



ASSER PRESS

# The Global Prosecution of Core Crimes under International Law

Christopher Soler



Springer

# The Global Prosecution of Core Crimes under International Law

Christopher Soler

# The Global Prosecution of Core Crimes under International Law



ASSER PRESS



Springer

Christopher Soler  
Faculty of Laws  
University of Malta  
Valletta, Malta

ISBN 978-94-6265-334-4                      ISBN 978-94-6265-335-1 (eBook)  
<https://doi.org/10.1007/978-94-6265-335-1>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2019

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

*To the wrongly convicted and imprisoned,  
in the hope they would be freed;*

*to all victims who still await criminal justice,  
in the belief it shall prevail; and*

*to all journalists who, at the risk of losing  
their own lives, courageously expose such sad  
stories.*

# Foreword

There are several ways by means of which one could read the book by Dr. Christopher Soler entitled *The Global Prosecution of Core Crimes under International Law*. The book adopts a multi-layered approach in which every part is both autonomous and functional to the larger design. This outcome may correspond to the author's own intellectual maturation while preparing his doctoral dissertation, but has the distinct advantage that the reader can benefit both from each and every chapter on its own, as well as from the entirety of the book as a whole for a unitary vision. To this extent, the book can serve as a valuable frame of reference for jurists, judges, legal practitioners, academics and public administrators who work in the dynamic fields of international human rights law and international criminal law, more so because the book has a noticeable substantive law dimension and a marked procedural law perspective.

Christopher Soler earned his Ph.D. from the prestigious University of Amsterdam, which degree led to this book, after conducting extensive research under the supervision of Prof. Harmen van der Wilt, whose guidance helped him deepen his reasoning relating to some delicate criminal responsibility issues in addition to various institutional matters revolving around the very "architecture" of international criminal justice as a system *per se*.

First, the book offers a bird's-eye view on international criminal justice and describes, in a competent and appropriate way, the diversified scope of jurisdictional avenues which serve to bring to justice those accused of major international crimes (the so-called "core crimes", and the author expresses an interesting view on this very terminology). The author scrutinizes the *aut dedere aut judicare* rule in the detail it deserves. This certainly constitutes an overarching benefit of this work.

Secondly, the book examines some of the most crucial difficulties in international criminal justice, namely the lack of cooperation, in particular in the execution of arrest warrants and in the surrender of defendants. In this regard, the author offers a number of interesting proposals and thought provoking comments with a view to strengthen the cooperation system between states and the International Criminal Court.

Thirdly, the book presents a renewed perspective on domestic efforts to prosecute and punish persons accused of international crimes by supporting the notion that a broader positive obligation for states to repress/punish core crimes is emerging.

Fourthly, there are constructive reflections upon possible improvements to be made to the coordination between the domestic and international level, so as to transform an often confrontational relationship into a more collaborative one. The vertical and horizontal systems of enforcement are thoroughly examined. This, in and of itself, contributes to a better understanding of such systems and is another enveloping benefit of this book. Moreover, both systems are integrated and dissected systematically to provide the answer to the main research question of the analytical study, this being: Which are the juridical obstacles to the surrender and/or extradition of individuals wanted for core crimes? The examination and critical analysis of both systems of enforcement of international criminal law in one and the same work gives this book a significant edge over other studies which only deal with the systems of enforcement individually and separately, just as though they were completely distinct and detached frameworks. This is another underlying asset of this work.

Finally, this book is a timely contribution to the broader debate on the future of international criminal justice and on the possible ways to offer redress to the victims of international crimes. The author combines his extensive practical experience as an attorney involved in criminal law cases with a trans-national dimension (extradition, judicial cooperation and so on), with diplomatic experience as State representative in ICC-related matters, together with an academic approach which leads him to offer both practical and expedient solutions.

In this vein, the author offers several potential options that could improve the current situation. Moreover, reviewing the framework of existing rules, he identifies a number of solutions which could strengthen the overall objective of rendering justice for core crimes in a more efficient and effective manner.

An area where recent developments will potentially benefit from this work is the establishment of mechanisms designed to collect and preserve evidence for possible use in criminal proceedings either at national or international level, before tribunals which are yet to be determined. In this regard, the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (also known as the “IIIM”) established by the UN General Assembly in December 2016 or the Investigative team to promote accountability for Daesh/ISIL crimes (UNITAD) created by the Security Council in September 2017, at the request of the Government of Iraq, come to mind. These recent mechanisms as well as other nascent initiatives such as the proposed multilateral treaty for mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes launched by the Netherlands together with several other States, as well as the possible draft convention on the prevention and repression of crimes against humanity emerging from the works of the International Law Commission, seem to point to a “new era” for international

criminal justice—the era of return to national jurisdiction, coherently—somehow—with the principle of complementarity of the ICC jurisdiction.

Broadly speaking the author does not challenge the main underlying idea behind the notion of complementarity that domestic courts are and remain the essential avenue for the prosecution and punishment of international crimes. However, he makes a clever attempt to offer a broader perspective that apart from domestic courts includes a strengthened role for the ICC, legislative reforms and appropriate implementation of the ICC Statute and domestication of international norms.

