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Core International Crimes at the Interface

In Search of Unity amidst Diversity in the Interpretation of International Criminal Law

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11.1 Introduction

In the two decades that have lapsed since the entry into force of the Rome Statute, the field of international criminal law has grown in both vibrancy and reach. Whilst the International Criminal Court (ICC) is at the centre of the system created by the Rome Statute, States are called to play a key role in investigating and prosecuting core international crimes, in accordance with the principle of complementarity.[1] In order to do so, States need to adopt national implementing legislation incorporating the crimes at the domestic level. To date, many States have adopted legislation to implement the Rome Statute[2] and have, therefore, offered their interpretation of the Statute in the process. However, this engagement has often led to divergent approaches, with several States deviating from the Statute. This chapter explores what happens when there is a clash between what is in the Rome Statute and when core international crimes are interpreted differently within and outside the ICC. It further looks into what happens at the interface. Unpicking this interaction not only offers useful insights into the practice and evolution of the core international crimes provisions but may also contribute to a better understanding of the rules of international criminal law interpretation, as well

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[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, preamble para 10, arts 1, 17 (Rome Statute).

[2] To date, over half of the State Parties (nearly 70) have at least partially adopted implementing legislation; see National Implementing Legislation Database, accessible at <https://demo.hrlc.net/en/> (last accessed 1 June 2025).

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as pave the way for possible Rome Statute amendments. Whereas many works have focused on the implementation of the Rome Statute, looking at this interface from the interpretation angle has been overlooked, to date.

This chapter will start with a brief consideration of those institutions that gave rise to international criminal law – namely, the Nuremberg and Tokyo International Military Tribunals (IMTs) and the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. It will consider the influence of customary international law in defining and interpreting core international crimes, as well as its relationship with the principle of legality, a key principle underpinning international criminal justice. Moving then to one of the major instruments of international criminal law of our time – the Rome Statute establishing the ICC – the chapter will discuss to what extent the definitions of crimes contained in Articles 6–8*bis* of the Rome Statute codify customary international law or rather constitute progressive development in the field. Although these categories of crimes can be regarded as largely reflective of customary international law of the time, it is important to note, as recognised under Article 10 of the Statute, that the exclusion of certain crimes from the Rome Statute or the adoption of retrograde definitions must not be read as limiting or precluding the existing customary international law framework or the progressive development of new customary law outside the Statute. Customary international law in this area has considerably developed alongside the Rome Statute, including through the national laws of States. Notably, when adopting domestic implementing legislation, State Parties have often significantly limited or expanded the scope of application of core international crimes enshrined in the Statute. It is, therefore, crucial to consider how different national core crimes provisions can influence the interpretation of the definitions of core international crimes crystallised in the Rome Statute when the ICC is required to step in owing to the national legal system being unwilling or unable genuinely to investigate or prosecute, in line with the principle of complementarity.

This chapter will consider how this potential new state practice and emerging customary law interacts with the treaty provisions and what this means for their interpretation. This chapter will argue that a distinction should be made between creating new substantive law and an interpretation within the scope of existing law. Subsequent practice or customary international law cannot, therefore, be invoked to unacceptably restrict, broaden, or modify the text of the Statute. Nevertheless, ICC

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judges need to remain cognisant of how core international crimes have been interpreted through implementation at the domestic level.

11.2 The IMTS and *ad hoc* Tribunals: Between Customary International Law and the Principle of Legality

The birth of modern international criminal law can be traced back to the Nuremberg and Tokyo IMTs, established by the victorious Allied Powers following the Second World War.[3] Notably, the definitions of the core crimes in international criminal law – namely, genocide, crimes against humanity, war crimes, and aggression – have been developed at the international level ever since the inception of the field with the creation of these two Tribunals. Core international crimes have since become established categories of crimes in international law, enabling the prosecution of alleged perpetrators at the international level.

At Nuremberg, the Military Tribunal observed that 'the law of war is to be found not only in treaties, but in customs and practices of States which gradually obtained universal recognition' and that 'in many cases, treaties do no more than express and define for more accurate reference the principles of law already existing'.[4] Therefore, the Nuremberg IMT explicitly referred to customary international law in defining the law applicable to the crimes falling within its jurisdiction.[5] Likewise, the Tokyo Tribunal engaged in the practice of determining whether the crimes listed in the Far East Charter constituted customary international law.[6]

It was said at the time that 'the [Nuremberg] Charter is not an arbitrary exercise of power on the part of the victorious nations, but ... it is the expression of international law existing at the time of its creation'.[7] Efforts were made to demonstrate respect for the principle

[3] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed and entered into force 8 August 1945) 82 UNTS 280; Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) 4 Bevans 20.

[4] *Judgment of the Nuremberg International Military Tribunal of 1 October 1946* (1947) 41 AJIL 172, 219 (*IMT Judgment*).

[5] F Pocar, 'International Criminal Justice and the Unifying Role of Customary Law' (2016) 21(2–3) Uniform LR 171, 171. Specifically, the customary role of war crimes embedded in the Nuremberg Charter was affirmed by referring to treaties such as the 1907 Hague Conventions and the 1929 Geneva Conventions.

[6] L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 260.

[7] *IMT Judgment* (n 4) 216.

