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# The Interaction of National and International Approaches in the Repression of International Crimes

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Cassese, Antonio and Mireille Delmas-Marty (eds), *Juridictions nationales et crimes internationaux*. Paris: PUF, 2002. Pp. 680, € 61.50.

Cassese, Antonio and Mireille Delmas-Marty (eds), *Crimes internationaux et juridictions internationales*. Paris: PUF, 2002. Pp. 272, € 29.00.

Fischer, Horst, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law. Current Developments*, Berlin: Berlin Verlag, 2001. Pp. 873, € 100.00.

Stromseth, Jane (ed.), *Accountability for Atrocities: National and International Responses* (International and Comparative Criminal Law Series). Ardsley, NY: Transnational Publishers, 2003. Pp. 350, US \$125.00.

## 1 Introduction: Four Books on National and International Enforcement of ICL

The rapid development of international criminal law (ICL) over the last decade has prompted a veritable avalanche of academic works. In addition to numerous textbooks and works on substantive and procedural law,<sup>1</sup> there is a growing body of literature on the three different levels of enforcement: the International Criminal Court (ICC) and ad hoc tribunals,<sup>2</sup> internationalized or hybrid criminal courts<sup>3</sup> and the role

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<sup>1</sup> See e.g. Bohlander, 'Book Review: Introductory Works to International Criminal Law and Collections of Materials', in 2 *International Criminal Law Review* (2002) 409.

<sup>2</sup> See e.g. Paulus, 'Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court', 14 *EJIL* (2003) 843.

<sup>3</sup> See K. Ambos and M. Othmann (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone & Cambodia* (2003) and C. R. Romano, A. Nollkaemper and J. K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004).

of national legal systems in repressing international crimes.<sup>4</sup> The four edited books under review here take up the challenge to bring the national and international(ized) layers together and should thus give us an idea of their interaction in the enforcement of ICL.<sup>5</sup> In this essay, I will first assess each book separately and then examine some of the themes they share.

*Accountability for Atrocities: National and International Responses* (hereinafter *Accountability*) originated in a course taught by its editor Jane Stromseth, Professor of Law at Georgetown University. Ten case studies written by her (now former) students, some with relevant experience but most without, cover all three levels of enforcement and by and large the entire list of conflicts that is so familiar to international lawyers today. From the Special Court of Sierra Leone to El Salvador's truth commission and from the various judicial bodies involved in the aftermath of Rwanda's genocide to the ICC, the book presents the reader with a highly readable overview of different responses to international crimes. The book specifically aims to contribute to 'a better understanding of how international and domestic efforts to address atrocities can – and do – interact, and how different kinds of international assistance can help encourage and reinforce domestic efforts' (at 4).

The primary strength of *Accountability* is its descriptive power, reflected in the many references to media sources. All contributions are well written and describe both the factual backgrounds to the conflicts and the legal responses to the crimes committed. The authors focus not only on criminal prosecutions, but also take into account non-penal responses such as truth commissions and reparations and highlight many pertinent questions on problems like selectivity and limited resources.

The book is less convincing in its analysis and doctrinal contribution. Its basic argument, that 'the arrival of the ICC will not diminish the need for sustained efforts to help strengthen national accountability processes, nor will it lessen the need for diverse mechanisms of accountability that combine international and national roles in innovative ways,' (at 5) is sensible but not exactly an eye-opener. Unfortunately, few of the contributions go deep enough to add any new insights to the already overcrowded field of transitional justice.<sup>6</sup> That most of the chapters originated in student papers can be seen in numerous serious mistakes and a lack of critical reflection. Some inaccuracies, such as the assertion that ethnic cleansing is a euphemism for genocide,<sup>7</sup> may stem from a choice for stylistic flow over analytical rigour. Others, however, are fatal for the arguments advanced or symptomatic for

<sup>4</sup> See e.g. the country reports in the series *Nationale Strafverfolgung völkerrechtlicher Verbrechen [National Prosecution of International Crimes]* and *Strafrecht in Reaktion auf Systemunrecht* of the Max Planck Institute for Foreign and International Criminal (http://www.iuscrim.mpg.de), edited by Albin Eser and others.

<sup>5</sup> Like the books, this review focuses in particular on the so-called core crimes: genocide, crimes against humanity and war crimes. As the books are all edited works, it should be noted that criticism of the editors does not affect the quality of individual contributions and *vice versa*.

