

## **Modes of International Criminal Justice and General Principles of Criminal Responsibility**

Hiromi Satō\*

### Table of Contents

A. Introduction.....	766
B. The Vacuum of International Law Applying to National Proceedings: Voice of Autonomy on the Part of National Laws.....	771
I. The Law of the ICC and National Legislation.....	772
II. The Vacuum of Customary International Law Binding National Proceedings.....	775
III. Unitary Rules on General Principles of Criminal Responsibility for Serious International Crimes?.....	779
C. Customary International Law Applying to Both International and National Proceedings.....	782
I. Superior Orders Defense.....	782
II. Command Responsibility.....	786
III. Functional Immunity.....	791
D. The Law of the ICC Differs from Customary International Law: Conventional versus Customary Norms.....	795
I. Operational Rules of the Principle of Legality.....	798
II. Mistake of Law.....	800
E. Conclusion.....	805

\* Associate Professor, Department of International Relations, National Defense Academy; LL.M. (University of Tokyo), M.Litt. (University of Cambridge), Ph.D. (University of Tokyo).

## Abstract

International criminal justice now functions via two systems – a direct one led by the international tribunals and an indirect one driven by national courts. The difference between the two systems inevitably brings about further differentiation with respect to the substantive aspect of these laws. It is especially noteworthy that the indirect system has not been equipped with customary international rules on several topics relating to general principles of criminal responsibility, so it relies heavily on the national laws of States that prosecute serious international crimes. Meanwhile, customary international law applying irrespective of judicial forums has more or less been developed with regard to other topics of general principles of criminal responsibility. Thus, two types of customary international law would be observed in this field – the one peculiar to international proceedings and the other applying to both international and national proceedings. It should also be noted that the law of the International Criminal Court sometimes differs from either type of customary international law, which has partially been caused by the difference between the normative characteristics of conventional and customary laws.

## A. Introduction

The establishment of the International Criminal Court (ICC) has brought about significant change in the structure of international criminal justice. It has drastically developed the system of direct application of international criminal law by international tribunals, which had already been introduced by the Nuremberg and Tokyo Trials as well as promoted with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) on the basis of the resolutions of the UN Security Council but not yet formulated into a permanent system.

The application of international criminal law has traditionally been realized only indirectly, with some exceptions such as the Nuremberg and Tokyo Trials. It has been applied and enforced within national legal orders with the support of international rules, especially those on judicial cooperation in criminal matters. In prosecuting international crimes, national courts have usually consulted a limited number of international conventions and closely examined relevant customary international law that is universally binding on national laws. Because of the paucity of

conventional rules in this field and the requirement of normative universality in the indirect system operating via national jurisdiction worldwide, customary international law has played a significant role with regard to this mode of international criminal justice. However, as relevant international rules remain far from fully developed, it has been necessary for national courts to rely heavily on their own national laws. On the other hand, the international tribunals have now been equipped with their own statutes that generally provide for the international rules required for prosecutions within their jurisdiction. Furthermore, these newly established judicial institutions have more or less represented the international society and obliged State parties to cooperate with them. The ICC may even expect the intervention of the United Nations (UN) Security Council in several aspects of its ordinary proceedings.<sup>1</sup>

The establishment of the ICC has not necessarily indicated a decisive change in the structure of international criminal justice as a whole. Instead, the Court restricts itself to playing a “complementary” role in relation to national courts; hence, there remains considerable scope for the indirect system driven by national courts to play significant roles in the regulation of serious international crimes. The principle of complementarity that has been specifically presented by the ICC Statute<sup>2</sup> even indicates that the indirect national judicial system has priority over the direct system of the ICC.

The co-existence of direct and indirect systems of international criminal justice has already specifically influenced the very substance of international criminal law applied at respective forums. The difference between the law of the ICC, for instance, and customary international law universally applying to national proceedings is especially conspicuous when it comes to procedural aspects. As noted already, the proceedings of the ICC anticipate the intervention of the UN Security Council, which may defer investigation or prosecution by the Court.<sup>3</sup> Such intervention is not ordinarily expected in national prosecution of international crimes. Regarding judicial cooperation with State parties, “surrender” of suspects to the ICC<sup>4</sup> is not identical to the traditional extradition process among States that is accompanied by several conditions such as the principle of double criminality and the rule of specialty.

<sup>1</sup> See *Statute of the International Criminal Court*, Arts 13 (b) & 16, 17 July 1998, 2187 U.N.T.S. 3, 99-100.

<sup>2</sup> See *id.*, Preamble, 91.

<sup>3</sup> *Id.*, Art. 16, 100.

<sup>4</sup> *Id.*, Art. 102, 149.

While the difference in procedural aspects between direct and indirect systems is readily apparent, their differences with respect to the substantive aspect of law are not obvious at a glance. However, the complexity of the modes of international criminal justice inevitably affects relevant substantive law, too.

The substantive aspect of international criminal law basically comprises two components – definition of crimes and general principles of criminal responsibility. With regard to the former, the accumulation of international conventions and other international legal instruments including resolutions of the UN organs and drafts prepared by the UN International Law Commission (ILC), national cases that applied international law, and the case law developed by international tribunals, have significantly contributed to the formulation of customary international law on the definition of war crimes, crimes against humanity, and genocide. Thus, for instance, the report by the UN Secretary General to the UN Security Council on the establishment of the ICTY stated that material jurisdiction of the Tribunal undoubtedly reflected concurrent customary international law.<sup>5</sup>

Contrastively, it can be said that comprehensive rules on general principles of criminal responsibility specifically appeared for the first time with the adoption of the ICC Statute. Relevant international conventions such as the *Geneva Conventions* of 1949<sup>6</sup>, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1977) (Additional Protocol I)<sup>7</sup>, and *The Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention)<sup>8</sup> lack comprehensive provisions on these topics. The Geneva Conventions do not provide for general principles of

<sup>5</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, 9, para. 33.

<sup>6</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

<sup>7</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 [Additional Protocol I].

<sup>8</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

criminal responsibility. Additional Protocol I only provides for command responsibility, and the Genocide Convention does not refer to general principles other than the rejection of official immunity. It is noteworthy that the Draft Statute for an International Criminal Court prepared by the ILC in 1994<sup>9</sup> did not deal with these topics. Provisions on general principles of criminal responsibility first appeared in comprehensive and specific manner in the Report of the Preparatory Committee on the Establishment of an International Criminal Court of 1996.<sup>10</sup> However, even this report did not present a conclusive proposal and remained a compilation of various ideas suggested by State parties. Relevant provisions of the ICC Statute were thus composed in a substantially short period. As a matter of course, it seems worth examining whether those provisions on general principles of criminal responsibility in the ICC Statute reflect corresponding customary rules, if any, of international law that are binding worldwide.

As will be seen below, it cannot actually be said that customary international law universally binding on national proceedings has afforded intricate substantive rules especially on general principles of criminal responsibility. Such legal circumstances would lead to the observation that international tribunals have been equipped with “customary international law” which only applies in the direct system. The inadequacy of the development of this type of customary international law should be supplemented by “general principles of law recognized by civilized nations” and arguably, “considerations of policy”.<sup>11</sup> Thus, it could be said that customary international law on general principles of criminal responsibility comprises two different parts: the one which applies only in direct system and the other which applies in both direct and indirect systems.

Customary international law on criminal matters generally comprises State practice and *opinio juris* indicated in relevant international legal

<sup>9</sup> *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, Yearbook of the International Law Commission (1994), Vol. II (2), 1, 18-87, paras 23-209, UN Doc A/49/10 (1994).

<sup>10</sup> UN, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, Vol. 3 (2002), 5, UN Doc A/CONF.183/2.

<sup>11</sup> *Prosecutor v. Dražen Erdemović*, Judgment (Appeals Chamber), IT-96-22-A, 7 October 1997, para. 19 [Erdemović Case, Judgment]; *id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 73-78 [Erdemović Case, Joint Separate Opinion].

instruments, national legislation, case law of national courts, etc.<sup>12</sup> Case law of international judicial organs also significantly influences the formation of customary international law with “persuasive force”.<sup>13</sup> However, considering the differences between direct and indirect systems and corresponding substantive laws, it seems necessary to further inquire “which” customary international law matters in examining these elements regarding criminal matters.

Furthermore, the difference with regard to principal applicable international laws in respective forums – conventional law for the ICC and customary international law for other international tribunals<sup>14</sup> and national courts – should also affect the substance of these laws. As will be seen below, the law of the ICC occasionally deviates from any type of customary international law and provides for *lex specialis* which is operable within its own jurisdiction.

Thus, this article argues that the meaning of “international criminal law” cannot but occasionally differ depending on the forum of judicial proceedings. Discussions on international criminal law do not seem to have paid much attention to the variation of this law even after the complex structure of international criminal justice was generally fixed in the 1990s. Although unnecessary diversity in the substance of international criminal law would jeopardize its integrity and should carefully be avoided, confusions of different “international criminal laws” could bring about injustice where such variation is inevitable or even appropriate. Discourse of international criminal law should, in the argument of the present author, be conscious of such diversity in pursuing its coherence.

In the following, this article tries to portray the layers of “international criminal laws” functioning in different judicial forums. The first section examines a possible vacuum of customary international law in the indirect system with regard to general principles of criminal

<sup>12</sup> Although it has widely been sustained that customary international law comprises two elements of State practice and *opinio juris*, these elements usually merge with each other and the proof of the existence of *opinio juris* is required only in exceptional cases. See Committee on Formation of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000), available at <http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376> (last visited 28 January 2013), 29-31.

<sup>13</sup> *Id.*, 19.

<sup>14</sup> The *ex post* characteristics of those tribunals generally restricts their applicable substantive laws to customary ones. As to this point, see Section D. I below.

responsibility, for which international judicial institutions can be said to have been developing their own customary rules applicable within their jurisdiction (Section B). Nonetheless, it will be noted that several rules on general principles of criminal responsibility have been well developed as customary international law that may apply irrespective of judicial forums where they operate (Section C). The third part deals with the law of the ICC as *lex specialis*, the substance of which differs from either type of customary international law (Section D).