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of *nullum crimen sine lege* – that is, the principle of legality.[8] Nevertheless, the inclusion of certain crimes in the Nuremberg and Tokyo Charters raised concerns about retroactivity and compliance with the principle of legality.[9] Notably, it is questionable whether crimes against peace and crimes against humanity constituted crimes under international law at the time of their occurrence during the Second World War.[10] Therefore, the Nuremberg and Tokyo IMTs have received a great deal of criticism on account of the fact that individuals were prosecuted for crimes that had not existed at the time they were committed.[11] Confronted with such a challenge, the Nuremberg judgment developed a relatively weak conception of the principle of legality, which can operate as a 'principle of justice' rather than as a 'limitation of sovereignty' and can, therefore, be outweighed by considerations of substantive justice.[12]

In response to the so-called victors' justice criticism of the Nuremberg and Tokyo paradigm, and after a long period of inactivity owing to the Cold War,[13] at the time of the establishment of the *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the 1990s, every effort had been made for core crimes definitions enshrined in their Statutes to reflect existing customary international law in the field.[14] The UN Secretary-General's report that preceded the establishment of the ICTY expressly stated that the Tribunal's material jurisdiction is limited to conducts that are, 'beyond any doubt',[15] recognised under

[8] KS Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 68.

[9] T Weigend, '"In General a Principle of Justice": The Debate on the "Crime against Peace" in the Wake of the Nuremberg Judgment' (2012) 10 JICJ 41, 45.

[10] Gallant (n 8) 68.

[11] ibid 44.

[12] *IMT Judgment* (n 4) 217.

[13] At the Nuremberg and Tokyo trials, only the conduct of the citizens of Nazi Germany and Japan were scrutinised, while the acts committed by the victorious Allied Powers were not investigated; see RM Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971).

[14] Sir David Hannay, from the UK delegation, observed that 'the Statute does not, of course, create new law, but reflects existing international law in this field'; UNSC, 'Provisional Verbatim Record of the 3217th meeting' (25 May 1993) UN Doc S/PV 3217, 19.

[15] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704 [34]. The report explicitly considers as part of customary international law the law embodied in the Geneva Conventions of 1949 for the protection of War Victims; the IV Hague Convention of 1907 and annexed

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customary international law, so that 'the problem of adherence of some but not all States to specific conventions does not arise'.[16] However, in the case of the ICTR, the Security Council adopted a more expansive approach to the choice of the applicable law, including within its subject-matter jurisdiction 'international instruments regardless of whether they were considered part of customary international law'.[17]

The UN Secretary-General's report on the ICTY reveals a presumption in favour of customary international law, according to which 'provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources'.[18] However, concerns were raised at the time on whether breaches of the Geneva Conventions in a non-international armed conflict constituted customary international law,[19] and whether customary international law for crimes against humanity required a nexus with an armed conflict.[20]

regulations; the 1948 Genocide Convention and the 1945 Charter of the International Military Tribunal.

[16] ibid [34].

[17] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134 [12]. For instance, art 4 of the ICTR Statute includes violations of the Additional Protocol II, 'which has not yet been universally recognized as part of customary international law' and criminalises, for the first time, the acts mentioned in art 3 of the four Geneva Conventions.

[18] *Prosecutor v Duško Tadić* (Appeal Judgment) IT-94–1-A (15 July 1999) [296]. Nevertheless, as observed at ibid [287], the presumption of consistency with customary international law is rebuttable and the Security Council could 'explicitly or implicitly depart from general rules of international law'.

[19] 'The content of customary law applicable to internal armed conflict is debatable'; UNSC, 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (27 May 1994) UN Doc S/1994/674 [42, 54]. However, the ICTY affirmed that war crimes can also be committed in non-international armed conflict and that this reflects customary international law; see *Prosecutor v Duško Tadić a/k/a/ "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94–1-T (2 October 1995) [134].

[20] 'Since customary international law no longer requires any nexus between crimes against humanity and armed conflict', the Security Council may have defined the crime in art 5 more narrowly than necessary under customary international law; *Prosecutor v Duško Tadić* (Decision on the Defence Motion) (n 19) [78, 141]. Moreover, crimes against humanity are prohibited 'regardless of whether they are committed in armed conflict, international or internal in character'; UNSC (n 15) [47].

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In any case, the primary role played by customary international law in the *ad hoc* international criminal Tribunals' experience has been deemed necessary to comply with the principle of *nullum crimen sine lege* and, specifically, with the prohibition against retroactive application of criminal law. By recognising that 'the tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed',[21] the drafters wanted to avoid risking a possible violation of the principle of legality in the event that a party to the conflict did not ratify a relevant treaty.[22] For the same reason, a few years later, the UN Secretary-General's report on the establishment of a Special Court for Sierra Leone expressly recognised that the international crimes enumerated in the draft statute 'are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime', linking the presumption of interpretation consistent with customary law with the principle of legality and the ban against the retroactive application of the law.[23]

11.3 The Rome Statute Crimes: Codification of Custom or Progressive Development?

The adoption of the Rome Statute of the ICC in 1998 provided a further opportunity for crystallising the customary international law of the time. In developing the definitions of core international crimes,[24] the intention of the drafters at Rome was to limit the Court's jurisdiction to crimes existing under customary international law.[25] To reach the widest possible consensus among States and promote its universal application, it was understood that the Rome Statute was not the 'right place for progressive development of the law into uncertain areas, or for the

[21] See *Prosecutor v Milanovic, Sainovic, Ojdanic* (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-05–87-PT (21 May 2003) [9].

[22] 'It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty.' *Prosecutor v Tadić* (Decision on the Defence Motion) (n 19) [143].

[23] UNSC 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone' (4 October 2000) UN Doc S/2000/915 [12].

[24] Art 5 of the Rome Statute lists genocide, crimes against humanity, war crimes, and aggression as crimes falling under the jurisdiction of the ICC.

[25] R Cryer, 'Of Customs, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11(2) JCSL 239, 251.

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elaboration of new and uncertain international criminal law'.[26] As stated by Philippe Kirsch, the Court's first president, 'the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not create new law'.[27] Although the Rome Statute does not expressly specify whether the crimes listed in Articles 6–8*bis* are declaratory of custom,[28] these categories of crimes can be regarded as largely reflective of customary international law at the time.[29] This ensures consistency with the principle of legality, as formulated in Article 22 of the Rome Statute.