The book, which I strongly commend, offers innovative ideas on how to further structure a functioning “global system” of international criminal justice where the various actors involved would cooperate more effectively towards the objective of rendering justice for victims of international crimes.

New York, USA/Catania, Italy  
October–November 2018

Salvatore Zappalà  
Professor of International and EU Law  
University of Catania (Italy)

Editor-in-Chief, *Journal of International  
Criminal Justice*

Member of the Steering Committee of the Antonio  
Cassese Initiative for Justice, Peace & Humanity

Former Legal Adviser (2010–2018)  
to the Permanent Mission of Italy  
to the United Nations in New York



# Preface

This book deals with the prosecution of core crimes and is aimed at legal practitioners (prosecutors, defence lawyers, magistrates and judges), jurists, experts of criminal justice, researchers, public administrators, law students, human rights activists and journalists. It provides the first comprehensive study of both systems of enforcement of international criminal law, and of the relationship between these systems, in one book by using with the same lens. It examines an under-studied field of law and serves to increase an understanding of the two systems of enforcement of international criminal law, these being the horizontal system of enforcement and the vertical system of enforcement, also known as the supra-national system and the inter-State system respectively. These are dealt with separately, but the interaction between them is also assessed. This book differentiates between various species (categories) of crimes, establishing a frame of reference for the ultimate consideration of the two systems of enforcement. It offers perspectives which, in turn, can be used to improve the prevailing enforcement regime. Moreover, it undertakes an exhaustive jurisprudential overview in assessing the systems of enforcement of international criminal law. In so doing, it offers insights about how the enforcement of international criminal law can be consolidated and improved, both in so far as substantive international criminal law is concerned and in respect of procedural international criminal law. By virtue of the legal analysis therein, this book espouses a human rights law oriented critique to the general enforcement of domestic, regional and international criminal justice.

It is distressing to contemplate why persons are investigated, prosecuted and punished for various crimes such as theft, to give just one example, whereas they are frequently not investigated, prosecuted and punished for mass atrocities (core crimes) which, besides endangering international peace and security, cause immense suffering and hardship to many human beings and to humankind in general. This *realpolitik*, i.e. the failure to investigate, prosecute and punish core crimes, is becoming more common place in view of an increasing number of States which are either unwilling or unable to do so for reasons which I delve into. Upon such failure, the responsibility to protect has to be assumed either by other States which could exercise other forms of jurisdiction, such as universal jurisdiction, over

persons found on their territory, or else by the international community in the form of an investigation and prosecution before an international criminal tribunal, a judicial panel, a special court, a hybrid court and/or the International Criminal Court. I research the ways (means) how this could be implemented, and also consider which judicial institution is best positioned (placed) to do so.

By scrutinizing the cooperation regime within both systems of enforcement, the book investigates the extent to which obstacles to the surrender and/or extradition of individuals are insurmountable or otherwise. Where grounds for refusal of extradition are invoked by States, some ideas to restrict their application and effect, without violating international human rights law, are postulated. These can include ways to circumvent the stumbling block, *id est*, the ground for refusal. I suggest ways, methods and ideas which could incentivise and encourage the cooperation of States which are called to surrender or extradite (i.e. physically transfer) an individual wanted for the purposes of an eventual prosecution of core crimes. My proposals are of a juridical (legal) nature and hinge upon the pretext that international criminal law is poorly executed and implemented because of a major stumbling block, this being that individuals wanted for core crimes are not surrendered to the International Criminal Court and are not extradited to the requesting State which intends to prosecute them for their alleged crimes notwithstanding the subsistence of compelling incriminating evidence which could, in all probability, be sufficient to secure their conviction before a competent criminal court. I challenge such grounds for refusal of surrender and/or extradition, where this is possible. Should this not be possible, I examine ways how the stumbling block (i.e. the ground for refusal) could be circumvented, provided these remedial measures do not violate international human rights law.

The book is divided in five (V) parts and organised in twenty-three (23) chapters. Throughout the work, I examine the extent to which grounds for refusal of surrender act as obstacles to hinder or jeopardise the process of surrender from a State to the International Criminal Court. I investigate the extent to which grounds for refusal of extradition act as obstacles to hinder or jeopardise the extradition process between the requesting State and the requested State. The critical analysis is preceded by an inspection of the concept of 'core crimes' which are distinguished from 'transnational organized crimes', 'international crimes' and 'domestic crimes'. I undertake an autopsy of the general State obligation to cooperate, illustrate the extent to which such obligation is binding (both upon State Parties to the International Criminal Court and upon non-State Parties in certain circumstances), and reveal the consequences in cases of a breach thereof.

To achieve the above objective, I avail myself and make use of principles, such as complementarity and subsidiarity, which are crucial to successfully execute rules of international law such as the obligation to extradite or prosecute (*aut dedere aut judicare*), a rule which is also examined in detail. Understanding both systems of enforcement, comprehensively and collectively, unmask the synergy and inter-relation between them. The work determines the ability and the potential of each one of the two systems of enforcement to fight impunity and, in a secondary manner, the ability and the potential of the remaining system to fight impunity upon

the default of the other system. The prospective roles of domestic, hybrid, special (*sui generis*) and international courts (and tribunals) in the fight against impunity for the purposes of the enforcement of international criminal law are discussed and evaluated. The proliferation of such courts and tribunals is a laudable effort of the international community which is aimed to ensure that victims of core crimes can at least have their day in court.

