift case lacking real evidence pushed by the Wiesenthal Centre to justify its existence. The Képiró judgment demonstrated the will of the domestic court being able to free itself from political considerations and expectations from parts of the international community and relying exclusively on legal issues.

The *Zentai* case also merits attention due to its way of handling by the courts, notwithstanding the political and media attention around it. Charles Zentai, now an Australian citizen, was a member of the Hungarian Army during World War II. He was charged with beating to death an 18-year-old Jewish civilian in 1944 for not wearing the yellow star, and dumped his body into the Danube. Zentai was tracked down by the Simon Wiesenthal Center. The Center initiated his extradition from Australia to Hungary to stand charges of war crimes, which was official confirmed by Hungary in the face of an extradition request. Consequently, in 2005 he was arrested in Australia to stand extradition hearings.

The 86-year-old Zentai at the time, suffering from several illnesses, was said not to survive the trip to Hungary. After several turns of appeals against extradition and the emergence of new evidences, including a testimony from his former commander blaming a fellow soldier for the crime Zentai was alleged to have been committed and a polygraph test passed by Zentai, he remained in Australia, since the Federal Court stated that it could not extradite Zentai due to the fact that Hungary had not laid charges against him but merely wanted to question him.

The confusion was about whether Hungary wanted to question him or lay charges against him. As the lawyers stressed during the proceedings in Australia, according to Hungarian legislation, questioning would come first, during which

<sup>732</sup> See point III. / Facts of the case in the judgment.

Zentai would have the possibility to argue his innocence, and the questioning could result in charges being brought against him<sup>733</sup>. The important issue for Australia though is whether Zentai is wanted for only questioning or for trial – a question that is not so clear-cut in the face of Hungarian criminal legislation.

The Australian Minister for Home Affairs appealed the decision in January 2011, but the decision was upheld by the Federal Court.<sup>734</sup> The Court said that it could not accept the extradition, because the offence ‘war crime’ did not exist in Hungarian legislation in 1944<sup>735</sup>. The controversy of the case was that the act could have constituted the crime of murder, and this was what the Minister of Home Affairs based the extradition decision on.

The issue reached the High Court of Australia, which considered at its hearing in May 2012 that the crime could have been qualified as murder according to the laws in force in Hungary at the time. However, murder was not listed in the extradition treaty with Hungary, but war crime was, even though war crime did not appear in Hungarian legislation until an 1945 law<sup>736</sup>. The High Court finally decided against the extradition of Zentai. It held, similarly to the Federal Court, that the condition of double criminality did not stand, because war crimes were not punishable under Hungarian laws in 1945<sup>737</sup>.

The resolution of the Institut de Droit International<sup>738</sup> raises attention on the need for balance between the role of national judges in the application of international law and the fact that being functionaries of their own country they are often exposed to political considerations or even pressure by their own government. The report sees the strengthening of independence as a part of the solution, including through “by removing certain limitations on their independence which are sometimes imposed with regard to the application of international law by law and by practice”<sup>739</sup>. The resolution sets out certain

<sup>733</sup> <http://www.theaustralian.com.au/news/nation/hungary-wants-zentai-to-face-murder-charge/story-e6frg6nf-1226057069337> [last visited on 23 May 2012]

<sup>734</sup> <http://au.news.yahoo.com/thewest/a/-/breaking/9461464/o-connor-was-misled-on-zentai-case/> [last visited on 23 May 2012]

<sup>735</sup> <http://www.perthnow.com.au/news/western-australia/charles-zentai-war-crimes-case-goes-to-high-court/story-e6frg13u-1226312099139> [last visited on 23 May 2012]

<sup>736</sup> [http://www.echotv.hu/kulfold/megnyitottak\\_a\\_charles\\_zentaiugy\\_utoolso\\_fejezetet.html](http://www.echotv.hu/kulfold/megnyitottak_a_charles_zentaiugy_utoolso_fejezetet.html) [last visited on 23 May 2012]

<sup>737</sup> <http://www.theaustralian.com.au/news/nation/charles-zentai-case-the-last-nazi-pursuit/story-e6frg6nf-1226451325521> [last visited on 3 September 2012]

<sup>738</sup> *The Activities of National Judges and the International Relations of their State, Final Report*, adopted in Milan. *Yearbook of the Institute of International Law*, 1993/65. (hereafter the Milan resolution).

<sup>739</sup> *Ibid.* Preamble, paras 4–5.

guidelines that should lead national courts during the application of international law. Although there is nothing striking new in the guidelines from the face of international law, some of its points merit attention and certainly point towards a more effective system.

The resolution, as a start, supposes that national courts *do* apply international law: “[n]ational courts should be empowered by their domestic legal order to interpret and apply international law with full independence.”<sup>740</sup>, including international customary law – which, as we had seen from cited cases, was not always obvious for national courts –, and general principles of law<sup>741</sup>. It also states that courts should enjoy the same freedom of interpretation as they do with other sets of rules. Finally, the following Article of the resolution could be easily understood, but not only, for universal jurisdiction cases: “[n]ational courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international tribunal and avoiding interpretations influenced by national interests”<sup>742</sup>.

Although Benvenisti accused the wording of the resolution by being bold and watered-down, and not without reason, he admits that the principles adopted by the resolution are meant to address doctrines that had been used by national courts to shield themselves from applying international law.<sup>743</sup> At the same time, when it comes to political pressure, it is not the courts that are to blame. The recommendations of the resolution are therefore grouped around these two issues: the need for courts to regard international law during their proceedings, and the abstaining of the other branches of the state from intervening. The existence of the two are inevitable for effective procedures that comply with international law.

The cases cited above in the present chapter and in other chapters of the present study testify to the difficulties, not only on the legal field, of courts in facing their tasks. We could not have imagined Belgian prosecutors and courts allowing for the prosecution of Ariel Sharon or French courts for allowing a criminal procedure against Donald Rumsfeld due to the politics around those cases.

The International Law Association established a committee to study the principles on the application of international law by domestic courts<sup>744</sup>. Although

<sup>740</sup> Ibid. Article 1.

<sup>741</sup> Ibid. Articles 4 and 6.

<sup>742</sup> Ibid. Article 5.3.

<sup>743</sup> BENVENISTI *op. cit.* 429.

<sup>744</sup> The Committee working on ‘Principles on the engagement of domestic courts with international law’ started working in May 2011. S. [http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1039](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1039) [last visited 5 October 2012]



the report is still in the making, the terms of reference of the working group give us a picture of the questions they are examining. While the committee is supposed to work on principle of national courts vis-à-vis “international obligations stemming from international institutions, including international courts, rather than to treaty obligations”, the terms of reference acknowledges that „the difference between the categories of decisions of international institutions on the one hand and treaty obligations, on the other, is not sharp and it may well be that national practices in regard of both categories are subject to similar principles.”<sup>745</sup>

The paper describes the perplexity of the question with the following: “these organs [national courts] remain grounded in the legal system and political order of the very state whose acts and policies they are to assess against the standards of international law”<sup>746</sup>. Yet, the paper approaches this issue from the side of international institutions as well: „[t]his duality leads to [...] practical questions as to when international institutions can, or cannot rely, on decisions of national courts.”<sup>747</sup> It will be interesting to see the findings of the committee.

Notwithstanding the difficulties that are indeed present for national courts and cannot be sided, there are important steps the state could make. The following sub-chapter introduces practical mechanisms that could enhance the work of authorities when facing war crimes procedures.

#### 4.3.2. *War crimes units*

Recognizing the difficulties in trying serious international crimes, a number of states have set up specialized units within their investigative authorities (police and prosecution), immigration services and courts to deal with cases concerning international crimes. Such units allow for the concentration of information, experience, know-how, expertise and good relations with other similar units, with international organizations and within the state authorities<sup>748</sup>. Recognizing

<sup>745</sup> Proposal for an ILA Study Group on the Principles on the application of international law by domestic courts, adopted by the International Law Association in May 2011. 1–2. Available at: [http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1039](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1039) [last visited 5 October 2012]

<sup>746</sup> Ibid. 1.

<sup>747</sup> Ibid.

<sup>748</sup> S. REDRESS/FIDH: Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialized war crimes units. December 2010 (hereafter REDRESS/FIDH report on war crimes units). 9. This sub-chapter relies in principle on the findings of this document.

the boosting effect of war crimes units on effective domestic procedures, the EU Council adopted several decisions supporting the formation of such bodies<sup>749</sup>.

