

What does the Rome Statute require from States? Penal Rigidity and Formal Flexibility in the Struggle Against Impunity

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This paper pursues a double goal: we will first problematize a few general elements about the complementarity of the International Criminal Court («the ICC»), which will then allow us to conclude with a theoretical hypothesis about international criminal law in general. According to this hypothesis, the ICC is part of a «fundamentally restrictive but formally open» criminal law: the Court takes a classical position by considering penal *severity* as the sole valuable response to mass atrocities, but provides distance from the classical model regarding the *form* of this severity.

Analysing the complementarity of the Court, we will thus highlight two corollary and possibly paradoxical arguments: on the one hand, the Rome Statute only recognises actions taken by States against mass atrocities if they are sufficiently severe (see Chapter 1, A) whilst, on the other hand, it leaves these States free to give their actions the title and form they prefer (see Chapter 2, A). Nevertheless, a wider interpretation of the Statute establishing the Court (hereinafter «the Rome Statute» or «the ICC Statute») may provide a more nuanced approach to these conclusions. (see Chapter 1, and Chapter 2, B).

In order to keep this contribution coherent and succinct, we will focus only on the cases where a sentence has already been pronounced. This approach does not imply that no acquittal could be recognised by an international criminal jurisdiction¹, and one should not forget the flexibility left to the ICC prosecutor, the case law and the expert scholars in the recognition of extra-penal actions undertaken by the States. From this could flow a policy which could be more open than that which we will identify here (cf. the nuances that we will describe in sections 1.B. and 2.B.). The hypothesis that we support in this paper is based upon a picture of the actual state of ICC law today; nonetheless, we think that it could be generalised on the basis of the practice of the international criminal tribunals (hereinafter ICTs) and the overall system of the ICC².

1 See D. Vandermeersch, «L'indépendance des juridictions nationales: un défi à relever», *Tribunal pénal international pour le Rwanda – Modèle ou contre-modèle pour la justice pénale internationale? Le point de vue des acteurs. Colloque international des 9, 10 et 11 juillet 2009*, organisé par l'ADH, l'IHEID et l'IEDES à Genève (inédit), p. 1.

2 See the author's developments in this regard, esp. in: *Trois propositions pour une théorie du droit international pénal*, Bruxelles, to be published in 2012.

Chapter 1

A rigid requirement of penal severity

A close reading of article 20 of the Rome Statute reveals a narrow conception of criminal law, which actually governs the ICC law. This appears logical as «final stage of the judiciary process», the sentence «reflects what the system is and what it favours»³, and the ICC aims to orchestrate a «système de répression internationale»⁴. As the sole response proposed to mass crimes by the Statute of the Court, criminal severity seems essential to the recognition of the action of national courts and tribunals against these atrocities. We will analyse the text of article 20, substantiating this first affirmation (1.A.), before clarifying it on the basis of the openness that could be possible on the basis of (a wide reading of) the complementarity of the Court (1.B.).

A. A strict and severe view of criminal action

Following the hypothesis which sets out that in good faith and without wrongdoing⁵, national tribunals will sentence an individual for crimes falling under the jurisdiction of the ICC, this conviction will be recognised as valid by the ICC on the condition that: (i) it led to a sentence *stricto sensu*; (ii) it is enforceable; and (iii) it is sufficiently severe.

(i) Although some debate this issue⁶, the use of the term «tried by another court» in article 20-3 of the Rome Statute⁷ seems to exclude any non-judiciary decision, such as transactions, mediations⁸ or reconciliation process. More precisely, the use of the term «tried» would deprive «non criminal» judgements

3 A.-M. La Rosa, *Juridictions pénales internationales. La procédure et la preuve*, Paris, 2003, p. 209.

4 A. Yokaris, *La répression pénale en droit international public*, Athènes/Bruxelles, 2005, p. 95.

5 Without activating the complementarity of the Court by showing the purpose of shielding the person concerned from criminal responsibility or lacking from independence or impartiality (see StICC, art. 17 and 20).

6 See e.g. J. Stigen, *The relationship between the International criminal court and national jurisdictions*, Leiden/Boston, 2008, p. 211.

7 StICC, art. 20-3:

«3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct (...).»

8 J. Dugard, «Possible Conflicts of jurisdiction with Truth commissions», in: A. Cassese/P. Gaeta/J.R. Jones (dir.), *The Rome Statute of the International Criminal Court*, vol. 1, Oxford, 2002, p. 702.

of any *res judicata* authority: more than any other reactions to atrocities, sentences imposed by courts and tribunals demonstrate the intent to participate in the struggle against impunity⁹. It is certain that a conviction without sentence could not prevent the intervention of the ICC. In other terms, the ICC may admit a case after an implementation of any mechanism where no sentence was ordered¹⁰: it is required that the convicted person was *punished* in the strict meaning of the term, within a domestic legal order recognised as valid and sufficient.

