Direct application of international criminal law in national courts

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Direct Application of International Criminal Law in National Courts

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ACADEMISCH PROEFSCHRIFT

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Amsterdam, 20 April 2005

W.F.
# Table of Contents

List of Abbreviations

Chapter I
Introduction
1 Introduction to the Problem
2 Methodology
3 Limitations and Problems
4 Defining the Framework: International Law in National Courts
5 Applicable Law: Substantive Criminality for the Core Crimes
6 Structure

Chapter II
Practice: Core Crimes Prosecutions in National Courts
1 Introduction
2 Prosecution on the Basis of National Law
2.1 Prosecution as an Ordinary Crime
2.2 Prosecution as an International Crime
2.2.a International Crimes in National Law
2.2.b Case study: Genocide
3 Prosecution on the Basis of International Law: Direct Application
3.1 Introduction
3.2 Specific Rule of Reference
3.2.a Rule of Reference for Substantive Criminality
3.2.b Rule of Reference to Establish Jurisdiction
3.3 General Rule of Reference
3.3.a Introduction
3.3.b Germany
3.3.c Switzerland
3.3.d Australia
3.3.e Senegal
3.3.f Belgium
3.3.g United States of America
3.3.h England and Wales
3.3.i Canada
3.3.j France
3.3.k Netherlands
3.3.l Ethiopia
3.3.m Argentina
3.3.n Hungary
3.3.o Other States
4 Conclusion

7
Chapter VI
The Principle of Legality and Direct Application of Core Crimes 225
1 Introduction 225
2 Legal Basis and Purpose of the Principle of Legality 226
3 A Special Position for the Core Crimes? 228
4 The International and the National Principle of Legality 233
5 The Principle of Legality under Customary International Law 236
   5.1 International Criminal Law as Lex 236
   5.2 Accessibility 239
   5.3 Foreseeability 241
   5.4 Penalties 252
6 Which Criminalizations are Directly Applicable? 259
7 The National Principle of Legality as an Obstacle to Core Crimes Prosecutions 266
8 Conclusion 269

Chapter VII
Synthesis 271
1 Introduction 271
2 The International Rules on Direct Application 271
3 Reconciling National and International Law 272
4 The Future of Direct Application of Core Crimes Law 275
5 Implications of Direct Application of Core Crimes Law 276

Nederlands: Samenvatting (Summary in Dutch) 279
Table of Cases 283
Cited Literature 299
Table of Documents 329
   I. International Reports 329
   II. National Reports 329
Index 331
List of Abbreviations

AC
ACHR
ACHPR
AJIL
All ER
AP I
AP II
Art.
ATCA
AVR
BGH
Bull. Crim.
BVerfG
BvR
BYIL
CA
Calif. LR
CAT
CCAIL
Cir.
CLR
CODICES
Columbia LR
CP
CPM
Cr App R
Crim. LR
CUP
Doc.
DPP
Draft Code 1996

Appeal Cases, England and Wales
American Convention on Human Rights
African Charter on Human and Peoples' Rights
Acta Juridica Hungarica
American Journal of International Law
All England Law Reports
First Additional Protocol to the 1949 Geneva Conventions
Second Additional Protocol to the 1949 Geneva Conventions
Article
(American) Alien Tort Claims Act
Archiv des Völkerrechts
Bundesgerichtshof (German Supreme Court)
Bulletin Criminel (Judgments of the French Supreme Court)
Entscheidungen des Bundesverfassungsgerichts (Judgments of the German Federal Constitutional Court)
Casenumbers of the Bundesverfassungsgericht
British Yearbook of International Law
Court of Appeal
California Law Review
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
(German) Code of Crimes against International Law
Circuit
Commonwealth Law Reports
Case-law collection of constitutional courts (at http://codices.coe.int)
Columbia Law Review
Code pénal
Code pénal militaire
Criminal Appeal Reports
Criminal Law Review
Cambridge University Press
Document
Director of Public Prosecutions
Draft Code of Crimes Against the Peace and Security of Mankind, 1996 (ILC)
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Duke J of Comp. &amp; Int. L</td>
<td>Duke Journal of Comparative &amp; International Law</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<td>ECHR</td>
<td>European Convention of Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EComHR</td>
<td>European Commission of Human Rights</td>
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<td>EChHR</td>
<td>European Court of Human Rights</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<tr>
<td>EWCA Crim.</td>
<td>Court of Appeal, Criminal Division (England &amp; Wales)</td>
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<td>EWHC</td>
<td>High Court, Administrative Court (England &amp; Wales)</td>
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<tr>
<td>F.2d</td>
<td>Federal Reporter, Second Series</td>
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<tr>
<td>Fam.</td>
<td>Law Reports: Family Division</td>
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<td>FCA</td>
<td>Federal Court of Australia</td>
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<td>GAOR</td>
<td>General Assembly Official Records</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GC</td>
<td>Genocide Convention</td>
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<td>GC I</td>
<td>Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</td>
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<td>GC II</td>
<td>Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</td>
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<tr>
<td>GC III</td>
<td>Geneva Convention (III) Relative to the Treatment of Prisoners of War</td>
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<td>GC IV</td>
<td>Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War</td>
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<tr>
<td>GDR</td>
<td>German Democratic Republic</td>
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<tr>
<td>Harvard ILJ</td>
<td>Harvard International Law Journal</td>
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<td>Harvard LR</td>
<td>Harvard Law Review</td>
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<td>HR</td>
<td>Hoge Raad (Dutch Supreme Court)</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>HRQ</td>
<td>Human Rights Quarterly</td>
</tr>
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<td>HuV</td>
<td>Humanitäres Völkerrecht</td>
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<tr>
<td>IACComHR</td>
<td>Inter-American Commission of Human Rights</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICL</td>
<td>International Criminal Law</td>
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<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILR</td>
<td>International Law Reports</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal (Nuremberg Tribunal)</td>
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<tr>
<td>IsraelYBHR</td>
<td>Israel Yearbook on Human Rights</td>
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<tr>
<td>JICJ</td>
<td>Journal of Criminal Justice</td>
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<tr>
<td>LCP</td>
<td>Law and Contemporary Problems</td>
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<td>LJIL</td>
<td>Leiden Journal of International Law</td>
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<td>Mich. LR</td>
<td>Michigan Law Review</td>
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<td>MLR</td>
<td>Military Law Review</td>
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<td>MPC</td>
<td>Model Penal Code</td>
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<td>MPI</td>
<td>Max Planck Institute</td>
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<td>MPYUNL</td>
<td>Max Planck Yearbook of United Nations Law</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
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<tr>
<td>NILR</td>
<td>Netherlands International Law Review</td>
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<tr>
<td>NJ</td>
<td>Nederlandse Jurisprudentie</td>
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<td>NJB</td>
<td>Nederlands Juristenblad</td>
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<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
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<td>No.</td>
<td>Number</td>
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<tr>
<td>NQHR</td>
<td>Netherlands quarterly of human rights</td>
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<tr>
<td>NSZ</td>
<td>Neue Zeitschrift für Strafrecht</td>
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<tr>
<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
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<tr>
<td>NZLR</td>
<td>New Zealand Law Reports</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<td>p.</td>
<td>page</td>
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<td>P.2d</td>
<td>Pacific Reporter, Second Series</td>
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<td>para.</td>
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<td>paras.</td>
<td>paragraphs</td>
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<tr>
<td>PC</td>
<td>Privy Council</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>PKK</td>
<td>Kurdistan Workers' Party</td>
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<td>PrepCom</td>
<td>Preparatory Committee</td>
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<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>QB/QBD</td>
<td>Law Reports Queen's Bench Division</td>
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<td>RdC</td>
<td>Recueil des Cours</td>
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<tr>
<td>RDMGD</td>
<td>Revue de droit militaire et de droit de la guerre</td>
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<tr>
<td>RDPC</td>
<td>Revue de droit pénal et de criminologie</td>
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<td>Res.</td>
<td>Resolution</td>
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<tr>
<td>RGDIP</td>
<td>Revue Générale de Droit International Public</td>
</tr>
<tr>
<td>RIDC</td>
<td>Revue internationale de droit comparé</td>
</tr>
<tr>
<td>RIDP</td>
<td>Revue internationale de droit pénal</td>
</tr>
<tr>
<td>RSC</td>
<td>Revue de science criminelle et de droit pénal comparé</td>
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<tr>
<td>SA</td>
<td>South African Law Reports</td>
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<td>SACJ</td>
<td>South African Journal of Criminal Justice</td>
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<tr>
<td>SC</td>
<td>Security Council</td>
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<tr>
<td>SCR</td>
<td>Supreme Court Reporter</td>
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<td>S.E.</td>
<td>South Eastern Reporter</td>
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<tr>
<td>STC</td>
<td>Simon's Tax Cases</td>
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<td>StGB</td>
<td>Strafgesetzbuch (German Penal Code)</td>
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<td>Suppl.</td>
<td>Supplement</td>
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<tr>
<td>Texas ILJ.</td>
<td>Texas International Law Journal</td>
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<tr>
<td>UCMJ</td>
<td>(U.S.) Uniform Code of Military Justice</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UN Doc</td>
<td>United Nations Document</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<tr>
<td>UNWCC</td>
<td>United Nations War Crimes Commission</td>
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<td>US</td>
<td>United States Supreme Court Reports</td>
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<td>USC</td>
<td>United States Code</td>
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<td>v.</td>
<td>versus</td>
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<td>Va. J. Int'l L.</td>
<td>Virginia journal of international law</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>Vol.</td>
<td>Volume</td>
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<tr>
<td>WIM</td>
<td>Wet Internationale Misdrijven (Dutch International Crimes Act)</td>
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<td>WLR</td>
<td>Weekly Law Reports</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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<td>WW I</td>
<td>First World War</td>
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<td>WW II</td>
<td>Second World War</td>
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<tr>
<td>Yale LJ</td>
<td>The Yale Law Journal</td>
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<tr>
<td>YIHL</td>
<td>Yearbook of International Humanitarian Law</td>
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<td>YIL</td>
<td>Yearbook of International Law</td>
</tr>
<tr>
<td>YILC</td>
<td>Yearbook of the International Law Commission</td>
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<tr>
<td>ZaöRV</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
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Chapter I
Introduction

1 Introduction to the Problem

This study will set out the present state of the international legal framework governing direct application in national courts of the international criminalizations of genocide, crimes against humanity and war crimes, the so-called ‘core crimes’. It will examine on the basis of comparative national and international case law under what conditions international law on the core crimes can or should be applied directly for the prosecution of individuals. I will also explore the underlying considerations for granting or withholding direct application. Direct application in the context of this study means that a national court applies an international rule, without it having been transformed into a rule of national law, because it is binding law for the court.

The problem studied here originates in the fact that national courts are the primary fora for the prosecution of international crimes, including the core crimes. The installation of the ICC has reinforced rather than weakened their importance, both in principle and in practice. In principle, because the principle of complementarity underlying the jurisdiction of the ICC confirms the dominant position of national courts. In practice, because many States are more likely to undertake national prosecutions, stimulated by the heightened attention for international crimes and the prospect of being labelled unwilling or unable by the ICC. Many are also better equipped to do so, since the implementing legislation for the ICC has improved numerous national laws on international crimes.

National prosecutions of international crimes effectively require resort to a combination of national and international law. Most legal systems incorporate (parts of) international law by reference (renvoi), also in the field of international criminal law (ICL). For example, several States criminalize violations of “the laws and customs of war,” requiring their courts to apply treaties like the Geneva Conventions and customary law in war crimes prosecutions. But even when it is not incorporated, international law has a

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1 These are the crimes subject to the jurisdiction of the International Criminal Court (ICC). Cf. Art. 20 of the ILC’s 1994 Draft Statute of an International Criminal Court (distinguishing genocide, aggression, crimes against humanity and war crimes from selected treaty crimes) and Commentary to Art. 20, in 1994 ILC Yearbook, Vol. II, Part 2, p. 38. Since ICC jurisdiction over the crime of aggression has been postponed for lack of a widely accepted definition, the term core crimes in this study comprises only the other three crimes.

2 Unless indicated otherwise, the term prosecution in this study refers to the entire process of prosecuting and punishing a defendant. Thus, it denotes a complete trial including any resulting convictions, not solely the work of the prosecution as opposed to that of the defense and/or the judge(s).

3 See for a more elaborate definition para. 4 and 5 of this Chapter.

4 The term international crimes in this study refers solely to crimes of individuals, not of states. See on the latter Pellet 2003; Wyler 2002; Pellet 2001; several articles in 10 EJIL, Issue 2 (1999); Hoogh 1996.


7 See e.g. Finnish Penal Code, Chapter 11, Section 1 (enacted 1995):

1) A person who is in an act of war

(1) uses a prohibited means of warfare or weapon;
role to play as it sets standards and provides the basis for national legislation on international crimes. Thus, it is often used by national courts to interpret, correct or supplement national (implementing) legislation.

Intrinsic in the prosecution of international crimes in national courts, the interplay between national and international criminal law raises numerous legal, practical and policy questions. Is ICL subject to the same constitutional scheme as general international law, or are there different conditions for its application? How do courts deal with inconsistencies between national laws and the international rules they are meant to implement? What arguments can be discerned in practice to determine the proper role of international law in national prosecutions?

These and similar questions are rendered more important by the fact that few if any national legal systems regulate the core crimes in full accordance with international law. Many national laws are incomplete, lacking anything from relatively minor provisions to forms of participation to complete crimes. Crimes against humanity, for example, have still not been included in numerous national laws. Furthermore, many national laws diverge from international law in their formulation of the core crimes and corresponding rules. For example, numerous national laws define the groups protected against genocide differently than the relevant international instruments, which protect national, ethnical, racial and religious groups. Where national laws are incomplete or divergent, the question arises whether direct application of the international law on core crimes itself can (partially) provide the legal basis for a national prosecution.

Doctrine predominantly rejects direct application of international core crimes law in national courts, often in a rather succinct manner. It is a common assumption that “[t]he adoption of implementing legislation is [...] a universal prerequisite for any application

2) abuses an international symbol designated for the protection of the wounded or the sick; or
3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law shall be sentenced for a war crime to imprisonment for at least four months and at most six years.

(2) An attempt is punishable.
See further below, Chapter II, para. 3.2.

9 See below, Chapter II, para. 2.2.

10 See Ambos 2003, p. 26 ("En general, el sistema continental o de civil law [...] no permite una aplicación directa de normas (penales) internacionales o una transformación de estas normas a través de una referencia al instrumento internacional por las exigencias de los principios nullum crimen sine lege (certa) y nulla poena sine lege."); Bohlander 2001, p. 12 ("[I]nternational criminal law is still in its formative stages, and it is too early to try and break it down directly to the national level."); Bremer 1999, p. 65-67; Kamminger 1998, p. 569. Cf. Henzelin 2002, p. 78-80; Fichet-Boyle and Mossé 2000, p. 872 ("La répression des infractions internationales définies par les conventions ne peut se faire sans le concours des normes de droit interne."); Sadat Wexler 1994, p. 364 ("Because of the embryonic state of international criminal law, [...] in any modern-day prosecution for crimes against humanity, although the normative aspect is derived from international law and is therefore international in character, the problem of punishment and procedure is necessarily municipal in character."). But compare Wolfrum 1996, p. 235 and 238; Triffterer 1966, p. 85.
of international criminal law principles in the national legal order." However, most commentators provide little or no proof for their views. Rather, they take it for granted that international criminal law differs fundamentally from, for example, human rights law where it concerns direct application. Yet, practice provides a more diverse perspective.

The possible direct application of the international criminalizations of the core crimes has received only limited attention in national courts, not least because national prosecutions of international crimes are relatively sparse. Still, it has been examined by the courts of various States, resulting in quite different outcomes. In 1996, the French Court of Cassation held that the Geneva Conventions could not be directly applied for the prosecution of war crimes because their provisions have too general a character, but the Hungarian Constitutional Court held that war crimes can be prosecuted directly on the basis of customary international law, as codified in the Geneva Conventions. In 1999, the Federal Court of Australia held that the prosecution of international crimes can not be based directly on international law or Australian common law, but requires a statutory criminalization. An English Court of Appeal, on the other hand, found in 2004 that the prosecution of international crimes does not require a statute but instead that "international law is capable of being incorporated into English law so as to create a crime punishable in domestic law."  

As is apparent from these examples, national courts approach the issue of direct application of the core crimes in very different ways. Even national judgments which share their rejection of direct application can vary considerably in their motivations. It should also be noted that in several States, direct application of international criminal law was accepted without much discussion in older judgments. These variations in judicial practice call for analysis, especially because the question of direct application can be expected to emerge in numerous national prosecutions to come. After all, deficiencies and incongruities in national implementation laws will remain a structural feature of ICL, if only because the important process of progressive criminalization under customary international law resists complete and timely transformation into national law.

Direct application of international criminalizations of the core crimes has not only a practical topicality, but also systematical implications for both international criminal law and public international law in general. For international criminal law, these implications can be sketched in three points.

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11 Stirling-Zanda 2004, p. 6. See also Gardocki 1989, p. 94:
"The direct application of criminal law conventions would, at the present moment be, impossible or would violate the generally accepted standards of the criminal justice. From national reports it is evident, that in no state national courts apply directly international criminal law conventions, although in some of them it is theoretically admissible, on condition that a given convention is sufficiently precise."

12 All of the following cases are described in more detail in Chapter 2, para. 3.3.
13 See below, note 367.
14 See below, Chapter II, para. 3.3.b, g and k.
First, the question of direct application determines in part whether States can fulfil their duty to contribute to the effective enforcement of international criminal law. International law under various circumstances obliges States to prosecute core crimes. Yet, States regularly lack adequate national law for such prosecutions. In that case, the possibility of direct application determines whether States can fulfil their duty to prosecute and uphold international criminal law. In the above mentioned Australian case, for example, the judges unanimously accepted that Australia is obliged to prosecute genocidal acts committed on its territory while their stance on direct application determined whether or not that obligation could be respected.

Second, direct application amounts to a valuable litmus test for the quality and development of international criminal law. It is often argued that international criminal law lacks precision and completeness, and should therefore not be directly applied in national prosecutions. That argument has serious implications for the legitimacy of core crimes prosecutions in international courts, and even of ICL itself. If customary and treaty law regarding the core crimes are indeed too unclear and uncertain to form the legal basis for a prosecution in a national court, why would it be acceptable to use that very same law as the basis for a prosecution in an international court? For the legal certainty of the individual, it does not matter so much which court tries him but rather what law it applies. Here, the study of direct application raises fundamental questions about the relationship of national and international courts, the current state of ICL and its very opposability against individuals. In this regard, the principle of legality takes up a central place in the analysis of direct application.

Third, the choice between direct application of ICL or the use of corresponding national law may have important implications for the coherence and systemization of ICL. While transformation of ICL can have advantages regarding internalization and adaptation to the peculiarities of the national legal system, it brings a risk of distortion of the law. Dissimilarities in the various national laws on core crimes threaten the coherence of ICL. As a practical matter, such variations complicate the ascertainment of custom and inhibit the possibilities of different courts to rely on each other's case law. These problems are diminished when all courts apply the very same rules, id est international law itself. On the other hand, it should be recognized that unity of law provides no guarantee for unity of adjudication. Divergent interpretation and ignorance of foreign case law can lead to very different results based on the same law. Yet, while the risk of distortion of the law should not be overstated, it can be asked whether direct application of international criminal law can enhance the unity of adjudication and cross-fertilisation between national and international courts.

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17 See e.g. Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, 2004, Human Rights Watch, p. 24-27 (plea for direct application of international criminal law in order to allow prosecution of core crimes involving command responsibility, which is not properly regulated in Serbian law).
18 See below, Chapter II, para. 3.3.d.
19 See e.g. Bremer 1999, p. 65-67.
20 See Knop 2000, p. 535.
In a broader context, the study of direct application in the specific field of international criminal law is also relevant for public international law in general, and its role in national legal systems in particular. It requires reconsideration of central concepts, like the maxim that international law leaves States freedom in its implementation, and analysis of relevant developments like the emerging hierarchy of norms, including *jus cogens*. The conditions for direct application of international criminal law examined here will apply at least partly to other fields of international law as well. This study also touches on the question to what extent the existing framework of public international law can accommodate the peculiarities of an individual-oriented field like international criminal law.

2 Methodology

This study seeks to sketch the dynamics of direct application of the core crimes from the perspective of international law. The description of State practice serves to gain insight in the relevant trends, problems and arguments as well as ascertain the contours of customary international law, but is not a goal in itself. This is not a comparative study. Thus, I will not attempt to be exhaustive in my description of particular crimes or legal systems.

My use of sources follows the generally accepted methodology of international criminal law. This methodology has been described by several authors and need not be repeated in detail here. Like modern international law in general, it recognizes subsidiary means like Draft Codes of the International Law Commission and the work of international bodies like the Human Rights Committee, in addition to the sources mentioned in Art. 38 (1) ICJ Statute.

It also departs from the distinction made in Art. 38 (1) ICJ Statute between primary sources (treaties, custom and general principles) and subsidiary means for the determination of rules of law (judicial decisions and doctrine). This dichotomy between primary sources and subsidiary means does not fully reflect the realities of international criminal law in action. Decisions of both national and international courts are regularly used in other ways than as subsidiary means.

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21 In doctrine, there is some support for the idea that the *jus cogens* status of an international norm can influence the obligations of the State in implementing it. See generally Wet 2004; Seideman 2001 and Meron 1986.

22 See Werle 2003, p. 51-66; Sliedregt 2003, p. 6-9; Bantekas, et al. 2001, p. 2-4; Paust 2000, p. 3-8

23 See respectively ICTY, Trial Chamber, Vasiljevic, 29 November 2002, para. 200 (subsidiary means like Draft Codes "may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law, but they do not constitute state practice relevant to the determination of a rule of customary international law") and Seibert-Fohr 2002b, p. 308-312.

24 National judgments can provide evidence of *opinio juris* or count as State practice for the ascertainment of customary law. In practice, national and international judgments are also used as independent authorities. See Nollkaemper 2003b; Zegveld 2000, p. 19-21; Lauterpacht 1929, p. 78-94.
3 Limitations and Problems

There are many subjects bordering on the topic of this study that can be treated only in passing or not at all. I will not engage in the debate on the desirability of criminal prosecution versus alternative responses to international crimes, like truth commissions, or the sensibility of combining the two.25 Neither will I compare the (dis)advantages of international and national prosecutions.26 I readily acknowledge that this study can provide only a limited understanding of the direct application of international criminal law. Some excellent works promote a broader understanding of the role of international law in national courts by focusing less on the formal legal framework and more on factors like the intrinsic value of the rules to be applied and the lines of communications between different courts and other relevant actors.27 Such studies complement more positivistic ones like the present one in important ways, but cannot replace them.

Two main problems complicate this study and limit the value of its outcomes. First, there is the problem of selectivity. This manifests itself both in the availability of materials and their use by this author. The materials to be studied, mainly legislation, case law and literature, are more widely available and easier accessible from western and/or English speaking States than from many other States.

Furthermore, the perspective of an author is colored by his background28 (western or non-western, small State or big, civil or common law, working in the field of international, constitutional or criminal law, etc.) and his selection of the already incomplete materials is further limited by his linguistic capabilities. While care has been taken to cast the net as wide as possible both in the selection of materials and analysis of the relevant questions, it should be noted that this study is unavoidably colored by the selective availability of sources and the background of the author (Dutch, civil law system, working in international law, etc.).

The second problem concerns the problematical relationship between law in the books and law in action. A lack of congruence between the two can diminish both the descriptive and the explanatory value of a study like this. When describing different constitutional frameworks for the application of international law, for example, it should be noted that in some States national provisions securing a role for international law are never actually applied and remain a dead letter.29 On the other hand, the explanatory power of legal scholarship is limited by the fact that courts and other relevant actors are partly, sometimes predominantly, guided by practical considerations, including political

25 See e.g. Sharp 2003, p. 173-177 (arguing that prosecutions of international crimes should avoid a narrow, legalistic strategy but aim for broader benefits to the society affected by the crimes). Cf. Dembour and Haslam 2004.
26 See e.g. Sands 2003, p. 40-42; Swart 1996, p. 21-34.
28 See for example Rubenfeld 2003 on the differences in perception of democratic legitimacy in the U.S. and Europe.
realities. Analysis of the principle of legality and other legal concepts does little to explain a decision to forego prosecution that primarily results from heavy political pressure.

Still, these problems are real but should not be overstated. The distorting influence of practical considerations and failing application of existing law are common to most legal studies. Practical, ulterior motives often play an important role in the process of shaping and applying the law but that does not diminish the need for or feasibility of theoretical systemization. Legislation, even if it is not actually applied, still amounts to State practice and reflects relevant attitudes and problems. The description of State practice regarding the prosecution of the core crimes and underlying considerations in the choice of law (Chapters 2 and 3) should serve to provide a better perspective on the relationship between theory and practice.

4 Defining the Framework: International Law in National Courts

The subject at hand, the direct application of international criminal law in national courts, is set in the framework of the role of public international law in national legal systems. The large body of literature on this theme does not share a coherent and consistent definition of relevant concepts. In different writings, terms like “direct application”, “domestic validity” and “(non) self-executing” are used in different ways. Therefore, it is necessary to give a concise description of this framework in order to define the key terms of this study. I will give a more systematical analysis of the framework in Chapter 4.

Broadly speaking, there are two ways for a State to implement international law: incorporation and transformation. Incorporation takes place when an international rule is integrated in the national legal order, so that the judiciary can directly apply that rule. This method of incorporation promotes complete implementation of, as the international rule cannot be modified. Transformation implies the enactment of a national law that mirrors the content of the international rule, thus transforming a rule of international law in a national one. This method of transformation gives the legislature the opportunity to tailor, or even modify, the international rule to fit the peculiarities of the national legal system. Technically speaking, international law is applied not at all after transformation. In these cases, national courts apply national law that reproduces the content of the original international norm.

Incorporation takes place through a rule of reference: a rule of national law that makes the international rule itself a part of the national legal order. A rule of reference can be

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30 See for an overview of relevant literature Henckaerts 1998.
31 See Buergenthal 1992, p. 318 and 362; Iwasawa 1986, p. 644. Some scholars assert that international law itself is never incorporated in the national legal order or applied in national courts. See e.g. Santulli 2001, p. 88-100 and 105-114 (asserting that international rules integrated and applied in national legal orders amount to “droit étatique d’origine internationale,” different in form and content from international law proper). See for a refutation of this argument Lauterpacht 1929, p. 77 and, in the specific context of international criminal law, Lauterpacht 1944, p. 64-67.
found in the constitution, but also in legislation of a lesser rank. Moreover, it can be a general rule – incorporating an entire source or field of international law, like treaties, customary law, or humanitarian law – but also a specific rule – incorporating only a particular norm or treaty provision. National provisions declaring all treaties to be the law of the land\(^{32}\) or the crime of apartheid to be regulated by certain paragraphs of the Apartheid Convention,\(^{33}\) are both rules of reference. A rule of reference can be written as well as unwritten. Thus, when there is a consistent practice of national courts to apply customary international law without an explicit authorization in national law to do so, this practice can be construed to be based on an implicit rule of reference that incorporates customary international law in the domestic legal order of that State.\(^{34}\)

Incorporation and transformation are two different ways to give effect to a rule of international law, but do not exclude each other.\(^{35}\) That an international rule has been transformed into a rule of national law does not prevent it from being incorporated itself in the national legal order and vice versa. On the contrary, it is often the case that international rules are both themselves part of the legal order, for example through a general rule of reference, and reflected in corresponding national laws at the same time.\(^{36}\)

When an international rule is incorporated into national law, it acquires **domestic validity**. A rule of international law is domestically valid when it has force of law in the national legal order.\(^{37}\) It is then binding law, in principle to be applied by the national courts. When this actually happens, I speak of **direct application**.\(^{38}\) Thus, direct application is a result in a particular situation rather than a test consisting of independent criteria under international law. Application is to be understood in a broad sense here. It is not confined to those cases where rights and duties of individuals are directly derived

\(^{32}\) See e.g. Art. VI, cl. 2 U.S. Constitution.
\(^{33}\) See Section 157 of the Hungarian Criminal Code (Btk., in force since 15 June 1996):

\[
\begin{align*}
&(1) \quad \ldots \\
&(2) \quad \text{The person who commits a crime of apartheid shall be punished with imprisonment lasting from 5 to 10 years.} \\
&(3) \quad \text{Punishment shall be imprisonment from 10 to 15 years or life imprisonment if the criminal act of apartheid described in subsection (2) has resulted in serious consequences.} \\
&(4) \quad \text{For the purposes of subparagraphs (2) and (3), a crime of apartheid shall mean the crime of apartheid defined in paragraphs (a)(ii), (a)(iii), (c), (d), (e) and (f) of article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on 30 November 1973 by the General Assembly of the United Nations in New York, promulgated by Law Decree No. 27 of 1976.}
\end{align*}
\]

\(^{34}\) See Cassese 2001c, p. 172.

\(^{35}\) Some authors speak of the contrast between transformation and adoption: see e.g. Rack 1979 and Seidl-Hohenfeldern 1963. But see Partsch 1992, p. 245; Dijk and Tahzib 1991, p. 417 (distinguishing adoption and incorporation); Iwasawa 1986, p. 638.


\(^{38}\) Cf. Peyró 2003, p. 81 ("l’applicabilité directe"); Iwasawa 1986, p. 643-645. I refer to direct application rather than direct effect, because the latter’s specific position in EC law has made it laden with connotations from that field. For many, the term direct effect signifies questions about the quality of a rule, its substance, *id est* whether it creates rights or duties for individuals, or the standing of individuals to invoke it. See e.g. Nollkaemper 2002, p. 162-163; Santulli 2001, p. 102; Jackson 1992, fn 1. Such an understanding is too narrow for this study.
from international law, but covers every situation where a national court bases (a part of) its decision directly on international law.\(^{39}\) Accordingly, use of an international norm to refuse application of a national provision is a form of direct application, as is the use of an international norm for the interpretation of national law as long as that international norm is regarded as 'the law of the land.'\(^{40}\)

For some authors, direct effect refers to use of international law as a rule of decision only, in contrast to its use as a means of interpretation, which is then called indirect effect.\(^{41}\) Such a distinction is, however, difficult to make in practice and results in an unnecessarily narrow view of the role of international law in national courts.\(^{42}\) Others do not distinguish between application of binding and non-binding international law, for example between the application of the ECHR by courts of State parties and non-State parties.\(^{43}\) This lack of distinction eliminates bindingness as an explaining factor in the analysis of international law in national courts altogether, and equates the application of international law with that of foreign law. This is unhelpful. While it should be recognized that a full understanding of the role of international law in national courts requires a broader perspective than the binding/non-binding dichotomy, the factor of bindingness forms an indispensable part of the complete picture.\(^{44}\)

There can be different reasons why an international rule that is domestically valid may not be directly applied,\(^{45}\) just as there can be different reasons why a rule of national law may not be applied in a particular case. A restriction on the party invoking the rule, like standing, can prevent its application, or a restriction on the court, like the political questions doctrine. The international rule may be trumped by another legal rule, national or international. It may also be the case that the rule lacks precision or comprehensiveness, and requires supplementation by a national or international action that has not yet been taken. A treaty provision that is deemed unsuitable for direct application, even if domestically valid, is often called non-self-executing.\(^{46}\) The doctrine of self-executing treaties is complex and confused and will be analyzed in Chapter IV, para. 4.

To recapitulate, direct application in the context of this study means that a national court applies an international rule as such because it is binding law, without it being transformed into a rule of national law.\(^{47}\) Thus, direct application is to be distinguished from the optional use of international law as a non-binding source, which is comparable

\(^{39}\) Compare Jackson 1992, pp. 313 and 321.

\(^{40}\) See below, p. 155 on the principle of consistent interpretation.


\(^{42}\) See Knop 2000, p. 501-505 on the pitfalls of defining the direct application of international law in an all-or-nothing fashion.

\(^{43}\) See e.g. Knop 2000 and below, note 792.

\(^{44}\) See also above, note 27 and accompanying text.


\(^{46}\) Numerous courts and writers erroneously assert that non-self-executing treaties do not acquire domestic validity. See on this point Iwasawa 1986, p. 644-645.

to the use of foreign law as a source of inspiration. To find that the contents of an international rule are not transformed into national law does not mean that the rule is applied independently of national law. It would be simplistic to interpret direct application of international law as excluding any role for national law. After all, every national legal system has broad rules of reference on the domestic validity of treaties and/or custom. The absence of an ad hoc rule of reference incorporating a specific rule of international law normally does not signify complete independence from national law, but rather the presence of a general, perhaps implicit, rule of reference, for example a constitutional provision incorporating treaties or custom. Indeed, it is broadly assumed that the domestic validity of international rules always depends on a rule of national law.\footnote{See Cassese 2001c, p. 168; Knop 2000, p. 521 and Verdross and Simma 1984, p. 539-540. See further below, Chapter IV, para. 3.} Even if that assertion may be questioned, as I will do in Chapter 4,\footnote{See below, p. 148 et seq.} the application of international law in national courts is in practice hardly ever, if at all, fully independent of national law. Of course, some rules of reference are more specific than others. Many of the questions surrounding direct application are most pressing for rules of reference that are general and/or implicit, as they signify the least conscious decision of the legislature to incorporate the specific international rule that is applied.

5 Applicable Law: Substantive Criminality for the Core Crimes

In its broadest sense, this study examines the way in which penal rules of international law are implemented and applied in national legal orders. International criminal law in the context of this study refers to ‘the accumulation of international legal norms on individual criminal responsibility (without implying that they form a coherent system)’.\footnote{Sung 1997, p. 7. Cf. Triffterer 1966, p. 30-34.} These norms can be found in treaties, custom and general principles.\footnote{See below, Chapter IV, para. 5.1.} National law is an object of study only where it reflects or implements a rule of international law, not where it regulates national criminal law with international implications. Of the different meanings attributed to ICL in doctrine, this study thus adheres to droit international pénal or Völkerstrafrecht as opposed to droit pénal international and Internationales Strafrecht.\footnote{Schmidt 2002, p. 2-5; Bremer 1999, p. 44-46; Triffterer 1966, p. 25-29 and 173-178; Hettinger 1965, p. 8-10. See for an overview of definitions of international criminal law Hollán 2000; Schwarzenberger 1950. Fourth preamble and Art. 5 ICC Statute.}

More specifically, this study examines the direct application of core crimes law in national prosecutions. Core crimes law is that part of international criminal law which deals with crimes subject to the jurisdiction of the ICC: genocide, crimes against humanity and war crimes. They have also been labelled ‘the most serious crimes of concern to the international community as a whole’,\footnote{See Art. 17, 18 and 20 Draft Code of crimes against the peace and security of mankind 1996. See also Allain and Jones 1997; Bassiouni 1993 and Lukashuk 2001, p. 273.} crimes against the peace and security of mankind,\footnote{See Art. 18, Draft Code of crimes against the peace and security of mankind 1996.} supranational crimes,\footnote{See Art. 17, Draft Code of crimes against the peace and security of mankind 1996.} international crimes sensu stricto,
international crimes proper or simply international crimes, as opposed to transnational crimes. 56

There are several reasons, both practical and systematical, for this focus. First, as a result of the ICC regime - at the time of writing of this study governing almost 100 State parties - national prosecution of the core crimes is now, more than before, a matter of considerable practical importance. Second, the core crimes are all globally punishable under customary international law, also by international courts and for States not party to the ICC. State practice of core crimes prosecutions can be compared both inter se, and with the practice of international courts. Third, the core crimes are generally believed to be governed by rules of jus cogens status. 57 Fourth, the core crimes generally qualify as the most serious human rights violations, giving rise to additional obligations of the State under international human rights law. All in all, these rules of a customary and peremptory nature apply globally and yield prima facie the most stringent international legal demands on States. Therefore, they can reasonably be expected to have the greatest impact on the national level. For these reasons, the core crimes should be distinguished from other international crimes, even though their direct application raises partly the same questions.

It should be noted that this study focuses on the category of core crimes, rather than their specific definition in the ICC Statute. Accordingly, the term core crimes in this study refers to the crimes of genocide, crimes against humanity and war crimes under international law generally. These crimes are enumerated in articles 6-8 of the ICC Statute and are further specified in the Elements of Crimes, but are also regulated by various other sources, including custom. While largely similar, there are significant differences in the way these different sources define the core crimes. 58 In the particular case of war crimes, the ICC Statute covers only a part of all war crimes under international law. Again, there is no need at this point to define the crimes in detail, as the divergence between their sources is one of the objects of this study rather than a limiting premise. Instead, I will outline the central characteristics of each crime, the most important contemporary treaties governing them, and the most obvious points of divergence between different definitions. I will give a more substantial analysis of the category of core crimes in Chapter 5.

Genocide concerns the intentional destruction or extermination of a specific group, or part of that group. 59 The primary definition of genocide was included in Art. 2 of the 1948 Genocide Convention and subsequently reproduced in Art. 4 ICTY Statute, Art. 2 ICTR Statute and Art. 6 ICC Statute. Its central characteristics are (1) the specific intent to destroy a group and (2) the specific character of that group, defined in these treaties as national, ethnical, racial or religious. Genocidal acts include killing as well as several

55 See Haveman and Kavran 2003; Röling 1979, p. 169.
56 See on the various definitions of such crimes Triffterer 1989, p. 47 and Hollán 2000.
57 See below, Chapter V, para. 3.3.
58 Various authors have analyzed the discrepancies between the ICC Statute (and Elements of Crimes) and customary international law. See e.g. Bothe 2001; Cassese 2001b; Cassese 2001a; Fischer 2000.
59 Cassese 2001b, p. 335.
other acts enumerated in the provisions mentioned above and do not require a connection to armed conflict. One of the most important points of possible divergence concerns the character of the group, as both numerous national laws on genocide and the case law of the ad hoc tribunals have broadened the definition of protected groups, raising the question whether customary law grants broader protection than the identical treaties.\(^{60}\)

A crime against humanity requires (1) a widespread or systematic attack (2) against a civilian population. Such an attack must be the result of a plan or policy of a State or organization. Crimes against humanity are defined *inter alia* in Art. 5 ICTY Statute, Art. 3 ICTR Statute and Art. 7 ICC Statute.\(^{61}\) These provisions list examples of inhumane acts like murder, torture and enslavement. There are several contentious elements in the definition of crimes against humanity, including the open-ended criminalization of “other inhumane acts,” the required scale of the crimes and the requirement of a nexus to armed conflict.\(^{62}\) At its conception, the concept of crimes against humanity was connected to armed conflict, but this no longer seems to be the case. Finally, a controversial point concerns the entity behind the attack. Traditionally, crimes against humanity could only be committed by States.\(^{63}\) Today, certain organizations also qualify as potential perpetrators, but there is no consensus on their required characteristics.\(^{64}\)

War crimes are connected, obviously, to a state of international or internal armed conflict. Generally speaking, they involve prohibited methods and means of warfare (Hague law) and violations of the law of protected persons (Geneva law).\(^{65}\) Hague law concerns rights and duties of the military in a conflict, stemming for example from the principle of proportionality and the principle that active combatants and military objectives are the only legitimate targets and are therefore to be distinguished from civilians. Geneva law consists of basic obligations designed to protect victims of armed conflict, namely the wounded, sick, shipwrecked, prisoners of war and civilians. The main treaties regulating war crimes are the Hague Conventions of 1907, the four Geneva Conventions and the First Additional Protocol, Art. 2 and 3 ICTY Statute, Art. 4 ICTR Statute and Art. 8 ICC Statute.\(^{66}\) Important questions stem *inter alia* from the differences between war crimes committed in international armed conflict, including the particular regime of grave breaches of the Geneva Conventions,\(^{67}\) and the more recent category of war crimes committed in internal armed conflict.\(^{68}\)

Several other international crimes can overlap with the three core crimes, even if they are not subject of study in their own right. Apartheid and certain cases of slavery are species of crimes against humanity. Torture can qualify as a war crime or a crime against

\(^{60}\) See below, Chapter II, para. 2.2.b and note 732; Schabas 2001, p. 447-471; Cassese 2001b, p. 341-347. See also Tournaye 2003 (on varying interpretations of genocidal intent). See generally Schabas 2000b.


\(^{62}\) See below, note 582.

\(^{63}\) See below, notes 583 and 584; Lattanz 2001, p. 485-486 and Cassese 2001a, p. 375-376.


\(^{65}\) See below, notes 583 and 584; Lattanz 2001, p. 485-486 and Cassese 2001a, p. 375-376.

\(^{66}\) See for an overview of relevant treaties Sassóli and Bouvier 1999, p. 101-104.

\(^{67}\) See Art. 50 GC I, Art. 51 GC II, Art. 130 GC III and Art. 147 GC IV.

\(^{68}\) See Kress 2001; Bothe 1995.
humanity. Arguably, the same is true for certain attacks commonly labelled as terrorism.\textsuperscript{69} While terrorism is a topical issue in ICL, there are good reasons not to add it to the core crimes studied here. First, the definitional unclarity is far greater for terrorism than for the core crimes. International instruments define terrorism in different ways, while numerous States have anti-terrorism laws that are so broad as to cover many crimes that clearly fall outside the scope of ICL.\textsuperscript{70} Second, the developments in the regulation of terrorism since 2001 are so recent as to set it apart from the far more developed core crimes, both concerning its status as an international crime and the development of the resulting interaction between international and national law. The crime of aggression, or crimes against peace,\textsuperscript{71} has been excluded for obvious reasons. Not only does its lack of definition in the ICC Statute reflect its unclear status under general international law, there is also an almost complete absence of recent meaningful practice in national legal systems in this regard.\textsuperscript{72}

As mentioned above, this study focuses on the international criminalizations of, rather than all international rules pertaining to, the core crimes. In other words, the focus is on the situation where the substantive criminality for the prosecution of an individual in a national court is based (in part) directly on international law. The distinction between substance and procedure in criminal law is often unclear and varies in different legal systems.\textsuperscript{73} For my definition of direct application, an international criminalization comprises the definition of the crime, forms of participation and rules on jurisdiction. Rules that are of a disputed character but further from the core of substantive criminality, like defenses and statutes of limitations, will not be included.

The inclusion of jurisdiction is imperfect because it straddles the line between substance and procedure. It is necessary, however, because in practice jurisdiction and substantive criminality can be intertwined in complex combinations. In Senegal, for example, an investigating judge in 2000 indicted former Tchadian dictator Hissène Habré for complicity in torture, following the victims’ assertion that universal jurisdiction for the national criminalization of torture could be derived directly from the Torture Convention.\textsuperscript{74} Such direct application of a treaty cannot be construed as concerning simply the jurisdictional reach of national criminal law, but implicitly derives substantive

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\textsuperscript{69} See Keijzer 2003 and Delmas-Marty 2002a, p. 292. Yet, in this regard many commentators, including those asserting that the Al-Qaeda attacks on the U.S. in 2001 amounted to crimes against humanity, ignore the requirement that the attacks must be carried out by an organization with State-like features. See for a critical analysis on this point Schabas 2002b. See also Mexico, Supreme Court, \textit{In re Cavallo (Amparo en Revision 140/2002)}, 10 June 2002 at 911 (concluding that the crime of terrorism can not be subsumed into that of genocide).
\textsuperscript{71} See Art. 6 Nuremberg Charter.
\textsuperscript{72} See generally Politi 2004; Müller-Schieke 2001 and Antonopolous 2001.
\textsuperscript{74} This indictment was subsequently annulled by the higher courts, see below, Chapter II, para. 3.3.e.
\end{flushright}
criminality from international law. Likewise, the trial of Imre Finta in Canada was based on then section 7(3.71) of the Canadian Criminal Code (now repealed), which extended Canadian jurisdiction over ordinary crimes like kidnapping, unlawful confinement, and manslaughter to extraterritorial acts that constitute war crimes or crimes against humanity.\footnote{Canada, Supreme Court, \textit{R. v. Imre Finta}, 24 March 1994.} It would be mistaken to see this as simply a jurisdictional provision governing manslaughter and other ordinary crimes, where it in fact regulates the substantive criminality of extraterritorial war crimes and crimes against humanity.\footnote{Id., para. 58 (Supreme Court confirms holding of the Court of Appeal that “s. 7(3.71) of the \textit{Criminal Code}, is not merely jurisdictional in nature, but rather creates two new offences, a crime against humanity and a war crime, and defines the essential elements of the offences charged.”). See also Fletcher 2002, p. 454-458; Cotler 1996, p. 465.} Of course, the inclusion of jurisdiction at this point is a matter of definition. Throughout the study, jurisdiction will be distinguished from 'pure' substantive criminality where necessary, for example with regard to the principle of legality.

The possible direct application of international criminalizations can come up not only in core crimes prosecutions, but also in extradition proceedings, namely to satisfy the double criminality requirement posed by many States. These cases, for example the \textit{Pinochet III} judgment of the English House of Lords, provide valuable information about the topic at hand. However, the legal framework for extradition proceedings is not comparable to that of prosecutions. Unlike the principle of legality, the double criminality rule has no basis in international law where it concerns international crimes.\footnote{See Poutiers 2000, p. 945-947. Cf. Lauterpacht 1944, p. 89.} In practice, the two proceedings are treated differently both in international law and in many national legal systems.\footnote{See e.g. U.S., Court of Appeals (First Cir.), Sabatier v. Dabrowski, 15 November 1978, 586 F.2d 866 at 869 (extradition is not considered a criminal proceeding).} Therefore, extradition proceedings will serve as useful sources but are not themselves object of study.

I will likewise take into account the practice of the so-called “internationalized” courts\footnote{See principally Romano, \textit{et al.} 2004; Ambos and Othmann 2003.} where relevant, but not treat it as an independent object of study. Although these courts take up an interesting position on the crossroads of national and international criminal law, their legal framework and the problems they experience in their work are quite unique.\footnote{See below, notes 649-650 and accompanying text.} In particular, the law they apply is for an important part based on treaties and/or regulations of international interim administrations. Their application of international criminal law can therefore be compared with that by national courts only to a limited extent.

Deriving substantive criminality from international law for a prosecution is in many aspects the ‘hard case’ that makes questions, for example regarding the principle of legality, most pressing. This limitation thereby allows for a thorough review of the pertinent problems and implications, while at the same time providing concreteness and a necessary curtailment of the workload. Many considerations on this subject apply,
mutatis mutandis, to procedural norms of international criminal law, and even to other norms of public international law more generally.

All in all, restricting the scope of the study to the direct application of criminalizations of the core crimes will render a homogeneous and rich analysis of the relevant rules of international law without casting the net to wide. Yet, while the subject of this study is quite specific, its general theoretical nature requires attention for the broader context. Therefore, I will focus on substantive criminality for the core crimes, but draw parallels to other international crimes and rules where necessary to describe the relevant legal framework or analyze the underlying issues. Likewise, as the aim here is to sketch the dynamics of direct application of the core crimes rather than give a sharp delineation of their content, I will give specific cases which likely but not conclusively concern core crimes the benefit of the doubt. For example, cases of large-scale torture that may or may not constitute crimes against humanity will be included, insofar the legal analysis in such cases is relevant for core crimes law.

6 Structure

First, I will give an overview of legislative and judicial State practice regarding the core crimes in Chapter 2. This description of practice will show the various ways in which international and national law are used in core crimes prosecutions. In short, core crimes can be prosecuted on the basis of national law, either as ordinary crimes like murder or specifically as international crimes, or directly on the basis of international criminal law. The emphasis in this descriptive part will naturally lie on direct application and include legislation, resulting national prosecutions or a lack thereof.

Chapter 3 will examine which policy considerations govern the choice between the different legal bases laid out in Chapter 2. I will list the factors that guide legislators, courts and prosecutorial authorities in practice. I will focus mostly on the considerations that are specific for international criminal law and particularly the core crimes, while merely signalling those considerations that apply to the direct application of public international law in general.

Chapter 4 constructs the public international law framework of direct application by examining the doctrines and principles that determine the obligations of States in implementing international law in general. It will analyze both the current state of international law and doctrine regarding the role of international law in the national legal order. Topics of analysis include the debate on monism versus dualism, the doctrine of self-executing treaties and the general rule that States are free to implement their international obligations in any way they see fit. I will also set forth the limits of this freedom, most notably the principle of consistent interpretation which obliges national courts to interpret national law in conformity with international law.

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81 Note that I draw on broader case law in Chapter 2 in order to give an accurate overview of the situation in different States.
Chapter 5 will focus on the particular field of international criminal law to identify the characteristics that set it apart from public international law in general. It will analyze the characteristics of the core crimes and their consequences for the implementation of those crimes in the national legal order. Topics of analysis include the obligations under international law to prosecute core crimes and the consequences of the *jus cogens* status of the core crimes.

Chapter 6 is devoted entirely to the principle of legality (*nullum crimen, nulla poena sine lege praevia*), as this principle is of great importance for the analysis of direct application of international criminal law in national courts. Focusing on the core crimes, it will examine the application of the principle of legality in national and international practice, its content in international law, and its implications for direct application of core crimes law.

In Chapter 7, I will bring the different strands together and reflect on the international legal framework governing direct application of core crimes law, the future prospects of direct application and its broader implications for international criminal law and public international law in general.
Chapter II
Practice: Core Crimes Prosecutions in National Courts

1 Introduction

This Chapter gives an overview of the different possible legal bases for the national prosecution of core crimes. To this end, I will examine legislative and judicial practice from diverse countries. The aim here is to sketch the dynamics between international and national law and the resulting complications, and therefore I will include relevant jurisprudence and legislation even if they are no longer valid today. The reader who is looking for broader and solely up-to-date information on core crimes prosecutions and relevant legislation will find useful references in the footnotes. 82

While I will focus on the national prosecution of genocide, crimes against humanity and war crimes in the last decades, I do not limit myself strictly to these cases, in order to give a thorough overview of relevant practice. Such a broadening of perspective is necessary, since many countries have no (recent) case law on the specific question of direct application of core crimes law for a national prosecution. Therefore, the question must often be explored with resort to other precedents, for example dealing with other international crimes or extradition instead of prosecution, insofar as relevant for the core crimes.

This Chapter is primarily structured around the different ways national and international law interact as a basis for prosecution. Core crimes can be prosecuted in national courts on the basis of national criminal law (para. 2), or through direct application of international criminal law (para. 3). As to the first, core crimes prosecuted on the basis of national law can be charged both as ordinary crimes (para. 2.1, e.g. murder in a national penal code) or as international crimes (para. 2.2, e.g. genocide in a national penal code). Direct application of international criminalizations normally takes place through a rule of reference in national law, which can be very specific (para. 3.2) or more general (para. 3.3). 83

As will become clear, the source of the substantive criminality (national or international law) and the designation of the crime (ordinary v. international crime) yield different possible legal bases for prosecution, 84 but these categories are not easily separable. Many

83 See above, Chapter I, para. 4.
prosecutions derive substantive criminality from a combination of national and international law. For example, direct application of international law may furnish the definition of the crime, while national criminal law provides the rules on jurisdiction and forms of participation. Moreover, multiple charges may involve different categories, for example a charge of genocide under national law and of war crimes under international law. Thus, this categorization to a certain extent creates artificial boundaries in a complicated continuum of different combinations of national and international law. Given the complexity of the interaction of international and national law in national prosecutions and the need for an analytical framework, this imperfection is unavoidable. It is important, however, to view the above categorization as one of different techniques to establish substantive criminality that can be combined, rather than as adequate labels for particular prosecutions. Accordingly, some cases will appear in multiple categories.

I will now examine legislative and judicial practice concerning core crimes prosecutions on the basis of national and international law. The part on national law serves mainly to outline the alternatives to direct application and complement the picture of legal bases for national prosecutions, and thus will receive only limited attention. The part on international law will form by far the greatest part of this Chapter. I will pay most attention to direct application of international criminalizations on the basis of a general rule of reference, as it is the most complex and disputed form of direct application. That part, para. 3.3, is subdivided in an overview of different countries and regions to give a thorough description of relevant practice.

2 Prosecution on the Basis of National Law

2.1 Prosecution as an Ordinary Crime

Core crimes concern acts that are generally punishable under various national penalizations, such as murder and assault. Accordingly, core crimes can be, and often are prosecuted as ordinary crimes. Many national prosecutions in the aftermath of World War II charged the defendants with ordinary rather than international crimes. Defendants that were prosecuted for their involvement in the widespread torture during the Greek Colonel’s regime in the period 1967-1974, which arguably amounted to crimes against humanity, were charged with such crimes as repeated abuse of authority,

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85 See Frände 2003, p. 35-44 (providing a detailed overview of ordinary crimes in Finnish law that correspond to international crimes). See also Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, 28 C.R. (4th) 265 (1994), La Forest J. (dissenting), para. 256:

"It is evident that compendious expressions like "murder, extermination, enslavement, deportation, persecution, or any other inhumane act or omission" include acts and omissions that comprise such specific underlying crimes as confinement, kidnapping, robbery and manslaughter under our domestic system of law."

France, Court of Cassation, Touvier (No. 1), 6 February 1975, Bull. crim., no. 42 ("[C]rimes contre l'humanité […] sont des crimes de droit commun commis dans certaines circonstances et pour certains motifs précisés dans le texte qui les définit").

86 See numerous examples in Lippman 1999.
unconstitutional detention and causing serious physical injury. In the United States, Lt. Calley was convicted for his involvement in the infamous My Lai massacre in the Vietnam war on the basis of murder and assault, where he could have been charged with war crimes. International criminal law was likewise ignored in the prosecution of a Russian colonel on the charges of rape and murder of a Chechnyan civilian. This case ended in 2003 in the final confirmation of a 10 year prison sentence. Amidst serious allegations of the widespread use of torture by U.S. forces against Iraqi detainees in 2004, possibly constituting war crimes and/or crimes against humanity, a limited number of military personnel was court-martialed for crimes not of an international nature. Charges included conspiracy, dereliction of duty, cruelty, maltreatment, assault, and indecent acts. These are only a few examples, while the list of prosecutions on the basis of ordinary crimes is long and growing.

Naturally, ordinary crimes are always available as a basis for the prosecution of criminal acts committed within the prosecuting State, since criminal law as a general rule has (at least) territorial application. Ordinary crimes do not normally provide a legal basis for the prosecution of extraterritorial acts amounting to international crimes. Yet, many States declare the provisions of their criminal codes to be applicable to (certain) extraterritorial conduct that constitutes an international crime. Japan, for example, has included Art. 4 (2) in its Penal Code, which supplements the applicability of the Code to crimes committed in Japan, by Japanese or against the Japanese State as follows:

"In addition to those provided for in the preceding three Articles, this Code shall also apply to every person who has committed outside Japanese territory those crimes mentioned in Book II which are considered to be punishable by a treaty even if committed outside Japanese territory."

Thus, this provision establishes extraterritorial jurisdiction over treaty crimes, which are then prosecuted as ordinary crimes. Similar provisions can be found in many other legal systems.

Numerous States have given their courts jurisdiction to prosecute specific extraterritorial war crimes, particularly those committed in WWII, as ordinary crimes. For example, the UK's 1991 War Crimes Act provides that proceedings for murder may be brought for certain offences committed in German-held territory in WWII, as long as these constituted "a violation of the laws and customs of war." In R. v. Sawoniuk (2000), a

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88 See U.S. v. Calley, 46 C.M.R. 1131, 1138 (1973) ("[A]ppellant was convicted by general court-martial of three specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134, Uniform Code of Military Justice, 10 USC §§ 918 and 934, respectively. [...] Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ").
90 See Paust 2004.
91 See Murphy 2004, p. 595.
93 See below, footnotes 178 to 186 and accompanying text.
94 Section 1:
British Court of Appeal upheld the conviction of the defendant for two counts of murder in Belorussia for his role in the holocaust on the basis of this provision.95 On the basis of a comparable Canadian statute, the accused in Regina v. Finta was charged under the Criminal Code in Canada with (and acquitted of) two counts each of unlawful confinement, robbery, kidnapping and manslaughter in Hungary for his role in the holocaust.96 As can be seen in these cases, the international character of the core crimes often surfaces in some way during their prosecution, even when they are charged as ordinary crimes.97 Where a prosecution is based on national provisions like the ones described above, it must be ascertained that the alleged acts fulfill international criminalizations in order to establish extraterritorial jurisdiction.98 In other cases, international criminal law is applied as a means of interpretation.99

Sometimes, the fact that the prosecuted act (allegedly) constitutes an international crime is merely mentioned by a prosecutor or a judge, without practical consequences for the outcome of the case. In Pius Nwaoga v. The State (1972), the Nigerian Supreme Court upheld a conviction for a murder during civil war and stated obiter that this killing amounted to a crime against humanity.100 In the Haitian trial for the Raboteau massacre,101 in which several members of the Haitian army were convicted for the organized killing of civilians, the defendants were charged and convicted for ordinary crimes but the judgment expressed the view of the court that the acts under consideration amounted to crimes against humanity.102 This explicitation of the international dimension of the crimes was actively sought by the prosecution with the idea that it might facilitate

97 See also Denmark, Eastern Division of High Court (Third Chamber), The Prosecution v. Saric, 25 November 1994 (resort to provisions from GC III and GC IV in order to substantiate charges of causing grievous bodily harm of a grave nature under the Danish penal code).
99 See e.g. Belgium, Court of Cassation, Van Beggelaer v. Belgian State, 27 March 1950, partial English translation in ILR 1950, no. 142 (use of Art. 52 of the Hague Regulations for the interpretation of a national provision criminalizing aid and assistance to the enemy).
100 Nigeria, Supreme Court, Pius Nwaoga v. The State, 52 ILR 494-497 at 497:
"To our mind, deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished."
Clearly, this qualification is doubtful at the very least.
102 Haiti, Gonaives Tribunal of First Instance, Raboteau, 9 November 2000, reported in Concannon 2001.
the extradition of some of the defendants who were absent and had sought refuge in other countries.\footnote{See e-mail interview of 30 March 2003 with Brian Concannon, one of the lawyers involved in the case on behalf of the Bureau des Avocats Internationaux, on file with the author.}

In conclusion, international crimes are often prosecuted as ordinary crimes. Their international dimension surfaces in such trials in various ways and gradations, varying from direct application of international criminalizations in order to establish jurisdiction to merely a reference in passing or not at all.

\subsection*{2.2 Prosecution as an International Crime}

\subsubsection*{2.2.a International Crimes in National Law}

Many States define and penalize international crimes in their national criminal law. States differ greatly in the extent to which they model these penalizations on international law. Numerous States parties to treaties such as the Genocide Convention and the ICC Statute copy the definitions of (most of) the crimes therein verbatim into their national laws.\footnote{See e.g. the Dutch International Crimes Act (2003).} Others base their penalizations on these treaty provisions, but make smaller or bigger alterations.

Some variations appear minor but may nevertheless bear considerable practical consequences. The French definition of crimes against humanity, for example, requires the constitutive acts to be both widespread \textit{and} systematic,\footnote{France, Art. 212 (1) Code Penal: \begin{quote} La déportation, la réduction en esclavage ou la pratique massive et systématique d'exécutions sommaires, d'enlèvements de personnes suivis de leur disparition, de la torture ou d'actes inhumains, inspirées par des motifs politiques, philosophiques, raciaux ou religieux et organisées en exécution d'un plan concerté à l'encontre d'un groupe de population civile sont punies de la réclusion criminelle à perpétuité. \end{quote}} whereas the generally accepted international definition requires them to be "part of a widespread or systematic attack."\footnote{See ICC Statute Art. 7 (emphasis added).} Arguably, this minor textual divergence can considerably raise the threshold for finding a crime against humanity.

On the other hand, some national definitions of international crimes bear only a vague resemblance to relevant international instruments. Art. 448 of the Criminal Law of the People's Republic of China provides that "those mistreating prisoners of war, if the case is serious, are to be sentenced to three years or fewer in prison."\footnote{Compare to Art. 130 GC III: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.} In a few cases, the
relationship between a national criminalization and its international counterparts is ambiguous. Germany, for example, criminalizes the preparation of a war of aggression. While the German legislature apparently did not intend to implement the crime of aggression under international law, Germany's Chief Federal Prosecutor has later construed this provision in conformity with ICL. Occasionally, national criminalizations are phrased in such a way that they appear to correspond to international crimes, while they in fact bear no relationship to international criminal law at all. In Islamic law, for instance, homicidal crimes against individual Muslims are regarded as crimes against all humanity. Therefore, an “ordinary” murder may be labelled a crime against humanity under Islamic law. It is clear, however, that this designation does in no way correspond to the concept of crimes against humanity under international law. Caution is warranted, therefore, in the analysis and application of international crimes under national law.

A sliding scale is also found between national provisions defining international crimes and rules of reference requiring direct application of international criminalizations. National law may well define a core crime and at the same time refer to its criminalization in international law. For example, the German Code of International Crimes defines as a war crime the killing in connection with an armed conflict of “a person who is to be protected under international humanitarian law.” As only the protected status of the victim and not the entire criminalization is taken from international law, it seems this provision defines the international crime rather than incorporates it. This is somewhat more difficult to say for the Canadian provision on genocide, which both defines the essence of the crime and refers to its international criminalization. Finally, the Ethiopian provision on war crimes clearly combines the two, as it both fully defines the crimes and refers to their international criminalizations. A similar

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108 See Art. 80 German Criminal Code.
111 Art. 8 (1) sub 1.
112 See Canadian Crimes Against Humanity and War Crimes Act, Art. 4 (3): “Genocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations. . .
113 Art. 282 Ethiopian Penal Code. War crimes against the civilian population: Whosoever, in time of war, armed conflict or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions:

(a) killings, torture or inhuman treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health; or
(b) willful reduction to starvation, destitution or general ruination through the depreciation, counterfeiting or systematic debasement of the currency; or
(c) the compulsory movement or dispersion of the population, its systematic deportation, transfer
combination of definition and referral for the core crimes is found in the Belgian Penal Code.14

2.2.2 Case study: Genocide

I will further illustrate the spectrum of varying correspondence between international crimes in national law and the underlying international law by looking in some detail at national prohibitions of genocide, in particular the protected groups in these national provisions, and some of the resulting prosecutions.

The Genocide Convention limits the concept of genocide to the (intended) destruction of "national, ethnic, religious or racial" groups15, and the ICC Statute reproduces this definition.16 Many States follow this wording in their national legislation.17 Others, however, have altered the definition of genocide in their national legislation, making it either overinclusive or underinclusive vis-a-vis international law. First, many national provisions extend the category of protected groups to ones that are not included in the Convention, like "political groups",18 "social groups"19 and various other groups.20

or detention in concentration camps or forced labour camps; or
(d) forcible enlistment in the enemy's armed forces, intelligence services, or administration; or
(e) denationalization or forcible religious conversion; or
(f) compulsion to acts of prostitution, debauchery or rape; or
(g) measures of intimidation or terror, the taking of hostages or the imposition of collective punishments or reprisals; or
(h) the confiscation of estates, the destruction or appropriation of property, the imposition of unlawful or arbitrary taxes or levies, or of taxes or levies disproportionate to the requirements of strict military necessity,
is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

See also Art. 283-285 and Mayfield 1995, p. 573.
14 See Art. 136bis, 136ter and 136quater (inserted by the Law of 5 August 2003).
15 Genocide Convention Art. 2:
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

See Schabas 2000b, p. 102-150.
16 See Art. 6 ICC Statute.
17 See a.o. the national provisions on genocide of Cuba, Albania, Australia, Austria, Azerbaijan, Brazil, Croatia, Denmark, Estonia, Fiji Islands, Hungary, Israel, Italy, Kyrgyzstan, Liechtenstein, Luxembourg, Mali, Mexico, Netherlands, New Zealand, Paraguay, Portugal, Russia, Slovenia, Spain, Sweden, Tajikistan.
See also Schabas 2000b, p. 350-351.
18 See e.g. Cote d'Ivoire, Code Pénal, Livre II - Titre 1er - Chapitre I: Infractions contre le droit des gens, Art. 137:
"Est puni de la peine de mort quiconque, dans le dessein de détruire totalement ou partiellement un groupe national, ethnique, confessionnel ou politique...";
Colombia, Código Penal, Art. 101 (Amended by Law 599 of 24 July 2000):
Second, several States broaden the protection against genocidal conduct to the open-ended category of “groups determined by any other arbitrary criterion.” Finally, there are also States which have curtailed rather than extended the definition of genocide in their national laws. Bolivia has omitted racial groups from its prohibition of genocide, El Salvador and the Czech Republic have omitted ethnic groups, and Nicaragua has omitted both racial and national groups.  

“Genocidio. El que con el propósito de destruir total o parcialmente un grupo nacional, étnico, racial, religioso o político…”;  
“Any person who, with the intent to destroy, in whole or in part, a national, ethnic, racial, political or religious group or a group of persons with a definite philosophical conviction…”;  
“Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group…”.

But see below, note 142 on the diverging versions of this provision in Amharic and English.  

See Peru, Código Penal, Art. 319o (Amended by Law No. 26926 of 19 February 1998):  
“Será reprimido con pena privativa de libertad no menor de veinte años el que, con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, social o religioso…”;  
Latvia, Penal Code, Art. 71:  
“Par genoc du, tas ir, part ū darb bu nol k piln gi vai da ji izn cin t k du nacion lu, etnisku, rases, soci lu…”;  
“Anyone, who with the intent to destroy all or part of people, belonging to any national, ethnic, racial, religious, social or political groups…”.

See Austria, Art. 321 (1) Penal Code– Genocide:  
“Whoever, with the intention to destroy, in whole or in part, a group determined by the belonging to a church or religious community, to a race, an ethnic group, a tribe or a state…”  
“Quien tome parte en la destrucción total o parcial de un determinado grupo de seres humanos, por razones de raza, nacionalidad, género, edad, opción política, religiosa o sexual, posición social, situación económica o estado civil…”;  
“A person who, with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, a group resisting occupation or any other social group…”;  
“Genocide: The commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group…”.

See France, Code Pénal, Article 211-1 :  
“Constitue un génocide le fait, en exécution d’un plan concété tendant à la destruction totale ou partielle d’un groupe national, ethnique, racial ou religieux, ou d’un groupe déterminé à partir de tout autre critère arbitraire…”.

Similar provisions exist in the national laws of Belarus (see Criminal Code, Art. 127), Burkina Faso (see Penal Code, Art. 313) and the Congo (see Law No. 8 - 98 of 31 October 1998 on the definition and the repression of genocide, war crimes and crimes against humanity, Art. 1). Translations of all these provisions are available at http://www.icrc.org/ihl-nat.

“A person who for the purpose of entirely or partially destroying a race or national, ethnic or religious group or another comparable group…”;

See Bolivia, Código Penal, Art. 138 (omitting racial groups):  
“El que con propósito de destruir total o parcialmente un grupo nacional, étnico o religioso…”;  
El Salvador, Código Penal, Art. 361 (omitting ethnic groups):

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The variations mentioned so far concern solely the protected groups in the definition of genocide. Further divergence between international law and corresponding national criminalizations becomes apparent when analyzing the acts that make up genocidal conduct and other elements of the crime. While a comprehensive survey falls outside the scope of this study, I will give some pertinent examples. The United States has copied the definition of the Genocide Convention into its federal criminal law, but has *inter alia* qualified the criterion of intent to destroy in whole or in part a specific group by requiring "*specific* intent to destroy in whole or in *substantial* part." Opinions differ on the extent to which these additional requirements separate the U.S. definition from its international counterpart. France requires acts to be "pursuant to a concerted plan" in order to amount to genocide, whereas the existence of a plan is neither required under the Genocide Convention nor under customary law. Ethiopia has included as a genocidal act "the compulsory movement or dispersion of peoples or children," whereas the Genocide Convention proscribes the forcible transfer of children only.

Actual prosecutions on the basis of national criminalizations of genocide, and attempts thereto, reflect the variation among these provisions. This will be illustrated by a short review of (attempted) genocide prosecutions in Germany, Spain and Ethiopia.

In Germany, genocide prosecutions have been undertaken on the basis of Art. 220a of the German Penal Code (now repealed but reinstated as Art. 6 German Code of International Law).

"El que con el propósito de destruir parcial o totalmente un determinado grupo humano, por razón de su nacionalidad, raza o religión...";

Czech Republic, Criminal Code, Part II, Section 259 (1):
"Whoever, with intent to annihilate, fully or partially, a national, racial or religious group..."

Nicaragua, Código Penal, Art. 549 (omitting racial and national groups):
"Comete el delito de genocidio y será penado con presidio de 15 a 20 años, el que realice actos o dicte medidas tendientes a destruir parcial o totalmente un grupo étnico o religioso...".

123 See United States Code, Chapter 50A - Section § 1091 (a):
"Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such...".

While the U.S. has made a similar declaration of understanding with regard to the Convention, the effects of that declaration are unclear. No prosecution for genocide has ever been undertaken on the basis of this article.


125 See above note 121 ("en exécution d'un plan concerté").

126 See Kriangsak 2001, p. 76. Cf. ICTR, Trial Chamber, *Kayishema and Ruzindana*, 21 May 1999, para. 94:
"It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation."

127 Compare Art. 281 Ethiopian Penal Code with Art. 2 Genocide Convention. That the forcible transfer of adults is not in itself sufficient to constitute genocide is borne out by its explicit rejection during the preparation of the Genocide Convention, its exclusion from the ICC Statute and the fact that considerable discussion arose in the ICC PrepCom over the age limit below which transfer would constitute genocide. However, forcible transfer of adults may form an element of genocide when its genocidal quality is established by context. See Rückert and Witschel 2001, p. 69-70 and Haile 2000, p. 48-49.

This article copies the definition from the Genocide Convention almost literally, but contains a minor alteration. Where the Convention criminalizes the genocidal act of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” Art. 220a speaks of “Lebensbedingungen […] die geeignet sind” to bring about that physical destruction (both emphasis added). The word “geeignet” translates back to English as apt, able, or likely, and thus lowers the threshold for finding the infliction of destructive conditions. The conditions no longer need to be calculated to bring about the destruction of the group, but must merely be capable of doing so.

The German courts have in several cases applied the divergent translation in its literal meaning instead of interpreting it in conformity with the Genocide Convention. Some commentators conclude that the courts in doing so have convicted defendants of genocide on the basis of universal jurisdiction for conduct that did not amount to genocide under international law. It should be noted, however, that the expansive approach taken in

129 Art. 220a Völkermord:
“(1) Wer in der Absicht, eine nationale, rassische, religiöse oder durch ihr Volkstum bestimmte Gruppe als solche ganz oder teilweise zu zerstören,
1. Mitglieder der Gruppe tötet,
2. Mitgliedern der Gruppe schwere körperliche oder seelische Schäden, insbesondere der in § 226 bezeichneten Art, zufügt,
3. die Gruppe unter Lebensbedingungen stellt, die geeignet sind, deren körperliche Zerstörung ganz oder teilweise herbeizuführen,
4. Maßregeln verhängt, die Geburten innerhalb der Gruppe verhindern sollen,
5. Kinder der Gruppe in eine andere Gruppe gewaltsam überführt,
wird mit lebenslanger Freiheitsstrafe bestraft.
(2) In minder schweren Fällen des Absatzes 1 Nr. 2 bis 5 ist die Strafe Freiheitsstrafe nicht unter fünf Jahren.”
[English translation on the ICRC website of Art. 220a Genocide [repealed]:
(1) Whoever, with the intention to destroy, in whole or in part, a national, racial, religious or ethnically distinct group as such,
1. kills members of a group;
2. inflicts serious physical or mental injury, especially of the type described in § 226, on members of a group;
3. subjects the group to conditions of life likely to bring about its physical destruction in whole or in part;
4. imposes measures intended to prevent births within the group;
5. forcibly transfers children from the group to another group,
shall be punished by imprisonment for life.
(2) Not less than five years’ imprisonment shall be imposed in less serious cases falling under subparagraph (1), numbers 2 to 5.]

130 See Ambos and Wirth 2001, p. 784-786.
131 See the prosecutions of Jorgic (Germany, OLG Düsseldorf, Jorgic, 26 September 1997, 2 StE 8/96; Germany, Supreme Court (BGH), Jorgic, 30 March 1999, 3 StR 215/98, in 19 NSZ (1999), 396-404; BGHSt 45, 64-91; Germany, Constitutional Court (BVerfG), Jorgic, 12 December 2000, 2 BvR 1290/99, in 54 NJW 2001, 1848-1853), Kusljic (Germany, BayOblG, Kusljic, 15 December 1999, 6 St 1/99; Germany, BGH, Kusljic, 21 February 2001, 3 StR 244/00, in 54 NJW (2001), 2732-2734) and Sokolovic (Germany, OLG Düsseldorf, Sokolovic, 29 November 1999, 2 StE 697; Germany, BGH, Sokolovic, 21 February 2001, 3 StR 372/00; BGHSt 46, 292-307; 54 NJW, 2728-2732). See for an analysis on this point Ambos and Wirth 2001, p. 786-789.
these decisions does not result solely from the variation in language. The German courts have also – unconnected to the divergent translation – interpreted the required genocidal intent in a broad manner. Instead of interpreting the specific intent to be the physical destruction of the group, the courts have interpreted the intent to be the destruction of the social existence of the group. While this interpretation was apparently not intended by the drafters of the Convention, it can well be reconciled with the language of Art. 2.\textsuperscript{133}

In the Pinochet case, the Spanish indictment which led to his arrest in the United Kingdom included a charge of genocide based on the definition in Art. 137 bis of the Spanish Criminal Code.\textsuperscript{134} This provision has been changed several times. At its enactment in 1971 it required “the intention of totally or partially destroying a national ethnic, social or religious group.” This formulation departed from the language of the Genocide Convention in two respects. First, by deleting the comma between national and ethnic these criteria had been merged, instead of providing two separate ones. Second, the term racial had been replaced by social. These discrepancies were later straightened out. In 1983, the word social was replaced by the word racial, and in 1995 the missing comma between national and ethnic was inserted.\textsuperscript{135} Thus, the Spanish prohibition of genocide currently mirrors the definition in the Genocide Convention, but this was not the case at the time of Pinochet’s alleged crimes.

Immediately after the Investigative Judge issued an arrest warrant against Pinochet, the public prosecutor lodged an appeal before the Audiencia Nacional, disputing among other points that the alleged conduct could amount to genocide. The Audiencia, however, approved the indictment on the basis that Pinochet’s government had targeted “national social groups”, namely those that opposed his rule.\textsuperscript{136} In doing so, the Audiencia gave a very broad interpretation of the term “national groups,” including such collectivities as AIDS patients and the elderly.\textsuperscript{137} The proceedings against Pinochet were aborted when the United Kingdom judged him unfit to stand trial and let him return to Chile.

Since 1994, Ethiopia has held large-scale trials for crimes against humanity and genocide allegedly committed during the Mengistu regime that ruled the country until 1991.\textsuperscript{138} There is only limited information available about these “Red Terror” trials, named after the repressive regime of the military council Dergue whose members and accomplices are prosecuted. So far, more than six thousand defendants\textsuperscript{139} have been charged with crimes

\textsuperscript{134} See generally Wilson 1999.
\textsuperscript{136} See Spain, Audiencia Nacional, Chilean Genocide Case, 5 November 1998, unreported, para. C (5). In addition, the indictment included an allegation of intent to destroy a religious group based on its atheist or agnostic ideology.
\textsuperscript{137} Id. See also Wilson 1999, p. 959.
\textsuperscript{139} According to a newsreport in November 2003, some 6,426 defendants – including the 106 top officials – were awaiting trial, including almost 3,000 in absentia. Meanwhile, more than 1,569 decisions have
against humanity and genocide, and alternatively with murder and other crimes against bodily integrity.\textsuperscript{140}

The charges of crimes against humanity and genocide are based on Art. 281 of the Ethiopian Penal Code (placed in Book III, Title II on Offences Against the Law of Nations).\textsuperscript{141} This provision is particular in at least three respects. First, it does not distinguish between crimes against humanity and genocide but blends them together in one crime. Second, the protected groups in the definition of genocide are not restricted to those in the Genocide Convention but include political groups. Third, there is a significant discrepancy between the English and the Amharic version of the provision. While the English version speaks of "a national, ethnic, racial, religious or political group," the Amharic version apparently indicates in relevant part that "whosoever, with the intent to destroy, in whole or in part, a social section of a multinational group having common language and custom (and) be unified by race, religion or political conviction, organizes, orders or engages..."\textsuperscript{142} While both the English and the Amharic versions of the Penal Code are authentic, the Amharic version overrides in case of discrepancies.\textsuperscript{143}

The charges brought against the first group of defendants in the trials incorporated language from both versions.\textsuperscript{144} The first charge alleged genocidal conduct against "members of various political groups whom they arbitrarily designated as anti-people and anti-revolution elements."\textsuperscript{145} The second charge alleged "intent to destroy in whole or in part a politically organized multinational social group" followed by the actual killing of "members of the political group."\textsuperscript{146} The defendants challenged the charge of genocide on two grounds.\textsuperscript{147} First, the defendants pointed to the Amharic version to argue that the

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\textsuperscript{140} See Kidane 2003, p. 676. Cf. Gouttes 1998, p. 702 (stating that in addition 54 defendants have been charged with war crimes). Apparently, some defendants have also been charged with other crimes. See Haile 2000, p. 27 and Gouttes 1998, p. 701-702.

\textsuperscript{141} Art. 281. Genocide; Crimes against Humanity

\textsuperscript{142} See Kidane 2003, p. 678, fn 60.

\textsuperscript{143} Id.

\textsuperscript{144} See Ethiopia, Central High Court, \textit{Indictment of Mengistu and 72 others}, October 1994. Unofficial translation on file with the author.

\textsuperscript{145} Id., p. 7.

\textsuperscript{146} Id., p. 8.

\textsuperscript{147} See Kidane 2003, p. 678-679.
Ethiopia's legislature had not intended to include political groups as such in the definition of genocide. Second, they argued that Art. 281 was null and void as it conflicted with the definition in the Genocide Convention, which according to Ethiopia's 1955 Constitution has a higher status than national law. The court, however, dismissed these objections, relying at least partly on a French draft of the Penal Code which also contained the reference to political groups.

It seems the inclusion of political groups was decisive for the prosecution of the crimes on the basis of genocide, as the victims could not have been classified under any of the four groups enumerated in the Genocide Convention. Prosecutions are on-going in Ethiopia.

3 Prosecution on the Basis of International Law: Direct Application

3.1 Introduction

For a proper understanding of national practice regarding direct application, it is important to keep in mind the theoretical framework of this study. Direct application in the context of this study means that a national court applies an international rule as such because it is binding law, without it being transformed into a rule of national law. Direct application often involves a rule of reference in national law. As set out above, the different legal bases for prosecution described here (ordinary crime, international crime in national law, direct application of international law) are not mutually exclusive, but on the contrary often complement each other. The Canadian Finta case provides an appropriate example of a case utilizing a combination of national and international law. It has been described above as a prosecution on the basis of ordinary crimes. At the same time, it requires direct application of international criminalizations since their fulfilment is a precondition for the exercise of jurisdiction.

Thus, direct application of international criminalizations, including the definition of the crime, jurisdictional provisions and forms of participation, does not rule out a (dominant) role for national law. The interaction of national and international law in national prosecutions takes place in a spectrum of relationships which greatly differ in their distribution and emphasis of substantive criminality and jurisdiction. I will show the role of direct application in this complicated continuum working from its narrowest and

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148 See below, note 444.
149 See Ethiopia, Central High Court, Asbete et al, 24 March 2002 (Ethiopian Calendar 15 -7-1995) (acquittal of five defendants on the facts, after they had earlier been found guilty inter alia of "planning and organizing, giving the orders and ultimately engaging in intentionally destroying, in whole or in part a national group with political foundations," charged on the basis of Art. 281 Penal Code). See also Haile 2000, p. 51; Reda 1999, p. 26 (stating that the crimes were committed neither against one of the groups designated under international law, nor with the intent to destroy the group as such). Cf. Kidane 2003, p. 683.
150 See above, p. 20.
151 See above note 96 and accompanying text.
152 See above note 73 and accompanying text.
least controversial towards its more disputed forms, namely from specific rules of reference towards general rules of reference, including unwritten ones, as a basis for direct application.

3.2 Specific Rule of Reference

Many countries allow for direct application of international criminalizations through rules of reference to specific norms of international law. In contrast to general rules of reference, specific ones give the individual an explicit indication that international law with a penal content is incorporated into the national legal order. Such specific rules of reference generally refer to international criminalizations either to furnish the substantive criminality for a prosecution or as a condition for establishing jurisdiction.

3.2.a Rule of Reference for Substantive Criminality

Numerous national laws contain rules of reference to international criminalizations as a basis for the charges to be laid in national prosecutions. These rules can vary considerably in their specificity. Some rules refer to specific treaty provisions or to particular international crimes, while others refer more generally to all treaty-based or customary criminalizations.

A narrowly tailored provision can derive substantive criminality from a concrete treaty provision. An example can be found in Hungarian law, where the criminal code refers back to specific provisions of the International Convention on the Suppression and Punishment of the Crime of Apartheid to define the crime of apartheid.\(^{153}\) Several States refer to Art. 2 Genocide Convention.\(^{154}\) Numerous States Parties to the ICC provide for criminalization of the core crimes in their national law by referring to Arts. 6-8 ICC Statute. This is the case, for example, in the United Kingdom.\(^{155}\) New Zealand allows for direct application not only of the definitions of the crimes, including the Elements of Crimes, but also of the provisions in the ICC Statute on forms of participation and other applicable rules like defences and general principles of criminal law. To achieve this result, New Zealand’s implementing legislation specifically lists every article of the ICC Statute that is to be directly applied in national prosecutions.\(^ {156}\)

Many national laws on war crimes criminalize violations of “the laws and customs of war”, the content of which is to be found in an extensive collection of both treaty and customary law. In Swiss law, Art. 109 of the Code Pénale Militaire (CPM) penalizes the

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\(^{154}\) See Schabas 2000b, p. 351.


violation of the laws and customs of war, to be found both in treaties and custom. In 1997, a trial on the basis of this article for war crimes allegedly committed in the conflict in the Former Yugoslavia resulted in an acquittal on the facts. The military prosecutor in the case fleshed out the charges under Art. 109 CPM with the 1949 Geneva Convention relative to the treatment of prisoners of war (GC III), the 1949 Geneva Convention relative to the protection of civilian persons in time of war (GC IV), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict (AP I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflict (AP II). A subsequent prosecution of a Rwandan bourgmestre resulted in his imprisonment for 14 years. Again, Art. 109 CPM formed the rule of reference for direct application of the Geneva Conventions. Like in the previous case, the Geneva Conventions were applied as a basis for prosecution themselves, not merely as an indication of customary criminalizations. The defendant was convicted of violating common Art. 3 GC's and Art. 4 AP II. Art. 109 CPM provided the applicable penalties.