These units usually comprise of police officers, prosecutors and immigration officials – either in one single unit or in separate units within the respective authorities, but working in close cooperation. Usually separate units exist in courts. As to the size of the units, the word “unit” is often misleading, as these mostly consist of one or two persons only. The personnel of such units participated at specialized trainings organized by international organizations, the Interpol or by experts of their own countries with experience in international tribunals or elsewhere<sup>750</sup>. Exchange of information or study trips among units are also contributing to their training and further education.

As for the expenses, although it is true that procedures related to international crimes are usually bearing high expenses, the setting up of units and their training have very low costs. Setting up of the units is merely an administrative measure, with personnel of the units being assigned to other cases as well. Trainings provided by international organizations or NGOs, such as the ICRC, OSCE or FIDH/REDRESS, are usually either free of charge or financial support is available.

The first war crimes units were set up with respect to investigation and prosecution of suspects with respect to Nazi crimes. Such units had been set up in Germany in 1958<sup>751</sup>, in the US in 1979<sup>752</sup>, in Canada in 1985<sup>753</sup>, in Australia in

<sup>749</sup> Preamble, Council Decision 2002/494/JHA, 13 June 2002: “The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law.” Article 4, Council Decision 2003/335/JHA 8 May 2003: “Member States shall consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question.”

<sup>750</sup> S. REDRESS/FIDH report on war crimes units op. cit.10–11.

<sup>751</sup> The Central Office of the State Justice Administration for the Investigation of National Socialist Crimes (Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen) [www.zentrale-stelle.de/servlet/PB/menu/1193355/index.html?ROOT=1193201](http://www.zentrale-stelle.de/servlet/PB/menu/1193355/index.html?ROOT=1193201) [last visited on 10 January 2012]

<sup>752</sup> US Department of Justice Human Rights and Special Prosecutions Section, [www.justice.gov/criminal/hrsp/about/](http://www.justice.gov/criminal/hrsp/about/) [last visited on 10 January 2012]

<sup>753</sup> Canadian Department of Justice, Crimes Against Humanity and War Crimes Program. In 1987, the Department of Justice Canada, the Royal Canadian Mounted Police and Citizenship and Immigration Canada were given specific mandates to take appropriate legal action against alleged Second World War crime suspects believed to be in Canada. In 1998, the Government expanded its war crimes initiative to modern (post-Second World War) conflicts, because there

1987<sup>754</sup>, in the UK in 1991<sup>755</sup> and in Poland in 1998<sup>756</sup>. However, these units finally ended up prosecuting only a very small number of suspects<sup>757</sup>. In the United Kingdom for instance, out of 376 investigations, only one prosecution took place. The expenses connected to this one conviction reached an absurd sum: the cost of investigation only in the first three years was 5,4 million GBP.<sup>758</sup> Not many states can afford this. Probably this was the main reason why most of these units were finally called off or reorganized.

An impediment of the setting up of specialized units could be that procedures related to war crimes, crimes against humanity and genocide are very rare compared to ordinary cases. Most of the domestic cases were related to crimes committed in one specific state or related to one specific situation which for any reason had a connection with the prosecuting state: either historical links (such as between Rwanda and Belgium and France), geographical proximity, a legislation open to universal jurisdiction cases (like in Belgium) or the fact that many immigrants arrived from the conflict as a result of advantageous immigration policies (e.g. Sweden). At the same time, in Western Europe, nearly all the states already had such cases, therefore it can be generally stated that for this or that reason all or most states will have to face such procedures.

In addition, the number of processes related to war crimes perpetrated by own soldiers in the framework of multi-national military missions has also decreased. The challenges to investigating and prosecuting crimes committed by own soldiers may be less demanding due to the easier availability of the suspect

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was no real distinction between the process and policy applicable to WWII and Modern War Crimes. S. [www.justice.gc.ca/eng/pi/wc-cg/www-pgm.html](http://www.justice.gc.ca/eng/pi/wc-cg/www-pgm.html) [last visited on 10 January 2012]

<sup>754</sup> David A. BLUMENTHAL – Timothy L.H. McCORMACK (eds.): *The Legacy of Nuremberg: Civilising influence or institutionalized Vengeance?* Leiden, Martinus Nijhoff Publishers, 2008. S. Review by Ben BATROS. *Journal of International Criminal Justice*, 2009/7/2. 440–442.

<sup>755</sup> S. War Crimes Act 1991.

<sup>756</sup> The Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (IPN). See [www.ipn.gov.pl/portal/en/35/1/Brief\\_history.html](http://www.ipn.gov.pl/portal/en/35/1/Brief_history.html) [last visited on 11 January 2012]

<sup>757</sup> For instance, the Australian unit was strongly criticized after the decision not to extradite Charles Zentai to Hungary. „At its height, from 1987 to 1992, a Special Investigations Unit set up by the Hawke government examined up to 800 cases of suspected Nazi-era war criminals living in Australia, but a lack of hard evidence and the unreliability of aged witnesses made it difficult to lay charges. Some questioned whether Australia’s heart was really in the hunt to prosecute crimes committed half a century earlier. A 2006 US-government commissioned report accused Australia of having “an ambivalent” attitude to hunting Nazi war criminals and a “lack of the requisite political will”. S. <http://www.theaustralian.com.au/news/nation/charles-zentai-case-the-last-nazi-pursuit/story-e6frg6nf-1226451325521> [last visited on 3 September 2012]

<sup>758</sup> S. [http://news.bbc.co.uk/2/hi/uk\\_news/309814.stm](http://news.bbc.co.uk/2/hi/uk_news/309814.stm) [last visited on 12 January 2012]

and evidences, still, in substance, these bear a significant similarity with cases where the perpetrator was not an own national.

An additional motive for states to set up war crimes units to allow effective procedures was that none of these states wanted to be seen as safe havens for criminals committing such crimes. The more states establish a set-up allowing for such procedures, the more other states will be considered as safe havens. This is especially true for Central European countries, where no such units exist, whereas most of the Western European countries either have such units or are otherwise dealing effectively with serious international crimes. Consequently, the more effective Western European countries become, the more Central European countries will be considered as safe havens.

In the endeavor to avoid that a state becomes a safe haven, the *immigration authorities* also have an important role to play. The part played by immigration authorities is often underestimated in inexperienced states. At the same time, if we think of it, it is just logical that in cases where the perpetrator is not a national of a foreign country, it is the immigration authorities that can stop the influx of such persons into the country without being noticed. Therefore their training and close cooperation with other law enforcement authorities is inevitable.

Correspondingly, war crimes units or small teams had been set up within immigration authorities in various countries to avoid that a person suspected of having committed a serious violation of international law can enter the country unnoticed and eventually seek asylum, refugee or other status.<sup>759</sup> The personnel of such units are often specialized in specific countries or contexts and work closely with law enforcement authorities. In other cases, personnel of war crimes units merely advise immigration officials or carry out specific methods, such as special interviewing techniques, to go through immigration/citizenship/refugee requests in order to sort out possible suspects of serious international crimes<sup>760</sup>. The action specialized units may take varies from refusal to enter the country, revoking citizenship or refugee status, refusal of granting refugee status or eventually handing the person over to the police.

In addition, immigration authorities may also be useful for ongoing cases in that they may be able to track potential victims and witnesses. In Denmark, for

<sup>759</sup> S. REDRESS/FIDH report on war crimes units op. cit. 11–12.

<sup>760</sup> Such techniques may include interviewing the applicant about previous jobs during which suspicion may be raised if the asylum seeker was a member of the army or militant group at a time when that army/militant group was known for commission of serious international crimes, or if the person was a member of the government or held important posts in a regime known for grave abuses.

example, the Special International Crimes Office has access to the files of the immigration authority through which it can track down potential victims and witnesses<sup>761</sup>. This resulted in subsequent investigation in 22 cases.

It must be noted, however, that numbers of investigations resulting from reports of immigration authorities vary. In the UK, although many possible suspects have been detected and were refused to enter the country, referral to the police and eventual investigations took place only in a relatively small number of cases. It is claimed that among the war crimes suspects living in Britain are Saddam Hussein's senior official, a Congolese police chief and a member of the Criminal Investigations Department in Zimbabwe under Robert Mugabe. It is also known that while during the period 2005-2010, 500 applications have been turned down due to fear that the applicant had been involved in the commission of war crimes, only 51 names have been forwarded to the Metropolitan Police, and no prosecution took place<sup>762</sup>.