(ii) The enforcement of a sentence also constitutes one of the typical criteria of recognition of a foreign decision by a national jurisdiction¹¹. Authors agree that the enforcement of the sentence is an indispensable corollary to the struggle against impunity¹². Pardon, parole or commutation of sentence could be considered as reliable by the ICC¹³, but these criminal temperaments must logically follow the pronouncement of an *enforceable* sentence: they could not, for instance, apply to a sentence of a symbolic nature. This requirement refers to the idea that the absence of enforcement could reveal something lacking in the national system¹⁴. From this perspective, a sentence without full enforcement would show too much mercy to the accused.

- 9 B. Broomhall, «La Cour pénale internationale: présentation générale et coopération des Etats», *ICC ratifications and national implementing legislation*, coll. Nouvelles Etudes Pénales, no. 13quater, Paris, 1999, p. 89.
- 10 J. Stigen, *op. cit.* note 7, p. 211.
- 11 Ch. Van den Wyngaert/T. Ongena, «Ne bis in idem principle, including the issue of amnesty», in: A. Cassese/P. Gaeta/J.R. Jones (dir.), *The Rome Statute of the International Criminal Court*, vol. 1, Oxford, 2002, p. 712.
- 12 M. El Zeidy, «The principle of complementarity: a new machinery to implement international criminal law», *Michigan Journal Int. Law*, 2002, vol. 23, p. 947, prob. about genocide, torture and serious violations of the Geneva Conventions, as defined by the Convention against Torture and other Inhuman or Degrading Treatment or Punishment, adopted by GAUN Res. 39/86, 10 Dec. 1984, entered into force on 26 June 1987, art. 7; *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by GAUN Res. 260 (III), 9 Dec. 1948 et entered into force on 11 Jan. 1951, art. 4; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Convention (III) relative to the Treatment of Prisoners of War, art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 146, all four adopted on 12 Aug. 1949 in Geneva and entered into force on 21 Oct. 1950.
- 13 B. Broomhall, «La Cour pénale internationale: directives pour l'adoption des lois nationales et d'adaptation», *ICC ratifications and national implementing legislation*, coll. Nouvelles Etudes Pénales, no. 13quater, Paris, 1999, p. 153; W.A. Schabas, *An introduction to the International criminal court*, Cambridge, 2001, p. 70.
- 14 See e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1, p. 46.

The requirement of an enforceable sentence confirms that a conviction *stricto sensu* mobilises the complementarity mechanism and the *ne bis in idem* rule¹⁵, in other words, it prevents the ICC from completing what was a national action. Without such a conviction, the force of *res judicata* is questionable: the national struggle against impunity could be considered as insufficient, and the Court could admit the case. This is consistent with the *criminal* project promoted by the Rome Statute.

(iii) As to severity of the sentence, article 20-3 of the Court Statute requires national jurisdictions to pronounce *sufficiently severe* sentences¹⁶. Too light a sentence could be regarded as undue leniency towards the accused¹⁷, whilst a particularly severe conviction, whatever its characteristics, would prevent the Court from completing the national process. Exceptions to the complementarity of the Court¹⁸ were conceived, but only in the sense of a favour granted to the accused: first and foremost, the negotiators of the Rome Statute wanted to avoid impunity¹⁹. In order to avoid criticism, national jurisdictions will therefore tend to pronounce severe sentences.

Of course, rule 145 provides for the ICC to apply the principle of proportionality when it imposes a sentence²⁰, and we can expect that it will impose the same requirement on national jurisdictions. Since the ICC is only responsible for mass crimes (genocide, war crimes and crimes against humanity, today), provided that the case is sufficiently grave²¹, sentences should logically be *severe* enough to be proportional. Whilst confirmed by the ECtHR, the link that

15 R. Kolb/D. Scalia, *Droit international pénal*, Bâle/Bruxelles, 2012, p. 211 ss.

16 In the same sense, see A. Nieto Martin, «Introducción: El principio de ne bis in idem en el Derecho penal europeo en internacional», in L. Arroyo Sapatero/A. Nieto Martin (dir.), *El principio de ne bis in idem en el Derecho penal europeo en internacional*, Cuenca, Ed. de la Universidad de Castilla – La Mancha, 2007, p. 15.

