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# ICL and Legal Pluralism – Straddling Cosmopolitan Aims and Distributed Enforcement*

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## 1. Introduction

The debate about legal pluralism in international criminal law started as part of a broader debate in international law on fragmentation. In 2000, the International Law Commission added to its programme of work the topic "Risks Ensuing from the Fragmentation of International Law."[1] Koskenniemi, in a 2002 paper published in the *Leiden Journal of International Law*, was one of the first to address fragmentation in international law.[2] In 2006, he produced a voluminous report providing for means and ways to cope with fragmentation.[3] What had sparked the debate about fragmentation was the proliferation of international criminal courts and tribunals.[4] The development of international criminal law as a specialist regime of international law was perceived as posing a risk to the coherence and homogeneity of international law. Much of the anxiety over fragmentation stemmed from the collision between the International Court of Justice ("ICJ") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") over the "overall control-test" in the *Tadić* case, in which the ICTY departed from settled ICJ law on attribution of liability and on qualification of the nature of an armed conflict, employing a standard of "effective control."[5] The fact that the ICTY had earlier referred to itself as a "self-contained' system"[6] fuelled these concerns over fragmentation.

International criminal law is not a single unified body of norms, and the pluralism paradigm is useful to describe its heterogeneity. We can go further and grant pluralism a normative claim,[7] embracing its cross-fertilization and legal dialogue potential. Pluralism in international criminal law, however, has come under attack.

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[1] U.N. GAOR, 55th Sess., U.N. Doc. A/55/10 (May 1–June 9 and July 10–Aug. 18, 2000), chapter IX.A.1, ¶ 729.

[2] Martti Koskeniemmi and Päivi Leino, "Fragmentation of International Law?: Postmodern Anxieties," *Leiden Journal of International Law* 15, no. 3 (Sept. 2002): 553–79.

[3] International Law Commission, Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law of Its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006,).

[4] For an overview, see Carsten Stahn and Larissa van den Herik, eds., "'Fragmentation,' Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?," in *The Diversification and Fragmentation of International Criminal Law* (Leiden: Brill-Nijhoff, 2012), 21–89.

[5] *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999.

[6] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, ¶ 11.

[7] James G. Stewart and Asad Kiyani, "The Ahistoricism of Legal Pluralism in International Criminal Law," *American Journal of Comparative Law* 65, no. 2 (June 2017): 393–449, 395–96.

Attributing to pluralism a normative claim is said to defy international criminal law's cosmopolitan ethos and universalist core.[8] Moreover, it is said to undermine principles of legal certainty and universal jurisdiction.[9] Stewart and Kayani in a recent piece on legal pluralism go further and blame legal pluralism for leaving intact transplants of colonialist rule.[10] Legal pluralism, in their view, results in normative distortions, a cover up of a system of subjugation.[11] They claim there is "nothing inherently good about legal pluralism" and argue in favour of a universal international criminal law.[12]

How to balance the pluralist reality of international criminal law with its universalist pretension? Legal pluralism is, in my view, inherent in international criminal law and impossible to deny, prevent or halt. Enforcement of international criminal law is out-sourced to a large number of different bodies and institutions. It is bound to result in differing interpretations and approaches. We do not need to adopt a normative stance to argue in favour of international criminal law reflecting local values when enforced at the local level. Local justice will reflect such values by the mere fact that its norm-enforcers are local. Criticizing any normative claim of pluralism is denying international criminal law's distributed nature. Greenwalt, in what is one of the early and leading papers on pluralism in international criminal law, argues that the search for consistency and uniformity is misguided.[13] International criminal law, he writes, "operates in an irreducibly pluralistic environment," and the law applicable to international crimes "should not be the same in all cases."[14] This is why international criminal law scholars, instead of striving for unity, call for ways of managing pluralism.[15]

In this chapter, I aim to answer the question of how to do justice to the universalist claim of international criminal law as an inherently pluralist body of law. I leave the descriptive-normative debate aside and take the pluralist nature of international criminal law as a given. Pluralism is the starting point from which to explore the questions and challenges it raises in the realm of international criminal law. Section II sets out the tension between pluralism and universalism at the International Criminal Court ("ICC"). Section III discusses the complementarity principle that underlies the ICC to explore whether it can encourage international harmonization. Section IV discusses domestic criminal justice. The *Van Anraat* case serves as a case study to illustrate the practice of enforcing international criminal law at the domestic/national level. As an interim conclusion, I propose that a mixed approach, applying both national and international criminal law norms in enforcing international criminal law, is a viable way to operate in a pluralist context. In Section V, I challenge the mixed approach by discussing the (apparent) oddity of applying local

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[8] Ibid., 393–449.
[9] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept," *Journal of International Criminal Justice* 2, no. 3 (Sept. 2004): 735–60, 743–44.
[10] Stewart and Kiyani, *supra* note 7, 393–449.
[11] Ibid., 413, 448.
[12] Ibid., 448. Here, Stewart and Kiyani cite Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Amsterdam: Elsevier, 2002), 89.
[13] Alexander K. A. Greenwalt, "The Pluralism of International Criminal Law," *Indiana Law Journal* 86, no. 3 (Summer 2011): 1063–130. See also Elies van Sliedregt and Sergey Vasiliev, eds., "Pluralism: A New Framework for International Criminal Justice," in *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), 3–39.
[14] Greenwalt, *supra* note 13, 5.
[15] Ibid.; Stahn and van den Herik, supra note 4; Elies van Sliedregt and Sergey Vasiliev, eds., "Pluralism: A New Framework for International Criminal Justice," in *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), 3–39.

law on the basis of universal jurisdiction. I look into the *Alema* case, which raises questions over legality and legitimacy in cases where courts impose local norms on non-nationals (at the time of the offences) for crimes committed abroad. Based on the analysis, which essentially comes down to nuancing international criminal law's universalist claim and arguing in favour of allowing room for local justice based on local norms, I formulate principles to manage legal pluralism while doing justice, as much as possible, to the universalist and cosmopolitan ethos of international criminal law.