The numbers give more way to optimism in the Netherlands, where immigration authorities refused to grant asylum due to possible involvement in serious international crimes in approximately 700 cases, and in 2009, 43 cases have been examined by the police and prosecution that had been referred to them by the immigration authorities, out of which 3 were pending before courts, 2 were in the investigation phase and 38 in the preliminary investigation phase<sup>763</sup>. In Denmark, one third of the cases investigated by the Special International Crimes Office have been reported by the Danish Immigration Service<sup>764</sup>.

It is important to realize that the number of prosecutions is not the only factor demonstrating the successfulness of war crimes units within immigration authorities. Their tasks are usually twofold: on the one hand, to ensure prosecutions and track down possible victims and witnesses, on the other hand, to be aware if a person suspected of having committed a serious international crime entered or is present in the country. This second factor is important in order to be able to take action: send the person back to the state of origin or extradite to a state

<sup>761</sup> S. p. 2 in: [http://www.sico.ankl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf) [last visited on 18 January 2012]

<sup>762</sup> S. „Exclusive: Britain: A ‘safe haven’ for war criminals; More than 50 people wanted for murder and torture living here free from prosecution, campaigners say”, *The Independent*, 6 April 2010, available at <http://www.independent.co.uk/news/uk/home-news/exclusive-britain-a-safe-haven-for-war-criminals-1936707.html> [last visited on 14 January 2012]

<sup>763</sup> S. REDRESS/FIDH report on war crimes units op. cit. 14–15.

<sup>764</sup> S. <http://www.sico.ankl.dk/page34.aspx> [last visited on 18 January 2012]

which has an interest in prosecution, or eventually hand over to an international court should such a request be made.

Special units set up in the *investigation and prosecution authorities* usually comprise of a couple of persons within the police and/or prosecution dealing exclusively with war crimes cases. In Denmark, the unit comprises of 17 persons (including both investigators and prosecutors) and is a part of the Danish Prosecution Service<sup>765</sup>; in Belgium, one senior prosecutor is supervising a team and five police officers are dealing only with serious international crimes; in the Netherlands, 30 investigators and four prosecutors are dealing exclusively with international crimes<sup>766</sup>; in Germany, two prosecutors are assigned permanently and four prosecutors temporarily, and seven investigators are working on war crimes cases; in Sweden, the police has a 10-member unit and four prosecutors working on international crimes cases.<sup>767</sup> Investigations into such crimes can often be lengthy, however, the Danish unit's demonstrated aim is to be able to determine within 12 months whether there is sufficient evidence to prosecute or else investigation should be halted. In 2009, 22 cases have been decided and this goal was met in 16 cases<sup>768</sup>.

Although one can rarely speak of a unit set up within *courts*, in most states a designated court has exclusive competence for international crimes cases and it is the same judge(s) that are carrying out the procedures. Such a system allows that a trained and experienced judge is dealing with such cases and also contributes to consistent judicial practice.

The result of the overall work of specialized units is nevertheless striking: out of 24 convictions on account of serious international crimes, 18 involved investigation and prosecution undertaken by specialized units.<sup>769</sup> The International Federation for Human Rights (FIDH) and REDRESS, in their project to map the

<sup>765</sup> SICO (Special International Crimes Office), since its establishment in 2002, has opened investigations in 237 cases related to crimes that have taken place in around 30 countries; out of these, 172 cases have been concluded until 2009. S. <http://www.sico.anl.dk/page34.aspx> [last visited on 18 January 2012] The majority of the cases are related to the Middle East, followed by the former Yugoslavia. S. 2009 Annual Report 2009 – Summary in English available at: [www.sico.anl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.anl.dk/media/SICO_2009_-_Summary_in_English.pdf) [last visited on 18 January 2012]

<sup>766</sup> Such a high number of persons assigned only to international crimes may be explained by the fact that the Netherlands is a specially affected state due to its favorable immigration policy and its determination to carry out effective war crimes procedures.

<sup>767</sup> S. REDRESS/FIDH report on war crimes units op. cit. 17–18.

<sup>768</sup> S. [http://www.sico.anl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.anl.dk/media/SICO_2009_-_Summary_in_English.pdf) [last visited on 18 January 2012]

<sup>769</sup> S. REDRESS/FIDH report on war crimes units op. cit. 18.

work of existing units and assess their usefulness have gone as far as declaring that “it will be difficult, if not impossible, to successfully prosecute a suspect of serious international crimes without special arrangements”<sup>770</sup>.

Indeed, numbers show that the number of investigations, prosecutions and eventual convictions are much higher in states having a specialized unit and cases are concluded within much shorter time if units exist. In Finland, for instance, *ad hoc* resources were provided for an ongoing case, which resulted in that investigation and prosecution was concluded within three years, and the trial was concluded within 10 months. The case raised huge media attention. It was unique in its kind in Finland. Around 100 witnesses had been heard in the pre-trial phase, most of them abroad; 68 witnesses were heard by the court (out of whom only one lived in Finland). The court proceedings included court sessions in Kigali and Dar es Salaam to hear witnesses, and a site visit in Nyakizu, Rwanda, where the crimes were committed. Finland’s Minister of Justice, Tuija Brax, said in an interview that the Nordic country was both capable and ready to host the trial. “We have specialists and lawyers working in international fields and expertise in international criminal cases [...] It’s a global world, and we’re not an isolated island,”<sup>771</sup>. In most countries these time-frames would be highly praised even for an average domestic case, let alone for a case involving an international crime. It goes therefore without question that the setting up of units dealing with serious international crimes requires relatively little effort and results in huge advantages.

#### 4.3.3. Recommendations for Hungary

Although it is clear that Hungary is not and probably will not be facing an influx of serious international crimes suspects on its territory or a mass amount of international crimes cases, it should nevertheless not neglect its international obligations. Besides, cases concerning international crimes occasionally did show up and at these occasions the Hungarian system has mostly demonstrated an instable ability to deal with them. What mostly seems to be lacking in Hungary is the recognition of the problem and the will to make it do. Arguments relating

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<sup>770</sup> Ibid. 21.

<sup>771</sup> S. *Prosecutor v Francois Bazaramba* (R 09/404), judgment of June 2011. See [http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw\\_vol04issue12.html#rw1](http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue12.html#rw1) [last visited on 18 January 2012] and Press Release of the District Court of ITÄ-UUSIMAA of 11 June 2010 available at [http://www.adh-geneva.ch/RULAC/pdf\\_state/Finland-decision.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/Finland-decision.pdf) [last visited on 18 January 2012]

to the absence of finances, small number of cases or the lack of national interest usually outdo any considerations about how the system could be improved without investing much money in it.

Due to the relatively small number of ongoing or possible cases and the meager financial possibilities it is naturally not viable to set up units composed of several persons in each authority: immigration, police, prosecution and the courts. Still, several technical measures could be adopted which do not require the allocation of serious funds<sup>772</sup>.

These are for instance:

- (i) The *setting up of units* in each authority with designating personnel who have gathered knowledge and information to be able to deal with international crimes cases. Such personnel may not have to be assigned to such cases exclusively but would have exclusive competence for war crimes and other serious international cases. Within the immigration authority this could mean that in case of any suspicions about an applicant's involvement in international crimes – which requires that all the personnel is informed to a basic extent about what could be a 'suspicious case' – his/her application could be run through the "war crimes unit", who could, should the need arise, undertake additional interviews with the person. Within the police and prosecution, this would obviously mean that investigation would be carried out by the unit or under the supervision or with the assistance of such unit.
- (ii) *Training* could be provided by taking advantage of trainings, conferences, workshops organized by international organizations and NGOs,<sup>773</sup> visiting other units to gather experience, seeking cooperation with academic institutions in Hungary and abroad and taking advantage of the experiences of Hungarians who had been working at international tribunals or courts. This also includes the encouragement of relevant personnel for temporary posting to international courts and tribunals. Worth to note, that similar units of several countries are organizing conferences and workshops to enable exchange of experience of their staff<sup>774</sup>.

<sup>772</sup> S. Réka VARGA: Domestic procedures on serious international crimes: interaction between international and domestic jurisprudence and ways forward for domestic authorities. *Miskolc Journal of International Law*, 2012/9/1. 67.

