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Legal Convergence and the Adaptation of Penal Mechanisms: Towards an Ordered Pluralism in the Prosecution of the Most Serious Crimes

ECASA NONDO DIDIER*

ABSTRACT

Modern criminal law is, at bottom, the adaptation of criminal law to contemporary conditions, and the prosecution of perpetrators of the most serious crimes can no longer be conceived through either a rigid universalism or an isolating relativism. This study asks what legal technique is best suited to ensuring, within domestic legal systems, the effective diffusion and reception of the mechanisms, principles, and global discourse that underpin the prosecution of the most serious crimes. Domestic norms in this field are treated as a secondary institution that reformulates pre-existing frameworks and generates effects across each State's punitive culture. Against the background of an evolving culture of evaluation, the analysis situates fusion, uniformisation, and harmonisation along a continuum of modes of legal convergence, and argues, drawing primarily on the work of Mireille Delmas-Marty and Germain Ntono Tsimi, that the most appropriate response is an ordered construction of these modalities, that is, an ordered pluralism lying beyond both the relative and the universal. Turning to a modelled framework of convergence, the study examines the four degrees of internationalisation of criminal law, the pure international and pure national models and their integrated and moderated variants, and the question whether States Parties bear an obligation to adapt their domestic legislation to the Rome Statute. It concludes that, rather than absolute autonomy or total subordination, the principle of complementarity introduces a mode of normative articulation grounded in a complementary hierarchy, through which the prosecution of the most serious crimes initiates a dual opening of national criminal systems towards both the supranational and the infra-state levels.

Keywords: *Ordered pluralism, complementarity, Rome Statute, International Criminal Court, legal convergence, harmonisation, adaptation of domestic law, internormativity, crimes against humanity, African criminal law.*

* Author is a student at the University of Yaounde II, Cameroon.

I. Introduction

What modern criminal law ultimately encompasses is nothing other than the adaptation of criminal law to contemporary conditions.[1] The examination of the forms of adaptation and the modes of legal convergence should therefore be understood as an inquiry into the possible avenues and mechanisms through which the pursuit of order and of a coherent framework for the punishment of perpetrators of crime may be maintained without predetermining or freezing its future development.[2] Viewed from the perspective of normative interaction, the prosecution of perpetrators of the most serious crimes cannot be reduced to a process of mere "normative densification." It must also be analysed in light of the "proliferation of technical standards" governing the dissemination of legal norms and the increasing "standardization of judicial practices."[3] Adopting this perspective, the central question addressed in this study is the following: what is the most appropriate legal technique for ensuring, within domestic legal systems, the effective diffusion and proper reception of the mechanisms, principles, and global discourse underpinning the prosecution of perpetrators of the most serious crimes?

The premise underlying this inquiry, and running throughout this study, is that domestic norms governing the prosecution of perpetrators of the most serious crimes constitute a secondary institution that reformulates pre-existing normative frameworks. In doing so, these norms generate normative effects that extend to other legal discourses and practices within the punitive culture of each State. This observation leads to the view that "when a global framework sets the tone for the legal culture of a given era, other discourses do not disappear; rather, they adapt according to modalities that must be carefully identified and analysed."[4] Consequently, there is a resurgence of the modes of legal convergence and of the forms of adaptation of penal mechanisms that traditionally characterized classical State criminal justice systems. As a result of this resurgence, the unity of the penal system is being reconfigured through a process of combination, mutual integration, and interaction among the various norms and legal orders that shape contemporary criminal law. In this respect, the resurgence signals the decline of a model of pluralism based on separation, which merely entails the coexistence and superimposition of distinct normative subsystems. It also marks a departure from convergence or adaptation through fusion, whereby unification is achieved through the dominance of a single normative order. Rather, the emerging model is one of "ordered pluralism," a novel mode of

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[1] Louis Arroyo Zapatero, *L'harmonisation internationale du droit pénal*, 3 Rev. Sci. Crim. & Droit Pénal Comparé 557, 573 (2011).
[2] Mireille Delmas-Marty, *Les forces imaginantes du droit (II): Le pluralisme ordonné* 7 (Editions du Seuil 2006).
[3] François Ost, *De l'internormativité à la concurrence des normativités*, 59 Les Cahiers de Droit 7, 10 (2018).
[4] *Id.* at 13.

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legal articulation through which actors, including judges, may draw simultaneously upon national and international, as well as local and global, legal registers and autonomously develop the interpretative and normative tools required for the prosecution of the most serious crimes.[5]

It goes without saying that a comprehensive transformation of domestic penal norms is likely to strengthen the influence of international criminal law rationales over national penal practices. Conversely, a more limited transformation of the domestic legal framework may give rise to interpretative shifts among competing norms, such that, in some instances, the rule most closely aligned with the logic of international criminal justice will be regarded as the most effective and therefore applied. In other instances, however, priority may be given to the norm that best responds to the most pressing needs of a particular context, such as national reconciliation, the preservation of the constitutional order and the supremacy of the Constitution vis-à-vis international legal rules, or the protection of traditional values.