## 2. Pluralism and the ICC

There are at least two reasons that account for the pluralist nature of international criminal law. First of all, international criminal courts and tribunals create distinct legal spaces; they each have their own statute, jurisdiction, and mandate. International lawyers, to quote Koskeniemmi and Leino "[h]ave always had to cope with the absence of a single source of normative validity."[16] This is particularly the case with international criminal law. With a well-developed body of ad hoc tribunal case law, an emerging body of case law at the ICC, hybrid, national-international systems like the Cambodia Tribunal and the Special Court of Sierra Leone ("SCSL"), and more and more domestic prosecutions, international criminal law can be referred to as inherently pluralist. This inherently pluralist nature might be thought to hamper judicial dialogue, though it might also foster it.[17]

The ICC most prominently functions as a separate legal system.[18] This is due to its institutional layout, in particular its approach to sources of law. Unlike Article 38 of the Statute of the ICJ, Article 21 of the ICC Statute creates a hierarchy of sources. The Statute, the Elements of Crime and the Rules of Procedure and Evidence—ICC-specific documents—are the primary sources. Applicable treaties and the principles and rules of international law come second. General principles derived from national law come third. Customary international law is not specifically mentioned in Article 21, but it may be applied under the heading "rules of international law" in Article 21(1)(b). Moreover, the ICC, by referring to the provisions of its Statute, can justifiably ignore the precedents of other courts; paragraph 21(2) only refers to principles and interpretations from its *own* decisions. Article 21—at least on paper—limits room for judicial development via inter-court judicial dialogue and cross-fertilization.

Secondly, international criminal law is enforced via national criminal justice systems. With the establishment of the ICC, which is a last resort court premised on the principle of complementarity, the paradigm of international criminal law has shifted to domestic criminal justice. States Parties to the ICC are expected to take up international crimes prosecutions; only when a local system is inactive, or unwilling or unable to investigate or prosecute, does the ICC step in. Setting up the ICC as a complementary, last resort court with a regime that favours domestic prosecution comes with domestic enforcement and hence legal pluralism.

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[16] Koskeniemmi and Leino, *supra* note 2, 558.

[17] The Statute of the Special Court for Sierra Leone, for instance, stipulates that appellate judges shall be "guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda." See Statute of the Special Court for Sierra Leone art. 20(3), Jan. 16, 2002, 2178 U.N.T.S. 138. Moreover, the Rules of Procedure and Evidence of the International Criminal Tribunal of Rwanda shall apply *mutatis mutandis* to the proceedings at the SCSL. See ibid., art. 14(1). This explicit alignment of tribunal law is, however, an exception.

[18] Robert Cryer, "Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources," *New Criminal Law Review* 12, no. 3 (Summer 2009): 390–405, 394.

There are, however, ways of attempting to limit pluralism. So far, two mechanisms have been used: (i) outreach activities providing guidance to domestic lawmakers and legal professionals and (ii) inter-court, judicial dialogue. An example of the former is the Legal Tools Project at the ICC.[19] The project has a twofold purpose under the communal banner of "knowledge distribution." First, it facilitates implementation of the ICC Statute in the domestic sphere.[20] Second, through a software platform—the so-called "Case Matrix"—it assists in organizing case files, aligning it with work processes at the ICC.[21] As to the latter approach, judicial dialogue can limit pluralism amongst international courts because while international statutes may create distinct legal regimes, there is overlap in the substantive normative framework, in particular with regard to the core crimes and modes of liability. Cross-fertilization and inter-court judicial dialogue may engender a more coherent and maybe eventually even a uniform body of international criminal law that can guide domestic judges and lawmakers. Judicial dialogue amongst international courts requires an attitude of comity, of feeling part of a community of courts that share aims and purposes.[22] Pauwelyn's metaphor of a universe of inter-connected islands comes to mind.[23]

In the early years of its existence, the ICC forged a distinct path away from ad hoc tribunal case law.[24] More recently, the ICC has been more open and engaged in judicial dialogue with other international courts. In 2018, ICC President Fernández de Gurmedi made clear that international judicial institutions "are all part of an interconnected global justice system."[25] She admitted that "our mandates and jurisdictions are distinct but we all share a unique and same goal, which is to ensure accountability and solve conflicts through justice," recognizing this state of connectedness contributes to building a more unified international justice system. Through interpretation and judicial dialogue certain statutory differences can be overcome. Let me give two examples.

ICTY law and ICC law, at least on the face of it, differ on the definition of crimes against humanity and the concept of command responsibility.[26] Unlike the definition of crimes against humanity in the ICTY Statute, the ICC's definition requires that crimes are committed as part of a widespread or systematic attack that is "pursuant to

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[19] See Legal Tools Database, accessed May 22, 2019, https://www.legal-tools.org.

[20] It provides for a tool-kit and guidelines on how to implement the ICC Statute in the domestic law framework. *Implementing the Rome Statute of the International Criminal Court* (Centre for International Law Research and Policy, Sept. 2017), https://www.legal-tools.org/doc/e05157/pdf/.

[21] See Morten Bergsmo, Olympia Bekou, and Annika Jones, "New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project," *Human Rights Law Review* 10, no. 4 (Dec. 2010): 715–29; Morten Bergsmo, ed., *Active Complementarity: Legal Information Transfer* (Oslo: Torkel Opsahl Academic EPublisher, 2011).

[22] Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44, no. 1 (Winter 2003): 191–219; Charles H. Koch Jr., "Judicial Dialogue for Legal Multiculturalism," *Michigan Journal of International Law* 25, no. 4 (Summer 2004): 879–902.

[23] Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands," *Michigan Journal of International Law* 25, no. 4 (Summer 2004): 903–16.

[24] Cryer, *supra* note 18.

[25] Silvia Fernández de Gurmendi, "Complementarity and Cooperation of Courts in an Interconnected Global Justice System" (opening remarks, ICC Judicial Seminar, The Hague, The Netherlands, Jan. 18, 2018), https://www.icc-cpi.int/itemsDocuments/180118-pres-stat-ENG.pdf.

[26] Miles Jackson, "Command Responsibility," in *Modes of Liability in International Criminal Law*, eds. Jérôme d'Hemptinne, Robert Roth, and Elies van Sliedregt (Cambridge: Cambridge University Press, 2019), 409–30, 428.

or in furtherance of a State or organizational *policy* to commit such attack."[27] By inserting what seems an additional threshold, ICC law provides for a narrower concept of crimes against humanity than the ICTY Statute. However, as Cupido has argued, looking at how crimes against humanity are proven at the ICTY, there is actually no difference with the ICC. In ICTY case law, policy is an evidentiary factor that proves that an attack was systematic. Recognizing that this statutory difference is not a "real" one when it comes to the application of the law means ICC courts can apply ICTY case law regarding the systematic nature of an attack.