<sup>6</sup> See the hundred-plus page bibliography published by the Institute for Justice and Reconciliation, searchable on-line via <http://www.ijr.org.za/research.html> (last visited 9 March 2004).

<sup>7</sup> Schvey, 'Striving for Accountability in the Former Yugoslavia', in *Accountability*, 44. The non-legal term 'ethnic cleansing' is generally used to denote various war crimes, crimes against humanity and only in exceptionally grave circumstances genocide. See J. R. W. D. Jones and S. Powles, *International Criminal*

the quality of the chapter. For example, the claim that the ICC has a reparative dimension that can prove to be an advantage over 'purely criminal' proceedings like Belgium's genocide law glosses over the fact that Belgium's legal system both allows victims in their role as *parties civiles* to attach civil claims to criminal proceedings and has a trust fund for victims similar to that of the ICC.<sup>8</sup> In an otherwise interesting chapter on 'comfort women' in World War II, the assertion that the prohibition against slavery 'had attained *jus cogens* status as evidenced by the codification of the 1926 Slavery Convention, well before the practice of Japanese comfort stations in 1932', (at 426) is deeply problematic and illustrative for the level of analysis. Apart from the fact that the existence of a concept of *jus cogens* in 1926 is highly disputable, the 1926 Slavery Convention, which is formulated in very broad terms, would be particularly poor evidence of that trend.<sup>9</sup> A notable exception in this regard is the only chapter written by an 'outsider': a very fine study of the different actors involved in East Timor's quest for accountability by Laura Dickinson of the University of Connecticut.<sup>10</sup>

Yet, while seasoned professionals may find only limited satisfaction, *Accountability* provides the interested reader with an accessible and wide-ranging guide to the different developments and dilemmas in transitional justice and ICL.

Quite different is *International and National Prosecution of Crimes under International Law, Current Developments* (hereinafter *Prosecution*), edited by Horst Fischer, Claus Kress and Sascha Rolf Lüder. The German editors all hold various appointments at and share their affiliation with the Institute for International Law of Peace and Armed Conflict at the University of Bochum, where they are respectively Academic Director, Corresponding Member and PhD candidate. Many of the contributors are well-known names in ICL, and the great majority of them participated in the negotiations on the ICC. The editors of this volume have chosen a narrower focus than Stromseth, discussing only criminal prosecutions on the international and national levels. Non-penal responses are not taken into account and the editors decided that the different internationalized courts had not yet matured enough at the time of writing (2001) to be included as an object of analysis (at 6). This still leaves the reader with more than 850 pages on substantive and procedural criminal law from the ICC, ICTY, ICTR and national jurisdictions.

The contributors, academics as well as practitioners, bring extensive expertise to the table and many insights from having seen the law in action. The first part on the

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*Practice* (2003), at 146–148 and L. A. Lehmler, *Die Strafbarkeit von Vertreibungen aus ethnischen Gründen im bewaffneten nicht-internationalen Konflikt zugleich ein Beitrag zur neueren Entwicklung des Völkerstrafrechts* (1999).

<sup>8</sup> Tallman, 'Universal Jurisdiction: Lessons from Belgium's Experience', in *Accountability*, 397. See e.g. the compensation from the Belgian fund awarded to the *parties civiles* in the case of the 'Butare Four' convicted for their role in the Rwandan genocide (Cour d'Assises Brussels, 8 June 2001, available at <http://www.u-j.info>, last visited 20 March 2004).

<sup>9</sup> See esp. Art. 2 (calling for the abolition of slavery 'progressively and as soon as possible') and Art. 9 and 10 (allowing state parties to reserve or denounce the effects of the treaty for parts of their territories).

<sup>10</sup> Dickinson, 'The Dance of Complementarity: Relationships among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia', in *Accountability*, 319–374.

ICC gives the reader a good idea of the complexities in the negotiation process of the Court, and the resulting need for compromise and ‘constructive ambivalence’ (at 174) in the Statute and secondary instruments. Predictably, the negotiators/authors often resemble loving parents in drawing their conclusions, trying to give an objective evaluation of their children’s accomplishments. This is, however, an acceptable price to pay, as the value of the insiders’ views in this part outweighs the resulting lack of objectivity. Both the second part on the *ad hoc* tribunals and the third on national criminal courts contain many good and some excellent pieces. Special mention should be made of the insightful analyses of genocide in the jurisprudence of the ICTY and ICTR by William Schabas and of belligerent reprisals in ICTY jurisprudence by Christopher Greenwood.