Valletta, Malta  
January 2019

Christopher Soler

# Acknowledgements

This book is an updated and revised version of the doctoral thesis which I defended at the beautiful *Agnietenkapel, Universiteit van Amsterdam*, on 22 December 2017, a very special day. This project started at the very end of 2010, with the encouragement of the Rector Emeritus of the University of Malta, Prof. Juanito Camilleri, and of the Chancellor of the University of Malta, Prof. David Attard, my role model, now Judge and Vice-President of the International Tribunal for the Law of the Sea. I thank you both for the encouragement and for your belief in me. This project was largely enabled by the financial contribution of the University of Malta, of which I am currently the Director (Legal Services) and which I thank for sponsoring my doctoral research. I hereby express appreciation to Prof. Alfred J. Vella, Rector of the University of Malta. *Rettur*, thank you for allowing me both to pursue my Ph.D. studies and to permit that I chair two important working groups under the auspices of the Maltese Presidency of the Council of the European Union, namely *COJUR* (Public International Law) and *COJUR-ICC* (International Criminal Court) between January and June 2017. I thank the Government of Malta for appointing me both to chair such workshops and also as its delegate to the Assembly of State Parties to the Rome Statute of the International Criminal Court in its 15th session held in The Hague between 16 and 24 November 2016. These were enriching experiences. Furthermore, my judicial role as Chairperson of one of the three Chambers of the Refugee Appeals Board in terms of the Refugees Act, Chapter 420 of the Laws of Malta, has increased my awareness about the distressing human tragedies that underlie the consummation of serious crimes of concern to the international community.

Throughout my doctoral research there have been some special colleagues, close friends of mine, who have shown interest in my project and, occasionally, provided sound advice. Their constructive critique has enabled me to pose some important questions which proved to be fruitful. These include Prof. Kevin Aquilina, my mentor, Prof. Andrew Muscat, Prof. Giuseppe Cataldi, Prof. Stephen Calleya, Judge Prof. Liesbeth Lijnzaad, Assist. Prof. Rosanne van Alebeek, Adjunct Prof. David Donat Cattin, Assoc. Prof. João Casqueira Cardoso, Judge Juan Carlos

Fernández de Aguirre, Dr. Michele Corleto, Dr. Monica Vlad, Dr. Ivan Mifsud, Dr. Omar Grech, Dr. David Friggieri, Dr. Audrey Fino, Dr. Alex Spiteri Gingell, Dr. Kevan Azzopardi, Ms. Zahra Mousavi, Ms. Morgane Nicot, Ms. Irene ter Stege, Mr. Michiel Egeler, Mr. Isaac de Toro Mezquita, Mr. Giuseppe Colasanto and Mr. Graziano Patriarca. I cherish moments where I am able to engage directly with some wise individuals whose commitment to human rights is truly relentless and inspirational. The President of the Republic of Malta, Marie-Louise Coleiro Preca, comes to mind in this regard. *Grazzi mill-qalb Eċċellenza*. Others whom I also know well, and who have contributed to the protection of human rights and the delivery of criminal justice, include Judge Emeritus of the European Court of Human Rights Giovanni Bonello, Judge Emeritus Joseph Galea Debono, Judge Emeritus Lawrence Quintano, Dr. Emmanuel Mallia, and Dr. Tonio Borg. Here I must also thank my lecturers at the University of Sussex, where I obtained my LL.M. in International Criminal Law in 1999, particularly Prof. Richard Vogler, Prof. Paul Omar and Dr. Emily Haslam. They consolidated and secured my passion for international criminal law and the extent to which I value the protection of fundamental human rights.

I show deep appreciation for the patience and dedication of members of staff at the libraries where I conducted my research, namely the T.M.C. Asser Institute in The Hague (especially Mr. Marco van der Harst), the University of Amsterdam, the Peace Palace Library in The Hague, the University of Malta (especially Director Mr. Kevin Ellul), the University of Sussex (United Kingdom), the Institute of Advanced Legal Studies in Russell Square, London, the *Università La Sapienza* of Rome, the University of Maribor, Slovenia (through Prof. Dušan Lesjak), the *Università degli Studi di Ferrara* (through Dr. Rocco Toffaletti), and the International Maritime Law Institute (IMLI) which is housed at the University of Malta. At the latter university, Ms. Daniela Agius Cachia and Ms. Denise Jones helped me coordinate secretarial, administrative and logistical matters which facilitated my tasks. They hereby deserve a note of thanks. Likewise, as an ultimate beneficiary of its informative ‘International Crimes Database’ website, I express words of praise to the T.M.C. Asser Institute. Furthermore ‘DomCLIC’ came in very handy especially when I compiled Part IV of my book. In pursuance thereof, I thank The Hague Justice Portal and the other partners involved in ‘DomCLIC’ for their priceless project. A word of thanks also goes to Springer-Verlag, distributors of my book. I express my heartfelt gratitude to T.M.C. Asser Press and to all its members of staff, especially to Mr. Frank Bakker, Publisher, and Ms. Kiki van Gorp, Production Coordinator, both of whom helped me to finalise the manuscript. Hence, ‘thank you, Asser Press’ and ‘thank you, Springer’.