However, the drafting of an international treaty is always an arduous process. It is hard to hold the narrow line between a pure codification of existing customary law and progressive or retrogressive developments.[30] The Rome Statute was the product of intense multilateral negotiation,[31] which revealed the existence of profound and diverging national positions. The substantive provisions contained in Articles 6–8*bis* 'represent a consensus reached by a large number of States following a lengthy and complex drafting process'.[32] Therefore, the numerous compromises that were made to build consensus among States led to divergence from the then existing content of customary international law.[33]

[26] R Cryer, 'The Doctrinal Foundations of International Criminalization' in MC Bassiouni (ed), *International Criminal Law*, Vol 1 (Martinus Nijhoff 2008) 107, 118. At the Preparatory Committee, 'several delegations held the view that the Statute should codify customary international law and not extend to the progressive development of international law'; see UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I' (1996) UN Doc A/51/22 [54].

[27] P Kirsch, 'Foreword' in K Dormann (ed), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003) xiii.

[28] Grover (n 6) 244.

[29] GM Danilenko, 'The Statute of the International Criminal Court and Third States' (1999) 21 MichJIntlL 445, 486. The four categories of crimes listed in art 5 of the Rome Statute are generally regarded as *jus cogens* obligations; see LN Sadat and SR Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88(3) Geo LJ 381, 407.

[30] GM Danilenko, 'ICC Statute and Third States' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol 2 (Oxford University Press 2002) 1871, 1891.

[31] The international diplomatic conference was held in Rome (Italy) from the 15th of June 1998 to the 17th of July 1998.

[32] W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 336. The Rome Statute was adopted by a non-recorded vote of 120 in favour, 7 against, and 21 abstentions.

[33] M Bennouna, 'The Statute's Rules on Crimes and Existing or Developing International Law' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol 2 (Oxford University Press 2002) 1101, 1102.

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While the provisions on genocide,[34] crimes against humanity,[35] war crimes,[36] and aggression[37] are generally considered in line with customary law,[38] the Rome Statute shows, in places, both (limited) progressive development, as well as instances of regression – in particular when looking at the definitions of crimes under Articles 7 and 8 of the Rome Statute. Indeed, as it has been observed by the ICTY in the *Furundžija* case, 'depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law'.[39] Therefore, the Rome Statute can be regarded as largely, but not completely, reflective of customary law.[40]

Provisions that have been considered by some authors as going beyond customary international law include, among war crimes, the conscription

[34] Art 6 of the Rome Statute reflects art 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is widely regarded as reflective of custom; see *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

[35] The notion of crimes against humanity has been recognised as part of customary international law before the adoption of the Rome Statute. *Prosecutor v Tadić* (Decision on the Defence Motion) (n 19) [141].

[36] Art 8 of the Rome Statute contains most of the provisions of the 1949 Geneva Conventions and Additional Protocol I on 'grave breaches', whose status of norms under customary international law is widely recognised. Although debate arose on whether war crimes committed in non-international armed conflict were declaratory of customary international law, the majority of States supported their inclusion; see T Yudan, *The Rome Statute as Evidence of Customary International Law* (Brill 2021) 69.

[37] The definition of art 8*bis* adopted at Kampala in 2010 has been based on the Nuremberg and Tokyo precedents, as well as on General Assembly Resolution 3314 (UNGA, 'Res 3314 (XXIX): Definition of Aggression' (14 December 1974) UN Doc A/RES/29/3314) and is generally accepted as part of customary international law; see A Cassese et al, *Cassese's International Criminal Law* (Oxford University Press 2013) 142–43.

[38] *Request under Regulation 46(3) of the Regulations of the Court* (Pre-Trial Chamber I, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute') ICC-RoC46(3)–01/18 (6 September 2018) [45]. Moreover, to the extent that the definitions of crimes in the Rome Statute reflect customary international law, they bind all individuals, regardless of their nationality and where the conduct was committed; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 38 (VCLT).

[39] *Prosecutor v Anto Furundžija* (Judgment) IT-95–17/1-T (10 December 1998) [227]; see also *Prosecutor v Šainović et al* (Appeal Judgment) IT-05–87-A (23 January 2014) [1648]. 'While the ICC Statute may be in many areas regarded as indicative of customary rules, in some areas it creates new law or modifies existing law.'

[40] T Meron, 'Crimes under the Jurisdiction of the ICC' in H von Hebel et al (eds), *Reflections on the International Criminal Court: Essay in Honour of Adrian Bos* (TMC Asser 1999) 47, 48.

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or enlistment of children under fifteen years of age into the national armed forces[41] and the indirect transfer by an occupying power of its civilian population into the occupied territory.[42] Moreover, the customary law status of certain acts amounting to crimes against humanity has been called into question, such as forced pregnancy,[43] enforced disappearance and apartheid,[44] as well as the long list of grounds of persecution.[45] Lastly, the policy element required by Article 7(2)(a) of the Rome Statute[46] has also been seen to narrow the customary definition of crimes against humanity.[47] Similar reasoning has been employed regarding the qualification of the concept of persecution as occurring 'in connection with any act or any crime within the jurisdiction of the Court'.[48] However, such progressive definitions, which were not regarded as declaratory of customary international law at the time of the Statute's adoption, are likely to have gradually evolved and crystallised into custom as a result of other international and domestic courts, or domestic implementing legislation, accepting them as 'encapsulating the world community's *opinio juris* on the matter'.[49]

On the other hand, the lack of prohibition on conspiracy to commit genocide constitutes a retrograde deviation from custom.[50] Moreover, in the context of war crimes, the Statute has inadequately codified

[41] Rome Statute, art 8(2)(b)(xxvi). UNSC (n 23) [18]; see also *Prosecutor v Norman* (Decision of Appeals Chamber on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) SCSL-2004–14-AR72I (31 May 2004) Dissenting Opinion of Judge Robertson [40–41].