Likewise, Art. 8 of the Dutch War Crimes Act (Wet Oorlogstrafrecht) criminalizes in broad terms all violations of the laws and customs of war. In 1996, a citizen of the Former Yugoslavia was prosecuted on the basis of this provision for his role in the Keratern concentration camp as well as murder and attempted rape. The District Court endorsed the prosecutor's submissions that the hostilities in Bosnia & Herzegovina amounted to a non-international armed conflict, and that the alleged crimes, if proven, constituted violations of common Art. 3 GC and therefore violations of the laws and

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157 Art. 109 CPM, titled Violations of the Laws of War (Violations des lois de la guerre):
(1) Whoever acts contrary to the provisions of any international agreement governing the laws of war or the protection of persons and property, or whoever acts in violation of any other recognized law or custom of war shall be punished with imprisonment except in cases where other provisions involving more severe sanctions are applicable. For offenses of high gravity the penalty is penal servitude.
(2) For offenses of little gravity the punishment can consist of a disciplinary sanction.
Translation from Ziegler 1998. See also Vest 2003, p. 49-50.
159 See Switzerland, Military Tribunal, Division 1 (Tribunal militaire de division I, Lausanne), In re G., 18 April 1997, ICRC Web site, La Cause (charging Art. 3 (1) sub a and c, 13, 14, 125 and 130 GC III; Art. 3 (1) sub a and c, 16, 27, 31, 32, 146 and 147 GC IV; Art. 10, 11, 75, 76, 77 and 85 AP I; Art. 4, 5 and 13 AP II).
160 See Switzerland, Tribunal militaire, Division 2, Lausanne, In re N., 30 April 1999; Switzerland, Military Court of Appeal, In re N., 26 May 2000, ICRC Web site and Switzerland, Military Court of Cassation, In re N., 27 April 2001. See also Reydams 2002.
161 See Roth and Jeanneret 2002b, p. 279.
163 Art. 8 (1) War Crimes Act:
"Anyone who commits a violation of the laws and customs of war shall be liable to a term of imprisonment of not more than ten years or a fine of the fifth category."
164 Netherlands, Arnhem District Court, Military Division (Chambers), Knezevic, 21 February 1996, NYIL 43.
customs of war. After that decision, however, a complex appeals process followed, mainly concerning the technical questions whether the War Crimes Act applied to conflicts to which the Netherlands was not a party and whether civil or military courts were competent in ensuing prosecutions. The case reached the Supreme Court twice, which eventually decided that involvement of the Netherlands was not a condition for the exercise of jurisdiction and that the military courts were competent in these prosecutions. After an earlier negative decision, however, the defendant had been released and when the continuation of the prosecution was ordered, he had already fled the country. The War Crimes Act has since been repealed, but the new International Crimes Act contains a similar provision.

Similar rules of reference to the laws and customs of war can be found in many other States. References to particular crimes can also incorporate far more limited international criminalizations. The Polish Penal Code, for example, threatens with imprisonment anyone “who, against the prohibition by international law or by the provision of law, produces, stockpiles, acquires, sells, retains, transports or sends means of mass destruction or means of combat.” Yet, even if the language of this provision refers to a clearly circumscribed set of acts, this rule of reference still, like those to the laws and customs of war, requires an analysis of all sources of international law to find the relevant rules.

An unusually broad rule of reference can be found in Art. 156 (3) of Venezuela’s Penal Code, which threatens imprisonment for a period between one and four years to everyone who violates a treaty to which Venezuela is a party “in a manner which entails the responsibility of the State.” On its face, this provision appears to criminalize violations of all treaty norms that lead to State responsibility, not just those treaty norms

165 See Netherlands, Arnhem District Court, Military Division (Chambers), Knezevic, 21 February 1996, NYII ?, para. 5: “The facts as described and defined in detail in the application entail an act in contravention of the provisions of the common article 3 of the Geneva Conventions and would, if proved, constitute, in the opinion of the court sitting in chambers, a violation of the laws and customs of war, as referred to in section 8 of the War Crimes Act.”

See also para. 6.3.

166 Netherlands, Supreme Court, Knezevic II, 11 November 1997, NJ 1998/463, para. 5.3, 6.3 and 7.3. The direct application of the Geneva Conventions was not disputed on appeal (see para. 6.1). See also Netherlands, Supreme Court, Knezevic I, 22 October 1996, NJ 1998/462.


171 See also Art. 3 Bangladesh’s International Crimes (Tribunals) Act 1973 (Act No. XIX of 19 July 1973) (giving specific national courts the “power to try and punish” the core crimes under reference to international law, as well as “any other crimes under international law”; note, however, that no prosecutions have ever been undertaken on the basis of this act. See Faust and Blaustein 1978).

172 Art. 156 (3): “Incurren en pena de arresto en Fortaleza o Cárcel Política por tiempo de uno a cuatro años: [...] Los venezolanos o extranjeros que violen las Convenciones o Tratados celebrados por la República, de un modo que comprometa la responsabilidad de ésta.”
establishing international crimes. Yet, there is reason to adopt a narrower interpretation, since Art. 156 as a whole deals with violations of the laws of war and is placed in Chapter III of Title I of the Penal Code, which regulates crimes against international law. (De los delitos contra el derecho internacional). Therefore, it may be thought that this provision refers only to the violation of treaty provisions that entail individual criminal responsibility under international law.\(^\text{173}\)

### 3.2.b Rule of Reference to Establish Jurisdiction

There are numerous rules of reference which refer to international criminalizations as a condition to establish jurisdiction, while the acts to be prosecuted are charged on the basis of national criminal law. Such jurisdictional provisions require courts to ascertain whether international criminalizations are fulfilled in order to establish, often extraterritorial, jurisdiction. Once this condition is met, the crimes are prosecuted on the basis of national criminal law. Again, these rules of reference vary considerably in the concreteness with which they identify the relevant international law.

Some national provisions refer to all international criminalizations for a particular crime. Numerous national laws establish jurisdiction for the prosecution of (certain, e.g. only WW II) war crimes, often to be charged as ordinary crimes, on the condition that the acts under consideration constitute violations of the international laws and customs of war.\(^\text{174}\) This was the case in the Canadian prosecution of Finta and the British prosecution of Sawoniuk, mentioned above.\(^\text{175}\) The extent to which courts actually apply the international criminalizations in such cases can vary considerably. In Finta, the analysis and application of international law was extensive.\(^\text{176}\) The trial of Sawoniuk, on the other hand, focused predominantly on factual questions while the qualification of the alleged crimes as war crimes under international law was taken for granted.\(^\text{177}\)

Then, there are those rules which refer to all international criminalizations of a particular source. Many States extend the jurisdiction of their national criminal law to extraterritorial crimes they are permitted or obliged to prosecute under treaty law. Examples can be found in Chinese,\(^\text{178}\) Danish,\(^\text{179}\) French,\(^\text{180}\) German,\(^\text{181}\) Greek,\(^\text{182}\)

\(^{173}\) Cf. Modolell González 2003, p. 547.

\(^{174}\) See above para. 2.1.

\(^{175}\) See above notes 95 and 96.

\(^{176}\) See Fletcher 2002, p. 455-458.

\(^{177}\) See U.K., Court of Appeal, R. v. Anthony Sawoniuk, 10 February 2000, [2000] 2 Cr. App. R. 220 at 223:

> "It was not disputed at the trial that the legal conditions for application of this section were met. [...] The victims were civilian members of the Jewish population, and their killing (if committed) was a violation of the laws and customs of war."

\(^{178}\) See Art. 9 New Chinese Penal Code 1997. See also Yuan and Jianping 2002, p. 350.

\(^{179}\) See Art. 8, para. 1, section 5 Danish Penal Code. See also Holdgaard Bukh 1994, p. 341-345.

\(^{180}\) See Art. 689 French Penal Code.

\(^{181}\) See Art. 6 (9) German Penal Code.
Laotian, Spanish, Swiss, and Yemeni law. It should be noted that many of those provisions vest jurisdiction both for international crimes and for conduct that States are obliged to criminalize while international law itself does not do so directly.

Finally, the broadest rules of reference include all international criminalizations, irrespective of their source. Some national laws contain such a broad rule of reference to all sources, but restrict it to criminalizations of a mandatory rather than permissive character. Austria, for example, establishes jurisdiction over “punishable acts which Austria is under an obligation to punish even when they were committed abroad.” Belgian law contains a similar provision. Other States have enacted rules of reference that include all international crimes, regardless of the question whether there is a corresponding duty to prosecute.

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183 See Art. 8 Greek Penal Code, translated in Discalopoulou-Livada 2000, p. 120 (providing extraterritorial jurisdiction for specific crimes and “any other crime for which special provisions or international agreements signed and ratified by the Greek State provide the application of Greek penal laws”).
184 See Art. 4 (3) Laotian Criminal Code.
185 See Art. 23-4 (g) Spanish Ley Orgánica del Poder Judicial. See also Buck 2002, p. 141.
186 See Art. 6 bis Swiss CP.
188 See above, para. 2.1.
189 International obligations to criminalize conduct that is not criminal under international law itself flow inter alia from human rights treaties. See below, Chapter V, para. 3.3.a. See also Schmidt 2002, p. 131-132 (distinquishing international criminalizations from "Externe Strafpfllichten nüt Umsetzungspflicht").
190 See Art. 64 Austrian Penal Code— Acts committed abroad punishable irrespective of the law of the place where they were committed:
   (1) The following crimes committed abroad are punished under Austrian criminal law irrespective of the criminal law of the place where they were committed:
   [..]
   6. other punishable acts which Austria is under an obligation to punish even when they were committed abroad, irrespective of the criminal law of the place where were committed;
191 See e.g. Ecuador, Code of Criminal Procedure, Art. 18 (6):
   “Hornis les cas visés aux articles 6 à 11, les juridictions belges sont également compétentes pour connaître des infractions commises hors du territoire du Royaume et visées par une règle de droit international conventionnelle ou coutumière liant la Belgique, lorsque cette règle lui impose, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites.”
   See e.g. Ecuador, Code of Criminal Procedure, Art. 18 (6):
   "Hornis les cas visés aux articles 6 à 11, les juridictions belges sont également compétentes pour connaître des infractions commises hors du territoire du Royaume et visées par une règle de droit international conventionnelle ou coutumière liant la Belgique, lorsque cette règle lui impose, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites.”
   Ethiopia, Penal Code, Art. 17 (1) (Offences committed in a foreign country against International Law or Universal Order):
   Any person who has committed in foreign country:
   (a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered:
   [..]
   shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Art. 19 and 20 (2)) unless he has been prosecuted in the foreign country;
   Tajikistan, Art. 15 (2) sub a Criminal Code:
As is apparent from this overview and that in the preceding paragraph, direct application of international criminalizations on the basis of a specific rule of reference is accepted in different forms by many States all over the world. Few cases question the competence of the legislature to refer to an international criminalization instead of defining it fully in national law. One such case is the judgment of the U.S. Supreme Court in *U.S. v. Smith* (1820). It concerned a prosecution on the basis of a statute providing for the death penalty for "the crime of piracy, as defined by the law of nations." The defendant argued that such a rule of reference was inappropriate since the Constitution required Congress "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Since international law did not define piracy with precision and certainty, the defendant contended, it was up to Congress to give "a distinct, intelligible explanation of the nature of the offence in the act itself." The Supreme Court rejected this contention, however, and found that a rule of reference to an international crime was as constitutional as an enumeration of the prohibited acts.

3.3 General Rule of Reference

3.3.a Introduction

The most far-going and controversial form of direct application of international criminal law takes place in the absence of a specific rule of reference to an international criminalization. In that case, the question arises whether general rules of reference to international law or a part thereof (treaties, custom or general principles) also incorporate international criminalizations, possibly including rules of jurisdiction, in the national legal order ("general direct application"). In other words, is ICL subject to the same constitutional rules on incorporation and transformation as international law in general, or does it take up a special position?

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Foreign nationals and stateless persons who do not permanently reside in the Republic of Tajikistan shall be liable under the present Code for crimes committed outside its boundaries in the following situations:

a) they have committed a crime provided for by the rules of international law recognized by the Republic of Tajikistan or by international treaties and agreements;

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192 See Bridge 1964, p. 1258-1260.
194 See 18 U.S.C.A. § 481 (s. 5.):

'That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.'

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195 See Art. I, section 8, clause 10 Constitution.
197 Id., 158-160.
Most States have not explicitly resolved the position of international law in their criminal law either in legislation or practice. Therefore, the question to what extent international criminal law can be directly applied normally requires resort to the general constitutional scheme regarding international law in the national legal order and an additional analysis whether international criminal law fits this scheme or encounters additional obstacles. Such an analysis is, however, a complex exercise with an unsure outcome.

It is not enough to examine national provisions on the principle of legality to see whether the text explicitly mentions international law as an accepted legal basis for substantive criminality. If it does, that fact alone does not conclusively determine whether international law can be directly applied or whether a statute is needed to effectuate that substantive criminality. On the other hand, the fact that international law is not explicitly mentioned is by no means the end of the matter. If for example, a national provision requires punishment to be based on national law, it remains to be seen whether national law in that sense includes international law because the latter is incorporated through a general rule of reference. Also, apparently rigid provisions of legality have been interpreted in the light of human rights treaties to include international law, for example in France and Hungary. Thus, national provisions on the principle of legality can not be taken on face value but form only one step in a more elaborate analysis.

Other national, often constitutional provisions can likewise be deceiving in their apparent rejection of international law in criminal matters. In the Netherlands, for example, the Constitution provides that both civil and criminal law “shall be regulated by Act of Parliament in general legal codes.” This formulation could be interpreted to rule out direct application of international criminal law altogether. Yet, it merely expresses the desired codification of national law and has never prevented direct application of international law of any kind.

Ukraine’s 1996 Constitution declares that “acts that are crimes, administrative or disciplinary offences, and liability for them are determined exclusively by the laws of Ukraine.” Therefore, the President of Ukraine argued before the Constitutional Court, ratification of the ICC Statute would violate the Constitution, as inter alia the Elements of Crimes would amount to foreign legislation imposed in violation of the Constitution. The Constitutional Court rejected this argument on the basis that, pursuant to Art. 9 of the

199 See below, note 206.
200 See below, para. 3.3.j and 3.3.n.
201 Art. 107 (1):
Civil law, criminal law and civil and criminal procedure shall be regulated by Act of Parliament in general legal codes without prejudice to the power to regulate certain matters in separate Acts of Parliament.
202 See Francisco 2003, p. 134 (while the author merely mentions this provision and does not analyze its consequences, it appears to have contributed to her mistaken conclusion that the Dutch legal order categorically rejects direct application of international criminal law).
204 Art. 92 (22). See also Art. 92 (14) and 75 ("The sole body of legislative power in Ukraine is the Parliament — the Verkhovna Rada of Ukraine.").
Constitution, treaties "are part of [the] national legislation of Ukraine." From this, one can conclude that direct application of customary international criminal law will be rejected as an unacceptable infringement on the power of the legislature. But despite the robust language on a national legislative monopoly in criminal matters, direct application of treaty criminalizations apparently conforms to the Constitution of Ukraine.

Likewise, Russia provides in Art. 3 (1) of its Criminal Code that "criminal activities, their punishability and any other criminal law consequences are governed only by this Code." But here also, criminal law may not be so impenetrable to international influences as it seems on first sight. Russia's Criminal Code aims inter alia to "ensure the peace and security of mankind" and is "based upon the Russian Constitution and basic principles and norms of international law." Some observers conclude that criminal law is not singled out from the general constitutional scheme and that international treaties are directly applicable also in criminal matters. Keeping in mind the Ukrainian example, an authoritative conclusion on the viability of direct application of international criminalizations will have to come from the Russian courts, which have not yet taken up the matter.

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205 Art. 9: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."

206 Ukraine, Constitutional Court, Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case), 11 July 2001, para. 2.5 and 2.6 (finding inter alia that "agreement for an international agreement to be binding (its ratification) is conducted by Verkhovna Rada [Parliament] of Ukraine in the form of a law, which, by its legal nature, does not differ from other laws of Ukraine").


209 See Art. 1 (2) Criminal Code (available on website ICRC):
"The present Code is based upon the Constitution of the Russian Federation and basic principles and norms of international law."

210 See Art. 15 (4) Constitution 1993:
"Generally accepted principles and norms of international law and international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation established rules other than those stipulated by law, the rules of the international agreement shall be applicable."


211 See Marie-Schwartzenberg 2002, p. 263. Cf. Lukashuk 2001, p. 268 (concluding that Art. 3 (1) Criminal Code in principle rejects direct application of international criminal law but "cannot be strictly interpreted. For example, as concerns such crimes as aggression, the production and distribution of weapons of mass destruction, and the use of mercenaries, it is unavoidable that the international law norms that provide the definitions of these crimes should be applied directly.") and Komarov 1980, p. 30-32 (on direct application in the Soviet Union).


212 See Marie-Schwartzenberg 2002, p. 274.
These examples demonstrate the difficulties in analyzing direct application of international criminalizations in the absence of judicial pronouncements on that very question. For that reason, this paragraph will focus primarily on legal systems where courts have squarely confronted the question whether international criminalizations can be directly applied in the absence of a specific rule of reference. The legal systems described here have been selected principally on the availability of relevant (recent) judgments to this author, either original or in translation. In addition, a few States have been included which lack recent practice on the precise question of general direct application but merit description for the richness of either their older case law or their doctrine. Care has been taken to include as legally and geographically diverse States as possible, but still Western and European States are decidedly overrepresented. This overrepresentation results at least in part from the fact that their case law is better accessible to this author than that of most other States, but may also indicate that the courts of these States are relatively active in the application of international criminal law. The selected States include ones that reject general direct application altogether, ones that are very open to it, and various forms in between. But although the States described here more or less reflect all shades of the spectrum, they are not representative for State practice as a whole, since they have been selected from those States that have most actively confronted the question of direct application of international criminal law.

The country reports vary considerably in length, which is mostly due to the difference in availability and complexity of judicial precedents and other sources for each legal system. Also, well-known judgments are treated in a cursory manner under reference to relevant literature in order to minimize duplication. The following description of national legal systems starts with States rejecting direct application of international criminalizations in the absence of a specific rule of reference and works towards States that are more open to it. To give a thorough outline of national approaches, this overview includes a final paragraph with a brief description of legislation and/or doctrine in other States.

3.3.b Germany

In Germany, all international law is incorporated in the national legal order. The German Constitution (Grundgesetz) regulates custom in Art. 25, which determines that “the general rules of public international law form part of the Federal law and directly create rights and duties for the inhabitants of the Federal territory.” It further states in Art. 59 (2) that “treaties which regulate the political relations of the Federation or relate to matters of Federal legislation require the consent or participation, in the form of a Federal

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213 See also the description of Hungary below, in para. 3.3.n. The “internationalist” interpretation of the principle of legality by the Constitutional Court that allowed direct application of customary criminalizations there was not readily discernible from an analysis of the constitutional framework.

214 Art. 25:

"Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes."
law, of the bodies competent in any specific case for such Federal legislation.” Together, Art. 25 and 59 (2) are generally interpreted to affirm or regulate the incorporation of all custom and treaty law in the German legal order.

Before the German reunification, there were a few instances of direct application of international criminal law. An example dating back to the 19th century concerned punishment of violations of international shipping regulations for the Danube. After WW I, some of the prosecutions held in Leipzig relied not only on national but also directly on international criminal law. For the prosecution of WW II crimes, West-Germany relied on national criminal law but East-Germany directly applied the Nuremberg Statute for some time. In *Globke* (1963), the East-German Supreme Court (*Oberster Gerichtshof*) held that Art. 6 of the Nuremberg Statute was directly applicable on account of a general rule of reference to international law in the East-German Constitution. In *Fischer* (1966), the prosecution of a medical doctor for crimes committed in Auschwitz, the Supreme Court reiterated the direct applicability of the offences of the Nuremberg Statute and asserted that their direct application was necessary for the proper characterization of the crimes, since ordinary criminal law did not capture all aspects of the acts in question.

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215 Art. 59 (2):

"Verträge, welche die politischen Beziehungen des Bundes regeln oder sich auf Gegenstände der Bundesgesetzgebung beziehen, bedürfen der Zustimmung oder der Mitwirkung der jeweils für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes. Für Verwaltungsabkommen gelten die Vorschriften über die Bundesverwaltung entsprechend."

216 In this regard, there is a debate in Germany on the declarative or constitutive character of Arts. 25 and 59 (2). See Bremer 1999, p. 145-151; Pieroth and Jarass 1995, p. 495 and 632. Cf. Roth and Jeanneret 2002a, p. 10; Steiger 2001, p. 68. See for strong recent support for the constitutive theory Germany, Bundesverfassungsgericht, *In re G.*, 14 October 2004, 2 BvR 1481/04, para. 30-45 (but see also para. 46 and 61-62, which are more ambiguous).

217 See Triffterer 1966, p. 182-188.


219 See for an elaborate description of the prosecution of WW II crimes in the GDR Wieland 2002.


"Im vorliegenden Verfahren sind die Tatbestände des Art. 6 des IMT-Statuts gemäss Art. 5 der Verfassung der Deutschen Demokratischen Republik als geltendes Recht direkt anzuwenden. Eines besonderen innerstaatlichen Gesetzes bedarf es nicht, weil Art. 5 der Verfassung der Deutschen Demokratischen Republik den allgemein anerkannten Regeln des Völkerrechts im innerstaatlichen Bereich unmittelbar geltung verschafft."


"Die vom IMT-Statut erfassten völkerrechtlichen Massenverbrechen unterscheiden sich hinsichtlich ihres Charakters, ihrer Begehungsweise als staatlich geplante und organisierte Massenverbrechen und hinsichtlich ihres Ausmasses prinzipiell von allen anderen Straftaten. Ihre vollständige Erfassung und richtige Charakterisierung ist deshalb allein durch unmittelbare Anwendung der einzelnen Tatbestandsmerkmale des Art. 6 Buchstaben a, b und c möglich."
In today’s reunited Germany, however, the situation is quite different. There is broad consensus in doctrine that modern German law rules out direct application of all international criminal law.\footnote{See Werle 2003, p. 42; Jessberger 2003, p. 291-292; Schmidt 2002, p. 69-79; Roth and Jeanneret 2002a, p. 10-11; Bremer 1999, p. 151-154; Schilling 1999, p. 399-400; Hettinger 1965, p. 11-12. But see Stuby 1995, p. 449.} The Constitution determines in Art. 103 (2) that “an act may be punished only if it constituted a criminal offence under statutory law before the act was committed.”\footnote{Art. 103 (2): “Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde”} This formulation of the legality principle requires a written basis in national law for all prosecutions.\footnote{See Pieroth and Jarass 1995, p. 883-885.} Although the German courts have in certain cases involving particularly serious crimes effectively set aside the principle of legality under application of the so-called Radbruch formula, these appear to be exceptions with little relevance for the direct application of ICL in general.\footnote{See Schmidt 2002, p. 71-78; Rogall 2000, p. 406-418; Schilling 1999, p. 391-392 and 396-399; Arnold and Weigend 1997, p. 89-91.} Thus, the principle of legality in German law is widely believed to exclude general direct application of international criminalizations altogether, whether they are contained in custom or treaties.

3.3.c Switzerland

Switzerland incorporates both treaty and custom as a general unwritten rule.\footnote{See Türrer 2001; Bremer 1999, p. 253; Ziegler 1997, p. 565.} Swiss legislation also contains a reference to international law for the criminalization of war crimes.\footnote{See above note 157. See for an elaborate description of relevant provisions Ziegler 1997, p. 567-574.} Yet, in the absence of such a specific rule of reference, the principle of legality\footnote{See Art. 1 Penal Code, Art. 1 Military Penal Code.} opposes direct application of international criminalizations for the prosecution of core crimes.\footnote{See Schabas 2003b, p. 48.} The failed attempt to charge a Rwandan bourgmestre with genocide under customary international law demonstrates this state of the law.\footnote{See above note 160.} The Military Tribunal in first instance found that the customary criminalizations of genocide and crimes against humanity are not directly applicable in the Swiss legal order and convicted the defendant on the other charges.\footnote{Switzerland, Tribunal militaire, Division 2, Lausanne, In re N., 30 April 1999. See Reydams 2002, p. 232.} The Military Court of Appeals agreed on this point, and set out the state of the law in some detail. According to the Court of Appeals, Art. 109 Military Penal Code (CPM)\footnote{See above note 157.} incorporates both customary and treaty criminalizations pertaining to war, to be understood as an international armed conflict.\footnote{Switzerland, Military Court of Appeal, In re N., 26 May 2000, Part. III, Chapitre 1 (b).} Art. 108 (2) expands the direct application of treaty crimes, but not customary criminalizations, to internal armed conflicts. Because the Court of Appeals characterized...
the conflict in Rwanda as internal, the customary criminalization of genocide could not be applied. In the absence of a governing treaty incorporated through Art. 108 and 109 CPM the defendant could not be charged with genocide but was convicted only for war crimes.

The different judgments in this case all imply that international criminalizations require a specific rule of reference for direct application. Thus, Swiss law allows general direct application for neither treaty nor custom.

3.3.d Australia

The position of public international law in Australia is a matter of some unclarity and dispute. Roughly speaking, treaties require transformation in national laws but can have limited effects irrespective of such transformation. The position of international custom is unclear. While custom has been incorporated through the common law in the past, there are contradictory authorities and opinions on its place in the Australian legal order.

The 1999 case of *Nulyarimma*, concerning the treatment of aboriginals in Australia, answered important questions regarding the direct application of ICL. *Nulyarimma* asked the Federal Court of Australia to pronounce on the applicability of the international crime of genocide in the absence of implementing legislation. The Court ruled with a 2-1 majority that genocide was not prosecutable under Australian law. In the absence of a relevant statute, the decision turned on the question whether the customary crime of genocide gained access to the Australian legal order through the common law. Two of the three justices answered that question in the negative in no uncertain terms:

"[I]t is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the

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234 Switzerland, Military Court of Appeal, *In re N.*, 26 May 2000, Part. III, Chapitre 1 (b):

"En l'absence d'une telle convention, il n'est pas possible d'appliquer à un conflit armé interne le droit coutumier prévu à l'art 109 CPM. Dans le cadre du conflit rwandais, de caractère non international […], la juridiction militaire suisse n'est pas compétente pour juger le cas sous l'angle de la prohibition du génocide découlant du droit coutumier à défaut de ratification de la Convention sur le génocide par la Suisse."

235 Switzerland had at that time not yet ratified the Genocide Convention. Today, Switzerland is a party to the Convention and has introduced a domestic provision on genocide in Art. 264 Penal Code.

236 See also Switzerland, Military Court of Cassation, *In re N.*, 27 April 2001, para. 9a ("la condamnation ne peut être fondée que sur l'Art. 109 CPM").


239 See Daglish 2001, p. 405-406; Mitchell 2000, p. 31-32.

basis that it is an international crime, it must be shown that Australian law permits that result. There being no relevant statute, that means Australian common law.\textsuperscript{241}

The majority relied on different arguments to reject direct application of customary criminalizations. Justice Wilcox suggested that international criminalizations could not be equated to non-penal rules as regards their incorporation in the national legal order.\textsuperscript{242} Both Justice Wilcox and Justice Whitlam considered the absence of a procedural framework for resulting prosecutions and the principle of legality as obstacles to direct application of international criminalizations.\textsuperscript{243} In addition, Justice Whitlam relied on the sovereign character of the administration of criminal justice to reject jurisdiction over international crimes without an explicit national authorization.\textsuperscript{244}

Dissenting Justice Merkel reached a different conclusion, namely that “genocide is an offence under the common law of Australia.”\textsuperscript{245} In doing so, he relied on the \textit{Eichmann} case and the reasoning of Lord Millett in \textit{Pinochet}.\textsuperscript{246} He rejected the arguments that this approach of incorporation via the common law would cause uncertainty or violate the separation of powers.\textsuperscript{247} He addressed concerns regarding the principle of legality, in particular the rule against common law crimes, but believed the application of a crime of universal jurisdiction under international law did not entail a violation.\textsuperscript{248} Also, Justice

\textsuperscript{241} Para. 22, Wilcox J.;
\textsuperscript{242} Para. 25:

“It is one thing, it seems to me, for courts of a particular country to be prepared to treat a civil law rule like the doctrine of foreign sovereign immunity as part of its domestic law, whether because it is accepted by those courts as being "incorporated" in that law or because it has been "transformed" by judicial act. It is another thing to say that a norm of international law criminalising conduct that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law.”

\textsuperscript{243} See para. 26 (Wilcox J.):

“[I]n the realm of criminal law "the strong presumption \textit{nullum crimen sine lege} (there is no crime unless expressly created by law) applies." In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide.”

See also Whitlam J. on the rule against common law crimes, para. 54.

\textsuperscript{244} Para. 52, Whitlam J.:

“Even if it be accepted that customary international law is part of the common law, no one has identified a rule of customary international law to this effect: that courts in common law countries have jurisdiction in respect of those international crimes over which States may exercise universal jurisdiction. That is hardly surprising. Universal jurisdiction conferred by the principles of international law is a component of sovereignty [...], and the way in which sovereignty is exercised will depend on each common law country's peculiar constitutional arrangements.”

\textsuperscript{245} Para. 186.
\textsuperscript{246} Para. 154.
\textsuperscript{247} Para. 165-181.
\textsuperscript{248} Para. 161 and 178. On the contrary, he emphasized the need for national courts to take account of the developments in international law, see para. 181:

“It would be anomalous for the Municipal Courts not to continue their longstanding role of recognising, by adoption, the changes and developments in international law.”

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Merkel explicitly rejected the argument that the position of international criminal law in the national legal order is different from public international law in general.\textsuperscript{249}

*Nulyarimma* has received broad criticism from commentators as an unclear decision that should be overturned.\textsuperscript{250} Yet, it has been followed by several state courts.\textsuperscript{251} Thus, it can be concluded that Australian law currently rejects general direct application of international criminal law, both treaty and custom. The statutory requirement formulated in *Nulyarimma* does seem to allow for direct application on the basis of a specific rule of reference.

### 3.3. e Senegal

Attempts to initiate the prosecution of former Tchadian dictator Hissène Habré\textsuperscript{252} in Senegal leaned heavily on international law.\textsuperscript{253} In 1999, several victims of his regime filed a “civil party complaint” (*plainte avec constitution de partie civile*) in Senegal, an action demanding a criminal prosecution joined with a civil suit.\textsuperscript{254} The complaint accused Habré *inter alia* of crimes against humanity and torture and referred to the ICTR’s *Akayesu* judgment, the CAT and the ICC Statute (both ratified by Senegal) as well as national criminal law to substantiate these allegations and Habré’s responsibility.\textsuperscript{255}

The complaint also relied on international law to argue that the defects in Senegal’s national criminal law were no obstacle to the prosecution sought.\textsuperscript{256} While Senegal has ratified numerous ICL treaties, it has adopted no provisions on international crimes in its

\textsuperscript{249} Para. 133 and 161:

“The authorities to which I have referred do not suggest that the principles governing the adoption of customary international law relate only to international civil law and not to international criminal law. The issue appears to be an open question that has not yet been the subject of authoritative decision although dicta to which I later refer supports the adoption into municipal law of international criminal law in respect of universal crimes.

[...] I do not accept that different policy reasons or principles ought to apply to the adoption of customary international criminal law in relation to universal crimes into municipal law.”

See also para. 139:

“[P]iracy is a long recognised example of jurisdiction vesting in a municipal court in respect of international crimes without legislation conferring the jurisdiction.”

\textsuperscript{250} See above note 240.

\textsuperscript{251} See Mitchell 2000, p. 43.

\textsuperscript{252} After his fall from power in Tchad in 1990, Habré left behind an estimated 40,000 dead and 200,000 victims of torture to find refuge in Senegal. See Rapport de la Commission d’enquête nationale du ministère tchadien de la Justice (1992), cited in Senegal, *Plainte avec Constitution de Partie Civile Contre Hissène Habré, Présenté au Juge d’Instruction du Tribunal Régional hors classe de Dakar, 1999*, part I (Informations générales).

\textsuperscript{253} See generally Sharp 2003; Cissé 2002, p. 441-446; Brody and Duffy 2001.

\textsuperscript{254} See Sharp 2003, p. 167.


\textsuperscript{256} Id., part IV and V.
criminal law except for torture. Moreover, criminal jurisdiction of the Senegalese courts is limited to the bases of territoriality, nationality and protection of State interests, while universal jurisdiction is not recognized. Yet, according to then Art. 79 of the Constitution, ratified and published treaties supersede national law.

The victims asserted in their complaint that international law required Senegal to extradite or prosecute Habré. In this regard, they cited the CAT, the Geneva Conventions and general international law. In their view, the lack of a national criminalization of crimes against humanity could be cured by directly applying the criminalization under customary international law. Likewise, universal jurisdiction could be derived directly from general international law, the CAT and the Geneva Conventions, despite the fact that national law suggests otherwise. In support of this view, the complaint cited a non-penal judgment of the Senegalese Supreme Court which privileged a treaty over conflicting national law. The victims further referred to the Belgian Pinochet decision and the Furundzija judgment of the ICTY. Lastly, the complaint requested the investigating judge (juge d'instruction) to apply Art. 6 (1) of the CAT and detain Habré pending further proceedings.

Following the complaint, the investigating judge of the regional tribunal of Dakar indicted Habré on 3 February 2000 for complicity in torture and placed him under house arrest. Furthermore, the judge opened an investigation against persons to be named for other crimes, including crimes against humanity. But on appeal, the Dakar Court of Appeals quashed the indictment and ruled that the Senegalese courts lacked competence...
to try Habré for crimes committed abroad.  

First, the Court held that in the absence of a national criminalization of crimes against humanity, the principle of legality in the criminal code precludes the Senegalese courts to try these crimes. Second, the Court held that Art. 5 CAT orders States to vest jurisdiction over acts of torture, but does not itself establish jurisdiction. Third, the Court considered that criminal law is an autonomous branch of law, uncomparable to other branches and governed by “a certain procedural formalism.”

This last statement is an implicit rejection of the suggestion by the victims’ lawyers that the CAT could override national criminal law to vest the courts with universal jurisdiction. It seems the Court relied simultaneously on two arguments: first, that the CAT does not itself establish universal jurisdiction and second, that the CAT cannot directly apply to override national criminal law in any case. Therefore, the Court held, it was up to the legislature to modify the Code of criminal procedure and recognize universal jurisdiction for torture. The present state of the law, however, excluded it. Thus, Habré could be prosecuted neither for crimes against humanity nor for torture.

On 20 March 2001, the Senegalese Cour de Cassation gave the final decision in the case. The judges dismissed all arguments of the parties civiles and upheld the judgment of the Court of Appeals, effectively foreclosing any prosecution of Habré in  

266 See Senegal, Cour d'appel de Dakar, Chambre d'accusation, Ministère Public et François Diouf Contre Hissène Habré, Arrêt n° 135, 4 July 2000.

267 See Art. 4 Code Pénal:

“Nulle contravention, nul délit, nul crime ne peuvent être punis de peines qui n’étaient pas prononcées par la loi avant qu’ils fussent commis.”

268 See Senegal, Cour d'appel de Dakar, Chambre d'accusation, Ministère Public et François Diouf Contre Hissène Habré, Arrêt n° 135, 4 July 2000, para. 3 (Sur la compétence des juridictions sénégalaises):

“Considérant que le droit positif sénégalais ne renferme à l’heure actuelle aucune incrimination de crimes contre l’humanité, qu’en vertu du principe de la légalité des délits et des peines affirmé à l’article 4 du Code Pénal, les juridictions sénégalaise ne peuvent matériellement connaître de ces faits;”

269 Id.

270 Id.:

“Considérant que la matière qui nous intéresse est relative à la justice pénale; qu’elle est bâtie sur deux grandes règles: d’une part les règles de fond qui définissent les infractions et fixent les peines et d’autre part, les règles de forme qui déterminent la compétence, la saisine et le fonctionnement des juridictions; Elle a toujours manifesté son autonomie par rapport aux autres normes juridiques; que cette particularité est due au caractère sanctionneur du droit pénal qui tend à la protection des intérêts de la société comme ceux des individus en cause et exige un certain formalisme de procédure;
Considérant de ce fait que toute comparaison avec les autres branches du droit est vouée à l’échec...”

271 Id.:

“Considérant qu’il résulte de ce qui précède que les juridictions sénégalaises ne peuvent connaître des faits de torture commis par un étranger en dehors du territoire sénégalais quelque soit les nationalités des victimes, que le libellé de l’article 669 du Code de Procédure Pénale exclut cette compétence;”

Senegal. Most importantly, the Court of Cassation rejected the arguments that the contested judgment violated the CAT and Art. 79 of the Constitution, which incorporates treaties in the national legal order.274 The Court did not explicitly endorse the assertion by the Court of Appeals that criminal law is exempted from the general framework which incorporates treaties. Rather, it found that the provisions of the CAT regarding jurisdiction did not fall under the reach of Art. 79 because their execution first required legislative measures.275 Thus, it is not entirely clear whether the Cour de Cassation embraced the principled exception for criminal law asserted by the Court of Appeals, or merely considered the provisions of the CAT to be non-self-executing without vetoing direct application of treaties with a penal content in general. The proceedings regarding Habré received considerable criticism, both on political interference276 and points of law.277

In conclusion, the Habré case indicates that Senegalese law does not allow direct application of customary criminalizations. The Court of Cassation also rejected direct application of the CAT in this case. Yet, its reasoning leaves open to question whether treaty-based criminalizations are entirely precluded from direct application, or rather have a high burden of self-executingness to meet.

3.3.f Belgium

The situation in Belgium is symptomatic for the uncertainty regarding general direct application of international criminal law in many States. Case law and doctrine are limited and divided, and the issue has not been conclusively settled in the higher courts. As a starting point, it may be noted that, like Germany, Belgium incorporates international law in general278 but also adheres to a strict interpretation of the principle of legality.279

275 Id.; “[Q]u'il en résulte que l'article 79 de la Constitution ne saurait recevoir application dès lors que l'exécution de la Convention nécessite que soient prises par le Sénégal des mesures législatives préalables;”
276 See Sharp 2003, p. 169-170; Cissé 2002, p. 445; Brody and Duffy 2001, p. 824 (several judicial actors involved in the case were transferred to different positions).
278 See e.g. Panken, et al. 2004, p. 27-37.
279 See Art. 12 (2) Constitution:

"No one can be prosecuted except in the cases provided for by law, and in the form prescribed by law."  
("Nul ne peut être poursuivi que dans les cas prevus par la loi, et dans les formes qu'elle prescrit.");

Art. 14 Belgian Constitution:

"No punishment can be made or given except in pursuance of the law."  
("Nulle peine ne peut être établie ni appliquée qu'en vertu de la loi.");
Nevertheless, an investigating judge of the Brussels Tribunal of First Instance concluded in *Pinochet* (1998), a case concerning a civil party complaint demanding prosecution *in absentia* of the former Chilean dictator, that the customary criminalization of crimes against humanity was directly applicable in the Belgian legal order, just like other international custom. Judge Vandermeersch derived jurisdiction, the definition of the crime and its imprescriptibility all directly from customary international law, and left no doubt that he felt authorized, and possibly obliged, under international law to prosecute crimes against humanity regardless of the lack of specific implementing legislation in Belgian law at that time. He reasoned that the principle of legality in Belgian law would be satisfied by applying the penalties for relevant ordinary crimes under Belgian law in force at the time the alleged acts were committed. Nonetheless, Judge Vandermeersch denied the request for the immediate issuance of an international arrest warrant as it would be detrimental to the ongoing investigation. When the judge later did issue the warrant, it was not implemented by Great-Britain as Pinochet was returned to Chile on account of his health.

In *Sharon and Yaron* (2002), concerning alleged core crimes committed in the infamous Sabra and Chatila massacre in Lebanon, another investigating judge of the Brussels Tribunal of First Instance took a very different stand. The judge rejected the reliance of the civil petitioners on direct application of “customary law and *jus cogens*” to circumvent the restrictions of Belgian statute law. The decision is, however, somewhat confusing in this regard. Art. 12 (2) Constitution determines that prosecutions must be governed by law. In similar language, Art. 4 Penal Code determines that extraterritorial

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Belgium, Court of Arbitration, 10 July 2002:

“By granting Parliament the power (a) to determine in what cases criminal proceedings are possible and what form they should take, and (b) to adopt legislation under which a penalty may be prescribed and applied, Articles 12.2 and 14 of the Constitution assure to all citizens that no action will be punishable and no penalty imposed except under regulations adopted by a democratically elected deliberative assembly.”

280 Belgium, Tribunal of First Instance (DISTRICT OF BRUSSELS), *In re Pinochet Ugarte*, 6 November 1998, YIHL, para. 3.3.

281 The judge examined the jurisdiction of the Belgian judiciary to prosecute foreigners *in absentia* for crimes committed abroad. Such universal jurisdiction was not established in Belgian law at the time, but the judge derived it directly from international law. Based on the principle “*aut dedere, aut judicare*” and in particular on General Assembly Resolution 3074 of 3 December 1973 (on Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity), the judgment established a customary rule granting jurisdiction to national authorities in all circumstances (para. 3.3.3). Finally, he found that crimes against humanity are, as a rule of customary international law which also applies directly, by their nature imprescriptible (para. 4). It should be noted that GA Resolution 3074 is a rather dubious source for universal jurisdiction *in absentia*, as its fifth principle determines that “[p]ersons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.”

282 Id., para. 3.3.2.


284 See above, note 279.
crimes will only be punished in accordance with the law.\textsuperscript{285} The judge concluded from these provisions that jurisdiction of Belgian courts to try extraterritorial crimes is “exceptional and strictly limited to cases determined by law.”\textsuperscript{286} Yet, given the similarity in language of the two provisions, it is hard to see how Art. 4 can raise the bar for extraterritorial prosecutions if \textit{all} prosecutions must already be governed by law. Therefore, it is not entirely clear whether the Brussels Tribunal’s rejection of direct application extends to all core crimes prosecutions, or only to extraterritorial ones.

Meanwhile, the situation outside the courtroom is not much clearer. Within weeks of the Pinochet decision, the Belgian Minister of Justice explicitly endorsed general direct application of international criminalizations of the core crimes in a report to the Senate.\textsuperscript{287} Some scholars received the Pinochet judgment and its acceptance of direct application of international criminal law wholeheartedly.\textsuperscript{288} Others, however, take a very different view and assert that the Belgian legal order rejects general direct application of international criminalizations on account of its principle of legality.\textsuperscript{289} To complicate things further, the investigating judge giving the order in Pinochet himself rejected direct application in later scholarly writings.\textsuperscript{290}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{285} Art. 4 Penal Code: \\
“L’infractio nn commis c  hor s  d u  territoir e  d u  Royaume , par  des Belges ou  par  des drangers , n’est punie , en Belgique , que dans les cas determine s  par  la loi.”
\item \textsuperscript{286} Belgium, Tribunal of First Instance Brussels (Kamer van Inbeschuldigingstelling), \textit{In re Sharon and Yaron}, 26 June 2002, reproduced in Wouters and Panken 2003, p. 323-339, at 327: \\
“Que l’on doit considérer que la compétence des juridictions belges à l’égard des étrangers pour des faits commis hors du territoire de la Belgique est exceptionnelle et strictement limitée aux cas determine s  par  la loi.”
\item \textsuperscript{287} See Belgium, Law for the punishment of Genocide, Report of the Justice Commission, Belgian Senate, 1 December 1998, No. 1-749/3, para. II B (2): \\
“Les cours et tribunaux belges peuvent connaître de faits constitutifs de crimes de génocide ou de crimes contre l’humanité commis avant l'entrée en vigueur d'une éventuelle modification de la loi de 1993. Tout d'abord, ces faits sont généralement constitutifs d'infractions de droit commun (meurtres, coups et blessures volontaires, viol, privation illicite de liberté,...) et peuvent être poursuivis sur cette base. Toutefois, des poursuites pourraient être engagées pour crime de droit international, constitutifs de crime de génocide et/ou de crime contre l'humanité en tant que tels. Dans ce cas, l'incrimination retenue est issue des règles contraignantes de droit international humanitaire et la peine est déterminée en se fondant sur les peines prévues pour l'infraction de droit commun correspondant aux faits considérés.” […] Si des poursuites intervenaient en Belgique pour des faits antérieurs à la modification de la loi de 1993, il n'y aurait donc pas d'entorse aux règles de droit pénal international selon lesquelles le droit pénal ne peut rétroagir au détriment des personnes poursuivies et qu'il n'existe pas d'infraction sans loi qui l'incrimine. L'application de la coutume internationale en ces matières est d'ailleurs expressément reconnue par les textes internationaux de protection des droits de l'homme. […] L'introduction d'une incrimination explicite relative aux crimes de génocide et aux crimes contre l'humanité ne constitue donc qu'une confirmation du droit existant...”
\item \textsuperscript{288} See Labrin and Boslly 1999, p. 300 (“Elle mérite d’être approuvée sans réserve.”).
\item \textsuperscript{289} See Bremer 1999, p. 301-304 and references cited there.
\item \textsuperscript{290} See Vandermeersch 2004, p. 134; Vandermeersch 2002a, p. 70.
\end{itemize}
\end{footnotesize}
All in all, it must be concluded that the question of general direct application in Belgium is subject to considerable uncertainty. It should be noted in any case that no such prosecutions have taken place.

3.3.g United States of America

In the U.S., it is an unwritten rule that all international law, including treaties, custom and general principles, is incorporated into national law. The Supremacy Clause in the U.S. Constitution, furthermore, declares all treaties to be the supreme law of the land and the judges in every American state to be bound thereby. Yet, it is well-established that treaties, and in fact all international law, are subordinate to the Constitution. Moreover, the actual direct application of international law in American courts is not as far-reaching as one might expect on the basis of the constitutional framework. This is due to the intricacies of national law, which, like in most other States, interposes numerous obstacles between international law’s broad domestic validity and its actual application. Among these intricacies are the rank of different international law sources in the American legal system, the question whether customary international law is state law or federal law, and the use of avoidance doctrines to evade direct application of international law, including the doctrine of self-executing treaties. These matters have been subjected to extensive and complex analyses, resulting in disputed and sometimes unclear outcomes. There is neither place nor need here to delve into all complexities of the position of general international law in the American legal order. Instead, I take note of the uncertainties just mentioned and focus on the direct applicability of international criminal law.

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291 See Smet and Naert 2003, p. 50-54 (cautiously concluding that Belgian law may allow direct application of treaty-based criminalizations, but not customary ones); Wyngaert 2003, p. 78-80 and 108-110; Wyngaert 1983, p. 507.
292 Some prosecutions of WW II crimes have convicted defendants for offences against the laws and customs of war, but done so on the basis of a specific rule of reference to that effect in national law. See e.g. Belgium, Court of Cassation, In re Köppelmann, 27 November 1950, partial English translation in ILR 1950, no. 126.
294 U.S. Const. Art. VI (2).
295 See U.S., Supreme Court, Reid v. Covert, 10 June 1957, 354 U.S. 1, 354 U.S. 1, at 16: “[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” See also Bradley 1999a, p. 549-550 and Henkin 1987, p. 869-870.
298 See for a recent overview of the debate Young 2002.
299 See Bradley 1999a, p. 555-557.
300 See principally Vazquez 1995; Buergenthal 1992, p. 370-382; Paust 1988; Iwasawa 1986. See further Yoo 1999b; Yoo 1999a; Sloss 1998; Paust 1993; Riesenfeld 1980. See also below, Chapter IV, para. 4.
Direct application of international criminal law on the basis of a specific rule of reference is well accepted in the U.S. Yet, the general direct application of international criminalizations for a criminal prosecution in the U.S. is uncertain at best. Most commentators assume that statutory authority is required for a criminal prosecution, with only a few dissenting voices regarding it as an open question. These commentators base their rejection of general direct application principally on the rule against common law crimes, as formulated early on in U.S. v. Hudson & Goodwin (1812). In this case, the Supreme Court in no uncertain terms rejected criminal prosecutions based on common law, finding that “the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.” Most writers take this language to exclude direct application of both treaty and custom in the absence of a specific statutory basis. Some see the ex post facto clause of the Constitution as an additional obstacle to direct application of international criminalizations, but this seems a doubtful assertion, taking note of the language of the clause and its application in practice.

Despite the Supreme Court’s sweeping language in Hudson and the near-unanimous rejection of general direct application in doctrine, the need for a specific statutory basis to give effect to international criminalizations is on careful analysis not all that clear. As a starting point, it is important to realize that general direct application has long been unequivocally accepted in American law. In older cases, both before and after Hudson, U.S. courts did not hesitate to base criminal proceedings on international law, including both treaty and custom. On the contrary, they regularly asserted a duty to punish crimes against the law of nations. Complete acceptance of direct application of

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301 See above note 193 and accompanying text.
302 See Cassel 2001, p. 428-429 (“The fact that international law authorizes states to exercise certain adjudicatory jurisdiction over international crimes does not mean that U.S. courts may, without more, exercise such jurisdiction. Under U.S. law our courts may exercise only such adjudicatory authority as is conferred upon them by U.S. law to prosecute crimes codified in U.S. law.”); Cassel 1999, p. 383 (identical); Ososky 1997, p. 203 and 215; Burgenthal 1992, p. 381 (stating that it is “widely assumed in the United States that a treaty cannot constitutionally create a criminal offence without implementing legislation”); Wise 1989, p. 939-940; Kobrick 1987, p. 1526 (“Although international law is part of the law of the United States, an international crime is not considered a violation of United States law, and the accused cannot be tried in the federal courts, until the United States passes a statute defining and punishing the offense.”); Restatement 1987, para. 111, Comment i and Reporters Note 6. Cf. Steinhardt 2004, p. 10-11.
305 Id., at 34.
306 U.S. Const. Art. I, § 9, cl. 3:
   “No Bill of Attainder or ex post facto Law shall be passed.”
309 See e.g. U.S., Supreme Court, The Antelope, 1825, 23 U.S. 66, 6 L.Ed. 268, 10 Wheat. 66 at 77 (finding that piracy is “a crime against all nations, so as to make it the duty of all to seek out and punish offenders”).

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international criminal law is traditionally found in cases concerning war crimes, at least where the U.S. is in some way involved. Section 13 of the so-called Lieber Code, an instruction manual for the U.S. army compiled in 1863, provided that “military offenses which do not come within the statute must be tried and punished under the common law of war.” Various cases have since affirmed the permissibility of direct application of international law for war crimes prosecutions, also, or perhaps especially, in the absence of a specific rule of reference.

Thus, the question is when and how this broad acceptance of general direct application was replaced by the strict rejection assumed by contemporary doctrine. There is no recent case law that conclusively settles the question of general direct application in core crimes prosecutions. The reliance on *Hudson* as the main authority for the statute requirement

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Cf. U.S., Supreme Court, United States v. Klintock, 1820, 18 U.S. 144 (Mem), 5 L.Ed. 55, 5 Wheat. 144 at 148:

“[T]he offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish.”

See also Steven 1999, p. 443-445 and references cited there.


311 See Lieber Code (Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863), Section 13:

“Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute-law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.”


“A war crime ... is not a crime against the law or criminal code of any individual nation, but a crime against the jus gentium. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers.”;

U.S., Supreme Court, *Yamashita v Styer*, 1946, 327 U.S. 1, at 16:

“We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.”

U.S., Supreme Court, *Ex Parte Quirin*, 1943, 317 U.S. 1, at 27-28:

“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nationals as well as enemy individuals.”;

See also Kobrick 1987, p. 1527 and Hyde 1943, p. 88 (“Here is impressive judicial testimony to the effect ... that the law of war[s] applicability by the courts in reference to penal matters need not await precise legislative appraisal or definition.”).


“Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. Jus cogens norms, which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty. [. . .K]idnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery.”;

U.S., Court of Appeals, D.C.Cir., *Demjanjuk v. Meese*, 27 February 1986, 784 F.2d 1114 at 117:
is, however, unconvincing for several reasons. First, in *Hudson*, the Supreme Court rejected the prosecution of "ordinary" common law crimes, not international crimes. Today, it may be an open question whether the rule against common law crimes covers customary international criminalizations as well. After all, customary international law is treated like federal common law, but differs from it in important respects. It is clear however, that when *Hudson* was issued, American courts did not interpret it as covering international criminalizations. The Supreme Court found in *U.S. v. Smith* (1820, seven years after *Hudson*) that "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity, is a conclusive proof that [piracy] is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment." Second, direct application of international criminalizations has taken place regardless of a specific rule of reference long after *Hudson*. Examples include violations of the laws and customs of war as well as other international crimes, based predominantly on custom, but occasionally also on treaty. Several of those cases explicitly rejected the need for a statutory basis. In 1820, like *Smith* seven years after *Hudson*, the Pennsylvania Supreme Court rejected outright the need for a statutory basis and found that the rule against common law crimes did not preclude vesting the jurisdiction for the criminal prosecution of a consul in federal courts solely on the general constitutional provision that "the Supreme Court shall have jurisdiction in all cases affecting a consul." It was fifty years after *Hudson* when Lieber wrote that "military offenses which do not come within the statute must be tried and punished under the common law of war."
Third, the rationale of the rule against common law crimes is to be found in the separation of powers between the federal government and the American states, not in concerns over legal certainty. That rationale requires federal courts to abstain from formulating new crimes that infringe on the legislative competence of the states. It does not preclude the application of existing international criminalizations on subject matters beyond state competence. This may explain why direct application of the laws of war was left untouched by Hudson: the states have no competence in the regulation of war, which is a power of the federal government. It also explains why various other international crimes were directly applied long after Hudson: the implementation and enforcement of international criminal law is a federal, not state competence.

Therefore, it can be doubted whether the rule against common law crimes formulated in Hudson actually opposes the direct application of international criminalizations. The direct application of the laws of war after Hudson, regardless of a specific rule of reference, suggests the opposite. It is unclear why genocide and crimes against humanity should be treated differently. After all, customary international criminal law can not be equated to federal common law, nor do U.S. courts unduly limit state powers in applying it.

It is unclear what obstacles prevent direct application of core crimes law if not the rule against common law crimes. Concerns over legal certainty are an unlikely candidate for several reasons. International law, both written and unwritten, has long been accepted

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321 See U.S., Supreme Court, United States v. Hudson & Goodwin, 13 February 1812, 11 U.S. 32 (Mem) at 33-34.
323 See Art. I, section 8, clause 10 Constitution (giving Congress the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."); U.S., District Court (D.C.), United States v Yunis, 12 February 1988, 681 F.Supp. 896 at 903. Cf. U.S., United States Court for China, U.S. v. Kearny, 8 October 1923, in Lobinger, Extraterritorial Cases, Vol. II (1928), p. 665-686 at 674 ("The power 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations' is not made exclusive and it would seem entirely permissible to define and punish 'offences against the law of nations' by treaty.").
324 See note to Henfield's Case, 11 F.Cas. 1099, at 1120-1121 ("It is not inconsistent, therefore, with the doctrine discarding the common law as an origin of jurisdiction to the federal courts, to hold that where an express subject matter is ceded to the federal government by the constitution, that subject matter is to be acted upon through the medium of common law forms.").

"[A]lthough customary international law has been said to be "part of" the common law, it is not merely "common law" but much more and of a higher transnational status with a recognizable constitutional base. Thus, it is possible that the customary prohibition of genocide is still directly enforceable in our courts despite the lack of relevant domestic legislation...."

326 Cf. Boot 2002, p. 124-126 and Wagner 1989, p. 910-915. But see Ososky 1997, p. 201-202. See also U.S., Supreme Court, Parker v. Levy, 19 June 1974, 417 U.S. 733 at 756 ("[f]or the reasons which differentiate military society from civilian society, [...] Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."); U.S., Supreme Court, Yamashita v Stryer, 1946, 327 U.S. 1, at 17 ("Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment."). It is open to question, though, which standards apply to core crimes law, even with respect to civilians.
in the U.S. as a “full” source of law, even if its actual application is limited. The Supreme Court suggested in *Smith* that Congress’ power to define offenses against the law of nations was necessary to shed light on the unclarities of the law of nations, while well-established crimes like piracy needed no further elaboration in national law.\(^{327}\) Arguably, the core crimes today are at least as clearly established in international law as piracy in 1820.\(^{328}\)

As for treaty-based criminalizations, there is some negative but undecisive case law. In *The Over the Top* (1925), a case concerning the smuggling of liquor, a district court held that “[i]t is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.”\(^{329}\) However, this judgment was neither consistent in its rejection\(^{330}\) nor representative of American case law in general. The Supreme Court later found the American-British Treaty in question to be self-executing and held that the treaty did, as to ships of British registry, extend the operation of the criminal laws of the United States to the shifting line designated in the treaty,\(^{331}\) as had another district court earlier.\(^{332}\) In *Hopson v. Kreps* (1980) a Court of Appeals stated obiter that “[t]reaty regulations that penalize individuals […] are generally considered to require domestic legislation before they are given any effect.”\(^{333}\)

The case of *U.S. v. Kearny* (1923), on the other hand, concerned an actual treaty-based prosecution.\(^{334}\) Decided by the United States Court for China, *Kearny* originated in an unusual setting but nonetheless treated important questions of general American law. The defendant was charged for conspiracy to trade in arms on the basis of several treaties between the U.S. and China that criminalized trading in contraband. The U.S. Court for China rejected both the argument that the treaty provisions were non-self-executing and the contention that it was beyond the treaty-making power to prescribe offenses, which, it was argued, should be done by Congress.\(^{335}\) In doing so, the court interpreted Supreme Court case law to understand the phrase “offenses against law” as including “those

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\(^{327}\) U.S., Supreme Court, *United States v. Smith*, 1820, 18 U.S. 153, at 158-159. See also U.S., Supreme Court, *Sosa v. Alvarez-Machain*, 29 June 2004, 124 S.Ct. 2739, para IV (“[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th -century paradigms we have recognized [including piracy].”).

\(^{328}\) See on the question of legal certainty in connection to core crimes further below, Chapter VI, para. 5.3.

\(^{329}\) U.S., District Court (Connecticut), *The Over the Top (Schroeder v. Bissell)*, 26 February 1925, 5 F. 2d 838 at 845.

\(^{330}\) See id.:

> “Whether therefore the Senate and the Executive may constitutionally enact criminal legislation by the device of a mere treaty is a question which fortunately we need not discuss. It is sufficient to conclude that the American-British Treaty did not in fact enact new criminal legislation.”


\(^{332}\) See U.S., District Court (New York), *The Pictonian*, 26 November 1924, 3 F.2d 145 at 148 (reaching the opposite result as *The Over the Top* for the same treaty).


\(^{335}\) Id., at 669-676.
prescribed by treaty equally with those defined by statute."\textsuperscript{336} The court also cited examples of other treaty based criminalizations.\textsuperscript{337} In the end, the defendant was sentenced to a fine under direct application of the treaty provisions.

Following Kearny, it may be argued that "offenses against the laws of the United States" include those against international criminal law, both custom and treaty, and thus the core crimes. In that case, American courts would have jurisdiction over the core crimes under a general provision like 18 U.S.C para. 3231.\textsuperscript{338} It seems this construction would also allow jurisdiction over extraterritorial core crimes. American courts have on numerous occasions assumed extraterritorial jurisdiction in the absence of explicit statutory language to that effect, \textit{inter alia} where extraterritoriality can be inferred from "the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved."\textsuperscript{339} They have further consistently accepted compliance with international law as a determining factor in interpreting the territorial scope of their jurisdiction.\textsuperscript{340} This has most often resulted in a limitation of jurisdiction, but it should logically lead to the acceptance of extraterritorial jurisdiction where international law so requires to comply with an obligation to extradite or prosecute.

Furthermore, although one should be careful to distinguish between different types of cases, it is noteworthy that the direct application of international criminalizations is not categorically rejected in American law. In 1967, Supreme Court Justice Douglas labelled the general direct application of treaty-based criminalizations in the context of a defense to refuse military service in the Vietnam war an undecided "extremely sensitive and delicate question".\textsuperscript{341} Also, civil cases under statutes such as the Alien Tort Claims Act (ATCA)\textsuperscript{342} show that U.S. courts today are still willing and able to apply customary

\textsuperscript{336} Id., at 671.
\textsuperscript{337} Id., at 674-675.
\textsuperscript{338} 18 U.S.C para. 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). See Paust 1971, p. 17-28.
\textsuperscript{339} U.S., Court of Appeals (9th Cir.), \textit{U.S. v. Vasquez-Velasco}, 25 January 1994, 15 F.3d 833 at 839. See also U.S., Supreme Court, \textit{United States v. Bowman}, 1922, 260 U.S. 94 at 97-98. But see U.S., District Court (D.C.), \textit{United States v Yunis}, 12 February 1988, 681 F.Supp. 896 at 903 ("Congress has the power to punish crimes committed overseas but it must evince such an intent with clarity"). In any case, it seems such intent can be inferred for international crimes from a general provision like 18 U.S.C para. 3238:

"The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia"

\textsuperscript{341} See U.S., Supreme Court, \textit{Mitchell v. United States}, 20 March 1967, 87 S.Ct. 1162 (Mem), 386 U.S. 972, at 972-974 (Dissenting opinion Justice Douglas to denial of certiorari, treating the possible direct application of the crime of aggression as defined in Art. 6 (a) Treaty of London of August 8, 1945 (Nuremberg Statute) on the basis of the constitutional Supremacy Clause as an open question).
international criminalizations to the detriment of individuals. In the recent case of *Mehinovic et al v. Vuckovic*, a district court awarded 140 million dollars in damages, 100 million of which were punitive, for *inter alia* war crimes and crimes against humanity committed in Bosnia-Herzegovina. The CAT, common Art. 3 and the grave breaches provisions of the Geneva Conventions, Art. 2 ICTY Statute, Art. 7 ICC Statute and the Genocide Convention served to ascertain the content of these customary criminalizations. The court explicitly stated that it aimed to "punish the defendant" for his abuses. Of course, in cases such as *Mehinovic* the ATCA provides a specific rule of reference that is limited to civil cases. They are relevant, however, because they demonstrate both that the U.S. courts are capable of handling international criminalizations and the apparent constitutionality of such direct application in proceedings with a (partly) punitive character despite the absence of a statutory criminalization.

In conclusion, the question of direct application of international criminalizations for core crimes prosecutions in the absence of a specific rule of reference can not be answered with certainty. Despite the fact that national law provides only partial jurisdiction over the core crimes, there is no recent case law on the matter. Doctrine generally assumes that only statute can form the basis for a criminal prosecution. Traditionally, however, general direct application has always been accepted, in particular for violations of the laws of war. I have set out what I believe to be strong legal arguments why direct application of all core crimes law is in principle possible under current U.S. law, but acknowledge that this position finds only minimal support in doctrine. In light of the generally sceptical attitude of U.S. courts towards international law today, the chances of continued judicial acceptance of general direct application appear slight.

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

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344 U.S., District Court, *Mehinovic et al v. Vuckovic*, 2 May 2002, 198 F.Supp.2d 1322, at 1344: "Plaintiffs have shown, as to each of them individually, that defendant Vuckovic committed the following violations of customary international law, which confer jurisdiction, and establish liability, under the ATCA: torture; cruel, inhuman or degrading treatment; arbitrary detention; war crimes; and crimes against humanity."

345 U.S., District Court, *Mehinovic et al v. Vuckovic*, 2 May 2002, 198 F.Supp.2d 1322 at 1360: "Punitive damages are designed both to punish and to teach a defendant, and to deter others from committing the same abuses."


347 See e.g. U.S., District Court, *Handel v. Artukovic*, 31 January 1985, 601 F.Supp. 1421 at 1427-1428: "While international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual states. [...] Until Congress evinces an intent to give effect to international law, either by passing a jurisdictional statute or by incorporating international rights into the statutes of the United States, the Court declines to infer such an intent solely from the United States' membership in the community of nations."
3.3.h England and Wales

This description of English law\textsuperscript{348} will not detail the English reception of international law in general\textsuperscript{349} or its treatment of international criminal law in particular,\textsuperscript{350} since these have all been extensively described already. English law does not allow direct application of treaty provisions but requires their transformation in order to safeguard "parliamentary sovereignty."\textsuperscript{351} Thus, due to concerns over the proper separation of powers, direct application of treaty-based criminalizations is altogether excluded.

The position of customary international criminalizations is less clear and was brought to center stage in the \textit{Pinochet} case, which concerned the question whether the former dictator could be extradited to Spain \textit{inter alia} for acts of torture likely amounting to crimes against humanity committed during his rule in Chile.\textsuperscript{352} In \textit{Pinochet III}, Lord Millett expressed his opinion that "the English courts have and always have had extraterritorial jurisdiction in respect of crimes of universal jurisdiction under customary international law" and "did not require the authority of statute to exercise it."\textsuperscript{353} He found that international law did not impose this result, but rather that direct application stemmed from England's incorporation of international custom through the common law.\textsuperscript{354} Lord Millett, however, represented a minority opinion. The majority held that extraterritorial torture did not become a crime in the United Kingdom until so provided by the Criminal Justice Act of 1988.\textsuperscript{355} While these Law Lords did not specifically discuss the possibility

\textsuperscript{348} It should be noted that Scotland and the Isle of Man have their own legal system, to be distinguished from that of England and Wales. These legal systems consist in part of law that governs the United Kingdom as a whole. Yet, even when citing legal propositions for the U.K. as a whole, this paragraph concerns solely the law of England and Wales, or in short English law.

\textsuperscript{349} See e.g. Shaw 2003, p. 128-143.

\textsuperscript{350} See e.g. Turn 2004, p. 341-353; Jones 2002 and Bremer 1999, p. 359-391.


\textsuperscript{352} See on the Pinochet case generally Johnson 2002; Woodhouse 2000. For a short insider's account, see Millett 2003.


\textsuperscript{354} Id.: "The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."

It should be noted, however, that international custom is strictly speaking not part of the common law but "an autonomous non-statutory strand of English law." See O'Keefe 2002, p. 301.

\textsuperscript{355} Id., at 148. See further at 189 (Lord Browne-Wilkinson: "I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under U.K. law."); 237 (Lord Hope: "[N]one of these offences, if committed prior to the coming into force of section 134 of the Criminal Justice Act 1988, could be said to be extraterritorial offences against the law of the United Kingdom within the meaning of section 2(2) of the Extradition Act 1989 as there is no basis upon which they could have been tried extraterritorially in this country.") and 290 (Lord Phillips of Worth Matravers: "It is only recently that the criminal courts of this country acquired jurisdiction, pursuant to section 134 of the Criminal Justice Act 1984, to prosecute Senator Pinochet for torture committed outside the territorial jurisdiction."). See also O'Keefe 2002, p. 300-301.
of general direct application of international criminalizations for the prosecution of extraterritorial crimes, their opinions appear to reject it as they assume a statutory basis is required in such cases.\textsuperscript{356}

Other authorities, again without explicitly analyzing the matter of general direct application, equally suggest that prosecutions of extraterritorial core crimes must find a specific basis in statute law.\textsuperscript{357} Many commentators assume that the need for a statutory basis applies not only to extraterritorial but to all core crimes prosecutions.\textsuperscript{358} They perceive the principle of legality and concerns over the proper separation of powers as the most important obstacles against general direct application.\textsuperscript{359} On the other hand, one scholar shows in an elaborate study how general direct application of customary criminalizations was accepted in the past\textsuperscript{360} and in his view is still conform English law today.

In \textit{Jones & Milling, Olditch & Pritchard, Richards v. Gloucestershire Crown Prosecution Service} (2004),\textsuperscript{361} an English Court of Appeal squarely confronted the question whether general direct application can furnish a legal basis for the prosecution of core crimes committed on English territory. This judgment concerned the joint appeals of three prosecutions for causing criminal damage to military installations. In all three cases, the defendants justified their actions as legitimate opposition to the United Kingdom's participation in the war in Iraq, asserting \textit{inter alia} that their use of force was a reasonable means to prevent the crime of aggression.\textsuperscript{362} The court in first instance had rejected this defense, holding that there was no international crime of aggression triable in domestic courts.\textsuperscript{363}

The Court of Appeal analyzed the matter in detail. It held that the question whether the international crime of aggression is triable in English courts depends both on the effect of public international law rules in English law and the principle of certainty:

\begin{itemize}
\item \textsuperscript{356} Id., at 276 (Lord Millett: "I understand, however, that your Lordships take a different view, and consider that statutory authority is require[d] before our courts can exercise extraterritorial criminal jurisdiction even in respect of crimes of universal jurisdiction.").
\item \textsuperscript{358} Id. See Jones 2002, p. 35-36, 59 and 66.
\item \textsuperscript{359} See Jones 2002, p. 59 and O'Keefe 2002, p. 311.
\item \textsuperscript{360} See O'Keefe 2002, p. 302.
\item \textsuperscript{362} See Section 3 of the Criminal Law Act 1967 ("A person may use such force as is reasonable in the circumstances in the prevention of crime.").
\end{itemize}

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"The mere fact that an act can clearly be established to be proscribed by international law, and is described as "a crime" does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment." The Court of Appeal concluded that "a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty." The Court then examined the Privy Council's decision in *In Re Piracy Jure Gentium* (1934), and accepted this case as "authority for the proposition that a rule of international law is capable of being incorporated into domestic law so as to found an indictment which, if proved, can result in punishment. To that extent we accept the submission that international law is capable of being incorporated into English law so as to create a crime punishable in domestic law." The Court distinguished *Pinochet III* for its focus on extraterritorial crimes, thereby limiting its own holding to territorial cases. In the end, the judgment concluded that the lack of international consensus on the elements of the crime of aggression, apparent in the negotiations over the ICC Statute, prevented the finding of "a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law." But more importantly, the Court of Appeal accepted the direct applicability of international criminalizations in general, also in the absence of a specific rule of reference.

In summary, the general direct application of international criminalizations in England and Wales is precluded altogether both for treaty crimes and in extraterritorial cases. The situation is uncertain for customary criminalizations in territorial cases. While doctrine in majority assumes that statutory authority is required also in these cases, a recent decision of a Court of Appeal explicitly sanctions direct application provided the international criminalization is firmly established. A final verdict on this issue will thus have to await a decision of the House of Lords.

### 3.3.1 Canada

In Canada, the Commission of Inquiry on War Criminals (Deschene Commission) explicitly analyzed the question of general direct application of international criminalizations. The Commission quickly rejected direct application of treaty provisions, as these require transformation under Canadian law. Although custom is

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364 Id., para. 24. See also para. 19.
365 Id.
368 Id., para. 37 and 38.
369 Id., para. 43.
370 See Report of the Canadian Commission of Inquiry on War Criminals, 1986, Deschene, p. 127 ("The question is whether war criminals can be prosecuted in Canada by virtue of international law alone.").
371 Id., p. 127-128.
incorporated, the rule against common law crimes also precludes direct application of customary international criminalizations, the Commission found: “International law as embodied in custom cannot act as a basis for prosecution of war criminals in Canada.”

Yet, according to the Deschenes Commission, a different regime applies to acts that are criminal according to the general principles of law recognized by the community of nations. Art. 11 (g) of the 1982 Canadian Charter of Rights and Freedoms, which has constitutional rank and was inspired by Art. 7 (2) ECHR and Art. 15 (2) ICCPR, determines that “any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.” This qualification of the principle of legality supersedes any inconsistent legislation. Therefore, the Commission concluded, “[i]t follows that, due to this adoption of “customary” international law lato sensu into Canadian law through Art. 11 (g) of the Canadian Charter of Rights and Freedoms, war crimes can now form the basis of a criminal prosecution in Canada, notwithstanding the lack of any domestic law, or even any domestic law to the contrary.” However, the Commission qualified its conclusion with the suggestion that “a prosecution under international law appears too esoteric.”

It should be noted that the Deschenes Commission’s distinction between (general) direct application of custom and general principles of law is illogical. Art. 11 (g) of the Canadian Charter recognizes “international law” on an equal footing as general principles for the establishment of individual criminal responsibility. It is hard to see then, why Art. 11 (g) would trump the rule against common law crimes contained in the Criminal Code for general principles, but not for “ordinary” custom. The better position appears to be that both custom and general principles are amenable to general direct application.

In the Finta case (1994), the Canadian Supreme Court cautiously endorsed the findings of the Deschens Commission but did not make the same clear-cut distinction between custom and general principles. Justice Cory stated that “Section 11(g) of the Charter allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place. The use of international legal principles to ground jurisdiction for criminal activity committed outside of Canada has thus been constitutionally permissible since 1982.” The opinion of dissenting Justice La Forest is somewhat ambiguous, yet appears to accept the

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372 See Art. 9 (a) Criminal Code:

“Notwithstanding anything in this Act or any other Act, no person shall be convicted [...] of an offence at common law”

373 Id., p. 130.

374 See also Report of the Canadian Commission of Inquiry on War Criminals, 1986, Deschenes, p. 131.

375 Id.


377 Id., p. 133.

378 Id., compare p. 130 and 132.

379 Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, Cory J., para. 64.
reasoning of the Deschenes Commission, save for the prosecution of extraterritorial crimes. For these crimes the situation would be different according to Justice La Forest, both because jurisdiction would be permissive rather than mandatory under international and Canadian law, and because the presumption of territoriality of the criminal law would preclude direct application.

In sum, it appears that the general direct application of international criminalizations in Canada is precluded for treaty crimes, but allowed for custom and general principles. Again, however, the question of general direct application is surrounded by some uncertainty.

3.3.1 France

French case law on the direct application of international criminal law is rich and complex. As an acceptable simplification, one can say that in general both treaty and custom are incorporated in the French legal order. I will now focus first on the position of treaty-based criminalizations and then come back to custom. Art. 55 Constitution places ratified treaties above national law, but not constitutional law, on the condition of reciprocity. In its 1999 decision on the constitutionality of the ICC Statute, the Constitutional Court found that treaties aiming to protect fundamental human rights, like the ICC Statute, are exempted from the requirement of reciprocal application by other State parties. Thus, it appears that treaties concerning core crimes are not excluded from general incorporation through Art. 55.

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380 See La Forest J. (dissenting), para. 254-256.
381 See Preamble of the French Constitution of 1946, para. 14 (referred to – and thus incorporated in – the preamble of the Constitution of 1958: “La République française, fidèle à ses traditions, se conforme aux règles du droit public international.”). Needless to say, the situation is infinitely more complex than presented here and direct application of international law in France, as elsewhere, is opposed by many obstacles in national law. See for an extensive analysis Oellers-Frahm 2002. For present purposes, however, this simplification suffices.
382 See France, Court of Cassation, 2 June 2000 (“la suprématie conférée aux engagements internationaux ne s’appliquant pas dans l’ordre interne aux dispositions de valeur constitutionnelle”).
383 Art. 55:

“Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie”

See also Buergenthal 1992, p. 346-348.
384 France, Conseil Constitutionnel, Traité portant statut de la Cour pénale internationale, 22 January 1999:

“[L]a France puise conclure des engagements internationaux en vue de favoriser la paix et la sécurité du monde et d’assurer le respect des principes généraux du droit public international ; que les engagements souscrits à cette fin peuvent en particulier prévoir la création d’une juridiction internationale permanente destinée à protéger les droits fondamentaux appartenant à toute personne humaine, en sanctionnant les atteintes les plus graves qui leur seraient portées, et compétente pour juger les responsables de crimes d’une gravité telle qu’ils touchent l’ensemble de la communauté internationale ; qu’au regard à cet objet, les obligations nées de tels engagements s’imposent à chacun des États parties indépendamment des conditions de leur exécution par les
French law contains some specific rules of reference to treaty provisions regarding core crimes. Moreover, the French courts have in the past on several occasions directly applied treaty criminalizations, in particular concerning crimes against humanity. Klaus Barbie, Paul Touvier and Maurice Papon were all convicted for crimes against humanity committed in WWII, despite the fact that French criminal law contained no statutory criminalization of crimes against humanity as such. These prosecutions relied largely on a law from 1964 that indirectly referred to the Nuremberg Charter and declared crimes against humanity imprescriptible.

Importantly, however, the French courts clarified in several judgments that direct application of treaty-based criminalizations did not depend on a specific provision such as the 1964 law but also followed from their general incorporation in French law. In its 1983 judgment in the Barbie case, the Court of Cassation gave its famous statement that "by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal criminal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign." The defendant acknowledged that criminal law is subject to the general constitutional framework incorporating international law, but argued that the principle of legality "requires either the ratification of a treaty or a municipal law giving force within the national legal order to declarations, resolutions or undertakings emanating from organizations or international bodies." The Court of Cassation unequivocally rejected this argument, relying both on Art. 15 (2) ICCPR and Art. 7 (2), and on Art. 55 Constitution.

autres Etats parties ; qu'ainsi, la réserve de réciprocité mentionnée à l'article 55 de la Constitution n'a pas lieu de s'appliquer.

See also Oellers-Frahm 2002, p. 868-869.

385 See in particular Art. 689 French Code of Criminal Procedure.


390 See Law No. 64-1326 declaring the imprescriptibility of crimes against humanity:

Sole article. Crimes against humanity, as defined by the United Nations' Resolution of February 13, 1946 taking account of the definition of crimes against humanity figuring in the Charter of the International Tribunal of August 8, 1945, are imprescriptible by their nature.

Translation from Sadat Wexler 1994, p. 320.

391 France, Court of Cassation, *Barbie* (No. 1), 6 October 1983, Bull. crim., no. 239; 78 I.L.R. 125 at 128 and 130 (citing and confirming the Court of Appeal).

392 Id., at 129.

393 Id., at 131.
A year later, the Court of Cassation again relied on Art. 15 (2) ICCPR and Art. 7 (2) to reject an appeal to the principle of legality in a subsequent judgment in the same case.\textsuperscript{394} Importantly, the court also found that the rule of reference in the 1964 law “limited itself to confirming the integration into French law of both the criminality of such acts and the fact that they are not subject to statutory limitation.”\textsuperscript{395} Therefore, the contested judgment “merely confirmed something which was already established under municipal law by the effect of the international agreements [...] to which France had acceded.”\textsuperscript{396} In the judgment contested before the Court of Cassation, the Court of Appeals had found more specifically that the Nuremberg Charter, being annexed to 1945 London Agreement, had “itself been integrated into the municipal legal order.”\textsuperscript{397} Thus, the reference to crimes against humanity in the Nuremberg Charter in the 1964 law was found to be declarative rather than constitutive.\textsuperscript{398}

At least two later judgments confirmed that treaty-based criminalizations are incorporated into French law through Art. 55 Constitution on the same footing as other international law. In its 1992 judgment in 

\textit{Touvier}, the Paris Court of Appeals held that the definitions of crimes against humanity in the Nuremberg Charter and, remarkably, the UN General Assembly Resolution of 13 February 1946 (affirming the Nuremberg Principles) “have the force of law and even enjoy an authority superior to that of laws by virtue of Article 55 of the Constitution. Consequently, they form part of positive law.”\textsuperscript{399} In \textit{Boudarel} (1993), concerning French crimes in Indochina, the Court of Cassation held that the criminalization of crimes against humanity stems directly from treaty law, while the French law of 1964 solely recognized this state of affairs.\textsuperscript{400} The Court furthermore interpreted the Nuremberg Charter as covering only crimes against humanity committed by the Axis powers in WWII, and concluded that the French crimes in Indochina could be neither designated as crimes against humanity nor prosecuted.

In the WWII cases of \textit{Barbie} and \textit{Touvier}, the interplay between ordinary crimes and the international criminalizations is rather complex. Several commentators have noted that the language of the different judgments is not consistent, referring to international criminalizations sometimes as “constitutive elements” that complement ordinary crimes

\textsuperscript{394} France, Court de Cassation, \textit{Barbie (No. 2)}, 26 January 1984, Bull. crim., no. 34; 78 I.L.R. 132 at 133 and 135, confirming the holding of the lower court that:

“[T]he prosecution of crimes against humanity is in accordance with the general principles of law recognized by civilized nations and, on this account, such crimes are not subject to the operation of the principle of the non-retroactivity of criminal laws.”

\textsuperscript{395} Id., at 135 (emphasis added).

\textsuperscript{396} Id.

\textsuperscript{397} Cited by the Court of Cassation, id., at 135.

\textsuperscript{398} See Lelieur-Fischer 2004, p. 236; Aubert 2000, p. 554.

\textsuperscript{399} France, Court of Appeals of Paris, \textit{Touvier}, 13 April 1992, 100 ILR 337 at 350.

\textsuperscript{400} France, Court de Cassation, \textit{Boudarel}, 1 April 1993, Bull. crim., no. 143, p. 353:

“que la répression des crimes contre l’humanité trouvant sa source dans des textes de droit international, la loi interne ne peut y déroger;

[...the French legislator] a voulu conférer un caractère purement recognitif à la loi du 26 décembre 1964...”

See also Lelieur-Fischer 2004, p. 237.
and other times as directly applicable "incriminations." Yet, even if the precise role of treaty-based criminalizations in these cases may give rise to some unclarities, it is beyond doubt that they were directly applicable, also in the absence of a specific rule of reference.

Recent case law, however, has set a high bar for treaty based criminalizations to be directly applied in practice. In the Javor case, Bosnian refugees in France tried to establish universal jurisdiction for the three core crimes and torture on the basis of several international instruments, including the Genocide Convention, the Nuremberg Charter, the CAT, the Geneva Conventions and UN General Assembly Resolution 3074 of 3 December 1973. The investigating judge rejected all but two of these proposed bases, accepting only direct application of the CAT and the Geneva Conventions. The judge found inter alia that the Genocide Convention did not provide for extraterritorial jurisdiction and that the Nuremberg Charter as well as GA Resolution 3074 covered only crimes against humanity committed in WWII.