Although it offers a wealth of information, *Prosecution* is too imbalanced to form a convincing whole. Part I on the ICC contains more than 400 pages and many pieces on procedural law of a highly detailed and technical character. Part II on the *ad hoc* tribunals takes up more than 300 pages, while Part III on national courts consists of little more than one hundred pages and treats very few procedural issues. The imbalances in length, subject matter (material versus procedural law) and complexity between the different parts and contributions seriously hamper the dialogue between and synthesis of the different levels of enforcement; this should be a primary goal in bringing them together in the one volume. After turning the last page, the reader has learnt a lot about national and international prosecutions, but little about their interaction.

Leaving aside the question of synthesis, one may ask whether the book gives an overview of the most important recent trends in the prosecution of international crimes in the different fora available, as the subtitle ‘Current developments’ suggests. Indeed, the editors ‘hope that the book provides the reader with a useful source of information about the latest stage of the development of international criminal law’ (at 7). But if that is the goal, one should not include a 70-plus page analysis of the position of witnesses before the ICC,<sup>11</sup> which is too technical to represent the development of ICL in general and better placed in a comprehensive commentary on the ICC. While there are several accessible pieces that fit the ‘current developments’ format very well, the lack of balance and coherence means the book only partially succeeds in its aspirations.

Moreover, it does not cast the net wide enough. With the exception of an interesting account of the African attempts to prosecute former Chadian dictator Hissène Habré, written by Reed Brody and Helen Duffy, all contributions on national courts are focused on Western Europe. Of course, there is more to be gained by including information on more diverse and less well-known prosecutions in national courts, such as the recent genocide trials in Ethiopia<sup>12</sup> and prosecutions for war crimes and

<sup>11</sup> Kress, ‘Witnesses in Proceedings before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure’, in *Prosecution*, 309–384.

<sup>12</sup> See e.g. D. Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecutions: The case of Ethiopia* (2000).

crimes against humanity under direct application of international criminal law in Hungary.<sup>13</sup>

All in all, the book lacks coherence and should have been edited more thoroughly, not least because the many typos and spelling mistakes do not add to the enjoyment of the reader.

Finally, there are the two interrelated French books on international crimes edited by Antonio Cassese and Mireille Delmas-Marty, professors at the University of Florence and Université de Paris I (Panthéon-Sorbonne), respectively. The editors have chosen a similar perspective to that of Fischer *et al*, namely criminal prosecutions at the national and international level. Yet, their approach is very different, with a keener eye for synthesis and analysis, and dealing with the ICC only laterally.

The heart of the first work, *Juridictions nationales et crimes internationaux* (hereinafter *Juridictions nationales*), consists of a series of country reports that form a *tour d'horizon* of national jurisdictions with regard to the prosecution of international crimes. Each report sets out the relevant legal framework for a country, including the treaties in force, their implementation in national law and the national regulation of other pertinent issues like immunities and extradition, as well as resulting prosecutions. While, again, Western Europe is overrepresented, the reporters lead us from China to Argentina and from Senegal to Russia. The country reports are followed by three regional overviews. A chapter by Kai Ambos summarizes his important work on ICL in Latin America<sup>14</sup> for a broader audience, while North America and the Islamic states are also included. The volume is completed by some insightful analyses of the information uncovered.

Some of the reports could have been more thorough. The Russian report, for example, may be technically correct in stating that '[I]l n'y a pas de jurisprudence russe en matière de crimes internationaux' (at 274). Yet, the 1995 decision of the Constitutional Court on the applicability of Additional Protocol II to the armed conflict in Chechnya seems quite relevant and would not have been out of place in the report.<sup>15</sup> Also noteworthy, even if the charges concern ordinary crimes, is the prosecution of a Russian colonel for the rape and murder of a Chechnyan civilian, which has been meandering through the Russian courts since 2000 and ended last year in the final confirmation of a 10-year prison sentence.<sup>16</sup> More generally, the reader would have benefited from the inclusion of an index and a bibliography on every country (some

<sup>13</sup> See Údvaros, 'Ungarn', in A. Eser and J. Arnold (eds), *Strafrecht in Reaktion auf Systemunrecht: Polen, Ungarn* (2002) 151 and Mohácsi and Polt, 'Estimation of War Crimes and Crimes against Humanity according to the Decision of the Constitutional Court of Hungary', in 67 *Revue internationale de droit pénal* (1996) 333.