## B. The Vacuum of International Law Applying to National Proceedings: Voice of Autonomy on the Part of National Laws

National legislation on the regulation of serious international crimes is an important element that evinces State practice and *opinio juris* that formulate customary international law binding national judicial proceedings in this field. With regard to general principles of criminal responsibility, it is common for national legislation to stipulate specifically that national laws also apply in terms of these topics in the regulation of serious international crimes. As will be seen below, at least the majority of the national legislation accessible to the present author upholds, in principle, the application of national laws on general principles of criminal responsibility. On the other hand, national legislation that prioritizes relevant rules of the ICC Statute remains in the minority.<sup>15</sup>

As the ICC Statute does not strictly oblige State parties to incorporate provisions of the Statute, there seems to be nothing problematic with such tendencies of national legislation in terms of the implementation

<sup>15</sup> National laws of Uganda (*International Criminal Court Act, 2000*, in International Committee of the Red Cross (ed.), *International Humanitarian Law: National Implementation*, available at <http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView> (last visited 28 January 2013) [International Humanitarian Law]), Trinidad and Tobago (*International Criminal Court Act, 2006*, in *id.*), Samoa (*Act to Enable Samoa to Implement and Give Effect to its Obligations Under the Rome Statute of the International Criminal Court, and for Related Matters of 2007*, in *id.*), Kenya (*International Crimes Act of 2008*, in *id.*), and New Zealand (*International Crimes and International Criminal Court Act 2000*, in *id.*) allow the application of rules both of their own national laws and the ICC Statute, and give priority to the latter in case of the conflict between them.

of the ICC Statute. Meanwhile, it has widely been recognized that customary international law obliges States to punish serious international crimes such as war crimes and genocide. The Preamble of the ICC Statute recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The application of national laws regarding general principles of criminal responsibility in the national prosecution of serious international crimes implies that relevant States understand that the international “duty” to prosecute those crimes may be fulfilled in such manner.<sup>16</sup> In other words, it can be said that they do not recognize any international obligation to apply relevant provisions of the ICC Statute as well as other forms of international law on general principles of criminal responsibility in spite of their “duty” to prosecute serious international crimes.

## I. The Law of the ICC and National Legislation

Examples of national legislation with respect to the implementation of the ICC Statute that clearly provides for the application of national laws on general principles of criminal responsibility include the *International Criminal Court Act 2001* and *International Criminal Court (Scotland) Act 2001* of the United Kingdom.<sup>17</sup> The former Act stipulates offences that correspond to those within the jurisdiction of the ICC and provides, “[i]t is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.”<sup>18</sup> In interpreting the definition of these crimes, the Elements of Crimes adopted in accordance with Art. 9 of the ICC Statute are taken into account. The Act then specifies

<sup>16</sup> At the Berlin Conference of 2000 for the examination of the implementation of the ICC Statute, which was sponsored by the International Criminal Law Society, it was recognized that States would have “a greater degree of latitude” regarding the issues on general principles of criminal responsibility. See J. Schense & D. K. Piragoff, ‘Commonalities and Differences in the Implementation of the Rome Statute’, in M. Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (2003), 239, 252-254.

<sup>17</sup> The legislations are available in V. Santori (ed.), ‘Domestic Implementing Legislation and Related Documents’ (CD-ROM), in C. Kreß *et al.* (eds), *The Rome Statute and Domestic Legal Orders*, Vol. II (2005).

<sup>18</sup> *International Criminal Court Act 2001*, Sec. 51 (1), *supra* note 17. The *International Criminal Court (Scotland) Act 2001*, *supra* note 17 stipulates in the same manner in Sec. 1 (1).

in Section 56, under the title, “Saving for general principles of liability, etc”, “[i]n determining whether an offence under this Part has been committed the court shall apply the principles of the law of England and Wales.”<sup>19</sup> This section provides special rules for these crimes only in terms of command responsibility and mental element, which mostly reflect corresponding provisions of the ICC Statute. Thus, the UK national law makes clear that it principally applies its own general principles of criminal responsibility in national prosecution of international crimes in question, although these crimes are defined as stipulated in the ICC Statute. The Explanatory Notes to International Criminal Court Act, which were prepared by the Foreign and Commonwealth Office, explain on Section 56 of the Act that some differences exist between general principles of law provided by the ICC Statute and those of the UK national law and that UK courts will apply the latter “for consistency with other parts of national criminal law.”<sup>20</sup>

The *International Criminal Court Act 2006*<sup>21</sup> of Ireland stipulates, “[a]ny person who commits genocide, a crime against humanity or a war crime is guilty of an offence.”<sup>22</sup> Each offence is respectively called an “ICC offence”.<sup>23</sup> Meanwhile, with regard to “[a]pplicable law”, Section 13 (1) provides that “[t]he law (including common law) of the State shall [...] apply in determining whether a person has committed an offence under this Part.” Special rules on general principles of criminal responsibility for ICC offences are provided only with regard to command responsibility and official immunity, and “as appropriate and with any necessary modifications”.<sup>24</sup>

The Canadian *Crimes Against Humanity and War Crimes Act (An Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to Make Consequential Amendments to Other Acts)*<sup>25</sup> of 2000 provides for defenses in Art. 11. It says, “the accused may [...] rely on any justification,

<sup>19</sup> *International Criminal Court Act 2001*, Sec. 56 (1), *supra* note 17. The same rule shall be applied also in Northern Ireland (*id.*, Sec. 63 (1)). The *International Criminal Court (Scotland) Act 2001* stipulates, in Sec. 9 (1), in the same manner as the *International Criminal Court Act 2001*.

<sup>20</sup> Foreign and Commonwealth Office (ed.), ‘Explanatory Notes to International Criminal Court Act’, in Santori, *supra* note 17, para. 100 [Explanatory Notes].

<sup>21</sup> The legislation is available at *International Humanitarian Law*, *supra* note 15.

<sup>22</sup> *International Criminal Court Act 2006*, Sec. 7 (1), *supra* note 21.

<sup>23</sup> *Id.*, Sec. 9 (1).

<sup>24</sup> *Id.*, Sec. 13 (2).

<sup>25</sup> The legislation is available in Santori, *supra* note 17.

excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.<sup>26</sup> A specially provided rule for the prosecution of those crimes is restricted to command responsibility.<sup>27</sup> The Act does not clarify what sort of defenses are available under international law, and the accused may rely on a more favorable defense – in some cases possibly on the defense under Canadian law, the legal consequence of which may be different from the one under international law.<sup>28</sup>

The legislation of Burkina Faso<sup>29</sup> aims to repress international crimes proscribed by the ICC Statute, Geneva Conventions, and Additional Protocols to the said Conventions, as well as to cooperate with the ICC and repress violations of the administration of the ICC.<sup>30</sup> While the *Loi* mostly reflects the provisions of the ICC Statute regarding official immunity, criminal intent, mistake of fact and of law, other defenses, and command responsibility,<sup>31</sup> it specifically provides that criminal responsibility of minors is regulated by general rules (“*droit commun*”).<sup>32</sup>

There is also legislation, which implicitly indicates the application of national laws on general principles of criminal responsibility. For example, through the *Law on Cooperation with the International Criminal Court* of 2007, Japanese legislation has adopted a so-called minimalist approach and mainly provides for procedural rules on cooperation with the ICC. As drafters understood that most of the criminal conduct stipulated by the ICC Statute was also criminalized as ordinary crimes by the Japanese *Keihō* (*Criminal Code*), the Law only provides for offences against the administration of justice of the ICC with respect to the substantive aspect of

<sup>26</sup> *Crimes Against Humanity and War Crimes Act (An Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to Make Consequential Amendments to Other Acts)*, Art. 11, available at *International Humanitarian Law*, *supra* note 15 [Crimes Against Humanity and War Crimes Act].

<sup>27</sup> *Id.*, Art. 5.

<sup>28</sup> W. A. Schabas, ‘Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences’, in Neuner, *supra* note 16, 35, 40-41.

<sup>29</sup> *Loi No 052-2009/AN*, 3 December 2009. The legislation is available at *International Humanitarian Law*, *supra* note 15.

<sup>30</sup> *Loi No 052-2009/AN*, Art. 1, *supra* note 29.

<sup>31</sup> *Id.*, Arts 3, 7-13.

<sup>32</sup> *Id.*, Art. 4.

the legislation.<sup>33</sup> Neither in the Law nor in the *Keihō* are there any special rules on general principles of criminal responsibility that are provided for the regulation of international crimes. In the light of the principle of legality that has strictly been interpreted in Japanese jurisprudence, it is highly unlikely that Japanese national courts directly apply customary international law on these topics.

## II. The Vacuum of Customary International Law Binding National Proceedings

There is also national legislation that applies national rules on general principles of criminal responsibility in the national prosecution of serious international crimes in general, that is, not necessarily or exclusively for the implementation of the ICC Statute. Exceptionally provided rules are restricted to those regarding the superior orders defense, command responsibility, etc. This type of national legislation further indicates the understanding of relevant States that there is no binding set of complete international rules on general principles of criminal responsibility that oblige them to adjust their national laws.

The examples include the *Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act)* of 2003 of the Netherlands that nationally criminalizes genocide, crimes against humanity, war crimes, and torture.<sup>34</sup> Sections 10-16 of the Act stipulate “[g]eneral provisions of criminal law and criminal procedure”, but refer only to the superior orders defense with respect to general principles of criminal responsibility. It is noteworthy that although the Penal Code of the Netherlands slightly differs from international doctrine and case law on general principles of criminal

<sup>33</sup> See K. Arai, A. Mayama & O. Yoshida, ‘Japan’s Accession to the ICC Statute and the ICC Cooperation Law’, 51 *Japanese Yearbook of International Law* (2008), 359; K. Takayama, ‘Participation in the ICC and the National Criminal Law of Japan’, 51 *Japanese Yearbook of International Law* (2008), 384; Y. Masaki, ‘Japan’s Entry to the International Criminal Court and the Legal Challenges it Faced’, 51 *Japanese Yearbook of International Law* (2008), 409.

<sup>34</sup> *Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act)*, available in Santori, *supra* note 17, Secs 3-8 [International Crimes Act].

responsibility, the *Explanatory Memorandum* explains that it is practical for Dutch courts to rely on its own law because they are more familiar with it.<sup>35</sup>

Likewise, in Australia, the *Criminal Code Act 1995*<sup>36</sup> specifies that its provisions on the regulation of international crimes are “not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory.”<sup>37</sup> General principles on criminal responsibility in the Code are principally applied when prosecuting international crimes.<sup>38</sup> Special rules for serious international crimes are exceptionally provided for in relation to the superior orders defense<sup>39</sup> and command responsibility.<sup>40</sup>

Germany’s *Code of Crimes against International Law*, which makes stipulations for the regulation of serious international crimes as well as the implementation of the ICC Statute, provides for a general part that is distinctively applicable to the prosecution of these international crimes. Nonetheless, the majority of general principles of the ordinary German *Penal Code* shall still be applied,<sup>41</sup> and the exceptions are restricted to some special rules on the superior orders defense and command responsibility. National rules that are different from those of the ICC Statute may thus be applied for the prosecution of serious international crimes. For instance, the German *Penal Code* allows the defense of mistake of law if the mistake in question was “unavoidable”, whereas Art. 32 (2) of the ICC Statute does not recognize such a defense except in the case where the mistake negates the mental element of the crime. With regard to this point, the German legislator argued that “the *principle of guilt*, which has constitutional rank in Germany, would bar the implementation of Article 32 (2)” of the ICC Statute.<sup>42</sup>

National laws of Finland, Poland, Sweden, Croatia, Russia, Israel, and South American countries also recognize that the general principles of

<sup>35</sup> H. Bevers, J. Roording & O. Swaak-Goldman, ‘The Dutch International Crimes Act (Bill)’, in Neuner, *supra* note 16, 179, 183, 186-187.