17 B. Broomhall, «La Cour pénale internationale: directives ...», *op. cit.* note 13, p. 163.

18 See StICC, art. 17 et 20-3.

19 So could consider the PrepCom that a too light penalty could constitute an objective sign of failure in the national judiciary process, see e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 1, A/51/22, GAOR, 1996, 51st sess., Suppl. 22, § 173. See M. Benzing, «The complementarity regime of the International criminal court: international criminal justice between State sovereignty and the fight against impunity», *Max Planck Yearbook of UN Law*, vol. 7, 2003, p. 612; J.K. Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions*, Oxford, 2008, p. 265. And in this sense, see the comment by the ILC of its own Draft Statute, Report of the International Law Commission to the General Assembly on the work of its 46th session, A/49/10, *Yearbook of the International Law Commission*, 1994, vol. II (part 2), p. 58.

20 «la sanction pénale doit être la mesure de l'infraction commise ni plus ni moins», see e.g. A.-M. La Rosa, *op. cit.* note 3, p. 181.

21 Acc. to StICC, art. 17-1-d.

connects necessity and the proportionality of the sentence²² seems to unravel here. It is not about limiting the arbitrary by guaranteeing that a sentence is proportional to the offence, but about ensuring that there is a strong severity of sentence which reflects the gravity of the crime committed²³. It is not only about «intervening within the limit of necessary, but each time and as much as necessary»²⁴ but about *sufficiently punishing*. The subsidiarity of criminal law itself is questioned by this requirement of severity. This is an overall trend that is not only found in international criminal law: a «culture of conviction» is being developed, which risks jeopardising the interests of the accused person, and even his fundamental rights²⁵.

The limited scope that the Rome Statute attributes to the *ne bis poena in idem* principle (which allows for the deduction of a first sentence from a second sentence pronounced *in idem*) seems to confirm this requirement of criminal severity. Indeed, the Court *can* take into consideration completed periods of detention when setting a prison sentence²⁶, but it is not obliged to do so. And nothing is provided for other kinds of sentences that have been previously purged. The silence of the Statute on this matter is not in contradiction with the essential status that the sentence holds in the international criminal process: that is to say that the application of a principle in favour of the accused is not a priority. In the difficult balancing act between the rights of the accused and criminal law, the fight against impunity and the necessity of the sentence brush aside judiciary temperance.

22 S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Bruxelles, 2001, p. 190.

23 This shows a vision historically opposite to the origin of the principle of proportionality: Cartuyvels clearly explains that, according to Montesquieu and Beccaria already, the argument of proportionality is justified by an idea of penal moderation. Cf. Y. Cartuyvels, *D'où vient le code pénal? Une approche généalogique des premiers codes pénaux absolutistes au XVIII^e siècle*, Bruxelles, 1996, p. 140 not.

24 R. Koering-Joulin/J.-F. Seuvic, «Droits fondamentaux et droit criminel», *Actualité juridique-Droit administratif*, 20 juillet/20 août 1998, p. 116.

25 R. Henham, «The philosophical foundations of international sentencing», *Journal of Int. Crim. Justice*, 2003, p. 72.

26 StCPI, art. 78-2:

«The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime».

B. Nuance: the possible recognition of alternative judiciary methods

A priori, the wording of article 20 of the ICC Statute does not allow alternative methods of dispute settlement to block the action of the Court²⁷. This is understandable: on the one hand, alternative methods of dispute settlement (including Truth and Reconciliation Commissions) raise diverse difficulties, notably in terms of the effectiveness of decisions, the right to a fair trial and the place of victims in the procedure. It is moreover difficult to define a global position regarding situations which are, by definition, local and created on an *ad hoc* basis²⁸.

That being said, these non-criminal processes remain as alternatives to the judicial process²⁹: it is certain that only «jurisdictions» can pronounce sentences, but no textual restriction can prevent the ICC, in its case law, from showing openness to these non-criminal responses. Some authors consider that this is at least a possibility³⁰, whilst others suggest that it is certain³¹ that a seriously conducted procedure, even if not in a criminal court, would be considered as *res judicata*. In our view, it appears more likely that these procedures would be considered as investigations followed by a decision not to prosecute, thus falling under the scope of article 17³². *De facto*, this would allow for some openness regarding alternatives to the criminal trial. The strict and severe formulation of the latter, which governs the actions of the ICC, would not be affected: only the criminal severity would be endowed with a maximal (*res judicata*) authority. Today, the «judgement» has to carry a sentence in the ICC view, otherwise is at risk of not to be recognised a judgment.

27 M. El Zeidy, *op. cit.*, note 13, p. 947. To some extent, see also: C. Stahn, «Complementarity, amnesties and alternative forms of justice. Some interpretative guidelines for the ICC», *Journal of Int. Crim. Justice*, 2005, vol. 3, p. 713.

