

Tobias Darge, Kriegsverbrechen im nationalen und internationalen Recht

Summary

War Crimes in National and International Law – With Special Regard to the Principle of Specificity

Whereas the law of war has generally seen a constant and rather slow development, one mechanism of enforcing compliance with the law of war (especially international humanitarian law) has seen a surprisingly rapid development over the last two decades. The law of war has traditionally been the part of international law that is directly addressing the individual and not only the state. Correspondingly, an individual enforcement mechanism exists: international criminal law.

The creation of the Rome Statute (1998) of the International Criminal Court (ICC) and the establishment of the court itself (2002) ushered the whole field of international criminal law into a new phase of its development. For the first time a permanent court will strive to ensure that “the most serious crimes of concern to the international community as a whole” (Preamble of the ICC’s Rome Statute) will not go unpunished. In addition to that, the ICC Statute contains an extensive and detailed list of crimes against international law. Both novelties would have been unimaginable at international criminal law’s humble beginnings after the First World War and even seemed unlikely when the major war criminals were tried in Nuremberg and Tokyo after the Second World War. The International Criminal Tribunals for the Former Yugoslavia and Rwanda were only created as *ad hoc* tribunals by the UN Security Council on a non-permanent basis following unexpected atrocities in the early 1990s.

Since the ICC Statute is governed by the so-called principle of complementarity, however, as a general rule, it is to be expected that the primary responsibility for punishing aggression, genocide, crimes against humanity and war crimes will still rest with individual states. Complementarity means that the ICC will regularly leave the prosecution of crimes under its statute to individual states. The ICC itself is – again, generally speaking – only the last resort. This envisaged system of penalization of crimes against international law will only be able to work in an efficient and effective manner if the definition of a given crime is identical, or at least almost identical, in both international and

national law. Otherwise, international criminal law is in constant danger of being split into a multitude of national regulations that would only partly overlap. In order to avoid such a shattered mosaic, it is necessary to transform crimes from the international to the national level in a way that keeps the substance of the crimes as defined in international law without subjecting them to major adjustments in individual countries. At the same time, such a transformation has to be in conformity with the requirements of the respective national law, especially constitutional law. Otherwise, a national codification might be declared unconstitutional and consequently become wholly inoperable in the respective country. As the success of the principle of complementarity and the success of enforcing international criminal law as a whole depends on the existence of national codifications and the willingness of states to prosecute, ensuring that national codifications are both in line with national constitutional law and at the same time contain the crimes as defined in the Rome Statute is of paramount importance. The current system of international criminal law as coined by the principle of complementarity, therefore, calls for an approach that reconciles the substance of international criminal law with the pre-existing constitutional framework.

Against this background, this paper deals with the transformation of war crimes from the ICC Statute into German law. War crimes are both much more complex than crimes against humanity or genocide and the transformation of war crimes law into national law tends to differ much more from the original definitions in the ICC Statute than the national “versions” of crimes against humanity and genocide.

After an introductory chapter and an outline of the history of international humanitarian law, international criminal law and war crimes prosecution, the thesis is divided into two major parts: a “general part” comprising chapters three to six and a “special part” comprising chapters seven to ten. The “general part” elaborates the principle of specificity in both international and national law and develops an approach towards the interpretation of war crimes that is in line with the guidelines of both international and national law. The “special part” builds on the general one and illustrates the approach described in the “general part” by examining certain war crimes contained in the (2002) German Code of Crimes against International Law (*Völkerstrafgesetzbuch*) that are problematic with a view to the principle of specificity. Chapters eleven and twelve contain a concise summary and a rather positive outlook on the future of war crimes prosecution.

The new German Code of Crimes against International Law is supposed to transform the substance of the ICC Statute and – beyond the statute – the substance of undisputed customary international criminal law into national law. The creation of a written code is without an alternative since the German constitution (*Grundgesetz*) only allows for a criminal court to pass judgements on crimes that were specifically defined in a written code before the crime was committed (principle of *nullum crimen, nulla poena sine lege*, art. 103 sec. 2 *Grundgesetz*). As crimes against international law were traditionally rather loosely defined under international law and the principle of specificity or *Bestimmtheitsgrundsatz* is traditionally upheld by the German Federal Constitutional Court (and much more so by the major part of academic writers), a field of tension is created between two principles of constitutional law: the aforementioned principle of specificity and the principle of interpretation in the light of international law (*Völkerrechtsfreundlichkeit*, art. 25 *Grundgesetz*). The latter principle is one aspect of the general “openness” or “friendliness” of German constitutional law towards international law. Art. 25 notwithstanding, however, international *criminal* law does not become “part of the law of the land” as it is possible in common law-countries. The fact that the “source” of crimes against international law is international law does not alter the need to comply with the substance of the national principle of specificity.

When creating the Code of Crimes against International Law, the major challenge was to incorporate the ICC Statute (and customary international criminal law) as completely as possible into German law while at the same time respecting the principle of specificity. One author aptly writes of “a national codification of international law”. While the classical and still dominating position assumes that the principle of *nullum crimen, nulla poena sine lege* is comparatively weak in the common law tradition as well as in international law, the author argues that a converging development is taking place. Since the creation of the ICC Statute, the main body of international criminal law is integrated in a single detailed international treaty and in such a manner that – apart from the lacking definition of sentences – is as (or even more) specific as most national criminal codes are. It can be assumed that the ICC Statute will be the pivot of the future international criminal law system. Therefore, it will influence the development of the whole system in such a way that the principle of specificity will gain more importance. And indeed it already does. In contrast to the strengthening of the principle of specificity in international law, German jurisprudence tends to verbally uphold the principle in a first step, but in a second step almost always

declares the disputed law to be in conformity with that principle. This development of *de facto* relaxing the principle of specificity is being heavily criticized by academic circles for decades – but to no avail.