Viewed in this light, the prosecution of perpetrators of the most serious crimes reveals both the shortcomings of legal universalism and the limits of a relativist approach confronted with the realities of globalization.[6] It is precisely within this tension between universal normative aspirations and local normative particularities that contemporary criminal law evolves, giving rise to new forms of interaction, accommodation, and coordination among legal orders. The challenge is therefore neither the imposition of a uniform legal model nor the preservation of isolated normative spheres, but rather the construction of an ordered pluralism capable of reconciling the demands of international criminal justice with the diversity of domestic legal traditions. In any event, the analysis of the diffusion of norms may be approached either from the broader perspective of an evolving culture of evaluation, or from the standpoint of modelling, in order to examine how the plurality of modalities is transformed into a twofold categorical imperative.

II. Modes of legal convergence within an evolving culture of evaluation

The convergence of national criminal legislations or the emergence of a common criminal law framework constitutes one of the core objectives pursued by international criminal law.[7] This objective necessarily requires the domestic transposition of internationally defined offences, mechanisms, and underlying rationales. The question, however, is by what means this may be

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[5] Germain Ntono Tsimi, *Le paradigme du crime contre l'humanité et la renaissance du pluralisme juridique dans les droits pénaux africains* 590 (Ph.D. thesis, Univ. of Yaoundé II 2012).
[6] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 7.
[7] Hervé Ascensio, Emmanuel Decaux & Alain Pellet eds., *Droit international pénal* 95 (2d rev. ed. 2012).

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achieved. Within the assessment of the evolving confluence of legal norms, certain modalities are generally available but remain subject to significant limitations. This has led legal scholarship to identify more coherent and viable models capable of achieving such convergence. As Spyridon Aktypis observes, these modalities amount to logical evidences rather than binding legal rules.[8]

A. General modes of convergence of international-type mechanisms

In general terms, several forms may facilitate the adaptation of international-type mechanisms with a view to steering the traditional culturalist approach towards a more universalist ideal. These forms may be situated along a continuum of modes of interaction between legal norms. In particular, they include fusion, unification, and harmonisation.

B. Convergence through fusion

Fusion presupposes the aggregation of concepts, mechanisms, or punitive rationales originating from different legal traditions in order to construct legal unity.[9] However, as Mireille Delmas-Marty has rightly observed, fusion "cannot be decreed, and imposed unity more often reflects hegemonic domination than genuine pluralism, whether in the field of human rights or crimes against humanity."[10] This observation is accurate insofar as achieving a genuine dialogue between legal cultures remains difficult, and consequently, reaching an identical or universally acceptable substantive content is equally challenging. This characteristic is also reflected in the Rome Statute of the International Criminal Court (Article 21(1)(c)), which endorses, subject to compliance with international principles, a recourse to the fusion of national criminal conceptions. In other words, international judges may rely on "general principles of law derived from national laws representing the different legal systems of the world" only where "principles and rules of international law" are absent. As a result, fusion does not facilitate uniformity of practice; rather, it opens the way to a more complex and in-depth normative exercise than a mere accumulation of legal materials.

By contrast, separation presupposes that States adopt norms and prosecute perpetrators of serious crimes in a fully autonomous manner.[11] Should separation still be defended in the age of globalization? The answer is in the negative, as endorsing separation amounts to embracing the illusion of complete autonomy. It assumes that the universal character of the fight against

[8] Spyridon Aktypis, *L'adaptation du droit pénal français au Statut de la Cour pénale internationale: état des lieux*, 8 DROITS FONDAMENTAUX 1, 15 (2008).
[9] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 13.
[10] *Id.*.
[11] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 13.

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impunity for the perpetrators of serious crimes is limited to a mere allocation of jurisdiction among equal and self-contained systems. On this view, separation would result in the breakdown of systemic and reciprocal exchanges. It has been rightly stated that "separation allows for plurality, but does not guarantee pluralism."[12] In other words, by failing to connect legal systems with one another, it merely juxtaposes distinct legal orders without constructing either a common legal order or shared punitive principles. Put differently, separation may, in a sense, foster impunity insofar as it excludes international norms from their role in universalising criminal repression through the circulation of ideas and the coherence of enforcement mechanisms.