<sup>36</sup> The legislation is available at *International Humanitarian Law*, *supra* note 15.

<sup>37</sup> *Criminal Code Act 1995*, Sec. 268.120, *supra* note 36.

<sup>38</sup> See also A. Biehler & C. Kerll, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Australien’, in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 6 (2005), 19, 45 [Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 6].

<sup>39</sup> *Criminal Code Act 1995*, Sec. 268.116, *supra* note 36.

<sup>40</sup> *Id.*, Sec. 268.115.

<sup>41</sup> M. Neuner, ‘General Principles of International Criminal Law in Germany’, in Neuner, *supra* note 16, 105.

<sup>42</sup> *Id.*, 120-121.

criminal responsibility of their own laws, which are more or less different from those provided by the ICC Statute, will be applied for the regulation of serious international crimes.<sup>43</sup> For instance, the criminal laws of Poland, Sweden, and Croatia recognize the notion of *dolus eventualis* as a subjective element of crimes,<sup>44</sup> which only requires that the perpetrator be aware of the “risk” of the particular consequences related to an event and yet consciously takes the risk. Meanwhile, Art. 30 (2) and (3) of the ICC Statute, which stipulates the mental element of crimes, requires the perpetrator’s awareness that a consequence “will occur in the ordinary course of events”, in order for the committal of a crime to be established. The former is apparently a wider notion than that presented by Art. 30 (2) and (3) of the ICC Statute. Nonetheless, those countries do not see any problems in applying those national rules on the regulation of serious international crimes.<sup>45</sup>

Some other legislation may possibly be construed as indicating the application of national laws on this subject. The criminal codes of Estonia,<sup>46</sup>

<sup>43</sup> As to Finnish law, see D. Frände, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Finnland’, in A. Eser & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 2 (2003), 21, 53 [Eser & Kreicker, *Nationale Strafverfolgung*, Vol. 2]; as to Russian law, see S. Lammich, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Russland und Weißrussland’, in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 6, *supra* note 38, 351, 377; as to Israeli law, see M. Kremnitzer & M. A. Cohen, ‘Prosecution of International Crimes in Israel’, in A. Eser, U. Sieber & H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 5 (2005), 317, 368 [Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 5]; as to South American law, see K. Ambos & E. Malarino, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Lateinamerika: Einige vorläufige Erkenntnisse’, in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 4 (2005), 469, 478.

<sup>44</sup> E. Weigend, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Polen’, in Eser & Kreicker, *Nationale Strafverfolgung*, Vol. 2, *supra* note 43, 77, 122; K. Cornils, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Schweden’, in Eser & Kreicker, *Nationale Strafverfolgung*, Vol. 2, *supra* note 43, 183, 224; P. Novoselec, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Kroatien’, in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 3 (2004), 19, 49 [Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 3].

<sup>45</sup> Weigend, *supra* note 44, 122; Cornils, *supra* note 44, 224; Novoselec, *supra* note 44, 49.

<sup>46</sup> *Penal Code of the Republic of Estonia*, Chapter 8, § 88, available at *International Humanitarian Law*, *supra* note 15. It domestically criminalizes crimes against humanity, genocide, aggression, and war crimes, among others.

Macedonia,<sup>47</sup> and Fiji<sup>48</sup> do not refer to general principles of criminal responsibility to be exceptionally applied for international crimes such as war crimes, crimes against humanity, and genocide, other than those pertaining to the superior orders defense and command responsibility. They do not specify that principles of their own national laws will apply for the regulation of international crimes. However, it would not be natural to expect that complete international rules on general principles of criminal responsibility, if any, would apply to serious international crimes in those countries, considering the fact that special provisions have been introduced only with regard to the superior orders defense and command responsibility.

The *Criminal Law* of the Republic of Latvia domestically criminalizes genocide, crimes against humanity, war crimes, and crimes against peace,<sup>49</sup> while it does not provide for general principles of criminal responsibility exceptionally applied to these crimes. The Latvian *Criminal Law* comprises “General Part” dealing with general principles of criminal responsibility, sentences, etc. and “Special Part” dealing with definition of crimes. The silence on special rules for serious international crimes in “General Part” in spite of their criminalization in “Special Part” implies the application of general principles of criminal responsibility for those crimes. However, as it is difficult for the present author to examine the relationship between national law and customary international law within the national legal order of Latvia, determining which law is to be applied for the prosecution of international crimes is still problematic.

In the United States, genocide and war crimes have been criminalized by national legislation and it has been recognized that crimes against humanity are regulated within the traditional framework of domestic crimes.<sup>50</sup> As the US Code lacks general provisions on the principles of criminal responsibility, one needs to look at case law with regard to these

<sup>47</sup> *Criminal Code* of the Republic of Macedonia, Art. 416- a, b, c, available at *International Humanitarian Law*, *supra* note 15. It domestically criminalizes genocide, crimes against humanity, war crimes, and aggression, among others.

<sup>48</sup> *Crimes Decree 2009* of the Republic of Fiji Islands, Art. 98, available at *International Humanitarian Law*, *supra* note 15. It domestically criminalizes genocide and crimes against humanity, among others.

<sup>49</sup> Chapter IX of the *Criminal Law* of the Republic of Latvia, available at *International Humanitarian Law*, *supra* note 15.

<sup>50</sup> E. Silverman, ‘Prosecution of International Crimes in the United States of America’, in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 5, *supra* note 43, 411, 430.

issues.<sup>51</sup> However, it is not clear if US courts may directly apply customary international law on general principles of criminal responsibility to international crimes cases without any specific national legislation.<sup>52</sup>

Most of the above-cited national legislation specifically or implicitly indicates the autonomy of their own national rules on general principles of criminal responsibility in the matter of national prosecution of serious international crimes. Notable exceptions are restricted to special rules on such issues as the superior orders defense and command responsibility.

National laws take liberties with formulating respective national legal orders that fix the relationship between national law and international law. However, violation of international obligations may incur State liability or other forms of international opprobrium. It would reasonably be expected that States more or less make efforts to adjust their national laws in line with relevant international law in order to avoid such negative reaction from other States. At least, it is highly unlikely for national laws to declare intentionally they are going to ignore and violate international obligations. The above examples of national legislation specifically provide for, or imply the application of a country's own national rules. They indicate that relevant States do not recognize any complete international rules on general principles of criminal responsibility, with the limited exception of rules on issues such as the superior orders defense and command responsibility, which are universally applicable and should be incorporated into respective national laws. If customary international law on general principles of criminal responsibility which binds national proceedings is substantially absent, the corresponding rules provided by the international tribunals would be categorized as those applying just within their jurisdiction.

### III. Unitary Rules on General Principles of Criminal Responsibility for Serious International Crimes?

As seen above, a remarkable number of national laws make it clear that national rules on general principles of criminal responsibility applicable to ordinary crimes, which are often different from relevant rules of the ICC Statute, are also applicable to serious international crimes. Such State

<sup>51</sup> *Id.*, 447.

<sup>52</sup> W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), 57.

practices could be understood to indicate that those States do not recognize international rules, either the law of the ICC Statute or customary international law, as binding national proceedings on general principles of criminal responsibility except in relation to such topics as the superior orders defense and command responsibility.

Needless to say, the adoption of the ICC Statute is significant from the viewpoint of further development of customary international law with regard to general principles of criminal responsibility. Nonetheless, considering the variety and difference of the said principles among national laws, one cannot help but doubt the immediate formulation of customary international law binding both national and international proceedings on these topics. Discordance among national laws may easily be observed if one looks into the oft-mentioned difference between common law and civil law on this subject.<sup>53</sup> For instance, on the drafting of the Nuremberg Charter, the Anglo-American delegates acknowledged that “the principles of conspiracy as developed in Anglo-American law” were “not fully followed nor always well regarded by Continental jurists.”<sup>54</sup> The ICTY, in the judgment of *Erdemović*, extensively examined national laws on the defense of duress and indicated that civil law countries recognize the said defense conditionally whereas common law countries categorically deny it in the case of serious crimes such as murder.<sup>55</sup> The divide between the two systems can also be seen on the issue of mistake of law. It is occasionally recognized in civil law countries that an unavoidable mistake of law may exempt the accused, whereas common law countries generally do not permit such an exemption.<sup>56</sup> Such differences among diverse legal systems would reach dizzying proportions when one takes into account Islamic law and other mixed jurisdictions.

In the light of such fundamental differences among various legal systems at the national level, the question to be answered is, as Alexander Greenawalt argues, “not how to eliminate inconsistency, but which form of

<sup>53</sup> See G. P. Fletcher, *The Grammar of Criminal Law, American, Comparative, and International*, Vol. 1 (2007), 43-58. Actually, tension among “national systems of criminal law” cannot necessarily be demonstrated as the discrepancy between civil and common law jurisdictions. It will persist rather “between the bipartite and tripartite systems” (*id.*, 53).

<sup>54</sup> *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1945), vii, 296, 301.

<sup>55</sup> *Erdemović Case*, Joint Separate Opinion, *supra* note 11, paras 59-61.

<sup>56</sup> See Sec. D. II of this article.

consistency to privilege.”<sup>57</sup> If one prioritizes consistency regarding general principles of criminal responsibility for serious international crimes, national laws should endure dual systems in which ordinary crimes and serious international crimes will be subject to different principles. On the other hand, consistency within respective national laws means a lack of uniformity on general principles of criminal responsibility for serious international crimes; national principles that are applicable for ordinary crimes would also apply for serious international crimes, and international tribunals need to develop their own laws applicable within their jurisdiction. Considering that international criminal justice has long operated through an indirect system of national judicial proceedings and that the direct system of the ICC now recognizes itself as complementary to national proceedings, one cannot but be cautious in the pursuit of complete uniformity on general principles of criminal responsibility, which brings about discrepancies in national legal orders.<sup>58</sup>

Even if one opted for unification of relevant rules, genuine hybridization of legal notions produced in various legal systems would be extremely difficult<sup>59</sup> and possible preferences for a certain legal system would generate a sense of inequity among States.<sup>60</sup> Some kind of hybridization is actually required for the direct judicial system led by the international tribunals.<sup>61</sup> However, hybridization within the jurisdiction of international tribunals is fundamentally different in its characteristics from

<sup>57</sup> A. K. A. Greenawalt, ‘The Pluralism of International Criminal Law’, 86 *Indiana Law Journal* (2011) 3, 1063, 1102.