[42] Rome Statute, art 8(2)(a)(viii); see Danilenko (n 30) 1893.

[43] Rome Statute, art 7(1)(g). A Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008) 126.

[44] Rome Statute, art 7(1)(i), (j). Cassese (n 43) 126.

[45] Rome Statute, art 7(1)(h). Cassese (n 43) 126.

[46] Art 7(2)(a) requires that an 'attack directed against any civilian population' must be committed 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.

[47] Cassese et al (n 37) 107; see also *Prosecutor v Kunarac, Kovac and Vukovic* (Appeals Chamber Judgment) IT-96–23/1-A (12 June 2002) [98].

[48] Rome Statute, art 7(1)(h); see *Prosecutor v Kupreškić et al* (Trial Chamber Judgment) IT-95–16-T (14 January 2000) [580].

[49] Cassese (n 43) 14. For instance, after the adoption of the Rome Statute, several States have incorporated art 7(2)(a) into their national legislation and the element of policy has widely crystallised into customary law; see Grover (n 6) 135 fn 101.

[50] Cassese (n 43) 146. However, it has been observed that this divergence between the ICC Statute and the 1948 Genocide Convention is the result of 'an oversight of exhausted drafters' in Rome. W Schabas, *Genocide in International Law: The Crime of the Crimes* (2nd edn, Cambridge University Press 2009) 315.

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prohibited weapons and clearly excluded the legal prohibition on the use of weapons of mass destruction.[51] The Statute also retains some retrograde distinctions between international and non-international armed conflicts, with significantly fewer categories of war crimes included in this latter section. For instance, Article 8(2)(e) lacks a comparable provision to that of Article 8(2)(b)(xx) on the use of weapons that cause superfluous injury and unnecessary suffering, or weapons that are inherently indiscriminate. Other crimes that are not replicated in internal armed conflicts include compelling a prisoner of war or other protected persons to serve in the armed forces of a hostile power;[52] intentionally directing attacks against civilian objects;[53] intentionally launching indiscriminate attacks likely to cause incidental loss of life, injury to civilians or damage to civilian objects, or widespread, long-term, and severe damage to the natural environment;[54] attacking undefended places, which are not military objectives;[55] improper use of flags and markings;[56] use of human shields.[57]

11.4 Temporality of International Criminal Law

Codifying customary international criminal law, as was largely the case with the adoption of the Rome Statute, ensures legal clarity, as well as better consistency and coherence of the law. However, it should be stressed that 'customary law continues to exist and develop alongside treaty law.'[58] International criminal law is a dynamic system. It is not intended to be frozen in time but evolves and develops continuously. As it has been observed by the Nuremberg IMT, 'the laws of the war are not static, but by continual adaptation follow the needs of a changing world'.[59] Concerns have therefore been expressed that the definitions of crimes adopted by the Rome Statute might have 'frozen customary

[51] RS Clark, 'Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare' (2009) 12(3) NCLR 366.
[52] Rome Statute, art 8(2)(a)(v).
[53] ibid, art 8(2)(b)(ii).
[54] ibid, art 8(2)(b)(iv).
[55] ibid, art 8(2)(b)(v).
[56] ibid, art 8(2)(b)(vii).
[57] ibid, art 8(2)(b)(xxiii).
[58] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [176].
[59] *IMT Judgment* (n 4) [445].

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definitions in a process of rapid evolution', thus leading to the 'stagnation, if not decline' of the field.[60]

The Rome Statute itself recognises that the ICC does not operate in a vacuum. Indeed, Article 10 stipulates that: 'Nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules for international law for purposes other than this Statute.'[61] This provision, which had been proposed by the late M. Cherif Bassiouni on behalf of the Egyptian delegation and with the strong support of the ICRC,[62] sought to mitigate concerns regarding the codification of some but not all customary international crimes contained in the Statute.[63] Likewise, Article 22(3) of the Statute confirms that the exclusion of criminal liability – in application to the principle of legality – for those conducts not criminalised under the Rome Statute 'shall not affect the characterization of any conduct as criminal under international law independently of this Statute'. Therefore, the exclusion of certain crimes from the Rome Statute, or departure from customary law, is not intended to prejudice the existing customary international law framework or the progressive development of new customary law in the field.[64]

While such provisions are intended to restrict the influence of the Statute on the development of customary law, they are not aimed at determining the role of custom for interpretation purposes. Such an approach is, however, of particular relevance, given that customary international criminal law has further developed alongside the Rome Statute, including through the adoption of national implementing legislation by States.

[60] A Pellet, 'Applicable Law' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol 2 (Oxford University Press 2002) 1051, 1054.

[61] Although the draft provision originally referred only to the definitions of war crimes, it applies to all the crimes defined in the Statute.

[62] Preparatory Committee on the Establishment of an International Criminal Court, 'Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December, Annex I: Report of the Working Group on Definitions and Elements of Crimes' (18 December 1997) UN Doc A/AC.249/1997/L.9/Rev.1; ICRC, 'Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1 / L.53' (8 July 1998) UN Doc A/CONF.183/INF/10 [4].

[63] LN Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (2000) 49(4) DePaul LR 909, 910–1.

[64] A Heinze, 'Article 10' in K Ambos (ed), *Commentary on the Rome Statute of the International Criminal Court* (4th edn, Beck, Hart, Nomos 2022) 756, 773.