The ICC concept of command responsibility, codified in article 28 of the Statute, is unique in that it requires an explicit causal link; crimes must have been committed "as a result of a failure to act" by the commander/superior. The ICTY, however, insists that causation as a *conditio sine qua non* is not part of the theory command responsibility.[28] Despite this difference between the command responsibility concepts, the ICC seeks alignment with ICTY law. In the *Bemba* case, the ICC effectively concluded that the causal element does not make sense as a general requirement for command responsibility.[29] While there is still some ambiguity on the causation element,[30] the law on command responsibility is aligned as much as possible to earlier international jurisprudence. Jackson in a recent study on command responsibility therefore concludes that, since World War II, the law on command responsibility is generally settled.[31]

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[27] Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], art. 7(2) (emphasis added).

[28] "Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject." ICTY, *Delalić et al.,* Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para 398; see also Chantal Meloni, "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?," *Journal of International Criminal Justice* 5, no. 3 (2007): 619–37, 629–30.

[29] The ICC Pre-Trial Chamber held that the clause "as a result of his or her failure to exercise control" did not refer to the duty to punish. ICC, *Bemba*, Decision of the Pre-Trial Chamber Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/08, 15 June 2009, ¶ 424. But see Darryl Robinson, "How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution," *Melbourne Journal of International Law* 13, no. 1 (June 2012): 1–58, 56–57 on how failures to punish may aggravate the risk of the commission of *subsequent* crimes.

[30] The ICC Appeals Chamber was split on the question whether the causal element is required for a commander's duty to prevent crimes. ICC, *Bemba,* Appeal Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08 A, 8 June 2018. Judges Morrison and Van den Wyngaert took the position that Article 28 "does not—and should not—require that the commander's failure caused his or her subordinates to commit crimes." Ibid., ¶ 56 (Separate Opinion of Judge Van Den Wyngaert and Judge Morrison). The Dissenting Opinion of Judges Monageng and Hofmanski disagreed, and adopted the approach set out by Judge Steiner in the Trial Chamber, to the effect that "the causality requirement would be satisfied where, at least, there is a *high probability* that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed." Ibid., ¶ 339 (Dissenting Opinion of Judge Monageng and Judge Hofmanski) (citing ICC, *Bemba,* Trial Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, (Separate Opinion of Judge Steiner), ¶ 24).

[31] Marjolein Cupido, "The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate," *Criminal Law Forum* 22, no. 3 (Sept. 2011): 275–309; see also Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," *American Journal of International Law* 93, no. 1 (Jan. 1999): 43–57, 47; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. (The Hague: Kluwer Law International, 1999), 244–46; William A. Schabas, "State Policy as an Element of International Crimes," *Journal of Criminal Law & Criminology* 98, no. 3 (Spring 2008): 953—82.

Building integrated international criminal law will limit pluralism at the domestic level when enforcing international criminal law. After all, it solves the dilemma for domestic courts who seek for guidance in international jurisprudence from deciding which law to apply: ICTY law or ICC law?

## 3. Complementarity: Encouraging Harmonization?

Central to the ICC system of international criminal justice is the complementarity principle.[32] Article 17(1)(a) of the ICC Statute stipulates that a case is inadmissible where it 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. State Parties retain the primary responsibility to investigate and prosecute crimes falling under the jurisdiction of the Court.

### *A. Positive Complementarity*

The ICC Statute is clear: national jurisdictions play a central part in pursuing the aim of ending impunity for international crimes.[33] Paragraph 6 of the ICC Statute calls it "a duty" of every State to exercise its criminal jurisdiction over those responsible for international crimes.[34] The Statute does not make clear what this duty entails and to what extent there is deference with regard to domestic criminal law traditions and concepts when prosecuting international crimes.

Does it for instance, limit the discretion of a domestic prosecutor to decide not to prosecute? The answer seems to be in the negative. In negotiating Article 17 of the ICC Statute, there was a stand-offish approach to domestic criminal justice affairs. Holmes recalls that "the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases."[35] This leaves discretion on the part of the Prosecutor and does not impose a duty to investigate or prosecute. In speaking of the "most obvious cases," Holmes seems to allude to those situations where national proceedings are used to shield a person from prosecution.

In practice, the ICC does not wait until states "fail" the complementarity test.[36] The Office of the Prosecutor ("OTP") works with national authorities to try and achieve complementarity through active monitoring and assistance.[37] A good example of this

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[32] See most comprehensively, Carsten Stahn and Mohamed M. El Zeidy, eds., *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

[33] Paragraph 4 of the Preamble of the ICC Statute reads: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." See ICC Statute, *supra* note 27.

[34] Ibid., ¶ 6.

[35] John T. Holmes, "Complementarity *The Rome Statute of the International Criminal Court: A Commentary* I, eds. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 675.

[36] Carsten Stahn, "Complementarity: A Tale of Two Notions," *Criminal Law Forum* 19, no. 1 (Mar. 2008): 87–113; William W. Burke-White, "Proactive Complementarity: The ICC and National Courts in the Rome System of Justice," *Harvard International Law Journal* 49, no. 1 (Winter 2008): 53–108.

[37] Positive complementarity is the OTP's proactive policy by which states are enabled to meet complementarity in practice. This policy was elaborated by the OTP in its 2003 informal expert paper on complementarity: "The Principle of Complementarity in Practice," ICC-01/04-01/07-1008-Ann.A

"positive complementarity" approach is the situation in Colombia where the OTP has monitored the peace process and its transitional and accountability processes to ensure there is an accountability mechanism in place.[38] In the Strategic Plan 2016–2018, the OTP mentions a number of tools it employs to comply with complementarity: knowledge centres, evidence sharing, open-source crime databases, platforms for exchanging confidential information, and capacity building by third parties.[39]

At the heart of the admissibility system of article 17 lies the concept of genuineness. In article 17(2), where the Statute deals with "unwillingness," it lists a number of situations that trigger the ICC to consider a case admissible: sham proceedings, delayed proceedings, and non-independent and non-impartial proceedings.[40] They all concern the situation where a State Party does not *genuinely* take up or proceed with an investigation, prosecution or a trial.[41] Inability in article 17(3) is not defined apart from being qualified to situations where there is a total or substantial collapse or unavailability of a State's national judicial system. This is understandable: "unable" is more objective and fact-driven than "unwilling."[42]

*B. Shaping Substantive Law: Crime Definitions*

While signing on to the Rome Statute does not impose upon States a duty to exercise jurisdiction, it certainly *encourages* States to do so.[43] According to Benzing, ICC membership requires State Parties to make their system of criminal law enforcement more effective.[44] The question is to what extent does this affect substantive criminal law? Does it require State Parties to incorporate the crime definitions of the ICC Statute? According to Robinson, a State Party could in theory satisfy the complementarity test by relying on existing national offences such as murder and

30-03-2009 1/37 CB T, ICC-OTP 2003, adopted in 2006 in "Report on Prosecutorial Strategy," Sept. 14, 2006.