<sup>58</sup> Greenawalt argues on this point that unification of international criminal law cannot be deemed indispensable in the light of major *raison d’être* of this law: securing additional bases of jurisdiction and punishment of wrongdoers (*id.*, 1095-1100). Direct and indirect systems function side by side in any event. He further observes that consideration for “rule of law values” such as consistency, legality, tribunal administration, normative development also does not legitimize unification at the international level (*id.*, 1100-1114).

<sup>59</sup> Hybridization would be difficult both in substantive and procedural aspects. See P. S. Berman, ‘Global Legal Pluralism’, 80 *Southern California Law Review* (2007) 6, 1155, 1191.

<sup>60</sup> Berman further criticizes the idea of universalist harmonization as it “may fail to capture the extreme emotional ties people still feel to distinct transnational or local communities” and “inevitably erases diversity.” Such harmonization may ignore less powerful voices, fail to bring about normative innovation through multiple legal orders, and fail to provide an important model of tolerant society (*id.*, 1190-1191).

<sup>61</sup> Regarding “*juris generative*” model of procedural mechanisms that manage hybridity, see *id.*, 1197-1201, 1210-1218.

that in customary international law binding both national and international proceedings. The latter duly requires national legal orders to incorporate newly-established international rules and national laws would possibly be forced to adopt foreign jurisprudence in criminal law. In any event, it would be far from realistic to expect for national criminal lawyers to modify general principles of national criminal laws that have been developed over centuries in respective cultural and political backgrounds. Fundamental changes in the general principles of national criminal laws for the sake of the establishment of international rules that also bind national proceedings would be realized only if some serious necessity, such as the one that the Allied Powers recognized during and after World War II, and an urgent need for international intervention into national legal orders are widely recognized in the international society.

### C. Customary International Law Applying to Both International and National Proceedings

As already noted, the majority of the above-cited national legislation makes special provisions on some topics – notably the topics of the superior orders defense and command responsibility – while indicating that national rules on general principles of criminal responsibility will generally apply to cases of serious international crimes. This observation corresponds with the fact that the international society has actually formulated customary international law binding irrespective of judicial forums on these two topics.

#### I. Superior Orders Defense

With respect to the superior orders defense, by which the accused contends exemption from criminal responsibility because of the fact that he/she merely executed orders from his/her superiors, customary international law has established the principle that the mere fact of acting under orders should not be recognized as a ground for exemption.<sup>62</sup> This

<sup>62</sup> See Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965); P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 *European Journal of International Law* (1999) 1, 172, 172-188; G. Werle, *Principles of International*

principle of the rejection of automatic exemption was presented at the Nuremberg Trial and later adopted as one of the *Nürnberg Principles* by the UN General Assembly resolution.<sup>63</sup> Some important questions contingent on this defense – the legal consequence of mistake of law on the part of subordinates regarding the illegality of orders, lack of manifest illegality of orders, and coercion under which subordinates were placed because of orders – have not been completely settled. However, the very principle of the rejection of automatic exemption has mostly been upheld in the subsequent international rule-making process.<sup>64</sup>

The statutes of the international criminal tribunals established in the 1990s and their case law also show some discordance on the problem of conditional exemption. The statutes of the ICTY and ICTR categorically deny the superior orders defense<sup>65</sup> and the case law of the ICTY denies the defense of duress under which subordinates are placed because of superior orders.<sup>66</sup> In contrast, Art. 33 of the ICC Statute recognizes possible exemption on the grounds of the accused's mistake of law and the lack of manifest illegality of the order in question. Art. 31 (d) of the Statute also recognizes possible exemption on the grounds of coercion apart from the superior orders defense. Notwithstanding some discrepancies in relation to the problem of conditional exemption, however, it is noteworthy that those international instruments commonly reject automatic exemption by the superior orders defense.

Much of the national legislation examined in the previous section, which specifies or implies that national rules on general principles of criminal responsibility will apply to cases of serious international crimes, exceptionally provides for special rules on the superior orders defense. Such State practice objectively accords with the case that basic structures of relevant rules have already been established at the international level.

*Criminal Law*, 2nd ed. (2009), 213-218, paras 581-595; H. Satō, *The Execution of Illegal Orders and International Criminal Responsibility* (2011).

<sup>63</sup> *Report of the International Law Commission on its Second Session*, Yearbook of International Law Commission (1950), Vol. II, 364, 375, UN Doc A/1316.

<sup>64</sup> See Dinstein, *supra* note 62, 217-252; H. S. Levie, 'The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders', 30 *Revue de Droit Militaire et de Droit de la Guerre* (1991) 1-4, 183, 197-203; Satō, *supra* note 62, 103-146.

<sup>65</sup> *Statute of the International Tribunal for the Former Yugoslavia*, Art. 7 (4), UN Doc S/25704 annex, 36, 39; *Statute of the International Tribunal for Rwanda*, Art. 6 (4), SC Res. 955 annex, UN Doc S/RES/955, 3, 6.

<sup>66</sup> *Erdemović Case*, Judgment, *supra* note 11, para. 19.

Further, as will be seen below, the substance of special rules on the superior orders defense presented in the above-cited national legislation more or less reflect the corresponding international law that was just examined.

Some national legislation recognizes the superior orders defense on condition that subordinates did not know the illegality of the orders in good faith and that the orders were not manifestly illegal. Such combination of the subjective and objective conditions is upheld by the national legislation of the Netherlands. The Dutch national law,<sup>67</sup> while specifying that it will apply national rules on general principles of criminal responsibility for serious international crimes, exceptionally utilizes special rules on the superior orders defense that should be applied for such crimes. It provides that subordinates will not be criminally responsible “if the order was believed by the subordinate in good faith to have been given lawfully”.<sup>68</sup> It is specified, however, that orders to commit genocide or crimes against humanity are deemed manifestly unlawful.<sup>69</sup> The German national law likewise provides that the superior orders defense will only be recognized “so far as the perpetrator does not realize that the order is unlawful and so far as it is also not manifestly unlawful.”<sup>70</sup> Australian law<sup>71</sup> reflects the provision of the ICC Statute regarding the said defense and provides that it may be recognized only for cases of war crimes and if the accused “did not know that the order was unlawful” and “the order was not manifestly unlawful.”<sup>72</sup> Latvian national law does not differentiate rules on the superior orders defense in the case of serious international crimes from those applied in the case of other national crimes, and recognizes the said defense only if the accused did not know the criminality of his/her conduct and if it was not manifest.<sup>73</sup>

There are also examples of simple rejection of the said defense. Estonian national law categorically rejects the superior orders defense for international crimes including war crimes, providing that “[c]ommission of an offence provided for in this Chapter pursuant to the order of a representative of State powers or a military commander shall not preclude

<sup>67</sup> *International Crimes Act*, *supra* note 34.

<sup>68</sup> *Id.*, Sec. 11 (2).

<sup>69</sup> *Id.*, Sec. 11 (3).

<sup>70</sup> Neuner, *supra* note 41, 123 (note 67).

<sup>71</sup> *Criminal Code Act 1995*, Sec. 268.120, *supra* note 36.

<sup>72</sup> *Id.*, Sec. 268.116 (3).

<sup>73</sup> *Criminal Law of the Republic of Latvia*, Art. 34, *supra* note 49.

punishment of the principal offender.”<sup>74</sup> Fijian national law provides that the superior orders defense cannot be recognized for genocide and crimes against humanity,<sup>75</sup> while it does not mention the case of war crimes.

The national laws that specially refer to the superior orders defense for cases of serious international crimes commonly do not recognize automatic exemption. They allow exemption by the said defense only conditionally or reject it completely. In any case, rules provided in these national laws can be said to be in line with the basics of concurrent international law – the rejection of automatic exemption.

This trend of State practices is also shared by other national laws referred to above that do not apparently provide for special rules on the superior orders defense in the case of serious international crimes, but seem to apply the same rules to both ordinary crimes and serious international crimes.

Examples of the combination of subjective and objective approaches in conditionally allowing the superior orders defense include the Finnish legislation. Finish law recognizes the superior orders defense unless subordinates knew the illegal character of orders that they had received and that the illegality of the orders was manifest.<sup>76</sup> US military law<sup>77</sup> likewise recognizes the superior orders defense conditionally. The *Rules for Courts-Martial* provide that the said defense can be allowed “unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”<sup>78</sup>

Meanwhile, the legislation of Poland, Russia, and Belarus indicates subjective condition with regard to the decision on the superior orders defense. Polish law rejects the superior orders defense only if subordinates knew the illegal character of the orders they received.<sup>79</sup> The criminal laws of Russia and Belarus recognize the superior orders defense if subordinates did not know the illegality of the order in question.<sup>80</sup> Legislations which indicate objective condition include those of Croatia and Israel. In Croatian criminal law, the superior orders defense cannot be recognized for war crimes as well as for other serious crimes, or if the illegality of the order in

<sup>74</sup> *Penal Code of the Republic of Estonia*, Chapter 8, § 88, *supra* note 46.

<sup>75</sup> *Crimes Decree 2009 of the Republic of Fiji Islands*, Art. 98, *supra* note 48.

<sup>76</sup> Frände, *supra* note 43, 64-65.

<sup>77</sup> Silverman, *supra* note 50, 465-467.

<sup>78</sup> *Manual for Courts-Martial: United States* (2012), R.C.M. 916 (d), II-110.

<sup>79</sup> Weigend, *supra* note 44, 128-129.

<sup>80</sup> Lammich, *supra* note 43, 381-382.

question was manifest.<sup>81</sup> Israeli criminal law permits the defense only if the order received was not manifestly illegal.<sup>82</sup>

Swedish law does not recognize the superior orders defense for international crimes, but a mistake of law on the part of subordinates who received illegal orders may be considered in terms of mitigating the punishment.<sup>83</sup>

Legislation of other countries that denies the superior orders defense either conditionally or unconditionally includes that of Albania, Austria, Bangladesh, Belgium, Brazil, Cambodia, Congo, Egypt, Estonia, Ethiopia, France, Iraq, Lebanon, Luxembourg, Niger, Peru, Rwanda, Slovenia, Spain, Switzerland, and Yemen.<sup>84</sup>

The number of national laws examined above is limited, and their accurate analysis in respect to relevant rules perhaps not attained. However, it is still noteworthy that there has apparently been no categorical rejection of established international rules on the issues of the superior orders defense in these national laws. In any event, other States are likewise obliged under international law to incorporate those rules into their national laws, the rejection of which may occasionally lead to negative reaction by the international society.