28 See a proposed solution by *ibidem*, p. 695-720.

29 A. Bernard/K. Bonneau, «Punir, dissuader, réparer. Quelle justice pénale internationale?», in: G. Devin (dir.), *Faire la paix. La part des institutions internationales*, Paris, 2009, p. 252.

30 W.W. Burke-White, «Complementarity in practice: the International criminal court as part of a system of multi-level global governance in the Democratic Republic of Congo», *Leiden Journal of Int. Law*, 18, 2005, p. 582.

31 J. De la Cuesta, «Les compétences criminelles concurrentes nationales et internationales et le principe «ne bis in idem». Rapport Général», *Revue int. droit pén.*, no. 73, 3-4, 2002, p. 703.

32 B. Broomhall, «La Cour pénale internationale: directives ...», *op. cit.* note 13, p. 153; to some extent, see J. Dugard, *op. cit.* note 8, p. 702.

Chapter 2

A polymorphic repression

In ICC law, the criminal rigidity described above is accompanied by a flexibility regarding the legal basis and forms of the fight against impunity: it is not about imposing a universal criminal procedure, but about punishing international crimes, *quasi* without paying attention to the forms taken by this fight against impunity³³.

That the Statute encourages States to act, but does not oblige them to comply with the letter of the Rome Statute implies that international criminal law is open to diversity. Below, we describe this flexibility and the possible variations of this branch of law (2.A.). In short, the Rome Statute demonstrates a high traditionalism regarding the view of the criminal (as described at point 1 above), but in an almost post-modern form, far from the classic and positivist canons. Nonetheless, through an extensive interpretation of the Rome Statute we will identify possible nuances regarding this formal openness(2.B.).

A. Flexible legal basis and form

Here we will demonstrate that in addition to its criminal rigidity, the system of complementarity established by the Rome Statute contains openness, diversity and formal flexibility. Indeed, only two of its provisions explicitly refer to an adaptation of national legislations without imposing an obligation of formal univocity (*i*). A relative obligation to act, with flexible content, is apparent from the preamble and the complementarity of the Court (*ii*), as well as in the interpretations of the Statute and States' practices. The States are encouraged to fight against impunity, but remain free regarding the way they reach this goal. Concretely, this results in high diversity in the actions carried out (*iii*).

(*i*) Only two provisions of the ICC Statute explicitly require an adaptation of national criminal laws. The first, is dedicated to acts obstructing the administration of justice; it is left to the appreciation of each State³⁴. The second deals

33 For a more detailed analysis of this opening to flexibility, see D. Bernard, «Le Statut de la Cour pénale internationale saisi par les Etats: un jaillissement du droit hors catégories?», in: Y. Cartuyvels et al.(dir.), *Les sources du droit revisitées*, to be published in 2012.

34 StICC art. 70-4:

«a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals (...).»

with the cooperation of the States with the Court³⁵. It may imply, through the principle of double criminality, that States have to provide indictments comparable to those established by the Rome Statute: the normal rules relating to extradition indeed set forth the possibility of States refusing extradition if the offence in question is not provided for in the concerned State law. That being said, the same qualifications are not required: it is about verifying whether a *corresponding* offence exists in the legal order of the State to which the extradition claim is addressed³⁶. The requirement of similarity, which differs from identity, thus allows for the existence of vagueness and differences between domestic and international legal orders.

(ii) According to the Preamble of the Statute, States have to participate in the repression of the gravest crimes. In addition to the fact that the binding character of the preambles is questioned³⁷, the form of this repression is not imposed on States: nothing is indicated on this matter³⁸. The commitment of a signatory party «ne se traduit pas forcément par un devoir de modification du droit interne et encore moins par un principe d'identité entre les Statuts et les législations étatiques»³⁹.

In the same sense, the complementarity of the ICC towards national jurisdictions also seems to *invite* the States to align their legislation with the Rome Statute (without forcing them). This mechanism of repartition of competencies does not express any literal obligation: compelling States to legislate one way or another would overly jeopardize sovereignty and the principle of complementarity⁴⁰. That being said, so that complementarity can be implemented effectively, States must be able to act without the Court needing to complete

35 StICC, art. 88:

«States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part».

36 See European Convention on Extradition, opened to signature on 13 Dec. 1957, entered into force on 18 April 1960, art. 2-1.

37 See Convention on the Law of Treaties, done at Vienna on 23 May 1969 and entered into force on 27 January 1980, or see e.g. J.-P. Cot/A. Pellet, «Préambule», in: J.-P. Cot/A. Pellet/M. Forteau (dir.), *La Charte des Nations Unies. Commentaire article par article*, Paris, 2005, p. 290.

38 StICC, Preamble, al. 4 et 6:

«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»

«Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes».