[38] John Vervaele, "Transitional Criminal Justice in Colombia and Complementarity Policy under the Rome Statute of the International Criminal Court," in *Alternative Systems of Crime Control: National, Transnational, and International Dimensions*, eds. Ulrich Sieber et al. (Berlin: Duncker & Humblot, 2018), XXX–XXX.

[39] Office of the Prosecutor, ICC, *Strategic Plan 2016–2018* (July 6, 2015), 32–33, http://www.legal-tools.org/doc/7ae957/pdf/.

[40] Art. 17(1) of the ICC Statute:

> 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;
> (c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.

[41] John Holmes, "Complementarity", 676.

[42] Ibid., 677.

[43] See Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity," *Max Planck Yearbook of United Nations Law* 7, no. 1 (2003): 591–632, 596.

[44] Benzing, *supra* note 43.

assault.[45] He points out, however, that this has risks because the penalty or stigma attached to a certain national offence does not reflect the seriousness of the crime under international law. Whether this is considered "unwillingness" on the part of the State Party, triggering the ICC's jurisdiction is not clear. In 2006, the ICTR refused a request of the ICTR prosecutor to transfer a genocide case to Norway, arguing that the country lacked specific laws on cases of war crimes. The defendant, former Rwandan business official Michael Bagaragaza, was charged with conspiracy to commit genocide for arming and training a militia to carry out attacks on Tutsi civilians. The Tribunal ruled that charges for multiple murder would not reflect the gravity of the charges[46] and eventually decided to try Bagaragaza itself (after he pleaded guilty).[47] The safest approach is to pass legislation recognizing genocide, crimes against humanity, and war crimes as distinct offences. This does not necessarily require a verbatim incorporation of ICC offences. Some States Parties have opted for crime definitions in their own terminology, making clear they comply with customary international law.[48] Other States have relied on crime definitions already implemented in their law as a result of ratifying the Genocide Convention and Geneva Conventions. They may have expanded the jurisdictional reach of these provisions as treaties may have more limited jurisdictional clauses than the ICC Statute.[49] In some cases, however, States have adopted in their legislation crime definitions that deviate substantially from treaty provisions. France, for instance, has added to the four groups protected by the Genocide Convention (national, ethnical, racial, and religious group) to include individuals who are a member of a group that is discriminated against on the basis of "any other arbitrary trait."[50] While this is not in line with the Genocide Convention and international case law interpreting it, it is hard to see how the ICC would seize on a case where more rather than less protection is offered to victims.[51] Robinson puts it succinctly: States in incorporating international crime definitions are less likely to be

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[45] Darryl Robinson, "The Rome Statute and its Impact on National Law," in *The Rome Statute of the International Criminal Court: A Commentary* I, eds. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 1849–1869, 1861.

[46] ICTR, *Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway (Trial Chamber), 19 May 2006, ¶ 16.

[47] ICTR, *Bagaragaza*, Sentencing Judgment (Appeals Chamber), 17 November 2009.

[48] Here we can refer to the German Code of International Criminal Justice, where the ICC's war crimes provision is largely redrafted reflecting different categories of war crimes than the ones in article 8 of the ICC Statute. See the Völkerstrafgesetzbuch, arts. 6–8.

[49] The Genocide Convention of 1948 only provides for territorial jurisdiction in article VI:

> 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.

[50] Genocide in article 211-1 of the French Penal Code is defined as follows: "Constitue un génocide le fait, en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou *d'un groupe déterminé à partir de tout autre critère arbitraire*, de commettre ou de faire commettre, à l'encontre de membres de ce groupe" (emphasis added).

[51] Going beyond settled international crime definitions, can, however, be a violation of the legality principle. In the *Jorgic* case where a German court had applied a broad and somewhat controversial interpretation of the genocide definition in convicting a Bosnian war criminal, the European Court of Human Rights determined that foreseeability plays a role when an interpretation or domestic provision is so outlandish that it was not foreseeable for a defendant that his/her conduct would amount to the commission of that particular international crime. The Court ruled that there must be consistency with the *essence of that offence* to be considered foreseeable. *Jorgic v Germany*, European Court of Human Rights, 12 July 2007, Application number 74613/01, ¶¶ 103–16, in particular ¶ 109.

found "unwilling" when definitions in domestic law are broader rather than more narrow than the international definitions.[52]

*C. Shaping Substantive Law: Modes of Liability*

Does signing the Rome Statute mean that its modes of liability need to be copied into domestic law? Article 25(3) of the ICC Statute provides for individual perpetration, joint perpetration, direct and indirect perpetration, as well as liability for attempt, ordering, inciting, aiding/abetting crimes and participating in a common criminal purpose. Van der Wilt argues that the complementarity regime does not extend to the general part of a State Party's criminal law.[53] It is difficult to see how concepts of liability that have been part of time-honoured domestic criminal law should give way to the ICC modes of liability.[54] This would have the undesirable effect of creating two types of criminal responsibility in one and the same criminal justice system: one for international crimes and one for common crimes. Greenwalt adopts a similar position. Any under-inclusion of international liability concepts would not connote incapacity or bad faith to shield nationals from criminal responsibility, but rather point to sincere and deep convictions as to how to mete out criminal justice.[55] For instance, rather than copying into national law the problematic provision on self-defence in article 31(1)(d) of the ICC Statute, domestic legislatures and judges are better off relying on their established theories and concepts of self-defence. In this, we must bear in mind that quite a number of the provisions in the Rome Statute are the result of political compromises drafted by diplomats, international lawyers, and military experts. They are not necessarily skilled in drafting criminal law provisions. Moreover, many of the liability concepts in the ICC Statute and other international statutes have a domestic law pedigree; they are not inherently international. What is more, copying international liability theories into domestic law means importing sometimes controversial concepts of liability. For instance, the theory of indirect co-perpetration, read into article 25(3)(a) of the ICC Statute, is a contentious concept.[56] The international concept of duress, on the other hand, heavily influenced by Anglo-American common law with a strong utilitarian underpinning, conflicts with principles of human frailty underlying certain civil law jurisdictions.[57]

The way to look at the statutory provisions on criminal responsibility in the ICC Statute is that they vest the Court with the power to try those who have committed, directly or indirectly, international crimes; for the ICC they have a