The insights of Prof. Harmen van der Wilt, my Ph.D. supervisor, were crucial. I wish to express profound appreciation to such a generous gentleman, a brilliant legal mind indeed. I cherish every moment spent with you and I am honoured to have been a recipient of your wisdom and a beneficiary of your frank guidance. You will always be a friend and colleague I will respect and look up to. Moreover, you were the one who recommended my book for publication by T.M.C. Asser Press. Thank you so much, Harmen. My heartfelt thanks goes to Prof. Salvatore

Zappalà, certainly a leading authority in the field, who immediately accepted my invitation to read my book and write a foreword thereto. Your praiseworthy words fill me with pride. *Grazie mille Salvatore.*

I am very grateful to my sister, Sara Bianchi, who left my nephews and niece with my brother-in-law in order to support me throughout the oral defence of my doctoral thesis. That meant a lot to me. I have been truly blessed to have the parents I have, William (an architect-writer, who was a pillar of advice and support), and Natalie, née Woods. They have been inspirational role models. From my decision to become a lawyer at the tender age of 11 to date, they have served as a bastion of respect and empowerment. There are no words which can capture and describe my gratitude in your regard. Thinking about you automatically conjures one thought to my mind: ‘you can’t light a candle to the sun’. Last but not least, a very special and unique thanks goes to my wife Christine, née Dyer, and to our children Daniel and Nina. You have been so patient and understanding to endure my love affair with international criminal law throughout this long journey which culminated in this opus. To all my family: *‘Inħobbkhom ħafna’*.

# Contents

## Part I Introduction

<b>1</b>	<b>Methodological Framework and Research Questions</b> . . . . .	3
1.1	Motivation and Objective . . . . .	4
1.2	Field of Application . . . . .	8
1.3	Structure, Methodology and Research Questions . . . . .	10
	References . . . . .	13
<b>2</b>	<b>Preliminary Observations on the Systems of Enforcement</b> . . . . .	15
2.1	The Vertical System of Enforcement: A Useful Frame of Reference . . . . .	16
2.2	The Horizontal System of Enforcement: From a <i>Ius Prosequi</i> to ‘Mandatory Prosecutions’? . . . . .	23
	References . . . . .	25

## Part II The Characterisation and Prosecution of Core Crimes: Some Underlying Assumptions

<b>3</b>	<b>Multi-level Prosecutions of Serious Crimes of Concern to the International Community</b> . . . . .	31
	References . . . . .	37
<b>4</b>	<b>Why Do We Need to Understand the Concept of ‘Core Crimes’?</b> . . . . .	41
4.1	The Salient Features of Core Crimes . . . . .	43
4.2	Why Are Core Crimes the Most Serious Crimes of Concern to the International Community? . . . . .	46
	References . . . . .	56
<b>5</b>	<b>What Is Required to Intrude into the Sovereignty of a Defaulting State in Order to Investigate and Prosecute Core Crimes?</b> . . . . .	59
5.1	The Principles of Human Security and International Harm . . . . .	61

5.2	Why Do Group (Collective) Crimes Breach Human Security and Why Are They so Harmful? . . . . .	66
5.3	Interventions Designed to Prevent and Punish Core Crimes by Prosecuting Core Crimes . . . . .	72
5.4	The Conceptual Genesis of the Responsibility to Protect . . . . .	73
5.5	The Transformation of the Concept of the Responsibility to Protect into a Legal Principle . . . . .	76
	References . . . . .	82
<b>6</b>	<b>The Overarching Contextual (Juridical) Elements . . . . .</b>	<b>89</b>
6.1	Genocide . . . . .	91
6.2	Crimes Against Humanity . . . . .	93
6.3	War Crimes . . . . .	101
6.4	Aggression . . . . .	104
	References . . . . .	106
<b>7</b>	<b>The Juridical Consequences of Core Crimes: Individual Criminal Liability and State Aggravated Responsibility . . . . .</b>	<b>111</b>
	References . . . . .	116
<b>8</b>	<b>Detecting the Determining and Distinguishing Factors . . . . .</b>	<b>117</b>
8.1	Core Crimes Versus Transnational Organized Crimes . . . . .	118
8.2	Core Crimes Versus Domestic Crimes . . . . .	131
8.3	Core Crimes Versus International Crimes . . . . .	133
8.4	Concluding Remarks . . . . .	138
	References . . . . .	139
<b>Part III The Vertical System of Enforcement</b>		
<b>9</b>	<b>Salient Features of the Vertical System of Enforcement . . . . .</b>	<b>147</b>
9.1	The Meaning of Verticality . . . . .	148
9.2	Distinguishable Models of the Vertical System of Enforcement . . . . .	149
9.3	The Line of Demarcation Between a Preference and a Necessity . . . . .	156
	References . . . . .	160
<b>10</b>	<b>The State Obligation to Cooperate under International Law . . . . .</b>	<b>165</b>
10.1	The Nature of the General Obligation of An ICC State Party to Cooperate . . . . .	166
10.2	The Obligations of Non-State Parties under the United Nations Security Council Resolution Regime . . . . .	175
10.3	The Consequences of a Breach of the State's Obligation to Cooperate . . . . .	184
	References . . . . .	201