To underscore the limits of both approaches, Mireille Delmas-Marty observed that: "Fusion heralds a form of legal unity that appears utopian, if not unsettling; whereas separation ('the one has grown alone out of the multiple') presupposes a perfect autonomy that no longer exists."[13] This has led to further developments through legal hybridisation, or "composition-fusion," which from the outset requires a more in-depth process than a mere accumulation of legal materials.[14]

C. Convergence through uniformisation

Within a framework of interconnection, the assessment of normative performance reveals a strong tendency towards what may be described as an "obsession with uniformisation."[15] This approach presupposes that legal rules are identical. It consists in giving the same form to a set of legal elements and, in a given field, assumes the meticulous elaboration of a single normative framework contained in one instrument to which all stakeholders adhere, without the possibility of derogation either in form or in substance.[16] As can be observed, uniformisation, like unification, leaves little room for discretion to domestic legal systems in the areas it seeks to regulate. Logically, the development of a uniform body of law across a range of State entities would presuppose that their societies share similar values at the time of unification or uniformisation. However, the values upheld by a society at a given moment are undeniably not the same as those endorsed by another society at the same period. Values vary according to customs, cultural beliefs, religion, political structures, and other contextual factors. This

[12] *Id.* at 16.
[13] *Id.* at 9.
[14] *Id.* at 16.
[15] Ost, *supra* note 3, at 11, 12.
[16] Innocent Fetze Kamdem, *Harmonisation, unification et uniformisation: plaidoyer pour un discours affiné sur les moyens d'intégration juridique*, 43 REVUE JURIDIQUE THÉMIS 605, 619 (2009); Sylvain Marchand, *Les limites de l'uniformisation matérielle du droit de la vente internationale. Mise en œuvre de la Convention des Nations Unies du 11 avril 1980 sur la vente internationale de marchandises dans le contexte juridique suisse* 17 (Helbing & Lichtenhahn 1994).

diversity significantly weakens this form of convergence and suggests that harmonisation constitutes the more appropriate path forward.

D. Convergence through harmonisation

Harmonisation is indisputably neither synonymous with unity nor with plurality: it is rather a process of emergence, a movement from one to the other.[17] It entails "a process of convergence around common guiding principles so as to render national legal systems mutually compatible."[18] Luis Arroyo Zapatero has thus noted that the harmonisation of criminal norms requires a new way of legislating and regulating.[19] In other words, harmonisation presupposes avoiding any form of convergence that would compel legal systems to relinquish their cultural and legal identities. Instead, legal systems retain their distinct identities while progressively converging around shared principles.[20] In short, harmonisation does not impose a strict hierarchy, nor does it require strict identity among legal norms. It therefore makes it possible to conceive of a normative space composed of a plurality of legal frameworks, some of which may be fully coordinated, others only partially so, and others still not yet harmonised.

E. The ordered construction of modes of convergence of penal mechanisms

The ordered construction of these modalities should be understood as a more appropriate and reasonable response to the question of the suitable mode of adaptation of penal mechanisms and rationales in relation to the prosecution of the most serious crimes. To borrow Mireille Delmas-Marty's formulation, the ordered construction of modes of adaptation of penal mechanisms may generally be conceived as "a response to the legal complexity of the world" in which national punitive systems still resist complete integration into an international legal order that would impose uniformity.[21] In this sense, ordered construction constitutes a modality situated beyond both the relative and the universal. It lies, in other words, between a relativism which, by presupposing the autonomy of each legal system, is nonetheless constrained by the interdependencies required for the effectiveness of the fight against impunity, and a universalism associated with fusion, which would entail the predominance of international penal mechanisms over domestic ones. Such predominance is sometimes affirmed in legal texts, yet it may remain ineffective at the domestic level due to differences in legal cultures and

[17] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 31.
[18] Mireille Delmas-Marty, *Tribunaux internationaux et mondialisation*, in *Crimes internationaux et juridictions internationales* 279 (Antonio Cassese & Mireille Delmas-Marty eds., Presse Universitaire de France 2002).
[19] Arroyo Zapatero, *supra* note 1, at 573; Stefano Manacorda, *Harmonisation et coopération: la nature et l'articulation des rapports*, in *L'harmonisation des sanctions pénales en Europe* 571, 582 (Mireille Delmas-Marty, Geneviève Giudicelli-Delage & Elisabeth Lambert-Abdelgawad eds., Société de législation comparée 2003).
[20] See especially Mireille Delmas-Marty, *Pour un droit commun* (Editions du Seuil 1994).
[21] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 26.

practices. This form of modality may be referred to as "ordered pluralism." To account for this approach, the analysis draws primarily on the writings of the late Professor Mireille Delmas-Marty and of Professor Germain Ntono Tsimi.

F. The theory of ordered pluralism according to Mireille Delmas-Marty

From a general perspective, the theory of ordered pluralism was conceived by Mireille Delmas-Marty as a mechanism seeking "to escape both the disorder of the world (radical separation and absolute relativism) and the order imposed by the strongest in the name of a top-down universalism (a totalising, hegemonic form of fusion)."[22] This approach encompasses the means and pathways of a legal order capable of structuring complexity without suppressing it.[23] The hypothesis of ordered pluralism thus presupposes the acceptance that interactions are structured through successive adjustments rather than through the automatic operation of fixed mechanisms. As Mireille Delmas-Marty further observes, "this hypothesis privileges movements and ongoing processes rather than the models they eventually produce."[24] Accordingly, ordered pluralism is grounded in a coherent intellectual framework that makes it possible both to resist the rigidity of systemic thinking and to avoid the excesses of doctrinal overreach. It is a modality oriented towards both process and purpose.