39 G. Werle et S. Manacorda, «L'adaptation des systèmes pénaux nationaux au Statut de Rome. Le paradigme du «Völkerstrafgesetzbuch» allemand», *Revue sc. crim et droit pén.*, 2003, vol. 3, p. 506.

40 I. Tallgren, «Article 20: Ne bis in idem», in: O. Triffterer (dir.), *Commentary on the Rome Statute of the International Court. Observers' notes, Article by Article*, Munich/Oxford/Baden-Baden, 2008.

their action (namely the Court re-judging an issue again after the State's tribunals).

Two arguments therefore come together: on the one hand, as complementarity is a cornerstone and fundamental pillar of the Rome Statute, non-participation as to its concrete implementation (by becoming adequately competent) could constitute a violation of the spirit of the Statute. On the other hand, an adequate and good faith implementation of the Statute is indispensable to the concrete application of complementarity⁴¹. Indeed, incomplete or inappropriate adaptation of its provisions risks provoking a multiplication of admissible cases before the Court. This would make the effective exercise of its complementary functions impossible (and would not respect the spirit of the Statute as it would not limit impunity). In that sense, Kleffner considers that the legislative adaptation of domestic legal orders relates to an interpretation of the Statute in accordance with the maxim *ut res magis valeat quam pereat* (or principle of utility): if not, the Statute loses the applicability it was supposed to have⁴². Teleological considerations (respect of the spirit of the Statute) and practices (to avoid the ICC having to act everywhere and being drowned by too great a number of cases) therefore combine in pushing States to incorporate the Statute into their national legislation. Nevertheless, one cannot talk about an absolute obligation. In short, States are encouraged and will tend to adapt their legislation in accordance with the ICC Statute (also for political reasons⁴³), but are not legally bound by a specific form of action or to a particular formalism.

(iii) National legislators and governments seem to agree on the fact that the obligation to adapt domestic law in accordance with the Rome Statute is not an express one⁴⁴: one observes «des interprétations distinctes mais convergen-

41 A. Zahar/G. Sluiter, *International criminal law*, Oxford, 2008, p. 489.

42 J.K. Kleffner, «The impact of complementarity on national implementation of substantive international criminal law», *Journal of Int. Crim. Justice*, 1, 2003, p. 93.

43 See e.g. R.S. Lee, «The Rome conference and its contribution to international criminal law. Introduction», in: R.S. Lee (dir.), *The International criminal court. The making of the Rome Statute: issues, negotiations, results*, Den Haag, 1999, p. 23; D. Robinson, «The Rome Statute and its impact on national law», in: A. Cassese/P. Gaeta/J.R. Jones (dir.), *The Rome Statute of the International Criminal Court*, vol. 1, Oxford, 2002, p. 1860; J. Verhoeven, «Souveraineté et mondialisation: libres propos», *La mondialisation du droit*, Dijon, 2000, p. 43-44.

44 For instance, the Netherlands have considered in this sense that States are implicitly obliged by the complementarity of the ICC to modify their national legislation according to the Rome Statute, see *Wet internationale misdrijven, Memorie van toelichting*, 3 May 2002, Kamerstuk 28 337 nb 3 (Second Chamber), p. 2; the Belgian Senate concludes to an «indirect invitation» to implementation, see *Projet de loi portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998*, Exposé des motifs, Sénat belge, Session 1999-2000, nb 2-329/1, § 21.

tes»⁴⁵ in that sense. As for the doctrine, although some authors consider that the strict incorporation of the Statute into national law is compulsory⁴⁶, most consider it to be a «soft» rather than a «hard» obligation⁴⁷, a «*strong incentive*» but not a legal obligation⁴⁸, a «motivation» to incorporation by the States⁴⁹, and an obligation of a moral character⁵⁰.

Overall, and without presuming to sum up the total discretion left to the States on that matter⁵¹, national legislators appear to be provided with four methods: mere reference to the Rome Statute, the adoption of definitions that are given to international crimes, the rewriting of these and the maintaining of the ordinary law of the State. This necessarily leads to the diversity we have announced.

Firstly, the State Parties can content themselves with a simple reference to international law. This is the solution – which is flexible since it remains open to evolutions of international crimes – which has been chosen by Canada, for instance, for war crimes⁵².

Others prefer to literally adopt the definitions of the crimes and principles of criminal law established by the Statute, by incorporating the exact terms into their domestic law⁵³. This method has been to the liking of Belgium, among

45 G. Werle et S. Manacorda, *op. cit.* note 40, p. 507.

46 See H. Relva, «The implementation of the Rome Statute in Latin American States», *Leiden Journal Int. Law*, vol. 16, 2003, 2, p. 331-366; Cl. Saas, «La nécessaire adaptation du droit français au Statut de Rome», *Actualité juridique. Pénal*, no. 6, juin 2006, p. 267-270.