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11.5 The Adoption of Divergent Domestic Implementing Legislation

With the principle of complementarity being the cornerstone of the Rome system of justice and the ICC operating as a court of last resort,[65] the primary responsibility to investigate and prosecute core international crimes rests with States.[66] The ICC can only intervene when States are 'unwilling' or 'unable' genuinely to do so.[67] To enable States to exercise primary jurisdiction over core international crimes, and investigate and prosecute these crimes domestically, enacting legislation implementing the provisions of the Rome Statute in their respective national legal systems is key. National implementation is indispensable for meeting the 'duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' – as stated in the Preamble of the Rome Statute.[68] Whilst the Rome Statute does not expressly mandate the enactment of national implementing legislation with regard to the Statute crimes, and the decision to implement is left at the discretion of States, over half of the State Parties have so far at least partially adopted domestic implementing legislation with respect to the four core crimes listed under Article 5 of the Statute.[69]

Importantly, the Rome Statute also does not expressly require States to enact domestic implementing legislation incorporating the core crimes in a uniform manner. As such, States are afforded wide discretion when carrying out the implementation task. Substantive differences, therefore, exist in how core international crimes have been interpreted when transposed into national systems. A number of States have replicated the exact wording of the Rome Statute or made explicit reference to its relevant provisions.[70] Other States have instead reformulated, rephrased,

[65] See C Stahn and MM El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, Vol 1 (Cambridge University Press 2012).

[66] Assembly of States Parties, 'Strengthening the International Criminal Court and the Assembly of States Parties' (9 December 2021) ICC-ASP/20/Res.5 [132] <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-Res5-AV-ENG.pdf> (last accessed 1 June 2025).

[67] Rome Statute, art 17.

[68] ibid, preamble para 6.

[69] See National Implementing Legislation Database, available at <https://demo.hrlc.net/en/> (last accessed 1 June 2025).

[70] For instance, Australia, Belgium, Georgia, Kenya, Malta, New Zealand, South Africa, and Trinidad and Tobago have followed the 'replication' method. Austria, Ireland, the Republic of Korea, Uganda, and the United Kingdom have instead embodied the 'reference method'; see Case Matrix Network, 'Implementing the Rome Statute of the

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and redrafted the conducts criminalised in the Rome Statute, using different terms from those employed by Articles 6–8*bis* of the Rome Statute in both retrograde or progressive ways.[71]

Some States have adopted narrower definitions of core international crimes – for instance, omitting racial groups or ethnic groups in the domestic definition of genocide,[72] or adopting restrictive definitions of torture or enforced disappearance of persons.[73] Conversely, other States have employed broader definitions based on general international law, other applicable treaties, or new developments in customary international law. Indeed, the implementation task carried out by States is 'not performed in a vacuum' but is necessarily influenced by developments in the field of international criminal law.[74] For instance, several State Parties – such as some Latin American and ex-Soviet countries – have expanded the scope of application of genocide by increasing the number of protected groups[75] or broadening the list of punishable acts to include displacement or deportation.[76] Other States, like Germany, have also included conducts that have been omitted during the negotiations of the Rome Statute – for example, the prohibition on the use of chemical

International Criminal Court' (*ICC Legal Tools Database*, September 2017) 22 <https://www.legal-tools.org/en/doc/e05157/> (last accessed 1 June 2025).

[71] T Hoffmann, 'The Crime of Genocide in its (Nearly) Infinite Domestic Variety' in M Odello and P Lubinski (eds), *The Concept of Genocide in International Criminal Law: Developments After Lemkin* (Routledge 2020) 67, 69.

[72] For instance, Bolivia, Ecuador, Guatemala, Paraguay, and Peru omit racial groups; Costa Rica, El Salvador, and Oman omit ethnic groups; and Nicaragua omits both racial groups and national groups; see Case Matrix Network (n 70) 26; Hoffmann (n 71) 70.

[73] For instance, Germany; see Case Matrix Network (n 70) 35–36.

[74] ICRC, 'Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice: Report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law', Vol I (*Czech Red Cross*, 2014) 12 <https://www.cervenykriz.eu/files/files/cz/nsmhp/setkaniNKMHP.pdf> (last accessed 1 June 2025).

[75] The definition of genocide under art 6 of the Rome Statute limits the protected groups to national, ethnic, racial, and religious groups. However, Bangladesh, Colombia, Costa Rica, Ecuador, Ethiopia, Ivory Coast, Nicaragua, Panama, Poland, Togo, and Uruguay include political groups; Estonia, Latvia, Paraguay, Peru, Portugal, and the Philippines include social groups; and Lithuania and Switzerland include both political and social groups; see Case Matrix Network (n 70) 26–27; Hoffmann (n 71) 97. Sixteen other countries, such as Francia and Romania, have undertaken an all-encompassing approach that potentially covers any identifiable group (ibid 84–85).

[76] For instance, Armenia, Bolivia, Ethiopia, Italy, Lithuania, and Spain; see Case Matrix Network (n 70) 30–31.

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and biological weapons among their war crimes provision.[77] Moreover, while some States have maintained in their legislation the distinction between international and non-international armed conflicts,[78] this has been blurred by others.[79] A number of States consider direct attacks against civilian objects, disproportionate attacks, and human shields to be war crimes also in non-international armed conflicts, even though the Statute only recognises these as war crimes solely when committed in the course of an international armed conflict.[80]

Whilst provisions of national legislation do not always correspond to the definitions enshrined in the Rome Statute, they purport to criminalise the same conduct. It is, therefore, crucial to consider what happens if national core crimes provisions differ from those found in the Statute – for instance, in a situation case where a State Party conflates international and non-international armed conflicts. Where the ICC is required to step in owing to the national legal system being unwilling or unable genuinely to investigate or prosecute in line with the principle of complementarity, it is at that interface that the interpretation of the national core crime provision in relation to the provision found in the Rome Statute becomes relevant.