In 1996, the Court of Cassation rejected also the last two bases. The court found that the CAT established universal jurisdiction only when the accused is present on French territory, which was not the case. As to the Geneva Conventions, the Cour de Cassation held that "their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal matters." It should be noted that while the net result was the same, namely no legal basis for prosecution, the reason why direct application was rejected in this case was very different for each treaty. That the courts analyzed each treaty on its content affirms that their direct application in a core crimes prosecution is not altogether precluded, even if it was rejected in this specific case. Thus, the reasoning of the different courts involved in Javor shows how direct application of

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402 See Elliott 2001, p. 130 ("Progressively the international law on crimes against humanity has been incorporated into French national law, first by the courts relying on the principle of monism, and then by the legislator."); Mattarollo 2001, p. 28; Aubert 2000, p. 552-556 and references cited there, and Zimmerman 1997, p. 281. But see Oellers-Frahm 2002, p. 887.
404 See France, Tribunal de Grande Instance de Paris, Juge d'Instruction, In re Javor, Ordonnance, 6 May 1994, on file with the author.
406 Id., at 381: "Ces dispositions revetent un caractere trop general pour creer directement des regles de competence extraterritoriale en matiere penale, lesquelles doivent necessairement etre redigees de maniere detalee et precise;" Translation taken from Stern 1999, p. 527. This decision apparently departed from established French case law, which had considered the Geneva Conventions to be self-executing since their ratification by France in 1951. See Reydam 2003, p. 137.
407 See Stern 1999, p. 526-527. In addition to the treaties already mentioned, direct application of the 1968 Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes against Humanity was rejected for lack of its ratification by France.
core crimes law is (still) in principle accepted in France, but subject to stringent conditions which most ICL treaties do not meet.\textsuperscript{408}

Customary criminalizations, on the other hand, are completely barred from general direct application in core crimes prosecutions.\textsuperscript{409} The different judgments in the \textit{Barbie} case, in particular the recurrent application of the general principles clauses of the ICCPR and ECHR\textsuperscript{410} and the holding of the Court of Cassation that crimes against humanity transcend the scope of French municipal criminal law, might have suggested that customary international criminalizations could be directly applied just like treaty provisions. Yet, the French courts never explicitly sanctioned such direct application of custom, and in later cases unambiguously rejected it. In \textit{Javor}, the investigating judge found that “universal principles defining crimes against humanity as an international crime are not sufficient to establish jurisdiction of the French courts.”\textsuperscript{411} In \textit{Aussaresses} (2003), the Court of Cassation declined the prosecution of a French general for self-confessed acts of torture and summary execution of civilians in the Algerian war.\textsuperscript{412} The court rejected the argument of the civil petitioner (\textit{partie civile}) that the customary criminalization of crimes against humanity could be directly applied to circumvent the French amnesty law for crimes committed in Algeria, stating that “international customary rules cannot make up for the absence of a provision which criminalizes the acts denounced by the civil petitioner as crimes against humanity.”\textsuperscript{413}

\textsuperscript{408} See also the similar case of \textit{RSF v Milles Collines}: France, Tribunal de Grande Instance de Paris, Juge d'Instruction, \textit{Reporters sans Frontières v. Mille Collines}, \textit{Ordonnance}, 9 February 1995, on file with the author and, in particular, France, Paris Court of Appeals (Cour d'appel de Paris), \textit{Reporters sans Frontières v. Mille Collines}, 6 November 1995, on file with the author:

“[L]a Cour releve, qu’en absence de dispositions de droit interne, la coutumie internationale ne saurait avoir pour effet d’étendre la compétence extra-territoriale des juridictions francaises. En ce domaine seules sont applicables dans l’ordre juridique interne les dispositions des traités internationaux a la double condition:

- que ces traités aient été régulièrement approuvés ou ratifiés par la France;
- et qu’en raison de leur contenu, les dispositions de ces traités comportent en elles-même un effet direct.”

See on this case Reydams 1996, p. 43-44 and on similar cases concerning Rwandan genocide suspects Reydams 2003, p. 137-139.


\textsuperscript{410} See also France, Court of Cassation, \textit{Glaeser}, 30 June 1976, Bull. crim., no. 236, p. 623:

“[II] convenait d’examiner si l’auteur des crimes dénoncés, a les supposer établis, ne se trouvait pas exclu du bénéfice de la non-rétroactivité de la loi pénale, en vertu des dispositions de l’article 7, alinea 2 [ECHR];”

\textsuperscript{411} France, Tribunal de Grande Instance de Paris, Juge d’Instruction, \textit{In re Javor, Ordonnance}, 6 May 1994, on file with the author, para. 2:

“Attendu que si le requérant souligne justement l’existence des principes universels définissant le crime contre l’humanité comme un crime international, ces seuls principes ne sont pas suffisants pour fixer la compétence juridictionnelle des Tribunaux Français.” (translation by this author)

See also France, Paris Court of Appeals (Cour d’appel de Paris), \textit{Reporters sans Frontières v. Mille Collines}, 6 November 1995, on file with the author, cited above, note 408.

\textsuperscript{412} France, Court of Cassation, \textit{Aussaresses}, 17 June 2003, 108 RGDP 754. See also Lelieur-Fischer 2004.

\textsuperscript{413} Id., at 756 (“Qu’enfin, la coutume internationale ne saurait pallier l’absence de texte incriminant, sous la qualification de crimes contre l’humanité, les faits dénoncés par la partie civile”). Translation from Lelieur-Fischer 2004, p. 236.
In conclusion, general direct application of international criminalizations has taken place in French courts but it is open to question whether this might happen again. Recent case law has adopted a more critical approach of direct application, but it is difficult to say whether this reflects a more rigid modern standard or is influenced predominantly by the fact that several of these cases concerned crimes committed by the French army in Algeria rather than WW II crimes committed against the French people. The relevant judgments are rather concise and omit a complete analysis of the matter. As a cautious conclusion, however, one can say that treaty-based criminalizations are domestically valid and in principle directly applicable, but that most ICL treaties, including the Geneva Conventions, do not meet the strict requirements of the French courts to receive direct application in practice. So far, only the Nuremberg Charter has been directly applied in prosecutions of WWII crimes. Customary criminalizations, on the other hand, are precluded from general direct application altogether.

3.3.k Netherlands

Following a long-standing customary practice, the Dutch legal order incorporates both treaty and custom.\(^{414}\) Thus, as a general rule, all international law is domestically valid in the Netherlands. Many writers\(^{415}\) overlook the fact that Art. 93 and 94 of the Dutch Constitution\(^{416}\) do not constitute the necessary rules of reference for this incorporation, but instead form limitations to an unwritten rule of reference that incorporates all international law.\(^{417}\) Art. 93 requires publication of treaties and decisions of international organisations binding on all persons (self-executing treaties and decisions) before obligations contained therein can bind individuals.\(^{418}\) Art. 94 determines that only such treaties and instruments supersede national law, including the Constitution itself,\(^{419}\) thus \textit{a contrario} excluding custom and non-self-executing treaties from superior rank.\(^{420}\)


\(^{415}\) See e.g. Strijdars 2000, p. 2115.

\(^{416}\) Art. 93: Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Art. 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

\(^{417}\) See Ferdinandusse 2001, p. 276 and references cited there; Brouwer 1992, p. 267-270.

\(^{418}\) See Akkermans and Koekkoek 1992, p. 866-870.

\(^{419}\) See Dijk and Tahzib 1991, p. 422. Significantly, the Constitution explicitly regulates the adoption of conflicting treaties in Art. 91 (3):

Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favor.

International criminal law has never in Dutch legal history been excluded from the general framework of incorporation of international law. Yet, the principle of legality, contained both in Art. 16 Constitution, and Art. 1 (1) Penal Code (identical), formulates additional demands and bars custom, but not treaties, as a basis for criminal prosecution. While there are no recent cases that have tested the question of direct application to the full extent, the above picture is well-established in legislative and judicial practice. I will set out the relevant law first for treaties and then for custom.

Treaties have in the past been directly applied as a basis for prosecutions in a few instances. In 1856, the Dutch Supreme Court explicitly affirmed the power of the King to enact treaties with a penal content. In that case, the defendant was sentenced to five years imprisonment under direct application of a treaty prohibiting the soliciting of desertion among foreign servicemen. Since then, the King has lost the treaty-making power and the Constitution has been amended several times, but the position of treaties concerning international criminal law has remained substantially the same. In 1947, the Special Court of Cassation found that jurisdiction to prosecute foreign war criminals required either a directly applicable treaty or a statute. When Art. 93 (then Art. 66) was introduced in the Constitution in 1953, the legislature clearly formulated the purpose of that provision, namely to ensure that individuals were familiar with the international obligations binding upon them. In general terms, the Supreme Court held in 1997 that the principle of legality as formulated in Art. 16 Constitution and Art. 1 Penal Code requires a criminalization to be formulated and published in Dutch. This holding reinforces the requirement of publication of treaties, that also follows from Art. 93 Constitution, before their penal provisions can be directly applied. Today, there are few examples of treaty provisions with a penal content being directly applied. Yet, the consistent direct application of Art. 32 of the Treaty of Mannheim for the prosecution of violations of the shipping regulations for the river Rhine shows the continued validity of the construction.

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422 Article 16:
No offence shall be punishable unless it was an offence under the law at the time it was committed.
424 Netherlands, HR, 3 December 1856, Weekblad van het Regt, No. 1878.
426 See Netherlands, Bijzondere Raad van Cassatie (Special Court of Cassation), Aalbrect I, 17 February 1947, NJ 1947/87 (“...dat de Nederlandsche rechter hetzelf een met Nederlandsche medewerking tot stand gekomen, daartoe strekkende internationale overeenkomst rechtstreeks kan toepassen, hetzij kan steunen op een Nederlandsche wet”).
428 See Akkermans and Koekkoek 1992, p. 866-868. Since neither horizontal effect of human rights obligations nor obligations of individuals under European law were feasible at that time, it can be asked what international obligations for individuals were meant if not those under international criminal law.
430 See NJ 1998/70, case note para. 2.
In most of the few recent Dutch core crimes prosecutions, the question of direct application of treaties has not come up.\textsuperscript{432} It did to some extent in the \textit{Bouterse} case.\textsuperscript{433} Here, the Amsterdam Court of Appeals stated in general terms that Dutch law requires a statute for the effectuation of international criminalizations.\textsuperscript{434} However, the Court of Appeals made this statement when discussing criminalizations under customary international law, and it contradicts the state of the law regarding direct application of treaties, as just described. Therefore, one could think this assertion was formulated too broadly and in fact applied only to custom. In any case, this judgment of the Court of Appeals was overruled, and the subsequent 2001 judgment of the Supreme Court clearly endorsed the direct application of penal treaty provisions over the national provisions on the principle of legality.\textsuperscript{435} Such direct treaty application did not take place in \textit{Bouterse} itself, though, because the courts assumed there was neither a duty to prosecute in absentia nor an applicable criminalization stemming from treaty law for an extraterritorial case of torture and/or crimes against humanity\textsuperscript{436} committed in 1982. The later case \textit{In re Zorreguieta et al} (2002), concerning alleged crimes against humanity and torture committed in Argentina between 1976 and 1983, likewise left the question of direct application aside because the Amsterdam Court of Appeals found it lacked universal jurisdiction in this case.\textsuperscript{437}

The \textit{Bouterse} case also offers a recent and explicit formulation of the state of Dutch law regarding direct application of customary criminalizations. While all customary law is incorporated in the Dutch legal order, its direct application as a basis for core crimes prosecutions is blocked by Art. 16 Constitution and Art. 1 Penal Code in combination with custom's lack of superior rank.\textsuperscript{438} In \textit{Zorreguieta}, the Amsterdam Court of Appeals further reiterated that Dutch courts can not derive jurisdiction from international custom
in contravention of Dutch law.\textsuperscript{439} It should be noted that the Dutch government has on several occasions denied the possibility of direct application of treaty based criminalizations.\textsuperscript{440} However, these statements clearly contravene established practice.\textsuperscript{441}

In short, Dutch prosecutions of core crimes can take place under direct application of published, self-executing treaties but not custom. Doctrine overwhelmingly endorses direct application of self-executing treaties for international criminal law in principle, but considers most ICL treaties unfit for direct application.\textsuperscript{442}

\subsection*{3.3.1 Ethiopia}

Ethiopia's 1994 Constitution declares that "all international agreements ratified by Ethiopia are an integral part of the law of the land."\textsuperscript{443} The rank of treaty law is not exhaustively determined in the Constitution. While treaties certainly rank under the Constitution, their relationship to other national law is not regulated.\textsuperscript{444} For custom, the situation is unclear. The Constitution does not refer explicitly to custom, but that does not rule out its direct applicability.\textsuperscript{445}

The constitutional formulation of the principle of legality is quite general and neither includes nor excludes international law as a basis of criminality in an explicit manner.\textsuperscript{446}

\textsuperscript{439} Netherlands, Amsterdam Court of Appeals, \textit{In re Zorreguieta et al}, 25 April 2002, para. 5.5:

"Of er een regel van ongeschreven volkenrecht bestaat op grond waarvan Nederland (met terugwerkende kracht) rechtsmacht heeft, kan eveneens in het midden blijven omdat het de rechter niet vrijstaat de nationale rechtsmachtvoorschriften buiten toepassing te laten wegens strijd met ongeschreven volkenrecht."

\textsuperscript{440} See Mv A WIM, EK 28 337, nr. 108b, p. 8 (2003); TK 28337, nr. 6, p. 19; Aanhangsel Handelingen Kamerstukken II 2000/01, 2073-2074 (Kamervragen 995, d.d. 28 maart 2001) and the Dutch Initial report to the Committee against Torture, UN Doc CAT/C/9/Add.1, 20 March 1990, at para. 21.


\textsuperscript{442} See Fleuron 2004, p. 329-337; Ferdinandusse, \textit{et al.} 2002, p. 343; Ferdinandusse 2001, p. 276-278; Swart and Klip 1997, p. 27 and Bemmelen, \textit{et al.} 1995, p. 3-4. Cf. Swart 1996, p. 36-37. But see Francisco 2003, p. 133-138 and Strijards 2000, p. 2115-2117 (Both authors reject all forms of direct application of international criminal law, but ignore the great majority of relevant practice and doctrine and misinterpret the few cases they discuss. To reject the direct application of penal treaty provisions, Francisco promotes the principle of legality to the status of a 'protolegal' principle (p. 138), a form of natural law unknown in Dutch legal practice, without citing a single case to support this proposition. Strijards rejects the superior status of self-executing treaties in the field of criminal law under reference to a case from 1950 (p. 2117). Both assertions contravene practice and are clearly ruled out by the 2001 Bouterse judgment of the Supreme Court, cited above note 435).

\textsuperscript{443} See Art. 9 (4).

\textsuperscript{444} See Art. 9 (1) Constitution:

"The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

See also Scholler 1997, p. 171.

\textsuperscript{445} See Haile 2000, p. 47.

\textsuperscript{446} See Art. 22 Constitution:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier
Importantly, the principle of legality must be interpreted in accordance with international law. As is well known, the principle of legality in international instruments includes custom and general principles as a basis for criminality. But on the other hand, Art. 28 (1) Constitution determines that “criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation (emphasis added).” This formulation could be read as limiting the legal basis for criminal liability of crimes that can not be subject to a statute of limitations to “international agreements and other laws of Ethiopia,” thus excluding unwritten international law.

Partly due to a lack of readily accessible authoritative sources, it is difficult to draw firm conclusions on the possibility of general direct application in Ethiopia. Several commentators have reported that ICL is directly applicable in Ethiopia and that the Special Prosecutor’s Office decided to apply customary humanitarian law in the Red Terror trials for cases that are not covered by the Penal Code. Another writer is more cautious in this regard. It seems that there is no judicial practice on this matter, as the national Penal Code has so far provided sufficient legal basis for the prosecution of international crimes.

In the end, there is not enough material to confirm the rather concise reports on general direct application of core crimes law in Ethiopia. None of the writers mentioned earlier gives a full analysis of the question of direct application, and there is no readily accessible judicial practice on the matter. In this situation, no definitive conclusions can be drawn.

3.3.m Argentina

In Argentina, deference to international law dates back to the Constitution of 1853. It is, however, especially the case law of the Argentinean Supreme Court (Corte Suprema de Justicia de la Nación) in the 1990’s that has firmly established the direct applicability

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penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed.

447 See Art. 13 (2):
“The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenant on Human Rights and International instruments adopted by Ethiopia.”

448 See below, Chapter VI, para. 5.1.

449 See above, para. 2.2.b (iii).


451 See Haile 2000, p. 53 (stating that the application of crimes against humanity “should be limited to specific acts that are criminal under the Ethiopian penal code [...] in order to avoid ambiguity and obviate the legality challenge.”).

452 See above, para. 2.2.b (iii). See also report in 4 YIHL 499 (2001)

and effectiveness of international law. Several constitutional revisions have cemented this trend, so that the Constitution now clearly expresses not only the direct applicability of treaty law, but also its higher rank than that of statute law and even the constitutional rank of selected human rights treaties. It is further settled case law that customary international law is also directly applicable, and that treaties must be interpreted in accordance with the case law of international courts.

Whether this direct applicability extends to international criminal law is a matter of debate. A relevant provision in this regard is Art. 118 of the Constitution, which provides that the trials for crimes “committed outside the territory of the Nation against international law” shall be held “at such place as Congress may determine by a special law.” Several commentators interpret this provision as a recognition of the direct

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455 See Art. 31 Constitution 1998 (“This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation…”).
456 Art. 75:
“Congress is empowered:
[...]
22. To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. [...]”
457 See Alvarez, et al. 2002, p. 326-327; Mattarollo 2001, p. 13 and 35-36. See also Art. 21 of Law 48: “Los Tribunales y Jueces Nacionales en el ejercicio de sus funciones procederán aplicando la Constitución como ley suprema del país, las leyes que haya sancionado o sancione el Congreso, los Tratados con Naciones extranjeras, las leyes particulares de las Provincias, las leyes generales que han regido anteriormente al país y los principios del derecho de gentes, según lo exijan respectivamente los casos que se sujeten a su conocimiento en el orden de prelación que va establecido.”
460 Art. 118 Constitution:
“Todos los juicios criminales ordinarios, que no se deriven del despacho de acusación concedido en la Cámara de Diputados se terminarán por jurados, luego que se establezca en la República esta institución. La actuación de estos juicios se hará en la misma provincia donde se hubiera cometido el delito; pero cuando éste se cometa fuera de los límites de la Nación, contra el derecho de gentes, el Congreso determinará por una ley especial el lugar en que haya de seguirse el juicio.”
applicability of international criminal law in the Argentinean legal order. Others are, however, more cautious or dispute this interpretation of Art. 118, pointing inter alia to the principle of legality in Art. 18 Constitution and the fact that the required jurisdictional special law has never been passed. It is noteworthy, furthermore, that Argentina has entered a reservation with regard to Art. 15 (2) ICCPR, declaring that "the application of the second part of article 15 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine National Constitution." Yet, the effects of this reservation are disputed. A few decisions of federal courts have noted that the reservation to the ICCPR can not alter the similar principle of legality under customary international law or even jus cogens.

The question whether genocide, crimes against humanity and war crimes can be prosecuted directly on the basis of international law has not been conclusively settled in Argentinean case law. But while no actual prosecutions on the basis of direct application have taken place, precedents regarding the extradition of war criminals and certain amnesty laws appear to support a positive answer to the question of direct application. In Schwamburger, a case from 1989 concerning the extradition to Germany of a suspect of crimes against humanity committed in WW II, the question arose whether direct application of international criminal law could secure imprescriptibility of the crimes in question. A federal court held unequivocally that the Constitution recognized the primacy of international law also in criminal matters, and that the principle of legality does not


462 See Raimondo 2003, p. 120 (stating that Art. 118 "implies the recognition of a customary international rule that authorizes Argentina to prosecute international crimes committed outside its territory.").

463 Art. 18 Constitution:

"Ningún habitante de la Nación puede ser penado sin juicio previo fundado en ley anterior al hecho del proceso, ni juzgado por comisiones especiales, o sacado de los jueces designados por la ley antes del hecho de la causa."

("No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried. [...]"

464 See Malarino 2003, p. 56-58; Ambos 2002b, p. 480-482.


467 See for an overview and analysis of relevant extradition proceedings Schiffrin 2003.

468 See Law No. 23.521 of 9 June 1987 ("Obediencia Debida") and Law No. 23.492 of 29 December 1986 ("Ley de Punto Final"). Technically speaking, these laws did not proclaim amnesties but merely regulated the availability of the defense of superior orders and a timeline for criminal prosecutions. However, they had the aim and effect of amnesty laws and are generally designated as such in doctrine. Therefore, I will follow this terminology. While these laws have been abrogated in Argentina's 2003 Law nullifying Obediencia Debida and Punto Final ("declaranse insahlablemente nulas las leyes 23.492 y 23.521."), the value of this step appears to be mostly symbolic. See Alvarez, et al. 2002, p. 318.
apply in a strict sense to international crimes.\textsuperscript{469} The Argentinean Supreme Court subsequently confirmed this judgment.\textsuperscript{470}

In the extradition proceedings concerning Erich Priebke (1995), suspected of war crimes and crimes against humanity committed in Italy during WWII, the Argentinean Supreme Court applied customary international law and found that the proceedings were governed by principles of \textit{jus cogens} status that can not be altered by the States involved.\textsuperscript{471} One of the judges found that the Geneva Conventions and the Genocide Convention enjoy a "presumption of operability," and that at least the majority of their provisions are directly applicable.\textsuperscript{472} Significantly, one of the dissenting judges accepted the direct applicability of international criminal law in principle, but regarded the lack of a specified penalty for war crimes and crimes against humanity as a decisive obstacle.\textsuperscript{473} The majority of the Supreme Court, however, did not share this objection and accepted in general terms direct applicability of international criminal law.\textsuperscript{474} Accordingly, the Court relied directly on international law to find the crimes under consideration imprescriptible and punishable in Argentina, thus satisfying the double criminality requirement in the extradition treaty between Argentina and Italy.\textsuperscript{475}

In a 1999 decision regarding the pre-trial detention of former head of the \textit{junta} Jorge Videla,\textsuperscript{476} a federal court explicitly addressed the import of the principle of legality, including Argentina’s reservation to Art. 15 (2) ICCPR for the prosecution of crimes


\textsuperscript{470} Argentina, Supreme Court, \textit{Extradition Josef Franz Leo Schwammberger}, 20 March 1990, 313 Fallos de la Corte Suprema de Justicia de la Nacion 256.


\textsuperscript{472} Id. at 353, per Judge Bossert, para. 53 (finding that "sus cláusulas gozan de la presunción de operatividad [...] por ser, en su mayoría, claras y completas para su directa aplicación por los Estados partes e individuos sin necesidad de una implementación directa"). See also Alvarez, \textit{et al.}, 2002, p. 309.

\textsuperscript{473} Id., at 361-362, per Judge Petracchi (dissenting), para. 2-5. See also Mattarollo 2001, p. 36-37.

\textsuperscript{474} Id., per Judges Nazareno and Moliné O’Connor, para. 39 and Judge Bossert, para. 51: "Que a diferencia de otros sistemas constitucionales como el de los Estados Unidos de América en el que el constituyente le atribuyó al Congreso la facultad de ‘definir y castigar’ las ‘ofensas contra la ley de las naciones’ (Art. I secc. 8), su par argentino al no conceder similar prerrogativa al Congreso Nacional para esa formulación recibió directamente los postulados del derecho internacional sobre el tema en las condiciones de su vigencia y, por tal motivo, resulta obligatoria la aplicación del Derecho de Gentes en la jurisdicción nacional –que así integra el orden jurídico general– de conformidad con lo dispuesto por el Art. 21 ley 48 ya citado”


against humanity.\textsuperscript{477} The federal court held that crimes against humanity are not subject to statutes of limitations, regardless of any national provisions to the contrary.\textsuperscript{478} It pointed out that the principle of legality as laid down in Art. 15 ICCPR was binding on Argentina also on the basis of other international sources, such as the ACHR.\textsuperscript{479} Therefore, the federal court found, it could not disregard laws established by the international legal system which take precedence over internal laws, "even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the international regulations and the weight of the obligations arising from the other sources of international legal norms."\textsuperscript{480} Moreover, the federal court asserted that "[t]he constitutional mandate of article 118, [...] establishing a kind of universal jurisdiction for the prosecution of crimes against international law and fully empowering the Argentine courts to carry out such trials would not be coherent if at the same time a sort of deconstructed law were allowed to be applied to every case which implied restrictions or exceptions to the normative framework which would be applicable at the international level."\textsuperscript{481} Several other judgments of federal courts contain similar or even identical holdings.\textsuperscript{482}

Of particular interest is the case of \textit{Julio Simon} (2001), in which an Argentinean federal judge nullified two amnesty laws\textsuperscript{483} to allow prosecution for the alleged kidnapping and disappearance of several victims, including a child that was subsequently raised by a military couple.\textsuperscript{484} After a lengthy analysis of relevant Argentinean legislation and case law, the judgment concluded that Art. 118 Constitution indeed provided for the direct application of international criminal law.\textsuperscript{485} It further concluded that such direct application was not obligatory if the crimes in question could also be prosecuted on the basis of ordinary criminal law.\textsuperscript{486} The judgment was upheld on appeal.\textsuperscript{487} The case is pending before the Argentinean Supreme Court at the time of this writing.

\textsuperscript{478} See Mattarollo 2001, p. 39.
\textsuperscript{479} Id., p. 40.
\textsuperscript{480} Id., p. 39-40.
\textsuperscript{481} Id., p. 41.
\textsuperscript{482} See Argentina, Federal Court of Buenos Aires, \textit{In re Massera s/ Excepciones}, 9 September 1999, para. III:

"No resultaría coherente, por otro lado, el mandato constitucional del artículo 118 en el sentido de establecer una suerte de jurisdicción universal para el juzgamiento de estos delitos contra el derecho de gentes y la plena facultad de los tribunales argentinos para efectuar tales procesos, si se admitiera a la vez la aplicación a cada caso de una suerte de derecho destruido que implicara recortes o excepciones a la normatividad que sería aplicable en el ámbito internacional."

See further Mattarollo 2001, p. 41, note 63.
\textsuperscript{483} See above, note 468.
\textsuperscript{485} Id., at 587 (para. IV A).
\textsuperscript{486} Id., at 590 (para. IV B):
In Arancibia Clavel (2004), the Argentinean Supreme Court confirmed the internationalist approach to core crimes found in the cases recited above. The suspect had been convicted by an Argentine federal court of homicide through the use of explosives and for participation in a criminal association, namely a Chilean intelligence unit which operated both in Chile and Argentina and targeted opponents of the Pinochet regime. On appeal, the Argentinean Criminal Court of Appeals (la Cámara Nacional de Casación Penal) had reversed and held that the charge of participation in a criminal association was barred by statutory limitations. But with a narrow 5-3 majority, the Supreme Court held that crimes against humanity, including genocide, torture, executions and forced disappearances, are not subject to statutes of limitation.

In its reasoning, the Supreme Court relied extensively on international instruments and the case law of the IACtHR regarding the duty to prosecute serious human rights violations. The Court reiterated the importance of Art. 118 Constitution for international crimes and the finding in Priebke that the provisions of modern treaties enjoy a “presumption of operability.” The Court interpreted the principle of legality in an internationalist manner, refusing to find a violation since at the time of the acts in question customary international law regulated both the criminality of the acts and the prohibition of statutes of limitations. The three dissenting judges, on the other hand, rejected such an internationalist interpretation and asserted that the principle of legality provides a decisive obstacle against direct application of international criminal law.

In conclusion, Argentinean doctrine is divided and actual prosecutions directly on the basis of international criminalizations are lacking. Yet, judicial practice predominantly supports the conclusion that all international criminalizations, both treaty and custom, can constitute a basis for core crimes prosecutions. Thus, one can cautiously conclude that Argentinean law in principle accepts general direct application of all core crimes law. The principle of legality is not a likely obstacle against direct application, as recent case law has interpreted it in an internationalist manner.

“[L]a punibilidad de las conductas con base exclusiva en el derecho de gentes no es una exigencia del derecho penal internacional sino una regla que cobra sentido, mas bien, en casos donde la ley penal de un estado no considera punibles a esas conductas”.

488 Argentina, Supreme Court, Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros, 24 August 2004. See also below, Chapter V, para. 5.
489 Id., para. 1-3.
490 Id., para. 2.
491 Id., para. 16-23.
492 Id., para. 13 and 35-36, and all separate votes.
493 Id., para. 16 and 30.
494 Id., para. 22, 23, 28 and 33. See also vote of Judge Boggiano, para. 32 and 40.
495 Id., separate votes of Judges Belluscio, Fayt and Vazquez.
In post-communist Hungary, attempts to punish serious crimes of the former regime brought the question of direct application of international criminalizations to the fore. The crimes under consideration included the use of deadly force against demonstrating civilians and the extra-judicial execution of dissidents. Committed during the 1956 invasion by the Soviet Union, many of these particular crimes were believed to constitute crimes against humanity and/or war crimes. National criminal law offered no basis for prosecution, because the statute of limitations for the relevant crimes had run out. To overcome this obstacle, the legislature first tried to adopt a new statute of limitations with retroactive effect and then to interpret the existing statute of limitations as having been interrupted by the political unwillingness of the communist regime to prosecute the crimes under consideration. These attempts, however, stranded on the veto of the Constitutional Court. The Court interpreted the principle of legality in the Hungarian Constitution to cover not only the definition of the crime but "every aspect of criminal liability." Therefore, any modification or reinstitution of a statute of limitations already expired would violate the principle of legality and thus be unconstitutional.

Thus, the prospect for prosecution did not look good. The Constitutional Court had made it clear that it would not bend the principle of legality, holding inter alia that the Constitution "required offences and their punishment and that [sic] the declaration of criminality of an act be regulated only by statute" and that "conviction and punishment could only proceed according to the law in force at the time of the commission of the crime." Nonetheless, the legislature next adopted a statute in 1993 that retroactively exempted certain crimes, ordinary ones but also war crimes and crimes against humanity,
from the statute of limitations altogether. In line with its earlier decisions, the Constitutional Court declared this statute unconstitutional insofar as it concerned ordinary crimes. The situation for war crimes and crimes against humanity, however, was quite different and prompted the Court to analyze the direct applicability of international criminalizations in extenso.

In its seminal decision of 1993, the Constitutional Court first analyzed the position of international law in general under the Hungarian Constitution. In short, custom is incorporated through a rule of reference in the Constitution, while treaties are incorporated through their promulgation or publication. Importantly, Art. 7 (1) determines that “the legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall harmonize the country’s domestic law with the obligations assumed under international law.” While this provision incorporates only unwritten international law, the duty to harmonize the national law with international obligations extends to all international law, including treaties. Furthermore, the Constitutional Court explained that this provision “absolutely does not preclude certain ‘generally recognized rules’ from being defined by other agreements (as well)... [...] The United Nations Charter and the Geneva Conventions, for instance, may contain such rules.” Thus, to the extent that treaty provisions reflect customary law, their content is directly applicable in the Hungarian legal order regardless of their ratification or publication.

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507 Note, however, that in Hungarian doctrine and practice, a different terminology is used than in this study. It is often said that a constitutional rule of reference to custom amounts to its “general transformation,” and that “promulgation or publication in the Official Gazette” of a treaty amounts to its “specific transformation.” Both custom and treaty themselves become part of the legal order, however, and are thus, in the terminology of this study, incorporated and directly applied. See Hungary, Report to the Committee on the Elimination of Racial Discrimination, 17 May 2002, CERD/C/431/Add.1, para. 3 and Hungary, Constitutional Court, Decision No. 53/1993, On War Crimes and Crimes against Humanity, 13 October 1993, English translation in Sólyom/Brunner 2000, p. 273-283, p. 274. See elaborately Küpper 1998.
509 Decision No. 53/1993, para. 3b:

“[A]rticle 7 § (1) of the Constitution requires the harmony of the Constitution and the obligations derived from international law – assumed directly under the Constitution or undertaken in treaties - as well as domestic law;”

See also Trang 1995, p. 15-17.
510 Decision No. 53/1993 at 277, para. 3a.
The Constitutional Court then set out to analyze the international law on war crimes and crimes against humanity. It found that “the norms on war crimes and crimes against humanity are undoubtedly part of customary international law” as well as general principles recognized by the community of nations, and therefore directly applicable in the Hungarian legal order. 511 Thus, even though their content had not been published in the Official Gazette, 512 the Geneva Conventions “may be applied constitutionally in the criminal courts,” 513 as a reflection of customary law. 514 With these words, the Constitutional Court effectively advocated general direct application of customary criminalizations. In so doing, the Court pointed out an alternative legal basis for prosecution of the communist crimes, because it again struck down the statute under consideration. Although it agreed with the legislature’s choice to rely on international criminal law, the Court pointed out that the statute was inconsistent with international law and therefore in violation of Art. 7 (1) Constitution. In referring to the Geneva Conventions, the statute “conflate[d] several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and create[d] a connection among them which does not appear in the Conventions.” 515 The statute inter alia declared grave breaches of the Geneva Conventions to apply in a situation of internal armed conflict.

How then, did the Constitutional Court reconcile its approval of direct application of customary international criminalizations with its earlier, rather strict holdings on the principle of legality? Here, the Court leaned heavily on the binding force of international law. It pointed to the gravity of war crimes and crimes against humanity, their jus cogens status, and the fact that international law imposes a duty to prosecute these crimes. 516 It rigorously separated international criminal law from its national counterpart, and emphasized that the two could not be fused. 517 The Court stated inter alia that “the significance of [war crimes and crimes against humanity] is too great to permit their punishment to be made dependent upon the acquiescence or general penal law policy of individual nation states.” 518 Therefore, the Court held under reference to Art. 7 (2) ECHR and Art. 15 (2) ICCPR, the prosecution of core crimes is governed only by the principle

511 Id., at 281.
513 Decision No. 53/1993 at 283.
515 Decision No. 53/1993 at 283.
516 Id., at 277-279 and 281. See for a fuller discussion of this part of the judgment below, Chapter V, para. 5.
517 Id., at 279 and 282:
“The gravity of war crimes and crimes against humanity, the fact that by their commission international peace, security and, indeed, humanity itself was placed in danger, cannot be reconciled with making their punishment subject to domestic law.

[...]
Through the penal power of the Hungarian state it is, in fact, the penal power of the international community which is given effect within the framework of conditions and guarantees provided by international law. Domestic substantive law may be applied only to the extent international law expressly commands it (for instance, as is the case with imposition of sentencing).”
518 Id., at 278.
of legality under international law, not by its Hungarian counterpart. What effectively happens in these prosecutions is that, pursuant to the incorporation of international custom through the Constitution, in Hungarian courts “alongside with the domestic law, another legal system, certain rules of international law, must concurrently be given effect.”

Remarkably, the legislature failed again in its next attempt to provide a legal basis for prosecution of the past crimes. It solely cut out the section on ordinary crimes and renumbered the other provisions, and then re-enacted the 1993 statute without addressing the Constitutional Court’s concerns over its erroneous references to the Geneva Conventions. Not surprisingly, therefore, the Constitutional Court in 1996 struck down the re-enacted statute. Perhaps concerned over the ability of the legislature to ever get it right, the Court in even clearer terms pointed to the possibility to prosecute under general direct application of customary international criminalizations.

Following the Constitutional Court’s suggestion, the prosecutorial authorities have since 1993 initiated more than 40 prosecutions under direct application of customary international law as codified in the Geneva Conventions. In many cases, these prosecutions were halted for lack of evidence, because the suspect was not available to stand trial, or for similar practical reasons. In other cases, the various elements of the international criminalizations were deemed not present. Several proceedings, however, led to convictions. In the Sálgotarján case (1994), concerning the shooting and killing of unarmed, demonstrating civilians, the court applied Art. 2 and Art. 3 (a) GC IV. The court explicitly found that national rules of reference, including Art. 7 (1) Constitution have only a declaratory character, while international criminalizations are directly applicable per se. Moreover, it held that the lack of publication of the Geneva Conventions in Hungary did not bar their direct application in the case. Two

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519 Id., at 278-282:
“[I]nternational guarantees cannot be replaced or substituted by the legal guarantees of domestic law. International law applies the guarantee of nullum crimen sine lege to itself, and not to the domestic law. […] The international legal regulation of war crimes and crimes against humanity pays no heed to the principle of nullum crimen given effect by domestic law when it makes the punishment of these offenses independent of the fact whether or not they constituted a criminal offense in the domestic penal law at the time of their commission. […] What occurs in this case is not the abandonment or destruction of the principle of nullum crimen but its limitation to the sphere of domestic law.”

520 Id., p. 281-282.
522 Id., para. II (2):
“Toutefois, la Cour constitutionnelle attir e 1’attention sur le fait que le droit international définit lui-même tous les crimes poursuivis et punissables et toutes les conditions de leur punissabilité.”

524 Id., p. 268, 271-274 and 277-278.
525 Id., p. 269-270 and 277 (in particular the elements of intent, and protected status of the victims under the Geneva Conventions were found absent in numerous cases).
528 Id.
defendants were sentenced to five years imprisonment for crimes against humanity, while ten others were acquitted. The Appeals Court, however, applied only Art. 2 and not 3, labelling the 1956 conflict as an international rather than an internal armed conflict, and consequently, the killings as grave breaches under Art. 147 GC IV. The judges followed the reasoning of the Constitutional Court in finding no violation of the principle of legality, and derived the applicable penalties from comparable ordinary crimes. The Appeals Court acquitted one of the two defendants, but raised the sentence of the other and also sentenced two of the suspects acquitted in first instance to two years imprisonment.

In the Kecskemét case (1995), concerning summary executions of several prisoners, the court applied Art. 3 (1a) GC IV. Two defendants were convicted for crimes against humanity and sentenced to two years imprisonment on probation. On appeal, however, the judgment was vacated and remanded for trial. Several comparable cases equally accepted the direct application of GC IV, but were halted for practical complications. Others are apparently on-going, but information on these proceedings is very limited.

In conclusion, both customary and (promulgated) treaty-based criminalizations of core crimes are directly applicable in Hungary. In the last ten years, several prosecutions for war crimes and crimes against humanity have taken place under general direct application of their international criminalizations. The Hungarian courts have explicitly found that a specific rule of reference is not necessary in this regard. The Geneva Conventions have been applied in these proceedings as evidence of customary criminalizations rather than in their own right, which allowed the courts to avoid complications regarding their (lack of) publication. The principle of legality in Hungarian law has been interpreted to apply only to national, not international crimes, while the principle of legality under international law sanctions custom as a basis for prosecution.

529 Id., p. 276-277 and 281-283.
530 Id., p. 299.
531 Id., p. 278-279 and 287-288.
532 Id., p. 277 and 283-284.
533 Id., p. 279.
534 Id., p. 284-287.
536 See also Hungary, Report to the Committee against Torture, 17 June 1998, CAT/C/34/Add.10, para. 2 and 21:

"As the [Torture] Convention has been fully integrated into the Hungarian legal system, the provisions of the Convention have the legal status of a sui generis law and consequently are directly enforceable. [...] In cases where the Convention contains provisions for the jurisdiction of the courts, as well as penalties for persons who are guilty of practising torture and other cruel, inhuman or degrading treatment or punishment, the implementation of the Convention is within the normal competence of the courts."

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3.3.0 Other States

I will now give a cursory overview of legislation and doctrine regarding general direct application in other States. The reader should keep in mind, though, that not all of the conclusions cited here are the result of thorough study of this particular topic. Some information stems from government reports to human rights bodies, which on occasion contain an overly optimistic outlook on one’s own legal system. Information has also been (indirectly) derived from some NGO reports, which are generally thorough and accurate but do not always provide an entirely neutral assessment of the law. In the end, given the complexity of the matter only authoritative pronouncements of national courts on precisely the question at hand bring a conclusive answer, as set out at the beginning of this paragraph. Like in the more elaborate description of a limited group of States above, four different groups of national legal systems can be distinguished where it concerns general direct application.

First, numerous legal systems reject direct application in the absence of a specific rule of reference both for treaty and custom, like Australia does. This may be due to a general rejection of direct application for all international law, as in Denmark\textsuperscript{537} and many Islamic States.\textsuperscript{538} It can also result from a strict formulation of the principle of legality in national law, as described above for Germany and Switzerland. Other States that have been reported to reject general direct application completely are Botswana\textsuperscript{539} and Tanzania.\textsuperscript{540}

Second, there are those States that reject general direct application of treaty-based criminalizations but accept it for customary ones, at least in principle. In South Africa, international customary law is directly applicable and the principle of legality explicitly recognizes international law as a basis for prosecution.\textsuperscript{541} Still, doctrine is divided, with some writers accepting direct application while others reject it, often without specifying the perceived obstacles that would preclude it.\textsuperscript{542} The Supreme Court of Zimbabwe stated in 1985, in a case concerning extraterritorial theft committed by a Zimbabwean diplomat, that “the permissibility under international law for a State to exercise jurisdiction is not a sufficient basis for the exercise of jurisdiction by a municipal court of that State.”\textsuperscript{543} Yet, the language of the decision suggests that criminal law is not exempted from the general incorporation of international custom, and that a mandatory

\textsuperscript{537} See Holdgaard Bukh 1994, p. 341.
\textsuperscript{539} See Nseroko 2000, p. 178.
\textsuperscript{540} See Kamanga 1998, p. 77 (“[G]enocide, strictly speaking, is yet to be proclaimed a crime under Tanzanian laws, and logically, not penal[s]ly sanctionable.”).
\textsuperscript{541} See Section 232 and 35 (3) (1) Constitution.
\textsuperscript{542} Compare Jessberger and Powell 2002, p. 349-350 (noting the direct applicability of international customary criminalizations, but a general reluctance among the courts to apply them) and Maqungo 2000, p. 186 with Erasmus and Kemp 2002, p. 77 and Dugard 2000, p. 141-142.
\textsuperscript{543} See Zimbabwe, Supreme Court, S v. Mharapara, 17 October 1985, 1986 (1) SA 556 at 559.
international customary criminalization rather than a permissive rule may be directly applicable.\(^{544}\)

Third, many States follow the reverse constitutional scheme for the incorporation of international law, and, like France, allow general direct application of treaty-based, but not customary criminalizations. In Haiti, for example, the *Ordonnance* (indictment) of the Raboteau trial,\(^{545}\) suggested that war crimes could be prosecuted directly on the basis of the Geneva Conventions.\(^{546}\) However, in the end all defendants were charged with ordinary crimes. General direct application of treaty-based criminalizations appears to be possible also in Austria,\(^{547}\) Chile,\(^{548}\) Greece,\(^{549}\) Russia,\(^{550}\) Spain,\(^{551}\) and Ukraine.\(^{552}\) As is true for the incorporation of public international law in general, there is often a significant gap between the constitutional rules on general direct application of treaty-based criminalizations and their actual effect in judicial practice. In numerous States, treaty-based criminalizations are domestically valid and can in principle be directly applied. Yet, courts simply refuse to do so, for example because they regard the relevant treaties as non-self-executing or because they show a hostile attitude to international law.

\(^{544}\) Id., at 559 ("Thus the fact that customary international law is part of the municipal law of a State does not assist [for a basis of prosecution], because there is only a permissive principle involved and not a mandatory rule.").

\(^{545}\) See above note 101 and accompanying text.

\(^{546}\) Haiti, Juge d'Instruction Jean Senat Fleury of the Gonaïves Tribunal of First Instance, *Ordonnance Raboteau Massacre*, 27 August 1999, On file with the author, p. 52 and 159:

"Attendu que les actes accomplis par ces militaires et civils armés les 18 et 22 avril 1994 à Raboteau, sont manifestement illégaux, contraires aux Conventions et Traités internationaux ratifiés par Haïti... Attendu qu'aux termes de l'article 42-3 de la dite Constitution, les violences exercées et les crimes perpétrés par des militaires, rendent ces derniers justiciables des tribunaux de Droit Commun."

[...]

"Attendu que les infractions graves à l'article 3 commun des quatre Conventions de Genève sont assimilables aux "crimes de guerre". Il n'y a donc que deux possibilités:
a) Il n'y a pas eu de conflit armé interne. Dans ce cas, les infractions perpétrées constituent des crimes de droit commun punis par le Code pénal.
b) Il y a eu un conflit armé interne. Dans ce cas les infractions perpétrées constituent des "crimes de guerre", réprimées par les Conventions de Genève ratifiées par Haïti."

Art. 42 (3) Constitution reads:

Les cas de conflit entre civils et militaires, les abus, violences et crimes perpétrés contre un civil par un militaire dans l'exercice de ses fonctions, relèvent exclusivement des tribunaux de droit commun.

See also Art. 276 (2) Constitution:

Les Traités ou Accord Internationaux, une fois sanctionnés et ratifiés dans les formes prévues par la Constitution, font partie de la Législation du Pays et abrogent toutes les Lois qui leur sont contraires.

\(^{547}\) See Gartner 2000, p. 52.

\(^{548}\) See Ambos 2002b, p. 500-502.


\(^{550}\) See above note 207 and accompanying text.


\(^{552}\) See above note 206 and accompanying text.
in general. Such divergence between the constitutional framework and actual practice has been noted e.g. for Brazil\textsuperscript{553} and Iran\textsuperscript{554}.

Fourth, a few States appear to sanction the general direct application of all international criminalizations, like Hungary and Argentina. This situation is primarily found where the national formulation of the principle of legality explicitly includes international law as a legal basis for punishment. Such is the case for example in Poland. Despite the fact that the Polish Constitution lists treaties, but not custom among the Polish sources of law\textsuperscript{555}, some writers conclude that the constitutional formulation of the principle of legality\textsuperscript{556} signifies an acceptance of general direct application for all international criminalizations\textsuperscript{557}.

As a conclusion to this overview of national legal systems, some States can be mentioned where the situation is especially uncertain. In Angola, a 1976 trial of mercenaries was partly based on charges of crimes against peace and the crime of mercenarism, both based on such international instruments as the Nuremberg Statute and numerous U.N. Resolutions. The defendants were convicted for mercenarism under customary international law. The many legal flaws and the political character of this trial, however, seriously impede its use as a precedent\textsuperscript{558}. Finally, the state of the law on general direct application in China\textsuperscript{559}, Croatia\textsuperscript{560}, Egypt\textsuperscript{561}, Finland\textsuperscript{562}, Italy\textsuperscript{563}, Morocco\textsuperscript{564}, Portugal\textsuperscript{565} is diffuse, disputed or unclear, at least for this author.

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\textsuperscript{553} See Choukr 2002, p. 334. Compare further Choukr 2002, p. 336 with Ambos 2002b, p. 493 and 499-500. General direct application has apparently been accepted in the past, as suggested by a 1905 judgment of the Brazilian Supreme Court that in directly applying a treaty in an extradition case interpreted the 1891 Constitution as granting federal courts jurisdiction to “direct the procedures and judge matters of international criminal law.” See Dolinger 1993, p. 1080.

\textsuperscript{554} See Beigzadeh and Nadjafi 2002, p. 400-401 and 416.

\textsuperscript{555} Art. 87 (1) Constitution 1997:
The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.


\textsuperscript{556} See Art. 42 (1) Constitution 1997:
Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

See also Weigend 2003, p. 143.


\textsuperscript{558} See Lockwood 1977.

\textsuperscript{559} See Yuan and Jianping 2002, p. 355-356.

\textsuperscript{560} See Art. 31 and 134 Croatian Constitution. See also Josipovic, et al. 2001, p. 95 and 121.

\textsuperscript{561} See Abdelgawad 2002, p. 379-383, 390 and 393.

\textsuperscript{562} See Frinde 2003, p. 71 (principle of legality excludes general direct application of customary criminalizations but the situation for treaty-based criminalizations is not reported).


\textsuperscript{564} See Ayat 2002, p. 431-435.

\textsuperscript{565} See Escarameia 2000, p. 151-155 and 166-167.
4 Conclusion

The overview of legislative and judicial practice in this Chapter allows us to draw some inferences that provide a better understanding of the concept of direct application of international criminalizations.

First, the different legal bases for the prosecution of core crimes distinguished in this Chapter (national or international law, ordinary or international crime) do not exclude but complement each other. Most, if not all, States do not rely on the same technique to criminalize all core crimes, but instead utilize different ones, often all three. Perhaps the most common combination before the drafting of the ICC Statute was the criminalization of genocide as an international crime under national law and a rule of reference ensuring direct application of international law for war crimes, while the criminalization of crimes against humanity was left to ordinary criminal law. This can possibly be explained by the complexity and breadth of the international law on war crimes and the (pre-ICC) absence of a treaty-based general definition of crimes against humanity, while the Genocide Convention provided both an incentive to criminalize genocide in national law and an easily transposable definition. Combinations of the different legal bases are also prevalent in actual national prosecutions. It is not uncommon to find defendants being charged with a combination of ordinary and international crimes, the latter drawn either from national or international law, or from both.

Second, direct application of international criminalizations for the punishment of core crimes is not a foreign concept that lacks application in practice. It is not even exceptional. Most, if not all, States have enacted specific rules of reference in national law that require direct application of (specific rules or parts of) international criminal law in national prosecutions. Decidedly less common, but still accepted in numerous States, is general direct application of international criminalizations in the absence of a specific rule of reference.

Third, there is no clear dividing line between the universally accepted direct application on the basis of a specific rule of reference and the often rejected general direct application of international criminalizations. National legal systems show a diverse and complex range of rules of reference that defies clear-cut categorization. Some rules refer to particular treaty provisions, some to particular international crimes, some to a source of international law, and some to a combination of crimes and sources. Some rules refer to international law for the definition of the crime and some to establish jurisdiction. Consequently, substantive criminality is often derived from a combination of national and international rules that is not easily disentangled. In short, the difference between direct application on the basis of a specific rule of reference and general direct application can be difficult to tell and is often smaller than one might think. One may ask whether the difference between a specific rule of reference establishing extraterritorial jurisdiction for

567 Cf. Peyró 2003, p. 76-77. See for a fuller analysis of the reasons behind this legislative practice below, Chapter 2.
568 See e.g. the cases cited above, notes 131 and 231.
crimes "which are considered to be punishable by a treaty," and a general rule of reference incorporating all treaties is all that fundamental.

Fourth, general direct application of international criminalizations is not a novel concept. Individual criminal responsibility directly under international law has a long history, not only for piracy and war crimes but also for other crimes such as offenses against internationally protected persons like consuls. Direct application of international criminal law, both treaty and custom, has occurred in numerous prosecutions in the courts of different nations over the last centuries, also in the absence of a specific rule of reference. Yet, it should be noted that numerous States where ICL was directly applied in the past appear more hesitant to do so today.

Fifth, contemporary national practice regarding general direct application of international core crimes law is varied, and more often than not shrouded in uncertainty. Numerous States, like Australia and Germany, reject it both for treaty and custom. Others, like France, accept it for treaty law but not for custom. In States like Canada, the reverse situation is found. Finally, a few States, among them Hungary and Argentina, accept general direct application of all international law for core crimes prosecutions. Yet, in most States that accept it, general direct application is seldomly or never used in core crimes prosecutions. It appears that prosecutors and courts prefer to use other legal bases wherever possible.

Sixth, the States that have so far rejected general direct application of treaty-based criminalizations have done so for different reasons. As a result, the prospect for general direct application in the future is very different in these legal systems. States that require transformation of treaty provisions, like the United Kingdom, or completely reject direct application of international criminal law in the absence of a specific rule of reference, like Australia and Switzerland, will not see a change of judicial practice any time soon. On the other hand, States that have so far rejected direct application of treaties like the Geneva Conventions for lack of precision or completeness rather than on principle, like Senegal and France, might allow future prosecutions under direct application of more developed treaties, like perhaps the ICC Statute.

Seventh, as one might expect, national courts look primarily to national law in determining the viability of general direct application of international core crimes law. In national law, the two pivotal determining factors are the constitutional rules on the transformation or incorporation of public international law in general and the principle of legality. The great majority of States allows for the incorporation of at least one of the

569 See above note 92 and accompanying text.
571 See in particular the paragraphs on the U.S., Germany and the Netherlands. See also Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496 at 504 and 506-507, cited below, notes 1259-1262; Triffterer 1966, p. 7-8 and 182-188.
sources of international law. In order to receive general direct application, international law must then either be recognized as a source of criminality by the national formulation of the principle of legality or be assigned a superior rank in the national legal system so as to supersede it. The latter option is exceptional though, since the principle of legality often has constitutional rank in national legal systems.

Eighth, while national courts look primarily to national law, their attitude in doing so is of great importance. The legal framework determinative for the viability of general direct application has many variables that allow for different accents in analysis and corresponding different outcomes. Courts with an internationalist inclination may draw different conclusions from the same legal framework than courts that are more focused on national law. The French and Hungarian courts, for example, both sanctioned direct application by interpreting their national formulations of the principle of legality in light of the broader provisions of the ECHR and the ICCPR. Other national courts have analyzed comparable legal frameworks as excluding direct application by adhering to a strict view of the principle of legality. Thus, general direct application is not determined solely by the state of national law, but also by the extent to which national courts feel compelled to enforce international criminalizations.

Chapter III
Underlying Considerations: What Crime, What Law?

1 Introduction

The previous Chapter presented an overview of national legislative and judicial practice focusing on the legal basis for core crimes prosecutions in national courts. A distinction was made between direct application of international criminalizations and prosecution based on national criminal law. A further distinction was made in national law between ordinary crimes and international crimes. Thus, core crimes can be prosecuted as ordinary crimes, as international crimes defined in national law, and by direct application of international criminalizations. The dividing lines between these categories are not always clear. Often, prosecutions are based on a combination of the three. In addition, it has become clear that numerous States allow direct application of (certain) international criminalizations in principle but lack a corresponding practice.

The aim of this Chapter is to show the considerations that influence the actual occurrence or non-occurrence of direct application of the international criminalizations of the core crimes, or the lack thereof. These underlying considerations affect the choices both between different legal bases for prosecution, and between granting and withholding direct application in the absence of an alternative basis for prosecution. At the national level, these choices are made, first, by the legislature and executive when they shape the national legal framework, second, by the prosecuting authorities when they select the legal basis on which to press charges, and, third, by the courts when they decide whether or not to uphold these charges. Of course, the freedom of each of these actors when they make these choices differs considerably. The choices of the legislature and executive largely determine the possibilities of the prosecutor, while the courts are constrained by the choices of all these actors. Nevertheless, even though they fulfil different roles, the considerations these actors entertain regarding direct application largely overlap. When I analyze these considerations I will therefore distinguish between the different actors only where relevant.

In this chapter I shall primarily be looking at policy considerations, for example concerning practical complications and political concerns. I will analyze arguments of a legal nature, including those concerning the specificity of the law, in the following three chapters. The description of national judicial practice in the previous Chapter demonstrates that the principle of legality is intimately connected with the question of direct application of international criminalizations. Courts confront appeals to the principle of legality in various ways, and with different results.\textsuperscript{574} Doctrine generally points to the principle of legality as the greatest, if not decisive, obstacle to direct application of ICL.\textsuperscript{575} In light of the importance and complexity of this subject, the

\textsuperscript{574} Compare e.g. Germany and Senegal to France and Hungary in Chapter 2.

principle of legality and connected issues like the accessibility and foreseeability of core crimes law will be analyzed separately, in Chapter 6.

Still, this Chapter includes some legal analysis where necessary for a full understanding of the policy considerations. Moreover, it is not always possible to separate legal arguments and policy considerations when analyzing legislative and judicial practice. For example, when a legislature or court refers to arguments regarding legal certainty to justify a particular legislative or judicial decision, it is not always clear whether it is referring to legal rules regarding the principle of legality requiring that particular outcome or solely to policy considerations that justify the outcome as the exercise of a certain discretion. This overview therefore focuses on policy considerations but values a fuller analysis of related points over a rigid separation of law and policy.

The considerations set out here vary greatly in relevance, specificity and the extent to which they are explicitly expressed in practice. Some are so central that they surface in almost every decision and debate on direct application, others are apparently less important. In the appraisal of the different considerations, there are significant differences between different States and legal systems, as well as between practitioners and academics of different backgrounds. Some considerations pertain to direct application of all international rules, while others are relevant only for the criminalizations studied here. Some are explicitly discussed in judgments and legislative debates, while others can be deduced only from a broader analysis of national practice and doctrine.

All these considerations, however, have a significant bearing on the question of direct application of international criminalizations of the core crimes. Reviewing them together will shed more light on the relevance and the practical consequences of direct application in core crimes prosecutions. It will also contribute to a better understanding of the practice set out in Chapter 2, in particular the noted gap between potential and actual direct application. Finally, it will show that international law is not neutral in its assessment of the different possible legal bases for core crimes prosecutions and thereby provide the broader background to the legal analysis in the following chapters. The differences between the various considerations, for example in relevance and specificity, will be indicated in their descriptions.

From here on, I will first describe the minimalism and selectivity that govern the approach of national actors towards core crimes prosecutions. These are general characteristics of national practice rather than considerations that directly govern direct application. Yet, they constitute key features of national practice regarding the core crimes which must be discussed in order to arrive at a full understanding of that practice. Also, as will be shown shortly, minimalism and selectivity do in practice influence the acceptance or rejection of direct application of core crimes law. After this, I will set out the, partially overlapping, underlying considerations, working from broader and more fundamental considerations like State sovereignty and democratic legitimacy of the law.

577 Compare the different country reports above, Chapter II, para. 3.3.
towards more practical ones like the penalties attached to the different legal bases for prosecution.

2 Minimalism and Selectivity in Core Crimes Prosecution

An important characteristic of national practice regarding the core crimes is the persistent lack of prosecutions. While recent years have seen a notable increase in the activity of national courts, the level of national core crimes prosecutions is still minimal. As will be explained more fully below, this situation brings questions concerning direct application to the fore. The global lack of prosecutions has much to do with the fact that many core crimes are "system crimes." Such crimes are not simply the result of the criminal impulses of individuals on the loose, but rather the product of State machineries at work. Genocide and numerous war crimes can by their very nature only be committed either with active or passive involvement of the State or, at the very least, an armed group with a significant degree of organization. Crimes against humanity, as originally conceived during WWII, could only be committed with active or passive State involvement. Today, customary international law broadens the category of possible perpetrators to include organizations, but it appears these must have certain State-like features. Most often, crimes against humanity are characterized by at least

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578 See e.g. Kamminga 1998, p. 564 ("Only a small proportion of those who commit genocide, crimes against humanity or war crimes are ever brought to justice."); Wolfrum 1996, p. 245 ("In practice, the rules of the four Geneva Conventions have been applied very rarely to the prosecution of grave breaches."); Cohen 1995, p. 20 ("There has probably been no historical instance where anything remotely like a full policy of criminal accountability has been implemented.").

579 See e.g. ICJ, International Court of Justice, Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 32 ("[T]here has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I."). A significant factor in the recent increase of (attempted) core crimes prosecutions appears to be the increased activity of victims with standing to initiate criminal prosecutions in particular legal systems (parties civiles). See Wible 2002, p. 282-283.

580 See below, p. 106 et seq.


582 See Schabas 2002b, p. 257. In Art. 2 (11) of its 1954 Draft Code of Offences against the Peace and Security of Mankind, the ILC labelled as crimes against humanity only inhuman acts committed "by the authorities of a State or by private individuals acting at the instigation or with toleration of such authorities," but it later abandoned this requirement. See Boot 2002, p. 464-465.

583 Cf. Art. 7 para. 2 (a) ICC Statute, which requires the attack to be "pursuant to or in furtherance of a State or organizational policy."

584 See ICTY, Trial Chamber, Kupreskic, 14 January 2000, para. 551-555, in particular at 552: "The need for crimes against humanity to have been at least tolerated by a State, Government or entity is also stressed in national and international case-law. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding de facto authority over a territory."

But see ICTY, Trial Chamber, Tadic, 7 May 1997 para. 645-648 and 654-655, in particular at 654:
passive State involvement.\textsuperscript{585} To be sure, there certainly are core crimes of an individual rather than systemic nature, in particular isolated war crimes.\textsuperscript{586} But on the whole, support or acquiescence of State institutions is an important characteristic of the core crimes.\textsuperscript{587}

Core crimes prosecutions form an unpopular undertaking for several reasons. First, core crimes prosecutions are often controversial because they involve State officials and implicate State institutions like armies or governments. Although core crimes prosecutions formally have no bearing on questions of State responsibility,\textsuperscript{588} it is true at least to some extent that a “judgment against an individual perpetrator can be considered as a (partial) remedy against the state.”\textsuperscript{589} Second, their character as system crimes also means that core crimes are seldomly committed in isolation. Therefore, a successful prosecution may pave the way for an unwanted influx of related cases, leading to an overburdening of the legal system.\textsuperscript{590} Third, prosecutions of core crimes are complicated, costly and time-consuming. In most core crimes prosecutions, both the law to be applied and the facts of the case are extensive and complex, requiring considerable expertise and time of the actors involved. Prosecutions involving foreign victims or perpetrators, which is regularly the case for core crimes, add many complications. Already difficult assessments of law and facts become even more complex due to cultural and linguistic barriers.\textsuperscript{591} Foreign defendants, victims or witnesses may require expensive translation services and visits to foreign sites, both with uncertain outcomes.\textsuperscript{592}
All in all, the many complexities involved make core crimes prosecutions daunting tasks with unsure results, and States therefore generally avoid rather than welcome them.593 Some of the legal and practical complications, which will be discussed more fully below, may justify a cautious approach.594 Yet, others are of a more dubious nature. In particular, States are not only minimalist but also selective when it comes to the prosecution of core crimes. Prosecution of own nationals generally requires judging the wars and crimes of one’s own government, which is not a popular task.595 The prosecution of foreign citizens, let alone State officials, or even the prospect of such prosecutions, can lead to serious political tensions between the different States involved.596

As a result, practice shows that States adequately prosecute mostly core crimes committed by other or past regimes, not those of their own officials and citizens, and tend to ignore core crimes involving allies and powerful States.597

Prosecutions of core crimes

"Se référant au jugement de première instance, le Tribunal d'appel a tenu compte de la situation particulière des témoins qui ont vécu les événements sanglants du printemps 1994 au Rwanda, qui ont souvent perdu des proches, qui ont subi des traumatismes, qui sont parfois illétrés ou ne connaissent pas le calendrier. Ces circonstances ne sont pas usuelles pour les tribunaux suisses. […]

Il est à l'évidence délicat pour un tribunal d'un pays étranger d'apprécier, plusieurs années après les faits, l'étendue des pouvoirs d'un magistrat de l'administration civile du Rwanda pendant une période de quelques semaines dans des circonstances dramatiques."

592 See for an instructive overview of the efforts and complications involved in the prosecution of a Rwandese genocide suspect in France ECHR, Mutimura v. France, 8 June 2004, para. 8-59 and 61. See also Hetherington and Chalmers 1989, p. 102:

"We would not wish the difficulties of prosecution [of extraterritorial WW II crimes] in this country to be underestimated. It is undoubtedly true that when trying a case of murder, a British jury will be most impressed by material witnesses whom they have seen in the flesh and whom they have seen cross-examined. […] How impressed a jury would be with evidence received via a satellite link, which would also be extremely expensive, when cross-examination is through an interpreter, is difficult to predict."


594 See in particular para. 6 on manageability of the law.

595 See e.g. Sadat 2003, p. 161 (on the opposition in France to prosecution of collaborators in WW II out of fear of dividing French society).


"The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power...;"

Germany, Supreme Court (BGH), Jorgic, 30 March 1999, 3 StR 215/98, in 19 NStZ (1999), 396-404; BGHSt 45, 64-91, para. I (aa):

"Da die besonders schwer wiegenden Fälle des Volkermords häufig durch den Heimatsstaat der Opfer oder wenigstens mit dessen Duldung begangen werden, ist in der Regel eine effektive Strafverfolgung im Tatortstaat nicht zu erwarten.";
in the courts of the State involved while the regime responsible is still in power are few at best, and mostly symbolic.\textsuperscript{598} Such prosecutions normally charge the defendants with ordinary crimes, which negates the broader context of the core crimes,\textsuperscript{599} and result in low sentences.\textsuperscript{600} Despite occasional suggestions to the contrary,\textsuperscript{601} democracies have no better track record in the prosecution of their own core crimes than other States.\textsuperscript{602}

The States that are most willing to prosecute their own nationals, societies emerging from the rule of an oppressive regime, are usually overburdened with cases, defendants and evidence to be processed. At the same time, their governmental institutions are destabilized and ill-equipped. Consequently, they have to select cases and forego many core crimes prosecutions, if only to avoid serious fair trial problems.\textsuperscript{603}

In short, States for various reasons tend to curtail (the prospect of) core crimes prosecutions in general and are selective in the ones they enable and undertake.

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\textsuperscript{598} Western democracies, for example, have not adequately prosecuted the many war crimes and/or crimes against humanity they have committed in the last fifty years alone against their indigenous peoples, in WW II, in colonial wars, and in numerous armed conflicts in the last decades. See e.g. Effekhari 2003 and Leilieu-Fischer 2004 (on French war crimes and crimes against humanity committed in Algeria and their impunity); Barrett 2001 (on the indiscriminate U.S. bombing of Cambodia and Laos, likely constituting war crimes and/or crimes against humanity); Australia, Federal Court, \textit{Nulyarimma v Thompson}, 1 September 1999, [1999] FCA 1192, para. 5-17 (on Australia's policies towards its indigenous population, arguably constituting at least crimes against humanity well into the 1960's); Waters 2003 and Cottier 2001 (on alleged NATO war crimes during the Kosovo conflict), Röling 1979, p. 196-197 and Rüter 1973, p. 149-165 (on the lack of adequate prosecutions for Dutch war crimes committed in WW II and Indonesia).

\textsuperscript{599} See also Cassese 2000, p. 440-441.

\textsuperscript{600} Despite occasional suggestions to the contrary,\textsuperscript{601} democracies have no better track record in the prosecution of their own core crimes than other States.

\textsuperscript{601} See e.g. Cassese 2000, p. 440-441.


\textsuperscript{603} See on the context and international dimension of the core crimes below, para. 8.
Minimalism and selectivity can be found in all governmental institutions concerned, even if they are seldomly formulated. National legislation on core crimes is often delayed, incomplete and restrictive, and falls well short of what is permitted or required under international law. Most legislatures prefer to formulate narrow bases of jurisdiction and criminalizations over broader ones. Some of them also add procedural barriers for core crimes prosecutions to take place. Several States, for example, require consent of certain State authorities for the institution of core crimes prosecutions, while such consent is not required for ordinary prosecutions. Sometimes, legislatures simply have other priorities.

Prosecutorial and judicial authorities are no different. Of course, there are notable exceptions like Belgian Judge Vandermeersch and Spanish Judge Garzon. Generally, however, both prosecutors and courts tend to minimize and carefully select their involvement in core crimes prosecutions. Prosecutorial authorities are hesitant to use their available options to prosecute. In many countries, foreign suspects of core

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604 See Kamminga 1998, p. 570; Ososky 1997, p. 218; Reydams 1996, p. 28; Komarow 1980, p. 34-35. Even a far-going national law like the Belgian law on international crimes, it should be remembered, was still a severely delayed piece of implementing legislation. See Wouters and Panken 2003, p. 10-14.

605 See e.g. Bassiouni, et al. 1989, p. 320-321, remarks Bassiouni:

"Somehow it seems that legislation like the [U.S.] implementing legislation on the Genocide Convention and the Canadian statute on prosecuting war crimes and crimes against humanity is focused toward the past and reflects more of a political statement on the part of legislative bodies referring to past experiences than a genuine effort to develop a legal instrument reflecting the present and, one hopes, applying to the future. [...] It also seems to me that there is a more insidious purpose in this type of legislation, whether it is the U.S. legislation or the Canadian legislation. The insidious purpose is to pass the legislation so that politicians can say we have it, but in fact to draft it in such a way that it is totally impossible to carry out."

And p. 324-325, remarks Steven Lubet:

"In sum, the [U.S.] Genocide Implementation Act appears to have been drafted in such a manner as to make it inapplicable in any practical sense. [...] It transcends irony that the legislative debate concerning the Implementation Act only discussed crimes that the Act cannot reach. [...] The Genocide Implementation Act must be seen as a conscious decision not to pursue genocide where and when it is most likely to occur."

606 See Section 53 (3) of the UK’s International Criminal Court Act 2001 (providing that proceedings for core crimes shall not be instituted except by or with the consent of the Attorney General). Various other States require consent of higher State officials for the prosecution of extraterritorial core crimes, also when the suspect is present on State territory and there is a duty to prosecute. See e.g. Vandermeersch 2004, p. 145; Wynaert 2003, p. 673-674 and 1120-1121; Holdgaard Bukh 1994, p. 348.

607 See Ayat 2002, p. 429 and Discalopoulou-Livada 2000, p. 121 (noting instances where national governments have stated that enacting legislation on core crimes was postponed because there were other priorities).

608 See above, note 280 and accompanying text.

609 See above, notes 134-136 and references cited there.

610 See Belgium, Tribunal of First Instance (District of Brussels), In re Pinochet Ugarte, 6 November 1998, para. 3.33:

"Now, in humanitarian law, the risk does not seem to lie as much in the fact that the national authorities exceed their competence but rather in the reflex with which they look for pretexts to justify their lack of competence, leaving the door wide open to the impunity of the most serious crimes (which is definitely contrary to the raison d'etre of the rules of international law)."

611 See e.g. Ziegler 1997, p. 583 ("Switzerland’s political authorities have mentioned on several occasions that they prefer extraditing war criminals over prosecuting them domestically.").
crimes are confronted by civil claims, exclusion from refugee status, denaturalization and/or deportation rather than by criminal prosecution.\footnote{See Aceves 2000, p. 141-149. See also Handmaker 2003, p. 688-689 (on the disparity in the Netherlands between the exclusion from refugee protection of several hundreds of suspects of international crimes and the lack of subsequent criminal prosecutions); Schabas 2003b, p. 50-51; Elst 2000, p. 816; Schabas 1999, p. 531 ("[T]he lack of success of the Justice Department in prosecuting Nazi war criminals has resulted in a policy decision to remove war criminals from Canada under the Immigration Act rather than prosecute them in Canada."); Reydams 1996, p. 39-41; Hetherington and Chalmers 1989, p. 70-72 (on the U.S. policy to deport rather than prosecute war crimes suspects).} Judges exert their influence through their, generally restrictive, interpretation and application of the law in core crimes prosecutions.\footnote{See Cassese 2003a, p. 306 ("[N]ational courts have developed in their judicial practice a restrictive tendency to limit as much as possible the impact of international rules on the exercise of jurisdiction by national courts over international crimes.").} Here also, selectivity can play a role. The French courts, for example, have been noticeably stricter in their application of the principle of legality for core crimes committed by the French military in former colonies than for Axis crimes committed in WWII.\footnote{See Lelieur-Fischer 2004, p. 236.}

Minimalism and selectivity affect all core crimes prosecutions, or lack thereof, no matter what their legal basis. They are important factors for a full understanding of national practice regarding core crimes prosecutions. At the same time, they also have their bearing on the specific question of direct application in several ways. First, minimalism of the legislature\footnote{See e.g. O’Keefe 2004, p. 758 (describing how political and practical considerations guided the Scottish and English legislatures in limiting the jurisdictional reach of their ICC implementing legislation).} explains both why the question of general direct application comes up regularly in national courts and why its answer is of great practical importance. It is generally the imperfect state of national legislation on core crimes that prompts the question whether general direct application can provide an alternative basis for a prosecution that can not otherwise take place. The description in Chapter 2 of national proceedings, for example in Australia, Senegal and Hungary, testifies to this fact.

Second, considerations of minimalism and selectivity influence national authorities on all levels to be critical of, and sometimes outright hostile to, direct application of international criminalizations.\footnote{See Abdelgawad 2002, p. 393; Choukr 2002, p. 334.} As will be discussed in more detail below, this critical attitude is motivated in part by the complexities of international criminal law. But often legislators, prosecutors and courts also entertain a desire to exert maximal control over the applicable law so as to be able to curtail and select the resulting prosecutions. Direct application, especially general but also on the basis of a specific rule of reference, does not afford maximal control. The international criminalizations that are directly applied can not be changed as easily as those in a statute, nor be sidelined with measures like amnesty laws. Moreover, the precise extent of the international law incorporated in the national legal order is generally not readily apparent and open to, sometimes rapid, change.\footnote{See Kirby 2004, p. 250; Röling 1979, p. 186.}
National authorities hardly ever openly express their desire to control, curtail and select core crimes prosecutions. It is therefore impossible to say to what extent it influences their approach to direct application. Only occasionally do national authorities reveal that they are guided (also) by considerations of minimalism and selectivity in their approach to core crimes law. In *Tel-Oren v. Libyan Arab Republic* (1984), an American Circuit Court rejected direct application of the 1907 Hague Convention, relying heavily on the practical problems direct application would cause.\(^{618}\) In *Handel v. Artukovic* (1985), an American District Court expressed even clearer that it found the same treaty to be non-self-executing, not for legal reasons but because its direct application would "create insurmountable problems."\(^{619}\) While these cases concerned civil rather than criminal proceedings, they are relevant for the question of direct application in core crimes prosecutions both as precedents on the non-self-executingness of humanitarian treaties and because the considerations expressed by the courts largely pertain also to criminal prosecutions.

There are more examples of courts openly expressing that practical considerations lead them to adopt a restrictive interpretation of the law under consideration. In *Al-Adsani* (1996), an English Court of Appeals declined to set aside the immunity of the State of Kuwait in order to allow a claim for civil damages for torture. Lord Justice Stuart-Smith made it clear that his position was influenced by the practical consequences a contrary decision would entail, noting *inter alia* that a "vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came."\(^{620}\) A subsequent judgment of the ECtHR

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\(^{618}\) U.S., Circuit Court (D.C.Cir.), *Tel-Oren v. Libyan Arab Republic*, 1984, 726 F.2d 774 at 810 (Bork, J., concurring):

"[T]he code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the [1907] Hague Convention violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation or the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations."


"Unlike the Geneva Convention, there is no provision in the [1907] Hague Convention for implementation by the party states. However, the consequences of implying self-execution compel the conclusion that the treaty is not a source of rights enforceable by an individual litigant in a domestic court. Recognition of a private remedy under the Convention would create insurmountable problems for the legal system that attempted it; would potentially interfere with foreign relations; and would pose serious problems of fairness in enforcement. [...Citing the practical considerations of Judge Bork in *Tel-Oren*]

For the reasons that Judge Bork outlined, this Court agrees that non-self-execution is the appropriate result."

\(^{620}\) U.K., Court of Appeal, *Al-Adsani v. Al-Sabah and Kuwait*, 12 March 1996, Lord Justice Stuart-Smith:

"... A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those
in this case accepted that the prohibition of torture has *jus cogens* status, but refused to find that the immunity of Kuwait violated the right of access to court of the applicant.\textsuperscript{621} At least two of the judges conveyed that they had been influenced to a considerable extent by the practical implications of the matter. In a separate opinion, they noted that “there is much wisdom” in the considerations of Lord Justice Stuart-Smith and added that another outcome of the case would have as a result “that precisely those States which so far have been most liberal in accepting refugees and asylum seekers, would have had imposed upon them the additional burden of guaranteeing access to court for the determination of perhaps hundreds of refugees’ civil claims for compensation for alleged torture.”\textsuperscript{622} Again, this example concerns civil rather than criminal proceedings. Still, it is not difficult to see how similar considerations may lead courts to reject direct application of international criminal law, which would at the very least complicate numerous States’ policy of deportation instead of prosecution of foreign suspects of core crimes. All in all, a negative attitude towards core crimes prosecutions is not at all uncommon among national prosecutors and courts.\textsuperscript{623} As a result, the possibility of direct application is regularly ignored, or treated with a negative bias.

3 Sovereignty

The prosecution of core crimes regularly gives rise to considerations about State sovereignty.\textsuperscript{624} The administration of criminal justice has always been and still is one of the most fundamental tasks of the State and is a core component of its sovereignty.\textsuperscript{625} who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination....”


\textsuperscript{622} Id., Concurring Opinion of Judge Pellonpaa, joined by Judge Bratza.

\textsuperscript{623} See e.g. Netherlands, Amsterdam Court of Appeals, *In re Pinochet*, 4 January 1995, 28 NYIL 363 (1997) at 364-365. In proceedings challenging the decision of the Public Prosecutor not to prosecute retired Chilean dictator Pinochet for torture upon his visit to the Netherlands in 1994, the Prosecutions Department asserted that such a prosecution would not only be “illusory,” given practical problems such as the collection of evidence, but also “disproportionate and presumptuous.” The Prosecutions Department even asserted that Pinochet’s presence in the Netherlands, which was a fact of public knowledge, had not been established with certainty. The Amsterdam Court of Appeals upheld the decision of the Prosecutor, calling the complaint against it “manifestly ill-founded” and holding that “prosecution of Pinochet by the Dutch Public Prosecutions Department would encounter so many legal and practical problems that the Public Prosecutor was perfectly within his rights to decide not to prosecute.” See on this decision Ingels and Wilt 1996.

\textsuperscript{624} See Ferdinandusse 2004, p. 1050 and references cited there (on sovereignty based arguments in core crimes law).

\textsuperscript{625} See e.g. Spain, Tribunal Supremo, Guatemalan Genocide Case, 25 February 2003, 42 ILM 686, para. II sub 1:

“La jurisdicción es una de las expresiones de la soberanía del Estado. Es entendida como la facultad o potestad de juzgar, es decir, de ejercer sobre determinadas personas y en relación a
General direct application of core crimes law, *id est* in the absence of a specific rule of reference, thus may be thought to infringe at least to some extent on the sovereign right of the State to shape its criminal law process to its liking. Appeals to sovereignty in the context of core crimes law fit into the broader discussion on the concept of sovereignty in contemporary international law.\(^\text{626}\)

Practice provides some support for the argument that national courts should prosecute only crimes that have received explicit recognition in national law, either through transformation or a specific rule of reference, to safeguard the sovereignty of the State in its administration of criminal justice. In *Nulyarimma v Thompson* (1999), for example, the Federal Court of Australia relied not only on the absence of a procedural framework and the principle of legality, but also on the sovereign character of the administration of criminal justice to reject jurisdiction over international crimes without an explicit national authorization.\(^\text{627}\) It is hard to say to what extent sovereignty related considerations play a role in practice, but it can safely be assumed that national courts (implicitly) entertain them more often.\(^\text{628}\)

However, it should be noted that States’ powers to shape their criminal laws are restricted primarily by the very fact that international law contains obligations for both States and individuals regarding the core crimes, rather than by the direct application of that body of law. After all, implementing legislation may give the State some opportunity to adapt

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\(^\text{628}\) Australia, Federal Court, *Nulyarimma v Thompson*, 1 September 1999, [1999] FCA 1192, para. 52, *per* Whitlam J.

\(^\text{629}\) Cf. Luxembourg, Court of Appeal, *Pinochet*, 11 February 1999, 119 ILR 360 at 363:

> "[T]he Luxembourg courts do not [...] become competent to exercise jurisdiction, in the absence of a legal provision establishing international jurisdiction consequent upon the accession of Luxembourg to the Torture Convention of 1984, having due regard to the significance of jurisdiction as a matter of public policy."


> "Unlike violations of federal statutes or the United States Constitution, no American legislative body has acted in any way with respect to customary international law. To imply a cause of action from the law of nations would completely defeat the critical right of the sovereign to determine whether and how international rights should be enforced in that municipality."

See also Cassese 2001c, p. 168:

> "States consider [...] the translation of international commands into domestic legal standards [as a] part and parcel of their sovereignty, and are unwilling to surrender it to international control. National self-interest stands in the way of a sensible regulation of this crucial area. As a consequence each State decides, on its own, how to make international law binding on State agencies and individuals and what status and rank to assign to it in the hierarchy of municipal sources of law."

core crimes law, but the substantial choices have already been made at the international level. Therefore, the extent to which State sovereignty can be protected by rejecting direct application and requiring implementing legislation is rather limited. 629

4 Democratic Legitimacy

In democratic States, sovereignty-based considerations are partly tied to the democratic legitimacy of the criminal justice system. 630 International (criminal) law is not enacted by an elected legislature, and therefore its direct application injects democratic legal orders with a collection of norms that lack the democratic legitimacy of national law. 631 But here also, several caveats are in order. First, like sovereignty, democratic legitimacy is not substantially furthered by requiring implementing legislation that does not leave any substantial choices. If one wants to enhance the quality of the law-making process, that improvement must take place where the law is actually made, which is on the international level. 632

Second, the very assumption that all criminal law must be made on the national level through a democratic law-making process may be questioned. After all, the international dimension of core crimes law removes its legislative process at least partly from the sovereign prerogatives of individual States. 633 It is doubtful then whether this body of law can be measured by the same standards as national law. Moreover, democratic legitimacy is not the only benchmark of the rule of law. 634 In short, it is mistaken to apply the notions of sovereignty and democratic legitimacy to international core crimes law in the same way as they are applied to national criminal law.

Third, the opposition between a democratically sound national law and an undemocratic international law is at least partly a caricature. The different State organs that shape national law also play a role in the formation of international law. 635 Elected executives and legislatures are involved in the making of both custom and treaty through various actions, including negotiating and approving treaties, crafting national legislation and

630 See e.g. Belgium, Court of Arbitration, 10 July 2002:
"By granting Parliament the power (a) to determine in what cases criminal proceedings are possible and what form they should take, and (b) to adopt legislation under which a penalty may be prescribed and applied, Articles 12.2 and 14 of the Constitution assure to all citizens that no action will be punishable and no penalty imposed except under regulations adopted by a democratically elected deliberative assembly."

633 See Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, per Merkel J., dissenting, para. 136 ("[U]niversal crimes directly impact upon and attack "the international legal order" and cannot be considered purely internal matters of sovereign States."). See for a discussion of the characteristics of core crimes law below, Chapter V, para. 3.
635 See Wouters 2004, p. 31.
making statements on issues of international law. Furthermore, they also have considerable powers to override the judiciary's contributions to international law, *inter alia* through legislation. The balance between those organs is decidedly different on the national and international plane, and the democratic legitimacy of international law may be less than that of many national laws or at least more indirect, but it is not entirely absent.