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[52] Robinson, "The Rome Statute and its Impact on National Law," *supra* note 45, 1864.
[53] Harmen van der Wilt, "Equal Standards? On the Dialectics Between National Jurisdictions and the International Criminal Court," *International Criminal Law Review* 8, no. 1–2 (2008): 229–72, 254.
[54] Ibid.
[55] Greenwalt, *supra* note 13.
[56] Jens Ohlin, Elies van Sliedregt, and Thomas Weigend, "Assessing the Control-Theory," *Leiden Journal of International Law* 26, no. 3 (Sept. 2013): 725–46; Thomas Weigend, "Perpetration Through an Organization: The Unexpected Career of a German Legal Concept," *Journal of International Criminal Justice* 9, no. 1 (Mar. 2011): 91–111; Stefano Manacorda and Chantal Meloni, "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?," *Journal of International Criminal Justice* 9, no. 1 (Mar. 2011): 159–78; Leila Nadya Sadat and Jarrod M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot," *Leiden Journal of International Law* 27, no. 3 (Sept. 2014): 755–88; Separate Opinion of Judge Adrian Fulford to *Lubanga*, Trial Chamber Judgment, ICC-01/04-01/06-2842, 14 March 2012; Concurring Opinion of Judge Christine Van den Wyngaert to *Ngudjolo Chui*, Trial Chamber Judgment, ICC-01/04-02/12-3-tENG, 18 December 2012.
[57] Greenwalt, *supra* note 13; Luis E. Chiesa, "Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond," *Vanderbilt Journal of Transnational Law* 41 (2008): 741–73.

jurisdictional/"constitutive" effect. This is different for domestic jurisdictions. If anything, they have a mere declaratory effect, repeating what is already law in the domestic sphere. This position, favouring deference to domestic law on liability, means heterogeneity, allowing pluralism to persist despite the complementarity principle's potential of shaping and making substantive law more uniform. So when Mégret argues that "complementarity has become part of the way in which international criminal lawyers project a sense of the international criminal law *acquis*, a sort of global package of norms that have to be adopted by states who become part of the ICC club,"[58] I would add that this is most likely to be the case with regard to crime definitions.

Now, this does not stop those advocating for ICC membership and engaging in outreach activities to persuade legislatures to implement the whole package: crime definitions and principles of criminal responsibility. The previously-discussed Legal Tools Project, while it insists that implementation remains at the discretion of the State, does encourage close alignment to the ICC Statute.[59] Amnesty International, in its Guide on Effective Implementation, takes the same approach.[60] A number of States Parties have indeed incorporated, alongside the crime definitions, the modes of liability of article 25 of the ICC Statute.[61] Some, however, have slightly modified them to fit the domestic context.[62]

## 4. Domestic Legal Practice: Nationalist and Internationalist Approaches

Providing for legislation that mirrors the Rome Statute does not in and of itself ensure alignment. Judicial attitudes are also significant. Judges may choose to be guided by international case law when dealing with an international crimes case, most likely when they interpret international crimes definitions. The same is not necessarily true when it concerns modes of liability. When there is no separate codification of international theories of liability, judges may adhere to domestic criminal law when adjudicating international crimes cases and use legal concepts and theories that are equally applicable to common/ordinary crimes. This is not necessarily so, however, as the Dutch case of *Van Anraat*[63] demonstrates.

Frans van Anraat, a Dutch businessman, was prosecuted on counts of complicity in genocide and in war crimes because he had delivered the chemical thiodiglycol ("TDG") to the regime of Saddam Hussein. TDG was used by Hussein to manufacture chemical weapons that were deployed in the massacre against the Kurdish population in the village of Halabja and in the war against Iran. The district

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[58] Frederic Mégret, "Too Much of a Good Thing?: Implementation and the Uses of Complementarity," in *The International Criminal Court and Complementarity: From Theory to Practice*, eds. Carsten Stahn and Mohammed M. El Zeidy (Cambridge: Cambridge University Press, 2011), 361–90.

[59] *Implementing the Rome Statute of the International Criminal Court*, *supra* note 20.

[60] See Amnesty International, *International Criminal Court: Updated Checklist for Effective Implementation* (London: Amnesty International, 2010), 15–16, https://www.amnesty.org/download/Documents/40000/ior530092010en.pdf.

[61] See Kenya, Trinidad and Tobago, Austria, and the Philippines in *Implementing the Rome Statute of the International Criminal Court*, *supra* note 20, 55–57.

[62] For instance, France has added recklessness and negligence as fault degrees. Malta has added instigation as a mode of liability and Norway has added conspiracy. See ibid., 56–58.

[63] District Court of The Hague, 23 December 2005, Case No. AX6406; Court of Appeal of The Hague, 9 May 2007, Case No. BA6734. Both judgments are translated into English; see http://ljn.rechtspraak.nl (accessed May 28, 2018). For commentary, see H.G. van der Wilt, "Genocide v. War Crimes in the *Van Anraat* Appeal," *Journal of International Criminal Justice* 6, no. 3 (July 2008): 557–67.

court acquitted Van Anraat of complicity in genocide but convicted him for complicity in war crimes. The acquittal was based on the finding that Van Anraat had no "positive knowledge" of the main perpetrator's genocidal intent. This standard derives from the ad hoc tribunals' case law, where proof of knowledge of the principal's *mens rea* is required, as well as awareness that the acts assisted the commission of a specific crime.[64] This knowledge standard differs from the lower *dolus eventualis*/conditional intent standard under Dutch law, which employs a foresight test.[65] The conviction for war crimes, on the other hand, was based on the national *dolus eventualis* standard. The court found that Van Anraat must have been aware of the considerable chance that his merchandise would be used to produce chemical weapons that would subsequently be deployed against Iraqis' (perceived) enemies and that he must have accepted that chance.

The district court applied an international *mens rea* standard for genocide (knowledge of the principal's intent)—and subsequently acquitted Van Anraat on that count—and a national *mens rea* standard for war crimes (*dolus eventualis*)—and subsequently convicted him—due to the special nature of the crime of genocide, more specifically, the special genocidal intent ("intent to destroy, in whole or in part, a national, ethnical, racial or religious group"). According to the district court, intent should be strictly construed in order to emphasize genocide's unique position as the "crime of crimes."[66] Special intent was regarded as an element of the crime of genocide, an additional subjective requirement encapsulated in the chapeau of the international definition of genocide. Applying the Dutch *dolus eventualis* standard would have watered down the intent to such an extent that it would not accord with the definition of the crime of genocide.