<sup>14</sup> See K. Ambos and E. Malarino (eds), *Persecución penal de crímenes internacionales en América Latina y España* (2003).

<sup>15</sup> See Constitutional Court of the Russian Federation, 31 July 1995, Decision of the Constitutional Court of the Russian Federation on the Constitutionality of Presidential Decree No. 2137 of 30 November 1994 etc., available at <http://www.icrc.org/ihl-nat.nsf> (last visited 15 March 2004).

<sup>16</sup> See, 'Colonel Jailed for Chechnya killing', *Financial Times*, 26 July 2003.

reporters provide references for further reading, but others do not). Also, it would have been useful to include the actual questionnaire that formed the outline for the reports to better delineate the topic, particularly as the reports do not always follow the same format. Still, these are minor points of critique and should not detract from the fact that the reports provide a great source of information, especially on the numerous jurisdictions that seldom appear in ICL literature.

The slimmer second book, *Crimes internationaux et juridictions internationales* (hereinafter *Juridictions internationales*) follows a different format. In spite of the title, this volume provides the reader with an analysis of fundamental questions underlying ICL rather than an overview of international jurisdictions. While predominantly of a legal nature, this analysis also includes more philosophical and political views. Contributors like ICC President Philippe Kirsch and former ICTY President, current ICC Judge Claude Jorda explore the relationship between ICL and, respectively, state sovereignty and universal values. Other topics deal with the role of (comparative) national law and the jurisprudence of the European Court of Human Rights (ECtHR) in the case law of the *ad hoc* tribunals, and various obstacles to the prosecution of international crimes in national courts.

The contributions are somewhat dissimilar in character and value. Some of the shorter pieces, as well as two round-table reports, are almost literal transcriptions of contributions to the conference from which this volume originated. It would seem that the first conference report to contribute as much as a well-composed article does is still to be written, and the ones in this volume are no exception. Other chapters, however, especially those written by the editors themselves, are carefully crafted and lucid in their analysis. On the whole, the chosen meta-perspective on ICL makes *Juridictions internationales* a cohesive and valuable addition to the editors' first book.

While the books under consideration are very different, they all in various ways shed light on the complications stemming from the interplay between the various actors involved in the repression of international crimes. I will now zoom in on some of the complexities originating from three key dichotomies, namely those between, first, penal and non-penal responses, second, different criminal courts, and third, national and international criminal law.

## 2 Penal and Non-Penal Responses to International Crimes

Criminal prosecutions of international crimes, in whatever court they take place, interact with various other legal proceedings, as well as with quasi-legal institutions like truth commissions.<sup>17</sup> Perhaps one of the most direct interactions takes place with human rights courts. These not only inform criminal courts on all levels of due process standards and contribute to the clarification of shared concepts like torture and

<sup>17</sup> See e.g. Dickinson, *supra* note 10, at. 353–360; Haines, 'Accountability in Sierra Leone: the Role of the Special Court', in *Accountability*, 201–207 and Cottier, 'What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings against Guatemalan Nationals Accused of Genocide', in *Prosecution*, 848.

rape,<sup>18</sup> but also regulate with increasing precision the extent to which serious human rights violations require criminal prosecution.<sup>19</sup> This can lead to a direct dialogue between human rights courts and criminal courts, as can be seen in the *Barrios Altos* case, where a judgment of the Inter-American Court of Human Rights prompted the Peruvian courts to prosecute army personnel for the killing of civilians, despite national amnesty laws.<sup>20</sup> Indeed, the duty to prosecute under human rights law is such a pivotal factor for the analysis of the relationship between penal and non-penal responses to international crimes that its neglect is a serious shortcoming of *Accountability*.

Criminal prosecutions also relate to a host of other judicial proceedings. In many countries, suspects of international crimes are far more likely to be confronted by civil claims, exclusion from refugee status, denaturalization and/or deportation than by criminal prosecution.<sup>21</sup> The tendency to use such non-penal responses as a relatively simple substitute for, often mandatory, criminal prosecutions is troubling. Whenever a suspect of torture or war crimes is deported or held liable for damages, this may constitute a form of accountability, but in most cases it also signifies a violation of the duty to extradite or prosecute such suspects.