All in all, considerations over democratic legitimacy do have their bearing on direct application of core crimes law in practice. Yet, like is the case for sovereignty, both the weight of and the optimal solutions for concerns over democratic legitimacy are doubtful in the case of core crimes law. In fact, it is a central feature of core crimes law that it bypasses the national legislature in order to directly regulate the behavior of individuals. One could think therefore that these concerns plead more for a limitation of the scope of core crimes law and a strengthening of the democratic quality of the international law-making process than against direct application.

5 Separation of Powers

Closely linked to the issues of sovereignty and democratic legitimacy are considerations about the separation of powers. Direct application of international criminalizations in the absence of a specific rule of reference in national law can distort the balance between the different national actors involved in the making and application of criminal law. It reduces the influence of the legislature and gives more power to the executive to regulate penal matters through treaty law, as well as more discretion to the judiciary through the application of customary law. In federal States, it may allow the federal government to regulate through treaties penal matters that are otherwise reserved for the states.

In practice, separation of powers considerations appear to play a significant role in the rejection of direct application of various international criminalizations. Particularly in common law States, the rejection of direct application of treaty law and the requirement of statutory authorization of extraterritorial jurisdiction are inspired considerably by the wish to preserve the position of the legislature. Other States, predominantly civil law

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636 See e.g. Labrin and Bosly 1999, p. 292-293 (on the various legislative steps concerning core crimes in Belgium).

637 See Boas 2004, p. 182-183 and Todres 1998, p. 187-88 (on the Australian legislature's, ultimately negative, consideration of legislation to reverse the doctrine of legitimate expectations derived from unincorporated treaties in the Australian *Teoh* case) and below, note 649.


639 See Rogers 1999, p. 215 ("To say that the courts have an additional body of "higher law" to apply, to be found in the whole amorphous body of customary international law, is to inject an enormously distorting overdose of additional power into the Judicial Branch.").

640 An alteration of the division of competences between the federal government and the individual states can also take place through implementing legislation. See on this point Australia, High Court, *Polyukhovich v. The Commonwealth of Australia and Another*, 14 August 1991.

641 See the paragraphs on England and Wales, the United States and Australia in Chapter 2. See also Kirby 2004, p. 245-246; Collins 2002, p. 493.
ones, with the same goal in mind ban custom rather than treaty from direct application. But while separations of powers considerations and their implications in practice take various forms in different States, as Chapter 2 indicates, it is apparent that they have their bearing on practice.

Meanwhile, by and large the same caveats apply as just set out for the related issues of sovereignty and democratic legitimacy. Distortion of the default separation of powers results primarily from the very existence of core crimes law, not just from its direct application. Rejecting direct application of core crimes law does not substantially enhance the position of the legislature, since its legitimate influence through implementing legislation is very limited. Furthermore, the distorting effect of direct application is real and significant, but should not be overstated. Most national legislatures have approved various steps in the development of core crimes law directly through legislation, e.g. on specific crimes and the cooperation with the ad hoc tribunals, and indirectly through control over the executive. Of course, this is only a limited form of control over this body of law. Yet, one can not say that the development of core crimes law has bypassed national legislatures entirely.

A vivid illustration of the different possible approaches to separation of powers concerns is provided by, again, *Nulyarimma v Thompson* (1999). In this case, the Australian government successfully urged its Federal Court to reject direct application of the customary international criminalization of genocide, arguing *inter alia* that “the creation of new crimes is a matter of policy for the legislature, rather than the courts, to determine.” Therefore, the government contended, “the extent to which international criminal law is to be incorporated into domestic law and also whether Australia’s international obligations are to be implemented domestically, is for the legislature alone to determine.” While the impact of this argument on the outcome of the case is unclear, the majority seemed to endorse it. Dissenting Justice Merkel, however, firmly rejected the argument that a proper separation of powers required the courts to ignore the crime of genocide in the absence of implementing legislation. He accepted the contention that Australian courts can no longer create offences, as used to be the case under the common law. Yet, he posited that the incorporation of existing international crimes in municipal law must be distinguished from the creation of new crimes, and is within the proper ambit of the courts’ functions.

The arguments and counter arguments in *Nulyarimma* neatly capture both the essence of the problem and its limits where it concerns core crimes law. The creation of new crimes without involvement of the legislature is indeed fundamentally problematic. This provides a solid argument against the direct application of treaty based criminalizations that neither reflect customary law nor have received the endorsement of the legislature.

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642 See e.g. Ferdinandusse, et al. 2002, p. 344.
643 *Australia, Federal Court, Nulyarimma v Thompson*, 1 September 1999, [1999] FCA 1192, para. 166.
644 Id.
645 Id., para. 57.
646 Id., para. 176.
647 Id., para. 177-179.
either through legislative approval of the treaty itself or a rule of reference in national law. However, the judicial recognition of genocide, crimes against humanity and war crimes can hardly be said to amount to the creation of new offences, even if direct application may well contribute to their further development. States, including Australia, have consistently rejected the argument that they were making new crimes when adopting retrospective war crimes legislation and setting up the ad hoc tribunals.\textsuperscript{648} It is not easy to see why that would be different for national courts, as long as they apply core crimes law within its international boundaries. Where courts go beyond those boundaries, the legislature can issue overriding legislation to correct them.\textsuperscript{649}

But while direct application of core crimes law does not provide national courts with unchecked powers to create new crimes, it can give them considerable leeway to shape the legal framework for the prosecution of existing ones. Prosecutions under direct application of international criminal law often allow national courts flexibility in combining national and international rules.\textsuperscript{650} Also, direct application of customary criminalizations allows courts a certain measure of discretion in formulating the precise elements of those crimes. In this regard, it should be noted that there are significant differences between national and international courts when it comes to their discretion in the prosecution of international crimes. First, international courts have a legal framework in their Statutes and rules that is more coherent and less flexible than the hodgepodge of national and international law from which national courts can choose. Second, international courts generally have greater expertise and are therefore less likely too err in their exercise of discretion. For national courts, which often lack a thorough grasp of the international law they apply, more flexibility means more chance of mistakes.\textsuperscript{651} Finally, international courts arguably have more legitimacy to develop international criminal law. Supported by at least a large part of the international community, international courts may have a better claim to the inevitable law making function that comes with the exercise of judicial discretion than national courts do. Then again, it may be objected that the development of core crimes law requires the concerted efforts of the national and international judiciary alike, not either one by itself.

In summary, separation of powers considerations have considerable relevance for the question of direct application. The prominence and practical consequences of these considerations differ for various States, depending \textit{inter alia} on their constitutional framework and the quality of their judiciary. Again, however, both the weight and implications of these considerations deserve critical scrutiny in particular cases.

\textsuperscript{648} See below, note 1307 and Belgium, Law for the punishment of Genocide, Report of the Justice Commission, Belgian Senate, 1 December 1998, No. 1-749/3, para. II (B) sub 2. See also Turns 2004, p. 354.

\textsuperscript{649} Cf. e.g. Art. 14 Canada's Crimes against Humanity and War Crimes Act 2000 (correcting the Canadian Supreme Court's holding in \textit{Finta} that superior orders defense is available if no moral choice is possible even when orders are manifestly illegal). See also Stahn 2000, p. 206.

\textsuperscript{650} See on this point below, note 710 - 716 and accompanying text.

\textsuperscript{651} See below notes 662 and 678 for examples of such mistakes.
6 Manageability of the Law

Once national authorities have decided to take action regarding the core crimes, an important consideration is the manageability of the law they are going to enact or apply. National law-makers and prosecutors often appear to favor national law as a basis for core crimes prosecutions over direct application of international criminal law because the former is more straightforward, accessible and familiar, and thus more "manageable," than the latter.\(^{652}\) Simply put, the different actors involved in the enforcement of international core crimes law on the national level have good reasons to keep the law, and thereby their work, as simple as possible. This facilitates both the making of the law and its enforcement, prevents complications in its application and thereby enhances the chances for successful prosecutions.

A preference for national law finds expression both on a practical and a more systematical level. As a practical matter, many national authorities long saw, and to a lesser extent still see, international criminal law as a foreign enterprise full of hazards. This may induce them, if only instinctively, to favor national law over international law as a basis for the prosecution of core crimes, and ordinary crimes over international crimes. In more systematic terms, there are good reasons in the making and application of law to choose the most simple solution, in order to minimize the risk of error and resulting flaws in the legal system. This consideration may prompt the same choices in a more reasoned manner. The transformation of international criminalizations into national law gives the legislature the welcome chance to clarify and supplement any points it finds unclear.\(^{653}\)

Within national law, ordinary crimes may be preferred over specific international criminalizations. It takes more time and effort to legislate on the core crimes with all their complications than simply extend jurisdiction for existing ordinary crimes like murder. For most prosecutors and courts, ordinary crimes are more familiar and easier to handle than international crimes.\(^{654}\) They are normally better developed and yield more precedents to rely on.\(^{655}\) Also, they are easier to prove. It is more difficult to establish genocidal intent, the existence of an armed conflict for war crimes or the context necessary for crimes against humanity, than to prove multiple counts of murder.\(^{656}\)

\(^{653}\) See Yuan and Jianping 2002, p. 356.
\(^{655}\) See Kirby 2004, p. 255-256; Haile 2000, p. 35.
\(^{656}\) See e.g. Germany, Bavarian Higher Court (BayObLG), Djajic, 23 May 1997, 3 St 20/06, in 51 NJW (1998), 392-395, where the defendant was convicted on counts of murder and attempted murder but cleared from the charge of complicity in genocide since genocidal intent could not be proven. Cf. Colombia, Corte Constitucional, Sala Plena, Sentencia C-578 (in re Corte Penal Internacional), 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2273 (finding that Art. 20 (2) ICC Statute leaves States the possibility to prosecute suspects who have been acquitted by the ICC on the basis of ordinary crimes, implying that ordinary crimes may be proven where core crimes can not). See also Bremer 240-242.
Therefore, it is generally more efficient and successful to prosecute on the basis of ordinary rather than international crimes where a choice is available.657

The difference in manageability of national and international law may weigh in heavily on the choices of legislatures and prosecutors alike. This is particularly, but not exclusively, so for States with a legal system of limited means and expertise in international law. International law is a complex and dynamic field, the proper understanding of which requires lengthy study. Most national actors in core crimes prosecutions, including courts, are not thoroughly trained in international law and can not fully grasp all its complexities in the limited time they can devote to its examination. The intricacies of custom constitute a prime example,658 but international law is complex in many other aspects.

International criminal law is no exception in this regard.659 The recent experiences of the internationalized courts in Kosovo, Sierra Leone and East-Timor show that national judges who lack expertise may have great difficulties in handling international criminal law. Several commentators have detailed how numerous judgments in those courts have failed to properly apply different elements and concepts of core crimes law.660 In part, this problem is one of adequate staffing, funding and support.661 But those judgments from Kosovo, Sierra Leone and East-Timor also serve as a reminder that direct application of international criminal law is a very complex task. There are more cases that show how national courts struggle with international criminal law,662 possibly

657 See Schabas 2002b, p. 260. Yet, this may not always be the case. It appears that a prosecution for genocide or war crimes rather than murder may have certain advantages, for example in cases where the body of the victim is missing or his identity can not be established. Cf. Switzerland, Military Court of Cassation, In re N., 27 April 2001, para. 4b (“Une poursuite pénale pour violations des lois de la guerre n’implique pas en soi la mention précise de l’identité des victimes.”). According to one commentator, the prosecution in the Ethiopian “Red Terror” trials preferred to charge the defendants with genocide rather than homicide because the latter charge would require each murder to be linked to the defendants whereas charges of genocide did not require such concrete linkage between every murder and every defendant. See Kidane 2003, p. 679 and 684. It is, however, unclear on which ground Kidane bases this assumption and it is likewise uncertain how this strategy has played out in the trials. Still, the difference in this regard may be highly dependent on the circumstances of the case and the form of responsibility to be charged, but it is indeed plausible that for example the ordering or inducing of genocide would be difficult to prosecute on the basis of separate charges of homicide where a concrete link between the defendant and these homicides could not be proved but his involvement in a general genocidal plan could.


659 See Stahn 2000, p. 201.


662 In the curious case of Ex parte Thring (2000), a British Court of Appeal held in no uncertain terms that the notion of an indiscriminate attack was too complicated for judicial review. See U.K., Court of Appeal (Civil Division), R. v. Secretary of State ex parte Thring, 20 July 2000, ICRC website, Clarke LJ: "The court would face what seems to me to be an almost insuperable problem. In order to determine whether an attack was indiscriminate within art 51 (5)(b) of the Geneva Convention, it would be necessary to consider whether an attack or attacks might be expected to cause:
leading to a general preference for national law over international law and ordinary crimes over international crimes.

Some of the more active national authorities tacitly acknowledge the complexity of international core crimes law through the different measures they take to facilitate prosecutions. Several legislatures take measures to concentrate core crimes prosecutions in specific courts or districts, and install special prosecutorial units, both in order to foster expertise. National courts often hear expert-witnesses to inform them on the requirements of international law when dealing with the core crimes. Occasionally, they analyze the differences among the various possible legal bases explicitly. In the Canadian Finta case, one of the justices paid considerable attention to the manageability of the law underlying the prosecution. Justice La Forest considered the prosecution of war crimes and crimes against humanity on the basis of ordinary crimes to yield "obvious advantages." Especially for the jury, which consists of lay men, the familiarity of

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'B... incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' This would involve a consideration of the military advantages concerned. For my part, while I see the force of the submissions made by the applicant, I do not think that the court could sensibly carry out an analysis of such a military advantages or disadvantages, which would involve a consideration of the activities of United Kingdom military operations over Iraq.'

Bennett J:

"The fact that the courts are ill-equipped in these matters is graphically shown by the terms of para (5) of art 51 of the Geneva Convention, now in the Geneva Conventions (Amendment) Act 1995, [...] it would be necessary to go into what happened on the occasions upon which the Royal Air Force used either missiles or bombs. It would then be necessary for the court to have evidence about the 'concrete and direct military advantage anticipated'; and, having had that, it would then be necessary for the court to exercise its judgment, as I read the paragraph, as to whether or not that advantage was excessive in relation to the incidental loss of civilian life, injury to civilians or damage to civilian objects, or a combination thereof. In my judgment, the resolution of such issues is not susceptible to judicial review."

While this concerned a civil case regarding an injunction to carry out military operations in Iraq, the language broadly disqualifies the ability of the judiciary to judge the notion of an indiscriminate attack, which is an element of certain war crimes, and shows the complexities national courts may encounter in enforcing humanitarian law. See also U.S., Court of Appeals, 9th Cir.,(Cal.), Quinn v. Robinson, 26 August 1997, 783 F.2d 776 at 799:

"In Artukovic we erroneously assumed that "crimes against humanity" was synonymous with "war crimes," and then concluded in a somewhat irrelevant fashion that not all war crimes automatically fall outside the ambit of the political offense exception. See 247 F.2d at 204. Our analysis was less than persuasive."

See also Kirby 2004, p. 251.

663 In the Netherlands, for example, core crimes prosecutions are brought by a special prosecutorial unit and held in the district court of Arnhem. See Art. 15 WIM.

664 See e.g. Netherlands, Amsterdam Court of Appeals, In re Boutserse, 3 March 2000, NJ 2000/266, para. 5.4; Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, para. 19 and 106; Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496 at 503 and 509-510.

665 Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 261:

"There are obvious advantages to the second approach [prosecuting on the basis of national ordinary crimes]. The judge and especially the jury are able to function largely pursuant to a system of law which, being our own, is more familiar to us and more precise. As much as possible, the intricacies of what constitutes international law and how it functions (with which even the judge is often unfamiliar) are avoided. The judge is able to instruct the jury secure in his or her knowledge of Canadian law. With the exception of international defences, which are available to
national law was to be preferred over the complexities of international law, Justice La Forest found.666

It should be noted that for the legislature, the desire to keep its task as simple as possible may conflict with the aspiration to enact the best manageable legal basis for core crimes prosecutions. Together with a jurisdictional extension for ordinary crimes, a reference to international law is probably the most straightforward form of criminalization, especially for complex crimes. Thus, many States proscribe war crimes by reference to “the laws and customs of war”, and/or specific treaties.667 Such rules of reference facilitate the work of the legislature, but leave it the judicial authorities to sort out the hard questions of ascertaining and applying the relevant international rules. Hence, there may be a certain conflict of interest in workload between the various national actors involved.

Three caveats regarding the manageability of the law are in order at this point. First, although core crimes law is complex and contains many open questions, there are various instruments that make it more manageable, also for non-experts. The legal instruments of the various international tribunals provide authoritative codifications of customary law. The case law of those tribunals provides further guidance on numerous important principles and questions. Finally, there are many doctrinal works that offer reliable and comprehensive support. These different sources do certainly not dispel all unclarities, and sometimes contradict each other. Also, national courts may have problems locating and accessing the most authoritative ones and distinguishing those from the ones that are partisan, parochial or otherwise of lesser value.668 Yet, the abundance of codification, case law and doctrine in core crimes law does mitigate its complexity to a considerable extent.

the accused, the jury can then perform its function pursuant to Canadian law which demands proof beyond a reasonable doubt that the accused committed the offence — a Canadian offence — with which he or she is charged.”

666 Id. See also para. 322-323:

“[E]ven among the authorities, much confusion exists as to the distillation of the contents of international law. No clear articulation of the physical and mental elements of the international offences of war crimes and crimes against humanity and their defences is found among scholars in this area. This confusion is understandable and unavoidable in our system of international law among sovereign nations. Although some aspect of these offences are delineated in conventions, this is not the case for all; another important source of international law is custom. To establish custom, an extensive survey of the practices of nations is required. It is, of course, not an answer to this complicated task to say that the contents of international offences are too difficult to distill and, therefore, that the accused cannot be found guilty; the confusion is the reality of the international law which Canada has obliged itself to observe and apply. This abandonment of international obligation, however, is likely to occur where the jury is called upon to determine the contents of the international offences. The necessary confusion could mislead the jury into believing that international norms are not really law and opens the door to manipulative lawyering.”

667 The reason that many States choose an open-ended rule of reference for war crimes is probably practical and connected to the extensive, complex and until recently uncodified body of humanitarian law. Unlike genocide, the definition of war crimes is no easy task for a legislator. Now that the ICC Statute provides an elaboration of (most) war crimes, many national laws refer to that Statute. See above, Chapter II, para. 3.2.

Second, the extent to which national law can remedy the complexities of core crimes law is limited. National law can only clarify or replace international criminalizations within the boundaries set by international law. Whatever legal basis one chooses for a core crimes prosecution, questions about the content of the relevant international rules will often come up in one way or another. The Finta case provides a suitable illustration. The choice to prosecute WWII war crimes and crimes against humanity on the basis of ordinary crimes like robbery, kidnapping and manslaughter did not relieve the prosecutor and court from confronting the difficult question whether the international criminalizations were met, with fatal consequences in this particular case. The usefulness of interposing rules of national law to mitigate the hard questions of international law may therefore be questioned.

Third, the argument that international core crimes law is too complex to form the basis for national prosecutions is put in perspective by the fact that national courts regularly apply it in other contexts. National courts of various, but certainly not all, States are quite comfortable directly applying complex concepts of international criminal law in many cases concerning the exclusion of asylum seekers from refugee status, civil damage claims for core crimes, various forms of civil disobedience against the military and even the occasional libel case. Quite a few of those cases apply core crimes law in detail in a manner that is not fundamentally different from their application in a criminal proceeding.

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669 See above, note 75 and accompanying text.
670 In short, the Canadian Supreme Court required proof of the actus reus and mens rea of both the ordinary crimes under Canadian criminal law and the underlying international crimes. The high requirements of proof of the knowledge of the defendant that he was committing international crimes, as well as the broad acceptance of defences like superior orders and mistake of fact, led to the acquittal of the defendant. See Turnes 2004, p. 356-358; Fletcher 2002, p. 455-458; Cotler 1996.
672 See numerous cases under the U.S. Alien Tort Claims Act, e.g. U.S., District Court (Cal.), Sarei v. Rio Tinto PLC, 9 July 2002, 221 F.Supp.2d 1116 (finding that Papua New Guinea residents provided prima facie evidence of war crimes and crimes against humanity, including genocide, against international mining group) and U.S., Court of Appeals (Second Circuit), Kadie v. Karadzic, 13 October 1995, 70 F.3d 232. See also Japan, Tokyo District Court, Shimoda et al. v. The State, 7 December 1963 (examining at length the legality of the atomic bombing of Hiroshima and Nagasaki under international humanitarian law).
674 See U.K., High Court of Justice Queen's Bench Division, Ken Lukowiak v. Unidad Editorial SA, 6 July 2001, para. 30-38 (libel case for accusation of war crime committed in the Anglo-Argentinean war over the Falkland/Malvinas Islands).
675 See e.g. U.S., District Court, Mehinovic et al v. Vuckovic, 2 May 2002, 198 F.Supp.2d 1322, described above, Chapter II, para. 3.3.g. Cf. Netherlands, HR, In re Kesbir, 7 May 2004 (In this case concerning the extradition of an alleged PKK-leader to Turkey, both the Attorney-General and the defense argued extensively on the applicability of the humanitarian law of internal armed conflicts to the situation in Turkey as well as the question whether the Turkish military could be a legitimate target under that body of law, but the Supreme Court did not reach a decision on these points.).
Criminal proceedings generally require higher standards than non-criminal ones, but in practice the difference is not always obvious. Also, procedural variations like those in the standard of proof do not touch on the question whether the law is sufficiently clear for direct application. These non-criminal cases show that national courts regularly consider core crimes law to be sufficiently manageable to form the legal basis for judgments that stigmatize individuals as core crimes perpetrators and attach practical consequences that can be as severe as criminal penalties. Still, the import of such non-criminal proceedings should not be overstated. Numerous of those administrative and civil proceedings apply core crimes law in a cursory or incorrect manner and thus support the argument of international law’s complexity, rather than contradict it.

In conclusion, considerations of manageability and effectiveness may well argue in favor of using national law and ordinary crimes rather than international law and international crimes as a basis for prosecution. But although there are good reasons to choose the most simple option available, the case for national law is not clear-cut. National courts will generally have to delve into questions of international law regardless of the legal basis of the charges. While there are various national judgments that illustrate the errors and complications that can result from direct application of core crimes law, other cases demonstrate that national courts are not as a general rule incapable to perform that task.

7 Development and Coherence of Core Crimes Law

The legal basis enacted and applied for national prosecutions has implications for the development and coherence of core crimes law. After all, the formation and development of legal rules take place through their formulation, interpretation and application. These are more fundamental considerations that do not often seem to play a role in practice. Yet, occasionally they may figure directly or indirectly in the decision making processes of the different actors involved. Also, with the continuing development of ICL these more fundamental systemic considerations may gain significance. Therefore, they will be treated here.

676 Cf. Wagner 1989, p. 895-897 (concluding that denaturalization and deportation proceedings in the U.S. often require the government to prove that the individual actually committed a war crime or crime against humanity while the U.S. Supreme Court has determined that the burden of proof in these proceedings is “substantially identical with that required in criminal cases”).
677 See above, notes 343 and 345.
678 For example, Dutch proceedings regarding the exclusion of refugees on the basis of Art. 1F Refugee Convention regularly conflate crimes against humanity with human rights violations, or summarily and questionable assume that the latter amount to the former. See e.g. Netherlands, The Hague District Court, 29 August 2003; Netherlands, The Hague District Court, 11 July 2002; Zegveld 2001. See also above, note 662.
679 While this process is inherent in the very nature of customary international law, it is also of obvious importance for the clarification and development of treaty law.
680 See e.g. Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 323 (“Not only is the judge better trained than the jury in evaluating international law, but, in fact, his or her interpretation of international law bears some force internationally.”).
First, it may be asked how the legal basis for core crimes prosecutions affects their contributive value for the development of ICL. Formulating specific national legislation on the core crimes gives the legislature not only the power to control the implementation of core crimes law on the national level but also a voice in its development on the international level. It leads to State practice and contributes to the development of customary ICL. The broadening of protected groups in many national definitions of genocide, for example, fuels a corresponding trend in customary international law that would not otherwise take place, or at least not with the same force.681

Prosecuting core crimes directly on the basis of their international criminalizations leaves more power to interpret and develop core crimes law for the judiciary, at the expense of the legislature’s influence. The flexible nature of judicial development can prove an advantage in a rapidly changing field like ICL. On the other hand, the shift of influence from the legislature to the judiciary may imply a diminution of the clarity and authoritativeness of State practice, at least when the law in question is applied only seldomly or in an incoherent fashion, as is the case for core crimes law in many States. In such circumstances, legislation may carry more weight than case law due to its general scope, the authority and democratic legitimacy of its source, and its (at least relative) clarity.

Yet, an important factor in the development of international law is the judicial dialogue that takes place when different courts interpret the same concepts and take into account each other’s case law.682 The more the law applied in national prosecutions diverges from the corresponding international law, the more this exchange is distorted. Therefore, direct application of international criminal law may have the advantage of fostering a more direct dialogue between different courts that apply the same law, and expounding the international law itself rather than a national reproduction of it.683 The value for other courts of core crimes prosecutions on the basis of ordinary criminal law will often be rather limited, while prosecutions on the basis of national law that specifically deals with the core crimes probably occupies the middle ground, depending inter alia on the extent to which this national law diverges from the underlying international rules.

A recent study of the various ways the ICTY has used national judgments as sources of international criminal law illustrates that the legal basis for national core crimes prosecutions may well influence their value for other courts.684 The ICTY has on several occasions qualified the value of core crimes prosecutions on the basis of national law. In Tadic, the Trial Chamber commented on the evidentiary value of the judgment of the French Cour de Cassation in Barbie:

681 See above, Chapter II, para. 2.2.b and, on the current status of this trend in contemporary international law below, note 732.
684 See Nolkaemper 2003b.
“While instructive, it should be noted that the court in the Barbie case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter..."\(^66\)

In Furundzija, the Trial Chamber warned that “for a correct appraisal of [the] case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value."\(^66\) It then commented on the case law of British military courts that “the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration."\(^67\)

So, there are signs that the legal basis of national prosecutions indeed makes up a significant determining factor for their value as a legal precedent for other courts, and thus for their contribution to the development of core crimes law. Then again, the differences in this regard should not be overstated as the reliance by international and other national courts on national judgments depends on many other factors besides their legal basis.\(^68\) Also, a desire to strengthen the national rule of law rather than worry about the development of international criminal law may result in a conscious decision to prosecute on the basis of ordinary crimes, especially for States with an underdeveloped or threatened legal system.\(^69\)

Second, there is the question how the legal basis for national prosecutions affects the coherence of core crimes law. The multitude of national and international voices, both legislative and judicial, involved in the development of core crimes law can easily lead to a lack of harmony. This is only a particular variant of the classical tension between development and coherence of (customary) international law. Yet, the penal character of core crimes law makes this tension decidedly intense, and heightens the need for coherence.\(^69\) After all, coherence of the law partly determines the legal certainty of the

\(^{66}\) ICTY, Trial Chamber, Tadic, 7 May 1997 para. 642. Note that this reading ignores the declarative rather than constitutive nature of the reference to the Nuremberg Charter in French law. See above, Chapter II, para. 3.3.j.

\(^{67}\) ICTY, Trial Chamber, Furundzija, 10 December 1998 para. 194.

\(^{68}\) ICTY, Trial Chamber, Furundzija, 10 December 1998 para. 196. See also ICTY, Appeals Chamber, Erdemovic, 7 October 1997 para. 52-55.

\(^{69}\) See Dickinson 2003, p. 304-308. Obviously, the accessibility of the judgment concerned is an important factor, which in turn depends *inter alia* on its language and source of publication. Cf. Stirling-Zanda 2000, p. 260-274. Moreover, courts often seem to be guided by other considerations in their use of case law than methodological concerns over the law applied. See for an analysis of other factors that determine the extent and significance of the international judicial dialogue Helfer and Slaughter 1997; Slaughter 1994.

\(^{69}\) See e-mail interview of 30 March 2003 with Brian Concannon, on file with the author (stating that the Bureau des Avocats Internationaux preferred to prosecute human rights violations in Haiti on the basis of national rather than international law in order to strengthen the rule of Haitian law).

\(^{69}\) See ICTY, Appeals Chamber, Aleksovski, 24 March 2000, para. 113:

“The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and
individual, which is a fundamental concern in criminal law.\textsuperscript{691} Therefore, both the development of core crimes law and the legal certainty of the individual require at least a minimal measure of coherence of the law used in national prosecutions.\textsuperscript{692}

Obviously, unity of law does not guarantee harmony in its application by different courts. ICL is replete with examples where courts have interpreted and applied the same law in different ways.\textsuperscript{693} The ICTY and the ICTR, for example, have developed significantly diverging case law on issues like the definition of rape, cumulative charging, the existence of a hierarchy of international crimes and the question whether the \textit{mens rea} of murder as a crime against humanity requires premeditation.\textsuperscript{694} Between the criminal courts of various States, different national conceptions of relevant elements may lead to divergent interpretation and application of identical criminalizations.\textsuperscript{695} Still, unity of law may not solve all problems, but it provides a better chance on a more or less coherent body of case law regarding the core crimes than a situation in which national courts all apply their own diverging laws.

The need for coherence of core crimes law finds clear recognition in practice. There is no principle of \textit{stare decisis} in international criminal law.\textsuperscript{696} Judgments of international criminal tribunals do not form binding precedents even for their own subsequent proceedings, let alone for national courts.\textsuperscript{697} Yet, the different actors involved in the enforcement of core crimes law strive for coherence of the law and its application in various ways. Several recent national laws regarding core crimes not only refer to the criminalizations in the ICC Statute, or copy them, but also require or allow their courts to take into account the way these offences are interpreted in the Elements of Crimes and/or applied by the ICC.\textsuperscript{698} Other legislatures have expressed their expectation that national

\begin{footnotesize}
\begin{itemize}
\item[691] See further below, Chapter VI, para. 5.3 (on the foreseeability of core crimes law).
\item[693] See e.g. Ziegler 1998, p. 81 (on the divergent interpretation of the international or non-international nature of the armed conflict in the former Yugoslavia by the Swiss courts and the ICTY).
\item[695] See Netherlands, Bijnondere Raad van Cassatie, Ahlbrecht II, 11 April 1949, NJ 1949/425; Partial English translation in Annual Digest 1949, No. 141, at p. 396-397 (on the different forms of homicide in national laws and their consequences for the interpretation of murder as a crime against humanity).
\item[696] See ICTY, Trial Chamber, Kupreskic, 14 January 2000, para. 540. See also Ferdinandusse 2004, p. 1048-1051.
\item[697] See Art. 21(2) ICC Statute ("The Court may apply principles and rules of law as interpreted in its previous decisions." - emphasis added). The \textit{ne bis in idem} rule requires acceptance of specific judgments as final, but does not make them legal precedents in a wider sense. See Art. 20 ICC Statute, Art. 10 ICTY Statute and Art. 9 ICTR Statute.
\item[698] See e.g. UK, Art. 50 International Criminal Court Act 2001:
\begin{enumerate}
\item (1) In this Part:
\begin{itemize}
\item "genocide" means an act of genocide as defined in article 6 [ICC Statute].
\item "crime against humanity" means a crime against humanity as defined in article 7, and
\item "war crime" means a war crime as defined in article 8.2.
\end{itemize}
\item (2) In interpreting and applying the provisions of those articles the court shall take into account:
\end{itemize}
\end{enumerate}
\end{footnotesize}
law will be interpreted in conformity with the case law of the ICC and other international courts during the drafting process rather than in the implementing legislation itself. National courts occasionally correct the legislature in order to safeguard harmony in core crimes law. In general, both national and international courts foster coherence of the law where possible and even recognize an informal hierarchy of precedents, topped by the international courts that carry most authority and expertise.

Coherence of the law is a relevant consideration, but it does not unambiguously plead for national or international law as a basis for core crimes prosecutions. On the one hand, direct application of ICL ensures that national and international courts apply the same law and facilitates the judicial dialogue. At this point, it is pertinent to note the subtle

(a) any relevant Elements of Crimes adopted in accordance with article 9

(5) In interpreting and applying the provisions of the articles referred to in subsection (1) the court shall take into account any relevant judgment or decision of the ICC. Account may also be taken of any other relevant international jurisprudence."

See likewise Art. 65 (5) and 66 (4). See also New Zealand, Art. 12 International Crimes and International Criminal Court Act 2000 (General principles of criminal law):

"[...]"

(4) For the purposes of interpreting and applying articles 6 to 8 of the Statute in proceedings for an offence against section 9 or section 10 or section 11,--

(a) the New Zealand Court exercising jurisdiction in the proceedings may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute;"

See e.g. Werle 2003, p. 232-234. But compare Boas 2004, p. 186-189 (on the Australian declaration accompanying its ratification of the ICC Statute that the core crimes “will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law”).

See e.g. the repeated invalidations of national laws implementing provisions from the Geneva Conventions in a flawed manner by the Hungarian Constitutional Court, above, Chapter II, para. 3.3.n. See particularly Hungary, Constitutional Court, Decision No. 36/1996, 4 November 1996, para. 1:

"En effet, la Loi rapproche les différentes dispositions concernant les champs d'application matériel et personnel des Conventions de Genève et de ce fait elle crée des rapports inexistants dans les Conventions. Ainsi, elle modifie le contenu des Conventions de Genève, viole l'harmonie entre le droit international et le droit interne, empêche l'application des principes généralement reconnus du droit international."

Unofficial translation from website ICRC.

See e.g. ICTR, Appeals Chamber, Semanza, Decision, 31 May 2000, Separate Opinion of Judge Shahabuddeen, in particular para. 25-32; ICTY, Appeals Chamber, Aleksovski, 24 March 2000, para. 107 and 113. See also Ferdinandusse 2004, p. 1051; Jones and Powles 2003, p. 370-371. But see Switzerland, Military Court of Cassation, In re N., 27 April 2001, para. 9d (finding that there is no need to analyze certain differences in interpretation of the law between the Swiss Court of Appeal and the ICTR: “Il n'y a donc pas lieu d'analyser de façon plus approfondie cette prétendue divergence dans l'interprétation des normes du droit international humanitaire. En revanche, il convient de vérifier si, dans l'application de ces critères sur la base des faits constatés de manière non arbitraire, le Tribunal d'appel a considéré à juste titre que les éléments constitutifs du délit de l'Art. 109 CPN étaient réunis.”).


See Wible 2002, p. 266 and 295:

“Domestic courts should incorporate as much international law, including both substantive and procedural standards, as possible into prosecutions for international crimes. [...] Because the crimes at issue are violations of universal norms, it is essential that national prosecutions maintain an international character and that there be formal mechanisms to prevent divergence from certain core universal touchstones. Harmonizing international criminal law will lead to a more coherent
difference between a rule of reference to an international criminalization and a seemingly identical national criminalization of an international crime. It may be thought that it makes no difference whether a national law refers to an international criminalization like Art. 2 Genocide Convention or contains a verbatim reproduction of it, and often this will be true. Still, there can be a significant difference in the way national courts interpret unclarities in these criminalizations. In many States, provisions of national law are interpreted according to national rules of interpretation, while directly applicable treaty provisions are interpreted according to international rules of treaty interpretation as codified in the VCLT. While it is not self-evident that the general rules of treaty interpretation are suitable for ICL, national courts may look primarily to international sources to decide questions of interpretation for directly applicable international criminalizations, but turn to national sources like the drafting process of the national law to interpret homonymous national provisions. Therefore, incorporation of international provisions may provide greater coherence of international law than transformation.

On the other hand, the coherence stemming from direct application should not be idealized. National courts can render very divergent interpretations of international law, particularly custom. Where this is the case, national legislatures may lay down a more authoritative interpretation of international rules in national law. Although legislatures can also differ in their reading of the law, they will often bring unity to diverging case law and thus provide a welcome increase of coherence, at least within the national legal order. Plus, the difference between national and international rules of interpretation set out above will in practice often be minimal or even none. After all, when interpreting national implementing laws courts often resort to international law in order to ascertain either the intent of the legislature, which is normally to give effect to the underlying international law, or the spirit or purpose of the law. Conversely, national courts

body of law, will better protect defendants from deficient prosecutions, and will act as a restraint on unjust exercise of extraterritoriality.”


Resort to international law may therefore required by quite general provisions on interpretation. See e.g. Art. 2 (3) Ethiopian Penal Code:

“In cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view.”

See Haile 2000, p. 48-49. Likewise, the classification of national provisions, for example in a title of the penal code concerning offenses against the law of nations, may indicate recourse to underlying international law. See Haile 2000, p. 53. See also U.K., House of Lords, R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3), 24 March 1999, [2000] 1 A.C. 147 at 163:
regularly pay lip-service to the international rules of treaty interpretation while they do not in fact follow them, adopting a more nationalist interpretation instead. Thus, whether national or international law as a basis for core crimes prosecutions brings greater coherence in practice depends on different factors, *inter alia* the clarity of the international norms and national courts’ practice of interpretation.

The need for coherence plays out not only for core crimes law in general, but also in individual cases. A case in point is the prosecution of the Rwandan *bourgmestre* N. in Switzerland. The different courts in this case frequently referred to the international character of the prosecution and the practice of the ICTR, also when deciding points that were regulated by Swiss law. Yet, a leading principle in striking the balance between Swiss and international law, however, seemed to be lacking, as can be seen in the judgment of the Military Court of Cassation (2001). In ruling that the defendant could be charged with the murder of unnamed victims, the Court stated that whatever the procedure of the ICTR may be on that point, the Swiss courts would follow their own. Yet, when the credibility of the testimony of traumatized and illiterate survivors was contested, the Court relied heavily on the practice of the ICTR to justify the use of partly inaccurate statements. Similarly, the Court treated the findings of the ICTR as decisive for the question whether the situation in Rwanda amounted to a non-international armed conflict, but subsequently dismissed its authority when analyzing the nexus between the crimes and the armed conflict. Unlike the Court of Appeal, however, the Court of Cassation considered it convenient to apply the criteria of the ICTR on this point.

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"Section 134 refers without qualification to "public officials" or persons acting in an official capacity. A former head of state cannot be excluded from its ambit. The ordinary meaning of the words does not support limitation, and, as a provision giving effect to the United Kingdom's obligations under a Convention it should, where possible, be construed compatibly with those obligations."


710 See above, Chapter II, para. 3.3.c.

711 Switzerland, Military Court of Cassation, *In re N.*, 27 April 2001, para. 4b:

"Une poursuite pénale pour violations des lois de la guerre n'implique pas en soi la mention précise de l'identité des victimes. [...] L'accusé se prétend encore d'une règle prétendument applicable devant le TPIR, selon laquelle, en cas d'accusation de violation de l'Art. 3 commun, les victimes devraient être nommément visées. Dans sa motivation, l'accusé ne renvoie à aucune norme du Statut ou du règlement de procédure de ce Tribunal, ni à aucun élément précis de sa jurisprudence. Quoi qu'il en soit, les juridictions suisses n'ont pas à appliquer les règles de procédure étrangères ou internationales. Quant à celles du droit suisse (Art. 147 PPM), elles ont été respectées dans le cas particulier. Ce motif de cassation est en conséquence mal fondé."

712 Id., para. 6b.

713 Id., para. 3d and 9d:

"Le TPIR a en effet admis, dans les jugements de ses Chambres de première instance où la question devait être résolue, que les événements ou les massacres de population au Rwanda entre avril et juillet 1994 s'inscrivaient dans le contexte d'un conflit armé interne [...] Le Tribunal militaire de cassation, en tant que Cour suprême, interprète de façon autonome l'Art. 109 CPM. [...] Les critères utilisés par les Chambres de première instance du TPIR pour déterminer si l'Art. 3 commun et le Protocole II ont été violés ne doivent pas nécessairement être repris dans la jurisprudence nationale suisse."

714 Id., para. 9d:
Finally, the Court of Cassation ignored the practice of the ICTR again when judging the suitability of the sentence, stating *inter alia* that the national sentencing criteria might be different from those of the ICTR.\(^{715}\) In short, it is unclear why national law prevailed over international practice on some issues, but not on others. Such selective reliance on international law is not uncommon in national prosecutions of core crimes.\(^{716}\) One could think that a more principled and explicit procedure for balancing the relevant national and international rules would be desirable, if only to eliminate the appearance of what could be called "law shopping" by national judges. This consideration does not so much favor any particular legal basis but rather requires a clear and consistent choice in this respect.

All in all, considerations regarding the development and coherence of core crimes law do not clearly point to national or international law as the preferred basis for core crimes prosecutions. While national criminalizations of the core crimes make a stronger legislative contribution to the development of ICL, direct application of international criminalizations bears more judicial influence and stimulates the international judicial dialogue. Likewise, the coherence of core crimes law may benefit both from direct application of international norms and from their codification and clarification in national law. Prosecutions on the basis of ordinary crimes, however, constitute the least preferred option when considering the development and coherence of core crimes law.

8 Underinclusion and Overinclusion

The possible legal bases for core crimes prosecutions vary considerably in the acts they criminalize. It has been noted time and again that essentially every single national law shows lacunae in the criminalization of the core crimes.\(^{717}\) But simultaneously, national criminalizations often cover acts which can not properly be characterized as core crimes. In other words, national criminal law is often both underinclusive and overinclusive at the same time. Thus, the choice between national and international law as a basis for the prosecution of core crimes can have significant consequences for the ability of States to fulfill their obligations under international law. Therefore, underinclusion and

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\(^{715}\) Id., para. 13b:

"Dans le cas particulier, il convient donc de reprendre [the ICTR] critères et de les interpréter en fonction de la situation concrète de l'accusé. C'est maladroitement que le Tribunal d'appel a affirmé s'écarte de l'actuelle jurisprudence du TPIR dès lors que, ce nonobstant, il a en définitive appliqué au cas particulier des critères correspondant à ceux que l'on vient d'exposer."

\(^{716}\) See Bridge 1964, p. 1260.

overinclusion of the different potential legal bases are noteworthy considerations for the
decision which law to enact or apply.

A lack of congruence with the underlying international law characterizes both ordinary
and international criminalizations in national law. Ordinary criminalizations are often
underinclusive. Leaving aside for now the international dimension and contextual
element of the core crimes, discussed above, national law regarding ordinary crimes
simply does not cover numerous specific acts that make up core crimes. This is often the
case for non-homicidal acts that amount to war crimes or crimes against humanity.\footnote{718}
Pertinent examples include unjustifiable delay in the repatriation of prisoners of war,
which constitutes a grave breach under AP I,\footnote{719} and certain acts of persecution.\footnote{720}
Perhaps focusing too much on the most obvious and violent core crimes, which
correspond to ordinary crimes like murder and rape, States easily overestimate the extent
to which their ordinary criminal law covers the core crimes.\footnote{721}

At the same time, ordinary criminalizations are generally also overinclusive. The broad
definitions of ordinary criminal law cast the net far wider than the more specific ones in
international core crimes law. For example, if one prosecutes a killing in war as murder
or manslaughter, the question of military necessity is left out of the definition of the
crime. As a result, killings that are justified under the laws of war may fulfil the
definition of murder. In some States, their legitimacy under humanitarian law will then
serve as a ground of justification, leading the defendant to be classified as a
"gerechtfertigter Straftäter", whereas the killing should not have been classified as a
crime at all.\footnote{722}

Likewise, national criminalizations of international crimes are often underinclusive,
overinclusive or both. The description of national criminalizations of genocide above
illustrates how variations in formulation regularly add elements to the core crimes, or
omit them.\footnote{723} Such discrepancies are also found abundantly in national criminalizations

\footnote{718} See Vandermeersch 2004, p. 135 and 137; Segall 2003, p. 267; Wouters and Panken 2003, p. 10-11;

\footnote{719} See Art. 85 (4) sub b AP I.

\footnote{720} See Art. 7 (1) sub b ICC Statute.

\footnote{721} See Malanino 2003, p. 61-63 (on the limited extent to which ordinary Argentinean criminal law covers
core crimes); Schabas 2000b, p. 352-353; Bremer 1999, p. 159-249 (showing in a detailed analysis how the
reliance of Germany on ordinary crimes prior to the adoption of the 2003 Code on International Crimes
failed to ensure the effective prosecution of all war crimes); Bothe 1996, p. 294-295; Wolfrum 1996, p.
243; Bothe 1995, p. 242-243. Cf. numerous recommendations of the Committee against Torture, noting that
parties to the CAT have failed to enact torture as a specific crime while their ordinary criminal law does not
cover all acts of torture. See e.g. Lambert-Abdelgawad 2002, p. 533 and United Nations Committee against
Torture and Holmström 2000, p. 4 (Country Report on Algeria, 1996); 30 (Colombia, 1995) and 42 (Cuba,
1997: "The failure to establish a specific crime of torture as required by the Convention leaves a gap in the
application of its provisions that is not filled by any of the existing offences directed against violations of
the bodily integrity or the dignity of the individual.").

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\footnote{723} See above, Chapter II, para. 2.2.b.
of the other core crimes,\textsuperscript{724} and in ancillary issues like command responsibility.\textsuperscript{725} Generally, these discrepancies are a conscious choice of the legislature,\textsuperscript{726} but occasionally they are simply the result of oversight.\textsuperscript{727} Whatever the reason, many national provisions on genocide, crimes against humanity and war crimes do not criminalize these offences exhaustively, or on the contrary expand their scope. A very common example of overinclusion concerns the choice of numerous legislatures to proscribe war crimes by a general rule of reference to violations of the laws and customs of war.\textsuperscript{728} After all, not all violations of humanitarian law amount to war crimes.\textsuperscript{729}

The disparities between national legislation and corresponding international law can lead to different problems. Underinclusion can obviously thwart or at least complicate core crimes prosecutions that a State wants to conduct.\textsuperscript{730} It can also lead to a violation of the State’s international obligations to criminalize the core crimes in its national legislation and to prosecute them.\textsuperscript{731} Overinclusion, on the other hand, can cause a State to prosecute acts as core crimes that can not be so categorized under international law. The proceedings in Spain, Germany and Ethiopia described above, for example, all appear to have charged defendants with genocide for acts that did not amount to genocide under international law.\textsuperscript{732} This is not necessarily problematic. Ethiopia, for example, is well


\textsuperscript{725} Compare e.g. Section 5 of Canada’s Crimes against Humanity and War Crimes Act and Art. 13 and 14 of Germany’s Code of International Crimes to Art. 28 ICC Statute.

\textsuperscript{726} See Schabas 2000b, p. 351 (citing a Canadian legislative committee as stating that “we believe that the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents”).

\textsuperscript{727} See Vandermeersch 2004, p. 136 (Belgian law copying Art. 7 ICC Statute on crimes against humanity omitted several constituting acts by oversight. This gap was later repaired).

\textsuperscript{728} See above, Chapter II, para. 3.2.a.

\textsuperscript{729} See ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995para. 86-94 and 134-135. See also Dinstein 2004, p. 229; Cassese 2003a, p. 50-51. However, it may be argued that “violations of the laws and customs of war” has become a term of art, referring only to those violations giving rise to individual criminal responsibility, as a result of its inclusion in numerous national criminal laws and the ICTY Statute. See Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, per Brennan J., para. 4 (“A war crime in international law is a violation of the laws and customs of war.”).

\textsuperscript{730} Note, however, that it can also make such prosecution easier by requiring less elements to be proven.

\textsuperscript{731} See on the legal basis and extent of the duty to prescribe and prosecute core crimes below, note 1040 and Chapter V, para. 3.3.d.

\textsuperscript{732} See above, Chapter II, para. 2.2.b. While most of the acts in question fall outside the scope of the Genocide Convention, it is open to debate whether customary international law nowadays recognizes a broader definition of genocide which would encompass, inter alia, political groups as possible victims. On the one hand, the recognition of political groups is reflected in various national laws and judgments and goes back to GA Resolution 96-1 of 1946:
permitted under international law to prosecute crimes committed by its nationals on its territory, even if these crimes do probably not fall within the definition of genocide under international law. Yet, there are several ways in which prosecutions on the basis of overinclusive national law can violate international law.

First, prosecutions of acts committed in international armed conflict on the basis of overinclusive national law may violate international humanitarian law. The complexity of this question requires a broader discussion of the relationship between national criminal law and core crimes law. As a general rule, States are free to shape their criminal laws to their preferences and thus to prohibit acts that international law does not criminalize.\textsuperscript{733} The international criminalizations of genocide, crimes against humanity and war crimes in internal armed conflict constitute only minimum norms.\textsuperscript{734} They do not have a legitimizing function, which would mean that relevant acts not prohibited by these norms must be considered to be allowed. Therefore, within the normal limits of jurisdiction imposed by international law, States are free to proscribe and prosecute acts that fall outside these international criminalizations, such as "genocidal" acts against political groups. Arguably, this freedom includes the competence to label such acts as genocide, crimes against humanity or war crimes in national criminal law.\textsuperscript{735} At least, practice

\textsuperscript{733} Numerous treaties with a penal content expressly preserve the freedom of States Parties to legislate in excess of the treaty. Such provisions are merely confirmations of the general rule. See e.g. Art. 1 (2) and 5 (3) CAT. See for a list of further examples O'Keefe 2004, p. 751.

\textsuperscript{734} Cf. ICTY, Trial Chamber, Tadic, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 67-74 and ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, para. 218-219.

\textsuperscript{735} See Colombia, Corte Constitucional, Sala Plena, Genocidio, Sentencia C-177, 14 February 2001, 30 Jurisprudencia y Doctrina 707 at 710: 

"Esta Corte encuentra que ningún reparo puede formularse a la ampliación que de la protección del genocidio a los grupos políticos, hace la norma cuestionada, pues es sabido que la regulación contenida en los tratados y pactos internacionales consagra un parámetro mínimo de protección, de modo que nada se opone a que los Estados, en sus legislaciones internas consagren un mayor ámbito de protección. Así, pues, no hay óbice para que las legislaciones nacionales adopten un concepto más amplio de genocidio, siempre y cuando se conserve la esencia de este crimen, que consiste en la destrucción sistemática y deliberada de un grupo humano, que tenga una identidad definida. Y es indudable que un grupo político la tiene."

See also Kleffner 2003, p. 100; Green 2000, p. 293.
shows both that numerous States do so, and a lack of protest from other States against this practice.

In Kesbir (2004), the Dutch Supreme Court analyzed the relationship of national criminal law and international humanitarian law governing internal armed conflicts in some detail. The petitioner in this case appealed to the Supreme Court to block her extradition to Turkey, where she was suspected of various crimes connected to her alleged involvement in the Kurdish organization PKK. She argued that several of the accusations against her concerned acts committed in an internal armed conflict which did not constitute crimes under international humanitarian law, and therefore not under Dutch law either. The desired outcome of this argument was that Turkey’s extradition request would be rejected for lack of double criminality of the acts in question, which was required by Dutch law. The broader claim underlying it was that the application of humanitarian law to internal armed conflicts is exclusive and rules out more extensive criminalizations in national criminal law. The Supreme Court rejected the argument in careful language, limiting its findings to situations of internal armed conflict. The Court held that the application of international humanitarian law to internal armed conflicts is not exclusive and that Common Art. 3 of the Geneva Conventions contains only minimum standards. Because Common Art. 3 does not “legitimize” the alleged violent acts in question, the Court found, the State retains the competence to punish them on the basis of its ordinary criminal law. In other words, overinclusion of national criminal law does not violate international law where it concerns acts committed in internal armed conflict.

However, it seems that the situation is different where it concerns humanitarian law governing international armed conflicts. In internal armed conflicts, international humanitarian law merely provides a minimum standard that complements national criminal law. In international armed conflicts, on the other hand, it constitutes the lex specialis. It has this position of lex specialis in relation to international human rights law, and arguably also vis-à-vis national criminal law. States may of course proscribe

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736 Netherlands, HR, In re Kesbir, 7 May 2004.
737 Dutch law regarding war crimes refers in general terms to the laws and customs of war. See above, note 163.
738 Netherlands, HR, In re Kesbir, 7 May 2004, para. 3.3.
739 Id., para. 3.3.3.
740 Id., para. 3.3.6 and 3.3.7.
741 Id., para. 3.3.7:

"De omstandigheid dat [Common Art. 3 GC’s...] van toepassing is, doet niet af aan de bevoegdheid van de betrokken Staat om strafbare feiten, begaan door leden van een gewapende oppositionele groep in verband met een intern gewapend conflict volgens zijn commune strafrecht te vervolgen en te bestrijden. Uit Art. 3 vloeit naar zijn aard dus niet voort dat anderen dan de niet aan de strijd deelnemende personen geen bescherming toekomt tegen aanslagen op hun leven of tegen lichamelijke geweldpleging. Dit artikel legitimineert zodanige handelingen niet."

742 See Green 2000, p. 319.
743 See ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 25 ("In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."). Cf. ICJ,
acts connected to international armed conflict for their own citizens, for example aiding the enemy, as well as acts that are not regulated by humanitarian law. But logically, they may not unilaterally impose stricter rules of warfare on their adversaries by prosecuting acts under national criminal law that are governed but not prohibited by international humanitarian law. In this sense, international humanitarian law does have a legitimizing function for lawful combatants. If a pilot on a bombing mission in an international armed conflict adheres to international humanitarian law’s demands, such as the principles of proportionality and distinction, her prosecution on charges of manslaughter and criminal damage would violate international humanitarian law.

Several judgments of national courts show that the question to the admissibility of an overinclusive national criminal law governing acts committed in international armed conflict is not without controversy. In Public Prosecutor v. Koi (1967), a divided Privy Council quashed the conviction of several Indonesian soldiers who had been found guilty of the possession of explosives in Malaysia on the basis of Malaysia’s Internal Security Act 1960. The soldiers were captured during an armed conflict between Indonesia and Malaysia. The majority found that “members of regular forces fighting in enemy country [...] are not subject to domestic criminal law.” Two dissenting Lords, on the other hand, stated that they knew “of no rule of international law which suggests that the national laws may not be applied to the armed forces of an enemy which invade the national territory.” In Polyukhovich (1991), dissenting judge Brennan of the Australian High Court rejected the idea that international humanitarian law has a legitimizing function, yet seemed to accept its quality of lex specialis.

Thus, the relationship between national criminal law and international humanitarian law just sketched is not beyond debate. In addition, there is a tension between the current tendency to relativize the distinctions between the legal regimes applicable to

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Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 105-106.

744 See above, note 99.

745 See Art. 43 (2) AP I (“Members of the armed forces of a Party to a conflict [...] are combatants, that is to say, they have the right to participate directly in hostilities.”). See also Dinstein 2004, p. 27-28 and 234 Green 2000, p. 112; Rowe 1991, p. 219 and 222. But see Baxter 1973, p. 73.


748 Id., at 867, per Lord Guest and Sir Garfield Barwick.

749 Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, per Brennan J. dissenting, para. 4-5 and 45: “[The laws and customs of war] limit the belligerents’ choice of means of injuring enemy forces, controlling enemy prisoners of war and treating enemy civilians, but are silent as to acts which do not contravene those limitations. [...] It is clear that the draftsman misunderstood the effect of the laws, customs and usages of war, for they give no permission for acts which would otherwise be forbidden; they simply forbid particular means of injuring enemy forces, controlling enemy prisoners of war or treating enemy civilians. [...] The real objection to the validity of the [Australian War Crimes Amendment Act 1988] is that the Act rejects international law as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal law definition which operates retrospectively.”
international and internal armed conflict and the difference in legitimizing function of those regimes found above. Yet, it appears that this trend has so far not led to a recognition of armed opposition groups in internal armed conflict as lawful combatants, with a corresponding right to participate in hostilities. Therefore, the conclusion is warranted that with regard to international, but not internal armed conflict, prosecutions on the basis of overinclusive national criminal law can violate international law, even if they take place on the basis of territorial jurisdiction.

Second, when overcharging takes place in a prosecution on the basis of universal jurisdiction, it may well exceed international law’s limitations on the exercise of extraterritorial jurisdiction. Whether a particular case indeed amounts to a violation depends principally on the availability of an alternative basis of jurisdiction for prosecution. Even if Spanish courts are wrong to classify certain political murders in Latin-American States as genocide, they may still have universal jurisdiction to prosecute those murders if these do in fact constitute other international crimes such as crimes against humanity. Note further that such a violation can stem not only from overinclusive national law, but also from the wrongful application of international criminalizations to acts that do not amount to the crimes charged. Both points are illustrated by the French case MC Ruby (1995), in which the French Cour de Cassation based jurisdiction over acts of assault committed on a ship on the high seas on a provision providing for universal jurisdiction for torture as defined by the CAT. The acts in question did clearly not fit that definition of torture, since they were neither perpetrated or condoned by a public official, nor committed for one of the goals enumerated in the CAT. Yet, this prosecution arguably did not violate international law, since jurisdiction could also be based, as the Court of Appeals in this case had done, on the concept of an indivisible link between the acts committed on the high seas and acts committed in French territorial seas. Of course, avoiding overinclusion of national law will not prevent all cases of overcharging, but it certainly provides an important step in that direction.

In practice, the inconsistencies and unclarities in the national criminalizations of the core crimes often remain without direct consequences. Even where resulting prosecutions depart from international law, as likely was the case in Germany, Spain and Ethiopia, this does not necessarily affect their outcomes in a practical sense. On occasion, however, the discrepancies between national criminalizations and their international counterparts inhibit or delay the prosecution of core crimes. In Hungary, the Constitutional Court more than once annulled legislation which erratically formulated criminalizations of war

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751 Cf. Art. 8 (3) ICC Statute (“Nothing in paragraph 2 (c) and (e) [governing war crimes in internal armed conflict] shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”). Prosecutions on the basis of national criminal law would seem to constitute a legitimate means to re-establish law and order in the sense of this provision.
752 See above, note 1206 and O’Keefe 2004, p. 759.
754 See Art. 1 (1) CAT. See also Koering-Joulin 1997, p. 146-150.
756 See above, note 732.
crimes to be applied to crimes committed during the communist era for being inconsistent with international law. With considerable delay, the intended prosecutions later took place based directly on international criminalizations. In Estonia, a prosecution for genocide and crimes against humanity was annulled and referred back to the courts of first instance, because the result reached on the basis of the national criminalization of these crimes was deemed inconsistent with international law.

In conclusion, the fact that national criminalizations of the core crimes are often underinclusive, overinclusive or both complicates their enforcement and may lead to violations of international law. The intrinsic under- and overinclusiveness of ordinary crimes makes them singularly unfit as a basis for the prosecution of core crimes. But direct application of international law may also have advantages over national criminalizations of genocide, crimes against humanity and war crimes. Theoretically, such national criminalizations could perfectly mirror core crimes law and avoid all disparities, but the reality is otherwise. Of course, the minimalistic approach of many national authorities noted above may in fact cause them to favor national law for its underinclusiveness.

9 Rank and Effects of the Crime and the Law

A next, rather practical, consideration to take into account concerns the rank and effects of the different legal bases for core crimes prosecutions. First, directly applicable international law may have a different rank in the national legal order than statutory law. The rank of the different sources of international (criminal) law differs in various States, depending on the hierarchy set by national law. Thus, whether substantive criminality is based on national law, treaty law or customary international law may have implications for its hierarchical position vis-a-vis other relevant norms, such as amnesty laws and the principle of legality.

Second, the core crimes, whether defined in national or international law, are often credited with particular effects that ordinary crimes lack. For example, there is significant support for the proposition that genocide, crimes against humanity and war crimes cannot

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757 See above, Chapter II, para. 3.3.n.
758 See Saar and Sootak 2003, p. 269-274.
759 It should be noted that the considerations regarding the rank of international law set out here principally concern general direct application. International law that is directly applied on the basis of a specific rule of reference generally has the same rank in the national legal order as the national provision that refers to it.
760 See above, Chapter II, para. 3.3. Cf. Cassese 1985.
761 See e.g. the position of the Dutch Supreme Court on this point, above, Chapter II, para. 3.3.k. Compare the practice of the Special Court for Sierra Leone, which has jurisdiction both over certain international crimes and ordinary crimes under the national criminal law of Sierra Leone. The Prosecutor of the Special Court decided early on to charge only international crimes in his indictments as this, in his view, would minimize both successful challenges to the jurisdiction of the Court on the basis of the amnesty provision in the Lome Peace Accord and complications stemming from Sierra Leonean criminal jurisprudence.
Interview with Mr. David Crane, Prosecutor of the Special Court for Sierra Leone, held in The Hague, 9 December 2003.
constitute political crimes, and are not subject to statutes of limitations and the ne bis in idem rule. There is also authority for the proposition that these crimes trump official immunities, as well as double criminality requirements and other obstacles to extradition, but these effects are more contested. Apart from the legal effects, the designation of certain acts as international rather than ordinary crimes may in practice put more political pressure on other States to render cooperation where needed.

Thus, the choice of the legal basis for the charges can have practical implications for the outcome of a core crimes prosecution. It should be noted, however, that the derogation of obstacles in national law is not entirely dependent on the rank of and effects ascribed to the criminalizations in question. National obstacles like amnesty laws have been overcome in numerous cases where core crimes have been charged as ordinary crimes.

Yet, even if they are not always decisive, the rank and effects of the different criminalizations certainly make up a relevant consideration, in particular for legislators and prosecutorial authorities.

10 Penalties

A final consideration of a practical nature concerns the available penalties. Within national law, the choice between international and ordinary crimes as a basis for prosecution can have significant consequences in this regard. A recent study on the punishment of serious crimes in the States making up the Former Yugoslavia and 23 other countries from all over the world paints the following picture. Regarding homicidal crimes, the applicable penalties do not differ substantially for ordinary and international crimes. This can be explained by the fact that most legal systems already reserve their highest penalties for ordinary homicidal crimes such as murder. For non-homicidal crimes, however, the differences can be considerable. In general, penalties for crimes like torture and rape are substantially higher when these are criminalized

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762 See Mexico, Supreme Court, In re Cavallo (Amparo en Revision 140/2002), 10 June 2002 at 892-896; Austria, Supreme Court (Oberster Gerichtshof), Cvjetkovic, 13 July 1994, available at http://www.ris.bka.gv.at/; Italy, Tribunale Supremo Militare, General Wagener and others, 13 March 1950, Rivista Penale, 1059-II, 745-764 at 753:

"Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of lèse-humanité (reati di lesa umanità) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences."


764 See Cassese 2003a, p. 264-274.

765 See below, Chapter V, para. 5. See also Swart 2002b, p. 580-581.


767 See below, Chapter V, para. 5. See also Alvarez, et al. 2002, p. 329.

768 Sieber 2004. The report was requested by the ICTY for sentencing in the Nikolic case.

specifically as an international rather than an ordinary crime. The differences are especially significant for international crimes that have no real counterpart in national law, such as persecution. While different elements of these crimes may be covered by ordinary criminalizations, these do not reflect their grave context and as a result allow only penalties that do not compare to those of international crimes.

The choice between national law and general direct application of international criminalizations is more complicated, since most international criminalizations are not accompanied by specified penalties. This point will be discussed extensively below, in Chapter VI, paragraph 5.4. At this point, however, it can already be noted that the specification of penalties in national criminal law provides a clear advantage.

11 Conclusion

The choice between national and international law as a basis for core crimes prosecutions is often framed as a choice between well-known but rigid law and a body of largely unfamiliar rules which is more flexible in its adaptation to new circumstances. The above analysis shows that the picture is both more complex and more refined than that. There are many different considerations to be balanced in the comparison of national and international law, practical as well as principled ones. These considerations in part explain the limited occurrence of direct application in practice, due primarily to the minimalist and selective attitude of national actors involved and the complexity of international criminal law. They also show that international law neither categorically prohibits or proscribes any particular legal basis for core crimes prosecutions, nor is completely neutral in its assessment of these different possible legal bases.

Leaving aside the principle of legality for closer analysis, the considerations analyzed in this chapter point in different directions. National provisions that specifically criminalize genocide, crimes against humanity and war crimes may be appreciated for their manageability, the close scrutiny they have received from the national legislature and their significant contribution to State practice and thus the development of core crimes law. Direct application of international criminalizations, on the other hand, avoids the problem of underinclusion and overinclusion, stimulates the judicial dialogue and thus coherence of core crimes law, and may also have certain practical advantages like imprescriptibility. Charging core crimes as ordinary crimes in national law may be an effective prosecutorial strategy, particularly in legal systems of limited means. Yet, it has serious drawbacks, in particular its failure to cover all relevant acts and to express the

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770 Id., p. 98-113.
771 Id., p. 114-124.
772 Cf. ICTY, Appeals Chamber, Mucic et al., 20 February 2001 para. 758: "The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal’s Statute."
773 See e.g. Kamminga 1998, p. 570.
international character of the crimes, and should, it is submitted here, therefore be in principle rejected and used only as a second-best solution in a transitory situation.
Chapter IV
The Public International Law Framework of Implementation

1 Introduction

This Chapter analyzes the international legal framework that governs the implementation of public international law in the national legal order. While setting out this framework in general terms, it will focus primarily on national courts. It will thus form a basis for the more specific analysis of the international legal framework governing the direct application of international criminalizations in national courts. The lay-out of this Chapter is as follows. First, it will give a short comment on the theories of monism and dualism and their (limited) relevance for today's practice (para. 2). Second, it will set forth the general rule that States are free to shape the implementation of their international obligations as they see fit, as well as its practical implications (para. 3). Third, it will show how the doctrine of self-executing treaties can be seen as a manifestation of the freedom rule (para. 4). Fourth, it will analyze the limits and qualifications of the freedom rule (para. 5). Particular attention will be paid to the tension between freedom of implementation and the principle of pacta sunt servanda, as well as the fact that national courts interpret national law in conformity with international law with considerable consistency. I will also analyze whether a specific qualification of the freedom rule is required for the particular fields of international law of a humanitarian character and peremptory norms (jus cogens).

2 Theory: Monism-Dualism

Academic writing regarding the relationship between national and international law has long been dominated by the dichotomy between monism and dualism. Taken literally, these terms postulate that national and international law are part of one and the same legal order (monism), or that they constitute separate legal orders (dualism). In this basic form, the dichotomy between monism and dualism establishes a starting point for the analysis of the effects of international law in the national legal order. It brings to the fore the fundamental question whether international law is actually part of, and thus presumptively valid in, the national legal order or not. How and to what extent States can alter that presumption of domestic validity (monism) or non-validity (dualism), and do so in practice, is then a topic for further analysis.

However, the monism-dualism dichotomy is the starting point for a highly complicated discourse that requires a thorough separation of theory and practice and clarifies State practice only to a limited extent. For many instances of State practice can be explained both under monist and dualist theories. National rules of reference to international law,

for example, may evidence a monist attitude when they are declarative, but a dualist attitude when they are constitutive.\textsuperscript{775} In the Netherlands, the legislature in its 1953 revision of the Constitution expressed the standpoint that the new constitutional provisions on the domestic validity of treaties were only declaratory of the legal situation that was dictated by international law.\textsuperscript{776} This position finds some support in the fact that all international law is since long incorporated in the Dutch legal order by way of an unwritten rule rather than constitutional provisions.\textsuperscript{777} However, in 1956 the legislature abandoned this view when it altered the provisions on the domestic validity of treaties only slightly, but now declared them to be constitutive instead of declaratory.\textsuperscript{778} The same ambiguity extends to many other aspects of the role of international law in national legal orders. Even the fact that many national courts do not in principle apply treaties as a source of law can be conceptualized either as a jurisdictional limitation of national origin permitted by international law (fitting monism) or as international law's lack of authority in this sphere (fitting dualism).\textsuperscript{779} Since State practice seldomly reveals the doctrinal positions underlying the practical results, let alone in a conclusive manner,\textsuperscript{780} the explanatory power of monism and dualism is limited.\textsuperscript{781}

Moreover, many writings on monism and dualism take these notions far beyond their literal meaning, which merely questions the existence of one or two legal orders. First, most scholars include the question of hierarchy in their definition of monism. They assert that monism stands not only for the proposition that international and national law make up one legal order, but also that one, most often international law, is superior in rank to the other.\textsuperscript{782} These are, however, separate questions and treating them as one distorts the analysis of both.\textsuperscript{783} A second complication in the monist-dualist debate concerns its "ideological and political overtones."\textsuperscript{784} Some writers defend monism or dualism as an article of faith rather than a tool for legal analysis.\textsuperscript{785} Third, others use monism and dualism as labels for particular legal systems, asserting that certain States are monist and others dualist.\textsuperscript{786} Generally, this use of the terms focuses on the direct applicability of

\textsuperscript{776} See Fleuren 2004, p. 188; Brouwer 1992, p. 138.
\textsuperscript{777} See above, note 417 and accompanying text.
\textsuperscript{778} See Brouwer 1992, p. 252.
\textsuperscript{779} Cf. Fleuren 2004, p. 15.
\textsuperscript{780} That legislatures are not always firmly decided in their doctrinal stand on international law is evidenced not only by the Dutch and German examples, but also by the preparatory work on Art. 4 of the Constitution of the Weimar Republic, in which the legislature quickly meandered between different conceptions of the obligatory nature of international law for inter-state relations. See Simma 1995, p. 41-43.
\textsuperscript{782} See e.g. Arango-Ruiz 2003, p. 917; Heiskanen 1992, p. 3-4.
\textsuperscript{784} Partsch 1992, p. 238.
\textsuperscript{786} See e.g. Aust 2000, p. 146-156; Buergenthal 1992, p. 316-317.
international law, or even only treaty law, in practice rather than the doctrinal position of the State.\textsuperscript{787} All in all, the variance in meaning ascribed to the terms monism and dualism has confused the debate and further undermined their usefulness for the analysis of the relationship between national and international law.\textsuperscript{788}

Doctrine has by now mostly abandoned the monism-dualism debate, making a move to pragmatism.\textsuperscript{789} Scholarship regarding the interaction of national and international law has predominantly moved away from conceptual analysis of the legal framework to focus on practical results.\textsuperscript{790} As some scholars have noted, the lack of attention for a unifying theory has serious drawbacks.\textsuperscript{791} Lack of a proper theoretical grounding, to name but one example, likely contributes to the unfortunate tendency of various scholars to equate the application of international law in national courts to that of foreign law, ignoring the obvious and important differences between the two.\textsuperscript{792} Yet, a rejuvenation of the theoretical discourse does not necessarily imply a resurrection of the monism-dualism debate, in fact far from it.

An attempt to classify this study as either “monist” or “dualist” will quickly illustrate the problems with these terms. This study inquires into the demands of international law regarding the direct application of core crimes law in national courts. It thus assumes that international law can, at least partly, regulate its own application in national courts, a premise that some will strike as irremediably monist. Some observations on the role of international law in national courts, in particular the principle of consistent interpretation in para. 5.2, likewise reflect a belief that national and international law do not constitute fundamentally separated legal orders. But on the other hand, I do acknowledge that in many States so many obstacles in national law impede the effective application of international law that the practical result amounts to a \textit{de facto} separation of national and international law. Commentators who use monism and dualism in a practical, result oriented rather than doctrinal sense may regard such observations as “dualist.” Thus, I will not use the terms monism and dualism in this study, because of their limited explanatory power and diffuse meaning.

\textsuperscript{787} See Fleuren 2004, p. 10-11 and 16-17; Arangio-Ruiz 2003, p. 915.

\textsuperscript{788} Cf. Heiskanen 1992, p. 12 (“The monist-dualist debate lacks technical specificity.”).


\textsuperscript{790} Cf. Santulli 2001, p. 105-106.

\textsuperscript{791} See e.g. Arangio-Ruiz 2003, p. 914-915. Not also that the need for a renewed theoretical understanding of the relationship between national and international law is a central premise of the Amsterdam Center for International Law’s research project on “Interactions between International Law and National Law,” of which this study is a part.

\textsuperscript{792} To be sure, there are certainly parallels to be drawn between the judicial application of foreign and international law, and valuable lessons to be learned by doing so. See above, note 40. Yet, to equate the two disregards crucial differences in bindingness and authoritativeness and misconstrues their respective positions in the national legal order. See e.g. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation 2001, 114 Harvard LR 2049 at 2051 (2001) (contending “that [national] courts' willingness to analyze and then either to follow or disregard foreign and supranational precedents suggests that they do not view domestic law as subordinate to international law.”).
3 The General Rule: Freedom of Implementation

As a general rule, international law leaves States free to implement and fulfil their international obligations in any way they see fit. For some time, an extensive scholarly debate questioned the applicability of the freedom of implementation to human rights law. Still today, the holdings of several international bodies keep the door open for an appeal to the principle of effectiveness to argue that the nature of human rights treaties requires their direct application in national courts. Yet, it is commonly accepted that human rights treaties, like international law in general, are not directly applicable per se. Thus, the oft-noted general rule remains that "international law does not itself prescribe how it should be applied or enforced at the national level." Also, the case law of international courts reflects a deference to actors on the national level in the margin of appreciation. Both human rights courts and the ICJ consistently give States substantial leeway to choose the means of implementation of their international obligations.

In doctrine, far-going freedom of implementation is often regarded as beneficial for both individual States and international law. First, the most traditional argument postulates that this freedom is a pivotal aspect of State sovereignty. According to this view, a more intrusive regime of implementation would infringe on the internal separation of powers and/or the democratic legitimacy of the law, the shaping of both of which is a prerogative of the State.

Second, the bottom-up approach of having States regulate the implementation of their international obligations themselves is generally thought to be more effective than a top-down regime detailed by international law. Since the intricacies of their national legal orders are best known to States themselves, freedom of implementation allows them to choose the most effective way of implementing their international obligations. It also allows them to mitigate some of the complexities of international law. A mediating role

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794 See below, notes 976-985 and accompanying text.
795 See ECtHR, Swedish Engine Drivers' Union v. Sweden, 6 February 1976, para. 50 (stating that the ECHR does not lay down "for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention."), see also Germany, Bundesverfassungsgericht, In re G., 14 October 2004, 2 BvR 1481/04, para. 31 and 45; above, note 793.
798 See e.g. ICI, Germany v. United States (LaGrand case), 27 June 2001, para. 125. But compare below, note 1032.
799 See above, note 628.
800 See above, Chapter III, para. 3, 4 and 5.
of national law may be valued in particular to alleviate the vagueness and uncertainty of (customary) international law for national courts.\footnote{802}{See above Chapter III, para. 6; Jackson 1992, p. 324-325.}

It may be countered, however, that a more intrusive framework of implementation could reduce and prevent inequalities in the effectuation of international law by imposing the same standards on all States. More rigid and precise international rules on implementation could, for example, prevent the situation that the courts of one State hold their executive branch strictly to its treaty obligations while the courts of another State party refuse to remedy comparable violations. Since national courts may hesitate to enforce various rules of international law in order to avoid imposing limitations on other branches of government which do not constrain foreign counterparts,\footnote{803}{See e.g Slaughter 1994, p. 116-117; Buergenthal 1992, p. 335; Jackson 1992, p. 326. Cf. Tomuschat 2001, p. 365-366.} a more intrusive regime of implementation may also have positive effects on the effectuation of international law.

The freedom of implementation itself is uncontroversial.\footnote{804}{But see below, para. 5.3 for an analysis of the question whether the freedom of implementation fully applies to all categories of international norms.} International legal scholarship commonly understands the freedom of implementation as giving States the liberty to separate national and international law,\footnote{805}{Or keep separated, depending on one’s doctrinal viewpoint regarding the unity or separateness of national and international law.} to choose which State organs will enforce international obligations, to order other organs to ignore those obligations,\footnote{806}{See Betlem and Nollkaemper 2003, p. 573; Reydamns 2003, p. 137, note 40 ("Whether an international convention can be directly applicable in the domestic legal order is [...] purely a matter of national law.")} and to make

\footnote{802}{See above Chapter III, para. 6; Jackson 1992, p. 324-325.}
\footnote{804}{But see below, para. 5.3 for an analysis of the question whether the freedom of implementation fully applies to all categories of international norms.}
\footnote{805}{Or keep separated, depending on one’s doctrinal viewpoint regarding the unity or separateness of national and international law.}
\footnote{806}{See Betlem and Nollkaemper 2003, p. 573; Reydamns 2003, p. 137, note 40 ("Whether an international convention can be directly applicable in the domestic legal order is [...] purely a matter of national law.")}

\footnote{807}{See e.g. Verdross and Simma 1984, p. 539-540: “[International law] überträgt seine Durchführung den verpflichteten Staaten, die es durch ihre Organen zur Anwendung zu bringen haben.... Bezweckt eine Völkerrechtsnorm Rechtswirkungen im innerstaatlichen Bereich, so muß ihr Inhalt in die innerstaatliche Rechtsordnung eingeführt (‘inkorporiert’) werden, um durch die staatlichen Organe erfüllt werden zu können.” [International law delegates its effectuation to the obliged States, which are to execute it through their organs.... If a norm of international law has the purpose of taking legal effect within the
the judicial application of international law subject to various demands such as the principle of reciprocity and the doctrine of self-executing treaties, or to limit it altogether.

Yet, the conditions and limits of the freedom of implementation are a matter of debate. Both courts and scholars frequently overestimate the extent of this freedom, invoking it to defend courses of action that (potentially) violate international obligations. They especially overestimate the extent to which international law allows States to keep international obligations separated from and subordinated to national law. An extreme view in this regard, notably expressed in a Separate Opinion of a Judge of the ICJ, is Sir Percy Spender's assertion that “assuming the constitutionality and validity of the Act within the domestic legal system of the State concerned, it is competent for a State party to any treaty or convention to pass a law binding on its own authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty. [...] But that in no way would be relevant to the question whether that legislation-or an act done pursuant to it-is or is not in breach of or incompatible with obligations binding upon the State by virtue of a treaty or convention.”

Sir Spender's statement, it is submitted here, does not correctly reflect the demands of international law. All liberties flowing from the freedom of implementation are subject to the condition of effective compliance with international law. States are allowed to separate national and international law and to order certain State organs to ignore international obligations only if they fulfil these obligations in another way. International law does not allow States to violate their obligations and accept State responsibility as a suitable price to pay. In a general institutional sense, international law may accept the

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State, its content must be introduced (incorporated) in the national legal order to enable State organs to comply with it.- translation by this author;
Fitzmaurice 1958, p. 90-91. But see Conforti 2001, p. 18 and 21-23; Danienko 1999, p. 54; Lauterpacht 1970, p. 280 (“To say that the State - and the State only - is the subject of international duties is to say ... that international duties bind no one; it is to interpose a screen of irresponsibility between the rule of international law and the agency expected to give effect to it.”). See for an elaborate problematization of the international obligations of State organs, or lack thereof, Ferdinandusse 2003.

808 See Partsch 1992, p. 245.
809 See Tomuschat 2001, p. 363; Henkin 1993, p. 149 and 153:
“'The international obligation is upon the state, not upon any particular branch, institution, or individual member of its government [...]. Since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations.'”

810 See below, notes 819-821 and 871-872.
812 Unless one interprets the word “competent” as denoting mere factual possibility rather than international legality. Such an interpretation seems stretched, however, given the place of this citation in a separate opinion of a judge of the ICJ.
813 See in this regard Jackson 2004 and Jackson 1997.
need for exceptional cases of violation and adaptation,\textsuperscript{814} but in concrete situations these remain violations and thus prohibited until they gather enough weight to change the rule in question. States are obviously in a practical sense able to legislate in contravention of their international obligations, but international law does not allow them to do so. Sir Percy Spender admits so himself when he states earlier in the same separate opinion that "[a] State, party to the Convention, may not, whatever the subject-matter of the law under which it acts, do anything which contravenes the provisions of the Convention."\textsuperscript{815} This rather straightforward statement is hard to reconcile with the one quoted above.

When the general rule of freedom comes into conflict with the basic principle that States must perform their international obligations in good faith (\textit{pacta sunt servanda}),\textsuperscript{816} the latter must prevail.\textsuperscript{817} This is perhaps a trite observation, but in practice national courts show considerable divergence in their appreciation of the limits of the freedom of implementation.\textsuperscript{818} National courts look predominantly, sometimes even exclusively, to national law in order to decide whether and to what extent to give effect to international law.\textsuperscript{819} They regularly allow the executive and the legislature to violate international obligations.\textsuperscript{820} It is not at all uncommon for a national court to assert that "[i]nternational practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress,"\textsuperscript{821} or words to that effect. It is especially telling that even initiatives for reform that aim at more effective enforcement of international obligations at the national level often focus on national law’s endorsement of international law.\textsuperscript{822} On

\textsuperscript{814} See D’Amato 1987, p. 376-377.
\textsuperscript{815} Id., at 119.
\textsuperscript{817} Cf. Rosenne 1989, p. 39 ("It is axiomatic that a treaty, made between States, is binding upon each State as a whole, upon each one of its organs. This is implicit in the lapidary formulation of the \textit{pacta sunt servanda} rule in article 26 of the Vienna Conventions.");
\textsuperscript{819} See e.g. U.K., \textit{Blackburn v. Attorney-General}, 1971, 2 All ER 1380, 1 WLR 1037, 52 ILR 414:

"Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.”

U.S., Supreme Court, \textit{Rainey v. United States}, 1914, 232 U.S. 310 at 316 ("Treaties are contracts between nations, and by the Constitution are made the law of the land."). But compare U.S., Supreme Court, \textit{Breard v. Greene}, 14 April 1998, 523 U.S. 371 at 375 ("[I]t has been recognized in international law that, \textit{absent a clear and express statement to the contrary}, the procedural rules of the forum State govern the implementation of the treaty in that State." – emphasis added). See also Denza 2003, p. 420-421.
\textsuperscript{820} See e.g. Germany, Bundesverfassungsgericht, \textit{In re G.}, 14 October 2004, 2 BvR 1481/04, para. 35; South-Africa, South African Constitutional Court, \textit{Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others}, 25 July 1996, para. 27; Australia, High Court, \textit{Horta v. The Commonwealth}, 18 August 1994, 181 CLR 183 at 195 (all holding that their respective constitutions allow the legislature to violate international law).
\textsuperscript{821} U.S., District Court (Connecticut), \textit{The Over the Top (Schroeder v. Bissell)}, 26 February 1925, 5 F. 2d 838 at 843.
\textsuperscript{822} See \textit{Resolution of the Institut de Droit International} (1993 Milan), 65 Annuaire De L’Institut De Droit International 321, Art. 1 ("National courts should be empowered by their domestic legal order to interpret and apply international law with full independence").