<sup>773</sup> For instance the Interpol, the Institute for International Criminal Investigations or the Joint Rapid Response Team are regularly offering such training possibilities.

<sup>774</sup> For example, the Nordic countries organized a conference early 2009, followed by two other events in the same year, seeking ways to further cooperate. S. p.3 in: [http://www.sico.ankl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf) [last visited on 18 January 2012]



- (iii) The adoption of adequate *legislation* to provide an adequate framework for such procedures, including taking into account the specificities of such trials, such as absence of the suspect (mainly in universal jurisdiction cases), the place of commission of the crimes being abroad, protection of victims and witnesses, etcetera.
- (iv) Develop *cooperation* lines where nonexistent and increase cooperation where already exists between immigration and investigation (police and prosecution) authorities in order to gain from each other's information on suspects, victims and witnesses. Cooperation is also important among units of different countries, especially bearing in mind that investigations and prosecutions are often carried out by several countries related to the same situation, such as crimes committed in Rwanda, Afghanistan, ex-Yugoslavia or Iraq. Sharing of information and cooperation among the units could substantially ease the work of the authorities<sup>775</sup>. It can even happen that two countries are investigating in the same incident which means they could benefit from each other's witness testimonies, documents or other relevant information. Worth to note that the EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes<sup>776</sup> brings together experts from ministries of justice, police investigators and prosecutors to share information and expertise on procedures related to these international crimes. Hungary already has a contact point for this network. The network often organizes events and conferences and facilitates the cooperation among states for the sharing of experiences.
- (v) Finally, on a more general note, the adequate *promulgation* of ratified international treaties is a must-do and a basis of further steps. Notably, the promulgation of the ICC Rome Statute would be highly desirable.<sup>777</sup>

<sup>775</sup> Taking Rwanda as an example, only in Europe around 10 countries have carried out investigations related to the genocide. S. REDRESS/FIDH report on war crimes units op. ci. 24–25.

<sup>776</sup> The EU Network was created by decision 2002/494/JHA, of 13 June 2002, of the Justice and Home Affairs Council and reaffirmed with Council Decision 2003/335/JHA. S. <http://www.eurojust.europa.eu/gen-network.htm> [last visited on 25 January 2012] In July 2011 the EU network established a permanent secretariat in the Hague.

<sup>777</sup> The issue of the official translation of the Geneva Conventions also regularly comes up. While the Geneva Conventions had been promulgated by law nr. 32 of 1954, this did not contain the original text or the Hungarian translation. The Hungarian text came out in a specific form, „International treaties from the Minister of Foreign Affairs”, nrs. 2000/17, 2000/18, 2000/19 and 2000/20 for the four Geneva Conventions respectively, these had been issued in the Official Gazette nr. 112 of 2000. It has been often questioned whether this form of promulgating the

As a conclusion, it would be simplistic to blame the individual prosecutors or judges for failing to adequately engage in questions concerning international law with which they had not met before. This problem requires a complex attitude from the state, and examples of many countries demonstrate that if there is a determination to invest a minimal effort in creating units and training personnel, states may be in a much better position when confronted with cases on international crimes.

#### *4.3.4. Role of the judiciary in exercising universal jurisdiction*

Universal jurisdiction is sought to be an enforcement mechanism whose final application and success will be decided in the courtroom. However accurate national legislation may be, its fate will finally be decided by the judges through how they apply it, how they harmonize it with basic legal principles, or whether they decide to put further restriction on its application in the name of the rule of law. In the end, the two factors that the judges will have to consider are international morality *versus* procedural convenience.<sup>778</sup>

Being aware of the motives of universal jurisdiction in the case of war crimes is an important aspect while actually applying it. Therefore judges are not completely free as to the interpretation of universal jurisdiction, but are bound by an interpretation that is consistent with its aim and purpose. At the same time, judges are restricted in the application of universal jurisdiction by basic legal principles, procedural rules and the sovereignty of other states.<sup>779</sup> Based on these latter considerations, application of universal jurisdiction has been blocked by many judges.

With this experience in the background, it is still a question for the future how universal jurisdiction can be made effective in a way that is acceptable for the judges but is also fulfilling the role assigned to it. It seems that pursuing a strict and pragmatic approach where universal jurisdiction is absolute is not workable

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text of the Geneva Conventions is appropriate and confirms with the principle of legality. Although the Hungarian text should have ideally been promulgated in the law of 1954, and the publication of the Hungarian text in a form that is practically not a law is far from an ideal solution, reference to non-availability of the text of the Geneva Conventions cannot be raised in the present author's opinion, especially in light of the fact that this argument had not been accepted by the European Court of Human Rights in the Korbely case either.

<sup>778</sup> SLAUGHTER *op. cit.* 169.

<sup>779</sup> Regarding the relationship between universal jurisdiction and state sovereignty, s. GRAEFRATH *op. cit.* 72–73.

or acceptable in many cases, at the same time, the restrictions judges link to the application of universal jurisdiction often contravene its very essence.

In addition, there are financial aspects influencing the exercise of universal jurisdiction. Collecting evidence in a country far away and where the act may have happened years or decades ago is fairly expensive, and states whose judiciary system is dealing with a continuing lack of resources even for their ordinary judicial procedures will not rush to investigate and prosecute a case which will be inevitably very expensive and does not concern the state directly. Therefore the exercise of universal jurisdiction also depends on the will of the state and the expression of such will in devoting money, manpower and energy into such cases. Countries such as those in Central Europe have typically not taken up such tasks.

#### *4.3.5. National case law on universal jurisdiction*

National case law on universal jurisdiction has substantially appeared only in the recent two decades and there is a tendency of an increasing number of cases. A non-exhaustive list follows below, highlighting some interesting aspects of the application of universal jurisdiction, or cases where the application of universal jurisdiction was controversial and provides a perfect demonstration of the non-legal considerations.

*Belgium*, often mentioned as the pioneer in applying universal jurisdiction, has imposed restrictions on its application. Although Belgian case law is rich in this respect, here only a Supreme Court decision will be highlighted around the much-debated restrictions:

“If ‘[e]ach 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’, as articles 49, 50, 129 and 146 of the four Conventions, respectively, provide, it requires some imagination to construe the provision as requiring that the parties only ‘progressively realize’ the obligation to prosecute war criminals. It may be argued that, because the establishment of an efficient prosecutorial system requires harnessing scarce public resources, the parties to the Conventions might not have intended to impose an obligation on every single State, rich or poor, to prosecute every single war criminal it

finds in its territory. In spite of the plausibility of this argument, in the *travaux préparatoires*, no intent of ‘progressive realization’ appears.”<sup>780</sup>

The Belgian Supreme Court therefore came to the conclusion that the Geneva Conventions’ intention was to oblige states to exercise universal jurisdiction in its full understanding immediately after the coming into force of the Conventions for them, still Belgian courts, before and after this judgment, adopted certain restrictions around its application, that were discussed in more detail in Chapter 3.3.2.

The *United Kingdom* is also among those states that have shown a willingness to exercise universal jurisdiction. A famous example was the recent attempt to arrest Doron Almog, retired Major General of the Israeli Defence Forces. The underlying law was the 1957 Geneva Conventions Act which provides for jurisdiction of courts of the United Kingdom over persons charged with war crimes irrespective of nationality and place of commission of the act.

A law firm filed a report with the authorities charging Almog with war crimes allegedly committed in Rafah, specifically referring to allegations that he had ordered the destruction in 2002 of more than 50 Palestinian homes in the Gaza Strip. On the basis of the report, a London court issued an arrest warrant in September 2005 to be executed against Almog when landing with an El-Al flight in London. However, the information about the intention to arrest was leaked to the Israeli Embassy, whose officers tipped the General, and eventually Almog did not leave the El-Al flight but flew back to Tel Aviv<sup>781</sup>. For fear of clashes between the British police and Almog’s security personnel and El-Al security personnel, the British authorities did not choose to board the flight and execute the arrest there.<sup>782</sup> Following these events, many IDF prominents cancelled their

<sup>780</sup> Belgium, *AZ and Others v FT and Others*, Cass. P.031310.F, Supreme Court of Justice (Cour de Cassation), decision of 14th January 2004, para 2. In the case, AZ and others argued that the 2003 law on universal jurisdiction, which gave the power to deny prosecution based on universal jurisdiction to the Prosecutor, violated the standstill principle. The standstill principle, used mostly in human rights contexts, implies that legislation may not weaken protection compared to what it had already reached. Although the Court found that the standstill principle was not a general principle of law, in 2005 the Constitutional Court found that it should be a court, not the prosecutor, to decide on prosecution.