This reasoning is not persuasive. First of all, applying the national standard for complicity in war crimes equally leads to a deviation from international criminal law and hence the "extension of the boundaries of liability under international criminal law."[67] The *dolus eventualis* standard under Dutch criminal law is broader than the knowledge-standard derived from ICTY law and the purpose-standard of Article 25(3)(c) of the ICC Statute. Second, it is a misconception to hold that combining *dolus eventualis* with a special intent crime such as genocide waters down the special intent and thus affects the special nature of genocide. The *mens rea* of complicity does not affect the elements of the crime. Complicity, in national as well as in international criminal law, is derivative liability, which means that the accomplice is not a perpetrator who fulfils the definitional elements of the crime. In other words, complicity liability, which in Dutch criminal law carries a lower maximum sentence than principal liability, has its own *mens rea*.[68] On appeal, the ruling was reversed and the appellate judges decided against the district court's internationalist approach to *mens rea* over domestic law. The appellate court referred to the legislative history of the Dutch International Crimes Act, which suggests an opposite conclusion: the

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[64] Judgment, *Tadic* (IT-94-01-A), Appeals Chamber, 15 July 1999, ¶ 229; Judgment, *Aleksovski* (IT-94-14/1-A), Appeals Chamber, 24 March 2000, ¶ 163. For aiding and abetting genocide, see Judgment, *Krstic* (IT-98-33-A), Appeals Judgment, ¶ 144; Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10-A, ICTR-96-17-A), Appeals Judgment, ¶¶ 500–01; District Court of The Hague, 23 December 2005, LJN: AU8685, ¶ 6.5.1.

[65] The standard of the ICC comprised in Article 25(3)(c) of the Statute is even stricter. It requires that he who aids or abets or otherwise assists does so with "the purpose of facilitating the commission of a crime." ICC Statute, *supra* note 27, art. 25(3)(c).

[66] District Court of The Hague, ¶ 7.

[67] Ibid., ¶ 6.5.1.

[68] See also Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide," *Journal of International Criminal Justice* 5, no. 1 (Mar. 2007): 184–207.

application of national law is preferred when interpreting concepts like criminal participation and complicity, if only to prevent legal uncertainty.[69] Moreover, and most importantly, the court of appeal found that "[e]specially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystallized completely."[70]

We see a similar "mixed approach," applying international standards to crime definitions and national standards to modes of liability, in international refugee law. Article 1F(a) of the Refugee Convention excludes from refugee status individuals who have committed war crimes, crimes against humanity (including genocide), and crimes against peace. Applying this clause requires relying on "international instruments." Across jurisdictions decision-makers adhere to international norms for the interpretation of said crimes. This is different with regard to the interpretation of "committing," a notion which encapsulates concepts of complicity and criminal participation. Here adjudicators tend to rely on domestic law concepts.[71]

A question that simmers through the debate on pluralism is that of the *sui generis* nature of international crimes. Liability theories modelled on domestic law may not capture the reality of mass atrocities and the systemic nature of these crimes. Mark Drumbl was an early critic of transplanting ("Western") national criminal law concepts to international criminal law. In his work *Atrocity, Punishment and International Law*, he points to the paradox of international lawmakers emphasizing the extraordinary nature of international crimes, demarcating the difference with ordinary common crimes yet relying on the ordinary/domestic modality of punishment, theory of sentencing, and process of determining guilt or innocence.[72] He argues that international criminal justice insufficiently takes on board local, non-Western perspectives on justice, which by embracing concepts such as collective guilt and punitive rituals that do not entail incarceration, deviate from key principles of Western-style justice.[73] Mimicking Western justice is especially problematic when victim communities themselves provide for such justice mechanisms. Think of the gacaca system in Rwanda.[74] Western-style international criminal justice may feel

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[69] Explanatory Memorandum, Parliamentary Papers II 2001/2002, 28 337, no. 3, at 29, as translated by Van der Wilt: "[I]t would be impractical and could lead to legal uncertainty if Dutch Courts were to apply the provisions on participation, justification and defences [set out in the ICC Statute] which only slightly deviate from those with which they are familiar." See Harmen G. van der Wilt, "Genocide *v*. War Crimes in the *Van Anraat* Appeal," *Journal of International Criminal Justice*, 6, no. 3, (July 2008): 557–567, 562.

[70] Court of Appeal of The Hague, p. 11, under B: https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat_Appeal_Judgment_09-05-2007_EN.pdf.

[71] For an overview, see Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Dordrecht: Republic of Letters Publishing, 2012), 210–75. Some adjudicators rely on *sui generis* concepts of liability, drawn from international criminal law but customized to the lower evidentiary standards of refugee law. A controversial concept is "membership of an organization with a brutal purpose," which creates a rebuttable presumption of complicity. The Supreme Courts of the United Kingdom, New Zealand, and Canada have restricted this practice by holding that mere membership is too broad and that exclusion requires the stricter test of a "voluntary, knowing and significant contribution" to a crime. *R v Secretary of State for the Home Department*, [2010] UKSC 15; *The Attorney-General v Tamil X and the RSAA*, [2010] NZSC 107; *Ezokola v. Canada* [2013] SCC 40.

[72] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 6.

[73] Ibid., 123–48.

[74] Ibid., 124.

distant from victims and undermine the efficiency of individualized criminal trials premised on incarceration.[75] Drumbl proposes what he calls a "cosmopolitan pluralism" theory of punishment based on universal values but diversified in its enforcement, leaving room for grassroots and local justice mechanisms that differ from and exist alongside Western-style criminal trials.[76]

Drumbl's plea for applying local concepts of law, doing justice to the values of victim communities, reinforces the argument against the imposition of an international theory of attribution and criminal responsibility. Similarly, Greenwalt argues that the idea of a uniform international criminal law is misguided. Such an "internationalist approach" creates fracture and inconsistency at the domestic level;[77] it threatens the integrity of a state's criminal justice system because it may cause a state to adopt criminal law principles for international crimes that are inconsistent with those otherwise applied.[78] Indeed, as stated in the introduction to this chapter, heterogeneity in substantive international criminal law at the state level is inevitable. The common core Drumbl refers to when he talks of cosmopolitan pluralism refers to crime definitions and international criminal law principles that have crystalized over decades, sometimes centuries (e.g., command responsibility, superior orders defence, no prescription). Outside of that core, there will always be cross-jurisdictional pluralism, which he embraces because it is tailored to the needs of local communities.