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the other hand, numerous national judgments are notably stricter in their adherence to international obligations, even if that requires a limitation of the freedom of implementation.823

For this thesis, the limits of the freedom of implementation, imposed inter alia by the principle of *pacta sunt servanda*, are very relevant. Clearly, the freedom rule is not compatible with a general international obligation of States to directly apply international norms. Still, the question remains if, and under what conditions, national courts should directly apply international norms where necessary to prevent violations of these norms. Such situations normally result from a failure of the government to take appropriate steps to fulfil its international obligations, such as the drafting of implementing legislation. As shown above, this is not at all uncommon in core crimes law.824 Therefore, the remainder of this Chapter will further explore the manifestations and limits of the freedom rule, as well as possible qualifications of the rule for specific categories of international norms.

4 The Doctrine of Self-Executing Treaties

States’ freedom of implementation finds visible expression in the doctrine of self-executing treaties. Many States incorporate treaties in their domestic law, but differentiate between treaty provisions that are directly applicable in national courts, or self-executing, and those that are not. The doctrine of self-executing treaties, a term originating in American law,825 is found in some form or another in many different States.826 It is a limitation on the enforceability of treaties in national courts imposed by national law,827 and thus a clear manifestation of the freedom of implementation in State practice.

What makes a treaty provision self-executing or non-self-executing is not readily definable, due to the confused state of national practice in various States.828 National courts have applied many different tests in this regard, employing both objective and subjective criteria. Under the most common objective test, courts will find a treaty provision non-self-executing when its subject is not amenable to adjudication in national courts or when its effectuation requires legislative action. The former is often assumed for foreign affairs matters like the pacific settlement of disputes.829 The latter is generally

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823 See cases cited below, para. 5.1.
824 See above, Chapter II, para. 2 and Chapter III, para. 2 and 8.
implications.\textsuperscript{840} Thus, self-executingness is effectively a compound concept that allows courts to put aside treaty provisions for very different reasons.\textsuperscript{841}

On closer scrutiny, it appears that the doctrine of self-executing treaties functions primarily as a stand-in for other avoidance doctrines, predominantly those that flow from separation of powers concerns.\textsuperscript{842} The objective test whether treaty provisions are precise and complete enough actually has little or no independent meaning and national courts have subordinated it to institutional concerns from the very beginning of the doctrine of self-executing treaties.\textsuperscript{843} After all, there are no technical standards which establish an objective minimum threshold for provisions of law to be applicable by the courts. Courts can apply even vague or incomplete rules in a meaningful way, be it that the effects of such rules will often be more limited than those of “mature” rules. In fact, imprecision and incompleteness can amount to a (possibly intentional\textsuperscript{844}) strengthening of the powers of the courts. Both national and international courts regularly apply international provisions which (other) national courts consider non-self-executing. The relativity of the precision and completeness test also shows in the fact that national courts often employ different standards of precision and completeness depending on the rank and character of the law involved, for example applying constitutional provisions that are far less detailed than treaty provisions they consider non-self-executing.\textsuperscript{845}

All of this is not to say that the entire doctrine of self-executing treaties is superfluous or wrong. There are legitimate separation of powers concerns involved in the direct

\textsuperscript{840} See above, notes 618 and 619. See also Vazquez 1995, p. 711 and 715-716.
\textsuperscript{842} See for an overview of various avoidance doctrines employed by national courts Collins 2002; Benvenisti 1993, para. II C.
\textsuperscript{843} See Buergenthal 1992, p. 374-380.
\textsuperscript{844} See U.K., n, \textit{In re N. (Child Abduction: Jurisdiction)}, 31 August 1994, [1995] Fam 96 at 100, \textit{per} Wilson J:

"The terminology [of Art. 7, 8 and 11 of the Hague Convention on the Civil Aspects of International Child Abduction 1980] is noticeably wide. I consider myself to be under a duty, as the judicial authority of a contracting state, to act expeditiously, [...] , in proceedings for the return of this child. I interpret the language both of the Articles of the Convention and of the text of the [British implementing] Act as being deliberately wide in its instruction to this court to co-operate with all other Contracting States in making orders which will secure the return of wrongfully taken children."

See also U.K., Family Division, \textit{In re C. (Abduction: Interim Directions: Accommodation by Local Authority)}, 12 December 2003, [2003] EWHC 3065 (Fam), [2004] 1 FLR 653 (similarly endorsing and using the discretion stemming from the broad language of Art. 7 Hague Convention on the Civil Aspects of International Child Abduction 1980, which reads:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—[...] (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;”).

the case when the provision regulates a subject that falls under the exclusive competence of the legislature, lacks precision or contains an explicit reference to envisaged legislation, for example to "such conditions as the law may establish." In this sense, the doctrine of self-executing treaties merely requires national courts to leave aside treaty provisions that are incomplete, imprecise or otherwise unfit for national judicial application. While the intent of the parties to the treaty may be taken into account as an additional factor, the primary criterion is the content and language of the treaty provision in question.

A subjective test gives far greater weight to the intent of the parties, considering treaty provisions non-self-executing whenever the parties intended to prevent these provisions from being enforced in national courts. In this way, the doctrine of self-executing treaties no longer hinges on the content of the treaty, but provides a "switch" for the treaty makers to turn judicial review in national courts off at will. This can be done by a clause to that effect in the treaty or, when courts accept the intent of their own executive or legislature as sufficient regardless of the view of the other parties, by a unilateral declaration at any stage in the conclusion and implementation of the treaty. Some national courts presume that treaties are as a rule non-self-executing, requiring an indication that the parties intended to make them self-executing rather than the other way round. Others have (mis)interpreted provisions calling for domestic implementation of the treaty as a sign that the treaty as a whole is intended to be non-self-executing.

Yet, the contrast between objective and subjective tests is only the beginning of the differences and complications in practice. Courts have applied complex and confused combinations of objective and subjective tests as well as others that, even if they do not violate international law, have no apparent legal basis. Some courts, echoing European Community law, have characterized only treaty provisions creating rights for individuals as self-executing. Some national judgments have held treaty provisions to be non-self-executing simply because their direct application would bring unwelcome practical

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832 See e.g. Art. 14 (1) ACHR: "Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."
839 Compare Nollkaemper 2002, p. 161 (distinguishing subjective and objective direct effect of international law, whereby the first denotes the right of the individual to invoke a provision rather than the intent of the parties to the treaty to make it self-executing, and the second corresponds to the content based test set out here).
application of treaty provisions, especially when these are broad or imprecise. A limited test of self-executingness can provide a useful tool to maintain a proper institutional balance. The point is rather that the precision and completeness test is not actually of a technical or objective nature, but a step in a separation of powers inquiry that allows courts to set aside treaty provisions where their application would bring the courts into (unwanted) conflict with other branches of government. This partly explains why courts apply such different standards in ascertaining precision and completeness: these vary with the institutional balance in the cases concerned.

Scholars have vigorously criticized the doctrine of self-executing treaties. Commentators in different States have called the practice of their courts in this regard confused and unpredictable, even unconstitutional. One scholar has criticized the tendency of some national courts "to engage in an open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea" as "incompatible with our society's conceptions about what it means for a norm to have the status of 'law,' and, in particular, about the judiciary's role in enforcing norms having such status." Others have implored courts to use narrower avoidance doctrines instead.

Significantly, however, none of these commentators asserts that the doctrine of self-executing treaties in itself violates international law. For, it is generally accepted, if States are at liberty to preclude their courts from applying treaties entirely, they must also be free to employ any limitation that falls short of a complete bar. Yet, certain applications and consequences of the doctrine do in fact violate international law. The refusal by some courts to find certain treaty provisions self-executing because their direct application would lead to unwelcome consequences directly leads to a violation of those treaty norms. Likewise, States which deny self-executingness to certain provisions or entire treaties while at the same time failing to ensure their effectuation through implementing legislation violate the principle of pacta sunt servanda.

5 Limits and Qualifications of the General Rule

Practice shows diverse legal phenomena that call into question the limits of the freedom of implementation, as well as possible qualifications of the freedom rule for specific categories of international norms. This paragraph will discuss the limits of the freedom rule (5.1), zoom in on the practice of national courts to interpret national law in conformity with international obligations (5.2), and analyze whether the ground rule of State freedom is valid in its entirety for the specific categories of international law of a humanitarian character and peremptory norms (5.3).

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847 See above, note 828.
848 See Paust 1988, p. 760.
852 See Källin 2000, p. 117.
5.1 Limits of the Freedom of Implementation

Both scholars and national courts easily overestimate the extent of the freedom of implementation. They regularly assume that the freedom rule implies that international law is silent on its effects in the national legal order, and consequently that "the effect of international law [...] within the legal order of a State will always depend on a rule of domestic law." While numerous national courts have adopted this view, there are good reasons to doubt it.

First, in most States, courts take international obligations into account in their interpretation of national law. More often than not, they do so without a clear obligation to that effect in national legislation. Numerous national judgments assert or suggest that international, not national law requires this practice of consistent interpretation. In light of its importance, this practice will be analyzed separately, in para. 5.2 below.

Second, a historical analysis of the reception of international law in various legal orders suggests otherwise. The fact that the courts of many States gave effect to international law before their national laws contained any provisions requiring them to do so suggests that, at least originally, they perceived the domestic validity of international law as flowing from international law itself, rather than from national law. In the U.S., for example, the domestic validity and direct applicability of international law was silently accepted in the early days of the Republic. While the historical understanding of the reception of international law in the U.S. is complex and disputed, there are clear indications that traditionally, the direct applicability of international law did not depend on a rule of national law. The same is true for numerous other States, in particular for custom but also for treaty law. The shift in position of the Dutch legislature described}

853 See above, note 806.
854 See above, note 819-821.
857 See e.g. Flaherty 1999 and Yoo 1999a.
858 See Perkins 1997, p. 485-489 ("In the understanding of the founders of the republic, the law of nations was applicable in our courts because it was binding on the United States. [...] The Constitution reflected their understanding of a binding law of nations that stood on its own authority."); Wright 1916, p. 223-227. See also U.S., Supreme Court, *Chisholm v. Georgia*, February Term, 1793, 2 U.S. 419 at 474:

"Prior to the enactment of the Constitution, the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed;"

859 See Stirling-Zanda 2000, p. 120-125; Danilenko 1999, p. 61 ("Judicial practice also indicates that some CIS judges embrace international law even in situations where neither the constitutional provisions nor the general political environment favours the direct application of international standards."); Buergenthal 1997, p. 214 ("[I]n some states where the constitution failed to deal expressly with the question of the domestic status of treaties, the courts have on their own adopted the article VI [of the U.S. Constitution] solution, provided always that the national parliament had a role in the ratification process.", citing the example of Uruguay); Buergenthal 1992, p. 348 (quoting judgment of 27 May 1971 (Le Ski) of the Belgium Court of Cassation, which held that in case of conflict treaties prevail over national law and, crucially, that their supremacy "is attributable to the very nature of international law").
above shows that national rules of reference to international law can be interpreted as declarative or constitutive. Thus, one cannot, as some scholars do, without further analysis take national rules of reference as evidence of international law's silence on its effects in the national legal order.

Third, an analysis of the role of various international norms of a procedural character in national legal orders also casts doubt on the notion that international obligations only take effect in the national legal order to the extent that national law so determines. For example, a moderating role of national law is hardly feasible for the duty to refrain from defeating the object and purpose of a treaty before its entry into force. After all, this obligation serves a preliminary and temporary role - one meant to precede the treaty's operation and implementation through national law. It seems unrealistic to argue that State organs are only bound by the duty to refrain from defeating the object and purpose of a treaty if national law contains an explicit rule to that effect. In fact, the more general understanding of the duty in the few national judgments employing it suggests otherwise.

In practice, national courts do not subject all rules of international law to the same tests and standards. They frequently apply international rules of a predominantly procedural character, such as those on immunities and treaty interpretation, as a matter of routine, but subject more substantive ones, especially those governing the rights and duties of individuals, to rather rigid justiciability tests like the doctrine of self-executing treaties. Thus, the need for a national "trigger" to effectuate international obligations in the national legal order, may be less clear-cut than often thought.

Varying interpretations of the extent of the freedom of implementation can often be seen in particular cases where there is a tension between the freedom rule and the principle of pacta sunt servanda. When the legislature and executive have failed to take adequate implementing measures, national courts often refrain from upholding international law

860 See notes 776 and 778 and accompanying text.
861 See e.g. Arangio-Ruiz 2003, p. 937-939; Rogers 1999, p. 31 ("The very application of [different authorizations in national law to apply international law] by United States domestic courts is an inherent rejection of the idea that international law is ipso facto binding in United States courts without an independent basis for reference to it in domestic law." (italics in original)).
863 See Art. 18 VCLT. See also Klabbers 2001a.
864 See Botswana, Court of Appeal, Unity Dow v. Attorney-General of Botswana, 3 July 1992, 1994 (6) Butterworths Constitutional Law Reports 1 at 137-140 (Per Aguda J., striking down discriminatory legislation on the basis of unincorporated treaties, noting inter alia that if a treaty "has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the Legislature or the Executive will not act contrary to the undertaken given on behalf of the country by the Executive in the convention, agreement, treaty, protocol or other obligation" and that it was "bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and obligations."). See also Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio /sustracción de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527 (striking down several amnesty laws, inter alia on the basis that they are incompatible with the object and purpose of the CAT) and Klabbers 2001a, p. 319-322.
through direct application, finding that they cannot substitute for the political organs in choosing the mode of compliance with international obligations. In such cases, the freedom to choose how to implement in practice extends to a freedom to choose whether to implement at all.866

An apt illustration is the Belgian Vermeire case.867 In a 1979 judgment, the ECtHR had found the different inheritance rights of legitimate and illegitimate children in Belgium discriminatory and in violation of the ECHR.868 The Belgian legislature acknowledged the problem but was rather slow in its reform of the legislation in question. So it could happen that in 1983 Mrs. Vermeire, an illegitimate child, presented an inheritance claim to a Brussels Court of First Instance which was ruled out by the still unchanged Belgian law, but clearly warranted under the ECHR.869 In these circumstances, the Court of First Instance adhered to the terms of the ECHR and granted Mrs. Vermeire the same inheritance rights as legitimate children, in contravention of the Belgian law.870

On appeal, however, the Brussels Court of Appeal quashed the judgment in first instance and denied Mrs. Vermeire her right of inheritance. The Court of Appeal followed the Belgian law rather than the ECHR, because there were various ways to comply with Belgium’s obligations under the ECHR and, the Court of Appeal held, those choices should be made by the legislature and not the courts.871 The Belgian Court of Cassation upheld this decision.872 Thus, the higher Belgian courts in this particular case sanctioned a breach of an international obligation in order to uphold the freedom of implementation. The ECtHR did not agree with this approach, finding that “[t]he freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [(now Article 46 ECHR)] cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed…”873

It is not uncommon for national courts to uphold the freedom of implementation to the point of violating international obligations because the legislature and/or executive have

866 See above, text preceding note 644.
870 Id. at para. 10, citing the Court of First Instance:
“[T]he prohibition on discrimination between legitimate and illegitimate children as regards inheritance rights [was] formulated in the [1979 ECHR] judgment sufficiently clearly and precisely to allow a domestic court to apply it directly in the cases brought before it.”
871 Id. at para. 11, citing the Court of Appeal:
“[I]n so far as Article 8 (Art. 8) entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable, but this is not the case in so far as Article 8 (Art. 8) imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention; (...) given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted as an obligation to act, responsibility for which is on the legislature, not the judiciary.”
872 Id., para. 12.
873 Id. at para. 25-26.
not decided on a means to effectuate those obligations. But there is also contrary practice. National courts have rendered many judgments that uphold the principle of *pacta sunt servanda* over the freedom of implementation. Nowadays, such contrary practice is especially strong in human rights law, but it is not limited to that field. In the last decades, both national and international courts have given judgments in various fields of law that lay more emphasis on an effective enforcement of international law than on the State’s freedom of implementation. It should be noted that much of this contrary case law is inconsistent and contains the proverbial exceptions to the rule.

National courts regularly curtail the State’s freedom of implementation in exceptional cases only to revert to more conservative positions in subsequent cases of a similar nature.

However, some of this contrary practice is of considerable authority and consistency. A particularly interesting example in this regard, both because of its consistency and its far-going consequences, is a quite recent group of cases in predominantly Latin-American courts that use Art. 27 of the Vienna Convention of the Law of Treaties to establish supremacy of international law over national law. The import of Art. 27 VCLT, which establishes that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” is on its face limited to inter-State relationships, to be settled on the international plane. Yet, several national judgments have credited Art. 27 with far-going effects in the national legal order.

In *Ekmekdjian v. Sofovich* (1992), a case concerning the right of reply under Art. 14 (1) ACHR, the Argentinean Supreme Court ascribed far-going effects to the incorporation of the VCLT in the national legal order, concluding that Art. 27 effectively required all State organs “to accord normative priority to treaties and imposed on them the obligation to emit the necessary regulations to ensure that treaty provisions be fully implemented.” Indeed, in *Ekmekdjian* the Supreme Court regulated the right of reply by judicial decree to make it effective, despite the fact that the Argentinean legislature had failed to establish by law the conditions under which the right could be exercised as envisaged in Art. 14 ACHR. Of broader importance was its holding that Art. 27 VCLT...

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875 See for examples and a separate analysis of international law concerning the rights and duties of individuals below, para. 5.3.a.
877 See Ferdinandusse 2003, p. 65-100; Denza 2003, p. 419-420.
879 Art. 14 (1):

“No one injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”

requires State organs to give primacy to treaty obligations and ensure their effective application even in the face of contrary national law or gaps therein.\footnote{Argentina, Supreme Court, \textit{Ekmekdjian v. Sofovich}, 7 July 1992, para. 19: 
"Que la necesaria aplicación del Art. 27 de la Convención de Viena impone a los órganos del Estado argentino asignar primacía al tratado ante un eventual conflicto con cualquier norma interna contraria o con la omisión de dictar disposiciones que, en sus efectos, equivalgan al incumplimiento del tratado internacional en los términos del citado Art. 27." [That the necessary application of article 27 of the Vienna Convention places an obligation upon the organs of the Argentine State to give primacy to the treaty in the event that a conflict arises with any contrary provision of domestic law or in the event it has omitted to enact provisions and that such omission, in its effects, is tantamount to non observance of the international treaty under the terms set out in article 27. – unofficial translation]}

Furthermore, the Supreme Court explicitly rejected the proposition that States are at liberty to keep international law out of their national courts, stating that “it should be borne in mind that when the Nation ratifies a treaty which it has signed with another State, it is making an international commitment that its administrative and jurisdictional bodies will apply that treaty to the cases covered thereby, provided that it contains sufficiently specific descriptions of such cases to permit its immediate application.”\footnote{Id., para. 20: 
"Que en el mismo orden de ideas, debe tenerse presente que cuando la Nación ratifica un tratado que firmó con otro Estado, se obliga internacionalmente a que sus órganos administrativos y jurisdiccionales lo apliquen a los supuestos que ese tratado contemple, siempre que contenga descripciones lo suficientemente concretas de tales supuestos de hechos que hagan posible su aplicación inmediata."} Argentinean courts have adhered to the interpretation of Art. 27 VCLT in \textit{Ekmekdjian} in several later cases.\footnote{See case law cited in Argentina, Supreme Court, \textit{Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros}, 24 August 2004, per Judge Fayt, para. 23-25 and in Argentina, Federal Chamber of Appeals, \textit{Incidente de Apelacion de Julio Simon}, 9 November 2001, para. XI; Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, \textit{Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años")}, 6 March 2001, 2000/B Nueva Doctrina Penal 527, para. VI (A) and there.}

The Peruvian \textit{Consejo Supremo de Justicia Militar} followed the interpretation of Art. 27 VCLT of the Argentine Supreme Court in the \textit{Barrios Altos} case (2001).\footnote{Peru, Consejo Supremo de Justicia Militar, \textit{In re Barrios Altos}, 4 June 2001, Case No. 494-V-94, on file with the author. See for a description in some detail below, Chapter V, para. 5.} Confronted with a judgment of the IACtHR demanding prosecutions of members of the military for certain crimes on the one hand, and two amnesty laws impeding those prosecutions on the other, the Peruvian military court relied \textit{inter alia} on Art. 27 VCLT to give effect to the international judgment. It ordered investigation and prosecution of the crimes, stating:

"That Peru is a party to the Vienna Convention on the Law of Treaties, which establishes by its twenty-seventh article that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty," in the spirit of which, the Consejo Supremo de Justicia Militar, as an integral part of the Peruvian State, must comply with the international ruling in accordance with its terms and in such manner as to implement the decision it contains in its entirety, vesting it with full effect and eliminating any
obstacle presented by substantive or procedural internal law that might stand in the way of its due execution and full performance."  

In Spain, both the Tribunal Supremo and the Audiencia Nacional have in a more cursory manner invoked Art. 27 VCLT simultaneously with Art. 96 of the Spanish Constitution to require national law’s conformity with international treaties. Chilean courts have likewise relied on a combination of national law and Art. 27 VCLT to substantiate the supremacy of treaties in the national legal order.

In these cases, one could say that the national courts involved use Art. 27 VCLT to import the supremacy of international law through the back door. A more traditional approach, which can be seen in other national courts, limits the import of Art. 27 to the international plane in order to preserve the freedom of the State to decide how and when to give effect to its international obligations. For example, an appeal to Art. 27 VCLT before the Senegalese Court of Cassation in order to overcome lacunae in Senegalese law and ensure the prosecution of Hissène Habré failed. The Court of Cassation did not explicitly address the argument but clearly refused to vest Art. 27 VCLT with the same far-going effects as its Latin-American counterparts did.

The contrast between Vermeire and Ekmekjian, both cases concerning the position of national courts where the legislature has failed to act in order to ensure the effective enjoyment of human rights, is notable. Unlike the higher Belgian courts in Vermeire, the Latin-American and Spanish courts in the cases just described place an effective enforcement of international obligations above prolonged freedom of implementation of the State. These courts assume that international law may in general be silent on how it is to be effectuated in the national legal order, but not that it is to be effectuated there. The

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885 Unofficial translation by Mason Weisz. Peru, Consejo Supremo de Justicia Militar, In re Barrios Altos, 4 June 2001, Case No. 494-V-94, on file with the author, unnumbered paragraph:

"Que, el Perú es parte de la Convención de Viena sobre Derecho de los Tratados, la misma que establece en su artículo veintisiete que "no se puede invocar disposiciones de derecho interno como justificación del incumplimiento de un Tratado", en tal sentido, el Consejo Supremo de Justicia Militar, como parte integrante del Estado Peruano, debe dar cumplimiento a la sentencia internacional en sus propios términos y de modo que haga efectiva en todos sus extremos la decisión que ella contiene, otorgándole plenitud de efectos y levantando todo obstáculo de derecho material y procesal propios del derecho interno que impida su debida ejecución y su cumplimiento en forma integral."


887 See Chile, Court of Appeals (Santiago), In re Fernando Laureani Maturana y Miguel Krassnoff Marchenko, 5 January 2004 para. 51-52. Confirmed in Chile, Supreme Court, In re Miguel Angel Sandoval Rodríguez, 17 November 2004.

888 See e.g. U.K., Chancery Division, NEC Semi-Conductors Ltd and other test claimants v Inland Revenue Commissioners, 24 November 2003, para. 50 (rejecting an appeal to Arts. 26 and 27 VCLT as ‘codification of public law principles’):

"[Arts. 26 and 27 VCLT] are concerned with the obligations in international law between the states which are the parties to international treaties, not with issues of how private parties may or may not be able to rely against a state on the contents of a treaty."

889 Senegal, Cour de Cassation, Souleymane Guengueng et autres Contre Hissène Habré, Arrêt n° 14, 20 March 2001, 7th moyen de cassation.

890 See above, Chapter II, para. 3.3.e.
same assumption underlies the practice of most national courts to interpret national law in conformity with international law, to which I now turn.

5.2 The Principle of Consistent Interpretation

National courts all over the world interpret national law in conformity with international law to the greatest extent possible. This principle of consistent interpretation has a long history, and is also called the rule of presumptive conformity \(^89^1\) or interprétation conforme. \(^89^2\) It is found in Argentina, \(^89^3\) Botswana, \(^89^4\) Germany, \(^89^5\) Japan, \(^89^6\) the Netherlands, \(^89^7\) Switzerland, \(^89^8\) the U.K., \(^89^9\) the U.S., \(^90^0\) and many other States on all continents. \(^90^1\) Some commentators have judged State practice sufficiently consistent to

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\(^89^1\) See Conforti 1997, p. 11 (calling the presumption of conformity of domestic law to international law “the most common criterion” in case-law of national courts regarding human rights); Lauterpacht 1970, p. 157.


\(^89^4\) See Botswana, Court of Appeal, Unity Dow v. Attorney-General of Botswana, 3 July 1992, 1994 (6) Butterworths Constitutional Law Reports 1 at 139-140:

“[I]t is the clear duty of this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind the international obligation. If the Constitutional provisions are such as can be construed to ensure the compliance of the State with its international obligations then they must be so construed. It may be otherwise, if fully aware of its international obligations under a regime creating treaty, convention, agreement or protocol, a State deliberately and in clear language enacted a law in contravention of such treaty, convention, agreement, or protocol.”

\(^89^5\) See Germany, Bundesverfassungsgericht, In re G., 14 October 2004, 2 BvR 1481/04, in particular para. 29-33 and 60-61. See also Bernhardt 2002, p. 392-397.


\(^89^7\) See Fleuren 2004, p. 372-382; Betlem and Nollkaemper 2003, in particular p. 574-576.

\(^89^8\) See Thürer 2001, p. 191; Wildhaber 1974.


“[T]here is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations [...] I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make upon the international obligations assumed by the United Kingdom under the [ECHR].”

See also Denza 2003, p. 433; Cassese 1985, p. 356; Buergenthal 1992, p. 360-361.

\(^90^0\) In the U.S., the principle is generally called the Charming Betsy canon, after the 1804 Supreme Court case that stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” U.S., Supreme Court, Murray v. The Schooner Charming Betsy, 1804, 6 U.S. (2 Cranch) 64 at 118. See for a recent application U.S., United States Court of International Trade, The Timken Company v. U.S., 5 September 2002, 240 F.Supp. 2d 1228 at 1238-1239 (“While an unambiguous statute will prevail over a conflicting international obligation, an ambiguous statute should be interpreted so as to avoid conflict with international obligations.”). See also Rogers 1999, p. 36-73; Bradley 1998; Rogers 1998.

\(^90^1\) See Betlem and Nollkaemper 2003, p. 575 (citing examples from Australia, Israel and the U.K.); Stirling-Zanda 2000, p. 127-129 (Italy, Portugal, Germany and Greece); Benvenisti 1994, notes 28 and 29 (Canada, Israel, Namibia and Zimbabwe); Jacobs 1987, p. xxvi (mentioning “the principle common to many systems that [domestic] legislation should wherever possible be so construed as not to conflict with the international obligations of the State”, followed by country reports describing the canon of construction
infer "an international duty of [national] courts to interpret, within their constitutional mandates, national law in the light of international law."\footnote{102} Indeed, it appears that the principle of consistent interpretation is a general principle of law in the sense of Art. 38 (1) sub c ICI Statute.\footnote{103} Even if national courts regularly fail to interpret their laws in such a way as to heed relevant international obligations, they seldomly if ever dispute the existence of the principle.\footnote{104}

Numerous States have embodied the principle of consistent interpretation in their national laws, either explicitly\footnote{105} or implicitly.\footnote{106} That does not mean, however, that in those States the principle is of national origin. In many of these cases the legislature followed the courts, rather than the other way round. Both in South-Africa and Russia, for

\begin{itemize}
\item a.o. in Denmark (p. 33), France (p. 60), then Federal Republic of Germany (p. 69), Italy (p. 100) and United Kingdom (p. 135 and 137); Cassese 1985, p. 398 \textit{(inter alia} Poland and India); Meijers 1985, p. 117-129 \textit{(inter alia} Austria and Pakistan). Cf. Bangalore Principle 4, \textit{reported in} 14 Commonwealth Law Bulletin 1196 at 1197 (1988):
\begin{quote}
"[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete..."
\end{quote}
\footnote{102} Betlem and Nollkaemper 2003, p. 574.
\footnote{103} See Bevenisti 1994, p. 428 ("[T]he may well be considered a general principle of law, that domestic law is \textit{prima facie} compatible with international law."); Committee on Economic, Social and Cultural Rights, \textit{General comment} 9, 3 December 1998, UN Doc E/C.12/1998/24, para 15: \begin{quote}
"It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the \textit{International Covenant on Economic, Social and Cultural Rights} and one that would enable the State to comply with the Covenant, international law requires the choice of the latter."
\end{quote}
\textit{HRC, Concluding Observations on Ireland, Doc. CCPR/C/79/Add.21, 3 August 1993, para. 18} ("Notwithstanding that the [ICCPR] cannot be directly invoked in the [Irish] courts, the need to comply with the international obligations should be taken fully into account by the judiciary."). Cf. Iwasawa 1998, p. 83 ("In most states, the principle is established that courts must interpret domestic laws in conformity with international law.")
\footnote{104} See \textit{e.g.} Barak-Erez 2004, p. 615.
\footnote{105} See Section 233 of South-Africa's 1996 Constitution:
\begin{quote}
"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."
\end{quote}
\textit{See also Section 39 (1); Art. 13 (2) Ethiopia's 1994 Constitution:}
\begin{quote}
"The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."
\end{quote}
\footnote{106} See Art. 17 (1) of Russia's 1993 Constitution:
\begin{quote}
"The basic rights and liberties in conformity with the commonly recognized principles and norms of international law shall be recognized and guaranteed in the Russian Federation and under this Constitution."
\end{quote}
\begin{quote}
"Article 7 § (1) of the Constitution also means that by the Constitution's order, the Republic of Hungary participates in the community of nations; this participation, therefore, is a constitutional command for domestic law. It follows therefrom [that] the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect."
\end{quote}
\end{itemize}
example, the courts adhered to the principle of consistent interpretation before their constitutions instructed them to do so.\textsuperscript{907} Likewise, the English courts accepted an obligation to interpret national law in conformity with the ECHR long before Section 3 of the Human Rights Act\textsuperscript{908} codified it.\textsuperscript{909}

National courts approach the principle of consistent interpretation from two different angles.\textsuperscript{910} First, courts may concentrate on the intent of the legislature and strive to honor it. In doing so, they consider internationalist interpretation to be the most accurate way to ascertain the meaning of the national law. According to this theory, the legislature would only violate international law after explicit deliberation and motivation. If such explicit intent to violate can not be found, the law must have been meant to conform to international law. While the result is international law friendly, the motivation behind it is to honor national rather than international law.

Second, courts may be focused more on honoring international obligations than on finding the most accurate interpretation of national law.\textsuperscript{911} In such cases, the reasoning of the courts often evinces a strong urge to uphold international law.\textsuperscript{912} A historic example

\begin{footnotes}
\item[907] See respectively Dugard 1997, p. 84-86; Danilenko 1999, p. 56.
\item[908] Section 3 (1) 1998 Human Rights Act, available at www.legislation.hmso.gov.uk ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.").
\item[909] See e.g. U.K., Court of Appeal, Schering Chemicals Ltd v Falkman Ltd, 27 January 1981, [1982] Q.B. 1 at 18, per Lord Denning ("I take it that our law should conform so far as possible with the provisions of the European Convention on Human Rights."); U.K., House of Lords, Derbyshire County Council v Times Newspapers Limited, 1992, (1992) 1 Q.B 770 at 830, per Lord Butler-Sloss:
\[
\text{"[T]he principles governing the duty of the English court to take account of article 10 [ECHR] appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. [...] But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10."}
\]
\item[910] See also Meron 1989, p. 116-117.
\item[911] See Rogers 1998, p. 640; Gulmann 1987, p. 32-33 (describing consistent interpretation in Danish law and distinguishing the rule of interpretation, that focuses on compliance with international obligations, and the rule of presumption, that focuses on the intent of the legislature).
\item[912] See Betlem and Nolkaemper 2003, p. 576.
\end{footnotes}
is the British case *Le Louis* (1817), where Lord Stowell stated that “no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own... the Legislature must be understood to have contemplated all that was within its power, and no more.”913 Some modern cases take such an internationalist approach to the principle that they effectively transform it into a mandate to uphold international obligations rather than use it as a tool to resolve ambiguities in national law.914

While the results of these two approaches can differ considerably,915 in practice the two categories can not always be adequately separated. Many national judgments silently adhere to the principle of consistent interpretation without clear motivation.916 Other judgments fuse the two approaches with varying emphasis on one or the other.917 For example, courts may sanction a breach of international law by an ambiguous national law only if the legislature clearly intended to bring about that factual situation *and* explicitly stated its intent to breach the international obligation by doing so.918 In the absence of an explicit intention to breach, the intent of the legislature to bring about the specific result is not enough and will be overruled by the court in favour of an internationalist interpretation.919

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> “This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.”


917 Compare e.g. in Germany, Bundesverfassungsgericht, *In re G.*, 14 October 2004, 2 BvR 1481/04, para. 30-33 to 46. See also Rogers 1998, p. 640-645.

918 See Conforti 1997, p. 12 (stating that this rule is followed mostly by American and Swiss courts).

919 See Italy, Court of Cassation, *Ministero Finanze v. Societa Compagnia di Navigazione Marsud*, 20 October 1976, 3 Italian Yearbook of International Law 361 at 364:

> “[I]t is difficult to imagine that the State would wish to break an agreement which it had just recognized. Use must, therefore, be made of the principle of interpretation which requires that, failing written provision to the contrary, the State must, when enacting a provision, be presumed to have intended to honour rather than to breach international commitments. The fact that, as the preparatory work on the provision makes clear, the legislature (wrongly) considered the introduction of the new charge to be compatible with the agreement and on that account intended it to apply to GATT-originated goods as well, is in no sense a conclusive reason for the adoption of an interpretation consonant with that intent.”;

It is also not uncommon to see national courts pay lip-service to the goal of ascertaining legislative intent, but go to such lengths to avoid violations of international law that the resulting judgments really belong to the second, internationally oriented category. These cases generally involve national laws that are in conflict with international law rather than ambiguous on their face, and the resulting judgments hardly disguise their dedication to the enforcement of international law. In Sharon and Yaron (2003), the Belgian Court of Cassation first acknowledged that Art. 5 (3) of Belgium’s 1993 Law relating to the suppression of grave violations of international humanitarian law ruled out a defense of immunity. However, it then “interpreted” this provision in such a way as to avoid a violation of the international obligation to grant immunity that had just been affirmed by the ICJ in Congo v. Belgium. The Court of Cassation held that “if this provision of Belgian domestic law were interpreted as setting aside the immunity principle of customary international criminal law, this provision would contravene the aforementioned principle; that the aforementioned rule cannot therefore be considered to have such a meaning, but instead must be understood as only excluding the official capacity of a person as a basis for penal non-accountability for the crimes enumerated in this statute.” Thus, in order to avoid a violation of international law, Belgium’s highest court effectively overruled the clear intent of the legislature to set aside immunity for core crimes prosecutions under the guise of interpretation.

920 See Benvenisti 1994, p. 428 (calling the principle “a potent tool that judges in a great number of jurisdictions use to apply international norms despite apparent conflicts with domestic law”).
921 See e.g. U.S., Court of Appeals (Fifth Circuit), United States v Columba-Colella, 604 F.2d 356 at 360-361 (federal court avoided extraterritorial application of very general but not ambiguous criminal statute in violation of international law by deciding “that because the defendant’s act in this case is beyond its competence to proscribe, Congress did not intend to assert jurisdiction here under 18 U.S.C. para. 2313,” and ended its judgment with the statement that “[t]he result we reach is part of the price a nation must pay to support mutuality of comity between sovereign nations.”). But see for a different reading of this case Rogers 1999, p. 46-48.
922 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:
   “Attendu que, sans doute, aux termes de l’article 5, § 3, de la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, l’immunité attachée à la qualité officielle d’une personne n’empêche pas l’application de ladite loi;”
   (“Whereas, without doubt, in pursuance of Article 5, § 3 of the statute of June 16 1993, relating to the suppression of grave violations of international humanitarian law, immunity attaching to a person’s official status does not prevent application of the aforementioned statute;”)
924 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:
   “Attendu que, toutefois, cette règle de droit interne contreviendrait au principe de droit pénal coutumier international précité si elle était interprétée comme ayant pour objet d’écarter l’immunité que ce principe consacre ; que ladite règle ne peut donc avoir cet objet mais doit être comprise comme excluant seulement que la qualité officielle d’une personne puisse entraîner son irresponsabilité pénale à raison des crimes de droit international énumérés par la loi;”
Another rather extreme example of the fictitious construction of intent in order to observe an international obligation is the famous PLO Mission case.\textsuperscript{926} In 1987, the U.S. Congress passed an Anti-Terrorism Act that\textit{ inter alia} banned all PLO offices within the jurisdiction of the United States. Closing the PLO’s Observer Mission in New York would violate the Headquarters Agreement with the United Nations, but it was clear from the text and drafting history of the Act that Congress intended to do so.\textsuperscript{927} Accordingly, the Justice Department filed suit in the Federal District Court of the Southern District Court of New York to secure closure of the PLO Mission. Faced with this conflict between the Act and a treaty, Judge Palmieri, writing for the District Court, first affirmed Congress’ competence to violate a treaty and stated that other branches of government were bound to implement such a violation when Congress’ intent was sufficiently clear.\textsuperscript{928} In a surprising move, he then ruled that the intention to violate the Headquarters Agreement was not manifest in the Act, which declared it unlawful “notwithstanding any provision of law to the contrary” to establish or maintain PLO facilities or establishments within U.S. jurisdiction.\textsuperscript{929} Therefore, he “interpreted” the Act in conformity with the Headquarters Agreement, with the result that it did not apply to the PLO Mission in New York. Since the Justice Department decided not to appeal, this was the final word in the case and the PLO Mission remained open.

It should be noted that cases like \textit{In re Sharon and Yaron} and the PLO Mission case give a good idea of the strong potential of the principle of consistent interpretation,\textsuperscript{930} but are not representative for its application in national courts. Most national courts do no more than what the principle requires: to interpret national law in conformity with international obligations, not to effectively overrule it. The principle of consistent interpretation under international law does not require \textit{contra legem} interpretation as found in these more extreme cases.

The important role of the principle of consistent interpretation in national courts constitutes a limit to the freedom of interpretation in two ways. First, it disproves the theory that international law needs a “trigger” in national law in order to take effect on the national level. The fact that international law obliges national courts to heed international obligations in interpreting national law means that it is not silent on its effects in the national legal order, nor allows States to keep international norms out of their courts entirely.


\textsuperscript{927} See Reisman 1989, p. 415-17 (“It was of little concern to its drafters that the legislation would have violated an international agreement. Despite Judge Palmieri’s opinion, there was no question that such was its intention and consequence”).


\textsuperscript{929} Id., at 1471.

\textsuperscript{930} See also Germany, Bundesverfassungsgericht, \textit{In re G.}, 14 October 2004, 2 BvR 1481/04, para. 51: “Hat der [ECtHR] eine innerstaatliche Vorschrift für konventionswidrig erklärt, so kann diese Vorschrift entweder in der Rechtsanwendungspraxis völkerrechtskonform ausgelegt werden, oder der Gesetzgeber hat die Möglichkeit, diese mit der Konvention unvereinbare innerstaatliche Vorschrift zu ändern.”

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Second, as a more practical effect, the principle of consistent interpretation may bypass certain obstacles raised by national law to the application and effectuation of international law in national courts. For example, the case of Timken Co. v. U.S. (2002) demonstrates how the principle can be used by litigants to overcome limitations of standing.\(^931\) The Timken court held that a private party can not challenge government action on the ground that it violates the World Trade Organization agreement because national law explicitly precludes such an action.\(^932\) However, the court held, a litigant is free to claim that the government's application and interpretation of United States antidumping law is contrary to congressional intent on the ground that it violates the WTO agreement which Congress intended to implement.\(^933\) Obviously, the result is by and large the same. Thus, in this case the principle was used to indirectly challenge rather than interpret national law on the basis of a treaty, where national law would normally rule out such a challenge. Such effects of the principle of consistent interpretation can significantly curtail the freedom of implementation in practice by limiting a State's ability to control the justiciability of rules of international law and the standing of private parties to invoke them.\(^934\)

5.3 Separate Regimes for Specific Categories?

The previous two sub-paragraphs have discussed the limits of the freedom of implementation in general. It may also be asked whether this freedom of the State applies equally to all international law, or requires qualification for particular categories of international norms. In contemporary international law, this question appears most pertinent for international norms of a humanitarian character, as well as those of jus cogens status.\(^935\)

5.3.a International Law of a Humanitarian Character

Numerous commentators have noted that international law’s increased focus on and direct ties to the individual call into question the continued viability of the freedom of

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\(^932\) Id., at 1238.

\(^933\) Id.


\(^935\) Note in this regard that a recent study on the implementation of Security Council resolutions concludes that “despite the proliferation of sanctions, the quasi-constitutional nature of Security Council resolutions contrasts with the place and formal ranking given to these resolutions in domestic law” and “[d]espite the importance of these resolutions, at the domestic level, even in monist states they are assimilated to non-self-executing treaty obligations and do not have immediate legal effects for individuals in member states.” Gowlland-Debbs 2003, p. 69-70. See elaborately Gowlland Debbas and Tehindrazanarivelo 2004. Therefore, Security Council resolutions will not be studied as a separate category of international norms here.
implementation as a general rule. Conceptually, the fact that international law is to a lesser and lesser extent exclusively inter-State law erodes the rationale for complete State control over its implementation at least to a certain degree. Where international law governs the rights and duties of individuals, it may not require the same freedom of implementation as where it functions primarily as a contract between States.

The question whether the general freedom rule applies to international law governing individuals is particularly pertinent for international law of a humanitarian character. This category of international law has been loosely, and somewhat circularly, defined as those norms "that uphold and promote humanitarian principles and the human dignity of individuals." These norms are found in the closely related bodies of human rights law, international criminal law and international humanitarian law. There are strong indications that this field of international law has particular characteristics, which set it apart from public international law in general and have practical consequences for its creation and application. It may be asked whether these characteristics also have their bearing on the implementation regime for this field of law, possibly resulting in a modification of the freedom rule.

The first characteristic that distinguishes international law of a humanitarian character from general international law is its largely non-reciprocal nature. While this category of international law undoubtedly creates (often erga omnes) obligations between States, it is not simply State-to-State law. The ICJ held long ago that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose. [...] Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties." The authoritative commentary on the Geneva Conventions asserts

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936 See Stein 1994, p. 450:

"Despite the pervasive mutation in the international system, the state is not about to "whither away." Yet, because of this mutation, one may question the continued functionality of the rule that a state is free, subject only to the broad international "good faith" standard, to choose the ways and means of implementing a treaty to which it is a party, and specifically to determine whether a treaty should or should not directly apply in its internal legal order. Unfettered discretion in the hands of national political institutions is particularly problematic in the case of treaties aimed at granting rights to, and imposing obligations upon, individuals."

Cf. Ferdinandusse 2003, p. 102-109; Nollkaemper 2000, p. 6-7, 13, 20 and 27; Bothe 1996, p. 302; Pescatore 1987, p. 274; Buergenthal 1985, p. 20 ("A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.").

937 Cf. Gaja 2003, p. 7 ("Should one accept the view that international law confers rights and obligations on individuals, it seems reasonable to hold that international law may also impose obligations on specific State organs.").


940 See Rasulov 2003, p. 144 (drawing on the term "treaties of a humanitarian character" in Art. 60 (5) VCLT, which is generally understood to comprise human rights law as well as international humanitarian law). See also Provost 1995, p. 402-403.

941 See e.g. Common Art. 1 GI/IV; Art. 1(1) AP I; Art. 4(1) AP II. See also Meron 1989, p. 246.

that the obligation “to respect and to ensure respect for the present Convention in all circumstances” in common Art. 1 “is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world […] so universally recognized as an imperative call of civilization.”

Human rights bodies have adopted the same line of reasoning. The IACtHR has emphasized that “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States,” but rather that the ACHR is a “multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.” Similar observations have been made by other human rights bodies.

That international obligations of a humanitarian character are not to the same extent as general international law subject to a condition of reciprocity has various concrete consequences. It means obligations of this kind may not be affected by countermeasures, while relevant treaty provisions can not be terminated or suspended in case of a material breach by another contracting party.

Second, the practice of international bodies shows a trend to limit not only the principle of reciprocity, but also the principle of consent for (at least certain) international obligations of a humanitarian character. The HRC has repeatedly asserted that “human rights treaties devolve with territory, and that States continue to be bound by the obligations under the [ICCPR] entered into by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, they cannot be stripped of that protection on account of a

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943 Pictet, et al. 1960, Vol. IV, p. 15. Cf. Art. 63 GC I, Art. 62 GC II, Art. 142 GC III, Art. 158 GC IV, Art. 1 (2) AP I and Preamble, para. 4 AP II; ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, para. 220. “[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”


946 See Art. 50 (1) sub b and c Articles on State Responsibility (2001) (excluding “obligations for the protection of fundamental human rights” and “obligations of a humanitarian character prohibiting reprisals” from obligations that can be affected by countermeasures). Note that in this article, obligations of a humanitarian character refer to humanitarian law only, while human rights law is mentioned separately. See Commentary to Art. 50, p. 336.

947 See Art. 60 (5) VCLT (prohibiting the termination or suspension of “provisions relating to the protection of the human person contained in treaties of a humanitarian character” in case of the material breach of a treaty).
change in sovereignty." This position thus denies States the choice to be bound by the ICCPR or not in respect of territories which they have acquired from States Parties to the Covenant. It further implies "that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it." There is also support for the assertion that treaties of a humanitarian character are subject to automatic succession for new States and a strong presumption against the admissibility of reservations, which, however, falls short of a total ban.

Likewise, the ICJ has observed on different occasions that "a great many rules" of humanitarian law are "fundamental to the respect of the human person" as well as "elementary considerations of humanity", and "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." Of course, all customary international obligations must be observed also by States that have not ratified treaties containing identical norms. This is not particular for international law of a humanitarian character. However, the language quoted in the paragraphs above suggests that something more is at stake than just the familiar situation of parallel sources of international obligations. Terms like "an imperative call of civilization," "elementary considerations of humanity" and "intransgressible principles," suggest that these norms are always binding, at least partly because of their humanitarian character.

Third, it appears that the formation of new customary rules of a humanitarian character is subject to more lenient demands than those for customary international law in general. This method of ascertaining custom essentially puts more emphasis on the requirement of

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949 HRC, General Comment 26 (Continuity of obligations), 8 December 1997, para. 5.
952 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 79 (quoting Corfu Channel 1949, 1949 ICJ 22).
953 See ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 1951 ICJ 23:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." (emphasis added)
opinio juris, and less on that of State practice.\textsuperscript{954} Courts and commentators speak in this regard of an “enlightened analysis” of customary law\textsuperscript{955}, the utilization of opinio necessitatis\textsuperscript{956} or modern positivism.\textsuperscript{957} The ad hoc tribunals have relied on it for important findings, such as the existence of individual criminal responsibility for acts committed in internal armed conflicts.\textsuperscript{958} Recently, the Ethiopia-Eritrea Arbitration Commission observed that there are “important modern authorities […] for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties.”\textsuperscript{959} While this particular method is closely tied to the limited direct and public interaction between States in this field of law,\textsuperscript{960} the humanitarian character of the norms in question also plays a role.

Yet, the law is more complex than many of the statements above suggest. An elaborate study on the principle of reciprocity in human rights and humanitarian law published in 1995 concludes that “reciprocity permeates both bodies of law without constituting a fundamental principle of either.”\textsuperscript{961} Humanitarian law may contain a strong presumption against reprisals, but various States have explicitly asserted their right to resort to reprisals under certain circumstances as recently as their ratification of the ICC Statute.\textsuperscript{962} Also, two recent studies conclude that State practice does not on the whole reflect a principle of automatic succession for treaties of a humanitarian character.\textsuperscript{963}

Thus, it would be an overstatement to say that the principles of reciprocity and consent play no role at all in international law of a humanitarian character. In this regard, it is important to realize that international law of a humanitarian character is, and long has been, the subject of continuous efforts by various actors to enhance its efficacy, inter alia through a diminution of the role of reciprocity and consent. Humanitarian law in particular was traditionally a fully contractual and reciprocal field of law, but has

\textsuperscript{954} See Meron 1998, p. 28.
\textsuperscript{955} See also Siedregt 2003, p. 7-8; Zeggveld 2002a, p. 22-24 and Meron 1996. Some scholars argue that instead of differentiating the threshold for custom, certain fields, like human rights law, should be regarded as embodying general principles of law rather than customary norms. See Safferling 2001, p. 26-27.
\textsuperscript{957} See ICTY, Trial Chamber, Kupreskic, 14 January 2000, para. 527.
\textsuperscript{958} See Heinegg 2003, p. 34; Roberts 2001; Simma and Paulus 1999. See also Reydams 2003, p. 7-8; Koskenniemi 1990; Meron 1989, p. 42, 74 and 246-247.
\textsuperscript{959} See below, Chapter V, para. 3.1.
\textsuperscript{960} Eritrea-Ethiopia Claims Commission, Partial Awards on Prisoners of War between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 1 July 2003 Eritrea's Claim 17, para. 40. See also Roht-Arriaza 1990, p. 490-492.
\textsuperscript{961} See Steinler and Alston 2000, p. 227-232; Meron 1989, p. 44.
\textsuperscript{962} Provost 1995, p. 453.
\textsuperscript{964} See Rasulov 2003, p. 157-167 and International Law Association, Rapport final sur la succession en matière de traités, April 2002 p. 28.
developed more and more towards a model of unconditional and universal application. \footnote{964}{See Abi-Saab 1984, p. 266-270. Cf. Provost 1995, p. 384-385.} This development explains why law of a humanitarian character and its constitutive instruments contain both reciprocal and non-reciprocal elements, sometimes in awkward combinations. \footnote{965}{Compare e.g. common Arts. 1 and 2 Geneva Conventions.}

International courts and bodies, as well as NGO’s, play a leading role in the quest for a more effective international law of a humanitarian character and the corresponding curtailment of the principles of reciprocity and consent. There is, therefore, good reason for a critical assessment of their findings on the particular nature of this field of law, as these may well be more progressive than existing law. A certain scepticism is in order especially when particular effects, such as unconditional and universal application, are grounded not on legal arguments but on normative appeals to notions such as an “imperative call of civilization” or “elementary considerations of humanity.” Such normative claims can also be characterized as techniques in a hegemonic struggle for greater control between different actors in international law, and there may indeed be some truth in the oft-cited notion that “whoever invokes humanity wants to cheat.” \footnote{966}{See Koskenniemi 2003, p. 97 and 108-110.}

Even when leaving aside the institutional interests of the actors involved, appeals to the tenets of humanity and civilization may be criticized as indeterminate and therefore unworkable. This indeterminacy calls into question exactly which rule and principles of a humanitarian character are subject to particular regimes such as a limitation of the principles of reciprocity and consent. After all, the obligation to refrain from genocide can be more convincingly characterized as an “imperative call of civilization” than, say, the obligation to guarantee the right of reply. \footnote{967}{See on the right of reply as embodied in the ACHR above, note 879.} In general, the imperative character of legal rules is more often than not debatable. For example, some people would characterize bull-fighting as “a violation of the plain dictates of the law of humanity,” whereas others would certainly disagree.

Still, it seems there is sufficient consensus on at least the limited core of standards of humanity and civilization necessary to attach tangible legal consequences to such notions. Few people would deny that acts of genocide or crimes against humanity are incompatible with basic notions of humanity and civilization. \footnote{968}{U.S., Supreme Judicial Court of Massachusetts, Commonwealth v. Tilton, October Term, 1844, 49 Mass. 232 at 234-235: “[T]he game or sport of cock-fighting is unlawful, because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity […] As being barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it, it appears to us to stand on the same footing with bull-fighting…”} This core, however, is

\footnote{969}{See Koskenniemi 1990, p. 1946-1947: “It is inherently difficult to accept the notion that states are legally bound not to engage in genocide […] only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to
very limited indeed. Developments in recent years shed doubt even on the long-established\textsuperscript{970} characterization of the prohibition of torture as a common minimal standard. In some States that have long condemned torture as inhumane, there is a public debate on the (il)legitimacy of the use of torture against suspects of terrorism.\textsuperscript{971} There are indications that at least one such State actually engages in institutionalized torture of terrorism suspects.\textsuperscript{972} Moreover, some national courts in other liberal States have explicitly found that under circumstances extradition of individuals facing torture may be justified\textsuperscript{973} or that evidence resulting from torture may be admissible in court.\textsuperscript{974} Regrettably as these developments may be, they do not seriously challenge the international prohibition of torture. Yet, they illustrate that appeals to self-evident standards of humanity and civilization are credible only for a very limited category of norms.

The question then arises whether the particular position of international law of a humanitarian character extends to its implementation. Human rights bodies, in particular the HRC, have forwarded the argument that a specific legal regime for this field of law is necessary to ensure its effective enforcement. According to this line of reasoning, the effectuation of international law which regulates the rights and duties of individuals, as international law of a humanitarian character largely does, can not be left to the standard enforcement mechanisms on the international level but must primarily take place in the national legal order.\textsuperscript{975} Thus, while the importance or natural law character of the rules involved may also play a role, this argument is grounded in essence on an appeal to effectiveness. This argument implies a significant restriction of States' freedom of implementation, in its strongest form amounting to mandatory direct applicability of the international rules.

Most human rights bodies have advanced this argument in a merely aspirational formulation.\textsuperscript{976} The UN Committee on Economic, Social and Cultural Rights, for example, first acknowledged that the ICESCR does not formally command its incorporation in domestic law, but then stated that such incorporation was nevertheless

\begin{itemize}
\item \textsuperscript{970} See Hope 2004, p. 823-826.
\item \textsuperscript{971} See e.g. McCarthy 2004.
\item \textsuperscript{973} See below, note 1017.
\item \textsuperscript{975} See Committee on Economic, \textit{General comment 9}, 3 December 1998, UN Doc E/C.12/1998/24, para. 4 ("The existence and further development of international procedures for the pursuit of individual [human rights] claims is important, but such procedures are ultimately only supplementary to effective national remedies."). See also the effective remedy clauses in the human rights treaties, above note 1111. Cf. Seibert-Fohr 2001, p. 426-429.
\end{itemize}

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"desirable" and that "[i]n general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals." The ECtHR has similarly endorsed the advantages of incorporation while upholding its optional character.

The HRC likewise started out cautiously and has long adhered to the position that "article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article." In recent years, however, the HRC has substantially increased its demands on States. It has found that States may not rely on unwritten law but must codify human rights law, and that "the need to comply with the international obligations [under the ICCPR] should be taken fully into account by the judiciary." Moreover, the HRC recommends and requires incorporation and direct application of the ICCPR with increasing forcefulness. In its 1994 concluding observations on Nepal, for example, the Committee emphasized "the need for the provisions of the Covenant to be fully incorporated into domestic law and made enforceable by domestic courts." Thus, the

977 See Committee on Economic, General comment 9, 3 December 1998, UN Doc E/C.12/1998/24, para. 4 and 8:

"In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. [...] While the [International Covenant on Economic, Social and Cultural Rights] does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law."

978 See ECtHR, Ireland v. UK, 18 January 1978, para. 239:

"[T]he drafters of the Convention [...] intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States [...]. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law."


980 See also note 903. See also Seibert-Fohr 2001, p. 434-435.

981 See e.g. HRC, Concluding Observations on Denmark, Doc. CCPR/C/79/ADD.68, 18 November 1996, para. 17 ("The Committee recommends that the State party take appropriate measures to ensure the direct application of the provisions of the Covenant into domestic law."); HRC, Concluding Observations on Gabon, Doc. CCPR/C/79/ADD.71, 18 November 1996, para. 18 ("The Committee recommends that the Covenant be incorporated in the domestic legal order and that its provisions be made directly applicable before the courts."). See also Seibert-Fohr 2001, p. 433-436

HRC assumes considerable restrictions on the freedom of implementation and is edging closer and closer towards mandatory direct applicability of the ICCPR.\(^985\)

State practice reveals some noteworthy trends regarding the implementation of international law of a humanitarian character. Numerous States have vested (parts of) international human rights law with constitutional status in deviation from the position of international law in general, thereby limiting their own ability to shape or limit the effectuation of human rights law through national law.\(^986\) Conceptually, this choice of the legislature is an exercise rather than a negation of the freedom of implementation. Also, it appears this trend is prompted largely by practical developments.\(^987\) Still, it amounts to a practical restriction of the freedom of implementation as well as a recognition of the tension between far-going freedom of the State and the effectuation of international law of a humanitarian character.

Furthermore, several national courts have enforced international norms of a humanitarian character in ways that coincide with the HRC's stricter views on the need for effective application at the national level.\(^988\) In *Tavita v Minister of Immigration* (1994), for


"By stipulating that the [national] court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, [ICCPR] requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant."


\(^987\) See Buergenthal 1997, p. 214 (identifying the institutional dynamics of international human rights courts and the emergence from non-democratic rule as important incentives for States to elevate human rights norms to constitutional rank).


"There is no reason why [certain unincorporated] international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose."

Australia, High Court, *Minister for Immigration and Ethnic Affairs v Teoh*, 7 April 1995, 183 CLR 273 at 291, per Justices Mason and Deane:

"Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention."

example, a Court of Appeals in New-Zealand dismissed the suggestion that the Minister of Immigration and his Department were at liberty to ignore the (unincorporated) ICCPR and the Convention on the Rights of the Child as "an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing." The court avoided ruling on this point by granting a stay to allow the Minister to reconsider his decision in this case, but warned that "[t]he law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution."

Various national courts have acknowledged the non-reciprocal nature of international obligations of a humanitarian character. In the Oubeid case (2003), the Israeli Supreme Court rejected the argument of the Israeli Attorney General that two Lebanese prisoners could be denied visits of ICRC delegates on account of Hezbollah's refusal to allow such visits to kidnapped Israeli soldiers. Some courts have accordingly set aside limitations of national law based on the principle of reciprocity. The French Constitutional Court held in 1999 that treaties aiming to protect fundamental human rights are exempted from the constitutional requirement of reciprocal application of treaties by other States parties. But not all national courts follow this line. In Hamdi v. Rumsfeld (2003), a U.S. court of appeals held the Third Geneva Convention to be non-self-executing in order to avoid "creating disparity among nations," thus ignoring the non-reciprocal nature of the Geneva Conventions.

However, it should be noted that these cases are generally stronger in language than in consistency, and thus not representative of national judicial practice. Judgments denying in clear terms the ability of the State to reject the direct applicability of humanitarian treaties are matched by at least as many judgments holding such treaties to be non-self-executing. Thus, it may be asked to what extent the views of the HRC reflect current

Birkenhead; Trinidad and Tobago, Privy Council, Thomas and Hilaire v. Baptiste, 23 March 1999, (1999) 3 W.L.R. 249. See on these cases also Collins 2002, p. 494-496. See further examples in the literature cited above, note 876.


9901 Id.

991 Israel, Supreme Court, Oubeid and al-Dirani v. Minister of Defence et al, 23 August 2001. See in particular 32 Israel YBHR 352. See also Israel, Supreme Court, Society of Physicians for Human Rights v. IDF Commander in the West Bank, 8 April 2002 (abuse of ambulances in combat situations by Palestinians does not constitute a justification for the Israeli army to violate rules of humanitarian law).

992 See above, note 384.

993 U.S., Court of Appeals (Fourth Circuit), Hamdi v. Rumsfeld, 8 January 2003, 316 F.3d 450 at 469: "[W]e would have thereby imposed on the United States a mechanism of enforceability that might not find an analogue in any other nation. This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132".


994 See e.g. Switzerland, Military Court of Cassation, In re N., 27 April 2001, para. 9 (a): "Quant aux Art. 146 et 147 de la Convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre, il s'agit de dispositions énonçant des obligations mises à la charge des Parties contractantes (promulguer une législation spéciale pour les sanctions pénales à appliquer aux personnes ayant commis des infractions graves à cette Convention; rechercher toute personne
international law, and more generally whether State practice indicates a more stringent regime of implementation for international law of a humanitarian character. As noted earlier, it is generally assumed that international law, including that of a humanitarian character, is not directly applicable *per se*. State practice reveals broad acceptance of the HRC’s demand that national courts should take relevant international obligations into account, but not of mandatory direct application of the ICCPR or international law of a humanitarian character more generally. As is apparent from the observations of the HRC itself, many States do not allow for direct application of (specific parts of) the ICCPR. In light of the absence of a clear textual basis in the ICCPR and the HRC’s own earlier findings to the contrary, it thus appears that the Committee’s cautious move towards mandatory direct application does not currently represent positive international law. Still, cases such as *Tavita* demonstrate that national courts, like the HRC, can be particularly uncomfortable with the room that unfettered freedom of implementation leaves for States to distort or negate the effects of international law where it concerns obligations of a humanitarian character.

In conclusion, there is a notable difference between the potential of the idea to subject international law of a humanitarian character to a more stringent regime of implementation and its acceptance in current international law. Conceptually, it is not difficult to see the logic of a more stringent regime. If some international norms are so fundamental that they bind States *per se* regardless of their consent, while proceedings on the national level provide the most, or even only, effective means of enforcement, it is difficult to accept that the applicability of those norms in national courts is subject to the discretion of the State.

But on balance, State practice shows a certain tendency to limit the freedom of implementation for international obligations of a humanitarian character, yet is far from conclusive in this regard. National courts have on various occasions limited the principle of reciprocity or the State’s freedom to disregard signed but unratified treaties, but in many other cases treated norms of a humanitarian character no different than general international law. Thus, the special position of international law of a humanitarian character appears to be in development, but should not be overstated.

5.3.b Jus Cogens

The idea that States are governed by a category of “peremptory norms of international law”, or *jus cogens*, has gained significant support both in practice and doctrine over the

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prevenue d'une violation de la Convention; juger une telle personne ou la remettre pour jugement à un autre Etat intéressé); elles ne contiennent donc pas de règles directement applicables à la conduite des hostilités.”;


995 See above, note 795.
996 See above, para. 5.2.
The concept of *jus cogens* was developed within the law of treaties, but there is considerable support nowadays for its broader application beyond that field of law. According to the Vienna Convention on the Law of Treaties, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The concept of *jus cogens* is puzzling in literally all its aspects. It is unclear exactly how a norm is elevated to or demoted from *jus cogens* status, what are the consequences of that status, and which norms currently fit into the category of peremptory norms. In 1990, a commentator ventilated his bewilderment in this regard in the aptly titled article “It’s a bird, it’s a plane, it’s *jus cogens*.” Since then, writings and judgments of all sorts have prolifically invoked the concept of *jus cogens*, but the confusion remains.

Leaving aside the many other intricacies of *jus cogens*, this section focuses solely on its possible consequences for the implementation of international obligations in national legal systems. Although the concept of *jus cogens* principally elevates norms to a higher status on the international plane, it has been suggested that it may also affect their status and application in national legal orders. Indeed, there is both international and national practice to suggest that the effectuation of *jus cogens* norms in the national legal order is governed by a particular regime that is more demanding than that of international norms in general. On the international plane, the ICTY found in its *Furundzija* judgment that the *jus cogens* nature of the prohibition against torture has certain effects at “the inter-state and individual levels.”

On the national plane, numerous courts have embraced the idea that the peremptory character of international norms is relevant for their effects in the national legal order. National courts have suggested, *inter alia*, that the consequences of *jus cogens* status

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1000 Art. 53 VCLT. See also Art. 64 and 71.
1002 D'Amato 1990.
1003 See Salcedo 1997, p. 590. While there are some excellent studies on this subject, see above note 998, these face formidable obstacles. The complexity of the concept, its minimal regulation in written international law and the tendency of many courts and writers to invoke *jus cogens* in diverse ways without substantial analysis together perpetuate the existing confusion.
1004 See for a specific analysis of the *jus cogens* status of the core crimes and its consequences for their prosecution below, Chapter V, para. 3.2.
1006 ICTY, Trial Chamber, *Furundzija*, 10 December 1998, para. 155 (emphasis added). See for an analysis of this holding below, p. 174 et seq. See also ECHR, Al-Adsani *v.* United Kingdom, 21 November 2001, in particular the separate and dissenting opinions.
might include domestic validity in the absence of a corresponding rule of national law,\textsuperscript{1008} supremacy over national rules, e.g. those on immunities,\textsuperscript{1009} and strengthened enforcement in deviation of the normal separation of powers.\textsuperscript{1010} Numerous national judgments concerning the core crimes refer to their \textit{jus cogens} status as a significant factor.\textsuperscript{1011} In a rare case of legislative practice, the 1999 Swiss Constitution explicitly recognizes \textit{jus cogens} as a limitation to the national legislative process.\textsuperscript{1012}

However, it appears that neither international nor national practice regarding the domestic effects of \textit{jus cogens} norms in general carries enough weight to carry a corresponding rule of customary international law. There is considerable contrary practice that treats \textit{jus cogens} norms with less deference. The suggestion that the \textit{jus cogens} status of international norms overrides immunities, whether contained in national or international rules, has ultimately been rejected by national\textsuperscript{1013} and international\textsuperscript{1014} courts alike. Numerous decisions of national courts reject the proposition that peremptory rules are exempt from the general national framework of implementation in any way.\textsuperscript{1015} Some national courts have held that \textit{jus cogens} status does not remove all discretion in the

\textsuperscript{1008} See U.S., Court of Appeals (Ninth Circuit), \textit{U.S. v. Matta-Ballesteros}, 1 December 1995, 71 F.3d 754 at 764 ("Kidnapping also does not qualify as a \textit{jus cogens} norm, such that its commission would be justiciable in our courts even absent a domestic law.").

\textsuperscript{1009} See Wet 2004, 105-112; Seiderman 2001, p. 111-115.


\begin{quote}
"When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law. If, on the other hand, Congress and the President violate a peremptory norm (or \textit{jus cogens} ), the domestic legal consequences are unclear."
\end{quote}

\textsuperscript{1011} See below, Chapter V, para. 5.

\textsuperscript{1012} See Art. 139 (3) (Volksinitiative auf Teilrevision der Bundesverfassung):

\begin{quote}
"Verletzt die Initiative die Einheit der Form, die Einheit der Materie oder zwingendes Völkerrecht, so erklärt die Bundesverfassung sie für ganz oder teilweise ungültig."
\end{quote}

Art. 193 (4) (Totalrevision)

"Die zwingenden Bestimmungen des Völkerrechts dürfen nicht verletzt werden."

Art. 194 (2) (Teilrevision)

"Die Teilrevision muss die Einheit der Materie wahren und darf die zwingenden Bestimmungen des Völkerrechts nicht verletzen."


\textsuperscript{1013} See e.g. Germany, Bundesgerichtshof, \textit{Distomo Massacre Case}, 26 June 2003, BGH - III ZR 245/98, para. 1 sub b (holding that international law does not deny State immunity for violations of \textit{jus cogens}); See also Gattini 2003, p. 354 (stating that all superior domestic courts which have pronounced on the matter have declined to make an exception to State immunity for grave violations of fundamental human rights); Working Group of the International Law Commission, \textit{Report on Jurisdictional Immunities of States and their Property}, 1999 (concluding that national case law predominantly upholds immunity claims in civil suits regarding \textit{jus cogens} violations); Bergen 1999, p. 169 (observing that in U.S. case law, immunities apply also in cases concerning violations of \textit{jus cogens} norms).

\textsuperscript{1014} ICI, International Court of Justice, \textit{Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)}, 14 February 2002; ECtHR, Kalogeropoulos v. Greece and Germany, \textit{Decision on Admissibility}, 12 December 2002, para. D1a (id.); ECtHR, Al-Adsani v. United Kingdom, 21 November 2001 (note however that the ECtHR decided Al-Adsani with a narrow 9-8 majority).

\textsuperscript{1015} See e.g. U.S., Court of Appeals (9th Cir.), \textit{Siderman de Blake v. Argentina}, 22 May 1992, 965 F.2d 699 (holding that the \textit{jus cogens} character of a violated norm does not obviate the need to establish jurisdiction on the basis of the Foreign Sovereign Immunities Act).
application of international law. In Suresh v. Canada (2002), for example, the Canadian Supreme Court cautiously accepted that the prohibition of torture might have *jus cogens* status, yet found that “in exceptional circumstances, deportation [of refugees who] face torture might be justified.”

Furthermore, the great majority of judgments, national or international, that privilege *jus cogens* norms is of limited authority. This case law consists to a significant extent of *obiter dicta* and decisions that have subsequently been overruled. Also, in many cases it is unclear whether an appeal to *jus cogens* status actually determines the outcome or merely serves to affirm a conclusion reached on other grounds. In addition, it can be unclear whether State practice actually says anything about the international rules regarding *jus cogens* or merely reflects a policy choice of the State. The value of the constitutional provisions in Switzerland, for example, is open to doubt. Does international law not prohibit national legislatures to contravene any international obligation, rather than just peremptory norms? From the viewpoint of international law, it is unclear whether these Swiss provisions express anything more than a partial reproduction of the well-established rule that States may not alter or contravene their international obligations through national legislation.

An additional problem that limits the authority of many relevant judgments is the quality of their reasoning. Many national courts declare international norms to be peremptory and to have far-going consequences without any analysis or substantiation. Often, it is clear from their holdings that they do not master the relevant law. This, obviously, undermines the authoritative value of their judgments. The assertion that a violation of a “*jus cogens* norm [is] justiciable in [national] courts even absent a domestic law,” is an interesting and definable proposition, but what is it worth coming from a court which believes that “murder” is a *jus cogens* norm?

1016 See e.g. U.S., District Court (Cal.), Sarei v. Rio Tinto PLC, 9 July 2002, 221 F.Supp.2d 1116 at 1152-1153 and 1207 (rejecting racial discrimination as a basis for the civil claim of Papua New Guinea residents against international mining group “on international comity grounds,” despite finding that racial discrimination constitutes a violation of a *jus cogens* norm and comity is a discretionary doctrine).

1017 Canada, Supreme Court, Suresh v. Canada (Minister of Citizenship and Immigration), 22 May 2002, 2002 SCC 1, para. 65 and 78:

> "Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.
>
> [...] We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified...”

See also Zambia, High Court, The People v. Davies Mumeno, No HPR/79, 10 July 1990, 1990-1992 Zambia Law Reports 13 (while *jus cogens* is not explicitly addressed, the court cites and follows the Zambian Supreme Court’s holding that “corporal punishment is a form of inhuman and degrading punishment which should be imposed sparingly and only in most serious circumstances.”).


1020 U.S., Court of Appeals (Ninth Circuit), U.S. v. Matta-Ballesteros, 1 December 1995, 71 F.3d 754 at 764:
International judges may be more knowledgeable about the concept of *jus cogens*, but their holdings are not necessarily clearer or better substantiated. The ICTY’s dictum on the consequences of the *jus cogens* status of torture in *Furundzija*, for example, is rather ambiguous. In light of its broad recognition as an authoritative precedent both in practice and doctrine, it will be analyzed here in some detail. The tribunal speaks of “effects at the inter-state and individual levels” which include international de-legitimization of national acts authorising torture and, consequently, criminal responsibility of torturers notwithstanding any national measure to the contrary. Furthermore, the Trial chamber holds that the peremptory character of the norm entitles every State to prosecute and punish torturers present on its territory and disallows the application of statutes of limitations and the political offence exemption to cases of torture.

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“Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. […] Kidnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery.”

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1022 See e.g. Gitti 1999, p. 81-82; Wilson 1999, p. 955-956 and below, footnotes 1025 and 1026.

1023 ICTY, *Trial Chamber, Furundzija*, 10 December 1998 para. 154-155:

“154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.

Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.

What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.

1024 ICTY, *Trial Chamber, Furundzija*, 10 December 1998 para. 156-157:

“156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally
One of the judges in the case has later asserted that this holding stands for the proposition that “peremptory norms may produce legal effects at the municipal law level.” Several writers have drawn similar conclusions. On close reading, however, this interpretation is questionable at least. First, it should be noted that the language of the decision is often ambiguous. The “inter-state and individual levels” constitute a false dichotomy, since the individual level obviously does not represent the national legal order. After all, the Tribunal finds that at the individual level, “every State is entitled to investigate, prosecute and punish torture,” which can only be an entitlement under international law. The term “de-legitimise” in para. 155 is colloquial and has no clear-cut meaning in international law. In para. 156, the Tribunal first concludes that a right to prosecute torturers present in one’s territory is “one of the consequences” of jus cogens status, but subsequently states that this legal basis “bears out and strengthens” the established legal foundation for universal jurisdiction, thus leaving unclear to what extent jus cogens status is either necessary or sufficient for the exercise of universal jurisdiction.

Second, the holding mentions various effects that are not particular for jus cogens. The maxim that international law pays no heed to contrary national law, either in international proceedings or for the determination of individual criminal responsibility, applies to all rules of international law, not only peremptory norms. The proposition that international law grants States universal jurisdiction over all jus cogens crimes while prohibiting them to apply statutes of limitations or the political offence exemption is interesting. Yet, nothing in the judgment suggests that these effects are limited to jus cogens crimes only or take place directly on the municipal law level.

In conclusion, then, the Furundzija dictum says nothing new about the national implementation of jus cogens norms. The only other possible outcome requires an interpretation of para. 155 as envisaging the automatic invalidation of national acts contravening jus cogens directly in the national legal order rather than under international law. This interpretation is left open by the ambiguity of the relevant sentence, as it is unclear whether the finding that “the national measures […] would produce the legal

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unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, “it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission”.

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”

1025 See Cassese 2001c, p. 145.
1026 See De Wet 2003, p. 100 (speaking of a proposal to apply jus cogens in national law) and Seiderman 2001, p. 59 (concluding that “the jus cogens character of norms carries direct legal effects vis-a-vis the legal character of all official domestic actions”).
1027 ICTY, Trial Chamber, Furundzija, 10 December 1998, para. 156.
effects discussed above” refers back to being “null and void ab initio” or to international de-legitimisation. For the interpretation of automatic invalidation pleads that “international de-legitimisation” and “not being accorded international legal recognition” would amount to the same thing, for which reason “the legal effects discussed above” must refer back to being “null and void ab initio.” This interpretation is squarely contradicted, however, by the fact that the paragraph sets out to discuss effects at “the inter-state level.” Moreover, in para. 150, the Trial Chamber found that “the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility,” suggesting a more cautious approach than automatic invalidation.

The commentators who interpret the Furundzija dictum as a progressive holding on the effects of *jus cogens* norms are equally ambiguous in specifying its precise meaning. The judge cited earlier, for example, states that “as the ICTY held in Furundzija, peremptory norms may produce legal effects at the municipal law level: they de-legitimize any legislative or administrative act authorizing the prohibited conduct. Consequently, national measures [...] may not be accorded international legal recognition or at any rate are not opposable to other States.”1028 This comment hardly makes things clearer. De-legitimization is not a legal effect, and a lack of international legal recognition and opposability to other States are neither “legal effects at the municipal law level” nor exclusive for *jus cogens* norms. Rather, they can be the fate of each and every national measure that violates international law. All in all, the holding in Furundzija is too unclear and contradictory to serve as firm evidence for the statement that the *jus cogens* character of a norm determines its effects in national law.

In conclusion, national and international practice regarding the domestic legal consequences of peremptory norms of international law is divided at best, and often unclear or poorly reasoned.1029 The lack of analysis and obvious mistakes in many judgments, especially of national courts, notably undercut their authoritative value. A cautious tendency can be discerned to accept a privileged position for *jus cogens* norms in the national legal order, but in the absence of firm State practice a corresponding rule of customary international law currently appears to be only in the (early) formative stages.1030

The prospects for future development of a privileged position of *jus cogens* norms in the national legal order are uncertain, and plagued by two fundamental problems. First, many of the suggested consequences of *jus cogens* status in the national legal order rest on the assumption that the rank of a norm is in itself enough to eliminate procedural barriers to its effectuation. This assumption is problematic. If one accepts that national courts lack the authority to judge the conduct of other States or their officials, then no characteristic of any given norm, whether it is its superior rank, intrinsic value or any other feature, can cure that omission. The argument that the *jus cogens* status of torture in itself gives

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1029 See Seideman 2001, p. 35 and 121.
1030 See Wet 2004, p. 119-120; Seideman 2001, p. 121.
national courts a competence to judge foreign States and officials which they would otherwise lack, is not far off from the argument that murder is such a serious crime that everybody should be allowed to punish its perpetrators. Both rest on an overly simplistic connection between characteristics of the norm and the procedure for its effectuation. Of course, States may well decide that it is no longer desirable to exempt their acts from scrutiny in foreign courts where peremptory norms are at stake. But importantly, such a step primarily requires a rethinking of the concept of sovereign immunity, rather than *jus cogens*. Courts and scholars often fail to broaden their analysis accordingly when analyzing the continued viability of immunities for *jus cogens* norms.

Second, any enhancement of the position of *jus cogens* norms risks limiting the impact of non-peremptory norms of international law (*jus dispositivum*) by implication. As set out above, the constitutional reference to *jus cogens* in Switzerland may be interpreted as a licence for the Swiss legislature to ignore *jus dispositivum* at will. This problem of relative normativity has figured in the academic debate of *jus cogens* and its implications for a long time, but is still very much with us today.\(^\text{1031}\)

However, as the case law of national and international courts indicates despite its unclarities and imperfections, the concept of *jus cogens* is certainly not devoid of potential in the national legal order. One could think that in an optimal scenario, the manoeuvring space of States would be differentiated in such a way as to allow maximum freedom of implementation, including the capability to adapt and in exceptional cases violate international obligations, but to limit violations of international law that flow from negligence or the desire to seek a unilateral exemption from international obligations that are otherwise left intact. A strengthened implementation and/or enforcement of *jus cogens* norms could provide a first step for such a differentiation, as States have virtually no possibility to adjust or need to mitigate the effects of their peremptory obligations in any case.\(^\text{1032}\)

6 Conclusion

States have the freedom to implement their international obligations in any way they see fit as long as they give full effect to those obligations. Yet, the consequences of this general rule are easily and often overestimated. For national courts, taking the freedom of the State as a starting point logically leads to a predominant focus on the national rules relevant for the implementation and application of international law in the national legal order. Numerous courts and scholars even go so far as to focus exclusively on what national law has to say on the matter. This is, however, erroneous.

\(^{1031}\) See principally Weil 1983. See also Wet 2004, p. 104 and 118-121.

\(^{1032}\) Cf. ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, para. 73 and Separate Opinion Judge Kooimans, para. 46:

"[The United States] opted for means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures."
International law grants States great freedom, but does not allow national courts to ignore international obligations altogether. The principle of consistent interpretation requires national courts to take international obligations into account in their construction of national law. It also follows both from a historical analysis of the reception of international law in national courts and a review of contemporary practice that international law is not silent on its own implementation and enforcement on the national level. Therefore, the international legality of certain modern variants of the doctrine of self-executing treaties is at least doubtful. While national law may impose far-going limitations on the application of international law by national courts, the practice of some courts to declare treaties non-self-executing solely or predominantly because they perceive the practical effects of their application as unwelcome violates their duty to give effect to international obligations where national law allows it.

Finally, practice shows a certain tendency towards a limitation of the freedom of implementation for international obligations of a humanitarian character and peremptory norms. For the first category, this tendency is limited but real. In the case of *jus cogens*, practice is diffuse and mostly aspirational.
Chapter V
The Framework of Implementation for the Core Crimes

1 Introduction

The previous Chapter set forth the general demands of international law for the implementation of international obligations in the national legal order. It noted that international law, as a default rule, leaves States free to implement their international obligations in the way they see fit. It also noted that, despite significant practice of national courts to this effect, the freedom of implementation does not extend to a freedom to violate international obligations. All liberties of States flowing from the freedom of implementation, such as the limitation of the judicial application of international law in national courts, are subject to the condition that the State ultimately adheres to its international obligations. Chapter 4 further showed that there is practice to suggest that the general international framework of implementation is subject to modification for certain kinds of international law, in particular that of a humanitarian character and/or jus cogens status. Yet, it concluded that State practice is mostly aspirational, and at best divided, on the question whether international law subjects those particular categories of international law to a more stringent regime of implementation and application.

The question then arises whether the general framework of implementation applies in its entirety to international core crimes law. Core crimes law is not only of a humanitarian character and jus cogens status, but has additional characteristics that have been interpreted in practice and doctrine to influence its implementation. In this Chapter, I will analyze whether international law imposes different demands on States for the implementation of core crimes law than the general framework outlined in Chapter 4. To this end, I will analyze the relevant characteristics of core crimes law and the way national courts treat the particularities of core crimes law in practice.

Taking a broad approach, I will explore the characteristics of both international criminal law in general (para. 2) and the core crimes in particular (para. 3), insofar as these are relevant for the question of implementation. I will examine in some detail the particularly

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1033 Cf. ICTY, Appeals Chamber, Erdemovic, 7 October 1997, Joint Separate Opinion of Judges McDonald and Vohrah, para. 78:

"It is clear to us that whatever is the distinction between the international legal order and municipal legal orders in general, the distinction is imperfect in respect of the criminal law which, both at the international and the municipal level, is directed towards consistent aims."

See also Stein 1994, p. 450 (cited above, note 936) and Lauterpacht 1944, p. 64 ("In no other sphere does the view that international law is binding only upon States and not upon individuals lead to more paradoxical consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war.").

1034 It should be noted at the outset that none of the characteristics to be mentioned here is in itself unique for core crimes law. The goal here is to analyze whether and to what extent the framework of implementation of core crimes law differs from international law's general framework, not to what extent core crimes law can be distinguished from other particular fields of international law. Certainly, there are other fields for which the viability of the general framework of implementation may be questioned, in part for similar reasons as those set out here.
grave character of the core crimes (para. 3.1), their *jus cogens* status (para. 3.2) and the mandatory character of their prosecution, which flows not only from international criminal law, but also from human rights law and the law on State responsibility (para. 3.3). This part continues the analysis of paragraph 5.3 of the previous Chapter on the more specific level of core crimes law. Next, I will ask whether international law requires States to reflect the international character of the core crimes in national prosecutions or allows them to prosecute core crimes as if they are ordinary crimes like murder (para. 4). Having thus examined the particularities of core crimes law, I will analyze to what extent national courts in practice adhere to or deviate from the general framework of implementation for international law where it concerns the core crimes (para. 5). Finally, I will describe the influence of the ICC Statute on the implementation of core crimes law (para. 6), before making up the balance of the current international framework of implementation for core crimes law (para. 7).