<b>11</b>	<b>Inherent Limitations of the Vertical System of Enforcement</b> . . . . .	209
11.1	Grounds for Refusal Emerging Directly from Admissibility Challenges . . . . .	216
11.1.1	Genuine Willingness or Ability to Prosecute . . . . .	218
11.1.2	<i>Ne Bis in Idem</i> . . . . .	231
11.1.3	Postponement of the Execution of a Request for Surrender . . . . .	249
11.2	Competing Requests and Conflicting Obligations . . . . .	251
11.3	Specific Requirements under National Law . . . . .	255
11.3.1	Abuse of Process . . . . .	256
11.4	Diplomatic Privileges and Immunities . . . . .	265
11.4.1	Immunities <i>Rationae Personae</i> . . . . .	278
11.4.2	Immunities <i>Rationae Materiae</i> . . . . .	289
11.5	The Rule of Speciality . . . . .	296
	References . . . . .	298
<b>12</b>	<b>The Ensuing ‘Jurisdictional Joint Venture’, A Division of Labour <i>Par Excellence</i></b> . . . . .	311
	References . . . . .	314
 <b>Part IV The Horizontal System of Enforcement</b>		
<b>13</b>	<b><i>Aut Dedere Aut Judicare</i></b> . . . . .	319
13.1	The Nature, Scope and Status of the <i>Aut Dedere Aut Judicare</i> Rule . . . . .	321
13.2	The Execution of the <i>Aut Dedere Aut Judicare</i> Rule in Domestic Criminal Courts . . . . .	351
13.3	Limitations of the <i>Aut Dedere Aut Judicare</i> Rule . . . . .	367
13.4	Emerging Alternatives to the <i>Aut Dedere Aut Judicare Formulae</i> . . . . .	370
13.5	The Fractional Re-characterisation of the <i>Aut Dedere Aut Judicare</i> Rule . . . . .	380
	References . . . . .	389
<b>14</b>	<b>The Reliance of the Horizontal System of Enforcement on the <i>Corpus Juris</i> Relating to Extradition</b> . . . . .	403
	References . . . . .	408
<b>15</b>	<b>The Impact of Customary International Law and General Principles of Law on the Horizontal System of Enforcement</b> . . . . .	411
	References . . . . .	413
<b>16</b>	<b>Pitfalls Within the Horizontal System of Enforcement</b> . . . . .	415
16.1	The Non-extradition of Nationals . . . . .	428
16.2	The Military Offence Exemption . . . . .	436

16.3	The Political Offence Exemption . . . . .	437
16.4	The Double Criminality Rule . . . . .	448
16.5	The Exclusion of the Cause of the Criminal Action by Reason of Amnesty . . . . .	454
16.6	Plea Bargaining . . . . .	465
16.7	Human Rights General Exceptions to Extraditions . . . . .	467
	16.7.1 The Right to a Fair Trial . . . . .	470
	16.7.2 The <i>Ne Bis in Idem</i> Rule . . . . .	477
	16.7.3 The Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment . . . . .	493
	16.7.4 Death Row and the Death Penalty . . . . .	507
16.8	Diplomatic Privileges and Immunities . . . . .	518
	16.8.1 Immunities <i>Rationae Personae</i> . . . . .	519
	16.8.2 Immunities <i>Rationae Materiae</i> . . . . .	522
	References . . . . .	533
<b>17</b>	<b>Concurrent State Obligations . . . . .</b>	<b>551</b>
	References . . . . .	553
<b>18</b>	<b>The Self-assumption of Jurisdiction: An Abuse of Process or a Necessary Evil? . . . . .</b>	<b>555</b>
	References . . . . .	559
<b>Part V Conclusion</b>		
<b>19</b>	<b>The Obligation of States to Prevent, Prosecute and Punish Core Crimes . . . . .</b>	<b>563</b>
	References . . . . .	577
<b>20</b>	<b>The Development of Functional International Constitutionalism . . . . .</b>	<b>581</b>
	References . . . . .	584
<b>21</b>	<b>The Exercise of <i>Kompetenz-Kompetenz</i> in the Determination of Presumptive Jurisdiction . . . . .</b>	<b>587</b>
	21.1 International Courts . . . . .	589
	21.2 Domestic Courts . . . . .	592
	References . . . . .	595
<b>22</b>	<b>The Proliferation of Judicial Panels and Judicial Partnerships . . . . .</b>	<b>597</b>
	References . . . . .	601
<b>23</b>	<b>Concluding Observations and Final Remarks . . . . .</b>	<b>603</b>
	References . . . . .	615
	<b>Table of Cases . . . . .</b>	<b>619</b>
	<b>Index . . . . .</b>	<b>657</b>