More attention in the books for the interaction between criminal, civil and administrative responses to international crimes would have been welcome. While there are significant differences between them, for example in the burden of proof, they cannot simply be dismissed as incomparable. Sometimes, criminal and civil responses to international crimes are combined in one proceeding or are mutually dependent.<sup>22</sup> In other cases, deportation, exclusion and compensation proceedings are used as 'surrogate

<sup>18</sup> See e.g. Cassese, 'L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux', in *Juridictions internationales*, 143 and Kress, *supra* note 11, at 369–372.

<sup>19</sup> See Delmas-Marty, 'La responsabilité pénale en échec (prescription, amnestie, immunités)', in *Juridictions nationales*, at 633–634 and more elaborately Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals', in H.-J. Cremer and H. Steinberger (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (2002) 315; Seibert-Föhr, 'Neue internationale Anforderungen an die Überführung von Menschenrechtsabkommen in nationales Recht: das Verhältnis des Internationalen Pakts über bürgerliche und politische Rechte zu nationalem Recht', in 62 *ZaöRV* (2002) 391 and Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen', in 37 *Archiv des Völkerrechts* (1999) 318.

<sup>20</sup> See Cassese, 'Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?', in *Juridictions internationales*, 16 and more elaborately Ferdinandusse, 'Out of the Black-box? The International Obligation of State Organs', in 29 *Brooklyn Journal of International Law* (2003) 45, at 89–93.

<sup>21</sup> See e.g. *Accountability*, at 379 and 443–444, and more elaborately Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation', in 41 *Harvard International Law Journal* (2000), at 141–149. See also Handmaker, 'Seeking Justice, Guaranteeing Protection and Ensuring Due Process: Addressing the Tensions between Exclusion from Refugee Protection and the Principle of Universal Jurisdiction', in 21 *Netherlands Quarterly of Human Rights* (2003) 677, at 688–689 (on the disparity in the Netherlands between the exclusion from refugee protection of several hundreds of suspects of international crimes and the lack of subsequent criminal prosecutions).

<sup>22</sup> See *supra* note 9 and accompanying text. See also Rule 106 of the ICTY's and ICTR's Rules of Procedure and Evidence (tribunals' judgments are 'final and binding' for national compensation procedures).

prosecutions' of international crimes, with potentially equally punitive results.<sup>23</sup> Receiving little attention in ICL literature generally,<sup>24</sup> the relationship between criminal trials and related non-penal proceedings remains a topic for more thorough analysis.

### 3 Interaction between National and International(ized) Criminal Courts

Putting aside non-penal responses still leaves an array of different actors involved in the prosecution of international crimes. National, internationalized and international criminal courts form an intricate web characterized by limited formal hierarchy and a minimal degree of systemization. This state of affairs can be seen both in the allocation of prosecutions between the different courts, and the precedential value of their judgments.

#### A *Dividing Cases*

While many jurisdictional relationships exist between different criminal courts (for instance, complementarity of the ICC to national courts, primacy of the ICTY and the ICTR over national courts, primacy of the Special Court for Sierra Leone over that country's national courts), international law does not establish a comprehensive hierarchy that determines the venue of prosecution for each case. There is no regulation of situations in which different national jurisdictions (for example, territorial, active and passive nationality, universal) want to prosecute the same crimes, as in the case of Pinochet.<sup>25</sup> The venue of prosecution in such a case is determined by practical factors, in particular the whereabouts of the suspect and the choices regarding extradition made by the state holding him.

In all four books, different contributors discuss the lack of hierarchy between national jurisdictions, with differing views on its desirability or required formality.<sup>26</sup> Despite the absence of a clear rule of international law, it is obvious that territorial jurisdiction would top that hierarchy, as it is widely seen as the strongest foundation for prosecution and the basis of criminal law. At the other end of the scale, universal jurisdiction is undoubtedly the weakest foundation. Accordingly, national courts

<sup>23</sup> See e.g. *Beharry v. Reno*, 183 F.Supp.2d 584 (2002) ('Characterizing a serious penalty as civil rather than criminal does not reduce its sting or make it any less punitive. However bottled, poison is toxic. . . . It defies common experience to characterize deportation of an alien such as petitioner as anything other than punishment for his crimes.') and *Bridges v. Wixon*, 326 U.S. at 164, 65 S.Ct. at 1457 (1945) (Murphy, J., concurring: 'The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.').

<sup>24</sup> But see Handmaker, *supra* note 21.