## II. Command Responsibility

Customary international law binding irrespective of judicial forums has also been formulated on the issue of command responsibility *stricto sensu*, that is, international criminal responsibility of commanders for their failure to supervise their subordinates.<sup>85</sup> Although the *Nürnberg Principles* adopted by the UN General Assembly did not provide for command responsibility, the legal notion of command responsibility *stricto sensu* was specifically examined and recognized in the Tokyo Trial, war crimes trials conducted by US military tribunals in occupied Germany, and other trials

<sup>81</sup> Novoselec, *supra* note 44, 54.

<sup>82</sup> Kremnitzer & Cohen, *supra* note 43, 381.

<sup>83</sup> Cornils, *supra* note 44, 232.

<sup>84</sup> J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. II (2005), 3822-3829, paras 898-941.

<sup>85</sup> See Werle, *supra* note 62, 185-189, paras 496-504; G. Mettraux, *The Law of Command Responsibility* (2009), 3-33; C. Meloni, *Command Responsibility in International Criminal Law* (2010), 33-76.

conducted by national courts of the Allied Powers during and after World War II.<sup>86</sup> Those national courts presented varied understandings of the definition of command responsibility; some judgments stated that commanders were criminally responsible only if they had actually known of the illegal conduct of their subordinates and still had not taken effective measures to regulate them.<sup>87</sup> Other judgments stated that command responsibility was recognized even if superiors had not known of their subordinates' illegal conduct, since commanders had a duty to effectively supervise their subordinates, and their negligence regarding supervision should bring about criminal responsibility.<sup>88</sup>

The inconsistency of the arguments has carried over to the subsequent international rule-making process. Art. 77 of the Additional Protocol I of 1977 provides that commanders are criminally responsible "if they knew, or had information" that should have enabled them to notice the criminal conduct of their subordinates. Case law of the ICTY staggeringly demonstrated a similar view that command responsibility should be established if superiors noticed the "alarming information" of criminal conduct of their subordinates.<sup>89</sup> On the other hand, the law of the ICC is obscure on this point. Art. 28 (a) (i) of the Statute provides that military commanders are criminally responsible if "[t]hat military commander or person *either knew or, owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crimes" (emphasis added by the present author). It is not clear whether or not the latter part of this phrase recognizes command responsibility only in case superiors noticed the risk of criminal conduct and excludes criminal

<sup>86</sup> See J. S. Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond', 5 *Journal of International Criminal Justice* (2007) 3, 638, 647-653; Meloni, *supra* note 85, 42-64.

<sup>87</sup> For example, the *High Command* case, in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XI, 1, 543-544 [Trials of War Criminals].

<sup>88</sup> For example, the *Hostage* case, in *Trials of War Criminals*, *supra* note 87, 759, 1271.

<sup>89</sup> *Prosecutor v. Zejnir Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga")*, IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 232; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, paras 62-64. Cf. *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 332. See Martinez, *supra* note 86, 654-659; Meloni, *supra* note 85, 111-114.

responsibility of superiors for negligence regarding the supervision of their subordinates.<sup>90</sup>

Notwithstanding varied ideas on the mental element of superiors that is required to establish command responsibility *stricto sensu*, it can be said that the basic structure of the said responsibility has commonly been recognized: commanders are criminally responsible for their failure to properly regulate their subordinates' criminal conduct.

The specially provided rules on command responsibility *stricto sensu* in national legislation mentioned above match concurrent international law. For instance, UK national law that was cited before provides that commanders are criminally responsible if they "either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences".<sup>91</sup> The Explanatory Note for this provision explains that it reflects a "well known concept of international law".<sup>92</sup> The national law of Macedonia similarly recognizes command responsibility "if he/she [a military commander or other superior] knew or according to all circumstances was obligated and could know that they [subordinates] prepare or commit such crimes".<sup>93</sup> Irish national law provides that the provision of the ICC Statute on command responsibility "shall apply, as appropriate and with any necessary modifications" in determining criminal responsibility for ICC offences.<sup>94</sup> Canadian national law recognizes command responsibility if "the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence".<sup>95</sup> With regard to the responsibility of non-military superiors, the Canadian law recognizes their command responsibility if "the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person".<sup>96</sup> Australian national law

<sup>90</sup> Cf. R. Arnold, 'Article 28', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (2008) [Triffterer, *Commentary on the Rome Statute*], 795, 828-830, para. 95.

<sup>91</sup> *International Criminal Court Act 2001*, Sec. 65 (2) (a), *supra* note 17. Sec. 5 (2) (a) of the *International Criminal Court (Scotland) Act 2001* (*supra* note 17) stipulates in the same way.

<sup>92</sup> *Explanatory Notes*, *supra* note 20, para. 104.

<sup>93</sup> *Criminal Code* of the Republic of Macedonia, Art. 416- b (1), *supra* note 47.

<sup>94</sup> *International Criminal Court Act 2006*, Sec. 13 (2), *supra* note 21.

<sup>95</sup> *Crimes Against Humanity and War Crimes Act*, Sec. 5 (1) (b), *supra* note 26.

<sup>96</sup> *Id.*, Sec. 5 (2) (b).

similarly provides that command responsibility be recognized if “the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences”.<sup>97</sup> Regarding non-military superiors, it is required that “the superior either knew, or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences”.<sup>98</sup> German national law differentiates cases where superiors knew of the criminal conduct of their subordinates from other cases where superiors did not know of the criminal conduct. With regard to the former, the German law recognizes superiors as main (co-)perpetrators.<sup>99</sup> If superiors did not know of their subordinates’ criminal conduct, command responsibility accrues from breaches of the duty to supervise their subordinates.<sup>100</sup> The national law of Estonia simply provides that superiors are criminally responsible if they failed to prevent their subordinates’ criminal conduct.<sup>101</sup> The mental element that is required to be proved is not specified.

Most of these national laws recognize command responsibility *stricto sensu* if superiors knew of the criminal conduct of their subordinates and if they, especially the superiors in a military section, noticed the risk of the criminal conduct. Although the mental element that is required to be proved for command responsibility in respective national laws differs slightly one from the other, the basic notion that superiors are criminally responsible for their failure to supervise their subordinates is commonly upheld among them. This basic notion corresponds with that of international law on command responsibility.

As it was the case regarding the superior orders defense, this trend of State practice is also shared by other national laws that do not apparently provide for special rules on command responsibility in the case of serious international crimes, but seem to apply the same rules to both ordinary crimes and serious international crimes.

Some of this type of national laws stipulate that command responsibility is recognized even if commanders did not actually know, nor notice the risk of the criminal conduct of their subordinates. For instance,

<sup>97</sup> *International Criminal Court (Consequential Amendments) Act 2002*, Sec. 268.115 (2) (a), available in Santori, *supra* note 17.

<sup>98</sup> *Id.*, Sec. 268.115 (3) (a).

<sup>99</sup> Neuner, *supra* note 16, 128.

<sup>100</sup> *Id.*, 129.

<sup>101</sup> *Penal Code of the Republic of Estonia*, Chapter 8, § 88, *supra* note 46.

Finnish criminal law equates command responsibility with complicity if commanders knew of the criminal conduct of their subordinates. If commanders did not know the fact of criminal conduct, they still bear responsibility for their negligence.<sup>102</sup> Croatian criminal law traditionally did not recognize command responsibility as the responsibility for negligence. However, its new criminal law revised in 2004 additionally recognizes command responsibility if commanders must have known of their subordinates' criminal conduct.<sup>103</sup> Under Israeli military law, commanders may be responsible as instigators or abettors regarding the criminal conduct of their subordinates. Commanders may also be responsible for negligence regarding the supervision of their subordinates.<sup>104</sup>

There are also examples of acknowledging command responsibility on the ground of the knowledge of criminal conduct or the recognition of the risk of such conduct. Polish criminal law recognizes command responsibility if commanders knew of the criminal conduct of their subordinates.<sup>105</sup> The criminal law of Belarus recognizes command responsibility if commanders do not prosecute their subordinates in spite knowing of war crimes committed by them.<sup>106</sup> Swedish criminal law also recognizes command responsibility if commanders could have foreseen the criminal conduct of their subordinates.<sup>107</sup>

The US legal instruments and case law pertaining to the military have not clarified the mental element of superiors that should be proved for the establishment of this type of responsibility. On the one hand, the US *Department of the Army Field Manual* states that superiors are responsible if they knew or should have known of their subordinates' criminal conduct.<sup>108</sup> The *Commander's Handbook on the Law of Naval Operations* recognizes command responsibility where an officer "failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur."<sup>109</sup> On the other hand, case

<sup>102</sup> Frände, *supra* note 43, 63-64.

<sup>103</sup> The revised rule has been inspired by the German *Criminal Code (Strafgesetzbuch)*. See Novoselec, *supra* note 44, 53-54.

<sup>104</sup> Kremnitzer & Cohen, *supra* note 43, 379-80.

<sup>105</sup> Weigend, *supra* note 44, 128. Command responsibility of officials is accrued from the non-fulfillment of their obligations.

<sup>106</sup> Lammich, *supra* note 43, 381.

<sup>107</sup> Cornils, *supra* note 44, 230.

<sup>108</sup> *Department of the Army Field Manual*, FM 27-10, 18 July, 178-179, para. 501.

<sup>109</sup> *Commander's Handbook on the Law of Naval Operations*, July 2007, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, para. 6.1.3.

law on courts martial seem to require the actual knowledge of superiors regarding their subordinates' criminal conduct in order to establish command responsibility.<sup>110</sup>

Legislation of other countries that recognizes command responsibility unconditionally or when superior knew/could know/had reason to know/noticed the risk of subordinates' illegal act include that of Argentina, Armenia, Azerbaijan, Bangladesh, Belgium, Cambodia, France, Italy, Luxembourg, the Netherlands, Rwanda, Spain, Ukraine, and Yemen.<sup>111</sup>

As in the case of the superior orders defense, there has apparently been no categorical rejection of established international rules on command responsibility in these national laws. It can be said that State practices presented here mostly reflect concurrent international law.

### III. Functional Immunity

Though not apparently indicated by the national legislation cited above, general principles of criminal responsibility on which basic rules have been formulated in customary international law applying to both international and national proceedings have not been restricted to those on the superior orders defense and command responsibility. The denial of functional immunity in the case of serious international crimes is another rule which States have an international obligation to incorporate into their national legal orders.

There are two aspects with regard to official immunity – personal immunity and functional immunity. The former is procedural/jurisdictional immunity for sitting senior officials and the latter is immunity in substantive law, which exonerates the officials in question and is recognized even after their period of office.<sup>112</sup> With regard to the former personal immunity, discussions do not yet seem concluded in both cases of direct and indirect application. In the aspect of direct application via international judicial forums, the ICJ presented its view, in *Arrest Warrant* in 2000, that personal

<sup>110</sup> *United States v. Medina*, C.M. 427162 (A.C.M.R. 1971), cited in Silverman, *supra* note 50, 464-465. See also G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), 388.