# Abbreviations

ABA	American Bar Association
ACIL	Amsterdam Centre for International Law
ACJHR	African Court of Justice and Human Rights
ACmmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court of Human and Peoples' Rights
AG	Advocate General
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
AI	Amnesty International
<i>AIDP</i>	<i>Association Internationale de Droit Pénal</i>
AIDS	Acquired Immune Deficiency Syndrome
AIP	Amnesty International Publications
AJICL	Arizona Journal of International and Comparative Law
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
AJPIL	Austrian Journal of Public and International Law
ALJ	Australian Law Journal
Anx.	Annex
A-P JHR	Asia-Pacific Journal on Human Rights
APSR	American Political Science Review
Ashgate	Ashgate Publishing Limited
ASIL	American Society of International Law
ASP	Assembly of State Parties to the Rome Statute of the International Criminal Court
ASR	African Studies Review
Asser Institute	<i>T.M.C. Asser Instituut</i>
Asser Press	T.M.C. Asser Press

AUILR	American University International Law Review
AULR	Auckland University Law Review
Basic Principles & Guidelines	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
BCICLR	Boston College International and Comparative Law Review
BEP	Berkeley Electronic Press
BiH	Bosnia and Herzegovina
BIICL	British Institute of International and Comparative Law
BJIL	Berkeley Journal of International Law
BLSR	Berkeley Law Scholarship Repository
Brill	<i>Koninklijke Brill N.V.</i>
BUILJ	Boston University International Law Journal
BWCC	Bosnian War Crimes Chamber
BYIL	British Yearbook of International Law
CaLR	California Law Review
CAP	Carolina Academic Press
CAR	Central African Republic
CAT	Convention Against Torture
CgJIL	Chicago Journal of International Law
ChJIL	Chinese Journal of International Law
CIA	Central Intelligence Agency
CILJ	Cornell International Law Journal
CILRAP	Centre for International Law Research and Policy
CISA	Convention Implementing the Schengen Agreement
CJEL	Columbia Journal of European Law
CJTL	Columbia Journal of Transnational Law
CLF	Criminal Law Forum
CLJ	Cambridge Law Journal
CIUP	Cornell University Press
CLP	Current Legal Problems
CLR	Criminal Law Review
CLSC	Crime, Law and Social Change
CMP	Cameron May Publishing Limited
CoE	Council of Europe
<i>COJUR</i>	<i>Comité Juridique</i>
CP	Clarendon Press
CPL	Cavendish Publishing Limited
CREMS	Convention Relating to Extradition between the Member States of the European Union

CUP	Cambridge University Press
D & H	<i>Dunker &amp; Humblot GmbH</i>
<i>Daesh</i>	<i>Ad-Dawlah al-Islamiyah fil 'Iraq wa ash-Sham</i>
<i>DINA</i>	<i>Dirección de Inteligencia Nacional, Chile</i>
DJCIL	Duke Journal of Comparative and International Law
Doc.	Document
DPLR	DePaul Law Review
DRC	The Democratic Republic of The Congo
EAC	Extraordinary African Chambers
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
ECE	European Convention on Extradition
ECFI	Court of First Instance of the European Communities
ECJ	Court of Justice of the European Union
ECMAC	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights and Fundamental Freedoms
ECvHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ed.	Editor
edn.	Edition
eds.	Editors
EE	Edward Elgar Publishing Limited
EILR	Emory International Law Review
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
EJIL: Talk!	The Blog of the European Journal of International Law
EJLS	European Journal of Legal Studies
EPPO	European Public Prosecutor's Office
ESPO	Ethiopian Special Prosecutor's Office
ETSPSC	East Timor Special Panels for Serious Crimes
EU	European Union
EUCLR	European Union Constitutional Law Review
<i>FARC</i>	<i>Fuerzas Armadas Revolucionarias de Colombia</i>
<i>FEDEFAM</i>	<i>Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos</i>

<i>FIDH</i>	<i>Fédération Internationale des Ligues des Droits de l'Homme</i>
FILJ	Fordham International Law Journal
FP	The Foundation Press
FRA	European Union Agency for Fundamental Rights
Framework Decision on the European Arrest Warrant	EU Council Framework Decision 2002/584 of the 13th June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States 2000/584/JHA
FRG	Federal Republic of Germany
FYIL	Finnish Yearbook of International Law
GAOR	General Assembly Official Records
German LJ	German Law Journal
GIP	Graduate Institute Publications
<i>Giuffrè</i>	<i>Giuffrè Editore S.p.A.</i>
GJIL	Goettingen Journal of International Law
GLJ	Georgetown Law Journal
GPO	Government Printing Office
GrJIL	Georgetown Journal of International Law
GULC	Georgetown University Law Center
GUP	Goettingen University Press
GYIL	German Yearbook of International Law
HAIL	The Hague Academy of International Law
HCSS	Hybrid Court for South Sudan
HHRJ	Harvard Human Rights Journal
HILJ	Harvard International Law Journal
HIV	Human Immunodeficiency Virus
HJIL	Houston Journal of International Law
HJJ	Hague Justice Journal
HoL	House of Lords
HP	Hart Publishing
HRB	The Human Rights Brief
HRC	Human Rights Committee
HRQ	Human Rights Quarterly
HRW	Human Rights Watch
IACmmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IACvHR	Inter-American Convention on Human Rights
IBA	International Bar Association
ICC Statute	Rome Statute of the International Criminal Court
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD of the HC of Kenya	International Crimes Division of the High Court of Kenya