<sup>781</sup> S. [http://news.bbc.co.uk/2/hi/uk\\_news/7251954.stm](http://news.bbc.co.uk/2/hi/uk_news/7251954.stm) [last visited on 28 March 2012]

<sup>782</sup> For a detailed summary of universal jurisdiction cases against Israeli officials s. CSIGE, Zoltán: Nemzeti bíróságok, mint a palesztin-izraeli konfliktus újabb szinterei – az univerzális joghatóság alkalmazásának egyes kérdései. (National courts as the newest stage of the palestinian – israeli conflict – certain questions of the application of universal jurisdiction) *Kül-Világ*, 2008/5/2.

trips to the UK for fear of arrest. After the 2008/2009 Israeli operations in Gaza, the IDF warned its high-level officers<sup>783</sup> not to travel to states which have legislation in place allowing them to arrest foreign nationals, among them, the United Kingdom.

The *Eichmann* case in Israel, as some scholars suggest, is not really a universal jurisdiction case: “[...] this was a case of distinctly nonuniversal jurisdiction: the Jewish state trying a man for the extermination of the Jews.”<sup>784</sup> One could agree on the first look, but if we think deeper and determine that the Jewish state did not exist when the crime was committed, it is more difficult to say that the case was prosecuted based on ordinary jurisdiction, considering that a state can only exercise ordinary jurisdiction for acts that were committed against its citizens, and citizens obviously only exist when there is a state. So the only jurisdiction that comes at hand is universal jurisdiction, and the Israeli State had as much right and was as much obliged to try war criminals as were any other states.<sup>785</sup> It is just that obviously Israel was more interested in the prosecution than any other State.

One of the main issues that are discussed around the *Eichmann* case is the question of sovereignty. This could remind us of the customary discussion around the compatibility of universal jurisdiction with states’ sovereign right to exercise jurisdiction, however, the real question of sovereignty in *Eichmann* lies somewhere else. The usual issue with state sovereignty lies in that based on universal jurisdiction a non-involved state has jurisdiction to try someone else’s citizen. However, in *Eichmann*, the problem came from the fact that he was kidnapped from Argentina by the Israeli secret forces, and abduction of a State’s national by the forces of another State clearly infringes the former’s sovereignty – a fact also admitted by Israel.<sup>786</sup>

<sup>783</sup> S. <http://www.ynetnews.com/articles/1,7340,L-3658823,00.html> [last visited on 29 November 2011] Such a warning has also been issued earlier, s. [http://www.israeltoday.co.il/NewsItem/tabid/178/nid/9368/mid/436/dnnprintmode/true/Default.aspx?SkinSrc=%5BG%5DSkins%2F\\_default%2FNo+Skin&ContainerSrc=%5BG%5DCContainers%2F\\_default%2FNo+Container](http://www.israeltoday.co.il/NewsItem/tabid/178/nid/9368/mid/436/dnnprintmode/true/Default.aspx?SkinSrc=%5BG%5DSkins%2F_default%2FNo+Skin&ContainerSrc=%5BG%5DCContainers%2F_default%2FNo+Container) [last visited on 29 November 2011]

<sup>784</sup> BASS op. cit. 78.

<sup>785</sup> The Attorney General in the *Eichmann* case underlined: „The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.” S. *Attorney General of Israel v Eichmann*, 36 I.L.R. 277, 304. (Israeli Supreme Court, 1962)

<sup>786</sup> RANDALL op. cit. 812–813.

Thus, universal jurisdiction does not mean that a state can exercise such jurisdiction using any means and it does not give an excuse for any action infringing other states' sovereignty, it merely means that the domestic courts have a special kind of jurisdiction over such crimes. The moral rationale of universal jurisdiction is that the gravest crimes are the concern of humanity as a whole, not only that of the victims. This has been one of the criticisms of Telford Taylor, the American chief prosecutor at the second round of the Nuremberg trials against the Eichmann case.<sup>787</sup>

In March 2009, the Association for the dignity of detainees, a *Spanish* NGO defending human rights, filed a complaint (“plainte”) against US officials, among them Douglas Faith, former Under Secretary of Defense for Policy. In April 2009 the judge ordered a preliminary investigation for having allegedly organizing and establishing a method for the torture, cruel inhuman and degrading treatment of detainees under their control in Guantanamo detention facility. In June 2009, the Parliament approved a reduction of the universal jurisdiction exercised by Spain, as a result of diplomatic pressure exercised on it by, among others, Israel and China. This resulted in that universal jurisdiction can be exercised if the accused is in Spain or if the victims are Spanish nationals. However, this effort was not without any effect : since 2009, news were reporting that the Attorney General appointed a special prosecutor responsible for investigating on the interrogation methods of detainees exercised by the US government after the September 11 attacks<sup>788</sup>.

*Finland* had a case against François Bazaramba, a Rwandan pastor, who allegedly planned and carried out the massacre of more than 5000 persons who were fleeing from the atrocities. Bazaramba lived in Finland since 2003. In June 2009 the prosecutor filed a case against him accusing him of committing genocide, crimes against humanity and war crimes, based on universal jurisdiction. In June 2010 he was sentenced for life imprisonment<sup>789</sup> for genocide and murder<sup>790</sup>. The court argued that it was obliged to try the case as it rejected a request for

<sup>787</sup> S. Bass op. cit. 81.

<sup>788</sup> S. <http://www.foxnews.com/politics/2009/08/24/special-prosecutor-probe-cia-interrogations/> [last visited on 28 March 2012] For developments, see [http://articles.courant.com/2011-06-30/news/hc-durham-terror-interrogations-070120110630\\_1\\_cia-interrogation-techniques-criminal-investigation-secret-cia-prison](http://articles.courant.com/2011-06-30/news/hc-durham-terror-interrogations-070120110630_1_cia-interrogation-techniques-criminal-investigation-secret-cia-prison) [last visited on 28 March 2012]

<sup>789</sup> *Prosecutor v Francois Bazaramba*, R 09/404, Judgment of 11.06.2010, Source: <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/810/action/show/controller/Profile/tab/legal-procedure.html> [last visited on 28 March 2012]

<sup>790</sup> S. [http://www.asser.nl/default.aspx?site\\_id=36&level1=15248&level2=&level3=&textid=39733](http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39733) [last visited on 28 March 2012].

extradition by Rwanda, for fear of a lack of a fair trial<sup>791</sup>. The court thereby applied the *aut dedere aut judicare* principle, in that it *could* not extradite, therefore had to proceed. Although this case was based on genocide and not war crimes, the same logic applies as to the application of the *aut dedere aut judicare* principle.

The French Court of Cassation found in the *Javor* case that the “search for and prosecute” provision has no direct effect, although it did not give an explanation, why<sup>792</sup>.

Australian High Court Judge Brennan opined in the *Polyukhovich* case (The War Crimes Act case) – a remarkable reasoning that digests many of the relevant international and domestic cases related to domestic prosecution of mainly World War Two criminals - that “[t]he universal jurisdiction to try war criminals is a jurisdiction to try those alleged to have committed war crimes as defined by international law [...] But jurisdiction under municipal law to try a municipal law offence which is similar to but not identical with an international crime is not recognized as a jurisdiction conferred or recognized by the law of nations. [...] However, when municipal law adopts the international law definition of a crime as the municipal law definition of the crime, the jurisdiction exercised in applying the municipal law is recognized as an appropriate means of exercising universal jurisdiction under international law. [...] International law distinguishes between crimes as defined by it and crimes as defined by municipal law and it makes a corresponding distinction between jurisdiction to try crimes as defined by international law and jurisdiction to try crimes as defined by municipal law.”<sup>793</sup>

Judge Brennan therefore makes a clear distinction between states exercising jurisdiction in the name of the international community and in the name of their own state and between carrying out a process for a violation of international law. No matter whether this is done based directly on international law or based on municipal law, if the procedure is related to crimes defined by international law, its rules on prosecution, elements of crimes, conditions of punishment have to be respected by the domestic judge.