11.6 Rules of Interpretation at the ICC

Since its coming into force, ICC judges have been repeatedly tasked with interpreting and applying the Rome Statute.[81] The applicable sources of law to be employed by the ICC are clearly laid down in Article 21 of the Rome Statute, which places primary importance on the text of the

[77] For instance, Argentina, Ecuador, and Germany.

[78] For instance, Lesotho, Lithuania, Malta, Mauritius, Norway, Portugal, Slovenia, South Africa, Timor Leste, Trinidad and Tobago, the Netherlands, the Philippines, Uganda, and the UK; see Case Matrix Network (n 70) 42.

[79] For instance, Albania, Bangladesh, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Capo Verde, Croatia, Ethiopia, Georgia, Germany, Greece, Montenegro, Serbia, the Republic of Korea, and the Former Yugoslav Republic of Macedonia have all adopted domestic legislation affording war crimes the same coverage regardless of whether committed in international or internal armed conflicts; see Case Matrix Network (n 70) 43–44.

[80] See PS Nagler, 'Research Brief: Harmonizing War Crimes Under the Rome Statute - Geneva Academy Research Brief' (*Geneva Academy*, March 2019) https://geneva-academy.ch/wp-content/uploads/2025/09/Harmonizing-War-Crimes-Under-The-Rome-Statute.pdf (last accessed 1 June 2025).

[81] The Rome Statute expressly refers to the task of 'interpretation' in arts 9(1), 21(3), 22(2). This confirms the role of ICC judges as interpreters and not only appliers of international criminal law. Grover (n 6) 68.

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Statute, its Elements of Crimes, and the Rules of Procedure and Evidence.[82] Only residually, and 'where appropriate', judges should apply applicable treaties and principles and rules of international law,[83] as well as general principles of law derived by the Court from national laws, including the national laws of States that would normally exercise jurisdiction over the crime.[84]

While Article 21 of the Rome Statute does not explicitly address the issue of interpretation, the inclusion of a list of applicable sources therein creates a *de facto* framework that guides ICC judges in their interpretative process. In this regard, paragraph 3 of Article 21 explicitly refers to both 'application' and 'interpretation' of the law, acknowledging the intertwined nature of the two processes. Although a distinction exists between application and interpretation,[85] interpretation is the first step in the process of applying the law. Therefore, Article 21 sets out a hierarchy between sources that ICC judges are to apply when interpreting core international crimes[86] and places the definitions contained in the Statute at the top to increase legal certainty and ensure better respect for the principle of legality.[87] Whilst the other sources of law, including

[82] Rome Statute, art 21(1)(a). The role of the Elements of Crimes in assisting ICC judges in the interpretation and application of arts 6–8*bis* is explicitly outlined in art 9(1).

[83] ibid, art 21(1)(b).

[84] ibid, art 21(1)(c).

[85] G Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 281, 303.

[86] The other sources of law provided for in art 21(1)(b) and (1)(c) can only be applied when '(i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided for in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and Article 21(3) of the Statute'; see *Prosecutor v Al Bashir* (Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05–01/09 (4 March 2009) [126]; *Prosecutor v Lubanga Dyilo (Appeals Chamber*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2)(a) of the Statute of 3 October 2006) ICC-01–04/01–06 (14 December 2006) [34].

[87] Some have pointed out that such a provision was meant as a limitation of the judges' creativity, to discourage judicial law-making; see W Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals' in J Doria et al (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Vol 19 (Martinus Nijhoff 2009) 77.

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custom,[88] occupy a subsidiary position,[89] they still have an acknowledged role to filling gaps in the text of the Statute or as an aid for the purposes of interpretation.[90] In any case, these rules of interpretation seem to provide an imperfect solution. They only apply to the Court itself and fail to take into account how States behave within the Rome system of justice created by the Statute, outside it but, in any case, not before the Court.

However, as an international treaty, the Rome Statute is also subject to rules and principles of interpretation codified by the 1969 Vienna Convention on the Law of Treaties (VCLT) – in particular, Articles 31 and 32.[91] As a general principle of interpretation, a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[92] Moreover, according to Article 31(3) of the Convention, judges are required to take into account subsequent agreements, practice, and law when interpreting a treaty.[93]

The provisions of the ICC Statute on applicable law and the rules set forth by the 1969 VCLT share common ground, yet they are also distinguishable. Both the ICC Statute and the VCLT emphasise the importance of interpreting treaties in accordance with the ordinary meaning of terms, the context, and in light of their object and purpose. Furthermore, Article 31(3) of the VCLT, on the consideration of

[88] Whereas the provision does not explicitly mention 'customary international law', it is widely recognised that this category is clearly encompassed in the generic reference to the 'rules of international law'. F Pocar, 'Transformation of Customary Law Through ICC Practice' (2018) 112 AJIL 182, 183. However, the role of customs, regarded as a secondary source, occupies a less prominent position in the Rome Statute than at the *ad hoc* International Criminal Tribunals.

[89] It has been, however, pointed out that – in practice – all the sources listed in art 21 are helpful to interpret the Rome Statute. Schabas (n 32) 514.

[90] Pocar (n 88) 184; see *Prosecutor v Bemba Gombo* (Judgment Pursuant to Article 74 of the Statute) ICC-01/05–01/08 (21 March 2016) [79].

[91] See *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04–168 (13 July 2006) [33]; *Prosecutor v Lubanga Dyilo* (Decision on the Admissibility of the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges of 29 January 2007') ICC-01/04–01/06 (13 June 2007) [8]; *Prosecutor v Katanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04–01/07 (7 March 2014) [43].

[92] VCLT, art 31(1); see *Prosecutor v Katanga* (n 91) [55].