ICD of the HC of Uganda	International Crimes Division of the High Court of Uganda
ICD	International Crimes Database, T.M.C. Asser Institute
ICJ	International Court of Justice
ICJ Rep.	Annual Reports of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICJR	International Criminal Justice Review
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICT of Bangladesh	International Crimes Tribunal (Bangladesh)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDEA	International Institute for Democracy and Electoral Assistance
<i>IDI</i>	<i>Institut de Droit International</i>
IDJHRL	Interdisciplinary Journal of Human Rights Law
IHT	Iraqi High Tribunal
IIIM	International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011
ILA	International Law Association
iLawyer	iLawyer, a blog on international justice
ILC Yearbook	Yearbook of the International Law Commission
ILC	International Law Commission
ILJ	Indiana Law Journal
ILR	Israel Law Review
IMO	International Maritime Organization
Intersentia	Intersentia Publishers
IRRC	International Review of the Red Cross
ISSJ	International Social Science Journal
IYIL	Italian Yearbook of International Law
JCL	Journal of Criminal Law
JCS	Journal of Conflict Studies
<i>JEP</i>	<i>Jurisdicción Especial para la Paz</i>
JHR	Journal of Human Rights
JHUP	John Hopkins University Press
JICJ	Journal of International Criminal Justice

JITE	Journal of Institutional and Theoretical Economics
JSJ	Journal of Social Justice
JW & SL	John Wiley & Sons Limited
KLI	Kluwer Law International
KRC	Kampala Review Conference of the Rome Statute of the International Criminal Court
KRP	Kosovo Regulation 64 Panels
KSC	Kosovo Specialist Chambers
LCP	Law and Contemporary Problems
LHPS	Long House Publishing Services
LJIL	Leiden Journal of International Law
LLAICLR	Loyola of Los Angeles International Law and Comparative Law Review
Longman Ltd.	Longman Publishing Group Limited
Maklu	Maklu Publishers
McGLJ	McGill Law Journal
MEDAC	Mediterranean Academy of Diplomatic Studies, University of Malta
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Michigan Journal of International Law
MLJ	Mississippi Law Journal
MnnJIL	Minnesota Journal of International Law
MNP	Martinus Nijhoff Publishers
MPYUNL	Max Planck Yearbook of United Nations Law
MS	<i>Mohr Siebeck GmbH &amp; Co. KG</i>
MUP	Manchester University Press
n.	Footnote
NATO	North Atlantic Treaty Organisation
NEJICL	New England Journal of International and Comparative Law
NELR	New England Law Review
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJIHR	Northwestern Journal of International Human Rights
NJIL	Nordic Journal of International Law
NIJIL	Netherlands Journal of International Law
No.	Number
Nos.	Numbers
notes	Footnotes
NQHR	Netherlands Quarterly of Human Rights
NY	New York



NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
NZJPIL	New Zealand Journal of Public International Law
OAS	Organization of American States
OJLS	Oxford Journal of Legal Studies
<i>OLAF</i>	<i>Office Européen de la Lutte Antifraude</i>
OPI	Oceana Publications Inc.
OTP	Office of the Prosecutor of the International Criminal Court
OUP	Oxford University Press
p.	Page
para	Paragraph
paras	Paragraphs
PB	Penguin Books
PCIJ	Permanent Court of International Justice
PE	Pearson Education Limited
PGA	Parliamentarians for Global Action
PiCT	Project on International Courts and Tribunals
pp.	Pages
PRI	Peace Research Institute
PULP	Pretoria University Law Press
<i>RBDI</i>	<i>Revue Belge de Droit International</i>
<i>RDI</i>	<i>Rivista di Diritto Internazionale</i>
<i>RIDP</i>	<i>Revue internationale de droit pénal: bulletin de l'Association Internationale de Droit Pénal</i>
RLP	Rowman and Littlefield Publishers
Round Hall	Round Hall Limited
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
S & M	Sweet & Maxwell
SAJJCJ	South African Journal of Criminal Justice
SCJIL	Santa Clara Journal of International law
SCSL	Special Court for Sierra Leone
S-G	Secretary-General of the United Nations
Sijthoff	A.W. Sijthoff International Publishing Company B.V.
SJIL	Stanford Journal of International Law
SJLTA	Southwestern Journal of Law and Trade in the Americas
Springer	<i>Springer-Verlag</i>
STL	Special Tribunal for Lebanon
SUP	Stanford University Press
SWCC	Serbian War Crimes Chamber
T & F	Taylor & Francis Group