When it comes to the prosecution of perpetrators of the most serious crimes, ordered pluralism makes it possible to conceptualise the punitive response on the basis of the universal values that underpin its legitimacy, while ensuring that its effectiveness and enforceability are grounded at the national level.[25] It is in this context that the principle of complementarity affirms the subsidiary nature of the jurisdiction of international courts vis-à-vis national jurisdictions.[26] Similarly, the obligation to investigate and prosecute is tempered by provisions recognising the Prosecutor's discretion to decline to initiate proceedings in the interests of justice.[27] These mechanisms thus make it possible to reconcile universalism and pluralism by allowing due consideration of the local context and, where appropriate, alternative forms of justice or reconciliation procedures. Mireille Delmas-Marty therefore observes the following:

"The opposition between unilateral and multilateral strategies could be overcome through a combination of legitimacy and effectiveness. Unilateral strategies, more closely associated with globalisation, cannot be limited to the sole criterion of instrumental validity and must

[22] *Id.* at 28.
[23] *Id.* at 28, 32, 36–40.
[24] *Id.* at 28.
[25] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 182.
[26] Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.
[27] *Id.* art. 53.

incorporate international norms in order to ground their legitimacy. Conversely, multilateral strategies, more firmly rooted in universalism, cannot rely exclusively on their legitimacy (understood in symbolic and axiological terms); their effectiveness must also be strengthened, both through cooperation and through the reinforcement of domestic justice systems. In the long term, these two strategies may converge towards a pluralist complementarity encompassing the entirety of the global legal space."[28]

In this perspective, the author aptly adds the following observation, which this study fully endorses:

"To achieve this rebalancing, it is undoubtedly necessary to conceive global criminal law not as a self-contained and closed 'system', but rather as a 'space' which, unlike the bipolar configuration emerging in Europe, is constructed in a 'multipolar' manner. Such a space is open to a wide range of vertical interactions (between international criminal law and domestic criminal law), as well as horizontal interactions (between international criminal law, international humanitarian law, international human rights law, and general international law)."[29]

In short, as a mode of convergence, ordered pluralism recognises the autonomy of international criminal law by reference to the punitive principles established in the instruments of international jurisdictions, customary international law, and international jurisprudence, all of which are grounded in the gravity of the crimes concerned. At the same time, it reflects an openness to domestic legal systems through a concern to respect legal diversity in the assessment of victims' interests and the relevance of alternative mechanisms, thereby acknowledging a margin of national appreciation that may provide valuable contributions rooted in different realities (for example in African realities).[30] In a word, ordered pluralism neither entails the loss of diversity nor the erasure of history, still less the neglect of the inventive capacity of peoples.[31] This, in a few brief words, is what may be said about ordered pluralism within the limits of this study. In the African context, this epistemological perspective has already been empirically confirmed, in terms of normative interaction, by Professor Germain Ntono Tsimi.

[28] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 183, 184.
[29] *Id.* at 184.
[30] Complementarity and other international law enforcement principles are understood here as regulatory concepts that ensure adjustments and realignments between the national and international levels. They also serve as regulatory mechanisms to prevent national discretion from leading to disintegration in the name of differentiation.
[31] Delmas-Marty, *Le pluralisme ordonné*, *supra* note 2, at 102.

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G. Normative observation of ordered pluralism in the African context by Professor Germain Ntono Tsimi: the finding of a dual opening of African State criminal systems and its effects

The normative validation of ordered pluralism in the African context has been carried out by Professor Germain Ntono Tsimi, drawing on the theoretical work of Mireille Delmas-Marty. The extent of Delmas-Marty's influence within Professor Tsimi's reflective framework can be appreciated by simply considering the following tribute:

"Mireille enables African legal systems to play a role in the construction of an international criminal justice system conceived between the relative and the universal. (…) Although she did not approach African legal systems as an object of study (…), her legal thought is so profound that it extends to the legal phenomenon in its entirety, precisely because it is close to nature and to humankind."[32]

In his doctoral dissertation on crimes against humanity, which engages African legal systems as part of its field of inquiry, Professor Germain Ntono Tsimi identifies the emergence of a dual opening within African criminal justice systems. On the one hand, there is an outward opening towards the supranational level, which calls for a redefinition of the relationship between the national and the international. On the other hand, there is an inward opening towards the infra-state level, which requires a reconsideration of the relationship between the State and the local sphere, or more precisely between law and custom.