<sup>111</sup> Henckaerts & Doswald-Beck, *supra* note 84, 3745-3751, paras 621-648.

<sup>112</sup> *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 25, para. 60 [Arrest Warrant Case].

immunity cannot be allowed in “proceedings before *certain* international criminal courts, where they have jurisdiction” (emphasis added by the present author).<sup>113</sup> The judgment thus implied that it depends on the type of international judicial forums whether or not personal immunity is recognized.<sup>114</sup> Meanwhile, the recent decision of the Pre-Trial Chamber of the ICC categorically stated that immunity “can not be invoked to oppose a prosecution by an international court.”<sup>115</sup> In the aspect of indirect application, the judgment of *Arrest Warrant* delivered that sitting senior officials enjoy unconditional personal immunity in foreign national courts even in the case of serious international crimes.<sup>116</sup> Contrastively, in the United States, for instance, immunity of foreign heads of States is not

<sup>113</sup> *Id.*, 25-26, para. 61.

<sup>114</sup> For detailed discussions, see D. Akande, ‘International Law Immunities and the International Criminal Court’, 98 *American Journal of International Law* (2004) 3, 407, 415-419. See also S. Wirth, ‘Immunity for Core Crimes?: The ICJ’s Judgment in the Congo v. Belgium Case’, 13 *European Journal of International Law* (2002) 4, 877, 889 (note 75).

<sup>115</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, paras 22-36. See also A. Cassese, *International Criminal Law*, 2nd ed. (2008), 311-313 [Cassese, *International Criminal Law*]

<sup>116</sup> *Arrest Warrant Case*, *supra* note 112, 20-21, 24, paras 51, 58. This argument of the Court was grounded on the “nature of the functions exercised by a Minister of Foreign Affairs” (*id.*, 21-22, para. 53). The judgment of *Arrest Warrant* has been supported by some recent national judgments as *Pinochet (R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte)* (2000), 1 A.C. 147, 201-202 (2000) and *Gaddafi* (in *Bulletin des arrêts de la Cour de Cassation, Chambre criminelle, Janvier 2001*, 218-219), which drew wide attention from the international society. National laws, for instance, of New Zealand (Sections 12 (1) (a) and 12 (1) (b) of the *International Crimes and International Criminal Court Act 2000*, *supra* note 15. See J. Hay, ‘Implementing the Rome Statute: A Pragmatic Approach From a Small Jurisdiction’, in Neuner, *supra* note 16, 13, 29), the Netherlands (Section 16 (a) of the *International Crimes Act*, *supra* note 34. See Bevers *et al.*, *supra* note 35, 194-195), Sweden (Cornils, *supra* note 44, 239-240), Croatia (Novoselec, *supra* note 44, 57), Serbia and Montenegro (M. Škulić, ‘Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Serbien und Montenegro’, in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 3, *supra* note 44, 211, 268), Greece (M. G. Retalis, ‘Prosecution of International Crimes in Greece’, in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 5, *supra* note 43, 189, 271) also recognize the personal immunity of sitting senior officials of foreign countries in general manner.

guaranteed and is bestowed at the discretion of the US government.<sup>117</sup> However, it should be noted that such legal uncertainty has been peculiar to procedural/jurisdictional aspect of official immunity. The denial of functional immunity as substantive defense cannot be affected by such ambiguity of the rules on procedural defense.

The denial of functional immunity of State officials from prosecution for serious international crimes has been one of the most significant principles in international criminal law since the Nuremberg Trial. Art. 7 of the Nuremberg Charter specifically denied exemption or mitigation of punishment on the grounds of the official position of the accused, which substantially expanded personal jurisdiction in the trial of serious international crimes. This denial of official immunity was formulated into one of the *Nürnberg Principles* adopted by the UN General Assembly<sup>118</sup> and further provided for in the ILC Draft Code.<sup>119</sup> International conventions on the regulation of serious international crimes also occasionally reconfirmed this principle. Art. 4 of the Genocide Convention clarifies that “constitutionally responsible rulers, public officials” will be punished for genocide similar to private individuals. Art. 3 of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (Apartheid Convention)<sup>120</sup> adopted at the UN General Assembly in 1973 likewise provides that “[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State”. Art. 1 (1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention)<sup>121</sup> defines acts of torture as those “inflicted by or at the instigation of or with the consent or

<sup>117</sup> Silverman, *supra* note 50, 474-477. The US court noted in *Noriega*, “simply because Noriega may have in fact run the country of Panama does not mean he is entitled to head of State Immunity, since the grant of immunity is a privilege which the United States may withhold from any claimant” (*United States v. Noriega*, 746 F. Supp. 1506, 1520 (1990)).

<sup>118</sup> See *supra* note 63.

<sup>119</sup> *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Yearbook of the International Law Commission (1996), Vol. II (2), 1, 17, para. 50, UN Doc A/51/10 [Draft Code].

<sup>120</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243.

<sup>121</sup> *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85.

acquiescence of a public official or other person acting in an official capacity.”

Recent international case law of the ICTY also affirmed the denial of functional immunity in the case of serious international crimes.<sup>122</sup> It can be said that Art. 27 (1) of the ICC Statute which provides that, “[t]his Statute shall apply equally to all persons without any distinction based on official capacity”, is a restatement of the well-developed principle on substantive defense in international criminal law which is binding irrespective of forums of judicial proceedings.<sup>123</sup>

<sup>122</sup> For instance, the ICTY judgment on *Blaškić* noted, “[t]he general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. [...] These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.” (*Prosecutor v. Tihomir Blaškić*, IT-95-14, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Appeals Chamber), 29 October 1997, para. 41.) The ICTY also referred to this principle in the judgment of *Furundžija*: “[i]ndividuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7 (2) of the Statute and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter “ICTR” are indisputably declaratory of customary international law.” (*Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, para. 140.)

<sup>123</sup> As to customary international law on the denial of functional immunity in case of serious international crimes, see S. Zappalà, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?: The Ghaddafi Case Before the French Cour de Cassation’, 12 *European Journal of International Law* (2001) 3, 595, 601-605; A. Cassese, ‘When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, 13 *European Journal of International Law* (2002) 4, 870-874; Wirth, *supra* note 114, 884-889; P. Gaeta, ‘Official Capacity and Immunities’, in A. Cassese, P. Gaeta & J. R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 975, 979-983.

#### D. The Law of the ICC Differs from Customary International Law: Conventional versus Customary Norms

The previous sections discussed customary international law on general principles of criminal responsibility which applies to the international tribunals, as well as the one which universally applies irrespective of forums of judicial proceedings. Meanwhile, customary international law is not necessarily reflected in its entirety in the ICC Statute. Although rules provided by the ICC Statute widely correspond with concurrent customary international law, it is impossible to expect complete accordance between the basic instrument of the ICC and customary international law. The ICC Statute is a conventional law, which is basically static in nature, whereas customary international law is dynamically changing to reflect the transitions of social circumstances and the development of discussions at the international level. Moreover, multilateral legal instruments are drafted through significant political compromise, the outcome of which consequently does not necessarily mirror concurrent customary international law in a precise manner. The Rome Conference for the conclusion of the ICC Statute was not the exception to such political compromise.<sup>124</sup>

<sup>124</sup> One of the most contentious compromises achieved at the Rome Conference was on the definition of war crimes with regard to the use of weapons of mass destruction. The use of weapons of mass destruction such as nuclear, biological and chemical weapons apparently contradicts the principle of international humanitarian law – the prohibition of weapons “of a nature to cause superfluous injury or unnecessary suffering” (*Additional Protocol I*, Art. 35 (2), *supra* note 7, 21. See L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (2008), 153-156). However, the problem of the use of nuclear weapons has especially been a sensitive matter, and some States including the permanent members of the UN Security Council contended at the Conference that “no blanket prohibition was established under conventional or customary international law” for nuclear weapons (H. Hebel & D. Robinson, ‘Crimes Within the Jurisdiction of the Court’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 79, 115). An eventual compromise was reached by not providing for the prohibition of weapons of mass destruction in a comprehensive manner; only the prohibition of the use of poison and gas, which was recognized as unquestionably established, was reconfirmed in the Statute. Questions of other weapons of mass destruction were deferred until the future revision of this instrument (*id.*, 116).

Thus, Art. 10 of the ICC Statute states, “[n]othing in this Part [Part 2] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” The drafting process of the said article implies that such limited interpretation also prevails outside Part 2 of the Statute.<sup>125</sup> Furthermore, Art. 21 of the ICC Statute states that the Court shall apply, in the first place, the very Statute together with “Elements of Crimes and its Rules of Procedure and Evidence”. The Pre-Trial Chamber of the ICC recently reconfirmed this point and emphasized that the Court is not necessarily bound by customary international law. The Chamber noted, “[p]rinciples and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution.”<sup>126</sup>

Against this background, the ICC apparently takes liberties with formulating its own rules on general principles of criminal responsibility, besides those on the definition of crimes. For instance, the Pre-Trial Chamber of the ICC presented, in the decision on the confirmation of charges in *Germain Katanga and Mathieu Ngudjolo Chui*, its own argument regarding the distinction between principals and accessories on the ground of “the concept of control over the crime”.<sup>127</sup> This argument of the ICC, although it should be noted that this is not a judgment but a decision at the pre-trial stage, differs from that of the ICTY,<sup>128</sup> which attaches primary priority to the subjective element of “common plan, design or purpose” among members of a joint criminal enterprise.<sup>129</sup> The law of the ICC also

<sup>125</sup> O. Triffterer, ‘Article 10’, in *id.*, *Commentary on the Rome Statute*, *supra* note 90, 531, 535.

<sup>126</sup> *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber), 30 September 2008, para. 508.

<sup>127</sup> *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber), 29 January 2007, para. 338.

<sup>128</sup> *Id.*, paras 328-331, 338.