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<sup>791</sup> S. the press release of the Porvoo District Court at: [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba\\_Press\\_Release\\_EN.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba_Press_Release_EN.pdf) [last visited on 28 March 2012]

<sup>792</sup> S. France, Court of Cassation, *Javor Elvir et al.*, 95–81.527, Judgment of 26 March 1996.

<sup>793</sup> *Polyukhovich v Commonwealth* (“War Crimes Act case”) [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991), High Court of Australia, Judgment, opinion of Judge Brennan. Paras 37–39.

## 5. CONCLUSIONS

One of the weakest points of international law is its enforcement. As the ICRC regularly noted as a response to the argument that international humanitarian law was outdated, the problem is not with the rules of humanitarian law themselves, but with the will to comply with it and the will to enforce it<sup>794</sup>. With international law containing rules that oblige individuals and their violations raising criminal responsibility, the corresponding fields of international law have developed quite substantively. International criminal jurisdiction was established through the setting up of *ad hoc* international tribunals and the International Criminal Court, and now it is clear that violations of international crimes result in individual criminal responsibility. Provisions related to the obligation of states to punish such violations have also developed extensively and, despite the significant progress in international criminal jurisdiction, national courts shall remain the primary forum for such proceedings. It is such domestic proceedings that the present monograph seeks to examine.

In light of the development of international law after the Second World War and the statements of states and international organizations, it seems there is a general commitment by the international community to repress war crimes. Although war crimes and crimes against humanity – although not yet named as such – had already previously been dealt with at the international level, and the Hagenbach-trial proved to be a success and well ahead of its time, attempts at setting up an international tribunal after the First World War failed. Building partially on previous experiences, several mechanisms were established after the Second World War to serve this goal.

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<sup>794</sup> As Angelo Gnaedinger, then Director-General of the ICRC noted, „It must be stressed (...), that in such circumstances [ie. new types of conflicts after 9/11] it is not the rules that are at fault, but the political will of the parties – and of the international community – to enforce them.” S. Angelo GNAEDINGER: Is IHL still relevant in a post-9/11 world? *Global Futures*, 2006/2.



The mechanisms to repress war crimes operate on two levels: on the international and national, developed to work as complementary systems<sup>795</sup>. The Nuremberg and Tokyo tribunals, the 1949 Geneva Conventions and their 1977 Additional Protocols, the establishment of the *ad hoc* tribunals and special and mixed courts and tribunals, as well as the establishment of the International Criminal Court have all supported this development.

A part of this progress in international criminal law is the adoption of individual criminal responsibility with the result that criminal accountability can be directly based on international law. In parallel to this development the list of war crimes under international law has evolved, increased and became more precise, and this development is still in progress. Although numerous writings have dealt with the question of collective responsibility especially after the Second World War, the notion of collective responsibility is difficult to apply in the case of war crimes, and, due to the acceptance of individual criminal responsibility, the concept seems pointless.

In addition, the enforcement of the rules of armed conflicts has become an even more cardinal question since reference to such rules in modern conflicts seems to serve a new military-political purpose, with the result that states are bound to demonstrate that eventual violations are individual acts, thereby denying an underlying state policy.

The Alien Tort Statute adopted in the United States is somewhat similar to the extra-territorial jurisdiction linked to war crimes in criminal cases. The Statute makes reparation claims for victims of serious international crimes available before US courts, irrespective of the place of the commission of the act or the nationality of the offender or the victim. Although these are civil law claims, they are often linked to war crimes due to the nature of the acts, and the procedures and arguments of the parties often set an interesting analogy with criminal proceedings related to war crimes.<sup>796</sup>

Although the concept of universal jurisdiction was adopted in 1949 for grave breaches, its application started only much later. The number of proceedings based on universal jurisdiction is still relatively few, although the number is

<sup>795</sup> Marco SASSÓLI – Julia GRIGNON: Les limites du droit international pénal et de la justice pénale internationale dans la mise en oeuvre du droit international humanitaire. In: *Le droit international humanitaire face aux défis du XXIe siècle*. Bruxelles, Bruylant, 2012. 133–134.

<sup>796</sup> For a detailed analysis on reparation in international law, s. SZABÓ, Marcel: Forms of Reparation in International Case Law. In: SZABÓ, Marcel (ed.): *Emlékkönyv Flachbart Ernő tiszteletére*. Budapest, PPKE-JÁK, 2003. 191–212., and with special regard to the right to reparation for victims of armed conflict, s. Christine EVANS: *The Right to Reparation in International Law for Victims of Armed Conflict*. Cambridge, Cambridge University Press, 2012.

emerging. Even though by today the concept is not new, discussions around its exact meaning and contents and ways of application are still ongoing.

The international and national levels of accountability are therefore complementary elements, putting the primary responsibility to prosecute on states, and only in case of its failure or non-availability do the international tribunals and courts step in. This sharing of responsibility is articulated in the system of the Geneva Conventions and Additional Protocols, and the complementarity principle of the International Criminal Court. This system does make sense, considering that in most cases domestic courts are in the best position to proceed, taking into account the restricted resources of international tribunals.

International law therefore has clearly set obligations relating to the repression of war crimes for more than fifty years. These obligations were at first quite general, but with the development of the law and the jurisprudence of international tribunals, they became more and more elaborate. Obligations now include specific restrictions on defences, certain requirements on national procedures or on basis of jurisdiction. These developments all point to a certain restriction of state sovereignty. From this point on, states are no longer completely free to decide on the criminalization of certain acts but are bound to criminalize them and proceed accordingly, acting not on their own behalf but on that of the international community.

The Geneva Conventions require states to adopt *effective* penal sanctions and other measures for grave breaches and other violations of their rules. Therefore the ratification of the treaties and the adoption of ineffective implementation measures are not enough. The consequences of such reckless implementation become apparent during their actual application. Therefore the legislator is bound to remedy in advance the eventual problems that may arise during the application of international law before domestic courts.

However, since these obligations are stemming from international law, states meet certain difficulties in applying them. These difficulties may arise from different factors. The nature of international lawmaking entails that international rules are less elaborate than domestic rules, and when applied, they have to fulfill the criteria of both the international law requirements and domestic legal guarantees. States used several ways to overcome these problems, depending on their own systems, and it can be stated that no uniform solution exists.

Although international law determining the list of criminal acts, their elements and the conditions of their punishability inevitably constrains the – voluntarily renounced – sovereignty of states, states are free to decide on the modes of

criminalization within the limitations set forth under international law. This is similar to human rights treaties, which now reach beyond the state-citizen relationship and regulate to a certain extent the citizen-citizen relationship as well, when it comes to the violation of basic human rights by another citizen and the obligation of the state to criminalize and punish such violations.

One of the controversial international obligations that was thoroughly examined in the book is universal jurisdiction. As its application also ventures into political considerations, the practice of states is not free from politics. Both legal and political considerations have led to the adoption of restrictions to the application of universal jurisdiction. Certain questions, such as immunity of state officials while exercising universal jurisdiction by a state has not been cleared yet, although there are an emerging number of cases where states did not accept immunity in case of former heads of state or other officials, while they seem to uphold immunity for acting state officials.

State sovereignty is one of the main arguments of those supporting universal jurisdiction only in case of an express authorization under international law. This question is raised mainly in connection with the application of universal jurisdiction for crimes committed in non-international armed conflicts and is a typical example where uncertainty resulting from the formulation of the rule under international law is sought to be corrected by domestic jurisprudence. The application of universal jurisdiction would normally infringe the sovereignty of the state with ordinary jurisdiction, therefore it can be applied only in case of express authorization rendered by a treaty or customary international law – according to the prevailing view in scholarly literature. Although the rule has not entirely crystallized, customary law seems to support this view.

The difficulties of application of international law in domestic systems are not new and not a specificity of international humanitarian law or repression of war crimes. The problems of legal transformation of international rules into domestic criminal law, however, might be even more delicate than in other fields, because complying with international obligations and at the same time fulfilling basic legal guarantees may be contradictory. Notwithstanding these complexities, it is still unacceptable that states repeatedly seem not to take notice of such circumstances and simply refer to the direct applicability of international law.