2 Characteristics of International Criminal Law

What then, are the characteristics of international criminal law that influence its implementation in the national legal order? Chapter 1 defined international criminal law as ‘the accumulation of international legal norms on individual criminal responsibility’, in other words: the penal aspects of international law.\(^{1035}\) This definition indicates a first characteristic that, even if it is obvious, requires mentioning: ICL primarily focuses on and addresses individuals.\(^{1036}\)

Second, and logically following from the first, the intended effects of ICL take place primarily within States and not between States. Therefore, ICL explicitly employs the national legal orders, and is essentially dependent on them, for its effectuation. The fact that ICL aims to stop individuals from performing certain acts does not mean it addresses *only* individuals. To regulate individual behavior, ICL issues a dual set of rules.\(^{1037}\) One addresses the individual and attaches criminal responsibility directly to certain acts. Another set of rules addresses States and authorizes or obliges them to prosecute infractions of certain norms.\(^{1038}\) The utilization of States, and thus their national courts, to prosecute international crimes is known as the *indirect model* of enforcement, as opposed to the *direct model* which employs international courts.\(^{1039}\) Importantly, the obligations of States are not limited to ensuring the effectuation of individual criminal responsibility, but often include separate obligations to enact necessary legislation.\(^{1040}\) Therefore, lacunae in the national legal system that obstruct core crimes prosecutions are

\(^{1035}\) See above, p. 22.

\(^{1036}\) See on the implications of this point, above, Chapter IV, para. 5.3.a.


\(^{1038}\) The norms of the first and the second set do overlap only partially. ICL also addresses the responsibility of States to react to certain infractions for which it does not impose criminal responsibility directly on individuals, as for example in the case of environmental crimes. See also above, note 188.

\(^{1039}\) See Mantovani 2003, p. 27; Werle 2003, p. 78-79; Bassiouini 1999b, p. 110.

\(^{1040}\) See e.g. Art. 5 GC; Art. 49 (1) GC I; Art. 50 (1) GC II; Art. 129 (1) GC III; Art. 146 (1) GC IV; Art. 4 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; Art. 5 CAT. See also Fichet-Boyle and Mossé 2000.
internationally wrongful in and of themselves, not solely in connection to an actual instance of impunity in practice.\textsuperscript{1041}

Third, it is generally accepted that States are, as a default rule, free to implement and effectuate their obligations under ICL in any way they see fit, like is the case for public international law in general.\textsuperscript{1042} ICL articulates relatively clearly which crimes must be prosecuted, but is far less detailed on the manner in which these prosecutions should take place. There is, for example, no general international rule that obligates States to prosecute international crimes directly on the basis of international law, or on the basis of any particular ground of jurisdiction.\textsuperscript{1043} In theory, this freedom allows States to choose the most effective way of implementing their international obligations.\textsuperscript{1044} In practice, the lack of specific implementing obligations often results in incomplete or otherwise imperfect implementation of the law, contributing to the widespread impunity for international crimes.

The fact that ICL leaves States considerable freedom of implementation should not obscure the fact that international criminalizations themselves are relatively precise. From the perspective of a national (penal) lawyer, international criminalizations may be ambiguous and confusing. From an international law perspective, however, they are among the international norms that articulate the clearest standards.\textsuperscript{1045} They do not, for example, require States to “establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible,”\textsuperscript{1046} but straightforwardly prohibit certain acts, threaten punishment to transgressors and obligate States to enforce these norms. There is only limited room for interpretation.

Human rights law specifies further demands, determining \textit{inter alia} that prosecution may take place only in independent courts.\textsuperscript{1047} The combination of ICL and human rights law gives a clear indication of the State organs which are responsible for the implementation of these treaty obligations, and sets limits on the way they may do so. Although numerous choices in the implementation process remain, for example which courts are to

\textsuperscript{1041} See ICTY, Trial Chamber, \textit{Furundzija}, 10 December 1998, para. 149. Cf. IACtHR, Certain Attributes of the Inter-American Commission on Human Rights ( Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights ), 16 July 1993, Advisory Opinion OC-13/93, (Ser. A) No. 13, para. 26 (“A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2.”); Harris, \textit{et al.} 1995, p. 19-20.

\textsuperscript{1042} See Lambert-Abdelgawad 2003, p. 541. See on the freedom of implementation in general international law above, Chapter IV, para. 3.

\textsuperscript{1043} See Cassese 2003a, p. 301. See on the question whether core crimes may be charged as ordinary rather than international crimes below, Chapter V, para. 4.

\textsuperscript{1044} See above, p. 140.

\textsuperscript{1045} Cf. Paust 1991, p. 368 (who may be slightly overstating the point in asserting that “it is difficult to imagine a more mandatory, controlling, detailed, definable, universal, and useful set of treaty standards” than those contained in the Geneva Conventions).

\textsuperscript{1046} Art. 11 (5) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 Dec 1979).

\textsuperscript{1047} See e.g. Cassese 2003a, p. 309-310.
apply what law, the interplay of different international obligations significantly curtails the freedom of States in practice. Also, ICL is becoming more and more detailed and comprehensive. It increasingly regulates defenses, forms of participation, general principles governing prosecutions and related matters.¹⁰⁴⁸

Moreover, international law requires States to give full effect to their international obligations.¹⁰⁴⁹ In interpreting these obligations, States must take into account their object and purpose.¹⁰⁵⁰ The object and purpose of international criminal law, or at least a pivotal aspect of it, is to prevent these crimes and, in order to achieve that goal, to punish international crimes when they occur.¹⁰⁵¹ States have, in treaties, other international instruments and declarations of various kinds, consistently maintained that punishment of international crimes is an essential and necessary step for their prevention.¹⁰⁵²

International courts take the same view.¹⁰⁵³ Therefore, States must take into account the goal of punishing core crimes perpetrators in every step of implementation they take. Where choices are to be made, be it in the interpretation of international law and national

¹⁰⁴⁸ See e.g. Mantovani 2003; Safferling 2001. Note, however, that ICL’s regulation of such matters is still far from complete. See Sassoli 2002, p. 121-123.
¹⁰⁴⁹ Cf. Art. 26 VCLT, widely believed to reflect customary law.
¹⁰⁵⁰ Cf. Art. 31 VCLT, widely believed to reflect customary law.
¹⁰⁵² See e.g. Preamble Rome Statute, para. 5 ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"); Preamble 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, para. 5:

"Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security,"

See also Bothe 1995, p. 241.
¹⁰⁵³ See e.g. ICTR, Trial Chamber, Niyitengeka, 16 May 2003, para. 484:

"In reaching its decision on an appropriate sentence to be imposed on the Accused, the Chamber has taken due consideration of the well-established principles of retribution, deterrence, and protection of society. Specific emphasis is placed on general deterrence, so as to demonstrate ‘that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights.’" (footnote omitted);

ICTR, Trial Chamber, Akayesu, Sentencing Judgment, 2 October 1998, unnumbered para.:

"[T]he establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace. It is therefore clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed on the one hand attri - - attribution (sic) of said accused who must see their crime punished and on the other hand as deterrence, namely dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights.”;

ICTY, Trial Chamber, Erdemovic, Sentencing Judgment, 29 November 1996, para. 64-65, cited above, note 1222. Cf. ICI, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), preliminary objections, 11 July 1996, para. 31; ICTY, Trial Chamber, Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18 ("The object and purpose of the (ICTY) is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.").
law or in legislative action, States are required to choose the option which best guarantees punishment of core crimes perpetrators.

Fourth, ICL is a strongly normative body of international law. Like human rights law, international criminal law differs from the traditional Westphalian conception of public international law in that it sets a normative standard as opposed to the “agnostic, procedural international law whose merit consisted in its refraining from imposing any external normative ideal on the international society.”\footnote{Koskenniemi 2003, p. 90.} ICL is, in a sense, a set of values rather than a language for participants. Even stronger than human rights law, the very act of criminalization expresses a powerful, negative judgment.\footnote{See Safferling 2001, p. 58 (stating that “only the gravest acts against the international community can be criminalized at the international level”). Cf. Seidman 2001, p. 187 and 202.} Its normative character may influence ICL’s enforcement in national courts. After all, the notion that the intrinsic value of the rule to be applied or the issue at stake can alter the balance between conflicting rules is not foreign to international law.\footnote{See Nollkamper 2003a, p. 630-631 (analyzing how international courts vary the standard of proof according to the gravity of the matter under consideration). Cf. Santulli 2001, p. 113-114, note 211. But see Eritrea-Ethiopia Claims Commission, Partial Awards on Prisoners of War between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 1 July 2003, Eritrea’s Claim 17, para. 45-47.}

3 Characteristics of the Core Crimes

3.1 The Grave Character of the Core Crimes

It will not be easy to find a text dealing with core crimes law that fails to mention their exceptional gravity. Legal instruments and judgments regarding these crimes are replete with references to their odious nature. The core crimes concern acts that threaten the peace and security of mankind.\footnote{See Art. 17, 18 and 20 Draft Code 1996. Cf. preamble ICC Statute, para. 3 (“Recognizing that such grave crimes threaten the peace, security and well-being of the world”). See also Triffterer 1966, p. 195-217. Historically, international criminal law was strongly focused on protecting the international community, i.e. ensuring the unimpeded functioning of States. The goal of protecting civilians from grave suffering has emerged more recently with the advent of human rights law. See Zoller and Reshetov 1990, p. 100 (“There was no offense against the law of nations when – however serious the offense committed by the individual – states could conduct their regular affairs along orderly and predictable lines.”).}

They are of a particular heinous character, indeed, even “inhumane”\footnote{See e.g. ICC Statute Art. 7 (1) sub k. Cf. Kritz 1996, 151 (“There will be cases of crimes so horrific that the international community will be obliged, for its own sake and for the preservation of fundamental universal principles, to hold the key planners or perpetrators accountable to all of humanity.”).} and “shocking for the conscience of humanity.”\footnote{See e.g. Preamble ICC Statute, para. 2.} It is widely accepted that core crimes law, in this sense including the crime of aggression, tops the normative hierarchy of international law.\footnote{See Congo (the), Supreme Court, Projet de loi portant définition et répression des crimes contre l’Humanité, 24 March 1998Au fond (“[N]ul ne peut valablement prétendre ignorer que le génocide et les autres crimes contre l’Humanité sont la forme la plus grave et la plus intolerable des atteintes contre la personne humaine et qu’ils sont naturellement interdits.”). Cf. Swart 1996, p. 6-7; Bassiouni 1996, p. 141-142; Triffterer 1966, p. 178. But see below, notes 1282 to 1284.}
Many of these statements effectively declare the criminalizations of the core crimes to be norms of natural law. Qualifications such as “inhumane” and “shocking for the conscience of humanity” exude the idea that the law on core crimes is not simply a choice of the relevant actors in international law, but rather an objective standard which imposes itself on everyone who wishes to partake in civilized society. That they are “crimes against the peace and security of mankind” suggests that their prevention and punishment is not just desirable but necessary to ensure the continued existence of mankind.

The criticism of appeals to natural law notions like “the conscience of humanity,” relayed in Chapter 4, also applies in the context of core crimes law. There are many acts which - hardly anyone will dispute - are incompatible with basic notions of humanity. Yet, our failure to apply such standards in a consistent manner undermines the authority of their invocation. The application of double standards to different core crimes surpasses simple factual denials of, or popular support for particular crimes in situations of conflict. It also takes the shape of more reasoned positions. An eminent modern philosopher has argued that there is a “supreme emergency exception” which “allows us to set aside – in certain special circumstances – the strict status of civilians that normally prevents their being directly attacked in war.” Therefore, he posits, the British bombing of German cities in WW II was justifiable in the period that Great-Britain alone opposed Germany and “had no other means to break Germany’s superior power.”

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1061 See preamble Genocide Convention, para. 1 and 3 (stating that genocide is “condemned by the civilized world” and “an odious scourge”). Cf. ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 19511951 ICJ 23, reiterated in ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), preliminary objections, 11 July 1996, para. 31:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946).” (emphasis added); Israel, Supreme Court, Attorney General of Israel v. Eichmann, 29 May 1962, 36 ILR 277, at 291, 293 (“Those crimes entail individual criminal responsibility because they [...] affront the conscience of civilized nations.”).

1062 See ICTY, Trial Chamber, Erdemovic, Sentencing Judgment, 29 November 1996, para. 28:

“Crimes against humanity [...] are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.”.

See also Schwarzenberger 1950, p. 272-273 ("In any social group in which a criminal law exists the highest values and interests are protected by rules of criminal law. International crimes would, therefore, be in all likelihood only acts of subjects or objects of international law which strike at the very roots of international society.").

1063 See above, p. 165.

1064 Rawls 1999, p. 98.

1065 Id.
Clearly, core crimes law categorically excludes such means-ends reasoning, regardless of how important or noble the end may be. To introduce it, no matter in how limited a manner, relativizes the inhumane character of the core crimes. If one accepts that Allied violations of humanitarian law in WW II may have been justified by a supreme emergency exception, one opens the door to a similar means-end defense for other core crimes. Even though such a defense will generally fail, its very possibility severely undermines the notion that some acts are so odious that they can never be permitted.

Still, such criticism amounts to a relevant qualification of appeals to natural law notions, but not a repudiation of the grave character of the core crimes. Courts and scholars have conceptualized the grave nature of core crimes law not only as a claim to natural law status, but also as merely a particularly strong normative content, or as an alternative articulation of its non-consensualist character expressed in more positivistic terms by reference to its customary and peremptory status. Whatever the label one attaches to it, the implications are substantially the same. The grave character of genocide, crimes against humanity and war crimes are frequently invoked as a justification to interpret or even adapt procedural and other relevant rules in such a way as to ensure their prevention and punishment to the fullest extent possible.

First, the exceptional character of the core crimes has been invoked to defend a method of ascertaining the content of customary law which stresses the element of opinio juris over that of consistent state practice. This method has been applied to law of a humanitarian character more generally, and is conceptualized partly as a necessary consequence of the prevailing complications in the analysis of State practice. But considerable emphasis has also been put on the character of the norms involved, particularly in the specific context of core crimes law. The underlying idea appears to be that the importance and necessity of the norm, when accepted by the international community, can remedy deficiencies in state practice that would normally bar it from becoming a rule of customary international law.

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1066 See Triffterer 1989, 42-44; Röling 1979, p. 163:
“The underdeveloped international legal order obviously needs a criminal law for those carrying out certain acts within that order. Such a need will arise if the standards of the legal community are of such cogency that other and lesser sanctions, such as reparations, are not considered sufficient.”


“[T]he international status [of war crimes and crimes against humanity] derives from their definition on a supra-national level, either on the basis of natural law (invocation of basic principles above and beyond positive law within international law is also a guarantee against arbitrary international agreements), or by reference to the protection of the "foundations of the international community," or by citing the threat posed by these activities for all of humanity: its commissioners are "enemies of the human race". Thus, the significance of these offenses is too great to permit their punishment to be made dependent upon the acquiescence or general penal law policy of individual nation states.”

1069 See above, Chapter IV, para. 5.3.a.

The ad hoc tribunals have frequently referred to the gravity of war crimes in internal armed conflicts to supplement the questionable legal foundation of their conclusion that these acts incurred individual criminal responsibility under customary law. None of these references suggests that the gravity of these crimes obviates the need to establish their criminality under customary law altogether. However, they can reasonably be interpreted as a justification for the application of an “enlightened” ascertainment of customary law to the core crimes. While this proposition raises serious methodological concerns, it has amassed considerable support. The fact that a great number of States embraced the concept of war crimes in internal armed conflicts in the ICC Statute, which was to contain only crimes with customary status, provides significant support for the reasoning in Tadic and similar cases.

Second, the character of the core crimes implies a restriction of the element of reciprocity in this body of law. Violation by one State cannot excuse another non-compliance. Third, the character of the core crimes is regularly invoked as an argument to decide other questions of law in their prosecution. Numerous national courts have posited that it is the grave nature of the core crimes which makes them subject to universal jurisdiction, in departure from the principle that criminal law jurisdiction is as a general rule territorial. Such assertions find support in doctrine.

1071 See e.g. ICTY, Appeals Chamber, Delalic et al, 20 February 2001 para. 173 (“It is universally acknowledged that the acts enumerated in common Article 3 [Geneva Conventions] are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15 (2) of the ICCPR, “criminal according to the general principles of law recognised by civilised nations.”); ICTR, Trial Chamber, Akayesu, 2 September 1998 para. 616 (“It is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.”); ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 para. 129 (“Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”).

1072 See for a critical analysis Heinegg 2003.


1074 See ICTY, Trial Chamber, Kupreskic, 14 January 2000, para. 511 (“The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character.”).

1075 But see above, note 164.

1076 See e.g. Belgium, Tribunal of First Instance (District of Brussels), In re Pinochet Ugarte, 6 November 1998, para. 3.3.3:

“It has got to be one thing or the other: either crimes of humanity are just incriminations among many other ones that do not transcend borders and their suppression is left to the discretion of each state, or these crimes are of an unspeakable and unacceptable nature and the responsibility for their repression is shared by all.”;

Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991 (); para. 34 (Toohey, J.: “Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail . . . ”); U.S., District Court (D.C.), United States v Yunis, 12 February 1988, 681 F.Supp. 896 at 900 (“The Universal principle recognizes that certain offenses are so heinous and so widely condemned that [any State that captures the offender may prosecute]”; U.S., Court of Appeals (6th Cir.), Demjanjuk v. Petrovsky, 1985, 776 F.2d 571 at 582 (“This universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people.”); Israel, Supreme Court, Attorney General of Israel v. Eichmann, 29 May 1962, 36 ILR 277 at 299:
courts and bodies have appealed to the particularities of core crimes law to justify modifications of defenses and due process rights. Most important in the context of this study, various national courts have invoked the nature of the core crimes to exempt their prosecution from particular rules and limitations in the national legal order. These cases will be discussed below, in paragraph 4.

3.2 The *Jus Cogens* Status of the Core Crimes

A further factor to be taken into account when analyzing the implementation, in particular the direct application, of core crimes law is its *jus cogens* status. Although I have concluded in Chapter 4 that international law does not at present impose a stricter implementation regime for all *jus cogens* norms, the peremptory status of core crimes law can still be a relevant factor for its implementation.

Immediately, however, it must be noted that the unclarity surrounding *jus cogens* in general certainly extends to the core crimes. In this regard, it is pertinent to reiterate here the conclusion that the Furundzija dictum of the ICTY does not actually in an unequivocal manner ascribe unique effects to the peremptory character of the prohibition of torture. More generally, it is often reiterated that genocide, crimes against humanity and war crimes are "*jus cogens* crimes," but less common to find an analysis of the precise scope and consequences of this status. Yet, such an analysis is indispensable, because a statement that genocide or torture is a *jus cogens* crime is too general to be

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"Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."

1077 See e.g. El Zeidy 2003, p. 838-839.
1078 See e.g. ICTY, Appeals Chamber, *Erdemovic*, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75 (rejecting duress as a defense for crimes against humanity and war crimes with an appeal to the grave character of those crimes) and below, Chapter VI, para. 5.3 (nature of the core crimes as an argument in the discussion on the principle of legality). See also ICTY, Appeals Chamber, *Kovacevic*, 2 July 1998, Separate Opinion of Judge Shahabuddeen; ICTY, Trial Chamber, *Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 28-30 (finding that the interpretations of due process rights by other international judicial bodies in the context of proceedings regarding ordinary crimes are relevant but not decisive for the proceedings regarding international crimes before the ICTY); EComHR, X. v. Federal Republic of Germany, 6 July 1976, Application/Requete No. 6946/75, p. 115:

"[T]he exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles (regarding Art. 6 ECHR) developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences."

See further Schabas 2002a, p. 172-174.
1079 See above, Chapter IV, para. 5.3.b.
1080 See above, p. 176.
1082 See Meron 1986, p. 22.
meaningful. International law imposes different obligations regarding the core crimes on States and individuals. These obligations can not automatically be lumped together and all branded _jus cogens_. In particular, the fact that the _jus cogens_ status of the prohibition of genocide, crimes against humanity and war crimes may bring about a duty to prosecute those crimes, does not mean that this duty to prosecute is itself also a peremptory norm.

In practice and doctrine, at least three different obligations can be distinguished. First, the obligation not to contribute to core crimes, be it by act or omission, surely has _jus cogens_ status. In other words: both the prohibition for States to actively participate in, or allow core crimes in any way and the individual criminal responsibility for core crimes under international law are peremptory norms. These norms make up the core of the international prohibition of these crimes. For individuals, it seems this _jus cogens_ status has no _direct_ consequences. They cannot themselves contract out of any of their international obligations or alter them in any way, so the peremptory character of those obligations does not actually change anything in this respect. Yet, there are _indirect_ consequences for individuals, in particular the fact that States cannot agree to repeal individual criminal responsibility for the core crimes.

Second, States are under a customary obligation to prosecute core crimes. Whether this obligation is a peremptory norm or not is an open question. On the one hand, there is considerable force in, and widespread recognition for, the argument that punishment of the core crimes is an intrinsic and necessary part of their prevention. If that is the case, the duty to prosecute must enjoy the same peremptory character as the duty to prevent. On the other hand, State practice suggests otherwise. It is generally accepted that the doctrine of immunity for (certain) State officials overrides the duty to prosecute, also in the case of _jus cogens_ crimes. Since States can derogate from the rules on immunity by treaty, these rules cannot be _jus cogens_ norms. It follows logically then, that the duty to prosecute can neither be a peremptory norm, since those norms can only be trumped by other peremptory norms. Thus, the peremptory or non-peremptory

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1083 Cf. Henzelin 2000, p. 434:

"La seule qualification de _jus cogens_ de l'interdiction des crimes d'agression, d'apartheid, de génocide ou d'esclavage ne donne pas forcément le droit et n'oblige certainement pas, en soi, un Etat qui ne pratique pas lui-même l'agression, l'apartheid, le génocide ou l'esclavage, de poursuivre et de juger, selon le principe de l'universalité, un responsable d’un autre Etat agresseur, génocidaire, esclavagiste ou pratiquant l’apartheid."

See also below, note 1280 and accompanying text.

1084 See Dupuy 2000, p. 79.

1085 See Gil Gil 1999, p. 53-54.

1086 See below, para. 3.4.

1087 Both ICL and human rights law base the need for punishment precisely on this rationale. See above, notes 1052 and 1053 and below, para. 3.4.a.


1090 See e.g. Art. 27 (2) ICC Statute.

1091 Cf. Art. 53 VCLT.
character of the duty to prosecute the core crimes is uncertain. Yet, in light of current
State practice and its numerous exceptions to the duty to prosecute - immunities,
amnesties and prosecutorial discretion - the better view seems to be that the duty does not
have *jus cogens* status.

Third, under different human rights treaties and possibly under customary international
law, States are under an obligation to provide civil remedies for core crimes victims. Yet,
there are no signs that the right to a remedy for core crimes victims has been
accepted "by the international community of States as a whole as a norm from which no
derogation is permitted." In proceedings before national and international courts,
victims have invoked the *jus cogens* status of the core crimes to attack the immunities
that generally preclude the adjudication or enforcement of civil claims against foreign
States and their officials. This line of reasoning, however, has been widely rejected in
national and international courts. Moreover, it can be doubted whether civil remedies
are, like criminal prosecutions, an integral and necessary part of the prevention of core
crimes. Like the rules on immunity for State officials, the rules on State immunity are not (trumping) *jus cogens* norms. Accordingly, the obligation to provide civil
remedies for core crimes is probably not of a peremptory character.

Thus, the *jus cogens* status of the core crimes does not automatically extend to all
international obligations regarding those crimes. While the prohibition for States and
individuals to commit core crimes is of a peremptory character, the obligation to provide
civil remedies for those crimes is not. The status of the duty to prosecute core crimes is
uncertain. This uncertainty is fed by a decided lack of rigor of national and international
courts in their analysis of the *jus cogens* status of core crimes law. Like is the case for
peremptory norms in general, national courts often invoke the *jus cogens* status of the
core crimes, but seldomly substantiate it or specify its implications. One commentator has
observed that many national judgments of genocide contain "a purely gratuitous claim
that [relevant] customary norms are also peremptory or *jus cogens* principles, [...]"
without explanation.\textsuperscript{1099} This lack of substantiation is relatively unproblematic when it concerns the basic prohibitions of genocide, crimes against humanity and war crimes, given that their peremptory character is not seriously disputed. However, both national and international courts too often fail to distinguish between the different international obligations relevant to core crimes, and also leave unclear exactly what conclusions they draw from the \textit{jus cogens} status of the core crimes. On the other hand, some attempts to address these matters in more detail result in conclusions that are difficult to comprehend.\textsuperscript{1100}

While it is important to take note of the persisting unclarities surrounding \textit{jus cogens} norms in general, there is neither place nor need here for their full analysis. Rather, I limit myself in this study to the import of \textit{jus cogens} status for the enforcement of these rules in national courts. In this context, the unclarities just noted do not render the \textit{jus cogens} status of core crimes law immaterial. The fact that this \textit{jus cogens} status is regularly invoked in national prosecutions is in itself significant. It shows that national courts consider it a relevant factor, despite the fact that it is usually not regulated or even mentioned in their national law. Moreover, numerous judgments do ascribe clear effects to the peremptory character of the core crimes. These effects include, for example, a duty to prosecute\textsuperscript{1101} and imprescriptibility.\textsuperscript{1102} Most importantly in the context of this study, 

\textsuperscript{1099} Schabas 2003b, p. 61.

\textsuperscript{1100} See e.g. ECtHR, Al-Adansi \textit{v. United Kingdom}, 21 November 2001, dissenting opinion of Judge Ferrari Bravo (asserting that as a consequence of the \textit{jus cogens} status of torture, States must allow claims for civil damages in extraterritorial cases of torture because they are under “a duty to contribute to the punishment of torture,” but are “not, obviously, [under a duty] to punish, [such cases] since it was clear that the acts of torture had not taken place in the United Kingdom but elsewhere, in a State over which the Court did not have jurisdiction.”); U.K., House of Lords, R. \textit{v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinuche Ugarte (No. 3)}, 24 March 1999, [2000] 1 A.C. 147 at 198 and 204-205, where Lord Browne-Wilkinson contradicted himself in stating that:

“...The \textit{jus cogens} nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. [...] I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as \textit{jus cogens} was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for punishment of the crime of torture could it really be talked about as a fully constituted international crime. What the Torture Convention did provide what was missing: a worldwide universal jurisdiction.”

See also above, Chapter IV, para. 5.3.b, on the ICTY’s obiter dictum in \textit{Furundzija} regarding the consequences of the peremptory character of torture.

\textsuperscript{1101} See e.g. below, note 1151. Cf. Congo (the), Supreme Court, \textit{Projet de loi portant définition et répression des crimes contre l'Humanité}, 24 March 1998, \textit{Au fond}:

“Considérant que la République du Congo est également Partie à la Convention du 9 Décembre 1948 relative à la prévention et à la répression du crime de génocide en vertu de la théorie de la succession d'état d'une part et d'autre part en vertu de ce que les normes contenues dans ladite convention du 9 Décembre 1948 sont de nos jours considérées comme l'expression du droit des gens c'est-à-dire comme des normes impératives et obligatoires pour tous et auxquelles nul état ne peut valablement se soustraire...”

\textsuperscript{1102} See e.g. Argentina, Supreme Court, \textit{Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros}, 24 August 2004, in particular para. 29 and vote of J. Boggiano, para. 30-32 and 40; above, notes 469-478 and several other cases cited in Cassese 2003a, p. 318.
various national courts have found that the peremptory character of the core crimes alters the normal balance between national and international law in their practice. These judgments will be discussed below, in paragraph 4.

3.3 The Duty to Prosecute Core Crimes

In the last few decades, international law has significantly increased its demands on States to prosecute perpetrators of core crimes. International legal practice, in particular that of the human rights bodies, and corresponding academic work on the duty to prosecute have proliferated.1103 At the same time, various commentators question the extent to which the work of the human rights bodies and doctrine reflect an actual duty to prosecute in positive international law.1104 Therefore, this paragraph will first outline the basis and (alleged) content of the duty to prosecute in international law, particularly treaties and the practice of the human rights bodies (para. 3.4.a), and then describe to what extent the duty has been accepted in State practice (para. 3.4.b). It will deal with the specific issue of amnesty laws (para. 3.4.c) before drawing conclusions on the current status of the duty to prosecute (para. 3.4.d).

It should be noted at the outset that the following analysis will distinguish the duty to prosecute in general from the admissibility of amnesty laws under international law.1105 While these two questions are closely connected, they can not be fused. International law may well oblige States to prosecute as a general rule, which may yield in extreme circumstances. Simply said: that Rwandese courts may feel entitled at some point to sanction an amnesty law to save their criminal justice system from drowning can hardly justify the conclusion that prosecutors in the Netherlands are at liberty to install or forego core crimes prosecutions as they see fit. Of course, State practice in the field of amnesty laws is relevant for the ascertainment of the duty to prosecute, especially where legislatures or courts discuss that duty in general terms. Exclusion of amnesties for core crimes is a clear indication of a duty to prosecute. Yet, permission for such amnesties may well evidence an exception to rather than a wholesale negation of the duty to prosecute. Thus, a proper conceptual approach requires a distinction between a duty to prosecute in general and the permissibility of amnesty laws. Accordingly, sub-paragraph 3.4.b will examine State practice regarding the duty to prosecute core crimes in general, while sub-paragraph 3.4.c will appraise the implications of State practice regarding amnesty laws.

1104 See below, notes 1149 and 1153.
1105 See on the specific question of amnesties e.g. Sadat 2004; Robinson 2003; Seibert-Fohr 2003; Delmas-Marty 2002b, p. 626-637; O'Shea 2002; Wyngaert and Ongena 2001; Dugard 1999; Scharf 1996b; Hammel 1993.
3.3.a Basis of the Duty to Prosecute in International Law

The duty to prosecute has three distinct bases in positive international law that differ in their territorial scope and the crimes they cover. First, human rights law requires States to prosecute all serious human rights violations, including but not limited to most core crimes, committed in their jurisdiction. This duty to prosecute finds its basis both in States’ general obligation to respect and ensure human rights like the right to life and the right to be free from torture, and in the procedural rights of victims, such as the right to an effective remedy and access to court. It has been developed primarily in the case law of the international human rights bodies.

The IACtHR was at the forefront of the development of a duty to prosecute serious human rights violations. The seminal case in this regard is Velasquez Rodriguez (1988), in which the Court held that “States must prevent, investigate and punish any violation of the rights recognized by the [Inter-American] Convention.” Since then, the IACtHR has developed this line of reasoning in various cases.

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See e.g. IACtHR, Bulacio v. Argentina, 18 September 2003, para. 38 and 110-121; IACtHR, Barrios Altos case 2001, below notes 1251-1253; IACtHR, Giraldo Cardona, Order of the Court of September 30, 1999, 30 September 1999, Ser. E, No. 2 (imposing a duty to prosecute as a necessary provisional measure in the sense of Art. 63 (2) IACHR to safeguard the wellbeing of witnesses). See also IAComHR, Mendoza et al. v. Uruguay, 2 Oct. 1992, Report No. 29/92, 82nd session, OEALV/11.82Doc.25, para. 40:

“What is denounced as incompatible with the [American] Convention are the legal consequences of the law with respect to the right to a fair trial. One of the law’s effects was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced [inter alia disappearances of persons and abduction of minors], determine criminal liability and impose punishment on those responsible, their accomplices and accessories, and their immediate superiors and associates after the fact.”
Unlike the IACtHR, the ECtHR cannot order prosecution as a remedy. But like its Inter-American counterpart, it has nonetheless developed a line of cases which reads a duty to prosecute in the Convention. In M.C. v. Bulgaria (2003), the Court held that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions." Therefore, the Court found, "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."

The ECtHR has taken this approach in numerous other cases and read a duty to prosecute in various provisions of the ECHR.

The HRC follows a similar path in its communications. The Committee has for example denounced certain amnesty laws as "an obstacle to the investigation and punishment of the persons responsible for offences committed in the past, contrary to article 2 of the Covenant." The African Commission on Human and Peoples' Rights has taken only cautious steps in the same direction.

The great majority of this case law concerns torture and homicidal acts. Since core crimes are by definition serious offenses and involve "fundamental values", it can reasonably be assumed that the duty to prosecute flowing from human rights law extends to all of them, with the possible exception of a few war crimes that do not involve bodily harm. In keeping with its normal scope, human rights law obliges States to prosecute

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1114 See ECtHR, Ireland v. UK, 13 December 1977, para. 187 ("the Court finds that the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law."). See also Harris, et al. 1995, p. 683-684.

1115 ECtHR, M.C. v. Bulgaria, 4 December 2003, para. 150.

1116 Id., para. 153.

1117 See e.g. ECtHR, Aktas v. Turkey, 24 April 2003, para. 329; ECtHR, Kiliç v. Turkey, 28 March 2000, para. 93

"[N]o effective criminal investigation can be considered to have been conducted in accordance with Article 13 [ECHR, right to an effective remedy] [...] The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother."); ECtHR, Assenov and Others v. Bulgaria, 28 October 1998, para. 102 and 114-118. See also Mowbray 2002; Chiavario 2001.

1118 See elaborately Seibert-Fohr 2002b and Seibert-Fohr 2002a.

1119 See e.g. HRC, Comments on Peru, Doc. CCPR/CO/70/PER, para. 9.

1120 See AfrComHPR, Commission Nationale des Droits de l'Homme et des Libertés v. Chad, October, 1995, Communication No. 74/92, para. 22 ("Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter."). See also Murray 2000, p. 74 and 82.

1121 See ECtHR, X and Y v. The Netherlands, 27 February 1985para. 27 ("The Court finds that the protection afforded by the civil law in the case of [a sexual offence against a minor] is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions.").

1122 The question how far the duty to prosecute human rights violations extends beyond the core crimes is not relevant here and must be left aside.
serious violations committed in their jurisdiction. Thus, with only limited exceptions, this duty to prosecute encompasses territorial, but not extraterritorial core crimes.

However, a possible widening of the duty to prosecute with broad implications lies in interpreting victims’ right of access to court in their State of residence to extend to core crimes committed elsewhere. In Al-Adsani (2001), the ECtHR found the right of access to court in the United Kingdom applicable in a case regarding torture committed in Kuwait. The ECtHR made a principled distinction between violations inside and outside the forum State to reject the applicability of the right to a remedy. However, the Court did not accept the United Kingdom’s argument that the right of access to court could not extend to matters outside the State’s jurisdiction. Thus, Al-Adsani suggests that victims of core crimes violations abroad might have a right to see their attackers prosecuted on the basis of extraterritorial jurisdiction if the legal obstacles to such prosecutions are regarded as arbitrary or serving no legitimate aim.

More recently, the ECtHR continued this line of reasoning in Mutimura v. France (2004), concerning the right of Rwandan genocide victims to see a genocidaire living in France prosecuted. In this case, the ECtHR found a violation of Art. 6 (1) and 13 ECHR for an unreasonable delay in the handling of both the civil party complaint filed by the victims and the resulting prosecution. Significantly, neither the Court nor respondent France questioned the applicability of the right of access to court and right to a remedy to extraterritorial crimes. Several cases in national courts provide further support. Note, however, that in this construction the duty to prosecute extraterritorial core crimes is not

1123 Cf. ECtHR, Kalogeropoulou v. Greece and Germany, Decision on Admissibility, 12 December 2002, available in French only, para. D2; ECtHR, Al-Adsani v. United Kingdom, 21 November 2001, para. 37-41.

1124 See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004 para. 107-113; ECtHR, Ilascu and Others v. Moldova and Russia, 7 May 2004, para. 310-335; ECtHR, Bankovic and others v Belgium and others, 12 December 2001, para. 59-73; ECtHR, Loizidou v. Turkey, Preliminary Objections, 23 March 1995, para. 62. See also Coomans and Kammenga 2004; Cassese 2004a, p. 874; Cassese 2003a, p. 11-14.

1125 See ECtHR, Al-Adsani v. United Kingdom, 21 November 2001 para. 46-49 and 52-67. It is to be noted that this case concerned a civil remedy rather than a criminal prosecution. However, the judgment suggests in para. 61 that its reading of the law applies a fortiori to the obligation to prosecute.

1126 Id., para. 40: “The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.”

1127 Id., para. 44 and 46-49.

1128 ECtHR, Mutimura v. France, 8 June 2004.

1129 See Luxembourg, Court of Appeal, Pinochet, 11 February 1999, 119 ILR 360 at 362 (“It is not disputed that the offences allegedly committed by Augusto Pinochet Ugarte, a Chilean national, were committed in Chile against persons of Chilean nationality. Those persons of Chilean nationality, resident in Luxembourg with the status of political refugees, are entitled in Luxembourg to the same treatment as nationals in relation to access to the courts.”). See also the Dutch cases Bouterse, above note 434, and Zorreguieta, above note 439, concerning victims’ access to court for extraterritorial crimes.
independent and general but attached to the presence (and legal participation) of victims of those crimes.

Commentators have long doubted whether the initially cautious language of the human rights bodies in fact required criminal punishment. Expressions like the need to “bring perpetrators to justice” or to “hold them responsible” appeared to leave room for other remedies than criminal prosecution, like civil damages, disciplinary measures and lustration. Such language also suggested that an investigation alone may suffice, for example through a truth commission, with no further need for sanctions of any kind. However, the human rights bodies have substantially expanded and clarified their outlook on these points in recent years, and it appears that both suggestions must now in principle be rejected. The duty to investigate is clearly distinct from the additional duty to prosecute. Punishment of serious human rights violations must be effective and proportionate, which requires, certainly for the core crimes, criminal sanctions.

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1130 See e.g. Scharf 1996a, p. 50-52; Roht-Arriaza 1990, p. 509-510.
1132 See IACHHR, Godínez Cruz, Compensatory Damages, 21 July 1989, para. 30 (“The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible.”); ECtHR, Hugh Jordan v. the United Kingdom, 4 May 2001, para. 130: “Notwithstanding the useful fact finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.”.

Cf. HRC, Comments on Cambodia, Doc. CCPR/C/79/Add.108, 1999, para. 6 (“The State party should take steps without delay to ensure that the alleged perpetrators of gross human rights violations and crimes against humanity are brought to trial before properly constituted independent courts ...”).

1133 See ECtHR, McShane v. the United Kingdom, 28 May 2002 para. 125: “While, civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of an award of damages, it is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State’s compliance with its procedural obligations under Article 2 of the Convention.”;

IACHHR, Barrios Altos Case, (Chimbipuma Aguiere v. Peru), Merits, 14 May 2001, (Ser. C) No. 75 (2001) and 41 ILM 93 (2002) at 118, para. 13 (Ramirez, Sergio Garcia, J., concurring and noting that “certain very serious human rights violations must be punished surely and effectively at the national and international level”); HRC, Bautista de Arellana v. Colombia, 27 October 1995, Doc. CCPR/C/55/D/563/1993, para. 8.2 and 8.6: “[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.
[...]
[T]he State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.”;
Contrary to what has been suggested, the specific requirement of criminal sanctions does not contravene the drafting history of the ICCPR. Compare Seibert-Fohr 2002a, p. 321-322 with Scharf 1996, p.49.
Second, States have in several treaty regimes accepted obligations to prosecute particular core crimes. The 1948 Genocide Convention obliges States to prosecute genocide, at least when committed on their territory. For crimes against humanity, several treaties governing specific crimes like slavery and apartheid impose affirmative obligations. The Geneva Conventions require States to either extradite or prosecute perpetrators of grave breaches. Other treaties establish additional obligations to prosecute war crimes.

The ICC Statute in its preamble “recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Thus, the Statute in a general sense recognizes an obligation for States to prosecute core crimes perpetrators. The term “recalling” indicates that this duty was already established under general international law and merely affirmed, not created, by the Statute. Yet, the

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But see HRC, *Thomas v. Jamaica*, 1993, Doc. CCPR/C/49/D/321/1988, Para. 11 (finding an obligation to investigate allegations of torture “with a view to instituting as appropriate criminal or other procedures against those found responsible”, emphasis added).


1135 Art. 1, 4 and 6. See also ICI, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, preliminary objections, 11 July 1996, para. 31 (“the obligation […] to prevent and to punish the crime of genocide is not territorially limited by the Convention”); ICI, *Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion)*, 1951 I.C.J. Reports 1951, p. 23 (noting “the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge'”).


1137 See Art. 49 GC I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV; Art. 85 and 87 AP I. Compare further Reydam 1996, p. 34 (asserting also a duty to search, arrest and prosecute persons responsible for violations of common Article 3 Geneva Conventions) with Meron 1998, p. 23:

“The fact that the Geneva Conventions created the obligation of aut dedere aut judicare only with regard to grave breaches does not mean that significant other breaches of the Geneva Conventions may not be punished by any state party to the Convention, or by international criminal tribunals, provided that they reflect significant obligations and customary law. In my view, any third state has the right, although probably not the duty, to prosecute serious violations of the Geneva Conventions, including those of common Article 3, even when it has no special nexus with either the offender or the victim.”

1138 See e.g. Art. 28 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (obliging States Parties “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”).

1139 ICC Statute, preamble, para. 6:

“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

[ […]]

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,”

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wording of the preamble leaves open to doubt the scope of this duty.\textsuperscript{1140} In addition, a duty to prosecute core crimes flows from Security Council resolutions,\textsuperscript{1141} for example from Resolution 1373 (2001) to the extent that core crimes overlap with terrorist acts.\textsuperscript{1142}

Third, the law of State responsibility may in specific cases require punishment of perpetrators of crimes that violate international law, \textit{inter alia} as part of the satisfaction to be given by the violating State.\textsuperscript{1143} This obligation can extend to all crimes everywhere, as long as they constitute international wrongful acts attributable to the State, either directly or on the basis of due diligence.\textsuperscript{1144}

These three different sources of the duty to prosecute share the same core. They establish the obligatory rather than discretionary character of the punishment of core crimes for States. Yet, there are two noteworthy differences between them. First, they have a different territorial scope. Human rights law principally requires States to prosecute core crimes committed within their territory. The treaties on specific crimes generally impose either a duty to prosecute territorial crimes, or a duty to prosecute or extradite. The law of State responsibility may require States to prosecute certain core crimes committed both within their jurisdiction and by their officials abroad.

Second, not all of these sources represent rules of customary law. The relevant rules of the law of State responsibility do. The relevant provisions of the general human rights

\textsuperscript{1140} See Arbour 2003, p. 586-587. It can be questioned whether the preamble recognizes a duty to enact any legislation necessary to prosecute core crimes, or merely to utilize the legislation already in place ("its jurisdiction"). See on this question Cassese 2003a, p. 302; Kleffner 2003, p. 92.

\textsuperscript{1141} See Swart 2002a, p. 1-2; Scharf 1996a, p. 59-60.

\textsuperscript{1142} See SC Resolution 1373 (28 September 2001), para. 1 and 2:

"1. \textit{Decides} that all States shall:
(a) Prevent and suppress the financing of terrorist acts;
(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
[...]
2. \textit{Decides also} that all States shall:
[...]
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;"


\textsuperscript{1143} See Art. 37 (2) of the ILC's 2001 Articles on State Responsibility ("Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."). See als Commentary No. 5 to Art. 37 (stating that "disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act" may be one of the appropriate modalities).

treaties as well as treaties like the Genocide Convention, the Geneva Conventions and the CAT may also be thought to reflect custom on account of the broad ratification of these treaties and subsequent consistent State practice.\textsuperscript{1145} The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, on the other hand, with only twenty States Parties can not easily be assumed to codify customary law.

The question then arises to what extent these three different sources give rise to a duty to prosecute the core crimes under customary international law. Doctrine is divided on this point. Nonetheless, some base lines can be drawn. First, there is no general obligation to extradite or prosecute for \textit{all} extraterritorial crimes.\textsuperscript{1146} Second, there is a clear consensus that States are not under an obligation to prosecute extraterritorial core crimes in the absence of \textit{any} link to the crime, such as nationality or presence of the offender.\textsuperscript{1147}

Commentators further agree that international law is moving towards a general obligation on States to prosecute all core crimes perpetrators present in their jurisdiction.\textsuperscript{1148} Yet, they mostly concur that this development is on-going and has not yet resulted in a rule of positive law.\textsuperscript{1149} Although the duty to prosecute or extradite is included in many treaties

\begin{footnotesize}
\begin{itemize}
\item[1146] See ICJ, Lockerbie Case (Libya v. United Kingdom), Provisional Measures, Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar, 9 April 1992, 1992 ICJ 24, para. 2:
\begin{quote}
"In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law there is no obligation to prosecute in default of extradition. Although since the days of Covarruvias and Grotius such a formula has been advocated by some legal scholars, it has never been part of positive law. This being so, every State is at liberty to request extradition and every State is free to refuse it. Should it refuse, a State is not obliged to prosecute."
\end{quote}

Yet, the declaration subsequently notes that numerous treaties have modified this situation for the States Parties thereto. Thus, despite the categorical language of this statement, it clearly represents the default rule rather than the state of the law for each and every crime. See also Cassese 2003a, p. 301.
\item[1147] Rather, it is a matter of some debate whether there is even a right to prosecute in the absence of any link. Compare e.g. Belgium, Tribunal of First Instance Brussels (Kamer van Inbeschuldigingstelling), \textit{In re Sharon and Yaron}, 26 June 2002, reproduced in Wouters and Panken 2003, p. 323-339 at 334 ("Qu'un droit qui consisterait a juger "in absentia" ne releve donc pas du ius cogens, car il est contraire aux [the Geneva Conventions, the Genocide Convention and the ICC Statute].") and Netherlands, Amsterdam Court of Appeals, \textit{In re Pinochet}, 4 January 1995, 28 NYIL 363 (1997) at 364 to Belgium, Tribunal of First Instance (District of Brussels), \textit{In re Pinochet Ugarte}, 6 November 1998, para. 3.3.3:
\begin{quote}
"[N]ational authorities have the right and even under certain circumstances the obligation to prosecute the authors of such crimes irrespective of where they are found. The fight against impunity of authors of crimes under international law falls [...] within the responsibility of all states of which the national authorities have the obligation or, at the very least, the right to take all measures in order to assure the prosecution and the repression of crimes against humanity."
\end{quote}
\item[1149] See Cassese 2003a, p. 301-303 (asserting that there is no customary obligation to prosecute the core crimes, but only a "general obligation of international cooperation for their prevention and punishment"); Tomuschat 2002, p. 342-343 (asserting that States have a customary duty to prosecute "grave crimes
\end{itemize}
\end{footnotesize}
on specific crimes, both current State practice and the cautious language of the ICC Statute call into question its current viability as a general customary rule for all core crimes. The work of the ICC and the corresponding practice of States may well bring more clarity to this matter in the years to come.

Some scholars also deny a general customary obligation to prosecute territorial core crimes and thus appear to recognize only the specific obligations contained in ICL treaties. They assert that the duty to prosecute formulated in the work of the human rights bodies exists only on paper, while States do not actually accept it in their legislation and judicial practice. In the absence of firm State practice, the argument goes, there can be no customary duty to prosecute, no matter how many international judgments, communications, declarations, UN resolutions, draft codes and principles assert the contrary.

However, State practice regarding the duty to prosecute has to a significant extent followed the development of international bodies and instruments. Therefore, I will analyze this practice in order to ascertain whether international law imposes a positive duty on States to prosecute all core crimes committed within their jurisdiction. The following analysis will take into account only individual declarations of States, legislation, and judgments of national courts, these being generally perceived as the “make-or-break” element of State practice regarding the duty to prosecute. Without in

against the life, physical integrity and freedom of human beings committed in their respective territories,” but not for extraterritorial crimes); Swart 2000, p. 202. Bassiouni makes a strong case for a duty to prosecute all jus cogens crimes in sweeping terms, but at the same time asserts it is of an aspirational nature and lacks firm State practice. See Bassiouni 1999a, p. 219 and 574; Bassiouni 1996, p. 63 and 66. 1150 See Bassiouni and Wise 1995, p. 73-302. See also Art. 9 Draft Code 1996 (containing an obligation to extradite or prosecute the core crimes).

1151 Only a few national judgments provide support for a general duty to prosecute or extradite core crimes perpetrators. See e.g. Australia, Federal Court, Nuyjarimma v Thompson, 1 September 1999, [1999] FCA 1192, Whitlam J, para. 57: “The emergence after the Second World War of the international crime of genocide no doubt imposes non-derogable obligations on Australia under the law of nations. The exercise of universal jurisdiction to prosecute such an offence is a matter for the Commonwealth….”);

Merkel J., para. 81 and 141: “It was also common ground between the parties, correctly in my view, that […] the prohibition of genocide is a peremptory norm of customary international law (jus cogens) giving rise to non derogable obligations erga omnes that is, enforcement obligations owed by each nation State to the international community as a whole. […] As explained earlier it is not in dispute that the acceptance under international law of a universal crime which has attained the status of jus cogens obliges a nation state to punish an offender or to extradite that offender, who is within its territory, to a state that will punish the offender.”


1153 See e.g. Scharf 1996a, p. 61. Presenting at a conference in Galway, Ireland, in 2004, Professor Scharf asserted that the duty to prosecute had still not matured in customary international law and adhered to the conclusions of his earlier writings. Cf. Ratner and Abrams 2001, p. 337.

1154 See e.g. Gitti 1999, p. 75; Dugard 1999, p. 1003; Scharf 1996a, p. 56-59.
any way doubting their significance, joint declarations and other international instruments and practice will be left aside, as they have been elaborately described elsewhere.\textsuperscript{1155}

3.3.b Acceptance of the Duty to Prosecute in State Practice

Recent years have seen a growing number of States explicitly acknowledging a duty to prosecute core crimes committed within their jurisdiction. They have done so in different ways.

First, many States have accepted the duty to prosecute territorial core crimes in declarations to this effect, particularly communications to human rights bodies.\textsuperscript{1156} This includes many States that have a poor human rights record, such as Paraguay,\textsuperscript{1157} Peru,\textsuperscript{1158} and various other Latin-American States.\textsuperscript{1159} These States do not adequately prosecute core crimes in practice, but implicitly or explicitly recognize a duty to do so while disputing the factual extent of their violations or citing practical problems as an excuse.\textsuperscript{1160} Apart from reports to human rights bodies, States have acknowledged a duty

\textsuperscript{1155} See the literature mentioned above, note 1103.
\textsuperscript{1156} See e.g. Hungary, Report to the Human Rights Committee, 13 March 2001, CCPR/C/HUN/2000/4, para. 288 (explaining that action was taken “partly in response to obligations arising from the [ICCPR], which requires states to bring to justice the perpetrators of human rights violations”). See also Gitti 1999, p. 76-80; Roht-Arriaza 1990, p. 496-498.
\textsuperscript{1157} See Paraguay, Reply to the Inter-American Commission of Human Rights, March 2002. Chapter III on Impunity:

“Los principales logros del actual sistema penal, y específicamente, en materia procesal son, 1) la eficiencia punitiva (no a la impunidad) [...] En ésta oportunidad, se reitera a la Comisión que la justicia paraguaya conforme con sus atribuciones, facultades y deberes constitucionales y legales está obligada a investigar y sancionar a los culpables de hechos punibles tipificados en el ordenamiento interno y más aun de los crímenes contra los derechos humanos. [...] Como podrá apreciar la Comisión de la información suministrada por el Estado en respecto a la obligación de investigar y sancionar las violaciones de los derechos humanos cometidas durante la dictadura 1954-1989 queda de manifiesto que “A la presente fecha la mayoría de tales violaciones han sido investigadas y castigadas” y por ende, demostrado el cumplimiento efectivo por parte de la justicia paraguaya de los mandatos de la Constitución, de las obligaciones internacionales contraídas libremente y las leyes penales vigentes.”;

HRC, Comments on Paraguay, Doc. CCPR/C/79/Add. 48, 1995 para. 9 (“The Committee appreciates the declaration made by the delegation according to which the Government will not enact any amnesty law, and that, on the contrary, concrete steps have already or are being taken to make accountable perpetrators of human rights abuses under the past dictatorial regime.”).

\textsuperscript{1158} In the Barrios Altos case, Peru submitted a communication of acquiescence to the IACHR and explicitly recognized “its international responsibility for the violation of the right to a fair trial and to judicial guarantees embodied in Articles 8 and 25 of the American Convention on Human Rights, because it had failed to conduct a thorough investigation of the facts and had not duly punished those responsible for the crimes.” See IACHR, Barrios Altos Case, (Chimbipuma Agüerre v. Peru), Merits, 14 May 2001, (Ser. C) No. 75 (2001) and 41 IL M 93 (2002), para. 35 and 39.
\textsuperscript{1159} See e.g. HRC, Concluding Observations on Guatemala, 27 August 2001, Doc. CCPR/CO/72/GTM, para. 8.
\textsuperscript{1160} See e.g. IACHR, Lincoleo v. Chile, 16 April 2001, para. 10-18; HRC, Periodic Report of Guatemala to the HRC, Doc. CCPR/C/GTM/59/2, 5 April 2000, para. 35-40 and 78-91 (“Measures against Impunity” and “Public Prosecutor's Department”); HRC, Periodic Report of Chile to the HRC, 3 December 1998, Doc. CCPR/C/95/Add.11, para. 80 (“Exceptionally, deaths which have been reported as possible instances of
to prosecute in various other statements and communications. In Ethiopia, for example, the Special Prosecutor's Office stated in a 1994 report on the ambitious and complex nature of its undertaking to prosecute thousands of suspects of international crimes committed under the Mengistu regime that the Transitional Government of Ethiopia accepted "their international legal obligations to investigate and bring to justice those involved in human rights crimes."\footnote{See Ethiopia, Office of the Special Prosecutor, Report on The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia, February 1994, Reproduced in Kritz 1995, Vol. III, p. 559-575, p. 559.}

Second, the duty to prosecute territorial core crimes is reflected in national legislation. Various kinds of national laws embody the principle that core crimes must be punished. On the highest level of legislation, this principle finds expression in the constitutions of several States, particularly those that have recently emerged from totalitarian rule. Among the States that include a duty to prosecute core crimes in their constitution are Ecuador,\footnote{See Art. 23 (2) Constitution 1998:}

\begin{quote}
"[...] El Estado adoptará las medidas necesarias para prevenir, eliminar y sancionar, en especial, la violencia contra los niños, adolescentes, las mujeres y personas de la tercera edad. Las acciones y penas por genocidio, tortura, desaparición forzada de personas, secuestro y homicidio por razones políticas o de conciencia, serán imprescriptibles. Estos delitos no serán susceptibles de indulto o amnistía. En estos casos, la obediencia a órdenes superiores no eximirá de responsabilidad."
\end{quote}

\footnote{See Article 28 (1) Constitution 1994 (Crimes Against Humanity):}

\begin{quote}
"Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ."
\end{quote}

\footnote{See Art. 29 Constitution:}

\begin{quote}
"El Estado estará obligado a investigar y sancionar legalmente los delitos contra los derechos humanos cometidos por sus autoridades. Las acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles. Las violaciones de derechos humanos y los delitos de lesa humanidad serán investigados y juzgados por los tribunales ordinarios. Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía" ("The State will be obliged to investigate and legally sanction crimes against humanity perpetrated by its authorities. The legal actions to prosecute crimes against humanity, grave human rights violations and war crimes will be without statute of limitation. Human rights violations and crimes against humanity will be investigated and judged by regular tribunals. Those crimes are excluded from any benefit that could lead to their impunity, including pardon and amnesty" - Translation by Zandra Valenzuela Delgado)\footnote{See for an elaborate interpretation of this provision Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002. Cf. Art. 10 of the 2002 Constitution of the Congo:}

\begin{quote}
"[...]
\end{quote}
laws but explicitly excluded the core crimes from their scope, which points to the mandatory character of the prosecution of these crimes. Further recognition of the duty to prosecute can be found in many national criminal laws, some specific, other general. Many States have enacted provisions in their criminal codes that establish jurisdiction over all acts for which international law (or only treaties) demands prosecution. In so doing, States recognize that there is an international duty to prosecute, but the extent of this duty remains unclear. It also deserves mention that numerous legal systems impose an obligation to prosecute all, or certain categories of crimes within their jurisdiction. This is the situation, for example, in most Latin-American States and Switzerland. Although such long-standing national practice

Tout individu, tout agent de l’État, toute autorité publique qui se rendrait coupable d’acte de torture ou de traitement cruel et inhumain, soit de sa propre initiative, soit sur instruction est puni conformément à la loi.” (emphasis added);

Art. 29 Constitution of Argentina:
“El Congreso no puede conceder al Ejecutivo nacional, ni las legislaturas provinciales a los gobernadores de provincia, facultades extraordinarias, ni la suma del poder público, ni otorgarle sumisiones o sumisiones por las que la vida, el honor o las fortunas de los argentinos queden a merced de gobiernos o persona alguna. Actos de esta naturaleza llevan consigo una nulidad insanable, y sujetarán a los que los formulen, consientan o firmen, a la responsabilidad y pena de los infames traidores a la Patria”
(“Congress may not vest on the National Executive Power - nor may the provincial legislatures vest on the provincial governors - extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland.”)

This article has been interpreted on numerous occasions by the Argentinean courts, including the Supreme Court, to prohibit amnesties for “acts involving the usurpation of public power or state terrorism.” See Brown 2002, p. 208-209. See also Coria 2003, p. 481 (on current constitutional reform in Peru which includes the proposal to rule out impunity for war crimes and crimes against humanity in the Constitution).

See e.g. Cote d’Ivoire, Art. 4 Amnesty Law No. 2003-309 of 8 August 2003 (excluding from amnesty “infractions constitutives de violations graves des droits de l’homme et du droit international humanitaire” as well as “infractions qualifiées par le code pénal ivoirien de crimes et délits contre le droit des gens”). Art. 8 of the 1996 National Reconciliation Act of Guatemala explicitly excludes from amnesty “crimes of genocide, torture and forced disappearance, as well as those violations that do not have a statute of limitations or which do not permit the extinction of criminal responsibility, in accordance with the domestic law and the international treaties ratified by Guatemala.” See Aldana-Pindell 2002, p. 1480; HRC, Concluding Observations on Guatemala, 27 August 2001, Doc. CCPR/CO/72/GTM para. 12 (2001). Croatia has enacted several amnesty laws in the last decade which all exclude core crimes from their scope. See Konjecic 1998.

See e.g. Colombia, Art. 14 Law 589 of 6 July 2000 defining genocide, forced disappearance, forced displacement and torture, and making certain other provisions (“Los delitos que tipifica la presente ley no son amnistiables ni indultables.”). Cf. preamble to the Rwandese Organic Law No. 40/2000 of January 26, 2001 setting up “Gacaca Jurisdictions” and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994 (“Given the necessity to achieve reconciliation and justice in Rwanda, to eradicate forever the culture of impunity and enact laws allowing for the prosecution and sentencing of perpetrators”).

See above, Chapter II, para. 3.2.b.

See e.g. Art. 71 Argentinean Penal Code:
“Deberán iniciarse de oficio todas las acciones penales, con excepción de las siguientes:
1) las que dependieren de instancia privada;
2) las acciones privadas.”
did not originate in a belief that it was obligatory under international law, it may be taken into account in when assessing whether more recent expressions of a State’s *opinio juris* on the international duty to prosecute are matched by corresponding legislative and judicial practice.

Third, the duty to prosecute territorial core crimes has been accepted by numerous national courts. But human right treaties are increasingly recognized as an additional or alternative basis. The Venezuelan Supreme Court held in 2002, under referral to the case law of the IACtHR, that amnesty provisions are inadmissible to grave violations of human rights because they contravene non-derogable rights recognized by international human rights law. “This is to say,” the Tribunal Supremo de Justicia explained, “that there is a material impossibility to apply [such norms], with the intention to impede or hinder the clarification of such facts, identify and prosecute those responsible for it, and prevent relatives and victims from knowing the truth and receive reparations.” Numerous other national courts, including ones in Argentina, Bolivia, Chile Colombia and Mexico, have similarly recognized the duty to

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See also Art. 5 Argentinean Code of Criminal Procedure. See further the different country reports in Ambos and Malarinio 2003.

1170 See Art. 103 and 114 Swiss Code of Military Criminal Procedure (requiring the investigation and prosecution of all criminal acts under the Military Criminal Code). See also Ziegler 1997, p. 575-576.

1171 See e.g. Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, Abilio Soares, 14 August 2002, p. 65 of 82 (“Punishment of the perpetrators of [serious human rights violations covering genocide and crimes against humanity] is recognized as an obligation to the entire international community (erga omnes obligation).”) and below, note 1269 (Hungary) and 1254 (Peru). See also Cassese 2003a, p. 314 (on Spanish cases).

1172 See e.g. Ukraine, Constitutional Court, *Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case)*, 11 July 2001, para. 2.2 (finding that the duty to prosecute the core crimes had been established by numerous treaties before the entry into force of the ICC Statute, including but not limited to the Geneva Conventions, the Apartheid Convention and the CAT).

1173 Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002, para. III:

“Recientemente la Corte Interamericana de Derechos Humanos sostuvo que son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos indesgubables reconocidos por el Derecho Internacional de los Derechos Humanos (Caso Barrios Altos, sentencia de 14 de marzo de 2001). Es decir, existe imposibilidad material en la aplicación de aquellas normas dictadas con posterioridad a la ocurrencia de hechos de esta naturaleza, con la intención de vedar u obstaculizar su esclarecimiento, identificar y juzgar a sus responsables e impedir a las víctimas y familiares conocer la verdad y recibir la reparación, si a ello hubiere lugar.”

1174 Id., translation by Zandra Valenzuela-Delgado.

1175 See Argentina, Supreme Court, *Arancibia Clavel, Enrique Lautaro y homicidio calificad y asociación ilícita y otros*, 24 August 2004, in particular para. 13, and other cases below, para. 4.


1177 See also Santalla Vargas 2003, p. 105-106.

1178 See Chile, Court of Appeals (Santiago), *In re Fernando Laureani Maturana y Miguel Krassnoff Marchenko*, 5 January 2004, in particular para. 49 and 84 (referring *inter alia* to case law of the IACtHR).

prosecute under international human rights law, and relied on it to set aside obstacles in national law that would otherwise block prosecution. In its first judgment in the Bouterse case (2000), the Amsterdam Court of Appeals found that prosecution of human rights violations is an obligation for the territorial State under the ICCPR, in this case Surinam, while prosecution in the Netherlands would, in the absence of the suspect, be merely "opportune." In Haiti, the 1999 indictment of the Raboteau trial referred to the ACHR and the ICCPR before mentioning national law, and subsequently concluded that the perpetrators must be prosecuted.

What then is the contrary practice that casts doubt on the customary status of a duty to prosecute? Of course, the sad fact remains that most core crimes still go unpunished. But naked violations, even on a broad scale, do not by themselves alter international rules. On the contrary, violations often reinforce the rule, because the State involved tries to justify an exception to the rule rather than its very existence. As noted above, States defend their lack of core crimes prosecutions generally with denials of the crimes or practical excuses rather than legal arguments. Thus, most violations of the duty to prosecute core crimes reinforce the legal norm rather than contradict it. Explicit denials in national case law of the very existence of a duty to prosecute core crimes are scarce.

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1177 See Colombia, Corte Constitucional, Sala Plena, Sentencia C-578 (in re Corte Penal Internacional), 30 July 2002, 31 Jurisprudencia y Doctrina 2231, in particular at 2265, 2268-2269 and 2275-2277.
1178 See Mexico, Supreme Court, In re Cavallo (Amparo en Revision 140/2002), 10 June 2002 at 909.
1179 Netherlands, Amsterdam Court of Appeals, In re Bouterse, 3 March 2000, NJ 2000/266, para. 4.2: "Het hof stelt voorop dat het instellen van een strafrechtelijk onderzoek ter zake van de op het eigen grondgebied mogelijk gepleegde strafbare feiten, die schendingen van mensenrechten opleverden, in beginsel een verplichting is die voor de Republiek Suriname voortvloeit uit het Internationaal Verdrag inzake burgerrechten en politieke rechten, waarbij het sinds 1977 partij is. [...] Vervolging in Nederland zou [...] opportuun zijn."
1180 See Haiti, Juge d'Instruction Jean Senat Fleur y of the Gonaïves Tribunal of First Instance, Ordonnance Raboteau Massacre, 27 August 1999, On file with the author, Conclusion, p. 159-160.
1181 "Vu: les traités et conventions internationaux ratifiés par Haïti, notamment la Déclaration Universelle des droits de l'homme adopté le 10 décembre 1948; la Convention Américaine relative aux droits de l'homme adopté le 22 novembre 1969 et entrée en vigueur le 18 juillet 1978; le Pacte International relatif aux droits civils et politiques adopté le 16 décembre 1966 et ratifié par Haïti en 1991 et, éventuellement l'article 3 commun aux quatre conventions de Genève de 1949 ratifiées par la République d'Haïti,
[...] Considérant que les actes arbitraires, attentatoires à la vie et à l'intégrité physique de la personne humaine perpétrés les 18 et 22 avril 1994 contre la population civile de Raboteau (Gonaïves) constituent des crimes graves et les auteurs doivent être poursuivis." (emphasis in original)
1182 See above, Chapter III, para. 2; Pasquahucci 2003, p. 339-340 (concluding that States in the Inter-American system have often failed to live up to their duty to prosecute); Jayawickrama 2002, p. 489-491. See for a detailed account of impunity in Guatemala Aldana-Pindell 2002, p. 1480-1498.
1183 See ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, para. 186: "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."
1184 See above, notes 1156 to 1160.
1185 See below, note 1188.
It should also be noted that the question whether general human rights law imposes a duty to prosecute territorial core crimes is primarily one of interpretation of existing customary rights and obligations, rather than an assessment of a brand new customary rule. Due to the widespread ratification and implementation of human rights instruments, primarily the ICCPR, ACHR and ECHR, there is little doubt that States are under a customary obligation to respect and ensure human rights like the right to life, freedom of torture and access to court. If States and human right bodies alike interpret those rights as encompassing a duty for the State to prosecute territorial core crimes, which they generally do, violations of that duty cannot easily change that conclusion. In other words, the customary status of the broader international norms that give rise to the duty to prosecute – such as the right of access to court and the right to life - is not dependent on the practice of actual prosecutions, but already well-established. It seems numerous commentators fail to take this point into account in their assessment of State practice.

3.3.c Amnesty Laws

So scarce as national judgments that deny a duty to prosecute the core crimes in general, so plentiful are national laws that grant broad amnesties after situations of conflict or war. Many of these amnesty laws extend the impunity they grant to core crimes perpetrators. Consequently, commentators often see these laws as decisive contrary State practice that precludes the finding of a general duty to prosecute the core crimes. However, this assertion is, certainly today, questionable for several reasons.

First, as set out above, in light of the specific and exigent circumstances that generate them, amnesties should be seen as possible exceptions to a duty to prosecute, rather than as wholesale denials of that duty. Indeed, the South African Constitutional Court in the famous Azapo case (1996) did not take position against a duty to prosecute serious human rights violations in general, but instead accepted the South African amnesty law in light of the exceptional character of both the situation of transition and the conditions for amnesty.

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1185 See Cassese 2003a, p. 312.
1188 See South-Africa, South African Constitutional Court, Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, 25 July 1996, para. 28-36, in particular 31: “It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself.”
Note also that the Constitutional Court did not deny an international duty to prosecute serious human rights violations committed outside armed conflicts in general, but only that such a duty would flow from the
Thus, while their non-application or prohibition certainly reinforces a duty to prosecute, phenomena like amnesty laws, and also prosecutorial discretion for that matter, do not collide head-on with such a duty. More likely, they are indicative of an exception to that duty. As one commentator notes, amnesties may well be reconciled with a general duty to prosecute, provided the circumstances require such a step and the conditions of the amnesty reflect a proper balance between the different interests involved.1189 This fact is aptly demonstrated by the ICC Statute, which in a general sense recognizes the necessity to prosecute but at the same time allows for prosecutorial discretion, and is silent on the legality and effects of amnesties because the negotiating States could not reach agreement on that point.1190

Second, it seems that many commentators overestimate the actual weight of existing amnesty laws in their assessment of State practice. Simply listing all amnesties in different States obscures the fact that they are very different in their scope and application. Various amnesty laws explicitly exclude the core crimes from their scope,1191 while others are ambiguous in this respect but have not prevented core crimes prosecutions in practice.1192 Some amnesty laws that are regularly cited as contrary

Geneva Conventions. Apparently, the applicants in the case did not invoke human rights law as a basis for the duty to prosecute. See para. 25, 30 and 32.

1189 See Harris, et al. 1995, p. 39-40:
“The duty to enforce the law to protect life also requires the proper investigation of all suspicious deaths [...] and the prosecution of both public and private offenders, subject to the normal rules as to prosecutorial discretion. [...] An amnesty for persons convicted or suspected of homicide is not inconsistent with Article 2 [ECHR] provided that it reflects a proper balance between the interests of the state in the particular circumstances in which the amnesty is declared and the general need to enforce the law to protect the right to life.”

See also Holdgaard Bukh 1994, p. 348.

1190 See preamble, para. 6 and Art. 53 (1) sub c ICC Statute. See also Robinson 2003, p. 483; Seibert-Fohr 2003.

1191 See above, note 1165.

1192 Haiti’s 1994 amnesty law, for example, applied only to “political matters” and not to the serious crimes that followed. Apparently, it has never been invoked by a defendant in a coup-era human rights trial while several perpetrators of international crimes have been prosecuted and punished. See Concannon 2000, note 54. Cf. Scharf 1996b, p. 15-18. Note also that the French Court of Cassation has on several occasions upheld amnesty laws for French crimes committed in Algeria and Indochina on the basis that these crimes did not amount to crimes against humanity. See Lelieur-Fischer 2004, p. 241-242. In particular the Court’s holding in Aussaresses (17 June 2003) that “since the alleged acts cannot be prosecuted as crimes against humanity, they are subject to the provisions of the amnesty law,” suggests that crimes against humanity cannot be annulled but must be prosecuted. See Lelieur-Fischer 2004, p. 242. Compare to France, Cour de Cassation, Ely Ould Dha, 23 October 2002, Bull. crim., no. 195 (refusing to apply a Mauritanian amnesty law in the prosecution of alleged acts of torture, holding inter alia that French prosecutions on the basis of universal jurisdiction are governed by French, not foreign law, and that application of foreign amnesty laws would cancel the purpose of universal jurisdiction); France, Conseil Constitutionnel, Traité portant statut de la Cour pénale internationale, 22 January 1999, para. 34 (holding that France’s obligation to arrest and hand over to the ICC anyone responsible for acts which, under French law, are covered by an amnesty or a time-limit infringed the essential conditions for the exercise of national sovereignty as articulated in the Constitution, thus implying that the core crimes could be the subject of amnesties and statutes of limitations). Note, however, that a subsequent revision of the Constitution changed this situation to ensure its compatibility with the ICC Statute and thus ruled out the possibility of an amnesty for the core crimes. See Cassese 2003a, p. 315.
practice are contested more than ever in the States that have adopted them.\textsuperscript{1193} For example, the amnesty laws in Argentina have both been set aside by several (lower) courts and revoked by the legislature.\textsuperscript{1194} In many States which have adopted amnesty laws, the complicated political situation delays the dialectical process between amnesties and prosecutions. We might therefore have to wait some time before we can pass final judgment on the authoritative value of many amnesty laws for core crimes.

The international legality of amnesty laws covering core crimes is highly complicated, not least because of the great diversity of amnesty regimes. There is considerable uncertainty of the law on this point, as can be seen in the lack of consensus on the implications of amnesty laws in the negotiation of the ICC Statute. International law is in rapid development in this area and corresponding academic work is rich and proliferating.\textsuperscript{1195} No attempt will be made here to address the more intricate issues of amnesty laws for core crimes. Clearly, current international law contains a strong presumption against amnesties for core crimes, but probably no more than that.\textsuperscript{1196} In practice, a rigid ban of all amnesties seems simply unrealistic, given the practical exigencies in a State such as Rwanda. In any case, amnesty laws do not generally constitute contrary practice to the very existence of a duty to prosecute the core crimes.

### 3.3.d Conclusion: Current Status of the Duty to Prosecute

A customary duty to prosecute core crimes finds its basis in human rights law, treaties concerning specific crimes, the law of State responsibility and corresponding State practice. While international law appears to be moving towards a more comprehensive duty to prosecute serious crimes, at present a general duty to prosecute or extradite all core crimes perpetrators is not firmly established. Of course, such a duty does exist for specific core crimes such as grave breaches of the Geneva Conventions and torture as a crime against humanity, taking into account the relevant treaties and their status as evidence of customary law.

Yet, customary international law today does impose a duty on States to prosecute all core crimes committed within their jurisdiction.\textsuperscript{1197} The preceding analysis reveals that State practice has developed significantly in the last decades, and especially in recent years.\textsuperscript{1198} While actual prosecutions are still limited, many States have recognized their duty to prosecute in a broad sense in the preamble of the ICC Statute and more specifically in national legislation, communications to human rights bodies and judicial practice. It can

\textsuperscript{1193} See e.g. Artucio 2001 (on proceedings contesting amnesty laws in Chile).
\textsuperscript{1194} See above, Chapter II, para. 3.3.m.
\textsuperscript{1195} See above, note 1105.
\textsuperscript{1196} See Special Court for Sierra Leone, Appeals Chamber, \textit{Prosecutor against Kallon and Kamara, Decision on Challenge to Jurisdiction (Lomé Accord Amnesty)}, 13 March 2004, para. 66-71.
\textsuperscript{1197} See Ambos 1999, p. 353-354.
\textsuperscript{1198} Compare e.g. the imperative language of recent national laws and judgments with the preamble to Bangladesh’s International Crimes (Tribunals) Act 1973 (Act No. XIX of 19 July 1973) ("Whereas it is expedient to provide for the detention, prosecution and punishment of the persons for genocide, crimes against humanity, war crimes and other crimes under international law...") – emphasis added).
no longer be said that the duty to prosecute is limited to “paper practice.” A proper assessment of the duty to prosecute under human rights law as a matter of interpretation of existing customary norms rather than the ascertainment of brand new ones, reveals a duty to prosecute all territorial core crimes. Amnesty laws constitute evidence of a possible exception rather than a negation of the duty to prosecute in general.

As paragraph 5 of this Chapter will show, the duty to prosecute the core crimes can have substantial implications for the direct application of their international criminalizations in national courts. The breadth and diversity of the international law involved makes the duty to prosecute hard to ignore. In fact, such disregard is realistic only in national legal systems which exclude international law from the national judicial process altogether. This, however, would be contrary to the principle of consistent interpretation, as I will set out in some detail in Chapter 7.

4 The International Character of Core Crimes Prosecutions

Given the characteristics of the core crimes just explored, it may be asked whether or not international law allows States to prosecute core crimes as if they are ordinary crimes. On the one hand, core crimes prosecutions must take place in conformity with international law. Notably, Art. 75 (7) AP I dictates that “in order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes and crimes against humanity [...] persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law.” It appears that this provision does not lay down the mandatory application of international law, but it does require that the law applied “must be strictly in conformity with the respective rules of international law.” Generally, ordinary criminal law does not reflect all relevant international rules on core crimes prosecutions and will thus not fulfill this requirement.

Accordingly, practice provides some indication that core crimes prosecutions may not take place on the basis of ordinary criminal law. In 2001, the Colombian Constitutional Court unambiguously rejected the ordinary crimes approach, as did the

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1201 See above, note 221.
1202 See Colombia, Corte Constitucional, Sala Plena, Genocidio, Sentencia C-177, 14 February 2001, 30 Jurisprudencia y Doctrina 707 at 713-714:

"Ciertamente, esta Corte considera inadmisible la tesis según la cual las conductas de aniquilacion de los grupos que actúan al margen de la ley, podían recriminalizarse acudiendo a otros tipos penales, verbigracia el homicidio, pues ella desconoce la especificidad del genocidio y la importancia de incriminar las conductas constitutivas de crímenes de lesa humanidad [...] En efecto, esta tesis degrada la importancia del bien jurídico que se busca proteger al penalizar el genocidio, que no es tan sólo la vida e integridad sino el derecho a la existencia misma de los grupos humanos..."
Belgian government in amending its legislation on core crimes in 1998.\textsuperscript{1203} The \textit{ad hoc} tribunals do not take into account national prosecutions on the basis of ordinary crimes in their application of the \textit{ne bis in idem} principle, signifying that they do not regard such prosecutions as satisfactory responses to core crimes.\textsuperscript{1204} Taking a similar stand, the ILC has in its Draft Codes and Statute for an International Criminal Court long favored a similar \textit{ne bis in idem} rule as those of the \textit{ad hoc} tribunals.\textsuperscript{1205}

The case against ordinary crimes charging is particularly strong for prosecutions on the basis of universal jurisdiction. After all, it is generally assumed that international law grants States universal jurisdiction to prosecute the core crimes, but not ordinary ones like murder and assault.\textsuperscript{1206} Regarding core crimes prosecutions involving foreigners more generally, one may note the assertion of the Dutch Special Court of Cassation in \textit{Ahlbrecht I} (1947) that “[i]t would be unreasonable to apply to members of the military and civil services of the enemy the provisions of Dutch criminal law which had never been intended to govern their conduct, instead of applying to them the international rules of war which were intended to govern it.”\textsuperscript{1207} This point may have broader significance

\textsuperscript{1203} See Belgium, Law for the punishment of Genocide, Report of the Justice Commission, Belgian Senate, 1 December 1998, No. 1-749/3, para. II (A) and (B) sub 2: “[L]e grand intérêt qu'elle [the inclusion of a criminalization of genocide in national criminal law] présente tient à sa valeur symbolique, en ce sens que les auteurs d'un génocide pourront être punis sur la base de cette incrimination spécifique, sans que le juge pénal doive se baser, pour les condamner, sur d'autres qualifications pénales telles que l'homicide intentionnel ou le meurtre. L'effet d'une condamnation pour génocide et son caractère préventif s'en trouveront renforcés.

[...]

L'introduction d'une incrimination explicite relative aux crimes de génocide et aux crimes contre l'humanité ne constitue donc qu'une confirmation du droit existant, en en assurant une meilleure visibilité, attirant l'attention sur la spécificité de ces faits et la nécessité, d'une part, de les poursuivre et, d'autre part, de les poursuivre en tant que tels.”

\textsuperscript{1204} See Statute ICTY Art. 10 (2) and Statute ICTR Art. 9 (2). See also ICTY, Appeals Chamber, \textit{Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction}, 2 October 1995, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83: “[The ICTY’s jurisdictional primacy over national courts] recognises the right of all nations to ensure the prevention of such violations by establishing international criminal tribunals appropriately empowered to deal with these matters, or else international crimes would be dealt with as ordinary crimes and the guilty would not be adequately punished.”

\textsuperscript{1205} See Art. 42 (2) ILC Draft Statute for an International Criminal Court 1994; Art. 9 (3) ILC Draft Code 1991; Art. 12 (2) ILC Draft Code 1996; Commentary no. 10 to Art. 12 Draft Code 1996 (stating that if an “individual was tried by a national court for an “ordinary” crime rather than one of the more serious crimes under the Code [...] the individual has not been tried or punished for the same crime but for a “lesser crime” that does not encompass the full extent of his criminal conduct.”). See also Zappala 2002, p. 196; Wouters and Panken 2003, p. 7.

\textsuperscript{1206} Cf. Reydams 2003, p. 21 (pointing out that prosecution on the basis of universal jurisdiction \textit{prima facie} infringes on the non-intervention principle and therefore requires a permissive rule of international law, which international law grants for certain crimes only). See also below, note 1147.

\textsuperscript{1207} See Netherlands, Bijzondere Raad van Cassatie (Special Court of Cassation), \textit{Ahlbrecht I}, 17 February 1947, Annual Digest 1947, p. 198 (NJ 1947/87, p. 188: “[D]at het ook onredelijk zou zijn, vreemde militairen en ambtenaren te berechten naar Nederlandsche normen die niet voor hen geschreven zijn, in plaats van hen te berechten naar de wèl voor hen geschreven normen die de oorlogsoorlog beheersen...”). Cf. Australia, High Court, \textit{Polyukhovich v. The Commonwealth of Australia and Another}, 14 August 1991, per Brennan J., para. 3 (“[I]t is artificial to apply a municipal system of law designed for the preservation of the King’s peace to acts done by or on behalf of belligerents in war.”).
than just for the laws of war. One could think that it is “unreasonable” more generally to judge defendants of extraterritorial core crimes on the basis of national norms that were not known to them and not written for international crimes, instead of applying the international norms that govern these offences.

But there is considerable practice to the contrary. In practice, full descriptive power of the charges must often be sacrificed to the demands of time, evidence and competing priorities, and prosecutions that charge genocide, crimes against humanity and war crimes as ordinary crimes like murder and assault are not at all uncommon. In 2001, an Argentinean court ruled explicitly that core crimes may be charged as ordinary crimes. Several States have explicitly stated that they regarded their ordinary criminal law as a sufficient basis for the prosecution of war crimes, and many others appear to follow this approach. Unlike the Statutes of the ICTY and the ICTR, the ICC Statute blocks a second prosecution if the accused has effectively been prosecuted by another court “for conduct also proscribed under” the Statute, thus leaving the characterization of the crime open to national courts. Numerous States have expressed their opposition to the more stringent ne bis in idem proposals of the ILC and their wish to preserve the freedom to prosecute on the basis of ordinary crimes. Hence, it appears that the ne bis in idem principle in general international law prohibits repeated prosecution and punishment regardless of the law applied for the first prosecution.