<sup>129</sup> *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 185-229; *Radoslav Brđanin*, IT-99-36-A, Judgment (Appeals Chamber), 3 April 2007, paras 393-414. With regard to discussions on the theory of joint criminal enterprise, see generally, G. Sluiter, ‘Foreword’, 5 *Journal of International Criminal Justice* (2007) 1, 67; J. D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007) 1, 69; H. v. d. Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’, 5 *Journal of International Criminal Justice* (2007) 1, 91; A. Cassese, ‘Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007) 1, 109; K. Gustafson, ‘Requirement of an Express Agreement for Joint Criminal Enterprise Liability’, 5 *Journal of International*

apparently differs from the case law of the ICTY on the issue of the defense of duress; the former recognizes the said defense provided the accused did “not intend to cause a greater harm than the one sought to be avoided”,<sup>130</sup> whereas the latter categorically denies the said defense in the case of the taking of innocent lives.<sup>131</sup>

It is worth examining whether or not these differences between the law of the ICC and customary international law are appropriate or, at least, unavoidable. The difference between the normative characteristics pertaining to the ICC Statute and customary international law does not automatically lead to the difference between the substances of these laws on general principles of criminal responsibility in whole. It is problematic that the priority to the ICC Statute over customary international law under Art. 21 of the ICC Statute brings about possible violation of the principle of *nullum crimen sine lege* where the substances of these laws are different. The ICC Statute allows prosecution of individuals without any basis of territoriality and nationality when the UN Security Council refers situations to the ICC (Art. 12 (2) of the ICC Statute) or when States that are not parties to the Statute declare that they accept the jurisdiction of the ICC for a specific crime (Art. 12 (3) of the ICC Statute).<sup>132</sup> In any event, from the viewpoint of securing coherence in the discussion of international criminal law, such discrepancies between the law of the ICC and customary international law with regard to substantive rules should carefully be evaluated.

Nevertheless, there seem to be several issues on general principles of criminal responsibility on which the law of the ICC would specifically be justified to deviate from corresponding customary international law in the light of the difference between the normative characteristics of the two laws.

*Criminal Justice* (2007) 1, 134; K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007) 1, 159; E. v. Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, 5 *Journal of International Criminal Justice* (2007) 1, 184; K. Hamdorf, ‘Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime’, 5 *Journal of International Criminal Justice* (2007) 1, 208.

<sup>130</sup> *Statute of the International Criminal Court*, Art. 31 (1), *supra* note 1, 107-108.

<sup>131</sup> *Erdemović Case*, Judgment, *supra* note 11, para. 19.

<sup>132</sup> See M. Milanović, ‘Is the Rome Statute Binding on Individuals?: (And Why We Should Care)’, 9 *Journal of International Criminal Justice* (2011) 1, 25, which suggests the primary application of customary international law regarding the prosecution of individuals in these cases.

This section deals with *lex specialis* of the ICC which in principle cannot accord with customary international law.

## I. Operational Rules of the Principle of Legality

The international judicial proceedings held at Nuremberg and Tokyo after World War II were substantially sustained by the notion of “substantive justice”.<sup>133</sup> The devastating and unprecedented ravages of war drew out theoretically lenient arguments on the principle of legality and introduced the notions of crime against peace and crimes against humanity at the international level. However, the argument of “substantive justice” faded away immediately after those trials and the strictly-defined principle of legality came to the fore instead.

The international society began formulating the principle of legality after World War II in the Declaration of Human Rights, which was adopted as the resolution of the UN General Assembly. Art. 11(2) of the Declaration reads:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”<sup>134</sup>

The first part of the provision indicates the principle, *nullum crimen sine lege*, which prohibits retroactive application of criminal law. The latter part indicates the principle of *nulla poena sine lege*, which prohibits retroactive punishment. A major international convention that provides for the principle of legality is the *International Covenant on Civil and Political Rights*. Art. 15 of the Covenant mostly reiterates Art. 11(2) of the Declaration of Human Rights with an important proviso that it does not prejudice “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations” (para. 2).

<sup>133</sup> See Cassese, *International Criminal Law*, *supra* note 115, 38-39.

<sup>134</sup> *Universal Declaration of Human Rights*, Art. 11 (2), GA Res. 217A (III), UN Doc A/810, 71, 73.

The principle has also been upheld by the ILC Draft Code, which reads, “[n]o one shall be convicted under the present Code for acts committed before its entry into force.”<sup>135</sup> Arts 22 and 23 of the ICC Statute can be deemed as reconfirmation of this firmly established principle of international law.<sup>136</sup>

Furthermore, national laws have widely supported the basic constituent of the principle of legality that has been established at the international level. According to the voluminous research by Kenneth Gallant, more than four-fifths of Member States of the UN accept the principle of *nullum crimen sine lege*, and more than three-quarters accept the principle of *nulla poena sine lege* in their constitutional laws.<sup>137</sup> Many other States uphold these principles in statutes other than constitutions, by implementing human rights treaties, etc.<sup>138</sup> At present, “virtually all states” recognize the prohibition of retroactivity both in terms of crimes and punishment.<sup>139</sup>

Thus, it can be said that the principle of legality has fundamentally been established in universally applicable customary international law. However, it should be noted that some operational rules of the said principle are different depending on whether it is applied to judicial proceedings of the ICC or of others that primarily apply customary international law.

The ICC Statute not only provides *nullum crimen sine lege* in Art. 22 and *nulla poena sine lege* in Art. 23, but also non-retroactivity *ratione personae* in Art. 24. Art. 24 (1) stipulates, “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.” The ICC Statute actually provides for various rules that are only applicable within the jurisdiction of the ICC and do not necessarily correspond to customary international law. In the light of such legal circumstances, the restriction of the Court’s jurisdiction to cases that arose after the entry into force of the Statute is vital from the viewpoint of the principle of legality.

<sup>135</sup> *Draft Code*, Art. 13, *supra* note 119, 38.

<sup>136</sup> B. Broomhall, ‘Article 22’, in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 713 and W. A. Schabas, ‘Article 23’, in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 731 for detailed discussions. See also P. Saland, ‘International Criminal Law Principles’, in Lee, *supra* note 124, 189, 194-196.

<sup>137</sup> K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009), 243-246.

<sup>138</sup> *Id.*, 246-251.

<sup>139</sup> *Id.*, 241.

The strict rule envisioned in Art. 24 of the ICC Statute can be deemed peculiar to the ICC. The ICTY and ICTR, together with other so-called hybrid tribunals, are judicial institutions established after the criminal conduct in question took place. The *ex post* characteristics of these tribunals' procedural aspect inevitably restricts their material jurisdiction, which basically reflects customary international law that has been binding long enough and worldwide.<sup>140</sup> Thus, the Report of the UN Secretary General that presented the Statute of the ICTY to the UN Security Council explained the material jurisdiction of the Tribunal as follows:

“In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”<sup>141</sup>

It would be better from the viewpoint of legality, especially that of *lex scripta* and *lex stricta*,<sup>142</sup> to provide specifically as the ICC Statute does, for rules that will be applied to all criminal cases treated at the international level in advance. However, the establishment of the ICC has not excluded further creation of *ad hoc* international tribunals and hybrid tribunals that bear *ex post* characteristics in their procedural aspect. The supplemental rule of Art. 24 of the ICC Statute on the principle of legality will remain contrastive to what would be held by other international judicial institutions in criminal matters.

## II. Mistake of Law

As will be seen in this section, customary international law on the issue of mistake of law does not seem to be established yet, in spite of the

<sup>140</sup> See R. C. Pangalangan, ‘Article 24’, in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 735, 736-738.

<sup>141</sup> *Report of the Secretary-General*, *supra* note 5, 9.

<sup>142</sup> With regard to the principles *lex scripta* and *lex stricta* in international criminal law, see S. Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 99 *Journal of Criminal Law and Criminology* (2009) 4, 857.

fact that the law of the ICC specifically denies mistake of law as a defense in principle. The difficulty in distinguishing legal elements from other elements of crimes in customary international law makes relevant rules on defenses even more obscure. Nevertheless, it seems possible and worthwhile to advance some arguments on these subjects for the sake of their future development, in consideration of the difference of legal circumstances within and outside the ICC.

Customary international law on the defense of mistake of law has long been under construction. Judgments of the Nuremberg and Tokyo Trials did not substantially examine the issue of mistake of law as such.<sup>143</sup> As there did not exist any rules applicable at the international level, military tribunals and other national judicial organs of the Allied Powers had to apply their own national laws in their war crimes trials during and after World War II.<sup>144</sup> It is noteworthy that the United Nations War Crimes Commission indicated varied and incoherent analyses of those national trials on the treatment of the issue of mistake of law.<sup>145</sup>

International legal instruments developed after the two international trials that dealt with the regulation of serious international crimes have not provided for mistake of law except for the ICC Statute. Even the Draft Code of the ILC questions the stipulation of general defenses as a whole, as was referred to before. Whereas the commentary for Art. 14 of the Draft Code presents some arguments on international cases relevant to general defenses,

<sup>143</sup> At the Nürnberg Trial, discussions on the issue of mistake of law were confined to those in terms of the superior orders defense. Regarding the Tokyo Trial, as it was proposed among defendants to avoid the prosecution of the Tennō (Japanese Emperor) and to prioritize the defense of the State over that of individuals, discussions on the superior orders defense were very limited and were not accompanied by those on mistake of law. See Satō, *supra* note 62, 58-71, 89-95.

<sup>144</sup> The situation has not changed since then. For instance, the judgment of the oft-cited *Calley* case, which dealt with the killing of unarmed civilians by American soldiers during the Vietnam War, rejected the defense of mistake of law on the grounds of the case law of the US courts (*United States v. First Lieutenant William L. Calley, JR.*, 46 CMR, 1131, 1179-1180 (1973)).

<sup>145</sup> For instance, the “Notes” on the *Karl Buck and Ten Others* case stated, “[t]here are some indications that this principle [*ignorantia juris neminem excusat*] when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable” (United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 5 (1948), 39, 44). On the other hand, the “Notes” on the *Max Wielen and 17 Others* case stated, “[i]n a case like this [mistake of law] the maxim *ignorantia iuris non excusat* certainly applies” (*id.*, *Law Reports of Trials of War Criminals*, Vol. 11 (1949), 31, 50).

it does not make any reference to the issue of mistake of law.<sup>146</sup> It is noteworthy that the ICTY recently delivered several judgments on this issue. For instance, in *Jović*, the Trial Chamber decided that the accused violated the orders of a Chamber by publishing transcripts that were rendered confidential and stated, “it is settled that a person’s misunderstanding of the law does not excuse a violation of it.”<sup>147</sup> However, the Chamber’s argument was substantially restricted to that of mistake of legal element, “in knowing violation of an order of a Chamber” in the Rule 77 (A) (ii) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, as the contention of the accused was that he did not know that the Chamber’s orders were legally binding on him as a journalist.<sup>148</sup> Moreover, the ICTY’s denial of exemption on the ground of mistake of legal element contrasts with the recognition of possible exemption on the same ground by the ICC Statute.<sup>149</sup>

The stagnation of discussions at the international level on mistake of law seems to reflect the significant difference among national laws on this subject. Especially, the difference between civil and common law on the issue of mistake of law has occasionally been highlighted. National laws of many civil law countries such as Germany,<sup>150</sup> France,<sup>151</sup> Austria,<sup>152</sup> Switzerland,<sup>153</sup> and Portugal,<sup>154</sup> leave room for exemption on the ground of mistake of law where the mistake in question was unavoidable. Meanwhile,

<sup>146</sup> *Report of the International Law Commission*, *supra* note 119, 39-42.