47 L.C. Dembowski, «The International criminal court: complementarity and its consequences», in: J.E. Stromseth (dir.), *Accountability for atrocities. National and international responses*, New York, 2003, p. 142.

48 R. Cryer, *An introduction to international criminal law and procedure*, Cambridge, 2007, p. 63.

49 M. Henzelin, «Droit international pénal et droits pénaux étatiques. Le choc des cultures», in: R. Roth/M. Henzelin (dir.), *Le droit pénal à l'épreuve de l'internationalisation*, Paris/Genève/Bruxelles, LGDJ/Georg/Bruylant, 2002, p. 116.

50 Acc. to Cl. Jorda and B. Cotte, see Sénat français, Ordinary session 2008, Séance no. 90, 10 June 2008, *Journal Officiel en ligne*, p. 2743.

51 R.S. Lee, *op. cit.* note 43, p. 29.

52 Canada's crimes against humanity and war crimes act, assented to 29 juin 2000, art. 4 (e.g. about war crimes).

53 A definition of crimes according to the Rome Statute does not guarantee a jurisdictional priority to national jurisdictions: States should also verify the adequacy of their general principles of criminal law, regarding immunities or defences in particular. Cases could be admitted by the ICC if the national conception of these principles implies, in the national order, the criminalisation and pursuit of less cases that according to the Rome Statute. See M. Delmas-Marty, «Tribunaux internationaux et mondialisation», in E. Fronza/S. Manacorda (dir.), *La justice pénale internationale dans les décisions des tribunaux ad hoc, Etudes des Law clinics en droit pénal international*, Paris/Milan, 2003, p. 278; D. Vandermeersch, «Droit belge», in: A. Cassese/M. Delmas-Marty (dir.), *Juridictions na-*

others⁵⁴. Yet, «d'un point de vue théorique, une adaptation de notre droit pénal aux incriminations du Statut de la CPI [n'était]... pas absolument indispensable»⁵⁵. Although this solution, consisting of mere incorporation, seems simple, it does not prevent future national and international case law following differing methods⁵⁶ and does not recognise that formally similar terms do not necessarily still have the same meaning.

Thirdly, States may reorganise national incriminations, lacuna by lacuna, in order to cover each and every situation to which the Statute applies. This appears to be difficult: if the national definition of a crime is narrower than the ICC's, the State could appear to be lacking the will or ability to pursue. Bosnia and Herzegovina took this risk by deciding not to include child conscription in their penal code, as did France by keeping their narrow definition of genocide⁵⁷: their jurisdictions may have to deal with conduct which is criminal according to the Rome Statute, but not according to their national law. To the contrary, terms and laws broader than the Statute should not be problematic⁵⁸: by criminalising more conducts, national jurisdiction would not be narrower than the ICC's. Germany for instance defined as war crimes the starving of civilians by depriving them from essential goods or obstructing their access to humanitarian aid⁵⁹, whilst the Rome Statute does not cover such conducts.

National authorities may fourthly consider their ordinary law as sufficient to address the struggle against international crimes. Nothing in the Statute deprives ordinary national trials of *res judicata* authority⁶⁰: requiring States to adapt a specific criminal law could be viewed as constituting a too strong challenge to their sovereignty.

tionales et crimes internationaux, Paris, 2002, p. 88. States are nevertheless not forced to opt for a specific definition of these principles.

54 The text of the Statute is literally reproduced and referenced in the Belgian *Loi relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*, 16 June 1993, *M.B.*, 5 août 1993, as modified by the Law of 23 April 2003, *M.B.*, 7 mai 2003, art. 1bis e.g.

55 E. David, «Les conséquences du Statut de la Cour pénale internationale pour la répression en droit belge», *Actualité du droit international humanitaire*, Bruxelles, 2001, p. 79.

56 J. Bacio Terracino, «National implementation of ICC crimes. Impact on national jurisdictions and the ICC», *Journal of int. crim. Justice*, vol. 5-2, 2007, p. 423.

57 The French definition of genocide limits indeed this crime to actions taken according to a «plan concerté», what is not established by art. 6 of the Rome Statute, see (French) C. pén., art. 211-1. The definition of a group of victims is conversely larger in this article than in the Statute.

58 B. Broomhall, «La Cour pénale internationale: directives...», *op. cit.* note 13, p. 158.

59 *Völkerstrafgesetzbuch*, 19 June 2003, section 11-1-5: «das Aushungern von Zivilpersonen als Methode der Kriegsführung einsetzt, indem er ihnen die für sie lebensnotwendigen Gegenstände vorenthält oder Hilfslieferungen unter Verstoß gegen das humanitäre Völkerrecht behindert.»