The analysis of the relationship between international law and national law and its domestic application indicates that due to the primary status of international law in case of a collision with national legislation – even where it collides with the constitution –, these conflicts must be resolved primarily on the level of legislation, otherwise the state's responsibility for non-compliance

with international law shall emerge. This is also true in cases where we are facing self-executing international norms or in legal systems which accept direct applicability of international law in domestic systems. This argument is substantiated by examples where domestic courts cannot deal with problems which arise in consequence of a lack of such harmonization. Therefore states are bound to consider during the adoption of implementing legislation which rules can really be directly applicable and which cannot.

Therefore the discussion on the previous chapters and pages concentrated on demonstrating that although direct application of international law by domestic courts may look easy in theory and may even work in some states without specific measures, in most cases it meets legal barriers and therefore demands a complex attitude. Therefore the question of direct applicability of international law by domestic courts has to be looked at from a practical point of view and ultimately the conclusion must be drawn that – in continental legal systems even more than in Anglo-Saxon systems – direct application only works if the inherent conflicts between international law and national legality guarantees are solved through implementing legislation. This does not mean, however, that judges are bound to rely solely on domestic laws and should not directly rely on international provisions.

States therefore have to decide how they make international obligations workable within their own legal systems and boundaries. In order to do this, they have to take into account the differences in legal sources – international and national –, different legal cultures and legal traditions. There are several ways offered, but the end-result has to be an effective application of international law. Solutions where repression of war crimes will in the end not be available for one or another reason are not enough to arrive at. States therefore have to consider whether or not implementing legislation might infringe basic legal principles, whether or not legal security will exist in the outcome, whether or not their solution will be really smoothly workable and applied in the courtrooms.

The adoption of the Rome Statute of the International Criminal Court gave an important impulse to such harmonization. Namely, in the case of the ICC, there is a direct consequence attached to the non-ability of state proceedings, embodied by the eventual jurisdiction of the ICC. Since all states shall obviously try to prevent ICC jurisdiction in a case affecting them, most states, even non-state parties, have started a comprehensive implementation process. This proved to be even more timely in Central European states, where criminal codes adopted during the communist era were in need of revision anyway.

Although most of the scholarly writings concentrate on the ‘unwillingness’ and ‘inability’ criteria of the complementarity principle, it must be noted that the primary condition for ICC jurisdiction based on the principle of complementarity is the lack of investigations or prosecutions by the state. The criteria of unwillingness and inability listed in the Rome Statute being cumulative, and inaction not being a part of it, if states are not investigating or prosecuting for any reason whatsoever – be it lack of adequate implementing legislation or the non-adequate application of international law by the prosecutor or the judge – the ICC may have jurisdiction. Therefore the demonstration of mere ability or willingness of a state will not be sufficient to bar ICC jurisdiction.

The determination of a state being unable or unwilling to proceed raises the question which considerations the Court will take into account during such examination and whether an international standard exists which could serve as a basis for such analysis. Since it seems that such a standard does not exist, the examination of the ICC will most probably be based on considerations spread between the frameworks set forth by the Rome Statute (elements of crimes, conditions of accountability and so on) and the due process requirements formulated under human rights law.

Examining the relationship between the complementarity principle of the Rome Statute and universal jurisdiction, we may observe that the following order of jurisdictions seemed to appear: (i) war crimes procedures shall be primarily carried out by states having ordinary jurisdiction, as normally it is these states that are most interested in the procedure and possess the most advantageous conditions to follow through with the procedure (presence of the accused, witnesses, documents, etc); (ii) in case states with ordinary jurisdiction do not proceed for some reason, then universal jurisdiction shall be applied; (iii) in case no state proceeds, and other conditions are met, the ICC may take the case. From above, it is clear that although the rules of international law concerning war crimes may have been a source of uncertainty for the domestic legislator and the courts, the Rome Statute seemed to have clarified many questions and appears to have a more direct influence on domestic legislation.

As noted above, there is a fundamental tension resulting from the implementation of crimes determined by the logic of international law into the domestic legislation underpinned by criminal justice guarantees and this situation raises conceptual questions for the states, such as (i) whether international crimes should be regulated in the criminal code, if so, whether ordinary crimes can be applied or separate crimes should be adopted, and in the latter case, whether it is better to transfer the crimes word for word to national legislation or to

re-formulate them; (ii) whether to make a distinction between crimes committed in international and non-international armed conflicts; (iii) how states with continental legal system can apply the conditions of accountability determined on the basis of a mixed, or in most cases, Anglo-Saxon legal tradition; (iv) how they can reconcile the special principles applicable to war crimes with their own legality principles. Most issues mentioned above may be dealt with on the level of national legislation. However, the proof of the pudding is in the eating, and many states amended their legislation after proceeding in one or two relevant cases.

Based on the considerations and questions raised above, the monograph reached the conclusion that although no uniform solution exist – bearing in mind the different legal cultures and traditions of states –, some common elements may be determined. For instance, it did not prove to be a good solution to apply ordinary crimes to war crimes. The reason being that war crimes bear specific elements and determination of violation or non-violation of humanitarian law is founded on so fundamentally different notions that ordinary crimes cannot represent such features.

To give an example, while self-defence must be analysed under domestic law according to certain considerations, the concept bears a very different meaning in the case of war crimes. Similarly, the principle of proportionality in humanitarian law – a notion often decisive for the lawfulness or unlawfulness of the action – is basically untranslatable into ordinary criminal law, still, its consideration may be the decisive element in the assessment of a given action. Proceeding on the basis of ordinary crimes yields further dangers. It is notably difficult to apply the non-applicability of statute of limitations or universal jurisdiction to war crimes while these are understood differently for ordinary crimes.

Examining certain states' legislation and practice we may arrive at the general conclusion that in most cases a direct reference to international law may not provide a full solution either. In practice, eventual conflicts or non-compliance with the legality principle caused the biggest problems. The *nullum crimen sine lege*, especially the *nullum crimen sine lege certa*, and the *nulla poena sine lege* principles are difficult to apply in full in case of a direct reference. This is because international law typically does not attach sanctions to crimes and its elements are not as clear and well defined as domestic law usually requires. Moreover, the elements of crimes of the Rome Statute are enshrined in a document lacking obligatory power, the reference to which may also raise issues of legality.

Reference to customary law may also raise the question of clarity and the well-defined formulation of crimes. Direct application of customary law may prove

to be most demanding in states where no national law, not even the constitution declares the applicability of customary law in domestic law.

When examining the influence that international tribunals and the ICC exert on domestic courts, it may be observed that although especially the procedural rules are based on completely different considerations for international bodies, they nevertheless do have an effect on domestic courts. In the case of substantive law, such effects may be detected in the determination of the elements of crimes, the determination of customary rules and the interpretation of the conditions of accountability; in the case of procedural rules, it would be the specific rules of international crimes that have an effect, such as the protection of victims and witnesses. It must also be mentioned that international courts also refer to domestic jurisprudence.

The completion strategies of the ICTY and ICTR prompted both Tribunals to hand over cases to domestic courts. Although this had been more successful in case of the ICTY, in both cases such hand-overs – be it based on the “Rules of the Road program”, or based on Rule 11*bis* – resulted in a significant development of domestic systems dealing with international crimes cases. In the case of post-Yugoslav states, the setting-up of special courts or special departments within existing courts and the existence of international experts, as well as the adoption of new criminal codes and criminal procedure codes have considerably raised the level of national expertise and resulted in more and more autonomous and high-level proceedings. In the case of Rwanda, the potential of 11*bis* cases reaching Rwandese authorities resulted in the adoption of numerous pieces of legislation to satisfy fair trial requirements and ultimately to make 11*bis* referrals viable.

Obviously, the outcome and success of war crime trials also depends on prosecutors and judges. The present study repeatedly mentions the reluctance of prosecutors and judges in directly applying international law. That they are reluctant to apply a completely foreign body of law in a procedure where they have to comply with standards given within their own legal system is by far not to wonder. This is a phenomenon that always reminds us of the necessity of states to realize that if they want prosecutors and judges to work with international law with more comfort, they have to provide them with sufficient ammunition, such as training, availability of documents, experience gained from other countries, motivation to work with war crimes cases and so forth. Without the provision of such resources it cannot be expected that international law will successfully be applied in domestic courtrooms. Looking at the practice of more experienced states, the present book arrived at the conclusion that training and establishing a group of experts dealing with war crimes (and other international crimes)

under the auspices of both investigative and immigration authorities as well as courts may in itself guarantee effective procedures compatible with international obligations.