<sup>147</sup> See *Prosecutor v. Josip Jović*, IT-95-14/IT-95-14/2-R77, Judgment (Trial Chamber), 30 August 2006, para. 21. See also *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Judgment on Allegations of Contempt (Specially Appointed Chamber), 14 September 2009, paras 63-67. With regard to the latter case, the Chamber eventually judged that relevant factors demonstrated the accused’s knowledge of the law (*id.*, para. 66).

<sup>148</sup> *Jović Case*, *supra* note 147, para. 16.

<sup>149</sup> *Statute of the International Criminal Court*, Art. 32 (2), *supra* note 1, 108. The Pre-Trial Chamber of the ICC stated, in *Prosecutor v. Thomas Lubanga Dyilo*, that if the accused was “unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)”, his “defence of mistake of law can succeed under article 32 of the Statute” (*Thomas Lubanga Dyilo*, *supra* note 127, para. 316). It was eventually denied that the accused made such a mistake (*id.*).

<sup>150</sup> § 17 of the German *Criminal Code (Strafgesetzbuch)*.

<sup>151</sup> Arts 122-123 of the French *Criminal Code (Code Pénal)*.

<sup>152</sup> § 9 (1) of the Austrian *Criminal Code*.

<sup>153</sup> Art. 21 of the Swiss *Criminal Code*.

<sup>154</sup> H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed. (1996), 468.

the national laws of countries having a common law, such as the United Kingdom and the United States, generally do not recognize exception to the maxim *ignorantia juris non excusat*, which denies exemption of the accused from punishment simply because he/she was not aware of the criminal character of his/her conduct at the time of the deed.<sup>155</sup>

It would not be possible to discuss *lex lata* the legal consequence of mistake of law in customary international law by examining relevant practices. As customary international law on the issue of mistake of law is ambiguous, it would be inappropriate to try examining the relationship between the relevant rules of the ICC Statute and customary international law. However, considering the apparent difference between the normative characteristics of conventional and customary law, it seems necessary first to develop some arguments on the variation of relevant rules.

Art. 32 (2) of the ICC Statute basically represents a widely recognized maxim, *ignorantia juris non excusat*. The provision reads, “[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility.” Art. 32 (2) only recognizes a mistake of law “if it negates the mental element” required for the establishment of crimes within the jurisdiction of the Court.

The ICC deals only with “the most serious crimes of concern to the international community as a whole” – the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>156</sup> In addition, the ICC Statute provides for specific definition of these crimes in advance. It would thus be difficult for the accused to contend that he/she did make a mistake as regards the criminal character of his/her conduct even in the case of war crimes, the definition of which are often technical and arguable. The Statute’s principal rejection of the mistake of law defense can be said to have reflected such specific character of this international judicial organ and its basic legal instrument.

On the other hand, legal circumstances are fairly different outside the ICC. Customary international law is not as specific as conventional law and it is not easy to distinguish legal elements from other elements of crimes under customary international law. When deciding on criminal cases by applying customary international law, judges are required to determine and

<sup>155</sup> See A. T. H. Smith, ‘Error and Mistake of Law in Anglo-American Criminal Law’, 14 *Anglo-American Law Review* (1985) 1, 3, 3-24; P. Matthews, ‘Ignorance of the Law is no Excuse?’, 3 *Legal Studies* (1983) 2, 174.

<sup>156</sup> *Statute of the International Criminal Court*, Preamble, *supra* note 1, 91.

narrate relevant rules to be applied. There is no guarantee that the element of crime characterized as a legal element and as the ground for exemption by the ICC Statute will be treated as such in judicial forums other than the ICC – judges may freely decide the scope of a legal element, or its non-existence. For instance, the elements of crimes such as “military necessity”,<sup>157</sup> “unlawfully and wantonly”,<sup>158</sup> and “judicial guarantees which are generally recognized as indispensable”,<sup>159</sup> which are treated as legal elements by the ICC Statute, may concretely be explained and narrated by judges outside the ICC. In such cases, even if mistake of legal element would be recognized as a defense under customary international law, the very rule cannot be applied as the said elements are not, in the first place, interpreted as “legal elements”. At least, it is not guaranteed that these elements are treated exactly in the same way within and outside the ICC.

Furthermore, definitions of crimes given by customary international law are generally more ambiguous than those specified in the ICC Statute. The definitions presented by the ICC Statute are not necessarily identical to those under customary international law. Especially, the recent expansion of customary international law regarding the scope of war crimes in the context of non-international armed conflict is so drastic that it is fairly difficult to decide it precisely at a certain point in time. The ICTY Statute thus gave up providing for the specific definition of “violations of the laws or customs of war”, listing only five of their examples and noting that the violations to be prosecuted shall not be limited to them (Art. 3). Eventually, the ICTY, by reviewing international and national State practices, formulated case law that widely recognizes war crimes in non-international armed conflict.<sup>160</sup>

<sup>157</sup> *Id.*, Art. 8 (2) (a) (iv), 95.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*, Art. 8 (2) (c) (iv), 97.

<sup>160</sup> See *Prosecutor v. Duško Tadić a/k/a “Dule”*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, paras 96-134. The ICC Statute does not fully reflect this recent development of international law and does not provide for the prohibition of attacks against civilian objects, attacks that cause excessive incidental damage to civilians, starvation of civilian populations, etc. in terms of non-international armed conflicts (Werle, *supra* note 62, 425-455, paras 1167-1256). The Statute likewise does not prohibit the use of weapons in non-international armed conflicts except for poison, gases, and bullets that expand or flatten easily in the human body, which was provided for in the amendments to the Statute in 2010 (*Amendments to Art. 8 of the Rome Statute*, Resolution RC/Res.5, 16 June 2010, 3).

The legal backgrounds of the ICC Statute and customary international law are apparently different in considering the problem of mistake of law. What is characterized as mistake of legal element in the ICC Statute would not necessarily be recognized as such under customary international law – its meaning may be deemed specific enough without any normative evaluation. There has actually been considerable vagueness in customary international law on the definition of serious international crimes, especially that of war crimes. The accused sometimes cannot be told in advance what specific conduct is regarded as crimes under customary international law. At first sight, it does not appear reasonable to adopt automatically the same rule on the mistake of law defense both in the ICC Statute and in customary international law. It seems to contradict the “principle of personal culpability” to deny the possibility of exemption where it was really unavoidable for the accused to make some mistake on the illegal character of his/her conduct, especially in the case of war crimes. The accused, in certain cases, could not be recognized as blameworthy in misunderstanding the highly technical demarcation between legal and illegal conduct of war. Although customary international law on the mistake of law defense has not yet been conclusively formulated, it seems necessary to consider the possible difference of this law from the law of the ICC in discussing its future development.<sup>161</sup>

## E. Conclusion

A long period has elapsed since the trials at Nuremberg and Tokyo, and international criminal law has entered a new era with the establishment of international tribunals that substantially represent the international society. Today, international criminal law is expected to be implemented via two different judicial systems – direct and indirect. The latter functions on the basis of multilateral treaties and customary international law that roughly define international crimes and provide limited rules on general principles of criminal responsibility, but oblige State parties to incorporate them strictly as they are. Because of the paucity of relevant international rules thus presented, the indirect system also heavily relies on the national

<sup>161</sup> For detailed discussions on this subject, see H. Satō, ‘Mistake of Law Within and Outside the International Criminal Court’, 15 *Touro International Law Review* (2012) 2, 138.

laws of States that prosecute serious international crimes. On the other hand, the former direct system, especially that of the ICC, is equipped with international rules on judicial proceedings. However, the basic instruments of international judicial organs do not oblige States to implement their rules in whole within national jurisdiction. With regard to the ICC, the eventual implementation of its Statute is expected to be indirectly and leniently realized with the principle of complementarity.<sup>162</sup> Thus, direct and indirect systems are now overlapping in international criminal justice, and both respect a certain level of autonomy on the part of national laws.

The judicial system's complex structure inevitably influences substantive aspects of international criminal law. As seen in this article, the relationship between customary international law peculiar to international proceedings, customary international law applying to both international and national proceedings, and the law of the ICC exceptionally applying to this judicial organ is intricate. There remain some issues for which a body of customary international law applying in both direct and indirect systems has not yet been developed and international tribunals have formulated their own rules at the international level. Here, national laws play significant roles in their respective national jurisdictions with regard to the prosecution of serious international crimes in indirect system. Meanwhile, customary international law applying to both international and national proceedings also developed on such subjects as the superior orders defense, command responsibility, and functional immunity for State officials. Furthermore, some other issues exist with regard to which the ICC has provided *lex specialis* restrictively applying within its jurisdiction, which is different from corresponding rules of customary international law.

Since the complex structure of international judicial proceedings is a reality in concurrent international criminal law, the complexity in substantive law seems also to be inevitable or even reasonable in this field. Indifference to such legal circumstances would bring about discord in the substance of arguments under the same rubric of "international criminal law", possible claims for the intervention by international law into national legal order where this is not actually required, and possible unreasonableness as, for instance, was discussed with regard to the issue of mistake of law. Discussions on international criminal law need to keep up

<sup>162</sup> See J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 1, 86.

with the differences among the two types of customary international law and *lex specialis* of the ICC. Considering that these differences influence the degree of intervention of international law into national legal orders, and States are especially sensitive with respect to the autonomy of their own criminal jurisdiction because criminal law is recognized as *ultima ratio*, it would be even more important to strike a careful balance among these laws operating in the direct and indirect systems. In order to realize a harmonious system of international criminal justice, conscious recognition of the differences among various modes of international criminal justice is apparently needed as well as caution against over-simplification of discussions on international criminal law.

Meanwhile, it would also be necessary to critically examine the differences among “international criminal laws” where they cannot immediately be justified in consideration of the complex of judicial proceedings. Especially, occasional discrepancy between the law of the ICC and corresponding customary international law apparently needs careful evaluation. International criminal justice traditionally cannot evade uncertainty on legal decisions among various jurisdictions; judgments cannot help varying more or less depending on which forum exercises jurisdiction on the case in question. However, pointless variety of judicial decisions at the international level is harmful to the coherent discourse of international criminal law and the construction of genuine universality with respect to the ICC.<sup>163</sup> The substance of *lex specialis* of the ICC and the two types of customary international laws is not static. It would be necessary to constantly reevaluate the development of respective laws as well as their relationship in order to strike a deliberate balance between the unity and diversity.

<sup>163</sup> As to the latter problem, see R. Wedgwood, ‘The International Criminal Court: An American View’, 10 *European Journal of International Law* (1999) 1, 93, 98-99.