60 J. Bacio Terracino, *op. cit.* note 56, p. 439.

Consequently, a real diversity appears in the national struggles against impunity: their extent and form depending on the political choices⁶¹, the legal tradition and the constitutional framework of each State⁶². To these variations, allowed by the Rome Statute, may be added the intrinsic complexity of international law: international crimes are differently defined in treaties⁶³, appear ambiguous in the Rome Statute itself⁶⁴ and may evolve over time⁶⁵. Diversity therefore cannot be avoided.

B. Nuance: the growing importance of the principles of due process

This openness of the Rome Statute to formal flexibility could be limited by a wide interpretation of the complementarity. Articles 17 and 20-3 of the Statute refer to the «norms of due process» as to judicial qualities, necessary to block an action before the Court.

In article 17, this reference to «principles of due process recognised by international law» serves globally to define a national *unwillingness*. It seems to cover a large set of elements, including the purpose of shielding the person concerned from criminal responsibility, an unjustified delay in the proceedings and a lack of independence or impartiality⁶⁶. Centred on this definition of the national «unwillingness to act», the norms of due process are logically limited to situations where a national jurisdiction would have protected the accused from a real trial. The opposite situation, where the unfairness of domestic investigations or prosecutions is prejudicial to the accused (by a stronger penalty for example), has not been considered⁶⁷. Several authors deduce from this that it is acceptable (even if it is not encouraged) to make an accused easier to convict⁶⁸. However, the Court could interpret this article in a broader way, choosing then a substantial definition of the norms of due process.

61 G. Werle et S. Manacorda, *op. cit.* note 39, p. 501.

62 D. Robinson, *op. cit.* note 43, p. 1850; B. Broomhall, «La Cour pénale internationale: présentation générale ...», *op. cit.* note 9, p. 85, and «La Cour pénale internationale: directives...», *op. cit.* note 13, p. 121.

63 R.S. Lee, *op. cit.* note 43, p. 32.

64 *Ibidem*, p. 29; M. Henzelin, *op. cit.* note 49, p. 115; R. Cryer *et al.*, *op. cit.* note 48, p. 451.

65 «Faire fonctionner la justice internationale – Manuel de mise en œuvre du Statut de Rome instituant la Cour pénale internationale», Human Rights Watch, Septembre 2001, vol. 13-4, p. 20; R.S. Lee, *op. cit.* note 43, p. 45.

66 StICC, art. 17-2.

67 E. Carnero-Rojo, «The role of fair trial considerations in the complementarity regime of the International Criminal Court: from «no peace without justice» to «no peace without victors' justice»?», *Leiden Journal of Int. Law*, 2005, vol. 4, p. 831.

68 K. J. Heller, «The shadow side of complementarity: the effect of article 17 of the Rome Statute on national due process», *Criminal Law forum*, 2005, vol. 17, p. 277.

A reference to fair trial also appears in article 20-3-b of the Statute. It seems that the goal was to objectivize the evaluation of national actions by the ICC⁶⁹. Three exceptions to the jurisdictional priority of the States are established here: the norms of due process recognized by international law are linked to the independence and impartiality of the national court, and to the intent to bring the suspect to justice. Several scholars consider these criteria as constituting a whole⁷⁰. On its own, an attempt to the norms of due process would not imply the admissibility of a case before the Court: it would only constitute a sign (between o the signs) of a deficiency at the first judge stage. According to this interpretation, a first trial would only block an action *in idem* before the Court if it did not respect the norms of due process, lacked independence of impartiality, and did not show a strong intent to pursue the accused. The requirement of fairness in the trial thus contributes to reinforce (or undermine) the admissibility of a case⁷¹.

The ICC has not yet had the opportunity to take a position as to this matter. In the Lubanga case however, the Appeal Chamber had to deal with eventual violations of the rights of the accused by national authorities (the Defence invoked certain violations as invalidating the international process⁷², but this has been considered as not sufficiently founded⁷³). The Appeal Decision is *mutatis mutandis* of interest for our reflexion:

«Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only

69 See i.a. J.T. Holmes, «The principle of complementarity», in: R.S. Lee (dir.), *The International criminal court. The making of the Rome Statute: issues, negotiations, results*, Den Haag, 1999, p. 53-54; E. Carnero-Rojo, *op. cit.* note 68, p. 851; M. Benzing, *op. cit.* note 20, p. 606; J. K. Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions*, *op. cit.* note 20, p. 127; P.-M. Dupuy, «Normes internationales pénales et droit impératif (jus cogens)», in: H. Ascensio/E. Decaux/A. Pellet (dir.), *Droit international pénal*, Centre de droit international de l'Université Paris X-Nanterre, Paris, 2000, p. 78. Cf. aussi Partie I, Chapitre I.