This dual opening entails a significant consequence. It gives rise to "complex normative relations between the norms, legal orders, and legal cultures that make up the African criminal justice system." In this regard, the normative force exerted by the paradigm of crimes against humanity on domestic criminal systems "signals a transition between models" or a "shift towards the renewal of the legal formalism of African criminal justice systems." Thus, the analysis of ordered pluralism in the African context suggests three key developments: the renewal of the sources of criminalisation, the reconfiguration of criminal repression, and the redefinition of the role of the judge in criminal law.[33] As he observes:

"Indeed, the emerging legal discourse shaped by the paradigm of crimes against humanity reveals that the law of international offences draws upon domestic legal systems as much as it generates its own normative production. Judges may potentially draw from all legal registers

[32] Germain Ntono Tsimi, *Mireille Delmas-Marty (la non) africaine au sens du droit comparé?*, 74 REVUE INTERNATIONALE DE DROIT COMPARÉ 47, 54 (2022).
[33] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 590.

(national/international, local/global) and autonomously construct their own interpretative and normative tools."[34]

The foregoing considerations lead the author to conclude that there is a resurgence of legal pluralism within African criminal law systems. This resurgence does not consist in the "reappearance of phenomena that had previously disappeared," but rather signifies that African criminal law systems are now taking shape through a new form of pluralism. It is not a question of:

"Neither a pluralism of separation, which existed prior to independence and would result in the superimposition of distinct normative subsystems, nor a pluralism of fusion resulting from the decolonisation process, which led to unification through the hegemony of a single subsystem. Rather, it is a matter of 'ordered pluralism', which leads us to no longer regard 'unity' and 'pluralism' as two antithetical theories. The idea of the resurgence of pluralism indeed presupposes that the unity of the penal system may be reconstituted through a combination, a pooling, and a process of communication between the various norms and legal orders that emerge as the current components of criminal law."[35]

The resurgence therefore favours forms of articulation based on a complementary hierarchy and entails the rejection of any form of articulation grounded in a rigid hierarchy.

III. A MODELLED FRAMEWORK OF CONVERGENCE OF PENAL NORMS IN RELATION TO SERIOUS CRIMES

In discussing jurisdictional axes and applicable norms at the intersection of normative spaces, Mireille Delmas-Marty identified the existence of four main "translation models" corresponding to four degrees of internationalisation of law. Furthermore, these four degrees correspond to a theoretical framework for the bi-directional adaptation of domestic legal systems.

A. The four degrees of internationalisation of international criminal law

The models in question in fact reflect the relationship that domestic legal systems, in relation to the prosecution of the most serious crimes, maintain with the norms of international criminal law. However, as the author has observed, "the uncertainties of international law and the evolving nature of domestic legislation (often adopted on an ad hoc basis) mean that most existing legal systems simultaneously fall within different models depending on the issues

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[34] *Id.*.

[35] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 590.

addressed."[36] These issues may concern obstacles to the establishment of criminal responsibility, modes of commission of crimes, jurisdictional rules, reparation mechanisms, or the definition of fair trial guarantees, among others. Nevertheless, however approximate it may be, this modelling approach allows for the identification of the relationships between norms across legal orders. These relationships, in turn, reveal the interaction between the logic of domestic criminal repression and the requirements of international criminal justice. Briefly, a distinction may be drawn between "pure models" on the one hand, and "intermediate integrated or moderated models" on the other.

B. The "pure international model" and the "pure national model"

These two models are generally regarded as less productive, as they suggest a form of impermeability between domestic legal orders and the international legal order, an impermeability that is almost insurmountable in the age of globalisation. On the one hand, there is a "pure international model" and, on the other, a "pure national model," located at the two extreme poles. In the pure international model, universal jurisdiction is strongly asserted and international norms are predominant. This configuration carries the risk of exacerbating inequalities between States and fostering a phenomenon whereby victims tend to "prefer States that have adopted universal jurisdiction in order to file their complaints there," and sometimes even to avoid restrictive procedural requirements.[37]

The pure national model operates on the basis of predominantly traditional jurisdiction and domestic law-centred norms.[38] As Mireille Delmas-Marty writes, this model is "built on an absolute rejection" of international norms and the preservation of traditional jurisdictional frameworks. It carries the risk of fostering "victor's justice," undermining the conditions for a fair trial before a competent and impartial tribunal, and entrenching a form of "reverse subsidiarity" in favour of international jurisdiction, particularly where the alleged perpetrators of crimes remain in power.[39] Hence the usefulness of intermediate models: the moderated model and the integrated model.

C. The "moderated international model" and the "integrated national model"

These two models prove to be particularly fruitful in that they presuppose communication between legal orders. They consist of a "moderated international model" and an "integrated national model," located between the two extreme poles. In the moderated international model,

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[36] Delmas-Marty, *Tribunaux internationaux et mondialisation*, *supra* note 18, at 278.
[37] Delmas-Marty, *Tribunaux internationaux et mondialisation*, *supra* note 18, at 279.
[38] *Id.* at 278.
[39] *Id.* at 278, 279.

strong assertions of universal jurisdiction coexist with predominantly domestic norms. By contrast, in the integrated national model, traditional jurisdiction coexists with predominantly international norms.[40] Both models have the advantage of allowing for the prospect of a gradual harmonisation of domestic practices. In this regard, Mireille Delmas-Marty aptly observed the following:

"The gradual integration of international norms (the integrated national model) should prepare domestic judges to also become guardians of a future common law. Conversely, the implementation of universal jurisdiction without the integration of international norms (the moderated international model) risks being disappointing, unless it is understood as a merely transitional stage."[41]

Faced with the uncertainties of international law, the established requirements of repression under international criminal law, and the diversity of domestic legal systems, any analysis of the prosecution of perpetrators of the most serious crimes may also aim to identify the state of domestic legislation and, where necessary, to clarify the model to which each system corresponds. Similarly, the researcher may examine the state of case law in order to determine whether domestic judicial practices could contribute to the formation of a shared legal culture or, alternatively, whether they may enrich international practice, notwithstanding the different interpretations and approaches that may emerge from jurisprudence. Before doing so, however, it is worth briefly outlining the perspective of the adaptation of domestic legislation to the Rome Statute.

D. Focusing on the possible obligation to adapt domestic law to the Rome Statute

The question here is whether there exists an obligation incumbent upon States Parties to the Rome Statute of the International Criminal Court to adapt their domestic legislation. In other words, should the obligation to take necessary measures be understood as entailing an obligation of legislative adaptation? This question is all the more relevant as it appears useful to distinguish between, on the one hand, the "supra-legislative character of international conventions" in general, which theoretically requires States not to rely on domestic legislation in order to evade their international obligations,[42] and, on the other hand, the "supra-legislative character of the Statute" of the international criminal court, which may reveal different practical realities of implementation.[43]

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[40] *Id.* at 278.
[41] *Id.* at 279, 280.
[42] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.
[43] Hervé B. Ngameni, *La diffusion du droit international pénal dans les ordres juridiques africains* 70 (L'Harmattan 2016).

The answer to this question will help clarify the orientation of domestic criminal legislation within the dynamics of legal borrowing and, more importantly, define the scope of domestic action in the interpretation of norms relating to the prosecution of perpetrators of the most serious crimes, in order to assess the contribution of national jurisprudence. It is therefore necessary to first identify the possible existence of such an obligation, before examining it within the framework of the Rome Statute of the International Criminal Court.

E. Searching for the existence of an obligation of adaptation derived from the spirit of the 1969 Vienna Convention: a misleading path

In seeking the legal basis for the possible existence of such an obligation, there is a tendency to force its grounding within the law of treaties. In this regard, it is argued that the obligation to adapt domestic law to the Rome Statute of the International Criminal Court should be assessed in light of Articles 18 and 26 of the Vienna Convention on the Law of Treaties, which require the good faith performance of treaty obligations and enshrine the principle of pacta sunt servanda, understood as the duty to respect commitments undertaken.[44] This view, which the present study does not share, nonetheless appears in the writings of certain authors. Bellivier, Eudes, and Fouchard, for instance, note that, on the basis of the obligation to prosecute or extradite, international conventions impose on States an obligation to legislate in order to organise domestic prosecutions on the basis of universal jurisdiction.[45] Through this position, they suggest that just as there exists a title of universal jurisdiction, there would also exist a kind of "universal adjudicator" assessing the inadequacy of domestic legislation.

Patrick Papin Dongmo Tiodon, for his part, acknowledges that there is no obligation of adaptation. However, he considers that "the adaptation of domestic legislation to the Rome Statute pursues two major interests," the first of which is technical. He explains:

"The technical interest is divided into two sub-elements. The first corresponds to the general obligation incumbent upon States to perform their international commitments in good faith. The well-known maxim applies: pacta sunt servanda (…). The second stems from the fact that the domestic criminalisation of international crimes is linked to the principle of legality."[46]

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[44] Etienne Kentsa, *L'obligation d'adaptation du droit pénal interne au Statut de Rome*, 75 REVUE INTERNATIONALE DE DROIT COMPARÉ 459, 480 (2023).

[45] Florence Bellivier, Marina Eudes & Isabelle Fouchard, *Droit des crimes internationaux* 308, 317 (Presses Universitaires de France 2018).

[46] Patrick Papin Dongmo Tiodon, *L'adaptation des législations pénales de quelques États africains à la lumière du Statut de Rome* 27 (Ph.D. thesis, Univ. of Poitiers & Univ. of Dschang 2019).

Even assuming the recognition of the principle pacta sunt servanda and the requirement that States may not rely on domestic law to evade their international obligations,[47] it would be more accurate to conclude that these two requirements reflect the basis of the binding force of international law within domestic legal orders rather than a genuine formulation of a distinct legal imperative.[48] It is in this sense that Professor Germain Ntono Tsimi notes: "There is, in the general theory of international legal obligations, no specific duty to incorporate international legal norms into the domestic legal order."[49] This is nevertheless a reality that must be examined in light of the provisions of the Rome Statute of the International Criminal Court.