TBA	Texas Bar Association
TILJ	Texas International Law Journal
TJLR	Thomas Jefferson Law Review
TLR	Texas Law Review
TOAEP	Torkel Opsahl Academic E-Publisher
TP	Transnational Publishers Incorporation
TRAL	Thomson Reuters (Professional) Australia Limited
TRIAL	Track Impunity Always
UCK	Kosovo Liberation Army
UCLALR	University of California Los Angeles Law Review
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
ULR	Utrecht Law Review
UMHRL	University of Minnesota Human Rights Library
UMJLR	University of Michigan Journal of Law Reform
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute for the Prevention and the Treatment of Offenders
UNC	United Nations Charter
UNCATOC	United Nations Convention Against Transnational Organized Crime
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNITA	The National Union for the Total Independence of Angola
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UPLR	University of Pennsylvania Law Review
USA	United States of America
UTFLR	University of Toronto Faculty of Law Review
UTLR	The University of Tulsa Law Review
<i>UvA</i>	<i>Universiteit van Amsterdam</i> (University of Amsterdam)
Vathek	Vathek Publishing
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
Vol.	Volume
<i>VUA</i>	<i>Vrije Universiteit Amsterdam</i> (Free University of Amsterdam)

WILJ	Wisconsin International Law Journal
WK	Wolters Kluwer
YIHL	Yearbook of International Humanitarian Law
YJIA	Yale Journal of International Affairs
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal
YUP	Yale University Press

**Part I**  
**Introduction**

# Chapter 1

## Methodological Framework and Research Questions



### Contents

1.1 Motivation and Objective.....	4
1.2 Field of Application .....	8
1.3 Structure, Methodology and Research Questions.....	10
References .....	13

**Abstract** This initial chapter introduces the book which portrays the position at law as at 1 January 2019, slightly more than twenty years after the signature of the ICC Statute. It does so by unmasking its objective. The aim of the book is to seek to provide a better understanding of the prevailing enforcement mechanisms within international criminal law by undertaking a normative account thereof which includes an analysis on the extent to which States enjoy leeway to refuse surrender and/or extradition of an individual wanted for core crimes. The chapter poses a research question, and some research sub-questions the reply to which will help to answer the research question, this being ‘which are the juridical obstacles to the surrender and/or extradition of individuals wanted for core crimes?’ The research sub-questions posed are the following: (1) to what extent, if at all, may international courts and/or States exact the surrender and/or extradition (for the purposes of subsequent prosecution) of those individuals accused of core crimes? (2) to what extent may grounds for refusal of surrender act as bars (obstacles) to hinder or jeopardise the process of surrender from a State to the ICC? (3) to what extent may grounds for refusal of extradition act as bars (obstacles) to hinder or jeopardise the extradition process between the requesting State and the requested State? I explain the methodology used to consider the obstacles which effectively hinder or block the surrender and/or extradition, and consequently the subsequent prosecution, of alleged perpetrators of core crimes.

**Keywords** Enforcement • Field of application • Methodology • Objective • Position at law • Research questions • Sources • Structure • Research sub-questions • Subject of international law

This book deals with the prosecution of core crimes. My work shall be introduced by means of this chapter which shall cater for the structure I shall adopt and the methodology I shall use. By virtue of this chapter the research question will be posed and the objective of this work, together with its field of application, will be portrayed.

## 1.1 Motivation and Objective

This book seeks to provide a better understanding of the prevailing enforcement mechanisms within international criminal law by undertaking a normative account thereof which includes an analysis on the extent to which States enjoy leeway to refuse surrender and/or extradition of an individual wanted for core crimes. It examines both systems of enforcement cumulatively and together, both individually and collectively, within the same study. Whilst proposing some improvements to each enforcement system when these are considered separately and autonomously, some conclusions are deduced after integrating both systems. I perform this task by examining pitfalls within the systems of enforcement of international criminal law. Where possible, this book attempts to propose methods which could be adopted to fill such gaps in compliance with international law. Therefore, the main research question can be coherently enunciated as follows: Which are the juridical obstacles to the surrender and/or extradition of individuals wanted for core crimes? Antonio Cassese had asserted that ‘criminal justice is among the most civilized responses to such violence’.<sup>1</sup> But criminal justice can only be meted out if persons are brought to trial (*id est*, surrendered or extradited), unless either a State enjoying custodial jurisdiction over these individuals is willing to prosecute them or unless trials *in absentia* are permissible. Thus, the quest for an international rule of law,<sup>2</sup> as opposed to mob rule,<sup>3</sup> may be said to be the fulcrum of this book since it constitutes a primary catalyst the aftermath of which is the intended maintenance of peace and security. This latter goal depends, at least *in partem*, upon an effective but fair

---

<sup>1</sup> Cassese 2011, p. 271.

<sup>2</sup> Although the dynamic concept of the rule of law can hardly be defined (De Gaetano 2018), it could be construed to signify that:

- i. No man is punishable or can be lawfully made to suffer in body and goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land; and
- ii. No man is above the law and that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(Dicey 1982, pp. 110–115). Observing the rule of law ‘imposes on the State the positive duty to protect individuals’ fundamental rights by providing for a system that can offer protection to any individual present in its territory against violations of his/her fundamental rights by others’ (Hirsch Ballin 2012, p. 12).

<sup>3</sup> Aquilina 2017, pp. 107–110.