The topic of the present debate deserves further study in various fields. The emerging number of domestic procedures inevitably results in a growing number of cases in front of the European Court of Human Rights. The Court, it seems, happily dives into questions of evidence, facts and law, questions that should be decided by domestic courts. An analysis of the practice of the ECtHR on cases relating to international humanitarian law and the growing, and according to the views of the present author, questionable, activism of the ECtHR in elements of domestic cases that are not under its jurisdiction would definitely deserve attention. Furthermore, the ICC's future jurisprudence on weighing the complementarity principle, more precisely the inactivity and the inability/unwillingness criteria will certainly shed light on the precise obligations of states to evade ICC jurisdiction.

Another matter that deserves attention is the development in national practice around the acceptance of immunity of state officials in universal jurisdiction cases. This is an important aspect of universal jurisdiction, since immunity was the most often applied obstacle to proceedings.

Issues as to the 'legal imperialism' applied by Western states directly or through the ICTY and ICTR in *11bis* cases or the ICC in assessing the admissibility of a case under the complementarity principle also deserve further examination. The search for a healthy balance between the need to fight impunity and respect for legal traditions of states and regions is inevitable to a functional system of international criminal justice, be it under international or national fora, and will certainly be an important question in the future.

A similar issue that deserves further attention is the neo-colonialism argument often raised with respect to the application of universal jurisdiction. As is apparent from the AU-EU expert report on universal jurisdiction, African states feel that the application of universal jurisdiction by European states is primarily directed against African states, and evokes feelings of colonialism. While the list of universal jurisdiction cases does not support the argument of pinpointing African states, its application is doubtlessly a sensitive issue, especially when it concerns foreign heads of state or other senior state officials. Since the primary aim is to end impunity, the ideal solution would be if the territorial/nationality states could and would proceed. Therefore efforts should be strengthened to increasing the capacity of such states and the application of universal jurisdiction should only be a last resort.



In sum, it must be noted that generally the activity of domestic courts is increasing with respect to prosecuting war crimes; however, it seems that the legislative and practical background – especially in Central European states – although already under development, still needs improvement. Scholarly literature has recently started to deal with this specific issue and a dialogue not only among academic circles, but also involving experts from the practice would be highly desirable. Examples of certain states demonstrate that once a general discussion has begun on the issue, it is always followed by an improvement in the awareness about the problem, legislation and general approach. The present monograph attempted to provide a contribution to this effort, with the hope that such discussions will also continue in Hungary.

**ANNEX:**  
**Legislation related to the prosecution of war crimes in selected  
Central European countries<sup>797</sup>**

	<b>Poland<sup>798</sup></b>	<b>Hungary<sup>799</sup></b>	<b>Czech Republic<sup>800</sup></b>	<b>Slovenia<sup>801</sup></b>	<b>Slovakia<sup>802</sup></b>
<b>Universal jurisdiction</b>	Yes (if Poland is obliged by international treaties to prosecute and if no decision on extradition has been made)	Yes (if international treaty promulgated in law stipulates)	(i) Yes, for certain war crimes (ii) for other war crimes yes, but only if the offender is apprehended on the territory of the Czech Republic and was not extradited	Yes, if the person has been apprehended in Slovenia and is not extradited, for crimes for which international agreement establishes universal jurisdiction	Yes for certain war crimes

<sup>797</sup> Specific references to articles are not indicated to avoid heavy footnoting. These references are available with the author on request. The table was prepared partially based on the research undertaken by the author for REDRESS/FIDH on universal jurisdiction. The REDRESS/FIDH report, including the findings of the research, are available at: [http://www.redress.org/downloads/publications/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union.pdf](http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf) [last visited on 21 March 2012]

<sup>798</sup> Answers are based on the following legislation: Criminal Code of 1997 as amended (substantial amendments were adopted in 2009), Penal Procedure Code of 1997 as amended.

<sup>799</sup> Answers are based on the following legislation: Criminal Code Nr. 100 of 2012, Criminal Procedure Code Nr. 19 of 1998, The Basic Law of Hungary.

<sup>800</sup> Answers are based on the following legislation: Criminal Code (Act No. 40/2009 of the Collection of Laws) as amended, Code of Criminal Procedure (Act No. 141/1961 of the Collection of Laws) as amended, Constitution of the Czech Republic of December 16, 1992.

<sup>801</sup> Answers are based on the following legislation: Criminal Code (Official Gazette No. 55/2008, corrected No. 66/2008), Criminal Procedure Act (Official Gazette of the RS, No. 32/2007), Constitution of the Republic of Slovenia.

<sup>802</sup> Code of Criminal Procedure, Criminal Code (Law no. 300/2005 coll.) as amended.

<b>Discretion to launch proceedings of war crimes</b>	Prosecutor <i>ex officio</i>	Prosecutor General	Prosecutor	Prosecutor / private prosecutor, but it can be overruled by a panel of investigating judges	Prosecutor General
<b>Who decides on extradition?</b>	If extradition is requested, Voivodship Court decides. Minister of Justice may request another state to take over (if accused is foreigner)	Extradition request is received and sent by the Minister of Justice or the Prosecutor General. Extradition request is decided by the Metropolitan Court.	No information	No information	No information
<b>Is subsidiarity a requirement for universal jurisdiction cases?</b>	Yes, universal jurisdiction only applicable if no extradition was made	No rules	No information	Yes, universal jurisdiction only applicable if no extradition was made	No information
<b>Can own national be extradited for war crimes?</b>	Yes	Yes	No information	No information	No information

<b>Case law on universal jurisdiction?</b>	No	No. Civil party prosecution was filed at the General Prosecutor's Office against the government of Israel for acts committed during the operation in Gaza in 2008/2009, based on universal jurisdiction. Application rejected.	No	No	No
<b>In absentia proceedings</b>	Presence of the accused at the first instance hearing is mandatory, unless otherwise provided by law. If the accused, notified of the date of the hearing, states that he will not participate, the court may continue the hearing without his presence, unless it finds the presence of the accused indispensable.	The fact that the location of the defendant is unknown shall not be an obstacle of the proceedings. Absence of accused is not an obstacle to proceed with the investigation. In case the accused is abroad and there is no place for extradition the prosecutor may initiate that the trial is held in the absence of the accused.	Yes	No for universal jurisdiction cases. Yes for ordinary jurisdiction cases, if his defence counsel is present at the trial and if the defendant has already been heard.	No information

<b>Statute of limitation applies for war crimes</b>	No	No	No	No	No
<b>Immunity applies for war crimes</b>	Diplomatic immunity. If immunity is granted by international law.	As governed by international law, and immunity based on national law.	Not clear, whether usual domestic law-based immunities also apply for war crimes.	Yes, for MPs, members of the National Council, Constitutional Court judges, judges; and for persons based on international law (these are not excluded for war crimes!)	Yes, immunities afforded by domestic law and international law
<b>Private prosecution/ substitute prosecution</b>	Yes (injured person). The public prosecutor's withdrawal of the charges does not deprive the subsidiary prosecutor of his right to press charges	Yes, but ultimately prosecutor decides.	No information	Yes	No information
<b>Domestic arrangements to investigate/ prosecute serious international crimes</b>	No specific measures	No specific measures	No specific measures	Special group established in 1994 within the Criminal Police Directorate to investigate crimes committed after World War II	No specific measures

<b>Legal basis for cooperation with ICC</b>	Yes (2004 amendment to the Penal Code). The cooperation will be implemented by the court or prosecutor through the Minister of Justice	Partially. ICC Rome Statute was not promulgated. However, ICC requests are handled similarly to general cooperation requests.	No information	No information	No information
<b>Case law on war crimes</b>	Yes. Case launched in 2007 against soldiers for unlawful attacks against civilians in Afghanistan. All acquitted	Yes. Cases concerning the 1956 revolution. Latest: case against Béla Biszku, former Minister of Interior.	No information	Not on war crimes, but a case on crimes against humanity involving massacres committed after the Second World War, killing political opponents of the communist regime	No



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## International treaties

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The present book discusses the different questions arising in the framework of the domestic repression of war crimes, both during the implementation phase as well as its application: the war crimes procedures. Besides discussing legal questions, primarily from the perspective of criminal justice guarantees and their possible conflict with the repression of war crimes, the book also deals with practical questions that may emerge as obstacles during domestic war crime trials.

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