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1208 See Special Court for Sierra Leone, Trial Chamber, Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinini Fofana and Allieu Kondewa, 2 August 2004, para. 29.
1209 See Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527, at 590, para. IV B ("En efecto, en la mayoría de los procesos seguidos ante cortes de diversos países que juzgaron crímenes de esta naturaleza [crimes against humanity] se han aplicado tipos penales creados por la ley de ese país."). See also above, Chapter II, para. 2.1.
1210 Id.: “Esta subsunciión en tipos penales locales de ningún modo contradice ni elimina el carácter de crímenes contra la humanidad de las conductas en análisis (cuestión que establece el derecho de gentes a través de normas ius cogens) ni impide aplicarles las reglas y las consecuencias jurídicas que les cabe por tratarse de crímenes contra el derecho de gentes.” “[Prosecution on the basis] of local criminal offenses, would not in any way contradict, nor eliminate the nature of the crimes against humanity of the conduct analyzed in this case (this as established in international law, throughout the peremptory norms of ius cogens) nor impede the application of the rules, and the correlating legal consequences related with its nature, being crimes against international law.” - unofficial translation by Zandra Valenzuela-Delgado.
1214 See Bassiouni and Manikas 1996, p. 335 ("It can be said ... that a general principle of law exists that prohibits repeated punishment and repeated prosecution for the same facts irrespective of the specific criminal charges."). Note however that the ne bis in idem principle in general international law does not prohibit repeated prosecution in different States. See Kleffner and Nollkaemper 2004, p. 374.
For core crimes prosecutions on the basis of universal jurisdiction, practice is not much different. Numerous such prosecutions have charged core crimes as ordinary crimes.1215 In some instances, national courts have disallowed such charges, but done so solely on the basis of obstacles in national law.1216 Most national courts do not regard the prosecution of core crimes as ordinary crimes to be prohibited per se by international law, whether on the basis of universal jurisdiction or not. Neither have States publicly protested against this form of charging. Thus, while there are sound reasons to believe that ordinary crimes do not meet all requirements of international law when it comes to core crimes prosecutions, practice does not on the whole reflect the premise that international law prohibits the prosecution of core crimes as ordinary crimes.

Still, even if international law allows it, to prosecute a core crime as an ordinary crime is quite unsatisfactory. It ignores important aspects of the prosecuted act, like its broader context and the particular intent of the perpetrator. To prosecute a genocidal killing as murder is at least as wide of the mark as prosecuting a carefully planned murder as manslaughter.1217 The criminalizations of ordinary crimes do simply not express the criminality of the conduct to be prosecuted in an adequate manner.1218 Rather, it is often said that the prosecution of core crimes as ordinary crimes banalizes them to a certain degree.1219 This can be unsatisfying, particularly for the victims, as one of the goals of these prosecutions is to expose the crimes for what they are in the context that made them possible,1220 not simply to impose punishment on the defendants.1221 It may also undercut

1215 See inter alia the Finta and Sawoniuk cases above, Chapter II, para. 2.1; Germany, BGH, Kusljic, 21 February 2001, 3 Str 244/00, in 54 NJW (2001), 2732-2734 and Germany, BayObLG, Kusljic, 15 December 1999, 6 St 1/99 (conviction for both genocide and murder); Djacic, above, note 656. In Finta, the Canadian courts extensively analyzed the manner in which ordinary crimes would form the basis for a prosecution on the basis of universal jurisdiction, yet never even considered the possibility that international law would disallow this practice. See also Baxter 1973, p. 67-69.

1216 In the Swiss prosecution of Niyonzima, a Rwandan bourgmestre was convicted for both the ordinary crimes of murder and instigation of murder, and war crimes. See Switzerland, Tribunal militaire, Division 2, Lausanne, In re N., 30 April 1999. The military court of appeal, however, found that as a matter of Swiss law military courts have no jurisdiction over ordinary crimes committed by civilians, and upheld only the conviction for war crimes. See Switzerland, Military Court of Appeal, In re N., 26 May 2000, Chapitre 1 (c). See also Reydam 2002, p. 234.

1217 See for a non-legal but apt explanation Gourevitch 1998, p. 201 ("What distinguishes genocide from murder, and even from acts of political murder that claim as many victims, is the intent. The crime is wanting to make a people extinct. The idea is the crime.").

1218 See Abi-Saab 2003, p. 598; Dickinson 2003, p. 305; Stahn 2000, p. 201. Cf. Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, Cory J., para. 72 ("[A] war crime or a crime against humanity is not the same as a domestic offence. [...] There are fundamentally important additional elements involved in a war crime or a crime against humanity.").

1219 See Klabbers 2003, p. 59 ("To reduce genocide or crimes against humanity to multiple murder or multiple assault and battery cases is to somehow misconstrue them and turn them into banalities."); Sadat Wexler 1994, p. 326-327 ("To state that a crime against humanity is just like any other crime, but with something extra added, banalizes it."); Cf. Fletcher 1998, p. 11; Koering-Joulin 1997, p. 150.

1220 Note that the goal of exposition meant here is limited to the broader context insofar as relevant for the crimes under consideration. It does not extend to the fundamentally problematic and oft-criticized proposition that criminal trials should aim to establish a complete historical record of an entire conflict or era. See on the latter point Special Court for Sierra Leone, Trial Chamber, Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinini Fofana and Allieu Kondewa, 2
the deterrent value of core crimes prosecutions. As these crimes are generally instigated or condoned by the State or committed in the absence of effective State authority, the deterrent effect of prosecutions hinges in part on their ability to convey the message that it is the international community, not just national authorities, that will not tolerate these crimes.  

This, in turn, requires an adequate reflection of their international character.

Of course, the deterrent effects of international criminal law are unclear and disputed. In part, the scepticism of the academic community in this regard appears tied to an overly simplistic notion of deterrence as being dependent on an explicit cost-benefit analysis of prospective offenders on their way to the scene of the crime. A more refined conception which focuses on the effect of international criminal justice on the structures and patterns that facilitate core crimes may lead to a more optimistic assessment. But regardless of the doubts and misgivings of many scholars - courts and other actors in international criminal law firmly adhere to the idea of prosecutions as a deterring mechanism. In this regard, there is a significant gap between practice and (at least a part of) academia.

In summary, international law does probably not prevent States from trying the core crimes as ordinary crimes. Yet, there are both principled and practical reasons to reject ordinary criminalizations like murder as a basis for core crimes prosecutions for their failure to capture the international character of the crimes. Of course, practical constraints often count heavily, and any prosecution is better than none whatsoever. Also, it should be noted that the international character of a prosecution does not depend entirely on the particular charges, but can be expressed through other means, like references to the case law of international tribunals. Still, the charges laid are an important factor in this regard.


1221 Cf. Chinkin 2003, p. 138 ("The cases before the ad hoc Tribunals [...] confirm that rape and sexual abuse of the civilian population are public crimes of violence inherent to the aims of the warring parties. They are not the random, private or personal acts of individual fighters that can somehow be distanced from the broader picture."). See also ICTR, Trial Chamber, Akayesu, 2 September 1998 para. 731-732.

1222 Cf. ICTY, Trial Chamber, Erdemovic, Sentencing Judgment, 29 November 1996, para. 64-65: "One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. [...]The International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity."

ICTY, Trial Chamber, Blaskic, 3 March 2000, para. 761-764. See also Jørgensen 2000, p. 98 ("It cannot be denied that hierarchical terms or quality labels serve a deterrent function by sending out a warning signal that the international community will not accept violations of certain "higher" obligations.").


1224 See e.g. Zimmerman 2003, p. 203 (remarks Jan Klabbers); Tallgren 2002, p. 567 and 584; Brierly 1927, p. 84.


1226 See below, notes 1052 and 1053.
Having examined the various characteristics of the core crimes, what remains is an appraisal of their relevance for the balance between national and international law in the practice of national courts. The courts of different States have invoked various of the characteristics examined above as determining factors in national prosecutions of core crimes. They have attached tangible consequences in particular to the grave and international character of the core crimes, their *jus cogens* status and the international obligation to prosecute them. To a significant degree, this practice can be explained as an interpretation of core crimes law in light of its object and purpose.\(^{127}\) However, in several cases this "interpretation" in practice amounts to a modification or rejection of established rules of national and international law and raises the question whether the particular characteristics of the core crimes require the direct application of their international criminalizations.

It is difficult, if not impossible, to determine the weight attached in national judgments to each individual characteristic that distinguishes core crimes prosecutions from other (criminal) proceedings. National courts generally reiterate characteristics like the grave character and *jus cogens* status of core crimes without specifying which they see as determinative for their conclusions and which constitute merely additional factors. Apparently, it is often the combination of different characteristics that leads courts to carve out a special position for core crimes law. They have done so in different ways.

Some national courts have asserted that particular rules of national (criminal) law do not apply at all to core crimes prosecutions. The French Court of Cassation, for example, stated in its 1983 judgment in the Barbie case that "by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal criminal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign."\(^{128}\) Likewise, one of the judges of the Argentinian Supreme Court asserted in *Schwannberger* (1990) that "neither time, borders nor the law of any particular State" could impede the punishment of crimes against humanity.\(^{129}\) Such holdings evince what one commentator has called a "radical cosmopolitan view on international criminal justice."\(^{130}\)

\(^{127}\) See above, note 1050 and accompanying text.

\(^{128}\) France, Court of Cassation, *Barbie (No. I)*, 6 October 1983, Bull. crim., no. 239; 78 I.L.R. 125 at 128 and 130 (citing and confirming the Court of Appeal, emphasis added).

\(^{129}\) Argentina, Supreme Court, Extradition Josef Franz Leo Schwannberger, 20 March 1990, 313 Fallos de la Corte Suprema de Justicia de la Nacion 256 at 265-266, per Judge Roger ("Ni el tiempo, las fronteras o la ley de determinado país, pueden impedir esta razonable avance del Derecho punitivo ante actitudes tan repudiables y que tan hondamente degradan al hombre y socavan la convivencia civilizada.").

\(^{130}\) Reydams 2003, p. 137.
Somewhat more cautiously, the Supreme Court of Costa Rica found in 2000 that the core crimes are at least to some extent exempted from the general regime of criminal law. In judging the compatibility of the ICC Statute with the Costa Rican Constitution, the Supreme Court determined that the constitutional provisions on the non-extradition of nationals and the immunities of members of parliament did not apply to proceedings before the ICC. It held that those constitutional guarantees are not absolute but compatible with the development of human rights law and that the Constitution does not oppose new developments in this regard but rather promotes them. The Court referred, inter alia, to the nature of the core crimes in denying the applicability of these constitutional provisions to proceedings involving the ICC. Comparable progressive interpretations of constitutional provisions in light of the nature of the core crimes have been endorsed by the courts and governments of several other States Parties to the ICC Statute. This line of reasoning has also been employed to set aside constitutional obstacles to direct application such as the principle of legality, for example in Hungary.

Other national courts have found that the particular characteristics of core crimes law elevate it to a superior rank, sometimes in deviation from the normal status of international norms in the national legal order. Thus, even if the ordinary rules of national (criminal) law do generally apply, they can not obstruct core crimes prosecutions.

In Argentina, various judgments of federal courts have upheld the supremacy of international criminal law in core crimes proceedings. Particularly noteworthy is the case of Julio Simon (2001). In the Simon case, federal judge Gabriel Cavallo found that the crimes of kidnapping and forced disappearance in question constituted crimes against humanity, the criminality and punishability of which are determined by the international community and not left to the discretion of individual States. In his decision of more than 100 pages, the judge dwelled extensively on the jus cogens status of the norms involved, the grave character of crimes against humanity and the duty to

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1232 See Art. 32 of Costa Rica’s 1949 Constitution (“Ningún costarricense podrá ser compelido a abandonar el territorio nacional.”).
1233 See Art. 110 and 121 (9) of Costa Rica’s 1949 Constitution.
1234 Costa Rica, Supreme Court of Justice (Constitutional Chamber), Advisory Opinion on the constitutionality of the draft law of approbation of the Rome Statute on the International Criminal Court, 1 November 2000, para. 11.
1235 Costa Rica, Supreme Court of Justice (Constitutional Chamber), Advisory Opinion on the constitutionality of the draft law of approbation of the Rome Statute on the International Criminal Court, 1 November 2000, para. 12.
1236 See Lambert-Abdelgawad 2003, p. 545-548, 555-556 and 566.
1237 See above, Chapter II, para. 3.3.n.
1238 See above, Chapter II, para. 3.3.m.
1240 Id., para. II (C) and III (J).
prosecute the crimes under consideration. In regard of the latter, Judge Cavallo cited inter alia the CAT, the ACHR and the ICCPR, as well as relevant case law of the IACtHR and other human rights bodies. Throughout the entire opinion, the judge referred constantly to numerous sources of international law, including the ICC Statute. Judge Cavallo asserted that the recognition of crimes against humanity and the conditions of their prosecution follow not only from Art. 118 of the Argentinean Constitution, but also, inter alia, from Argentina’s role in the international community, and its recognition of jus cogens through the VCLT. Finally, he declared both amnesty laws incompatible with Art. 1, 2, 8 and 25 ACHR, Art. 2 and 9 ICCPR, the object and purpose of the CAT, as well as national law.

On appeal, the Federal Chamber of Appeals upheld the decision of Judge Cavallo, following his reasoning closely and relying equally on a breadth of international sources and case law. The Court of Appeals reiterated inter alia that the qualification and punishability of the crimes was not up to the State, but governed by international principles of a peremptory character. The appeals judgment also discussed the duty to prosecute under human rights law at length, and concluded that there was no alternative for the invalidation of the amnesty laws. Like Judge Cavallo, the Federal Chamber of Appeals relied both on national and international law in reaching its decision.

The highest military court of Peru reached a comparable outcome as the Argentinean courts in Simón, relying primarily on a combination of the duty to prosecute, national law and the Vienna Convention of the Law of Treaties. The Barrios Altos case (2001) arguably concerned crimes against humanity. In 1991, six members of the Peruvian army attacked a group of civilians in a neighborhood in Lima known as Barrios Altos, killing fifteen civilians. Two amnesty laws subsequently deterred investigation and prosecution of the matter. Yet, when the case reached the IACtHR, Peru recognized its international responsibility in the case and declared its willingness to reach a friendly

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1241 Id., inter alia para. III (E) and (I), as well as IV (B).
1242 Id., para. III (E), (F) and (I).
1243 Id., e.g. para. III (I).
1244 Id., at 598:

"Entonces, el reconocimiento de los crímenes contra la humanidad así como las condiciones para su juzgamiento que impone el derecho de gentes a través de sus normas más encumbradas, no sólo se deriva de la recepción que realiza el Art. 118 de la Constitución Nacional, tal como se ha expresado más arriba, sino, además, del hecho de formar parte de la comunidad internacional, de aceptar sus normas, de formar parte de la Convención de Viena sobre el Derecho de los Tratados (que consagra una de las funciones del ius cogens) y el hecho de haber contribuido a la consolidación del derecho penal internacional."

1245 Id., operative paragraph ("Resuelvo").
1247 Id., inter alia para. XVIII (2).
1248 Id., inter alia para. XV and XVIII.
1249 It is to be noted that numerous human rights treaties are incorporated in the Argentinean Constitution.
See above, note 456.
1250 See on this case generally Ferdinandusse 2003, p. 89-93 and Cerna 2002.
settlement with the petitioners. The IACtHR decided unanimously that Amnesty Laws No. 26479 and No. 26492 were "incompatible with the American Convention on Human Rights and, consequently, lack[ed] legal effect."\(^{1253}\)

Just weeks after the judgment of the Inter-American Court, the Peruvian Consejo Supremo de Justicio Militar ordered the military courts to give effect to the judgment, "which resulted in the reopening of the Barrios Altos case at the national level and the rendering of the amnesty laws without effect."\(^{1254}\) In doing so, the highest military court relied both on the authorization in Peruvian law to execute international court judgments,\(^{1255}\) and the Vienna Convention of the Law of Treaties.\(^{1256}\) This Peruvian judgment uses several of the same arguments as the Argentinean judgments in the Simon case, but lacks any discussion of the jus cogens status and the grave character of the core crimes.\(^{1257}\) Their outcomes are, however, substantially the same.

Other judgments, on the other hand, rely emphatically on the jus cogens status of core crimes law. A relatively early example dates back to 1959,\(^{1258}\) when the Polish Voivodship Court of Warsaw directly applied the Fourth Hague Convention of 1907 and the Nuremberg Charter for the prosecution of crimes against humanity, war crimes and crimes against peace committed during WWII.\(^{1259}\) The Polish Court held inter alia that the Fourth Hague Convention "constitutes jus cogens, i.e., it contains rules the application of which does not depend on the free discretion of any State."\(^{1260}\) The Supreme Court of Poland affirmed this judgment, holding that "[t]he basis of

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\(^{1252}\) Id., para. 37-39.
\(^{1253}\) Id. at para. 51(4). See for an analysis of the scope of this holding Ferdinandusse 2003, p. 90-91.

"Las sentencias expedidas por los Tribunales Internacionales, constituidos según Tratados de los que es parte el Perú, son transcritas por el Ministerio de Relaciones Exteriores al Presidente de la Corte Suprema, quien las remite a la Sala en que se agotó la jurisdicción interna y dispone la ejecución de la sentencia supranacional por el Juez Especializado o Mixto competente."

\(^{1256}\) See above, p. 152.
\(^{1257}\) Note that the Argentinean judgments also relied on Art. 27 VCLT, albeit it gave them less emphasis. See Argentina, Federal Chamber of Appeals, Incidente de Apelacion de Julio Simon, 9 November 2001, para. XI; Argentina, Judge Gabriel Cavollo of the Buenos Aires Federal Court, Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustraccion de menores de 10 anos"), 6 March 2001, 2000/B Nueva Doctrina Penal 527, para. VI (A).
\(^{1258}\) Although the notion of jus cogens was not codified in a treaty until the VCLT of 1969, it appeared in doctrine, and to a lesser extent practice, before that date. See Hannikainen 1988, p. 23-156; Robledo 1981, p. 17-36; Kunz 1945, p. 187-193.
\(^{1259}\) Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496. See in particular 504:

"The [London Agreement of 8 August 1945 and the annexed Nuremberg Charter] are obligatory in Polish municipal law, while at the same time they define the content of war crimes and crimes against humanity, and also fix the sanctions therefore; as multilateral international treaties, they have legal force in many States."

Note, however, that the accused was found guilty of crimes summarily set out in a Polish decree of 1944, while the international instruments were apparently applied to furnish the definitions of those crimes. See p. 497 and 509.
\(^{1260}\) Id., p. 503.
responsibility for war crimes rests on two international instruments,” namely the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, including the annexed Nuremberg Charter.\textsuperscript{1261} The Supreme Court further distinguished extradition of common criminals from extradition of war criminals, stating that “[t]he above international treaties regulate in a different way from our own law of extradition the procedure of punishing war criminals, and they provide for responsibility for all war crimes and crimes against humanity.”\textsuperscript{1262}

In Argentina, various penal judgments on different levels before the *Simon* case have asserted that no national law, not even the Constitution, can prevent the effectuation of international norms of *jus cogens* status.\textsuperscript{1263} In several other States, precedents of limited authority also credit peremptory norms with an enhanced status in the national legal order in rather general terms. In the *Bouterse* case, the Dutch Attorney-General suggested in 2001 that all *jus cogens* norms might supersede national law in deviation of the normal implementation framework in the Netherlands, which gives supremacy only to treaties but not to custom.\textsuperscript{1264} However, this assumption did not affect the outcome of the case since the Attorney-General did not believe that the prohibition of prescription of torture constitutes a *jus cogens* norm\textsuperscript{1265} and the Supreme Court did not reach a holding on this point. A similar but more ambiguous holding is found in the Belgian *Pinochet* ruling of 1998.\textsuperscript{1266}

In one of the most detailed and elaborately motivated examples, the Hungarian Constitutional Court by and large exempted war crimes and crimes against humanity from the regular framework of national criminal law in its 1993 decision that allowed direct application of the international criminalizations for the prosecution of these crimes.\textsuperscript{1267} In doing so, the Constitutional Court relied extensively on their particular characteristics. It noted that “these crimes threaten the foundations of humanity and international coexistence” and that “the rules of non-applicability of statutory limitations

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\item \textsuperscript{1261} Poland, Supreme Court, *In re Koch*, 10 November 1959, 30 ILR 509 at 510.
\item \textsuperscript{1262} Id.
\item \textsuperscript{1263} Examples are cited in the *Simon* case in both instances. See also Mattarollo 2001, p. 21-22, 35-36 and 40.
\item \textsuperscript{1264} Netherlands, Attorney-General to the Supreme Court, *Voordracht en vordering tot cassatie in het belang der wet door de Procureur-Generaal* (Petition for Cassation in re *Bouterse*), 8 May 2001, NJ 2002/559, para. 94:

“Bij het hierna volgende wordt er van uitgegaan dat ook ongeschreven ius cogens bij onverenigbaarheid met de wet deze laatste verdringt, zulks in afwijking van wat overigens naar gangbare opvatting voortvloeit uit Art. 94 Grondwet.”

\item \textsuperscript{1265} Id., para. 105:

“[G]een regel van ongeschreven volkenrecht, laat staan van ius cogens, [verbiedt] verwijaring van het recht tot strafvordering inzake foltering […]”

\item \textsuperscript{1266} Belgium, Tribunal of First Instance (District of Brussels), *In re Pinochet Ugarte*, 6 November 1998, para. 3.3.2:

“[T]here are grounds to consider that before being codified into treaties or acts, crimes against humanity were sanctioned by international custom and are, as such, part of the international *jus cogens* which imposes itself on the internal legal order with restrictive effect ‘erga omnes’.”

\item \textsuperscript{1267} See generally above, Chapter II, para. 3.3.n.
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are closely related to the nature of war crimes and crimes against humanity."  

The Hungarian Constitutional Court also found that "the regulations on the punishment of war crimes and crimes against humanity" are peremptory norms of general international law and "those states which refuse to assume these obligations cannot participate in the community of nations." Furthermore, it held that in the context of national prosecutions of international crimes "[n]o domestic law confronted with a conflicting and express peremptory rule of international law (jus cogens) may be given effect." After all, "[t]he gravity of war crimes and crimes against humanity, the fact that by their commission international peace, security and, indeed, humanity itself was placed in danger, cannot be reconciled with making their punishment subject to domestic law."  

Therefore, the Hungarian Constitutional Court concluded, the core crimes are "sui generis criminal offenses" that can be punished "even by those member states whose domestic system of law does not recognize the definition or does not punish that action or omission," namely under direct application of their international criminalizations. This decision effectively exempted core crimes law from the general national framework governing criminal proceedings altogether, instead authorizing its application parallel to national criminal law. Its basic argument is that in core crimes prosecutions, national courts must function as organs of the international community rather than as enforcers of national criminal law.  

These judgments of national courts all point in a similar direction. They differ somewhat in their reasoning and the characteristics they ascribe to the core crimes. They also draw slightly varying conclusions from their analysis of core crimes law. But they share the conviction that core crimes must be effectively prosecuted in national courts, where necessary through an alteration of the normal balance between national and international law in favor of the latter.

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1269 Id. at 278:

"The states committed themselves by international agreements to the punishing of such crimes. During the past ten to fifteen years, the activities of international organizations (committees and tribunals) established to monitor and ensure compliance with the comprehensive human rights conventions have come to articulate with increasing vigor the condemnation of those states which in their domestic law fail to comply with their international obligations. (It is primarily the decisions and resolutions of the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights which developed the international law based duty of states to initiate criminal prosecution which may not be avoided even by amnesty)."

1270 Id., at 281.
1271 Id., at 282.
1272 Id., at 279.
1273 Id., at 279.
1274 Cf. id., at 278:

"[T]he state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the community of nations, according to the conditions imposed by international law."
However, the picture drawn so far requires qualification. First, there is significant contrary practice. Numerous national judgments reject the idea that the particular characteristics of the core crimes affect their justiciability in the national legal order. Several judgments do so implicitly. For example, legal opinions on the constitutionality of the ICC Statute in Belgium, Luxembourg and France have found the absence of immunity incompatible with their constitutional provisions on the inviolability of high State officials, thus rejecting the approach of Costa Rica and Ukraine which makes an exception for the core crimes in this regard. Other national judgments refuse to apply a different test to establish jurisdiction for the core crimes than for crimes of a non-peremptory character. An illuminating implicit rejection of the particular character of core crimes law is found in the decision on the constitutionality of Australian war crimes legislation in Polyukhovich (1991). Dissenting Judge Brennan of the Australian High Court considered the legislation under scrutiny to be unconstitutional for exceeding the foreign affairs power of parliament. Ignoring appeals to the grave and international character of war crimes, Judge Brennan issued a lengthy and technical analysis on the separation of powers involved, culminating in the question whether a law would be "properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person who, being a citizen and resident of France, had dropped litter in a Parisian street forty years ago?"

Some national judgments state explicitly that traits of the core crimes like their *jus cogens* status and grave nature have no special consequences on the municipal law level. In *Nulyarimma* (1999), for example, the Federal Court of Australia held that in the absence of implementing legislation, Australian courts cannot punish genocide "simply because it has now become recognised as an international crime with the status of *jus cogens* under customary international law." One of the justices first accepted both the peremptory character of the international prohibition of genocide and the fact that international law commands its prosecution, and subsequently described the choice to enforce the international criminalization of genocide as "a policy issue" which should be decided in the negative. Similarly, in *Pinochet III*, the House of Lords accepted that torture is a

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1275 See Lambert-Abdelgawad 2003, p. 544 and 546. See also Correa 2003 (on the 2002 judgment of the Chilean Constitutional Court declaring the ICC Statute unconstitutional).

1276 See for examples of such case law Chapter 2.


> "The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of *jus cogens* under customary international law."

See also para. 53

1279 Australia, Federal Court, *Nulyarimma v Thompson*, 1 September 1999, [1999] FCA 1192, para. 18 and 26, Wilcox J.
some judgments and dissenting opinions reject outright the assertion that the grave and international character of the core crimes makes them fundamentally different than ordinary crimes. These include judgments from the very same courts that in other cases ascribed a far-going autonomy to core crimes law. The French Cour de Cassation had, just eight years before finding in Barbie (1983) that "crimes against humanity do not simply fall within the scope of French municipal criminal law but are subject to an international criminal order," asserted in Touvier (1975) that "crimes against humanity are ordinary crimes committed under certain circumstances and for certain motives specified in the text that defines them." Also, in several later decisions the Cour de Cassation adhered more to its line of reasoning in Barbie about an international criminal order. In Canada, a dissenting judge in the Finta case (1994) issued an opinion of the same tenor as the holding in Touvier.

Second, it should be noted that most of the judgments which assert an enhanced position for the core crimes in the national legal order rely not only on the particular characteristics of core crimes law, but also, simultaneously, on their State’s constitutional framework regarding the incorporation of international law. The judgment of the Hungarian Constitutional Court leaned to a great extent on a constitutional clause which requires harmonization of national and all international law, not only core crimes law. The Argentinean cases mentioned above, including the Simon case, likewise leaned

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1281 See above note 1228.
1283 See above, Chapter II, para. 3.3.j.
1284 Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 258 and 290: "[T]he acts comprised in war crimes and crimes against humanity are in this country in essence crimes that fall under the familiar rubrics of our law such as confinement, kidnapping, and the like. They would be equally blameworthy if done by private individuals or criminal groups for other similar vile motives. The additional circumstances are added to crimes against humanity to tie them to the international norm and permit extraterritorial prosecution by all states.
[...]
More serious was that the trial judge at several points referred to the accused's actions having "risen up" to the quality of a war crime or crime against humanity. This is not strictly accurate; there may be different considerations for the offences under international law, and they may have some additional requirements to those for domestic offences, but these are not always higher and may not be related to individual culpability. To use language that suggests that somehow there is a higher degree of culpability required in relation to the international crimes is misleading."
heavily on constitutional provisions. Both in *Nulyarimma* and *Pinochet III*, the dissenting judges who accepted direct application of the customary criminalizations of genocide and torture respectively, based their minority views on incorporation through the common law rather than the *jus cogens* status or heinous nature of these crimes.

Then again, the fact that these judgments do not rely *solely* on the particular characteristics of the core crimes does not diminish the authoritative value of their holdings, which in explicit language assert a special position for the core crimes. In addition, a relativization of the contrary practice is also in order. Many judgments do neither embrace an autonomous position for the core crimes nor reject it explicitly. While such judgments do amount to implicit contrary practice, they do not carry the same weight as judgments which explicitly discuss and decide the matter, especially if the position of the core crimes has not been brought up or (adequately) argued in the case. Some of the judgments that explicitly reject a special position for the core crimes, such as *Nulyarimma*, clearly violate international law.

Finally, it should be noted that several of the precedents mentioned above, both *pro* and *contra* a special position, are strong in language but limited in authority. Dissenting opinions, *obiter dicta* and older precedents of courts that have since then changed their stance do not carry the same weight as recent decisions that turn on the very question discussed here. Of course, the place of the courts involved in their national judicial hierarchy also counts.

On balance, the stance of national courts is divided. Various national courts have directly applied core crimes law in order to exempt the core crimes from (at least part of) the national legal framework governing ordinary criminal proceedings, but others explicitly or implicitly reject this line of reasoning. While the involvement of the highest courts of different States gives some momentum to the tendency to exempt core crimes law from national limitations that would ordinarily prevent its enforcement in national courts, practice is too limited and inconsistent to support a corresponding rule of positive international law in this regard. Still, this tendency is a noteworthy development, and

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1286 See above, Chapter II, para. 3.3.m.
1287 See Australia, Federal Court, *Nulyarimma v Thompson*, 1 September 1999, [1999] FCA 1192, para. 183-186 (While Justice Merkel loosely suggests in para. 183 that the *jus cogens* character of genocide is an additional reason to endorse this form of incorporation, stating that "genocide is an a fortiori example of where a rule of international law is to be adopted as part of municipal law," his elaborate analysis of the criminal aspects of the Australian common law makes clear that the peremptory character of the norm is not in itself enough to override the national implementation framework); U.K., House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 A.C. 147 at 276. See further above, Chapter II, para. 3.3.d and 3.3.h.
1288 Apart from the actual result of such cases, it should be acknowledged that national courts themselves violate their duty to interpret national law in conformity with international obligations when they recognize an international obligation, characterize the decision to adhere to that obligation or not as a "policy choice" and then decline to adhere to it. See on the principle of consistent interpretation above, Chapter IV, para. 5.2.
1289 Note that the use of a rule of international law in order to refuse application of a rule of national law meets the definition of direct application as set out above, p. 21.
finds additional support in the enactment of the ICC Statute and the resulting implementing practice of several nations, to which I now turn.

6 Implications of the ICC Statute and its Implementation

The coming into force of the ICC Statute provides additional support for the tendency of some national courts to enforce international core crimes law regardless of shortcomings in relevant national law. First, the Statute contains a detailed and very complete regulation of core crimes law which many States have incorporated into their national legal orders. The Statute sets out definitions of the crimes and forms of participation, as well as applicable penalties, and predominantly reflects international customary law. Therefore, the ability of many national courts to rely on international law for the prosecution of core crimes has greatly improved. Moreover, since the Statute in a general sense confirms the customary duty to prosecute core crimes perpetrators, it also brings an (additional) source of explicit recognition of this duty into many national laws.

Second, the way some States have implemented the ICC Statute in their domestic law, or are in the process of doing so, provides support for an autonomous position of core crimes law. As set out above, several constitutional courts have carved out an exception for core crimes law in the constitutional framework governing criminal proceedings. Other States have explicitly made exceptions for the ICC Statute through amendments to their constitutions. Generally, the purpose of these amendments was merely to allow quick ratification of the ICC Statute without having to do a thorough revision of the

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1290 See above p. 58.
1291 Some national judgments have accordingly recognized a duty to prosecute flowing from the ICC Statute. See Belgium, Tribunal of First Instance Brussels (Kamer van Inbeschuldigingstelling), In re Sharon and Yaron, 26 June 2002, reproduced in Wouters and Panken 2003, p. 323-339 at 332 (“[Q]ue le Statut de Rome comporte ainsi des obligations a caractère juridictionnel” - The implications of this rather terse statement are unclear, but it is noteworthy that the Belgian court referred to jurisdictional obligations flowing from the ICC Statute in proceedings concerning alleged extraterritorial core crimes.); France, Paris Court of Appeals (Cour d'appel de Paris), In re Gaddafi, 20 October 2000, 105 RGDIS 475-476 at 476:

“Qu'au demeurant, la convention portant statut de la Cour pénale internationale, […] indique dans son préambule, 'qu'il est du devoir de chaque Etat de soumettre à sa juridiction criminelle les responsables de crimes internationaux', […] Qu'il est ainsi reconnu par cette convention qu'il est du devoir pour les États l'ayant ratifié de juger les crimes internationaux, lesquels ne sauraient, aux termes de l'article 22 [ICC Statute] susvisé, être limités aux crimes contre l'humanité, de génocide, d'apartheid et de guerre, ce quand bien-même la personne poursuivie aurait la qualité officielle de chef d'État ou de gouvernement.”

(“Moreover, the preamble to the convention constituting the Statute of the International Criminal Court, […] says that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." […] That convention recognizes a duty on the part of ratifying states to try defendants for international crimes, as Article 22 [ICC Statute] provides, including but not limited to crimes against humanity, genocide, apartheid and war crimes, even if the accused is an official head of state or government;”)

1292 See notes 1231 - 1236.
entire constitution. The result, however, is a distinction between core crimes law and other criminal law. For example, Luxembourg has explicitly placed its obligations under the ICC Statute above constitutional requirements by providing in its Constitution that "the provisions of the Constitution do not hinder the approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein." France has expressed in its Constitution that it may recognize the ICC under the conditions stipulated in the Statute. Other States have adopted similar constitutional provisions regarding the ICC. The practice of various States to exempt the ICC Statute from the normal constitutional framework governing criminal proceedings, both through judicial interpretation and legislation, provides support for an autonomous position of core crimes law.

7 Conclusion

Several characteristics of international criminal law in general, and the core crimes in particular, sit uncomfortably with international law's general framework of implementation. It may be questioned to what extent (the combination of) the \textit{jus cogens} status of core crimes law, its disqualification of contrary national law, its focus on

\textsuperscript{1293} See Lambert-Abdelgawad 2003, p. 563-564.

(Unofficial translation ICRC)

\textsuperscript{1295} France, Art. 53-2 Constitution, modified by Decision 98-408 DC of 22 January 1999: "La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998."

\textsuperscript{1296} See Colombia, Art. 93 Constitution: "[...] El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución. La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él."


Portugal, Art. 7 (7) Constitution: "Portugal pode, tendo em vista a realização de uma justiça internacional que promova o respeito pelos direitos da pessoa humana e dos povos, aceitar a jurisdição do Tribunal Penal Internacional, nas condições de complementaridade e demais termos estabelecidos no Estatuto de Roma.";

Although most of these provisions do not explicitly single out the obligations flowing from the ICC Statute from normal constitutional limitations, they were all adopted with this goal in mind. See Lambert-Abdelgawad 2003, p. 562-563 (also reporting similar initiatives in Cameroon and Brasil) and Duffy 2001, p. 9-10.
individuals, the grave nature of the core crimes, the duty to prosecute them and their character as system crimes can be reconciled with the freedom of States to block judicial enforcement of international law in the national legal order, make that enforcement dependent on national implementing law, or subject it to the principle of reciprocity.

Various national courts have exempted core crimes law from different rules and principles that normally govern the judicial application of international law. Together, these cases suggest that core crimes law, on account of the characteristics mentioned above, takes up a particular position in the national legal order. This suggestion of a more or less autonomous position reflects the international character of the core crimes in a heightened focus on the relevant international rules and a corresponding limitation of the extent to which national law can constrain their effectuation. It finds support in the significant but divided case law of national and international courts on the particular position of all international law of a humanitarian character. The practice in various States to exempt the ICC Statute from certain constitutional provisions may add further momentum to this development.

However, there are also numerous national judgments that refuse to give full effect to international core crimes law through an internationalist approach to obstacles in national law. Some of these contrary judgments constitute clear violations of international law and serve principally as a reminder that national courts are too often unaware of their international obligations, or unwilling to heed them. International law demands to be given full effect, where necessary through direct application. Nonetheless, the practice of national courts in core crimes prosecutions is divided, so that it can not be concluded that international law subjects core crimes law to a more stringent regime than other international norms. Still, it is noteworthy that numerous national courts have taken a decidedly internationalist stance on the implementation and effectuation of core crimes law.

1297 See above, Chapter IV, para. 5.3.a.
Chapter VI
The Principle of Legality and Direct Application of Core Crimes

1 Introduction

In this Chapter, I will analyze the tension between the principle of legality (nullum crimen, nulla poena sine lege praevia) and direct application of international criminalizations of core crimes in national courts. As established in Chapter 5, States are, at least to some extent, under a duty to prosecute core crimes, regardless of the shape of their national law in this respect. As shown in Chapter 2, several national courts have confronted the question whether core crimes can be prosecuted directly on the basis of international law where relevant national law is absent or defective. In various cases, these courts denied direct application. Of the many different (including practical) considerations that play a role in decisions on direct application, described in Chapter 3, a key legal obstacle appears to be the principle of legality. Learned writers also point to the principle of legality as a cardinal obstacle to direct application.¹²⁹⁸

I will now analyze the demands of the principle of legality under international law regarding national prosecutions of core crimes. This analysis concerns solely those requirements of the international principle of legality that are potentially decisive for the question of direct application of core crimes law in national courts.¹²⁹⁹ Accordingly, I will leave aside the question whether the international principle prohibits analogy and extensive interpretation¹³⁰⁰, as it exceeds the scope of this study. Where appropriate, I will distinguish between treaty-based and customary criminalizations, as these raise different concerns with regard to the principle of legality.

Analyzing the role of the international principle of legality in national core crime prosecutions is no easy task. There are many dichotomies that influence the content ascribed to nullum crimen: national law – international law, national courts – international courts, ordinary crimes – core crimes. Most judgments do not elaborate on the way in which these factors determine their view of the principle of legality. Therefore, it is not always clear which precedents are determinative for the international rules applicable to core crimes prosecutions in national courts and which ones are less relevant. Moreover, as soon will become clear, there are considerable disagreements among States on this topic. Due to these factors, the law set forth here is subject to some uncertainty.

The following analysis requires several steps. First, I will map the purpose and legal basis of the principle of legality under international law (para. 2). Second, I will consider whether the core crimes take up a special position or are subject to the principle of legality.

¹²⁹⁸ See above, notes 10-11.
¹²⁹⁹ Note, however, that the principle of legality certainly affects direct application of core crimes law as the basis for a national prosecution, but not necessarily other instances like direct application in order to refuse application of national statutes of limitations. See below, p. 227.
legality in the same way as ordinary crimes (para. 3). Third, I will scrutinize the relationship between the international principle and the principle of legality in national legal systems (para. 4). Fourth, I will discuss in turn the demands of the principle in customary international law on the specific points of applicable law (para. 5.1), its accessibility (para. 5.2), its foreseeability (para. 5.3), and the applicable penalties (para. 5.4). Fifth, I will apply these general demands to specific international criminalizations (para. 6). Sixth, I will discuss what role international law leaves for national principles of legality in core crimes prosecutions in national courts (para. 7). Finally, I will summarize the conclusions of this Chapter (para. 8).

2 Legal Basis and Purpose of the Principle of Legality

The principle of legality is found both in national law (hereinafter national principle of legality) and international law (hereinafter international principle of legality), the latter including custom as well as treaties. An early recognition of the principle of legality by an international court appears in the PCU's Advisory Opinion in the Danzig case. The national and international principles share the same two essential goals. The first is to guarantee the legal certainty of the individual. Legal certainty requires criminalizations to be specific and forbids their retroactive application. These are essential conditions for individuals to know in advance both the "moral quality" (acceptable or unacceptable) and the legal consequences of their behavior.

Second, the principle of legality delimits and separates the powers of the institutional actors involved in the (international) criminal justice system. It prevents the legislature from punishing past acts by legislation, instead of criminalizing future conduct. It also stops the judiciary, national or international, from imposing arbitrary punishment and effectively drawing up new criminalizations. In international criminal law, the principle has the added function of ensuring that the law is specific enough for States to fulfill their obligations regarding the enforcement of ICL and the cooperation with international tribunals. Thus, it prevents international criminal courts from

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1302 See Werle 2003, p. 38; Barboza 2000, p. 148.
1303 See Art. 22 and 23 ICC Statute; Art. 15 ICCPR; Art. 7 ECHR; Art. 9 ACHR; Art. 7 (2) African Charter on Human and People's Rights; Art. 99 GC III; Art. 65, 67 GC IV; Art. 75 (4) (c) AP I; Art. 6 (2) (c) AP II. See also Art. 11(2) Universal Declaration of Human Rights; Art. 49 Charter of Fundamental Rights of the European Union, 7 december 2000.
1307 Cf. Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, per Mason, CJ, para. 23-41 (discussing and dismissing the argument that the retroactive character of Australian war crimes legislation amounts to punishment by legislation and therefore infringes on the judicial powers of the courts).
demanding transferal of, or cooperation in, prosecutions where States have no obligation to do so under international law. These institutional ramifications, like the legal certainty of the individual, require core crimes law to clearly separate criminal from non-criminal conduct.\footnote{See on the topic of separation of powers further above, Chapter III, para. 5.}

The demands of specificity and non-retroactivity make up the core of the principle of legality. Doctrine generally assumes that the principle of legality requires prosecution and punishment of individuals to be based on a legal norm that (1) existed at the time of the offense (\textit{nullum crimen sine lege praevia}), (2) is accessible to the individuals it addresses and (3) is so clear as to make the possibility of prosecution and punishment foreseeable (the requirement of \textit{lex certa}).\footnote{Cf. Cassese 2003a, p. 141-142; Jones and Powles 2003, p. 401.} In addition, the requirement of an indication of the applicable penalties is often seen as an intrinsic part of the principle (\textit{nulla poena sine lege}), but, as will be shown below, its scope in international law is uncertain.\footnote{See below, para. 5.4.}

The legal basis and foreseeability of a prosecution should be judged for the time the crime was committed. Between the commission of the crime and its prosecution, the scope of the criminalization may not be expanded, nor may the penalty be increased. However, other conditions of the prosecution that are not material for the determination of the "moral quality" of the act, such as statutes of limitation and rules on jurisdiction, are not subject to the international principle of legality. Thus, they can be determined and changed after the commission of the crime. While some States extend the principle of legality to cover such conditions, neither treaty law nor State practice provides a basis for a corresponding international rule.\footnote{See e.g. Poland, Constitutional Tribunal, \textit{Case of 6 July 1999}, 6 July 1999, para. II (2):

"[The principle of legality] does not encompass situations when that act was prohibited at the moment of commitment and then due to different reasons it stopped being punishable. The moment of commitment of the act is the point of reference for that principle. Everything what happens later is off the range of its application."

See also Swart 2002b, p. 584-586. Cf. Fletcher 1998, p. 10-23. But see Safferling 2001, p. 87-88 (contending that the international principle of legality requires the existence of the court that will judge the crime before it occurs).} There is ample evidence, furthermore, that the international principle of legality is substantially different from the standards in many national laws, and far more minimalistic.\footnote{See Kittichaisaree 2001, p. 269-272; Paust 2000, p. 8; Vyver 1999, p. 316 ("[T]he same standard of specificity required for the circumscription of criminal offences by some criminal justice systems does not apply in international law");}

Before setting out to map the different requirements of the international principle of legality for core crimes prosecutions, I will inquire whether the core crimes are treated different from or similar as ordinary crimes in this regard.
A Special Position for the Core Crimes?

Are prosecutions of the core crimes, including those in national courts, subject to the international principle of legality in the same way as prosecutions of ordinary crimes, or are they governed by different standards? The answer to this question determines to what extent State practice on the principle of legality in general, including cases of ordinary crimes, is relevant for the particular category of core crimes prosecutions.

Some older authors have maintained that the principle of legality does not apply to international crimes at all because it is not compatible with the structure of international criminal law. They supported the negation of an international principle of legality generally by reference to post WWII prosecutions. Indeed, the language of some of those judgments suggests a complete disregard of the principle of legality. In United States v. Altstötter (1947), a U.S. Military Tribunal stated that “[i]t would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth.” However, despite this categorical language, the Tribunal ultimately opted for a restrictive interpretation of the principle of legality rather than its non-application.

On closer scrutiny, post-WW II prosecutions generally rejected a rigid reading of the nullum crimen principle, rather than the principle in its entirety. In United States v. Von List (1947), for example, the Tribunal found that “it is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally.” Clearly, the condition that the crime should be recognized under international law signifies a recognition of the principle. Similarly, in many post-WWII prosecutions the principle of legality was interpreted in a restrictive manner, but still treated with considerable deference. On balance, therefore, it seems more

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1314 See Woetzel 1960, p. 112-116 and references cited there.
1316 Id., at 977-978: “As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught.”
1318 Id., p. 635; “If the acts charged were in fact crimes under international law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements.”
accurate to say that these prosecutions recognized a minimal core of the principle, than not at all.\textsuperscript{1320}

A similar picture emerges from various more recent judgments of national courts. Several of those judgments suggest that the principle of legality does not apply at all to particular crimes or situations. Examples include the German Borderguards cases, in which both German courts and the ECTHR effectively set aside the principle of legality, in a manner which arguably amounts to a violation of international law.\textsuperscript{1321} An explicit departure from the principle of legality is also found in the jurisprudence of the Indonesian Ad hoc Human Rights Tribunal. In the case of Abilio Soares (2002), the Tribunal first reiterated the international origin and non-derogability of the principle of legality.\textsuperscript{1322} But then, the Tribunal mentioned the jurisdictional scheme of the ICTY and ICTR and concluded “that the legality principle is not absolutely valid and there may be exceptions to this principle.”\textsuperscript{1323} In the case of Domingos Mendonca (2003), East-Timor’s Special Panel for Serious Crimes held that “under customary international law crimes against humanity are criminal under general principles of law recognized by the community of nations, and thus constitute an exception to the principle of retroactivity.”\textsuperscript{1324} But while again sweeping in language, these judgments all make sure to establish the criminality of the conduct under international law, or at the very least verify the foreseeability of its punishment.\textsuperscript{1325} Thus, they do not set aside the principle of legality but instead adopt more flexible standards for international crimes.

\textsuperscript{1320} Compare Boot 2002, p. 219 (“In war crimes trials conducted after the Second World War, the \textit{nullum crimen sine lege} principle has been interpreted and applied in a more liberal way than in current national criminal laws.”) with Paust 1997a, p. 666 (concluding that “it is doubtful, then, that either the IMT at Nuremberg or the subsequent Tribunal under Control Law. No. 10 considered nullum crimen sine lege to be a principle of international law”). See also Triffterer 1966, p. 40-41.

\textsuperscript{1321} See below, note 1441 and accompanying text. See also note 1462 (on the question whether the borderguards cases involved core crimes).

\textsuperscript{1322} Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, \textit{Abilio Soares}, 14 August 2002, unnumbered paragraph, p. 64 of 82:

“In considering, that the prohibition of retroactive law (ex facto) is a basic right that is a non derogable right, as stipulated in Article 28 (i) 2nd Amendment 1945 Constitution and Article 4 Law No.39 year 1999 concerning Human Rights, is universal and is derived from Article 11 of the Universal Declaration of Human Rights.” (The Tribunal made further references to the ICCPR and ECHR.)

\textsuperscript{1323} Id., p. 65:

“Therefore the retroactive principle may also be valid to examine and try serious human rights violations cases in the prescribed periods, in particular as in the Penjelasan Undang-undang [commentary accompanying the law] it is clearly stated that: "in other words the retroactive principle may be applied to protect human rights itself under Article 28 jo verse (2) Undang-undang Dasar 1945 [i.e. the 1945 Constitution]".”

\textsuperscript{1324} East-Timor, Special Panel for Serious Crimes, \textit{Domingos Mendonca, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment}, 24 July 2003, para. 20.

\textsuperscript{1325} See on the Borderguards cases below, notes 1445, 1461 and accompanying text; Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, \textit{Abilio Soares}, 14 August 2002, p. 59 (stating that the “crime against humanity has become part of general legal principles recognized by a community of nations, [so] that violence by commission or omission may be charged retroactively”); East-Timor, Special Panel for Serious Crimes, \textit{Domingos Mendonca, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment}, 24 July 2003, para. 22-30.
A differentiation in the standards of the principle of legality for ordinary crimes and international crimes has been adopted also by various other national courts. Argentinean case law to this effect has been described above.\textsuperscript{1326} The Colombian Constitutional Court found in its 2002 judgment on the constitutionality of the ICC Statute that the standards of the principle of legality are not identical for international and national criminal law.\textsuperscript{1327} Various national courts have relied on Art. 15 (2) ICCPR and Art. 7 (2) ECHR to adopt this differentiation.\textsuperscript{1328} In \textit{Barbie} (1984), the French courts rejected appeals to the principle of legality by reference to the general principles provisions of the ECHR and the ICCPR, finding that crimes against humanity are exempted from the principle of legality as formulated in French law.\textsuperscript{1329} A like reasoning was applied by the Slovenian Constitutional Court in several cases in the 1990's.\textsuperscript{1330} The Court struck down certain \textit{ex post facto} criminalizations of acts committed during WWII for violating the principle of legality in the Slovenian Constitution.\textsuperscript{1331} Under reference to Art. 15 (2) ICCPR and Art. 7 (2) ECHR, however, the Court left unaffected all acts which “attract a penalty by the general legal principles recognized by civilised nations.”\textsuperscript{1332}

In Hungary, the Constitutional Court in 1993 also found that prosecutions for crimes against humanity and war crimes are not governed by the national principle of legality, again under reference to the mentioned articles of the ICCPR and the ECHR. The Constitutional Court held that the general principles exception in these treaties “makes possible the prosecution of the aforementioned and described \textit{sui generis} criminal offenses defined by international law even by those member states whose domestic system of law does not recognize the definition or does not punish that action or omission.”\textsuperscript{1333} For, the

\begin{itemize}
\item \textsuperscript{1326} See above, Chapter II, para. 3.3.m.
\item \textsuperscript{1327} See Colombia, Corte Constitucional, Sala Plena, Sentencia C-578 (in re Corte Penal Internacional), 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2292 (speaking of “un estándar diferente del principio de legalidad que orienta el derecho penal tanto en el ámbito nacional como en el contexto internacional”).
\item \textsuperscript{1328} See on these provisions also below, para. 5.1.
\item \textsuperscript{1329} France, Court de Cassation, \textit{Barbie (No. 2)}, 26 January 1984, Bull, crim., no. 34; 78 I.L.R. 132, at Bull. crim., no. 34, p. 92 (Cour de Cassation citing and affirming the Court of Appeals):
\begin{quote}
“[Q]u’ en définitive, l’incrimination de crimes contre l’humanité est conforme aux principes généraux de droit reconnus par les nations civilisées ; qu’a ce titre ces crimes échappent au principe de la non-rétroactivité des lois de répression...”
\end{quote}
\item \textsuperscript{1330} See Slovenia, Constitutional Court, U-I-6/93, 13 January 1998 and Slovenia, Constitutional Court, U-I-6/93, 13 January 1994.
\item \textsuperscript{1331} See Art. 28 Constitution:
\begin{quote}
“No person may be punished for an offence which was unknown to the criminal law, or which attracted no penalty, at the time the offence was allegedly committed.”
\end{quote}
\item \textsuperscript{1332} Slovenia, Constitutional Court, U-I-6/93, 13 January 1994, para. 20.
\item See also Slovenia, Constitutional Court, U-I-6/93, 30 September 1998, para. 14:
\begin{quote}
“The Constitutional Court already in the cited decision No. U-I-6/93 found the retroactive application of the Decree on Military Courts allowed insofar as consistent with the general legal principles recognized by civilised nations. It compared the Decree’s retroactivity with the retroactive effect of the London Agreement reached on 8 August 1945, on the basis of which Nuremberg trials for war crimes had been carried out. The retroactivity of that time was legitimate due to the fact that during World War II such delicts were committed which could not have been imagined, nor even envisaged, by previous legislatures. For these very reasons the departure from the prohibition of the retroactive effect of criminal laws should be allowed and legitimate also in [this] case...”
\end{quote}
\item \textsuperscript{1333} See above, note 1273.
\end{itemize}
Court found, “such acts must be prosecuted and punished in accordance with the conditions and requirements imposed by international law. The second section of both (International and European) Conventions evidently break through the penal law guarantees of domestic law.”

Some States, following the language of the ECHR and the ICCPR, have included an exception for international crimes in their formulation of the principle of legality in national law. An example can be found in Art. 42 (1) of the Polish Constitution of 1997 which determines that the principle of legality “shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.” Similar provisions are found in the Criminal Code of Bosnia and Herzegovina and the Canadian Constitution. On the basis of the latter provision, the Canadian Commission of Inquiry on War Criminals concluded that general principles of law recognized by the community of nations can form the basis for war crimes prosecutions.

The gist of these national decisions and provisions is that prosecutions of core crimes, also in national courts, are governed by the standards of the international principle of legality, which are more lenient than the standards of their national criminal law. This approach appears to be in line with the position of contemporary human rights law. While the ICCPR and the ECHR declare the principle of legality to be non-derogable, they also contain an exception clause for acts that are “criminal according to the general principles of law.” The ECtHR relied on this exception in Naletilic v. Croatia (2000)

1334 Id.
1335 See above, note 556.
1336 See above, note 556.
1337 Art. 3 (2):
“No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.”;
Draft Art. 4a:
“Articles 3 and 4 of this Code [containing the principle of legality] shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.”

1338 See above, text preceding note 374.
1339 See above, Chapter II, para. 3.3.i.
1340 See also Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, Justice Dawson, para. 18:
“(T)he ex post facto creation of war crimes may be seen as justifiable in a way that is not possible with other ex post facto criminal laws [... ] The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law. [... ] This justification for a different approach with respect to war crimes is reflected in [Article 15 of] the International Covenant on Civil and Political Rights [... ] War crimes [...] simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law.”.

1341 See Art. 4 (2) ICCPR and Art. 15 ECHR. See also Art. 27 (1) ACHR.
1342 See Art. 15 (2) ICCPR:
Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
to find a complaint based on Art. 7 ECHR inadmissible. The applicant complained against his transferal to the ICTY, where he stood accused of crimes against humanity and war crimes, asserting *inter alia* a violation of Art. 7 ECHR on the ground that he might be sentenced to a heavier penalty by the ICTY than by the domestic courts. The European Court noted concisely:

"As to the applicant’s contention that he might receive a heavier punishment by the ICTY than he might have received by domestic courts if the latter exercised their jurisdiction to finalise the proceedings against him, the Court notes that, even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention. This means that the second sentence of Article 7 § 1 of the Convention invoked by the applicant could not apply."

Thus, like the national courts cited above, the ECtHR makes a clear differentiation between core crimes and ordinary crimes with regard to the principle of legality.

But there is also contrary practice. Many national laws do not make an explicit exception for the prosecution of international crimes in their formulation of the principle of legality. Instead, a few States have made reservations to the exception clauses in the ECHR and the ICCPR in order to object to the prosecution of acts that were criminal according to general principles of law. When ratifying the ECHR, then West-Germany declared that it would only apply Art. 7 (2) within the limits of its national law. Since that national law contained a strict principle of legality, this statement essentially amounted to non-acceptance of Art. 7 (2). In a similar manner, Argentina made a reservation to Art. 15 (2) ICCPR, but this reservation has effectively been set aside by subsequent case law of the Argentinean courts.

In *Armando dos Santos*, East-Timor’s Court of Appeal held that “even though the acts committed by the defendant in 1999 include the crime against humanity provided for under section 5.1 (a) of UNTAET Regulation 2000/15, the defendant may not be tried..."
and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively. In cases like Bouterse (2001), and Habré (2001), the core crimes are not treated differently than ordinary crimes where it concerns the demands of the principle of legality. In Habré, the Senegalese Court of Appeals found that in the absence of a criminalization of crimes against humanity in national law, the principle of legality in the Penal Code precludes the prosecution of those crimes in Senegalese courts. In Bouterse, the Dutch Supreme Court found that the principle of legality as formulated in Dutch law does not make an exception for international crimes, but constitutes an “unreserved prohibition” of prosecutions that are not based on Dutch law. Numerous other judgments do not contain such explicit statements on the role of the principle of legality, but appear to adhere to the same line of reasoning in a more implicit manner. They see no reason to treat international crimes differently than ordinary crimes where it concerns the principle of legality.

In sum, the picture that emerges from State practice is divided. Despite sweeping language to the contrary in some judgments, the principle of legality does apply to the core crimes at least in some form. While there are strong legislative and judicial precedents for applying only a minimal nullum crimen standard to the core crimes, also in national courts, practice is divided on this point. But beyond doubt, the precedents just mentioned do indicate that there can be significant differences between the national and the international principle of legality.

4 The International and the National Principle of Legality

National prosecutions are governed simultaneously by national and international law. Therefore, the question arises how the demands of the principle of legality under these two bodies of law relate to each other. Are the standards they postulate on the basis of their common core of specificity and non-retroactivity comparable? Or should we distinguish the international principle of legality from its national counterparts as imposing fundamentally different standards? For direct application of ICL in prosecutions of the core crimes, this is a crucial question. After all, it is a fundamental rule of international law that obligations under national law cannot excuse violations of international obligations. Thus, a national principle of legality that goes beyond the requirements of international law is not a valid reason to forego a mandatory prosecution of a core crime.

1349 East-Timor, Court of Appeal, Armando dos Santos, Applicable Subsidiary Law decision, 15 July 2003, p. 14. Note, however, that this decision departs from several other judgments of the Court of Appeal and that the Special Panel for Serious Crimes has openly refused to adhere to it. See e.g. East-Timor, Special Panel for Serious Crimes, Domingos Mendonca, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment, 24 July 2003.
1350 See above, Chapter II, para. 3.3.e and 3.3.k.
1351 See above, note 268.
1352 See above, note 435 and accompanying text.
1353 See above, Chapter II, in particular the paragraphs on Australia and Switzerland.
Practice indicates that States regard the international principle of legality as a minimal standard which differs considerably from the stricter standards many set in their national laws. First, this is reflected in the massive support for the ad hoc tribunals. If States demanding a written definition of both the crime and the penalty under their national law had seen these conditions as satisfying an international obligation, they could not have supported the ad hoc tribunals in their present form. The great majority of States accepts prosecutions for crimes in Rwanda and Yugoslavia on the basis that these crimes were well established in customary international law at the time of commission, which shows that also States with strict national principles of legality interpret the international principle as more lenient.

Second, the lack of congruence between the national and international principles of legality can be discerned in national legislative and judicial practice, as described in the preceding paragraph. In the Netherlands, for example, the Supreme Court acknowledged in Bouterse that the national principle of legality did not match the principle as formulated in Art. 7 ECHR.\textsuperscript{1354} Also, the West-German reservation to Art. 7 (2) ECHR and the Argentinean one to Art. 15 (2) ICCPR show that these States perceived their national principles of legality as more demanding than and thus distinct from the formulations of the principle in the human rights treaties. Meanwhile, national judgments refusing prosecution of core crimes generally refer only to national principles of legality without elaborating on the relationship between the national and the international principle.\textsuperscript{1355}

Thus, there are good reasons to distinguish the international principle of legality from its national counterparts.\textsuperscript{1356} Even if they share a common core, the discrepancies between the national and the international formulations of the principle are considerable and of substantial effect. As the ICTY noted in Delalic, these discrepancies reflect differences between national and international law, \textit{inter alia} in their nature, legislative policies and standards, and drafting process.\textsuperscript{1357}

It follows, that in the analysis of the demands of international law regarding the \textit{nullum crimen} principle for national prosecutions of core crimes, care should be taken to distinguish rules ascribed to national law from those ascribed to international law. This is a complex task. The simultaneous application of the international and stricter national principles of legality leads to the situation that much of State practice is relevant to ascertain what is \textit{allowed} by the international principle of legality, but not what is \textit{required} by it, unless expressly indicated otherwise. The finding of the Hungarian Courts that prosecution of core crimes on the basis of customary international law is permissible indicates that they interpret the principle of legality under international law as allowing

\textsuperscript{1354} See Netherlands, HR, \textit{In re Bouterse}, 18 September 2001, para. 4. See also Dutch legislative history acknowledging different standards of national principle of legality and Art. 7 ECHR, cited in para. 4.3.2.
\textsuperscript{1355} See above, Chapter II, e.g. para. 3.3.c and 3.3.d.
this practice. On the other hand, there is no indication that the Dutch Supreme Court understands its stricter interpretation of the principle of legality as required by international law. On the contrary, the Supreme Court expressly indicated that it based its decision on the Dutch principle of legality and not on the more lenient international principle.\(^{1358}\)

Meanwhile, it should be noted that various States have forwarded a more rigid view of the international principle of legality during the establishment of the ad hoc tribunals and the ICC.\(^{1359}\) In this regard, there is a clear desire among certain States to elevate the international principle of legality to a stricter level, comparable to their national principles.\(^{1360}\) This tendency could perhaps in the future reduce the divergence between the international principle and stricter national principles. At present, however, it seems that the push for a stricter principle has not resulted in an adaptation of the principle of legality under general international law.

Notably, the ICC Statute contains a strict principle of legality in Arts. 22 and 23.\(^{1361}\) However, the import of these provisions is not clear-cut, since the Statute does not fully correspond to customary law. The ICC’s lack of jurisdiction over core crimes committed before the entry into force of the Statute is not a consequence of the principle of legality, but a political choice.\(^{1362}\) In fact, the Statute recognizes explicitly that neither its formulation of the principle of legality nor its sentencing provisions reflect the demands of general international law.\(^{1363}\) Of course, the Statute’s provisions may contribute to a more rigid interpretation of the principle of legality under general international law in the future. Yet, it appears that they currently neither reflect customary international law nor have a bearing on the prosecution of core crimes in national courts.\(^{1364}\)

\(^{1358}\) The Court declined to analyze whether the international principle would allow the prosecution of Bouterse where the national principle did not, as it could not discern a duty to prosecute in the case. See Netherlands, HR, In re Bouterse, 18 September 2001, para. 4.5-4.8.


\(^{1360}\) Cf. Cassese 2003a, p. 142-145.

\(^{1361}\) Art. 22:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.”

Art. 23:

“A person convicted by the Court may be punished only in accordance with this Statute.”

\(^{1362}\) See Jessberger 2003, p. 283-284. See also Art. 124, which allows States parties to postpone the Court’s jurisdiction for war crimes for a period of seven years.

\(^{1363}\) See Art. 22 (3) and Art. 80:

“Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.”

\(^{1364}\) See Broomhall 1999, p. 448, 451 and 459; Fife 1999, p. 1010.

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Finally, it should be emphasized that the distinction between principles of legality in national and international law does not correspond to a separation between national and international courts. The international principle of legality governs proceedings in all courts, also national ones. Its focus is primarily on the individual that is to benefit from the principle, as can be readily seen in the formulations in different treaties. Thus, the interpretation by international courts of the required legal certainty could be relevant for the demands put upon national courts and will be included in the following analysis.

5 The Principle of Legality under Customary International Law

This paragraph will analyze the requirements of the principle of legality under customary international law with regard to the legal basis for the prosecution of core crimes, the accessibility of that law, its foreseeability, and the provision of applicable penalties. I will pay substantial attention to Art. 7 (2) ECHR and Art. 15 (2) ICCPR, as these provisions and their application in practice are generally seen as important indications for the principle of legality under customary international law.

5.1 International Criminal Law as Lex

The traditional sources of international criminal law are treaties, custom and general principles. Security Council resolutions constitute an additional source. As some authors contend that the principle of legality requires a written law, it is occasionally doubted whether custom and general principles constitute law in the sense of nullum crimen sine lege. Consequently, transformation into written national law would be necessary. This doubt is unwarranted.

The international principle of legality, whether under customary law or as defined in human rights treaties, does not exclude unwritten law from the notion of lex. Civil law states generally formulate a stricter national principle requiring written law, and frequently exclude international law as an independent basis for prosecution altogether, but this practice does not likely reflect customary law or a general principle of that nature. Various formulations of the principle of legality in international treaties to which many civil law states are parties, as well as the practice of

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1365 See Bassiouni 1999a, 4.
1366 See above, notes 1141-1142.
1369 See Bassiouni 1996, p. 289 (“International criminal law currently requires the existence of a legal prohibition arising under conventional or customary international law”). See also ECtHR, C.R. v. the United Kingdom, 27 October 1995, para. 33; ECtHR, Sunday Times v. UK, 26 April 1979, para. 47.
1370 See Triffterer 1989, p. 60.
the ad hoc tribunals, accept that customary law can provide a basis for substantive criminality. Moreover, the fact that many States in their national laws simply refer to international criminal law in general terms, e.g. “the laws and customs of war,” suggests that they consider international criminalizations, including customary ones, a sufficient legal basis for prosecution.

Likewise, it can safely be assumed that the nullum crimen principle allows general principles to serve as a source of substantive criminality. Several authors have argued that the reference to general principles in Art. 7 (2) ECHR and Art. 15 (2) ICCPR cover only the admissibility of post-WWII prosecutions or the Nuremberg Principles, and have no broader relevance in modern international law. Both a correct interpretation of these treaties and subsequent State practice, however, require a firm rejection of this assertion. First, it is an elementary rule of treaty interpretation that the travaux preparatoires cannot alter the ordinary meaning of the text of a treaty. A normal contextual analysis of these provisions obviates the need to resort to the drafting history altogether, especially when taking into account the character of these human rights treaties as “living instruments.”

Even if they are to be consulted, the travaux preparatoires of the ICCPR indicate that Art. 15 (2) was indeed inspired by the wish to safeguard the legitimacy of post-WWII prosecutions, but they do not warrant the conclusion that the effect of this provision is limited to those proceedings. On the contrary, while some States understood the second paragraph to cover only post-WWII prosecutions, numerous parties expressed their view that it should cover future cases. The representative of Yugoslavia, for example, stated that Art. 15 (2) “provided that crimes against humanity should always be punished, whenever and wherever they had been committed.” According to Ghana it

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1373 See Ziegler 1997, p. 573. See also above, Chapter II, para. 3.2.
1375 See Dutertre 2003, p. 240 and Simma and Paulus 2000, p. 64.
1376 See Peyró 2003, p. 81-83.
1377 Cf. VCLT Arts. 31 and 32, widely believed to reflect customary law.
1378 See Weissbrodt 2001, p. 75-91.
1379 See e.g. U.N. Doc. E/CON/4.SR.159 (1950) at 12-13 (Representative of the United Kingdom stated that: “It was important to emphasize in the covenant that acts which might not so far be the subject of express provisions in international law, could nevertheless be contrary to the general principles of law recognized implicitly in both national and international legislation.” This position was explicitly supported by Lebanon, Greece, France and Yugoslavia.; U.N. Doc. A/C.3/SR.1008 (1960) at 133-134 (Representative of Poland stated that “she could not agree with [those] who had attempted to deny the existence of the general principles of international law…the Polish delegation wished to declare publicly that if war crimes like those which had been punished at Nürnberg should be perpetrated in the future, they must be judged with the same severity and in accordance with the same principles of international law.”) (para. 2-3), support for the applicability of Art. 15 (2) to future situations was expressed by India and Cuba).
1380 U.N. Doc. A/C.3/SR.1008 (1960), at 135: “Thus article 15, paragraph 2, of the draft Covenant merely strengthened and confirmed the fundamental principles of the United Nations. He was firmly opposed to its deletion and to any amendment which might weaken it. Such a provision should be included in the Covenants, and should form an integral part of an international instrument; that might perhaps prevent a repetition...
“represented a saving clause introduced in the interest of the States parties to the Covenant, enabling them, despite paragraph 1, to convict or acquit defendants and fix penalties for offences in accordance with their own legislation.” Thus, the parties clearly did not agree to give a “special meaning” to the term general principles which restricted its scope to post-WWII prosecutions. The same can be concluded for Art. 7 (2) ECHR, for example from the German reservation to that provision, which pertains to its future application.

Moreover, the general applicability of Art. 7 (2) ECHR and Art. 15 (2) ICCPR has been accepted in practice. Resort to these provisions is limited but consistent. Some national laws explicitly recognize general principles as a source of substantive criminality and various national courts have applied them in recent cases. The ECHR has relied on Art. 7 (2) ECHR in Naletilic v. Croatia, and several separate opinions in other cases have also interpreted this provision as meaning just what it says, rather than as an obsolete reference to past WWII prosecutions. In the Borderguards case (2001) for example, Judge Pellonpää phrased as one of the relevant questions whether the killing of a fugitive in Berlin in the 1970’s “constituted an offence under international law (paragraph 1 of Article 7) or was “criminal according to the general principles of law recognised by civilised nations” (paragraph 2). Likewise, the ICTY in Delalic rejected an alleged violation of the principle of legality under referral to Art. 15 (2) ICCPR, thus confirming its general applicability.

of past events and deprive war criminals of any opportunity of escaping justice on the ground that their offences were not provided for under the laws of their country or under international law.” Support for this position was expressed by the Philippines and the USSR (p. 136-137). Saudi-Arabia stated that it “saw no reason for basing paragraph 2 of Article 15 on the Nürnberg and Tokyo trials alone. [... ] Dictatorial regimes and colonial wars had been and still were the occasion for crimes similar to those referred to in paragraph 2 of the article under discussion.” (p. 137, para. 30)


1382 Cf. VCLT Art. 31 (4).

1383 See Report of the Canadian Commission of Inquiry on War Criminals, 1986, Deschenes, p. 143 (“It is true that some delegations had expressed a deep concern for the protection of the past...[...] But many more had taken into consideration both the past and the future.”).


1385 See above, para. 3 of this Chapter.

1386 See above, note 1342.


1388 ECHR, K. - H. W. v. Germany, 22 March 2001, Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupancic. See also Partly Dissenting Opinion of Judge Cabral Barreto, para. 4. Cf. EComHR, S. W. v. the United Kingdom, 27 June 1994, Dissenting Opinion of Judge Loucaides, joined by Judge Trechsel, Judge Nowicki and Judge Cabral Barreto:

“The travaux préparatoires indicate that [Art. 7 (2) ECHR] was intended to cover prosecution of crimes against humanity in the context of the post-second world war Nuremberg trials. While it cannot be excluded that other conduct might fall within the ambit of the paragraph, I am of the opinion that there is insufficient general consensus as regards marital rape...”

1389 ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 313 (“[T]he caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the
posited that the principle of legality does not rule out resort to general principles as a source of criminality but on the contrary may require so.\textsuperscript{1390}

In conclusion, customary law and general principles are both law as required by the maxim \textit{nullum crimen sine lege}.\textsuperscript{1391} Their application might raise issues with respect to accessibility and foreseeability, but their quality as a source of international criminal law is well established in general international law, as indicated by the provisions of the ICCPR and ECHR and the practice of a variety of States.\textsuperscript{1392}

5.2 Accessibility

The principle of legality requires not only that criminalisations are based on law, but also that this law is readily accessible.\textsuperscript{1393} Accessibility presupposes that the legal rules making the acts in question punishable must be obtainable for the person concerned. The accessibility of the law on core crimes constitutes a somewhat abstract if not fictitious test and is problematic in two respects. These are, first, the dependence on States to make international criminal law accessible for individuals, and second, the particularly poor accessibility of unwritten sources of international law.

\textsuperscript{1390}ICTY, Appeals Chamber, Delalic et al, 20 February 2001, para. 173:

"It is universally acknowledged that the acts enumerated in common Article 3 [Geneva Conventions] are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, “criminal according to the general principles of law recognised by civilised nations.”"

\textsuperscript{1391}ICTY, Trial Chamber, Furundzija, 10 December 1998, para. 177:

"The Trial Chamber [...] considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (\textit{Bestimmtheitgrundsatz}, also referred to by the maxim "\textit{nullum crimen sine lege stricta}"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws."

See also ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 128-134.

\textsuperscript{1392}ICTY, Trial Chamber, Furundzija, 10 December 1998, para. 177:

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See also ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128-134.
The first problem follows from the fact that international law largely depends on national governments for its dissemination. It is up to States to make international law accessible for their citizens by translating and publishing treaties and other material sources of international law. Consequently, many States allow the direct application of treaty provisions against individuals only after the treaty has been published. Some national courts prosecuting foreign suspects for core crimes ascertain that the relevant treaties were in force in the State of the crime, and thus accessible for the defendants.

The advent of the information age has to some extent diminished the central role of the State in disseminating the content of international law. Today, there is a growing body of information that makes international law accessible independent of State action. Using the internet and other means of mass communication, international organizations like the U.N. and the Red Cross, as well as educational institutions and NGO’s disseminate international law to a large audience. However, especially for groups that are hampered by lack of access to modern means of communication and/or language barriers, the State still plays a crucial role in the dissemination of international law. This dependence is problematic, since the applicability of core crimes law should as a matter of principle be independent from the efforts of the national government.

The second problem concerns the accessibility of criminalizations based on customary law and general principles. As these are unwritten sources, they can not simply be published like treaties or statutes. As a result, they are less accessible for the general public. Of course, expressions of the customary norm are generally accessible. Individuals can inform themselves of customary rules through judgments of national and international courts, declarations and communications of States, as well as treaties, legislation and other sources.

For the core crimes in particular, an indication of the law can be derived from numerous readily available sources, such as treaties, relevant international documents, the

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1394 See e.g. Art. 93 Dutch Constitution; Belgium, Court of Cassation, Publication of Treaties Case (Belgium), 25 November 1993; Germany, Reichsgericht in Strafsachen, Publication of Treaties Case (Germany), 25 September 1920, Partial translation in English in Annual Digest 1919-1922, No. 234, p. 323.

1395 See e.g. Swiss Tribunal Militaire de Division I, 18 April 1997, para. En Droit, Compétence; Swiss Tribunal Militaire D'appel IA, Niyonteze 2000, Chapitre 3 sub A; Swiss Tribunal Militaire de Cassation, Niyonteze 2001, para. II sub b (all establishing that the territorial States of the crimes were bound by the relevant Geneva Conventions and Protocols). Although these courts do not specify the relevance of their findings, it seems plausible that accessibility of the law is an important reason to establish the status of the treaties in the territorial State. After all, it is not relevant for the scope of the duty to extradite or prosecute under the Geneva Conventions, which extends to all alleged perpetrators, not only nationals of the Contracting parties.

1396 Cf. Art. 27 (2) and 33 ICC Statute (irrelevance of official capacity and superior orders); Nuremberg Principles II (fact that internal law does not impose a penalty does not relieve perpetrator from responsibility under international law) and IV (no defense of superior orders provided a moral choice was possible). See also Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527, para. III (J).
widespread condemnation of crimes under international law, reports about proceedings against (alleged) perpetrators in national and international courts and the work of academics, governmental and non-governmental organisations. However, the fact that the ascertainment of a customary rule often requires the analysis of many sources combined, and the fact that most of these sources are not comprehensive, clearly diminishes the accessibility of customary rules. For example, the ICTY has relied upon many and diverse sources to ascertain certain customary rules - including case law, military manuals and legislation of numerous countries – which are not generally accessible to the average individual.

While the dependence on the State for dissemination and the poor accessibility of unwritten international law are real problems, they are greatly mitigated by the fundamental character of many of the core crimes. Whether one believes that the core crimes constitute a modern form of natural law or not, a successful plea of lack of accessibility of the law is hard to imagine for a crime like genocide. Still, one can conclude that proper concerns over accessibility plead for the codification of ICL in treaties.

In the practice of both national and international courts, claims about a lack of knowledge of the applicable law are relatively scarce and consistently denied. It appears that ultimately, accessibility of the law is not an independent requirement of the principle of legality, but rather a step in the scrutiny of the foreseeability of the norm. The legal certainty of the individual is safeguarded where she is aware of the rules to be followed, no matter how she has learned of them. In spite of the wording of some judgments of the ECtHR, which suggests that accessibility and foreseeability are two different coexisting demands, accessibility is not explicitly included in the various treaty provisions and seems relevant only in the context of the question to foreseeability. It is inconceivable that the principle of legality would preclude the prosecution of a perpetrator who was aware of the illegality of his conduct but incapable to access the relevant law. Therefore, the following analysis of the requirement of foreseeability will further clarify the relevance of the principle of legality for the direct application of the core crimes.

5.3 Foreseeability

The essence of the principle of legality, that an individual may not be surprised by prosecution for conduct she could not know was punishable, requires the law to be so clear as to make its consequences foreseeable. In this respect, the prosecution of core crimes gives rise to several problems, especially when the international criminalizations

\[139^7 \text{ See below notes 1416-1419.} \]
\[139^8 \text{ See above note 1393 ("accessibility and foreseeability").} \]
\[139^9 \text{ In other instances, the ECtHR has treated foreseeability as the only requirement to be satisfied. See e.g. ECtHR, C.R. v. the United Kingdom, 27 October 1995, para. 42-44.} \]
\[140^0 \text{ See e.g. ECtHR, G v. France, 27 September 1995, para. 24-25; ECtHR, Sunday Times v. UK, 26 April 1979, para. 48-49.} \]
are directly applied.\textsuperscript{1401} The old warning that criminal proceedings before national courts are "a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy"\textsuperscript{1402} has not lost its cogency. The rudimentary state of ICL negatively impacts its foreseeability in numerous ways. Both international criminalizations themselves and the system of ICL in which they are enforced possess a number of characteristics that negatively influence their foreseeability. In addition, the interplay between ICL and national law can lead to divergent or even conflicting demands on individuals.

First, most international criminalizations, including the core crimes, are not formulated as "classic prohibitions." As relevant treaties are generally addressed to States and not individuals, the difference between a direct international criminalization and an order for States to do so is not always evident.\textsuperscript{1403} Further, the need to compromise in international law-making often inhibits the formulation of clear, unambiguous criminalizations. Consequentially, many international criminalizations lack a detailed description of the prohibited conduct,\textsuperscript{1404} applicable penalties,\textsuperscript{1405} and even references to its character as a crime or its intended prosecution.\textsuperscript{1406} A pertinent example of an international crime which lacks a clear definition is aggression.

Second, as stated above when discussing accessibility, even when leaving aside the matter of national implementation, the law on the core crimes is contained in a plurality of formal sources. These sources complement each other, but at times they are at variance or even contradictory. For the foreseeability of customary rules, a plurality of material sources poses further problems. Custom is ascertained by the synthesis of many diverse material sources, most of which are not readily accessible for the average individual.\textsuperscript{1407} These sources, both national and international, often differ to a certain extent, which can lead to confusion about the precise content of the rule. A pertinent example is torture as a war crime or crime against humanity. In \textit{Delalic}, the ICTY resorted \textit{inter alia} to the Geneva Conventions and Protocols, CAT, 1975 Declaration on Torture, Universal Declaration of Human Rights, ICCPR, ECHR, ACHR, Inter-American Convention to Prevent and Punish Torture, African Charter on Human and Peoples' Rights, 1907 Hague Convention (IV), as well as jurisprudence of several international and regional judicial


"Those who have criticized the [Genocide] Convention for vagueness are absolutely correct. Any prosecutor would face formidable, if not insurmountable, obstacles: was there requisite "intent," was the elimination of the target group "substantial," was it an "act of state" or "military necessity" or "putative military necessity," is it applicable in civil wars, and would prosecution be an illegal interference in internal affairs? [...] The international community has not yet reached the point of civilization where offenses are unambiguously and unequivocally condemned."

\textsuperscript{1402} Lauterpacht 1944, p. 74.

\textsuperscript{1403} That ICL relies predominantly on the indirect enforcement model is reflected in its limited content specificity. See Bassiouni 1999a, p. 5. See further below, para. 6.

\textsuperscript{1404} See e.g. Rückert and Witschel 2001, p. 75 (on the lack of a definition of extermination as a crime against humanity prior to the ICC Statute).

\textsuperscript{1405} See below para. 5.4.

\textsuperscript{1406} See Paust 1997a, p. 664.

\textsuperscript{1407} See above para. 5.2.
bodies, to arrive at a definition of torture. Taking into account the ICTY’s elaborate treatment of these divergent provisions, it cannot be said that the elements of torture must have been crystal clear to the defendants at the time of their acts. Moreover, custom can be formed and adapted by digressing from established rules. The gradual process whereby violations of existing customary rules gain enough support to change the law and establish a new rule, with all uncertainties of a transitional period, is not exactly beneficial for the legal certainty of the individual.

Third, an important distinction between national and international criminal law is the lack of a supreme judicial authority in the latter system. A coherent body of case-law can remedy vagueness in the law to a large extent. International criminal law lacks a judicial body with the competence of authoritative interpretation. The various national and international courts influence each other to a significant extent, but are not formally bound to follow each other’s precedents. Thus, they sometimes give different interpretations of the same customary rules. The lack of a coherent body of case-law negatively affects the foreseeability of the core crimes.

The fourth problem concerns the interplay between national law and international criminalizations. This can take place in two different forms. National law can serve to implement international criminalizations, but it can also issue contradictory demands. While national implementing law spelling out the international crimes to be prosecuted will generally enhance foreseeability, both forms of interplay can actually diminish the foreseeability for the individual.

For all criminal law with an international component, rules of national law that are meant to clarify international norms, to complement them, or to enable their national enforcement, may well result in complex referrals to different bodies of law, doing little to enhance the individual’s legal certainty. In the particular case of core crimes law, such national rules can obscure the fact that it is ultimately international law that must determine the content of the rule. Regardless of the content of national law, core crimes

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1408 ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 452-497.
1409 See ECHR, Kokkinakis v. Greece, 25 May 1993, para. 40 ("In this instance there existed a body of settled national case-law [...]. This case-law, which had been published and was accessible, supplemented the letter of [the law] and was such as to enable Mr Kokkinakis to regulate his conduct in the matter.").
1410 See above, note 693-695.
1411 See ECHR, Kokkinakis v. Greece, 25 May 1993, para. 52 ("An offence must be clearly defined in the law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable"). Cf. Wasilkowski 1996, p. 335 (stating that the case-law of the European Court of Justice is what gives European law the character of a system).
law always binds the individual on the international level. Thus, when an international criminalization is transformed into a national law that is incomplete or in deviation, reliance on that national law might lead individuals to erroneously assume that their conduct is in conformity with international law.\textsuperscript{1414}

Likewise, a focus on the legal framework that determines the national enforcement of core crimes can distract attention from the fact that enforcement of these crimes can also take place in other States or by international tribunals and is not dependent on any particular implementation regime.\textsuperscript{1415} Thus, even the most thorough study of one's own legal system is of limited value when one is later prosecuted in other States or by an international tribunal, as some citizens of the former Yugoslavia and Rwanda have learned.