[93] ibid, art 31(3).

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subsequent agreements, practice, and relevant rules of international law, aligns with the ICC's approach outlined in Article 21. By virtue of this provision, judges are expected to take into account applicable treaties and principles and rules of international law. It could therefore be argued that the ICC Statute is a specialised regime of the VCLT's general principles for treaty interpretation able to meet the specific needs, complexities, and criminal nature of the ICC.

In any case, the interplay between Article 21 ICC Statute and Article 31(3) of the 1969 VCLT, puts ICC judges at the interface: taking into account subsequent agreements, practice and other sources of international law, including custom, when interpreting the Rome Statute. As customary law and general principles of law will continue to evolve beyond the Statute, and new relevant treaties between States will continue to be concluded, the definitions of crimes cannot be considered frozen in time but need to be interpreted in the light of the law existing when the crime is alleged to have been committed.[94]

11.7 The Role of Domestic Implementing Legislation in Interpreting the Rome Statute Crimes

The idea of international criminal law not being static raises questions of how domestic implementing legislation can influence the interpretation of the definitions of core international crimes crystallised in the Rome Statute. This is particularly the case when the Court steps in in light of the principle of complementarity, that is, when national authorities are unwilling or unable to genuinely investigate or prosecute the case. It is, therefore, crucial to understand how potential new State practice and emerging customary international law would interact with the treaty provisions and what this means for their interpretation. The adoption of divergent national legislation on core international crimes does not necessarily have an impact on the interpretation of such crimes.[95] However, a 'systematic, repetitive and concordant' practice of States[96] interpreting and applying the definitions of core international crimes at the domestic level might contribute to the evolution of international customary law alongside the definitions of crimes contained in the

[94] Grover (n 6) 380.
[95] Hoffmann (n 71) 97.
[96] R Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 226.

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Rome Statute.[97] If a considerable number of States, both parties and non-parties to the Rome Statute, enacted a particular definition for a crime that departs in some way from Articles 6–8bis of the Statute, it might be argued that a new State practice and possibly opinio juris emerges on the content of the elements of that crime under customary international law. If several States consistently interpret and apply definitions of core international crimes at the domestic level, in a way that departs from the Rome Statute but aligns with one another, this can be perceived as subsequent practice that reflects a common understanding among those States. In this context, the consistent domestic practices might qualify as evidence of the parties' agreement regarding the interpretation of the relevant treaty provisions, falling under Article 31(3)(b) of the 1969 VCLT.[98] Furthermore, even when such consistent State practice does not fully align with the common intention of the parties but reflects general practice among a significant number of States, it could still fall under Article 32 of VCLT, as a supplementary means of interpretation. It could help clarify the treaty provisions in question and confirm the meaning resulting from the application of Article 31.[99]

For instance, with regard to the definition of genocide, a clear trend in State practice towards expanding the list of protected groups to include political and social groups can be identified. To the extent that this evidence of State practice is supported by opinio juris, it could be argued that a larger number of protected groups has crystallised into customary law.[100] Moreover, there is also a growing trend to abandon the distinction between international and non-international armed conflicts among war crimes, which appears in line with customary international law.[101] But does this mean that where a State Party has blurred the distinction between international and non-international armed conflicts – and the ICC steps in owing to complementarity – ICC judges could extend their

[97] ICRC (n 74) 25.

[98] VCLT, art 31(3)(b).

[99] ibid, art 32.

[100] However, Hoffmann observed that national differences in the list of protected groups are a sign of dissatisfaction with the international definition but do not represent 'modifications undertaken with the intention of creating a new *opinio juris* and state practice'. Hoffmann (n 71) 97. Similarly, Nersessian pointed out that 'there is no evidence of *opinio juris*' around the inclusion of political groups in domestic law; see DL Nersessian, *Genocide and Political Groups* (Oxford University Press 2010) 128.

[101] B McGuckin, 'The Conflict Between Armed Conflicts: Dispensing with the Distinction Between International and Non-International Armed Conflicts' (2018) Durham Global Security Institute Working Paper No 1, 22.

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subject matter jurisdiction to war crimes that constitute customary international law but have been excluded from the list of Articles 8(2)(e) of the Rome Statute?

In this regard, it is key to emphasise that the International Criminal Court is bound by the principle of legality. Article 22 provides that no one can be held responsible under the Rome Statute 'unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'.[102] Moreover, the definition of a crime shall be 'strictly construed'.[103] The goal of the drafters in Rome was to set out all crimes falling under the jurisdiction of the ICC, in as specific and detailed a manner as possible.[104] Therefore, ICC judges are strictly bound by the limits of the Statute's wording when undertaking their interpretative task.[105]

A certain level of flexibility within the Statute's framework is still acceptable 'to avoid excessive rigidity and to keep pace with changing circumstances'.[106] However, whilst the rule of strict construction shall not be intended as curbing the progressive juridical clarification or specification of the content of an offence,[107] the Rome Statute cannot be stretched to create new criminal prohibitions that would then be applied retrospectively. An interpretation based on the object and purpose of the Statute could not be used to create a body of law extraneous to the terms of the treaty or incompatible with the literal reading of the text.[108] It is therefore necessary to distinguish between the creation of new substantive law and an interpretation within the scope of existing law. Whilst a reinterpretation based on subsequent practice or customary international law can be considered acceptable, if it can be reasonably accommodated by the actual text of the Statute, modification of the text under the guise of interpretation is not permissible. A significant departure from the intention of the drafters in order to give effect to a creative

[102] Rome Statute, art 22(1).
[103] ibid, art 22(2).
[104] A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10(1) EJIL 144, 152.
[105] G Hochmayr, 'Applicable law in Practice and Theory: Interpreting Article 21 of the ICC Statute' (2014) 12(4) JICJ 655, 664.
[106] *Kokkinakis v Greece* (25 May 1993) Application no 14307/88 [40].
[107] B Broomhall, 'Article 22' in K Ambos (ed), *Commentary on the Rome Statute of the International Criminal Court* (4th edn, Beck, Hart, Nomos 2022) 1149, 1162.
[108] *Prosecutor v Katanga* (n 91) [55].