<sup>25</sup> See Swart, 'Le place des critères traditionnels de compétence dans la poursuite des crimes internationaux', in *Juridictions nationales*, at 570–571. National proceedings against Pinochet involved not only the courts of Great Britain and Spain, but also, among others, those in Belgium, Luxembourg, The Netherlands and Sweden.

<sup>26</sup> See *Accountability*, at 33 and 399–400; *Prosecution*, at 850–852; *Juridictions nationales*, at 350, 570–571, 609–610 and *Juridictions internationales*, at 23, 193–194, 209–211.



have in several instances formulated additional demands for the admissibility of prosecutions of international crimes on the basis of universal jurisdiction. For several years, German courts required a legitimizing link between the crime and the German state or territory for the prosecution of genocide or grave breaches of the Geneva Conventions on the basis of universal jurisdiction. This requirement was rejected, however, by the new German Code on International Crimes.<sup>27</sup>

Expressing their preference for territorial jurisdiction, the Spanish courts have made prosecutions on the basis of universal jurisdiction subject, first, to the 'principle of subsidiarity', and later, to the 'principle of necessity of jurisdictional intervention'.<sup>28</sup> Each principle in essence requires the Spanish courts to ascertain that the courts of the state where the crime was committed are inactive before utilizing universal jurisdiction, and the difference between them appears to belong to the exclusive knowledge of the Spanish judiciary. While one cannot but admire the ease with which these courts find authoritative yet theretofore completely unknown jurisdictional principles, it should be noted that none of these additional requirements had any basis in national or international law. Moreover, they might be prompted by legitimate theoretical concerns, but can in practice severely hamper the prosecution of crimes that are otherwise left unpunished, as Michael Cottier demonstrates.<sup>29</sup>

The unregulated concurrence of national jurisdictions is an ambiguous phenomenon. While there are definite advantages to territorial prosecutions, the unfortunate reality is that states prosecute international crimes adequately only when committed by other or past regimes. Therefore, giving primacy to courts that exercise territorial jurisdiction seriously complicates prosecutions in foreign courts, which provide the only realistic chance of enforcement. In each case, a prosecutor acting not on the basis of territorial jurisdiction will have to prove the inactivity of the territorial courts, which is the rule rather than the exception in ICL. Indeed, one may ask whether formulating a hierarchy of national jurisdictions is desirable so long as the underutilization of national courts, rather than competition between them, is the most pressing problem. On the one hand, establishing priority rights for certain bases of jurisdiction can perhaps reinforce a corresponding duty to prosecute by clearly allocating responsibilities. Yet, granting courts more leeway in their exercise of different forms of jurisdiction, including the decision whether or not to defer to other national courts, might prove more beneficial to the goal of a more effective prosecution of international crimes. Also, an abstract hierarchy of jurisdictions may not always correspond

<sup>27</sup> See Ambos and Wirth, 'Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts', in *Prosecution*, at 778–783; Dembowski, 'The ICC: Complementarity and its Consequences', in *Accountability*, at 163–165 and Roth and Jeanneret, 'Droit allemand', in *Jurisdictions nationales*, at 19–22.

<sup>28</sup> See Buck, 'Droit espagnol', in *Jurisdictions nationales*, at 140–141 and Cottier, *supra* note 17. The 13 December 2000 decision of the *Audiencia Nacional* they discuss, introducing the 'principle of subsidiarity,' was overruled by the 25 February 2003 *Judgment on the Guatemalan Genocide Case of the Tribunal Supremo* (Supreme Court). See 42 ILM (2003) 686 and Ascencio, 'Are Spanish Courts Backing Down on Universality?: The Supreme Tribunal's Decision in Guatemalan Generals', in 1 *JICJ* (2003) 690. Subsequently, the 'principle of necessity of jurisdictional intervention' was introduced in the 20 May 2003 *Judgment on the Peruvian Genocide Case* of the same court. See 42 ILM (2003) 1200.

<sup>29</sup> See Cottier, *supra* note 17, at 854–855.

adequately to practical cases. For example, when both torture victims and their attackers have found refuge in another country, there are both practical and principled arguments against granting priority of prosecution to the courts of the state where the crime occurred.