F. The dual perspective on the adaptation of domestic legislation under the Rome Statute of the ICC

A second line of reasoning seeks to ground the alleged obligation of adaptation through a comprehensive reading of the Rome Statute, understood as encompassing both its Preamble and its operative provisions. Turning to paragraphs four and six of the Preamble to the Rome Statute of the ICC, it appears that the prosecution of the most serious crimes must be "effectively ensured by measures taken at the national level and through international cooperation," and that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." By requiring States to "exercise their criminal jurisdiction" over the perpetrators of such crimes, this wording is more properly understood as establishing an obligation to prosecute, rather than an obligation to adapt domestic legislation to the requirements of the Rome Statute. It nevertheless remains the case that the notion of "measures" to be taken is not defined by the Statute. Moreover, even assuming that such measures were to be interpreted as mandatory measures of adaptation, anchoring this principle in the Preamble would revive the question of the legal value of the Preamble itself.[50] This issue has not yet been

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[47] Vienna Convention on the Law of Treaties arts. 26, 27, May 23, 1969, 1155 U.N.T.S. 331.

[48] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 90.

[49] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 90; Patrick Papin Dongmo Tiodon, *L'adaptation des législations pénales*, *supra* note 46, at 26; Olivier Cahn, *L'hypothèse de l'applicabilité directe des dispositions matérielles du Statut de Rome par le juge pénal français*, in *L'adaptation du droit pénal français à l'institution de la Cour pénale internationale* 37, 38 (Pascal Plas & Damien Roets eds., Institut Universitaire Varenne 2018).

[50] According to a certain Kelsenian doctrine, it is not the placement of a provision (in the Preamble or in the body of the text) that creates a rule of law or an obligation. For a provision to be considered an obligation, it must be accompanied by a sanction. Hans Kelsen, *Théorie du droit et de l'État* 80–94 (Bruylant & LGDJ 1997); Spyridon Aktypis, *L'adaptation du droit pénal français*, *supra* note 8, at 3. Regarding the legal force of the UN Charter, the ICJ has already held that the provisions of the Charter's Preamble are not, in and of themselves, rules of law. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, 50 (July 18). Under Article 31(2) of the Vienna Convention on the Law of Treaties, the Preamble serves only to provide contextual guidance: "For the purposes of the interpretation of a treaty, the context includes, in addition to the text, the Preamble and any annexes." Given this lack of consensus, Professor Ntono Tsimi argues that "it is through an interpretation of the maxim ut magis valeat quam pereat that we can discern the normative nature of the preamble to the Rome Statute." For, he says, "in criminal matters, determining the values of a text almost always corresponds

settled by the jurisprudence of the International Criminal Court. Accordingly, the Preamble offers only a "facultative perspective of adaptation," based on the principle of complementarity, which "constitutes an important stimulating factor" for, and promotes, the implementation at the domestic level of international criminal law. At first sight, it would even appear contradictory to envisage the primary activation of national jurisdiction without accompanying it with an obligation of legislative adaptation.[51]

Pursuant to paragraph 10 of the Preamble and Article 1(2) of the Statute, the prosecution of perpetrators of the most serious crimes by the ICC is complementary to the action of national courts. This complementarity is explicitly articulated in Article 17 of the Statute. A reading of this provision quickly reveals the existence of a form of control that may be exercised by the Court over national criminal proceedings. Articles 86 to 88 of the Rome Statute make ratification of the Statute tantamount to acceptance of obligations to regulate all matters relating to cooperation. Article 70(4) of the same instrument likewise makes ratification equivalent to acceptance of the obligation to criminalise offences against the administration of justice of the Court at the domestic level. From these provisions, it appears that what is required is an obligation to incorporate criminal conduct, rather than penalties.

In so doing, the resulting mandatory perspective rests on the idea that, in principle, State responsibility may be engaged.[52] This therefore constitutes a possibility that relativises the "facultative" perspective. More fundamentally, it amounts to a symbolic order, which may be understood as implying an implicit obligation deriving from the principle of complementarity upon which the entire ICC system is based.[53] This principle grants States a primary role in adjudicating perpetrators of the most serious crimes, while still allowing for supranational oversight. Professor Germain Ntono Tsimi observes that:

"State sovereignty in matters of criminal jurisdiction no longer consists in the full freedom to internalise or not the crimes set out in the Statute, but rather in a margin of appreciation regarding the modalities of reception of those crimes, in light of the potential review exercised by the International Criminal Court. Under the Rome Statute, there is therefore neither a requirement of direct application of the Court's law by national authorities, nor an obligation for those authorities to incorporate the provisions of the Statute in their entirety, nor to reproduce it verbatim in domestic legislation. Implicitly, the principle of complementarity (…) appears

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to identifying the protected interest." Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 194–98.

[51] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 261.

[52] *Id.* at 261, 262.