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interpretation of the Statute would appear to be 'an inappropriate arrogation of the legislative function by the judiciary'.[109]

The principle of legality, and the primacy of the Statute's text, therefore, prevents judges from expanding the Court's jurisdiction to prosecute crimes that are merely based on subsequent practice or custom but are not clearly defined in the Statute.[110] For instance, ICC judges could not extend their subject matter jurisdiction to the war crime of intentionally directing attacks against civilian objects, as this would broaden the punishable acts beyond Article 8(2)(e) of the Rome Statute. However desirable this may be, and even though a trend is beginning to develop in national legislation to conflate the two, the Statute provision remains abundantly clear. Similarly, finding an accused guilty of political or social genocide before the ICC would clearly constitute a violation of the principle of legality.[111]

Such an approach may seem unduly restrictive, if not conservative. A rigid textual interpretation of the Rome Statute promotes a narrower scope for the definitions of core international crimes.[112] Brave acts of judicial activism have also occurred in a number of instances in the past, including before international tribunals. For instance, in *Tadić*, the ICTY Appeals Chamber held that the nexus with an armed conflict in crimes against humanity was no longer required under customary law.[113] In the *Akayesu* judgment, the ICTR Tribunal expanded the traditionally protected groups under the definition of genocide to include 'any stable and permanent group'.[114] However, although the Rome Statute's provisions offer some flexibility, they are not fully flexible. It is important not to try and stretch them beyond their limits and intended scope.

ICC judges need to be cautious when taking into account subsequent practice and customary international law that significantly narrow or broaden the scope of a crime. Whilst they should be mindful of developments both in State practice and customary law, they must also recognise

[109] *Prosecutor v Ruto and Sang* (Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial') ICC-01/09–01/11–1066-Anx (25 October 2013) Joint Separate Opinion of Judge Kourula and Judge Ušacka [11].

[110] Schabas (n 32) 543; see *Prosecutor v Bemba Gombo* (n 90) [83].

[111] Nersessian (n 100) 133.

[112] N Jain, 'Interpretive Divergence' (2017) 57(1) VJIL 45, 50.

[113] *Prosecutor v Tadić* (Decision on the Defence Motion) (n 19) [141].

[114] *Prosecutor v Akayesu* (Trial Chamber I Judgment) ICTR-96–4-T (2 September 1998) [516].

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that the Statute is a treaty and that the interpretation and application role of the judiciary must be kept distinct from the law-making role.[115] It is the Assembly of States Parties, as the 'management oversight and legislative body' of the ICC,[116] that can initiate amendments to the Statute following the Article 121 Rome Statute process. For example, a unified approach to war crimes committed in non-international and international armed conflicts could only be taken at the ICC if an amendment were to be made to Article 8(2)(e) of the Rome Statute to incorporate analogous provisions to those found in Article 8(2)(b).[117]

11.8 Concluding Remarks

The chapter has explored what happens at the interface of domestic legal systems having interpreted core international crimes differently from the Rome Statute and the International Criminal Court. Addressing the question of how national implementing legislation can influence the interpretation of the definitions of core crimes crystallised in Articles 6–8*bis* of the Rome Statute provides useful insights into the progressive evolution of international criminal law and sheds some light on the under-explored interaction between implementation and interpretation of the Statute. However, the rules of interpretation laid down in Article 21 of the Rome Statute do not represent an adequate framework to fully unpick this interaction. They only apply to the Court itself and fail to take into account the interpretation of core international crimes provided at the domestic level.

ICC judges ought to be cognisant of how State Parties have implemented core international crimes in their domestic law when engaging in the interpretation of the Rome Statute. Under the 1969 VCLT, judges are required to take into account subsequent agreements, practice, and other

[115] A Ashworth and J Horder, *Principles of Criminal Law* (Oxford University Press 2013) 69.

[116] ICC, 'Assembly of States Parties' (*ICC*, 2025) <https://asp.icc-cpi.int/assembly> (last accessed 1 June 2025).

[117] For instance, an amendment has been adopted on 10 June 2010 granting the Court jurisdiction over the war crime of employing certain poisoned weapons (art 8(2)(b)(xiii)), expanding bullets (art 8(2)(b)(xv), as well as asphyxiating or poisonous gases, and all analogous liquids, materials or devices (art 8(2)(b)(xiv)), when committed in armed conflicts not of an international character; ICC, 'Amendments to Article 8 of the Rome Statute' (10 June 2010) RC/Res.5. More recently, on 6 December 2019, another amendment has been adopted to extend the international use of starvation of civilians as a method of warfare to non-internal armed conflicts.

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sources of international law when interpreting a treaty. It may be that some flexibility within the Statute exists, and judicial activism and creativity may be inevitable or even desirable to keep pace with progressive developments in the field. However, it remains necessary to distinguish between an interpretation within the scope of the existing law and modification of the text of a treaty. ICC judges cannot expand the scope of core international crimes' definitions to include new types of conduct or contextual circumstances that are not clearly supported by the text of the Statute. Therefore, where (re)-interpretation based on subsequent State practice cannot be reconciled with the text of a specific provision, formally amending the Statute – following the procedure set forth in Article 121 of the Rome Statute – remains the only available route. Keeping the Rome Statute under review and ensuring its continued evolution in accordance with customary international law would maintain the unity of the international criminal law system and avoid (further) fragmentation.

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