As much as I agree with Greenwalt's common sense approach to pluralism and Drumbl's nuanced position on cosmopolitan pluralism, I would caution against an unqualified endorsement of legal pluralism. This would downplay the need for a "general part" in international criminal law.[79] Unlike Greenwalt, I would argue in favour of developing a uniform, or at least harmonized, core of substantive international criminal law. Accepting pluralism at the national level does not disqualify pursuing a harmonized, general part at the international level. Substantive international criminal law is under-theorized and lacks a common "grammar."[80] Moreover, certain liability theories have developed as genuine, *sui generis* international liability theories (e.g., joint criminal enterprise, co-perpetration) that could be implemented at the national level alongside local law that traditionally forms part of the domestic general part (e.g., complicity liability, defences, sentencing). Developing an international general part will contribute towards a more sophisticated substantive international criminal law, especially when drawn on (general) principles of time-honoured domestic criminal law. In doing so, one must adopt a harmonizing approach. By looking beyond labels and concepts differences may be minimized to allow for developing an international theory of attribution.

## 5. Universal Jurisdiction: To Each, Their Own?

Recent case law sheds new light on the choice for domestic law that I advocate with regard to modes of liability, at least until there is a harmonized international general part. This requires discussing the *Alemu* case and universal jurisdiction.

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[75] Ibid., 184.
[76] Ibid., 185–87.
[77] Greenwalt, *supra* note 13, 1067–68.
[78] Ibid., 1068–69.
[79] I argue in favour of this. See Elies van Sliedregt, "Pluralism in International Criminal Law," *Leiden Journal of International Law* 25, no. 4 (Dec. 2012): 847–55; van Sliedregt and Vasiliev, *supra* note 15.
[80] van Sliedregt, "Pluralism in International Criminal Law," *supra* note 79, 852.

There is no single globally-accepted definition of the concept but, for working purposes, it can be described as criminal jurisdiction based solely on the nature of the crime, without regard to the territory where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.[81]

A. The *Alemu* Case

On December 15, 2017, the Hague district court convicted Eshetu Alemu, a former official of Ethiopia's military communist regime, to life imprisonment for participating in the commission of war crimes during the infamous "Red Terror" campaign of the late 1970s.[82] The judges found the accused guilty of murder, arbitrary deprivation of liberty, inhuman treatment, and torture as violations of the laws and customs of war under the Dutch 1952 Wartime Offences Act. They used the concepts of superior responsibility and co-perpetration to establish his individual liability for these crimes.[83] The court applied the "mixed approach" advocated above. The charged war crimes and command responsibility, concepts with an international law pedigree, were defined exclusively by reference to, and in compliance with, established (customary) international law. In particular, with regard to command responsibility, the court relied on ICTY case law to determine the scope of liability under international custom, as it existed during the "Red Terror."[84] With regard to co-perpetration, the judges referred to present-day Dutch law and jurisprudence to construct the legal elements of co-perpetration. Alemu was a Dutch national at the time of prosecution, but not at the time of the offences. The court had jurisdiction based on two jurisdictional principles: the (active) nationality/personality principle for both the war crimes and the crimes under Dutch law (e.g., murder, deprivation of liberty) and universal jurisdiction for the war crimes. The court did not make explicit the principle on which it proceeded.

The exercise of extraterritorial jurisdiction, whether via nationality or via the universality principle, touches upon questions of legitimacy and legality. Is the principle of legality an obstacle to applying the law of the forum state (i.e., the state where the case is brought) to crimes committed abroad by—at the time—a non-national? With regard to the war crimes, can the fact that the charge concerns crimes for which there can be no impunity justify the exercise of jurisdiction? With regard to the domestic crimes, can the fact that the defendant later acquired Dutch nationality justify the exercise of jurisdiction?

It is generally perceived as a right to be tried by one's home forum or by one's peers.[85] This corresponds with the default rule in criminal law that courts, when exercising jurisdiction over nationals for misconduct abroad, seize the matter and

[81] See principle 1(1) of "The Princeton Principles on Universal Jurisdiction," in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo (Philadelphia: University of Pennsylvania Press, 2004).
[82] *Prosecutor v. Alemu* (ECLI:NL:RBDHA:2017:16383), Judgment, District Court of The Hague, 15 December 2017, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:16383.
[83] Ibid., § 13.5.3.
[84] Ibid., §§ 13.5.1., 13.5.2.
[85] William Burke-White, "Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation," in *The Emerging Practice of the International Criminal Court*, eds. Carsten Stahn and Göran Sluiter (Leiden: Brill/Nijhoff, 2009), 79-115, 92-93.

apply the law of the forum state.[86] Unlike the general rule in international private law where adjudicators often apply the law of the State where the harm was caused, in transnational criminal law and in international criminal law, extraterritorial crimes are tried by the *lex fori*. In exceptional cases, courts may apply the *lex mitior*-rule to extraterritorial crimes and impose the most lenient penalty when there is a difference between the laws of the forum state and the laws of the *locus delicti* state.[87] Some jurisdictions restrict extraterritorial jurisdiction based on the active personality principle, and hence the application of domestic law, by requiring it to meet the double criminality rule. This rule requires that the conduct in question is punishable under the criminal law of two states: the state where it is prosecuted and the state where the crime was committed. For serious crimes, double criminality is generally not a condition.[88] In *Alemu*, there was no double criminality test for crimes under Dutch law because article 7(1) of the Dutch Penal Code does not require this test for *misdrijven* (i.e., serious offences). Double criminality is generally not a requirement for international crimes. Their nature as being universally condemned comes with the idea that criminality can be presumed.

Van den Wyngaert considers double criminality an aspect of the legality principle.[89] A person can only be accountable for conduct that was punishable under the law of the place where it was committed. This raises pertinent questions. If double criminality is part of legality and hence is a fundamental human right, to what extent are the exceptions to double criminality (for serious crimes) compatible with the legality principle? Van den Wyngaert's view means that *Alemu* could claim that as long as there is no verification by the court of double criminality, exercising jurisdiction would be an infringement on the legality principle and his human rights. This is even more so when we bear in mind that he acquired Dutch nationality after the crimes had been committed. On the other hand, for the war crimes charges no such double criminality verification is required because here the court also exercised universal jurisdiction. And we encounter the internal inconsistency of the universality principle. The universality principle is a jurisdictional link that is considered weaker than the principal links of jurisdiction—territory and nationality[90]—yet this weakness is not compensated by double criminality verification. This inconsistency is suddenly visible when we compare universal jurisdiction to the active personality principle based on acquired nationality; there is only a thin line dividing universal jurisdiction and extraterritorial jurisdiction based on acquired nationality.

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[86] Neil Boister, *Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012), 135–59; Christine van den Wyngaert, "Double Criminality as a Requirement to Jurisdiction," *Nordisk Tidsskrift for Kriminalvidenskab/Nordic Journal of Criminology* 76, no. 5 (1989): 43–56.