Finally, there is a danger that a formal priority right of prosecution will be used by territorial states as an argument to claim ownership over international crimes committed on their territory. It might reinforce the idea that states can oppose the prosecution of international crimes committed on their territory or by their nationals with concepts like sovereignty and the principle of non-intervention. This mistaken line of reasoning recurs in different forms, for example in the American position on the ICC and the position of non-party states.<sup>30</sup> But, as several contributors to these volumes point out, states cannot appeal to sovereignty-based arguments to claim a veto over prosecutions that are authorized or required by customary international law or treaties binding upon them.<sup>31</sup>

In any case, a formal jurisdictional hierarchy can only be the framework for a proper division of cases, not the final word. In this respect, it will be instructive to see the choices made by the prosecutor of the ICC. Aram Schvey rightly points out that the example of the ICTY has shown the advantages of trying smaller cases before targeting the big fish.<sup>32</sup> This course would allow the ICC to develop necessary practice, jurisprudence and legitimacy in relatively straightforward and low-key cases before turning to more complex and controversial prosecutions. Therefore, the formulated intention of the prosecutor to focus solely on those who bear the greatest responsibility, and deal with lower-level perpetrators only where instrumental for the prosecution of their leaders, can be questioned.<sup>33</sup> The analysis that the Statute would require such a narrow focus is at least doubtful and it unnecessarily complicates the functioning of the Court by establishing an additional threshold for admissibility. As a practical matter, the prosecution of lower-level perpetrators, while perhaps not ideal, is fully justified where leaders are for various reasons more difficult to target successfully. As a more important matter of principle, one should keep open the targeting of all categories of perpetrators if one believes in the deterrent function of the ICC, since people are generally influenced most by examples closer to their own situation.

## B Deciding Cases

The simple fact that ICL judgments do not form a coherent body of law emanates from the description of different criminal courts and cases in all four books.<sup>34</sup> International

<sup>30</sup> See generally Kaul, 'The Continuing Struggle on the Jurisdiction of the International Criminal Court', in *Prosecution*, 21.

<sup>31</sup> See Ambos and Wirth, *supra* note 27, at 779–780; Cassese, *supra* note 18, at 26; Gaeta, 'Les règles internationales sur les critères de compétence des juges nationaux', in *Juridictions internationales*, at 198–199.

<sup>32</sup> See Schvey, *supra* note 7, p. 83.

<sup>33</sup> See Paper on some policy issues before the Office of the Prosecutor, November 2003, at 3 and 6–7 (available at <http://www.icc-cpi.int>, last visited 20 March 2004).

<sup>34</sup> Cf. *Juridictions internationales*, at 260 (in their general conclusion, the editors speak of a '*pluralisme juridique très poussé*').

regulation may be limited regarding the jurisdictional hierarchy of the different courts involved in the prosecution of international crimes, but it is non-existent where it concerns the use of case law from other courts as legal precedent. There is no higher court to authoritatively decide points of law in ICL, nor a system of binding precedent or *stare decisis*. In fact, the international courts are not even required to follow their own case law, let alone that of others.<sup>35</sup> National courts follow the jurisprudence of their own legal system, but international law does not require them to follow the precedents of international(ized) courts.<sup>36</sup> Furthermore, since each court functions within its own legal framework (statute or national law), which only partially overlaps with that of other courts, incoherence looms in ICL jurisprudence.

Different initiatives to counter this danger of fragmentation can be discerned. The *ad hoc* tribunals share an Appeals Chamber to further unify their work, but a proposal to attach this Chamber also to the Special Court for Sierra Leone was ultimately rejected. Some states now require their courts to have recourse to the law and practice of the international courts in their implementing legislation on the core crimes.<sup>37</sup> Of course, courts, especially national ones with limited resources, are generally quite willing to take into account each other's precedents when prosecuting similar crimes. In this regard, there is certainly an *informal* hierarchy of precedents, headed by the international courts which carry most authority and expertise. Yet, the limits of a system of 'persuasive precedent' and the resulting complexities are obvious. It can lead to diverging interpretations of central legal concepts, as illustrated by the case law of the ICTY and the ICTR on rape, cumulative charging and the existence of a hierarchy of crimes.<sup>38</sup> It can also render curious results in particular cases. The Belgian Court of Cassation, for example, ruled in 2002 that a prosecution could be reinstated even after the ICTR had, upon transferral, in no uncertain terms rejected the case for lack of *prima facie* evidence.<sup>39</sup>

<sup>35</sup> See ICTY, Trial Chamber, 14 January 2000, *Kupreskic*, IT-95-16-T, para. 540: '[S]ubject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes.' See also Art. 21(2) ICC Statute ('The Court *may* apply principles and rules of law as interpreted in its previous decisions' (emphasis added)).