This development can be illustrated by anticipating one of the results of the thesis' second major part. International law defines “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” as a war crime under art. 8 sec. 2 (b) (iv) of the ICC Statute. The German Code of Crimes against International Law (para 11 sec. 1 (3) and sec. 3), only requires the collateral damage to be excessive in relation to the concrete and direct military advantage anticipated. The crimes are defined in a similar manner, apart from the omission of the word “clearly” in the national codification. Applying the ICC Statute and the German Code to the same case might consequently lead to different results. Surprisingly, and contrary to the classical view, the definition in the ICC Statute is much narrower than the definition in the national Code and much better suited to meet standards of specificity.

This example illustrates that (i) national law is not *per se* designed to be more specific or detailed than international law and (ii) the broader national law even goes beyond what is penalized under international law. The former aspect leads us to reconsider the classical assumption that the standard of specificity in national law is more elaborated than in international law. The latter aspect leads to the consequence that a war crime defined in broader fashion than is permitted under international law cannot be applied universally, i.e. national authorities would be hindered from prosecuting war crimes committed abroad by foreigners.

This dilemma, which can only be described quite shortly here, can be resolved by applying the approach developed in the “general part”. The author argues that national law in principle always has to meet the – generally and theoretically higher – standard of specificity prescribed by the German constitution. Constitutional law cannot be substituted by a – again generally and theoretically – lower standard of specificity in international law. The German constitution and legal dogmatics, however, provide for a “backdoor”. As mentioned before, according to art. 25 of the German constitution, national law related to, and in this case even derived from, international law has to be interpreted in the light of international law. To be quite clear: in the majority of conflicts, the results will not differ and most definitions in both the ICC Statute

and the German Code meet the required principle of specificity governing in international and national law, respectively. It has to be considered, however, that the remaining conflicts which cannot be so easily resolved are often the more complex and practically important ones.

In the dogmatic arsenal of German constitutional law, a conflict between two constitutional principles is usually resolved by putting it to the test of what can be rather inelegantly (from an already inelegant term) translated as “practical concordance” (*praktische Konkordanz*). At the heart of that test is a consideration of both principles under the circumstances of the given case. The aim is to strike a balance between two conflicting constitutional principles, the result being “practical concordance” (a term, by the way, that originally describes in geology the mere fact that two strata lie on top of each other). The generality of this approach is both its strength and its major weakness. While respecting the fact that no article of the constitution can be interpreted in a way that leaves it without relevance, it seems to be open to discretionary argumentation. This weakness notwithstanding, the approach is both a well-tested and widely accepted instrument to resolve tensions between conflicting constitutional principles.

According to your author, the undisputed weakness should and can be confronted by (i) abstractly identifying the colliding principles, (ii) abstractly weighing the principles, (iii) balancing the principles with a view to the concrete collision at hand. The third step is the most important one.

In the context of war crimes, a comparatively unspecific element can be upheld if the result of its nullity or voidness would be the subsequent inapplicability of a large part of war crimes law. For example: the German Code contains the element of “persons to be protected under international humanitarian law”. This term is an innovation of the German Code, it is nowhere to be found in international law and additionally, as such, it has to be considered as being rather unspecific. Some authors suggest that the term probably does not meet the required standard of specificity. Its voidness would, however, not only affect one single war crime, but, since the term is an element of a multitude of war crimes, would render the whole “law of Geneva” inapplicable in German law. Considering that, and further taking into account that the term’s substance can be identified by turning to the relevant treaties (such as the Geneva Conventions), this is one example where the concrete balancing of our conflicting principles would result in principally upholding the term, even though it is unnecessarily loose.

Moving away from the specific aspect of “practical concordance”, the question of a given element being specific or unspecific can only be answered after its interpretation. In addition to the standard methods of interpretation (grammatical, systematical, teleological, and historical), the interpretation in the light of the element’s source – international law – is important. Equally important, on the other hand, is that the principle of specificity cannot be reduced to nothing. In case of ambiguity, specificity persists and a definition has to be applied in a manner favourable to the accused.

Returning to the aforementioned example of the war crime of inflicting (clearly) excessive collateral damage, interpreting the German definition of the crime in the light of international law leads the author to the result that reducing the definition to its core under international law is best suited to maintain that war crime in a constitutional manner. Therefore, the word “clearly” has to be read into the German definition when it is to be applied.

In the present thesis, a comprehensive theory of war crimes interpretation is developed in the “general part”, whereas the “special part” is to be read as an illustration and exemplification of the former. In this summary, only few examples could be given. Even though, in the view of the author, the most problematic definitions of the German Code of Crimes against International Law were identified and put to the test, the further development of international criminal law will undoubtedly deliver more questions. The aim of the present thesis is to contribute to their anticipation and to the creation of a coherent system of international criminal law.