[53] Papin Dongmo Tiodon, *L'adaptation des législations pénales*, *supra* note 46, at 28.

instead to accept a degree of disharmony (…) which the supranational instance is called upon to review on the basis of a requirement of compatibility between domestic law and international law."[54]

Ultimately, from this dual perspective, it becomes clearer that the adaptation of domestic law results from a necessity arising from the ratification of the Rome Statute and reconciles two aspirations: on the one hand, the preservation of State sovereignty without evading responsibility, and on the other, participation in the punitive framework grounded in the universal conviction that the most heinous crimes must not remain unpunished.[55] This constitutes a second interest of the adaptation of domestic legislation to the Rome Statute of the International Criminal Court. It is what Patrick Papin Dongmo Tiodon refers to as the symbolic interest:

"The symbolic interest is fundamental. It is also twofold. The first aspect is linked to sovereignty. Adaptation enables the State to preserve its jus puniendi, an essential attribute of sovereignty. It allows it to 'avoid disavowal and avoid exclusion' (…). The second aspect relates to the fact that international crimes, by their very nature, cannot be equated with ordinary offences. Failure to take account of the specificity of these crimes has significant repercussions for the entire legal system, particularly in relation to technical elements concerning jurisdiction or criminal responsibility."[56]

By virtue of this necessity, the technical modalities for implementing the adaptation of domestic criminal law to international punitive norms may, in an optional manner, be broken down into five operations: the immediate (or direct) application of the provisions of the Rome Statute; full reference by domestic law to the provisions of the Rome Statute; verbatim transposition of the provisions of the Rome Statute into national legislation; the option of autonomous adaptation;[57] and a combination (in various forms) of the preceding options.[58] In any event, to borrow the words of Professor Germain Ntono Tsimi:

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[54] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 121, 261.

[55] Jacqueline de Guillenchmidt, *L'expérience de la France quant à la participation au traité portant statut de la Cour pénale internationale* 15 (Paper presented at the seminar on Lebanon's accession to the International Criminal Court, Beirut, Leb., May 19–20, 2006); Florence Bellivier, Marina Eudes & Isabelle Fouchard, *Droit des crimes internationaux*, *supra* note 45, at 316.

[56] Patrick Papin Dongmo Tiodon, *L'adaptation des législations pénales*, *supra* note 46, at 27, 28.

[57] Stefano Manacorda & Gerhard Werle, *L'adaptation des systèmes pénaux nationaux au Statut de Rome*, 3 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 501, 516 (2003).

[58] Sam Bokolombe Batuli Yaseme, *Réception du droit international pénal en droit congolais: les lois d'adaptation du 31 décembre 2015 à l'aune de la question de l'intégration normative descendante* 159–63 (Editions Droit et Société 2020).

"The principle of complementarity, in its substantive dimension, introduces a mode of normative articulation that departs from the traditional scheme governing the relationship between domestic and international legal orders, in that it presupposes neither absolute autonomy nor total subordination of one to the other."[59]

IV. Conclusion

From all the foregoing, the paradigm of the most serious crimes reveals that there is a resurgence of the modes of legal convergence and of the forms of adaptation of penal enforcement mechanisms that traditionally characterised classical State criminal law systems. This resurgence entails a reconfiguration of the unity of the penal system through a combination, pooling, and mutual communication of the various norms and legal orders that now constitute the components of contemporary criminal law. It is therefore no longer a matter of a pluralism based on separation, which would result in the superimposition of distinct normative subsystems, nor of a pluralism of fusion, which led to unification through the hegemony of a single subsystem. Rather, it is a matter of "ordered pluralism," which leads us to no longer regard "unity" and "pluralism" as two antithetical forms or modalities, but as a single and renewed framework that expresses the resurgence of criminal legal orders and from which the repression of international crimes draws upon all legal registers. Consequently, judges may potentially draw from national/international as well as local/global legal registers and autonomously construct their own interpretative and normative tools.

The entirety of these considerations reflects the fact that the technical modalities for implementing the adaptation of domestic criminal law to international punitive norms express a mode of normative articulation that stands in opposition to the traditional scheme governing relations between domestic and international legal orders, in that it presupposes neither absolute autonomy nor total subordination of one to the other. Preference is instead given to forms of articulation based on a complementary hierarchy, and to the rejection of any form of articulation grounded in a rigid hierarchy. In sum, the prosecution of perpetrators of the most serious crimes initiates a process of dual opening of national criminal systems, as aptly noted by Professor Germain Ntono Tsimi. On the one hand, an outward opening towards the supranational level, which calls for a redefinition of the relationship between the national and the international. On the other hand, an inward opening towards the infra-state level, which requires a reconsideration of the relationship between the State (law) and the local sphere (custom). In doing so, the normative force exerted by the paradigm of the most serious crimes over State criminal systems

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[59] Ntono Tsimi, *Le paradigme du crime contre l'humanité*, *supra* note 5, at 121, 122.

signals a "shift towards the renewal of the legal formalism of criminal justice systems," which in turn suggests both the reconfiguration of criminal repression and the redefinition of the role of the judge in criminal law, among other developments.

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