<sup>36</sup> The *ne bis in idem* rule requires acceptance of specific judgments as final, but does not make them legal precedents in a wider sense. See Art. 20 ICC Statute, Art. 10 ICTY Statute and Art. 9 ICTR Statute.

<sup>37</sup> See Jones, 'Droit anglais', in *Juridictions nationales*, 58 and Dembowski, *supra* note 27, at 155.

<sup>38</sup> See respectively Dörmann, 'War Crimes in the Elements of Crimes', in *Prosecution*, 131; Stuckenberg, 'Multiplicity of Offences: *Concursus Delictorum*', in *Prosecution*, 573 and Nemitz, 'Sentencing in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', in *Prosecution*, 615.

<sup>39</sup> The Court found that the decision not to confirm an indictment is, unlike an acquittal, not subject to the *ne bis in idem* rule. Cour de Cassation, 2e Chambre, 9 January 2002 (No. RC02194).

## 4 Interaction between National and International Criminal Law

No matter in which court it takes place, the prosecution of international crimes often requires application of both national and international law. Internationalized courts by definition apply both bodies of law. But national criminal law also plays an important role in the jurisprudence of international courts, even if application of that law itself is not part of their mandate. Mireille Delmas-Marty sets forth with great clarity how the *ad hoc* tribunals have resorted to comparative national law for reasons of interpretation and legitimization.<sup>40</sup> She also signals the pitfalls of this practice, such as the natural inclination of judges to lean disproportionately on legal concepts and jurisprudence from their own legal system.<sup>41</sup>

National courts also necessarily resort to a combination of national and international law. Most legal systems incorporate (parts of) international law by reference, not least in the field of ICL. But even where they do not, international law is often used by national courts to interpret, and sometimes correct or supplement, corresponding national legislation. The extent to which international law can remedy lacunae and harmonize inconsistencies in national law is of great practical importance, since no national law is flawless in its regulation of international crimes. While the current wave of ICC implementing legislation has considerably improved many national laws, deficiencies and incongruities in national implementation will remain a structural feature of ICL, if only because the process of progressive criminalization under customary international law resists complete and timely implementation.

The role of international law in national prosecutions raises important questions. What are the conditions for its application? Is ICL subject to the same constitutional rules on incorporation and transformation as general international law? How are courts to deal with inconsistencies between national laws and the international sources these are meant to implement? Under what circumstances can international law itself form the legal basis for a national prosecution through direct application?

The reports in *Juridictions nationales* make clear that this last form of interplay between national and international criminal law has received only limited attention in practice, not least because national prosecutions of international crimes are sparse. While several states have rejected direct application of international criminal law altogether by reference to the principle of legality, the position of many others is more complex or has not yet crystallized.<sup>42</sup> Noteworthy in this respect, but not included in any of the books under review, is the approach of the Hungarian Constitutional Court

<sup>40</sup> Delmas-Marty, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in *Juridictions internationales*, 95.

<sup>41</sup> See also Schabas, 'The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', in *Prosecution*, at 467–470 and Tochilovsky, 'Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia', in *Prosecution*, 627.

<sup>42</sup> See *Juridictions nationales*, e.g. at 35–36 (England), 219–225 (The Netherlands), 279–282 (Switzerland), 482, 498–504 (Latin-American states), 544 (Islamic states), 565 and 592–596 (synthesis).

in sanctioning prosecutions directly on the basis of (customary) international law. Appealing to the *sui generis* character of and the need for a unified response to international crimes, the Court ruled that their prosecution is governed not by the principle of legality in national law, but solely by the more lenient principle contained in Article 7(2) ECHR and Article 15(2) ICCPR.<sup>43</sup>

## 5 Conclusion

The quest for accountability for international crimes produces complex processes of interaction. Criminal courts interact with counterparts on different levels, as well as with other courts and other bodies such as truth commissions. The division of labour between all these actors, the consistency and uniformity of their work and the thorough use of the output of other courts are central issues in enhancing the legitimacy and efficiency of ICL. The books discussed here on various levels provide an outlook on the interaction between national and international approaches to international crimes. Together, they show that there is a lot to be gained by further systemization of international criminal law.

<sup>43</sup> Decision of the Constitutional Court No 53/1993, 13 October 1993, para. IV (4). See for an English translation L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (2000), at 273–283. See also *supra* note 13.