[87] Ibid., 44.

[88] Ibid., 46.

[89] Ibid., 53.

[90] We are reminded here of the hierarchy in principle 8 of the Princeton Principles, entitled "Resolution of Competing National Jurisdictions":

> Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria: (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting state; (d) the nationality connection of the victim to the requesting state; (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; (g) the fairness and impartiality of the proceedings in the requesting state; (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and (i) the interests of justice.

Concerns over the ambiguity of universal jurisdiction from a legality and legitimacy perspective is often addressed by arguing that the legality principle in international criminal law is different than in national law because the issue of foreseeability is less of a concern when it comes to the commission of mass atrocities. This, however, is not persuasive. A similar argument on foreseeability can be made regarding serious domestic crimes such as murder. Maybe we are looking at the wrong end of the telescope. Maybe we are comparing jurisdictional principles that are in essence very different: one is still based on classic principles of sovereignty and territoriality whereas the other transcends boundaries, sovereignty, and territoriality. The more pertinent question then is that of legitimacy. To what extent is a domestic court, exercising universal jurisdiction on the basis of international law, "allowed" to impose its normative framework on a non-national for crimes committed abroad?

*B. Looking for Legitimacy*

The *Alemu* case points to the other side of the legality principle, the democratic-legitimacy question. Can a court apply domestic law when it derives jurisdiction from an international title? In international private law, the choice of law-model solves the question of both legitimacy and legality; a court applies pre-agreed foreign law, often the law of the state where the harm occurred or whose national caused the harm. Applying this model would make universal jurisdiction deviate from the general rule in criminal law that the law of the forum state applies. This can be justified by pointing to its separate place in criminal law on jurisdiction.

In an attempt to think creatively about the choice of law when looking for legitimacy in exercising universal jurisdiction, a place to start is the *ius puniendi*, the right to punish. I can think of three models. First, the relationship model based on Anthony Duff's work.[91] Courts can be seen to act as representatives of the international community when they exercise universal jurisdiction. By adjudicating international crimes, they serve the interests of the international community. In performing this role, judges adhere to international crime definitions and to international norms of liability. This approach calls for a full-on internationalist approach. Secondly, domestic courts trying international crimes committed abroad by non-nationals act as care-takers temporarily relieving the courts that would normally have jurisdiction but that are temporarily unable (because of conflict, collapse of justice system, etc.). The care-taker model comports with the forum choice model of international private law, to the extent that it points towards applying foreign law. In international criminal law, we have, or had, a number of "care-taker" courts. Both the ad hoc tribunals for the former Yugoslavia and Rwanda acted as care-taker courts even though they largely applied their own law.[92] The hybrid or mixed courts, the Special Court for Sierra Leone and the Cambodia Tribunal are better examples since they apply local law alongside international law. A third model links legitimacy to the justification of having mere standing. This model, advocated by Reeves, is premised on the idea that as long as domestic courts have the ability to conduct fair and adequate procedures and can

[91] Antony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

[92] The exception to this is the provision on sentencing: "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 24(1), adopted by S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993), 32 I.L.M. 1159. A similar provision can be found in the Statute of the International Criminal Tribunal for Rwanda, art. 23(1), adopted by S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994), 32 I.L.M. 1598.

address the question of criminal responsibility, they can legitimately exercise universal jurisdiction.[93] His theory—"Reason Dependence of Standing"—applies to international criminal tribunals and courts but equally applies to domestic courts exercising universal jurisdiction. Reeves' theory does not come with a prescription of which law to apply. Given that in his view legitimacy links to the ability of tribunals and courts to apply their own law, this means, by analogy, that domestic courts exercising universal jurisdiction law can legitimately apply domestic law. This somewhat "nihilistic" approach has appeal because it acknowledges that any other justification is unpersuasive. Duff's theory does not really work when applied to an elusive international "community." We are all members of different communities in an increasingly global world. In that same vein we can disqualify the care-taker theory. Szigeti, in a recent paper on criminal jurisdiction, disqualifies traditional ways of thinking about jurisdiction as illusory and doomed since it is premised on territorial and extra-territorial terms.[94]

From this, by no means exhaustive, analysis of universal jurisdiction, it seems to me that as long as there is no convincing theory arguing otherwise the default position is that domestic courts can legitimately apply domestic law to international crimes committed by a non-national abroad. The "mixed approach" advocated in this chapter, despite legality and legitimacy concerns when there is no territorial or nationality link, still prevails.

## 6. Concluding Observations

Pluralism in international criminal law is a reality. Until we have one body that is in charge of enforcement, it is here to stay. Is this a problem? Yes and no. From legality, equality, and legitimacy perspectives, it is a second-best situation. Yet, it can be managed and as such lived with. A number of "management principles" emerge from the analysis in this chapter. First of all, any court dealing with international crimes needs to comport with core principles of international (criminal) law and human rights law: fair trial, due process, and no strict liability. Secondly, international crime definitions and concepts of liability with an international pedigree should, a much as possible, be interpreted by adhering to international norms and standards. Bearing in mind that the ICC is the only permanent international criminal court and that complementarity increasingly shapes the core of international criminal law, these standards can be found in ICC law. Thirdly, until we have a harmonized general part of international criminal law, national judges and lawmakers should stick to national law when it comes to attribution of liability.

Applying domestic law of the forum state is in my view legitimate even when a court exercises universal jurisdiction, deriving a title from international law. Drawing on Reeves' "nihilistic" model, for the lack of another, leads me to conclude that there is no fundamental reason against applying the law of the forum state to a defendant who is not linked to the forum through territoriality or nationality. The mere fact of being able to conduct a fair trial and deliver justice is sufficient. Here the analogy to piracy is interesting. This crime, which essentially saw the birth of universal jurisdiction, is premised on the idea that any court, applying its own normative framework, has

[93] Anthony R. Reeves, "Liability to International Prosecution: The Nature of Universal Jurisdiction," *European Journal of International Law* 28, no. 4 (Nov. 2017): 1047–67.
[94] Péter D. Szigeti, "The Illusion of Territorial Jurisdiction," *Texas International Law Journal* 52, no. 3 (Fall 2017): 369–99.

jurisdiction to try those considered *hostis humanis* for whom there can be no impunity, no place to hide. Unlike piracy, which belongs to the category of transnational crimes, international crimes are the product of a supranational justice system where the law is enforced by both domestic and international justice systems. This means that domestic courts enforcing international criminal law need to straddle national and international criminal law. We are back to the "mixed approach," the only approach that comports with the reality of an inherent pluralist international criminal law centred around a common core of international values and norms.