70 See e.g. K. J. Heller, *op. cit.* note 68, p. 277; B. Broomhall, «La Cour pénale internationale: présentation générale et coopération des Etats», *op. cit.* note 9, p. 90.

71 K. J. Heller, *op. cit.* note 69, p. 257.

72 ICC, *The Prosecutor vs Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19-2-a of the Statute of 3 October 2006, 14 Dec. 2006, § 5.

73 ICC, *The Prosecutor vs Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19-2-a of the Statute, 3 October 2006. Confirmed by the Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19-2-a of the Statute of 3 October 2006, 14 Dec. 2006, § 42.

*means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.»*⁷⁴

It is then possible (but uncertain) that the Court gives a qualitative content to its complementarity. Nothing prevents the ICC, in its case law, from requiring a strict respect of these principles by the national jurisdictions. The reference to due process would then imply an extension of the mandate given to the Court⁷⁵, by a *qualitative* evaluation of national trials⁷⁶. Some scholars consider that article 20-3 may be understood in this qualitative way⁷⁷, even if the negotiators of the Statute initially wanted to objectivize the evaluation of national processes by the Court (by the «principles of due process» between other limits), but did not want to extend the mandate of the ICC. At the same time, this would limit the formal flexibility previously described. States should indeed respect certain forms (of law, of judicial process...) in order to guarantee their judicial autonomy under the aegis of a Court without jurisdiction in the matter (articles 5 to 8 of the Statute exhaustively describe the material jurisdiction of the ICC, which is not a Court of human rights).

⁷⁴ *Ibidem*, § 37.

⁷⁵ Cf par ex. M. Newton, «Comparative complementarity: domestic jurisdiction consistent with the Rome Statute of the International Criminal Court», *Military Law Review*, vol. 167, 2001, p. 66.

⁷⁶ W.A. Schabas, *An introduction to the International criminal court*, Cambridge, 2001, p. 68.

⁷⁷ See e.g. I. Tallgren, *op. cit.* note 40, p. 695; A. Gurule, «United States opposition to the 1998 Rome Statute establishing an International Criminal Court: is the Court's jurisdiction truly complementary to national criminal jurisdictions?», *Cornell Int. Law Journal*, 2002, vol. 1, p. 26.

Conclusion

Through two allegations centred on the recognition of national process by the ICC, we have outlined a double proposition: ICC law contains a strictly penal requirement, but also an openness to formal flexibility.

Concretely, the Rome Statute already has a strong impact on internal systems⁷⁸, despite the soft and fuzzy nature of its requirements towards States. ICC law seems open to diversity and is adjustable and flexible. Theoretically, its tolerance of relativity and equivalences could appear to be overcoming the classical and positivist model of criminal law. This pluralism even gives international criminal law an «anti-modern» veneer⁷⁹.

This allegation however limited to purely formal issues. International criminal law remains strictly penal in its goals and functions (e.g. excluding alternatives to pure penalty). Essential issues remain open regarding this strictly penal vision and its articulation in relation to other reactions to mass atrocities: by maintaining its goal of absolute repression, instead of officially contributing to an array of non-criminal actions for peace, international criminal justice perhaps lacks humility (at least explicitly, because the Prosecutor of the ICC has a wide possibility of cooperation with other actors and recognition of extra-judiciary processes).

International criminal law is now at a crossroads between classical law and a formally pluralistic new law, full of novel challenges. This discrepancy between form and means or goals should be examined, and many notions should be re-defined, as should equality between accused from different systems (who may be differently treated), proportionality and legal security. This phenomenon is general: inside national orders, a deep evolution of classical ideals (stability, perfect legislator and judge, pure clarity) can also be identified⁸⁰.

⁷⁸ D. Robinson, *op. cit.* note 43, p. 1868.

⁷⁹ See the terms used by L. Foffani, «La giustizia penale internazionale: un sistema penale «antimoderno»?», in: M. Delmas-Marty/E. Fronza/E. Lambert-Abdelgawad (dir.), *Les sources du droit international pénal, – l'expérience des Tribunaux Pénaux Internationaux et le Statut de la Cour Pénale Internationale*, Paris, 2004, p. 371-372.

⁸⁰ See e.g., in 1998 already, M. van de Kerchove and Fr. Tulkens, «D'où viennent les flous du pénal? Les déplacements de l'objet et du sujet», in: *Politique, police et justice au bord du futur. Mélanges pour et avec Lode Van Outrive*, Paris/Montréal, 1998, p. 131-141.

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