In addition, national law can impose demands on individuals that contradict those of international criminalizations. In fact, as many core crimes are State-sponsored, this might happen more often than not. When soldiers under a legal obligation to follow orders are ordered to commit war crimes, this clearly raises doubts about the foreseeability of the consequences of their conduct. This is especially the case when they are younger and in a position of dependence.

However, in recent practice, arguments about a lack of foreseeability are systematically dismissed, predominantly on the basis of the manifest illegality of the core crimes in question.\textsuperscript{1416} In \textit{Delalic}, the ICTY found that "it strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment."\textsuperscript{1417} In the \textit{Finta} case (1994), Justice Cory stated that "war crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes are vague or uncertain."\textsuperscript{1418} The Italian courts have rejected defenses of ignorance and mistake of law in several contemporary prosecutions of slavery, finding that slavery constitutes a "natural crime."\textsuperscript{1419}

\begin{footnotesize}
\begin{enumerate}
\item[1414] See Stahn 2000, p. 201.
\item[1415] Cf. ICTY, Trial Chamber, \textit{Furundzija}, 10 December 1998, para. 155: "Perpetrators of torture acting upon or benefiting from ... national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State.""
\item[1418] Canada, Supreme Court, \textit{R. v. Imre Finta}, 24 March 1994, Cory J., para. 215: "The definitions of crimes against humanity and war crimes include the gravest, cruellest, most serious and heinous acts that can be perpetrated upon human beings. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations."
\item[1419] See Lenzerini 2000, p. 275 and 277 (citing \textit{inter alia} cases from 1989 and 1993).
\end{enumerate}
\end{footnotesize}
These cases show how national and international courts generally see appeals to a lack of foreseeability as incompatible with the gravity of many of the core crimes. They signal that an indication for the prohibition of genocide and crimes against humanity under international law can be found as much in positive sources as in their very nature as universal crimes. Since Nuremberg and Tokyo, the international community has assumed that the prohibition of these crimes is common knowledge. This assumption is strengthened by the fact that the conduct that constitutes these crimes is criminalized by all legal systems in the world (as murder, assault, etc.). Because genocide, crimes against humanity and the more obvious war crimes are universally condemned, their prohibition can also be presumed to be known to everyone.

Consequently, foreseeability may not necessarily require knowledge of the exact definition of the crime. As one commentator rightly states, the negotiations on the ICC Statute show that the precise content of war crimes and crimes against humanity is not so well known and agreed upon as is often claimed. Yet, the differences are generally technical rather than fundamental and more likely to exculpate suspects whose conduct is widely regarded as criminal than to incriminate conduct that is generally seen as innocent. Simply put: the foreseeability of crimes like rape and murder in a non-international armed conflict does not in the first place depend on their precise definition under international law. In Kunarac, the ICTY affirmed its earlier holding in Furundzija that international law prohibited torture as war crime without defining the specific content of that prohibition. The assumption that the core crimes need not be defined in detail finds implicit support in various national laws that contain open rules of reference, for example to the laws and customs of war, and has been adopted in several national prosecutions. Such cases often rely on the manifest illegality of the crimes in question as a more important factor for establishing the foreseeability of their prosecution.

An exception should be made for various war crimes, since not all war crimes are manifestly illegal. Some war crimes can hardly be said to be of a self-evident nature, for example certain acts that do not involve bodily harm. It seems overoptimistic to

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1420 See Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 347 ("much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being mala in se").
1421 See Haveman 2003a, p. 60.
1422 ICTY, Trial Chamber, Kunarac, Kovac and Vukovic, 22 February 2001, para. 468-469.
1423 See e.g. U.S., Supreme Court, Ex Parte Quirin, 1943, 317 U.S. 1 at 29-30: "It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns.[... ] Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course."
1424 Note however that in this regard one cannot make a categorical distinction between crimes involving bodily harm and those that do not, but should judge the manifest illegality of war crimes in the context of specific situations. See Lauterpacht 1944, p. 79 (warning that it is not helpful "to establish a rigid distinction between offences against life and limb and those against property. Pillage, plunder and arbitrary
assume that the general public recognizes the manifest illegality of e.g. the abuse of the Red Cross signs, which constitutes a grave breach of the Geneva Conventions.\textsuperscript{1425} Other war crimes concern choices of a rather technical nature in large military campaigns, for example in the selection of targets. The line between permissible and forbidden belligerent action is not always clear-cut.\textsuperscript{1426} Even well-trained armies can face complex questions with debatable outcomes regarding the legality of their operational choices. The fact that war crimes are not of the same status as the other core crimes in this regard finds expression in the ICC Statute, which designates genocide and crimes against humanity, but not war crimes, as “manifestly unlawful” for the defense of superior orders.\textsuperscript{1427} This represents a retrogression from customary law for those war crimes that are manifestly illegal and may well complicate their prosecution.\textsuperscript{1428} Yet, it seems appropriate for those war crimes of a less self-evident nature.

In addition to manifest illegality, there is a second notion which mitigates problems of foreseeability for core crimes law. Where defendants perform public functions, often after expert trainings, they may be held to a higher standard of conduct than the average individual. This is the notion of Garantenstellung.\textsuperscript{1429} Military personnel can be expected to familiarize themselves with the laws of war, and State officials can be expected to have more knowledge of international law than private citizens.\textsuperscript{1430} After all, law may still satisfy the requirement of foreseeability if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.\textsuperscript{1431} If that can be expected from a private person,\textsuperscript{1432} it can a fortiori be expected from individuals responsible for the conduct of public affairs, who generally have the opportunity to consult legal advisors prior to the implementation of a given policy. Having the possibility to do so also implies a higher degree of foreseeability. At least to some extent, the same can be said with regard to individuals who exercise de facto authority and thereby are in a position to order and commit crimes under international law.\textsuperscript{1433} They can be expected to take special care in assessing the risks that such activity entails.
Together, the manifest illegality of many core crimes and the heightened standard of knowledge required from military personnel and civilians in a position of authority leave little room for a successful defense on the basis of a lack of foreseeability. After all, these two notions complement each other. War crimes that are not manifestly illegal are often committed by military personnel which may be assumed to know the laws of war. Choices in target selection for military campaigns may be complex, but the people making those choices are expected to go to lengths in studying the relevant law in order to make the right decisions.

Still, the manifestly illegal character of the core crimes may be a pivotal factor in determining the foreseeability of their criminal prosecution, but should not be used as a standard answer to routinely deny all appeals to the principle of legality. Care should be taken to address each *nullum crimen* defense on its merits, taking into account the international nature and special characteristics of the core crimes. This requires an analysis that is not overly narrow, but at the same time respects the line between moral indignation and legal prohibition. While the former feeds the latter, the grave character of the conduct is not in itself enough to reject a *nullum crimen* defense but can only support the legal analysis. In short, moral blame, criminality under national law and criminality under international law are three different qualifications of human behavior and should be distinguished as such. Admittedly, this is easier said than done.

That wholesale reliance on manifest illegality can yield problematic results is demonstrated by the German Borderguards case (2001) before the ECtHR. It should be noted that the following account concerns only the prosecution of the borderguard himself. The prosecution of policy makers responsible for the border regime is not comparable where it concerns the question of foreseeability and should thus be distinguished.

The applicant had been convicted of intentional homicide in Germany for shooting and killing a fugitive in 1972, when he served as a 20 year old borderguard in East-Germany. At that time, there was a clear gap between East-German law and policy. The law demanded proportionality and respect for the right to life and criminalized homicide even if committed pursuant to statute or orders, while State policy required the borderguard to act as he did: borderguards were instructed to shoot fugitives and non-compliance with these orders was punished as a negligence of duty. After the shooting, the borderguard was decorated and rewarded with a financial bonus. Some twenty years later, however, the regime changed and the borderguard was prosecuted for the killing. The German

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1434 See e.g. Klabbers 2003, p. 67 ("[The] very impossibility of defining [the core crimes] comprehensively [...] dictates that the *nullum crimen sine lege* defense need not be taken too seriously.").

1435 See Boot 2002, p. 177 ("[A]n arbitrary punishment cannot be atoned by moral judgment about the conduct concerned, as the principle of *nullum crimen sine lege* exactly protects against such weighing of interests.").


1438 *KHW. v. Germany*, para. 71.

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courts differed slightly in their reasoning but predominantly relied on Radbruch’s formula, which essentially posits that positive law should not be applied if this will lead to intolerable injustice. In all instances, the German courts found the shooting to be manifestly illegal and therefore punishment of the borderguard to be justified.

The ECtHR judged the prosecution of the borderguard not to be in violation of the principle of legality embodied in Art. 7 ECHR. In a confused and unclear judgment, the Court effectively suggested that the principle of legality can be interpreted as more lenient than normally where the most fundamental human rights are at stake and that individual criminal responsibility can be derived solely from human rights law. The Court grounded the permissibility of the prosecution on the illegality of the conduct both in national and international law, but at the same time seemed to perform a balancing act between the principle of legality and the right to life. It did not make a clear choice for any of these options, however, and thereby undermined the persuasiveness of all of them.

In answering the question whether the prosecution was foreseeable at the time of the shooting, the ECtHR relied on the manifest illegality of East-Germany’s border control policy. The Court took the view that “even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR’s own legal principles but also internationally recognised human rights.” It cited approvingly the German Bundesverfassungsgericht as stating: “The decisive factor is that the killing of an unarmed fugitive by sustained fire was, in the circumstances of the case, such a dreadful act, not justifiable by any defence whatsoever, that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the proportionality principle and the elementary prohibition on the taking of human life”.

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1440 See for the facts, the relevant national law and the proceedings in the German courts KHW. v. Germany, para. 10-33 and Rytter 2003, p. 41-45; Schmidt 2002, p. 73-78; Gropp 1996. References to German literature can be found in Arnold, et al. 2003.
1441 See para. 88-90: “[R]egarding being had to the pre-eminence of the right to life in all international instruments on the protection of human rights [...] the Court considers that the German courts’ strict interpretation of the GDR’s legislation in the present case was compatible with Article 7 § 1 of the Convention. [...] The Court considers that a State practice such as the GDR’s border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as “law” within the meaning of Article 7 of the Convention.”
1442 See para. 103 (“Even supposing that [individual criminal] responsibility cannot be inferred from the above-mentioned international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 of the GDR’s Criminal Code”).
1443 See for a lucid analysis on this point Rytter 2003, p. 43-59.
1444 KHW. v. Germany, para. 76.
1445 Id., para. 80. See also Bothe 1996, p. 296.
It is submitted here that the finding that the borderguard could have foreseen the illegality of killing an unarmed fugitive in 1972 is, like the Court’s suggestion that individual criminal responsibility can be based solely on human rights instruments, mistaken. National law, which must always be assessed in its totality, including administrative regulations and relevant orders,\(^\text{1446}\) did evidently not provide sufficient notice. On the contrary: it provided notice that disobedience of the order to shoot would be punished. As for international law, the Court found that the human rights to life and freedom of movement sufficiently established the illegality of the shooting.\(^\text{1447}\) This argument fails for two reasons.

First, East-Germany was a party neither to the ECHR nor to the ICCPR at the material time. The Court therefore needed to take a two-step approach: it derived foreseeability from international human rights law, which should have been known by the borderguard because national law referred to it.\(^\text{1448}\) Of course, this selective reliance on national law is unfair, as it disregards the fact that anyone looking to the totality of East-German law in 1972 would conclude that apparently the human rights law referred to did not preclude the border control policy under dispute.\(^\text{1449}\)

Second, and more importantly, the assertion that the international rights to life and freedom of movement in 1972 unambiguously precluded the border control policy is questionable at least. Under the human rights conventions, both rights are subject to exceptions regulated by law\(^\text{1450}\) and East-Germany was not the only State to provide such exceptions. Certainly at that time, but still today, several States restricted the right of their citizens to leave the country.\(^\text{1451}\) The suggested international consensus on the illegality of the use of deadly force against an unarmed fugitive in 1972 is even more doubtful. This can be aptly demonstrated by reference to the American case *Tennessee v. Garner* (1985).\(^\text{1452}\) It should be noted in this regard that both *Garner* and *KHW v. Germany* concerned the killing of fleeing suspects of non-violent crimes: whatever one may think of the GDR legal system at that time, it is undisputed that by crossing the border, fugitives committed an offence against GDR law.

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\(^{1446}\) In assessing the foreseeability of the law, regard should be had to all relevant sources, including e.g. administrative practice. Cf. ECHR, *Leander v Sweden*, 25 February 1987, para. 51 and ECHR, *Silver and others v United Kingdom*, 25 February 1983, paras. 88-89.

\(^{1447}\) *KHW v. Germany*, para. 92-101 and 105.

\(^{1448}\) Id., para. 104-105:

"[A]lthough the event in issue took place in 1972, and therefore before ratification of the International Covenant, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights, as he could not have been unaware of the legislation of his own country. In the light of all of the above considerations, the Court considers that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.”

\(^{1449}\) Cf. Pieroth and Jarass 1995, p. 888-889.

\(^{1450}\) See ECHR Art. 2 (2) and Protocol 4, Art. 2 (2); ICCPR Art. 6 (1) and 12 (3).

\(^{1451}\) See generally Jayawickrama 2002, p. 451-457.

In *Garner*, the US Supreme Court judged the constitutionality of a statute which provided that after giving notice of an intent to arrest, a police officer “may use all the necessary means to effect the arrest.”1453 The specific case concerned the shooting and killing of a burglary suspect in 1974, two years after the shooting that gave rise to the borderguards case. While the lower courts were divided on the matter, the Supreme Court ruled that the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect violated the US Constitution.1454 Three judges dissented, placing the public interest of law enforcement above that of the individual, and finding that “the legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.”1455 At that time, numerous American states entertained a similar rule on the use of deadly force as Tennessee.1456

Although the US Supreme Court in *Garner* found the use of deadly force to be unreasonable, that conclusion was controversial. This can be seen in the lack of unity in the findings of the different courts and judges involved, the fact that a similar rule on the use of deadly force was in operation in many American states and the way the judgment was received in the legal community.1457 Moreover, *Garner* was concerned with the constitutionality of the shooting and not the individual criminal responsibility of the police officer. Also, the holding in *Garner* is a narrow one. Even today, it is interpreted in the U.S. as ruling out the use of deadly force to prevent the escape of an unarmed, non-dangerous *suspect*, but not of an unarmed, non-dangerous *detainee*.1458 Likewise, in South-Africa the killing of an unarmed, non-dangerous suspect of a minor crime was under circumstances regarded as justifiable homicide well into the 1990’s and its (il)legality is still a matter of some controversy.1459 Although the situation might be different today,1460 these examples indicate that in 1972 the illegality under international law of the killing of an unarmed, non-dangerous fugitive was questionable at best.

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1453 Id., at 1696.
1454 Id., at 1701.
1455 Id., at 1710-1711:

“Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. [...] A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable...”

1456 Id., at 1703-1704.
1457 See e.g. Allen, *et al.* 1995, p. 882 (one of the questions following *Garner* asks “if a person who chooses to communicate by telephone in effect forfeits any privacy interest in the identity of the number dialed, [...] why should a person who chooses to be a fleeing burglar not forfeit the right to personal safety?”).
1458 See U.S., Court of Appeals (Fifth Circuit), *Brothers v. Klevenhagen*, 1 August 1994, 28 F.3d 452 (killing of an unarmed, non-dangerous pretrial detainee to prevent his escape is not constitutionally unreasonable). See on this case *White III* 1995.
1459 See Burchell 2000, p. 212.
1460 See ECtHR, *Nachova and others v. Bulgaria*, 26 February 2004, para. 103:

“[B]alanced against the imperative need to preserve life as a fundamental value, the legitimate aim of effecting a lawful arrest cannot justify putting human life at risk where the fugitive has committed a non-violent offence and does not pose a threat to anyone. Any other approach would be incompatible with the basic principles of democratic societies, as universally accepted today...”
While the circumstances of the cases were very different, both the borderguards case and Garner turned essentially on the legitimacy of killing an unarmed, non-dangerous fugitive to prevent his escape. It took the American judiciary more than ten years to find a final answer in that specific case, without even having mentioned the individual criminal responsibility of the police officer involved. In this light, it seems rather unreasonable to expect a 20-year old indoctrinated borderguard, at the bottom of the hierarchy and subject to disciplinary proceedings, to conclude that the border control policy regulated by national law evidently fell outside the legitimate exceptions to the right to life and freedom of movement and should therefore not be executed.

In sum, the borderguards case illustrates how anger over an immoral act or regime can tempt us to blur the line between moral indignation and legal prohibition under the guise of manifest illegality. At the same time, it is open to discussion whether his conduct can be classified as a crime against humanity. This should warn us that even for core crimes, arguments concerning a lack of foreseeability cannot be rejected out of hand.

But while the borderguards case cautions against automatic reliance on the manifest illegality of core crimes, it is not a reason to discard the notion altogether. The circumstances of the case - in particular its highly institutionalized setting, the law enforcement character of the act and the fact that the comparable use of deadly force is not uncommon in other situations - set it apart from the great majority of core crimes. Most core crimes involve acts of cruelty, discriminatory acts against particular groups, or other acts that are criminalized everywhere. Their manifest illegality is therefore a very different matter, as indicated by the fact that they are generally concealed rather than celebrated in public after the fact. It is hard to disagree with the finding of the ICTR in judging the discriminatory acts of sexual violence, beatings and murders in Akayesu that “it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.” The same is true for most core crimes.

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1461 See KHW. v. Germany, para. 17 (“[T]he [German] Regional Court held that, even for a private soldier, it should have been obvious that firing at an unarmed person infringed the duty of humanity.”) and Concurring Opinion of Judge Bratza, joined by Judge Vajic (“I can find no reason to depart from the considered opinion of the national courts that opening fire on a defenceless person, who was attempting to swim away from East-Berlin and who posed no threat to life or limb, so clearly breached any principle of proportionality that it was foreseeable that it violated the legal prohibition on killing.”).

1462 The ECtHR did not reach a decision on this point. See KHW. v. Germany, para. 106. The judges were divided on this question in their individual opinions. Compare Concurring Opinion Judge Loucaides (concluding that the killing constituted a crime against humanity) with Partly Dissenting Opinion of Judge Cabral Barreto and Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupancic.


1464 Although core crimes perpetrators, particularly those in the military, are regularly praised and rewarded in their own States, such public appraisal is normally confined to the individuals involved and not the specific crimes they have committed.

1465 ICTR, Trial Chamber, Akayesu, 2 September 1998, para. 616.
5.4 Penalties

The principle *nulla poena sine lege* prohibits retroactive penalties. It is undisputed that the principle forbids the imposition of heavier punishment than the one applicable at the time of the crime.\(^\text{1466}\) The status of another requirement commonly attributed to the *nulla poena* principle\(^\text{1467}\) is less clear under international law: the mandatory indication of the applicable penalties in law. Most human rights instruments do not formulate any demands regarding specificity or form of the determination of the penalty. The relevant provisions require a definition of the crime in law, but their demands regarding penalties are generally limited to the prohibition of heavier penalties than those applicable at the time of the crime.\(^\text{1468}\) Since doctrine generally perceives the *nulla poena* principle as a major obstacle to direct application of international criminal law,\(^\text{1469}\) I will treat it in some detail.

In practice, roughly four approaches can be discerned regarding the requirement of an indication of the penalty for core crimes. First, a strict approach to the *nulla poena* principle sees a clear indication in law of the penalty to be incurred as a prerequisite for prosecution, also for the core crimes. As an example of this approach, the preamble to Rwanda's law on the national prosecution of the international crimes committed in the 1990’s states that prosecutions must be based on the national penal code because the relevant international conventions lack corresponding penalties.\(^\text{1470}\) However, it should be

\(^\text{1466}\) See Universal Declaration of Human Rights, Art. 11 (2); ECHR Art. 7 (1); ICCPR Art. 15 (1); IACHR Art. 9. See also e.g. HRC, *Casafranca v. Peru*, Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, (Communication No. 981/2001) (September 19, 2003), para. 7.4; ECHR, *Jamil v. France*, 25 May 1995, para. 34-36. But see ICTY, Trial Chamber, Delalic et al., 16 November 1998, para. 1210-1212. The prohibition of heavier penalties should not be confused with the mandatory application of lighter penalties enacted after the crime, the *lex mitior* principle. While the two are often grouped together, for example in Art. 15 (1) ICCPR, the *lex mitior* principle is distinct from the *nulla poena* principle.


\(^\text{1468}\) See provisions cited above, note 1466. But see Art. 7 African Charter on Human and Peoples' Rights ("No penalty may be inflicted for an offence for which no provision was made at the time it was committed.").


\(^\text{1470}\) See Organic Law No. 40/2000 of January 26, 2001 setting up "Gacaca Jurisdictions" and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, Preamble:

"Given that the acts committed are offenses provided for and punished by the Penal Code as well as the crime of genocide or crimes against humanity;
Given that Rwanda has ratified those three conventions and published them in the Official Gazette of the Republic of Rwanda without having provided penalties for these crimes;
Whereas, consequently, prosecutions must be based on the Penal Code;"

See also Organic Law No. 08/96 of August 30, 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, preamble. Cited in Schabas 2003b, footnote 42.
noted that the sources referred to before reaching that conclusion include the national principle of legality in Rwanda’s 1991 Constitution, but not the international principle of legality.\footnote{1471}

The second approach to the \textit{nulla poena} principle requires a clear indication of the penalty, but allows recourse to relevant ordinary crimes in force at the time of the offence to “borrow” such an indication.\footnote{1472} Thus, it allows punishment for the core crimes under application of the penalties proscribed for ordinary crimes such as murder and assault. The drafters of the statutes of the ICTY and the ICTR, although divided on this question,\footnote{1473} ultimately decided to demand both tribunals to “have recourse to the general practice regarding prison sentences” in the courts of the countries concerned.\footnote{1474} While the language of these provisions leaves open the question whether this recourse to national penalties is binding or merely a policy choice, the drafting history indicates that the aim of the proposers was to satisfy the \textit{nulla poena} principle.\footnote{1475}

Yet, both \textit{ad hoc} tribunals squarely rejected the notion that the \textit{nulla poena} principle requires recourse to national penalties.\footnote{1476} In \textit{Erdemovic}, the ICTY stated that:

\begin{quote}
“It might be argued that the reference to the general practice regarding prison sentences is required by the principle \textit{nullum crimen nulla poena sine lege}. Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality…”\footnote{1477}
\end{quote}

In contravention of the intentions of the proposers of the provision, both the ICTY\footnote{1478} and the ICTR\footnote{1479} have consistently held that the recourse to national sentencing practice is not required by the \textit{nulla poena} principle, but constitutes solely a non-binding guideline.\footnote{1480}

Other indications for support or opposition of the second approach are ambiguous. No recourse to national penalties is required under the ICC Statute. However, the Statute

\textit{Id.}, referring to Rwanda’s 1991 Constitution, Art. 12, which reads in relevant part:

\begin{quote}
“[…]
(2) The liberty of the human being shall be inviolable; no one may be prosecuted, arrested, imprisoned, or convicted other than in the cases prescribed by the law in effect at the time of the perpetrated act and within the forms prescribed by that law.
(3) No infraction may be punished by penalties which were not prescribed by law before it was committed.”
\end{quote}

\footnote{1472}{See Schabas 1997, p. 469-473.}
\footnote{1473}{See Statute ICTY, Art. 24 (1) and Statute ICTR, Art. 23 (1).}
\footnote{1474}{See Schabas 1997, p. 469-473 and 482.}
\footnote{1475}{See Schabas 2000c, p. 528-536.}
\footnote{1476}{ICTY, Trial Chamber I, \textit{Erdemovic} Sentencing Judgment, 29 November 1996, para. 38.}
\footnote{1478}{See \textit{Prosecutor v. Serushago}, Case No. ICTR-98-39-A (Appeals Chamber), April 6, 2000, para. 30.}
\footnote{1479}{See Lamb 2001, p. 758-762.}
contains a general provision on penalties and has no retroactive application. Therefore, the *nulla poena* question does not present itself as it did for the *ad hoc* tribunals. Some national judgments assert that the *nulla poena* principle may be satisfied by application of the penalty provisions of national criminal law. Yet, the value of most of these pronouncements for international law is limited, as explained above, due to the convergence of national and international principles of legality. For example, the Belgian *Pinochet* judgment (1998) suggested recourse to the penalties provided for corresponding offences in national law, but explicitly based that requirement on the national principle of legality. It thus provides an indication of the content of the Belgian, but not necessarily the international formulation of the *nulla poena* principle.

The third approach minimizes the required indication of the penalty for the core crimes, sometimes to the point of discarding it altogether. What the principle requires, the argument essentially posits, is a warning that there will be a penalty, or perhaps a broad indication of its form or severity, but not a precise description. Thus, in its strongest form this approach effectively discards the strict condition of an indication of the penalty and merely requires an indication of criminality. After all, conduct can be criminalized without specification of a corresponding penalty. The ILC has in its work on the Draft Codes of Crimes Against the Peace and Security of Mankind adhered to the view that an indication of criminality, rather than a precise penalty, suffices for international crimes. Accordingly, the different Draft Codes contain only minimal penalty provisions. In its commentary on the 1996 Draft Code, the ILC asserted that "it is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment." Various States, however, objected to this position.

1481 See Art. 77 ICC Statute.
1482 See Belgian *Pinochet*, para. 3.3.2.
1485 See Art. 3 Draft Code 1996:

"An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime."

Art. 3 (1) Draft Code 1991:

"An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment."

Art. 5 Draft Code 1951:

"The penalty for any offence in this Code shall be determined by the tribunal exercising jurisdiction over the individual accuse, taking into account the gravity of the offence."

(Deleted in 1954. See Triffterer 1966, p. 77-78.)
1486 See Art. 3 Draft Code 1996, Comment 7:

"It is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgement and in article 15 (2) of the International Covenant on Civil and Political Rights."
Traditionally, many different States accepted a minimal indication of penalties, or even a lack thereof, for all crimes. Common law systems have long accepted the power of the courts to determine the applicable penalties where the law was silent. In legal systems based on Islamic law, the courts still have discretion to apply unspecified penalties for a particular category of offenses (Ta’azir) whereas for other categories the penalties are fixed. Yet, most States, including common law systems, today take the view that not only the crime but also the applicable penalties require definition in law. The ECtHR has held unambiguously that, as a general rule, penalties must be defined by law. The IACtHR, on the other hand, has suggested that a broad indication of the punishment to be incurred might suffice.

For the core crimes, however, the “minimalist” approach finds support in practice until the present day. Several post-WWII prosecutions set aside the penalty requirement. The Dutch prosecution of Rauter (1949), resulting in his death sentence, discarded the nulla poena argument because important interests of justice “do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous

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1488 See e.g. U.S., Court of Oyer and Terminer, at Philadelphia, Republica v. De Longchamps, October Sessions, 1784, 1 Dall. 111 at 116 (“Punishments […] must be such as the laws expressly prescribe; or where no stated or fixed judgment is directed, according to the legal direction of the court.”).
1490 See e.g. U.S., Cook v. Commonwealth, 1995, 20 Va. App. 510 (defendant could not be convicted for second-degree murder because legislator had prescribed conduct but by oversight omitted a corresponding penalty); U.S., Court of Appeal, State v. LaMaster, 1991, 811 S.W.2d 837; South-Africa, Transvaal Provincial Division, S v Theledi, 7 October 1991. [1993] 2 SA 402. But see Zambia, High Court, Thomas James v. State, 18 April 1974, 8 The comparative and international law journal of Southern Africa 152 at 154 (finding that a legal provision can amount to a criminalization in the absence of a penalty and that the breach of a prohibition in unambiguous and imperative terms regulating a matter of “public grievance,” must be held an offence unless the contrary intention is manifest); U.S., Court of Appeal, Nunley v. State, 2001, 26 P.3d 1113.
1491 See ECtHR, Coëme and Others v. Belgium, 22 June 2000, para. 145 (“[O]ffences and the relevant penalties must be clearly defined by law.”); ECtHR, C.R. v. the United Kingdom, 27 October 1995, para. 33 (“[O]nly the law can […] prescribe a penalty”).
1492 See IACtHR, Castillo Petrazzi et al., 30 May 1999, para. 121 (“This Court has stated that the principle of penal legality “means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.”
1493 See Schabas 1997, p. 469; United Nations War Crimes Commission 1947, vol. 15, p. 166-169. See also Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496 at 504 (“Hague Convention No. IV of 1907 contains legal rules with penal sanctions and therefore there is no room for objection based on the principle nulla poena sine lege.” It is, however, unclear from the judgment where the Polish court in this case found these penal sanctions, since the Hague Convention does not contain explicit provisions to that effect.).
threat of punishment was absent." Some more recent national judgments regarding core crimes have likewise dismissed objections based on the *nulla poena* principle.

The ECtHR adhered to the minimalist approach for core crimes in *Naletilic* (2000). As set out above, the ECtHR held that a defendant accused of crimes against humanity and war crimes before the ICTY could not rely on the prohibition of heavier penalties in Art. 7 (1) ECHR. Instead, the Court held, if the principle of legality in the ECHR applied to this case at all, Art. 7 (2) was the relevant clause. This clause does not contain any requirements about the penalty to be applied. It is noteworthy that the ECtHR has effectively left aside the *nulla poena* principle also in a few cases involving ordinary crimes. In its well-known judgments regarding the punishability of marital rape in the United Kingdom, the Court focused on the object and purpose of the principle of legality to avoid strict scrutiny of its different elements. In doing so, it minimized the *nulla poena* principle, concentrating instead on the question of foreseeability. The ECtHR appealed to the manifest illegality of the conduct in question, perhaps implying like the Dutch court in *Rauter* that the *nulla poena* principle should be interpreted less strictly for particular serious crimes, like the core crimes, if a strict interpretation would preclude their punishment altogether.

Finally, it has been argued that the *nulla poena* principle does require an indication of the penalty, but that this condition is satisfied for the core crimes by a general principle of international law laying down that the most serious crimes deserve the heaviest penalties available. Accordingly, this approach would allow national courts to punish the core crimes on the basis of international criminal law, under application of the heaviest penalties available in their national laws. Like the minimalist approach, the appeal to a general principle of the heaviest penalties for the gravest crimes can be traced back to post-WWII jurisprudence. The Norwegian Supreme Court, for example, held in *Klinge* (1946) that according to the laws and customs of war, "war crimes can be punished by the most severe penalties, including the death penalty. In other words, the criminal character of the acts dealt with in the present case as well as the degree of punishment are already laid down in International Law in the rules relating to the laws

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1495 See e.g. Austria, Supreme Court (Oberster Gerichtshof), Cvjetkovic, 13 July 1994, available at http://www.ris.bka.gv.at/ (finding that the acts in question were contrary to humanitarian law, *inter alia* the Geneva Conventions "sodaß - der Beschwerde zuwider - der Grundsatz "nulla poena sine lege" vorliegend gar nicht zutrifft"); Canada, Supreme Court, *R. v. Imre Finta*, 24 March 1994, Cory J., para. 218-227.
1496 See above, note 1342 and accompanying text.
1499 ECtHR, *C.R. v. the United Kingdom*, 27 October 1995, para. 42.
1500 See e.g. Peyró 2003, p. 83; Schabas 1997, p. 474. But compare Schabas 2003b, p. 62 (stating that the phrase "effective penalties" in the Genocide convention is "hardly enough to respect the principle of legality").
1501 See United Nations War Crimes Commission 1947, vol. 15, p. 200 (citing several national prosecutions where the death penalty was imposed for non-homicidal crimes, such as torture and rape, and concluding that "[i]nternational law lays down that a war criminal may be punished with death whatever crime he may have committed.").
and customs of war." This approach still finds support in practice. The ICTY relied on "the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity" in Erdemovic and on similar reasoning in Delalic. The ICTR seemed to endorse this approach in more implicit terms in Akayesu.

To sum up, there are strongly divergent interpretations of the nulla poena principle. While some regard an indication in law of the specific penalty to be incurred as a conditio sine qua non for core crimes prosecutions, others dispute the applicability of this requirement altogether. State practice reflects this divergence also in national legislation regarding the core crimes. A cursory survey reveals that national legal systems differ considerably in the specificity of penalties for the core crimes. Most States determine maximum penalties, many of them set minimum penalties and they all allow for considerable, if differing degrees of discretion in the judicial determination of the penalty in specific cases. Some national laws contain very broad penalty provisions. The Swiss Military Penal Code, for example, provides in Art. 109:

"Violations of the Laws of War:
(1) Whoever acts contrary to the provisions of any international agreement governing the laws of war or the protection of persons and property, or whoever acts in violation of any other recognized law or custom of war shall be punished with imprisonment except in cases where other provisions involving more severe sanctions are applicable. For offences of high gravity the penalty is penal servitude.
(2) For offences of little gravity, the punishment can consist of a disciplinary sanction."

Obviously, the rather open categorization of offences according to their gravity, with different corresponding penalties and the fact that only the form of punishment is

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1502 Norway, Supreme Court, Klinge, 27 February 1946, Annual Digest 1946, p. 262 at 263.
1504 ICTY, Appeals Chamber, Delalic et al, 20 February 2001, para. 817:
"There can be no doubt that the maximum sentence permissible under the Rules ("imprisonment for [...] the remainder of a convicted person's life") for crimes prosecuted before the Tribunal, and any sentence up to this, does not violate the principle of nulla poena sine lege. There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties."

1505 ICTR, Akayesu, Sentencing Judgment, 2 October 1998 ("Rwanda like all States which have incorporated crimes against humanity or genocide in their domestic legislation has envisaged the most severe penalties in its criminal legislation for these crimes.").
1508 See e.g. Art. 127 Egyptian Penal Code (generally understood to cover cases of torture, indicating a penalty of imprisonment of unspecified duration for public officials imposing excessive or unlawful punishment); Art. 20 (2) Bangladesh's International Crimes (Tribunals) Act 1973 (Act No. XIX of 19 July 1973) (providing for a "sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper." Note, however, that no prosecutions have ever been undertaken on the basis of this act). See on Art. 127 Egyptian Penal Code also Abdelgawad 2002, p. 377.
indicated but not the duration, starkly limit the predictability of the punishment to be incurred.\textsuperscript{1510}

The same schism as in national legislation is found in the work of the ILC,\textsuperscript{1511} and the drafting process of the ICTY Statute, where some States proposed general penalty provisions in line with the minimalist approach, determining for example that “penalties shall be based on ‘general principles’ of law as they exist in the world’s major legal systems” or that the Tribunal would “have the power to sentence convicted persons to imprisonment or other appropriate punishment.”\textsuperscript{1512} Yet, other States found such general provisions unacceptable and wanted the ICTY to derive the penalties from the criminal law and practice of the Former Yugoslavia.\textsuperscript{1513} While a provision to that effect was ultimately included in the Statute, the ICTY in its judgments subsequently relativized the need for and binding character of recourse to national law.

But in the final analysis, State practice suggests that the principle of legality under customary international law does not preclude the prosecution of the core crimes in the absence of specified penalties. When distinguishing the international principle of legality from its stricter national counterparts, it seems that no court has declared punishment of a core crime inadmissible on the basis of the \textit{nulla poena} principle in international law.\textsuperscript{1514} Instead, there is ample authority for the propositions that a broad indication of the applicable punishment suffices for the prosecution of core crimes, or that these crimes by definition attract (up to) the highest available penalties. In practice, the result of these two approaches is more or less the same, namely far-going sentencing discretion for the courts. Moreover, there also is considerable support for the proposition that core crimes may be punished under recourse to the penalty provisions of relevant ordinary crimes. While various States argue for a stricter approach to the applicable penalties, at present their views seem to be no more than aspirational.\textsuperscript{1515}

From a policy perspective, it may be questioned whether a stricter interpretation of the \textit{nulla poena} principle is desirable. After all, the admissibility of prosecutions on the basis of unwritten law\textsuperscript{1516} has important consequences for the indication of the penalty. Since international law does not demand a written provision for the prosecution of core crimes, the required precision of the penalty can likewise only be limited. Thus, the characteristics of core crimes law oppose too strict a standard for the provision of

\textsuperscript{1510} See Ziegler 1997, p. 580 (“[T]he judge remains free to mete out a penalty from a mere three days of imprisonment to 20 years of penal servitude, according to whether he finds a case of ordinary or high gravity and the mitigating circumstances he establishes.”).

\textsuperscript{1511} See above, note 1487.

\textsuperscript{1512} See Schabas 1997, p. 473.

\textsuperscript{1513} See above, note 1475.

\textsuperscript{1514} One of the dissenting judges of the Argentinean Supreme Court in the extradition proceedings concerning Erich Priebke asserted that the \textit{nulla poena} principle prevented extradition or prosecution under direct application of international criminal law. The majority of the Supreme Court, however, rejected this approach. See Mattarollo 2001, p. 36-37 and above, Chapter II, para. 3.3.m.

\textsuperscript{1515} See on the limited weight of the provisions of the ICC Statute in this regard above, text preceding note 1364.

\textsuperscript{1516} See above, para. 5.1.
penalties. This is not necessarily problematic. If States regard a broad indication of the sort of punishment as sufficient, as in Art. 109 Swiss Military Penal Code and some other national laws, it seems overly formalistic to hold the imposition of imprisonment under customary international law in violation of the principle of legality. While national law generally curtails the discretion of the courts by additional rules and jurisprudence, it often leaves them considerable latitude as well.

On the other hand, the principle that core crimes attract the highest penalties seems unfit for “minor” war crimes. While national laws generally impose the highest penalties for at least homicidal acts that amount to core crimes, this is often not the case for acts that do not involve bodily harm, such as property crimes (pillage) and abuse of internationally protected emblems. Most national laws impose considerably lower sentences than the maximum for such crimes, and some even impose solely a fine, instead of imprisonment. Therefore, complete discretion for national courts to punish such crimes with any penalty up to the maximum seems problematic. Yet, this problem may be mitigated to some extent by the possibility for national courts to derive sentencing directions for core crimes from the practice of international and other national courts, and the rules of the ICC.

Finally, it is submitted here that mandatory resort to penalties attached to relevant ordinary crimes has rightfully been rejected by the ad hoc tribunals. This sentencing approach is not only unnecessary, but even harmful for the development of international criminal law as it denies its ability to function independently. Moreover, it is doubtful whether this approach provides an appropriate answer to nulla poena concerns. The crimes from which penalties are “borrowed” might be superficially comparable, but ultimately they are different crimes. This is shown most clearly in cases based on universal jurisdiction, where the ordinary crimes which provide the penalties can simply not apply to the conduct to be punished. If, for example, General Pinochet had been prosecuted in Belgium under application of the penalties of corresponding crimes as suggested, his judges would have had to apply the penalty provisions of either Belgian ordinary crimes that did not apply to conduct in Chile, or Chilean ordinary crimes that could not be prosecuted in Belgium. It can be asked whether such a course furthers either the legal certainty of the individual or the delimitation of State power.

6 Which Criminalizations are Directly Applicable?

What now remains is a translation of the general international rule into a more specific assessment of core crimes law. In other words, when do international criminalizations of the core crimes meet the requirements of the international principle of legality? Since international law does not impose firm conditions for the direct application of its rules in

1517 See e.g. Art. 13 of India’s Geneva Conventions Act, 1960.
1519 See above Chapter V, para. 4.
general, the principle of legality constitutes international law’s threshold test for the direct application of core crimes law in national courts.

International law’s lack of more general demands for direct application finds illustration in the parallel applicability of international rules and national implementing laws. The fact that the legislature has adopted implementing legislation for a treaty does not rule out its simultaneous direct application through a general rule of reference. Nor does a domestic implementation clause in a treaty prevent the direct applicability of its provisions. There are good practical reasons why many treaties specifically call for legislative action by the States Parties, but that does not make domestic legislation a necessary condition for the effectuation of those treaties in national courts. In general, domestication of a treaty may improve its effectuation, and in various States legislative action is necessary to make the treaty effective. In the particular case of international criminalizations, the provision of specified penalties in national law is not necessary, but certainly desirable. Yet, those practical reasons to call for implementing legislation do not rule out the direct application of international rules in those States whose constitutional framework allows it, neither for general international law nor for international criminal law. Thus, the fact that the Genocide Convention contains a domestic implementation clause in Art. 5 does not rule out the direct application of its criminalization of genocide.

As concluded above, the principle of legality in international law requires both a sufficiently specific definition of an act and a clear indication that it attracts individual criminal responsibility. It does, however, neither require a written law nor a specification of the precise penalty to be incurred. Where national criminal law contains a specific rule of reference to international core crimes law, these conditions will almost always be met.

The harder question is when international criminalizations are sufficiently developed to form the basis for core crimes prosecutions in the absence of a specific rule of reference in national law (general direct application). The test for answering it is complex and does certainly not lie in a comparison to the classic formulation of offences in national criminal law. International law can well define an act and make it punishable without explicitly mentioning criminal proceedings, courts or penalties. But on the other hand, not every act that is prohibited under international law attracts individual criminal responsibility. Moreover, one must be careful to distinguish acts that are criminal under

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1520 See above, p. 20.
1525 Cf. Triffterer 1966, p. 30-34.
1526 See ICTY, Trial Chamber, Tadic, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 70 (“The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability.”). See also Cassese 2003a, p. 50.
international law from those for which international law merely imposes an obligation on States to criminalize them without doing so itself.

For customary international law, one must look to a vast array of material sources. In particular, one should note that the definition of the act and its criminalization may be contained in separate material sources. An act may be defined in a treaty, while its criminality stems from the fact that it has consistently been prosecuted in national courts or prohibited in military manuals. At present, the ICC Statute and the corresponding Elements of Crimes provide a catalogue of core crimes under customary international law that is on the whole highly authoritative. Yet, these instruments contain some offences that are of doubtful customary status and omit others that are well-established. Thus, the ICC Statute provides important guidance but can not substitute for the broader body of customary international law.

The analysis whether customary international law attaches individual criminal responsibility to a particular act is complicated and may lead to debatable outcomes. An apt illustration of this point is found in the ICTY case of Vasiljevic, a rare example of a successful nullum crimen defense in a core crimes prosecution. In Tadic, the ICTY had found that “the acts proscribed by common Article 3 [Geneva Conventions] constitute criminal offences under international law” and in Blaskic that the offence of violence to life and person, contained in Common Art. 3 Geneva Conventions, “is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences.” In Vasiljevic, however, the Trial Chamber departed from its earlier holdings and found the offence of violence to life and person to be insufficiently defined under customary international law. Therefore, it could not be charged as a violation of the laws and customs of war under Art. 3 ICTY Statute.

The Trial Chamber noted that “[b]oth “life” and the “person” are protected in various ways by international humanitarian law.” Yet, “[i]n the absence of any clear indication in the practice of states as to what the definition of the offence of “violence to life and person” identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists

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1529 See ICTY, Trial Chamber, Vasiljevic, 29 November 2002.
1530 ICTY, Trial Chamber, Tadic, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 67. See also ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128-137.
1531 ICTY, Trial Chamber, Blaskic, 3 March 2000, para. 182.
1532 ICTY, Trial Chamber, Vasiljevic, 29 November 2002, para. 193-204.
1533 Id., para. 195.
under that body of law." The Trial Chamber did convict the defendant for his acts on charges of persecution as a crime against humanity and murder as a violation of the laws and customs of war. Thus, it disputed solely the criminality of violence to the life and person under customary international law, not the foreseeability of prosecution for the acts under scrutiny. It should further be noted that Vasiljevic is not representative for the case law of the ICTY and has been strongly criticized by several commentators. Still, the case illustrates the complexities of establishing individual criminal responsibility under customary international law.

If treaty-based criminalizations of the core crimes are to be directly applied in their own right, id est not as evidence of customary law, they must contain both the definition of the act and an indication of its criminality. But if that is the case, no other demands need to be fulfilled. The Genocide Convention, for example, defines genocidal acts (Art. 2 and 3) and declares them to be “crime[s] under international law” (Art. 1) and “punishable” (Art. 3). Of course, national law may well rule out direct application of the Genocide Convention and in practice national courts will more often than not regard it as an inadequate legal basis for prosecution. To satisfy the international principle of legality, however, a criminalization such as this one suffices, despite the fact that it is not formulated like the provisions found in most national criminal codes.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993), on the other hand, provides that each State Party shall “prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity” as well as “extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.” This language does not directly criminalize the use of - and various other acts concerning - chemical weapons, but merely obliges States Parties to do so. The 1993 Convention thus contains a duty to criminalize (Externe Strafpflicht mit Umsetzungspflicht), rather than a direct criminalization of such acts under international law. This does not rule out the direct applicability of the 1993 Convention, for example to furnish the definition of prohibited acts. However, it means that the 1993 Convention can not form the basis for prosecutions standing alone, but needs the support of customary international law, other treaties or national law to establish individual criminal responsibility.

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1535 Id., para. 203.
1536 Id., para. 307.
1538 See e.g. above, p. 76 (France) and note 1470 (Rwanda). But compare to p. 85 (Argentina).
1539 See above, note 1524.
1540 Art. VII (1) sub a.
1541 Art. VII (1) sub c.
1543 See Arts. I and II.
The line between actual criminalizations and duties to criminalize is not always a clear one. The CAT defines torture (Art. 1) and determines that each State Party shall “ensure that all acts of torture are offences under its criminal law” and “make these offences punishable by appropriate penalties which take into account their grave nature.” This formulation raises the question whether States must ensure that their national laws reflect a criminality of torture established by the treaty, or must establish such criminality themselves in their criminal laws. Several national proceedings clearly opted for the latter scenario, but again, these do not necessarily reflect the standards of international law. Still, while this question is open to debate, the language of the CAT on the whole appears to establish a duty to criminalize torture rather than a directly applicable criminalization.

A distinction must also be made between those acts that a treaty criminalizes, and those that it merely prohibits without attaching individual criminal responsibility. Some treaties contain both, as in the case of the Geneva Conventions. The provisions on grave breaches clearly define the acts in question, and can also be said to criminalize them. Although the language of these provisions could be more explicit, the declaration that these acts are grave breaches, the establishment of the duty to extradite or prosecute, and the obligation for States Parties to enact effective penal sanctions together indicate the criminalization of the acts in question. In this regard, it is significant that the States Parties are not required to criminalize the grave breaches, like is the case in the Chemical Weapons Convention, but merely to provide effective penal sanctions, which suggests that the acts are already criminal under international law. Moreover, Additional Protocol I of 1977 declares that all grave breaches shall be regarded as war crimes.

Common Art. 3 of the Geneva Conventions, on the other hand, prohibits certain acts in the context of an internal armed conflict, but does not indicate their criminalization.

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154 Art. 4 (1) and (2) respectively.
154 See above, Chapter II, para. 3.3.e, 3.3.j and 3.3.k.
154 See Art. 49 and 50 GC I, Art. 50 and 51 GC II, Art. 129 and 130 GC III and Art. 146 and 147 GC IV.
154 Cf. Triffterer 1966, p. 84-88.
1550 See Art. 85 (5) AP I ("Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.")
1551 Common Art. 3:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;"
This does not preclude the prosecution of individuals who breach these norms. But individual criminal responsibility in such cases flows from either customary international law\(^\text{1553}\) or a rule of national law\(^\text{1554}\) not from the treaty itself. Thus, the Geneva Conventions contain both directly applicable criminalizations of the grave breaches, and prohibitions of other acts which are not of a penal nature.

Finally, it may be asked whether criminalizations contained in the statutes of international courts are directly applicable in national courts. One may question to what extent the direct application on the national level of a legal framework drafted for a specific international context\(^\text{1555}\) is compatible with the international principle of legality.

Practice does not provide a coherent picture in this regard. The Colombian Constitutional Court, on the one hand, has quite recently ruled out direct application of the ICC Statute in national prosecutions.\(^\text{1556}\) Yet, a 2002 judgment of the Venezuelan Supreme Court appears to take the opposite view, as it states that “[c]riminal responsibility for crimes against humanity (regular crimes) will be determined according to the Constitution of the Bolivarian Republic of Venezuela and the Rome Statute of the International Criminal

\[
\begin{align*}
&\text{(c) outrages upon personal dignity, in particular humiliating and degrading treatment;} \\
&(d) \text{the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.}
\end{align*}
\]

\[^{1552}\text{See Triffterer 1966, p. 181.}\]
\[^{1553}\text{See ICTR, Trial Chamber, \textit{Akayesu}, 2 September 1998 para. 608:}
\]
\[^{1554}\text{See Art. 49 GC I, Art. 50 GC II, Art. 129 GC III and Art. 146 GC IV (“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches…”). See also ICTR, Trial Chamber, \textit{Kayishema and Ruzindana}, 21 May 1999, para. 156-157:}
\]
\[^{1555}\text{Provisions denying immunity to serving State officials, for example, are clearly not transposable. See Art. 27 ICC Statute. See also above, p. 172.}\]
\[^{1556}\text{See Colombia, Corte Constitucional, Sala Plena, \textit{Sentencia C-578 (in re Corte Penal Internacional)}, 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2346 (holding that the provisions of the ICC Statute “no reemplazan ni modifican las leyes nacionales de tal manera” and that “el tratado no modifica el derecho interno aplicado por las autoridades judiciales colombianas en ejercicio de las competencias nacionales”).}\]

264
Court, ratified by Venezuela, in its subject matter; and the Code of Organic Criminal Procedure in procedural matters."\footnote{1557} Venezuela had at the time of this judgment, and also at the time of this writing, not yet adopted implementing legislation for the ICC Statute. However, its Constitution does incorporate treaties that relate to human rights\footnote{1558} and requires the prosecution of crimes against humanity.\footnote{1559} Therefore, it appears that the Venezuelan Supreme Court was referring to general direct application of the ICC Statute,\footnote{1560} but its succinct holding provides no further guidance on this issue.

East-German, French and Polish courts have all directly applied the Nuremberg Statute’s provision on crimes against humanity for domestic prosecutions of crimes committed during WW II.\footnote{1561} More recently, the French courts have refused such direct application for crimes outside this context. Yet, they have based this refusal on the narrow wording of the provisions of the Nuremberg Statute, not on their place in the Statute of an international court.\footnote{1562} Likewise, the refusal of a Dutch Court of Appeal to apply the Nuremberg Statute in a case concerning alleged crimes against humanity in Argentina rested on a lack of universal jurisdiction, not on the character of the Statute.\footnote{1563}

From the viewpoint of international law, there seems to be no reason to prevent national courts from directly applying generally phrased criminalizations contained in the Statutes of international courts. After all, the statutes of the different international criminal courts all criminalize the core crimes in general language and indicate explicitly that those crimes are to be judged also by national courts.\footnote{1564} Thus, the criminalizations of genocide, crimes against humanity and war crimes contained in Art. 6 to 8 of the ICC Statute can possibly provide the basis for future national prosecutions, also if national law does not specifically refer to those provisions.

\footnote{1557} Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002, : "La responsabilidad penal en las causas por delitos de lesa humanidad (delitos comunes) se determinará según lo disponen la Constitución de la República Bolivariana de Venezuela y el Estatuto de Roma de la Corte Penal Internacional suscrito por Venezuela, en cuanto a la parte sustantiva; y el Código Orgánico Procesal Penal en cuanto a la parte adjetiva."

Translation by Zandra Valenzuela Delgado.

\footnote{1558} See Art. 23 Constitution: "Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público." See also Ambos 2002b, p. 504.

\footnote{1559} See Art. 29 Constitution, cited above, note 1164.

\footnote{1560} See Ambos and Malarino 2003, p. 564-565.

\footnote{1561} See above, Chapter II, para. 3.3.b and 3.3.j; note 1259-1262.

\footnote{1562} See France, Court of Cassation, Aussaresses, 17 June 2003, 108 RGIDP 754 at 756 ("Que les dispositions [...] du Statut du Tribunal militaire international de Nuremberg [...] ne concernent que les faits commis pour le compte des pays européens de l'Axe"); above, Chapter II, para. 3.3.j.

\footnote{1563} See Netherlands, Amsterdam Court of Appeals, \textit{In re Zorreguieta et al}, 25 April 2002, para. 5.5.

\footnote{1564} See preamble, para. 6 and 10, and Art. 17 ICC Statute; Art. 8 ICTR Statute; Art. 9 ICTY Statute; Art. 4 and 6 London Agreement 1945 as well as Art. 10 and 11 Nuremberg Statute.
Importantly, all international criminalizations must be analyzed not only on their direct applicability in general, but also on the foreseeability of their penal consequences for the defendant in the particular case. The manifest illegality of the core crimes is a pivotal factor for the determination of foreseeability. This explains why direct application of treaty based criminalizations that are not phrased in clear-cut language does not necessarily run afoul of the principle of legality. It also suggests both that direct application of core crimes law will fail the foreseeability test only in exceptional circumstances and that direct application of international criminalizations can be extended beyond core crimes law only to a limited extent. Some international offences are, like the core crimes, manifestly illegal. For others, foreseeability will be ensured by publication of a treaty or national legislative action. Yet, in general the foreseeability test requires strict scrutiny of the law to be applied and creates a certain presumption against direct application of less “obvious” criminalizations.

7 The National Principle of Legality as an Obstacle to Core Crimes Prosecutions

As is readily apparent from both Chapter 2 and the preceding paragraphs, national formulations of the principle of legality are generally stricter than the international principle of legality. In many cases, they form a decisive obstacle to the prosecution of international crimes which are not fully implemented in national law, as they block prosecution directly on the basis of, at least customary, international law. National principles of legality can thus collide with States' international obligations.

In general, States are free to adopt a stricter principle of legality than that under international law, as long as it does not interfere with their duty to criminalize and prosecute the core crimes. But when they fail in this duty, the stricter national principle becomes problematic. Of course, the State in such a case violates its duties not solely through its national principle of legality but rather through the combination of its lack of implementation and its inability to directly apply international law. It is up to the State to choose the way through which to make the international crimes prosecutable and thereby live up to its duty.

Nevertheless, a strict national principle of legality that is applicable to the core crimes can amount to a “measure which may be prejudicial to the international obligations in regard to the punishment of persons guilty of war crimes and crimes against humanity”

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1565 See U.S., District Court (D.C.), United States v Yunis, 12 February 1988, 681 F.Supp. 896 at 902:
 "While it might be too much to expect the average citizen to be familiar with all of the criminal laws of every country, it is not unrealistic to assume that he would realize that committing a terrorist act might subject him to foreign prosecution."

1566 See Broomhall 1999, p. 461.

1567 See e.g. Prinssen 2004, p. 48-51 (on the lack of direct application of European Law in penal cases).

1568 See Bouterse and Nulyarimma, above, Chapter II, para. 3.3.d and 3.3.k. See also Bremer 1999, p. 148, 256, 303-304 and 396 (concluding that the national principles of legality block direct application of customary ICL in Belgium, Germany and Switzerland).

1569 See above Chapter V, para. 3.3.
from which States should refrain. So much was recognized by the UN Committee against Torture in 2002 when it called on Indonesia to ensure that its national principle of legality would not apply to international crimes like torture and crimes against humanity. When in a concrete case the national principle of legality blocks a prosecution that is mandatory under international law, the principle is simply a national impediment that must give way to international law, just like a national amnesty law. While national principles of legality and amnesty laws might be perceived differently in terms of legitimacy, international law treats them alike when they block mandatory prosecutions of the core crimes: as national obstacles which are to be removed.

Yet, it should be acknowledged that the legal framework just sketched does not find adequate reflection in State practice regarding the core crimes. While various judgments have confirmed the subordination of the national principle of legality to international obligations, others have taken a different view or ignored the issue. Why did the national principle of legality prevail over international law in cases like Nulyarimma and Habré? Do these cases amount to State practice that contradicts the conclusions drawn here or are they simply violations of the law?

Three factors may help to explain why national courts have not left aside the national principle of legality more often in order to allow core crimes prosecutions. First, national courts are generally bound by rather restrictive national rules on their ability to give effect to international law. Some courts, like the Argentinean and Hungarian ones, have showed themselves willing to go to considerable lengths to give effect to international law. Others have been more hesitant. Yet, even if arriving at a different result, these more conservative decisions do not deny the requirements of international law. None of them asserts that the international principle of legality blocks direct application in core crimes prosecutions. Rather, they refer exclusively to national principles of legality. Thus, these courts effectively declare themselves unable to adhere to their international obligations

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1570 See General Assembly resolution 3074 (XXVIII) of 3 December 1973 on Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, Principle 8:

"States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

1571 See CAT, Concluding Observations on Indonesia, Doc. A/57/44, 1 November 2002 at paras. 44 and 45:

"44. The Committee...expresses its concern about the following:
[...]
(c) The inadequacy of measures to ensure that the second amendment to the 1945 Constitution, relating to the right not to be prosecuted based on retroactive law, will not apply to offences such as torture and crimes against humanity which under international law are already criminalized;
[...]
45. The Committee recommends that the State party:
[...]
(f) Ensure that crimes under international law such as torture and crimes against humanity committed in the past are investigated and, where appropriate, prosecuted in Indonesian courts;"

1572 See further below, Chapter VII, para. 3.
because of conflicting national law. As set out before, such practice does not oppose or modify the relevant international obligations.\textsuperscript{1573}

Second, for a variety of reasons, national courts generally approach the prosecution of core crimes in a minimalistic and selective way.\textsuperscript{1574} This attitude explains why courts often do not interpret or overrule the national principle of legality even where national law allows it and international law requires it. For example, in the Senegalese prosecution of Habré, it was open to the courts to prioritize the duty to extradite or prosecute under the CAT over the national principle of legality. In fact, it was even required under the Senegalese Constitution.\textsuperscript{1575} Yet, it was also clearly unwanted by the government. In this situation, the courts came up with different legal innovations (exception for direct application of international criminal law and exception for direct application of non-self-executing treaty law) to avoid the required prosecution. Significantly, however, the Senegalese courts ignored the international obligations rather than confronted them.

Third, in some high profile cases regarding the core crimes, there was no clear duty to prosecute. In cases involving crimes committed abroad while the suspect is not present in the country, such as Bouterse, it is generally assumed that international law does not impose a duty to prosecute.\textsuperscript{1576} It should also be noted that broader recognition of the duty to prosecute under general human rights law is a relatively recent phenomenon. It is not common knowledge and may therefore be disregarded by the courts if not argued convincingly. But again, unlike denial, sheer ignorance of international obligations does not amount to contrary State practice.

These three factors, it is submitted, largely explain why the outcomes of numerous national prosecutions do not reflect the rules of international law.

As the principle of legality is an important human rights guarantee, it may be questioned whether the bypassing of the national principle in core crimes prosecutions is desirable. For the legal certainty of the individual, bypassing the national principle is not fundamentally problematic, since the international principle that remains in place safeguards the core requirement of foreseeability. If the international principle of legality suffices to safeguard the individual's legal certainty in international prosecutions, there is no reason why it would not suffice for national prosecutions of the same crimes. Moreover, national principles are generally geared to regulating prosecutions of crimes which are incomparable to the core crimes in terms of foreseeability.

Applying the international rather than the national principle of legality is appropriate furthermore if one accepts that the foreseeability of core crimes should be judged first and foremost on the international level.\textsuperscript{1577} After all, the relevance of national implementing laws is ultimately limited. For national law can only inform the individual

\textsuperscript{1573} See above, note 1182.
\textsuperscript{1574} See above, Chapter III, para. 2.
\textsuperscript{1575} See above, Chapter II, para. 3.3.e.
\textsuperscript{1576} See above, Chapter V, para. 3.3.a and d.
\textsuperscript{1577} See Swart 2002b, p. 585.
about one particular system of enforcement among many (the legal regimes of national and international courts). Also, national prosecutions for these crimes are regularly held on the basis of universal jurisdiction against foreigners, who are not familiar with the national legal system and may not even speak the language. In such cases especially, it is only appropriate to look to international rather than national law.

Meanwhile, considerations of legal certainty should be a strong incentive for caution in the interpretation and development of core crimes. But where the criminality of an act under international law is well-established, the need for effective enforcement of ICL must be taken into account. Given the characteristics of the international law-making process, it is clear that ICL can satisfy only minimal nullum crimen requirements if it is to be effective.\textsuperscript{1578} The basic tension between international sources and the requirements of criminal law is something that needs to be acknowledged.\textsuperscript{1579} It can be alleviated by a more direct form of law-making, for example through treaties that unequivocally criminalize certain acts and determine the applicable penalties, but it will remain a structural feature of ICL. Custom will always be a necessary part of ICL\textsuperscript{1580} and treaties will always be weakened by the need to compromise.\textsuperscript{1581} If one believes this makes its norms unsuitable for adjudication, one limits the reach of ICL to a set of commands for States and denies it the status of a self-sufficient system of criminal law. This, however, is not something States are willing to do. Therefore, bypassing the national principle of legality may be a necessary and logical step for the effective enforcement of ICL.

8 Conclusion

The international principle of legality finds its source both in treaties and customary law. It requires foreseeability: the criminality of core crimes must have been apparent at the time of their commission. Therefore, their character as a crime must have a clear legal basis. Yet, this criminal character can be derived from a diffuse set of material sources, both written and unwritten. Instead of demanding one comprehensive criminalization, one must look to the totality of the law. Accessibility of the law is not an independent requirement, but merely a step in analyzing foreseeability. For most core crimes, their manifest illegality and/or the legal knowledge that may be expected of individuals in official positions is a more important factor in this analysis. No precise indication of the

\textsuperscript{1578} Rodley 1999, p. 77 ("a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition."). Cited approvingly in ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 469.

\textsuperscript{1579} See Ambos 2002a, p. 370-371. See also Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 338:

"The nature of a decentralized international system is such that international law cannot be conveniently codified in some sort of transnational code. Its differing sources may alarm some strict legal positivists, but almost all international lawyers now recognize that such a crude analogy to the requirements of a domestic law system is simplistic"

\textsuperscript{1580} After all, "it takes only a small minority of sympathetic nations to thwart the most carefully planned attempts at international law-making," which inhibits in particular law-making through treaties. Komarow 1980, p. 35. See likewise Meron 1998, p. 27.

penalty is required, as long as it is clear that the act will be punished. If a penalty has been indicated in law, however, it may not be increased.

National law often contains stricter demands. In particular, many States require written criminalizations and precise penalties. Numerous States make additional matters such as statutes of limitations and rules of jurisdiction subject to the principle of legality where international law does not. Such additional demands under national law can not be invoked, however, to avoid compliance with international obligations regarding core crimes prosecutions. International law requires States to give priority to the duty to criminalize the core crimes and prosecute them, at the expense of national law. National courts can comply with this obligation through consistent interpretation or, where possible, overruling of the national principle of legality.

Where international law allows but not requires core crimes prosecutions, States are free to adhere to a stricter national principle of legality and refuse prosecution. While there are good policy reasons to apply the international rather than the national principle of legality to all core crimes prosecutions in national courts, including voluntary ones, there is no rule of international law requiring States to do so.

In general, the drawbacks of core crimes as to their accessibility and foreseeability pose no decisive obstacles for their application. Yet, they are not to be dismissed out of hand. Judging core crimes by the standards of national criminal law may lead too a view that is overly restrictive and unnecessarily impedes the enforcement of core crimes. On the other hand, emphasizing their fundamental character can lead us to dismiss some real problems too easily. Discussion of the application of core crimes in light of the principle of legality is too often confined to these two extremes. This is basically the conflict between the view of the national criminal lawyer, used to standards of legality that are unattainable for international criminal law, and the international lawyer, for whom every appeal to problems of accessibility and foreseeability represents a threat to the international system.
Chapter VII
Synthesis

1 Introduction

This study has set out to describe the present state of the international legal framework
governing direct application of the international criminalizations of genocide, crimes
against humanity and war crimes (the core crimes) in national courts. Direct application
in the context of this study means that a national court applies an international rule,
without it being transformed into a rule of national law, because it is binding law for the
court.\textsuperscript{1582} It thus includes cases where national courts apply international norms on the
basis of a rule of reference (renvoi) in national law. The previous chapters have analyzed
the practice of selected States in this regard, the underlying considerations shaping that
practice, and the international rules that govern it. This chapter aims to bring all strands
together and give a concise appraisal of international law’s regulation of direct
application of core crimes law, as well as an assessment of the prospects of direct
application and its relevance for international law in general. It will address four principal
questions. First, does international law as a general rule prohibit, allow or impose direct
application of core crimes law? Second, how does international law require national
courts to handle the aggregate of national and international rules that govern direct
application of core crimes law? Third, what are the prospects and limits of direct
application of core crimes law for the future? Fourth, what are its broader implications
for international criminal law and public international law in general?

2 The International Rules on Direct Application

International law allows national courts to directly apply international law for core crimes
prosecutions. As described in Chapter 6, the principle of legality in international law,
unlike many national formulations of the principle, does not preclude customary
international law or even general principles as a basis of criminality. Neither does the
international principle of legality demand a specific penalty provision for core crimes.
Thus, the international criminalizations of genocide, crimes against humanity and war
crimes, whether contained in treaty or custom, can constitute a legal basis for
prosecutions in national courts in conformity with international law.

In principle, direct application is voluntary rather than mandatory. There is a certain
tendency to subject international law of a humanitarian character or \textit{jus cogens} status,
thus including at least part of core crimes law, to a more stringent regime of
implementation. At this stage, however, practice does not allow the inference of a firm
international rule to that effect. The language of some national judgments suggests more
narrowly that core crimes law is subject to a specific regime that is largely independent

\textsuperscript{1582} See above, p. 20.
from national law, and should be applied more or less parallel to it. However, such suggestions are not matched by corresponding practice. Even those judgments themselves by and large follow the normal constitutional rules governing the position of international law in the national legal order. Hence, international law allows, but does not as a general rule require national courts to directly apply international criminalizations of the core crimes.

3 Reconciling National and International Law

In practice, as set out in Chapter 2, national courts demonstrate widely divergent attitudes towards direct application of core crimes law. While they all sanction direct application where national law contains a specific rule of reference to international criminalizations, they differ considerably on its acceptability in the absence of such a specific rule (general direct application). Some courts accept general direct application for treaties but not for custom, others for custom but not treaties, for both, or for neither of the two. But even in legal systems that in principle accept general direct application of core crimes law, national courts are hesitant to rely on it. Actual prosecutions of genocide, crimes against humanity or war crimes directly on the basis of international law in the absence of a specific rule of reference in national law are rare.

In determining their position, national courts mainly look towards national law, in particular the constitutional framework for the implementation of international law and the principle of legality. Refusals of direct application generally result from a limiting role of national law. It may therefore be asked how international law requires national courts to handle the variety of national and international rules governing direct application of core crimes law and solve conflicts between them.

The fact that international law does not prescribe direct application of core crimes law as a general rule does not mean it leaves the matter entirely to the discretion of national courts. As described in Chapter 5, States have extensive obligations under international law with regard to core crimes prosecutions. First, they have a duty to criminalize: an obligation to ensure the punishability of most core crimes under their national law. Second, they have a duty to prosecute at least all core crimes committed within their jurisdiction as well as those for which prosecution is required under the law of State responsibility.

International law requires national courts to take these international obligations into account, regardless of their implementation in national law, or lack thereof. The principle of consistent interpretation imposes an obligation on national courts to interpret national law in conformity with relevant international obligations. This has far-going consequences for core crimes prosecutions that various national courts have so far disregarded.

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1583 See above, notes 1228-1229 and 1267-1273.
1584 See above, Chapter IV, para. 5.2.
First, when national courts are faced with the question of direct application of core crimes law while national criminal law lacks a specific provision on the crime in question, their answer determines whether or not the State complies with its obligation to ensure the punishability of that crime in the national legal order. The principle of consistent interpretation therefore obliges them to endorse direct application in order to effectuate the international duty to criminalize unless national law unambiguously rules it out.\textsuperscript{1585}

To find that the crime of genocide is not punishable under national law, that the permissibility of direct application of the customary international criminalization of genocide is a policy issue left open by national law and then decline such direct application, as one of the judges did in Nulyarimma,\textsuperscript{1586} is an open violation of the principle of consistent interpretation. The principle of consistent interpretation requires courts to accept general direct application of core crimes law if that is the only possible basis of criminalization.

Second, national courts must take the duty to prosecute core crimes into account. This duty imposes additional demands, independent from the duty to legislate. It may be the case that the State has fulfilled its duty to legislate in a general sense, but national criminal law nevertheless does not provide a legal basis for a particular core crimes prosecution. A national limitation like an amnesty law may provide an obstacle. Direct application can then provide an alternative basis for prosecution. If the prosecution in question is mandatory under international law, national courts must take into account the duty to prosecute core crimes and interpret national law in conformity with it.

Importantly, the principle of consistent interpretation extends to all aspects of national law that impede the effectuation of the duty to legislate on and prosecute the core crimes. Thus, national courts must interpret national provisions on jurisdiction, specific crimes, forms of participation and also the principle of legality in such a way as to enable the unimpeded effectuation of the different international obligations. The courts of various States have demonstrated that such consistent interpretation is a powerful and effective tool that can indeed be applied to a variety of national provisions.

Practice shows in particular, as set out in Chapter 6, that there are various ways to interpret the national principle of legality in such a way as to allow direct application of core crimes law. Where national law requires fixed penalties that are absent, courts can either interpret the \textit{nulla poena} principle as allowing the highest penalties for core crimes or resort to penalties for relevant ordinary crimes.\textsuperscript{1587} Where the national principle of legality requires conduct to be criminalized in “law”, courts can interpret “law” as including international law, in conformity with Art. 7 ECHR and Art. 15 ICCPR. Finally, courts can interpret the national principle of legality as covering only the prosecution of ordinary crimes and not extending to the core crimes at all.

\textsuperscript{1585} Of course, if the principle of consistent interpretation can provide no solution, breaches of a duty to criminalize will result in State responsibility.
\textsuperscript{1586} See above, note 1279.
\textsuperscript{1587} But see for criticism of the practice to “borrow” penalties from ordinary criminal law above, p. 259.
Perhaps an unexpected implication for the principle of consistent interpretation is its effect on the doctrine of self-executing treaties. As described above, this doctrine is a limitation on the direct applicability of treaty provisions imposed by national, not international law.\textsuperscript{1588} Thus, like other impediments under national law, it must be interpreted in conformity with relevant international obligations. In other words, if the choice between declaring treaties like the Genocide Convention self-executing or non-self-executing determines whether a State will live up to its obligations to legislate for and prosecute the core crimes, and national law leaves a margin of discretion, courts must hold these treaties to be self-executing.

Of course, the principle of consistent interpretation has its limits. While various national courts have taken it beyond its normal meaning to effectively set aside unambiguous national law, the international principle requires no more than interpretation of national law in light of relevant international obligations. The line between proper and \textit{contra legem} interpretation is thin, disputed and impossible to describe in general terms. What seems like permissible consistent interpretation to one, may well be impermissible judicial activism to the other. But in any case, where national law clearly rules out direct application of core crimes law, the principle does not normally provide a remedy for that situation.

Yet, it is by no means certain that the duties to legislate and prosecute have to go unvindicated where consistent interpretation provides no solution. The broad legal basis of the duties ensures that they are cognizable in almost every national legal system. They flow equally from customary law and treaties. As set forth in Chapter 5, they have a basis in human rights law as well as international criminal law. The duty to prosecute has an additional basis in the law of State responsibility. Most States have incorporated one or more of the relevant treaties, or parallel customary obligations, into their national legal order. General human rights treaties like the ECHR and the ICCPR are an especially relevant source of the duties, since numerous States have granted those treaties constitutional status.\textsuperscript{1589} Decisions of international courts can give an additional imperative to recognize overriding international obligations.

Therefore, the duty to prosecute may well override national obstacles to direct application where consistent interpretation can not reconcile the two. For the national principle of legality, however, that chance is limited, since the legality principle often has constitutional status itself. Thus, as can be seen in practice, there are certainly cases where obstacles in national law preclude direct application of international core crimes law and neither the principle of consistent interpretation nor international norms with a superior rank in the national legal system provide a solution. In such cases, the State will most likely violate its international obligations and only the, often unsatisfactory, remedies on the international plane remain to remedy that situation.

\textsuperscript{1588} See above, note 827.
\textsuperscript{1589} See above, note 986.
The relevance of direct application of international core crimes law is, however, not limited to those instances where international law imposes it. Direct application of core crimes law has important functions, which should be taken into account when assessing its feasibility in future cases. First, it provides a means to remedy the lacunae and incongruities of national laws. As described in Chapter 2 and 3, most if not all national legal orders fail to regulate core crimes in full accordance with international law. Irregularities range from minor linguistic adaptations, which can still have significant consequences, to the omission of entire crimes. Where national law does not meet the terms of international law, direct application enables core crimes prosecutions that could not otherwise take place, or at least not in the correct fashion.

Second, direct application both effectuates and emphasizes international criminal law’s principled autonomy from national law. An eminent scholar wrote in 1944 that “[o]nce it is realized that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State determined to punish war crimes recedes into the background.”1590 This observation has not lost its cogency, but it leaves unsaid the other side of the medal. If it is indeed international law that ultimately governs core crimes prosecutions, then the inadequacies of that law should be solved on the international level. The mediating and “repairing” role of national law can only provide a second-best solution. This is most apparent in prosecutions on the basis of universal jurisdiction, where defendants of core crimes generally have no knowledge of the national law of the forum State whatsoever.

Thus, national courts have good reason to consider direct application of international core crimes law also where it is not mandatory. Conversely, there are grounds to be sceptical about the role of national law as a basis for core crimes prosecutions. In particular the widespread practice to charge core crimes as ordinary crimes like murder and rape has serious disadvantages. Admittedly, it is not entirely clear whether international law allows or prohibits this practice, and there may be cases where national courts lack the means and expertise to choose a different course. But in general, it should be noted that the discrepancies between ordinary criminal law and the core crimes lead to numerous practical complications. Moreover, such prosecutions fail to capture the full extent of the acts in question and often do not reflect the international character of both the crimes committed and the legal response thereto.

Specific criminalizations of genocide, crimes against humanity and war crimes in national law are far more acceptable. Yet, in practice also these criminalizations often diverge from the demands of international law. This may be seen as an acceptable form of State practice, even necessary for the development of customary core crimes law. However, such divergences can also be impediments to the effectuation of the international norms, to be circumvented through direct application of those international norms themselves.

1590 Lauterpacht 1944, p. 67.
Still, national courts are reticent about the direct application of core crimes law and in part they have legitimate reasons to be cautious. Core crimes law is imperfect, complex and its proper application requires expertise and time, both of which are not always available in national courts. But courts are driven also by other motives, including political considerations and a hesitation to venture beyond the familiarity of their national criminal codes. However one judges its legitimacy, the hesitation of national courts to directly apply international criminalizations is a reality that will not change anytime soon. While the influence of the ad hoc tribunals and the ICC, particularly through the resulting implementing legislation in many States, has enhanced the position of core crimes law in the national legal order, it will not dispel all hesitations that currently inhibit national courts.

Therefore, mandatory direct application might one day provide a suitable crown on the development of core crimes law, but not any time soon. Until that time, national courts should be more vigorous in their enforcement of core crimes law, including through its general direct application where necessary to remedy the deficiencies of national criminal law. They might be encouraged to do so by the realization that direct application has received the sanction of many national legislatures through explicit rules of reference and has been accepted by the courts of different States also in the absence of such rules. The increasing familiarity of national actors with international criminal law as well as that law’s growing specificity should provide another incentive for national courts to lose some of their reticence about direct application.

5 Implications of Direct Application of Core Crimes Law

Direct application of international core crimes law in national courts is a topic rooted not only in international criminal law, but also in the fields of public international law and criminal law more generally. Accordingly, various of the specific topics treated here have a broader relevance for international or criminal law. The legal framework for the implementation of international obligations, set forth in Chapter 4, is obviously relevant for international law in general. The principle of consistent interpretation constitutes an important safeguard for the effectuation of those international obligations that have not been properly implemented in national legislation also for other international norms than those concerning core crimes. Likewise, that the principle of legality is not as stringent and absolute as doctrine often portrays it to be, as demonstrated in Chapter 6, has implications for criminal law more generally.

That the topic of this study lies at the crossroads of international and criminal law also explains to a considerable extent why it encounters such diametrically opposed reactions both in practice and doctrine. The viewpoint of (national) criminal law on the direct application of international criminalizations differs fundamentally from that of international law. In fact, the different outcomes of national proceedings reflect different underlying assumptions about both the proper role of national courts in the enforcement of international law, and the current state and proper role of core crimes law.
First, direct application provides something of a yardstick to measure the development of core crimes law. The reticence of national courts is a clear sign that this development still has a long way to go. On the other hand, the fact that direct application actually takes place shows that this development occurs not only in international but also in national courts, and that core crimes law has passed its most rudimentary stage.

Second, the question of direct application of core crimes law provides a vivid illustration of an enduring schism in national courts' appraisal of their proper role of in the enforcement of international law in general. While some scholars assert that national courts should act as organs of the international community in their enforcement of international law, others emphatically reject this view. The practice of national courts regarding the direct application of core crimes law demonstrates that these opposing viewpoints are not merely of theoretical interest, but have a considerable bearing on the outcome of national proceedings. Those courts that conceptualize their role as being an organ of the international community reach markedly "internationalist" results, ensuring diligent adherence to international obligations. By contrast, courts that explicitly reject this notion focus predominantly on national rather than international law.

1591 The most famous conceptualization of national courts as organs of the international community is found in George Scelle's famous theory of dédoublement fonctionnel. See for a concise description of this theory and further references Cassese 1990. See in the particular context of international criminal law Burke-White 2002, p. 14 and 16-17 and Wolfrum 1996, p. 236 and 250. See for notable criticism ICJ, International Court of Justice, Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, Separate Opinion of President Guillaume, para. 15 ("[To confer universal jurisdiction in absentia on national courts would] be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community.").


“[E]l estado que tome intervención en el juzgamiento de una persona acusada de haber cometido un crimen contra el derecho de gentes, estará actuando en interés de toda la comunidad internacional. ";


“[T]he state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the community of nations, according to the conditions imposed by international law." 

1593 See Netherlands, Attorney-General to the Supreme Court, Voordracht en vordering tot cassatie in het belang der wet door de Procureur-Generaal (Petition for Cassation in re Bouterse), 8 May 2001, NJ 2002/559, para. 6:

“Treedt de Nederlandse rechter [bij de bestraffing van een internationaal misdrijf op basis van universele jurisdictie] op als internationale of als nationale rechter? Bij het opstellen van de middelen is van dat laatste standpunt uitgegaan."


“We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court.”

277
Finally, the conditions required for direct application provide a valuable indication for the role we assign to international criminal law in general. Is international criminal law merely a centralized counterpart to national criminal law, formulated at the international level but otherwise subject to similar conditions for its enforcement? Or does the fight against the most serious crimes committed with State involvement require an international criminal law that must be restricted in its subject matter but more flexible in the conditions of its enforcement? It is submitted here that the latter view must prevail. Therefore, the attempt to enhance the foreseeability and quality of international criminal law enforcement, while in itself legitimate and important, should not result in the undifferentiated adoption of national criminal law standards, for that will ultimately undermine international criminal law’s effectiveness and even its very rationale.
Nederlandse Samenvatting (Summary in Dutch)

Direkte werking van internationaal strafrecht in nationale rechtbanken

Deze studie onderzoekt de direkte werking van de internationale strafbaarstellingen van genocide, misdrijven tegen de menselijkheid en oorlogsmisdrijven (de zogenaamde “core crimes”) in nationale rechtbanken. Direkte werking wordt hier breed gedefinieerd als de toepassing van een internationale rechtsregel door een nationale rechtbank op grond van het bindende karakter van die rechtsregel, zonder dat deze is omgezet in nationaal recht. Direkte werking impliceert niet volledige onafhankelijkheid van nationaal recht. Doorgaans ligt een verwijzingsregel in nationaal recht (rule of reference, of renvoi) ten grondslag aan direkte werking van internationaal recht. Zo’n verwijzingsregel kan heel specifiek zijn, bijvoorbeeld door verwijzing naar één verdragsbepaling, maar ook zeer algemeen, bijvoorbeeld door verwijzing naar al het verdrags- of gewoonterecht. Een algemene verwijzingsregel kan ook ongeschreven zijn, zoals in de Nederlandse rechtsoorde het geval is. Ook kunnen internationale rechtsregels tegelijkertijd effect sorteren door direkte werking én omzetting in nationaal recht. Een verdragsbepaling, bijvoorbeeld, kan zowel zijn omgezet in een uitvoeringswet als zelf worden toegepast door de nationale rechter.

Direkte werking van internationale strafbaarstellingen op basis van specifieke verwijzingsregels is algemeen geaccepteerd en komt in zeer veel landen voor. Een pertinent voorbeeld is de strafbaarstelling van oorlogsmisdrijven in verschillende staten door verwijzing naar schendingen van “de wetten en gebruiken van oorlog.” De rechtspraktijk aangaande direkte werking is aanzienlijk diverser wanneer specifieke verwijzingsregels ontbreken. De vraag is dan of internationale strafbaarstellingen kunnen worden toegepast door nationale rechtbanken op gelijke wijze als andere regels van internationaal publiekrecht. Nationale rechtbanken beantwoorden deze vraag doorgaans op basis van hoofdzakelijk nationaal recht. Daarbij kijken zij met name naar de positie die in de grondwet aan internationaal recht wordt toegekend, alsmede het legaliteitsbeginsel (nullum crimen sine lege praevia).

In de literatuur wordt veelal aangenomen dat direkte werking van internationaal strafrecht niet mogelijk is zonder een specifieke verwijzingsregel in nationaal recht. Dit standpunt vormt echter geen adequate weergave van de praktijk. Nationale rechtbanken nemen zeer uiteenlopende standpunten in op dit gebied, in lijn met de grote verschillen tussen landen aangaande direkte werking van internationaal publiekrecht in het algemeen. Sommige rechtbanken accepteren direkte werking van verdragsrechtelijke maar niet gewoonterechtelijke strafbaarstellingen, andere van gewoonterechtelijke maar niet verdragsrechtelijke strafbaarstellingen, van allebei, of van geen van beide. Echter, ook in nationale rechtsoordes die direkte werking van internationaal strafrecht in algemene zin accepteren, vormt zij maar zelden de basis voor daadwerkelijke strafvervolgingen van genocide, misdrijven tegen de menselijkheid of oorlogsmisdrijven. Mede door dit gebrek aan praktijk bestaat in veel landen aanzienlijke onduidelijkheid over de toelaatbaarheid van direkte werking van internationaal strafrecht.
Verschillende factoren dragen bij aan het feit dat internationale strafbaarstellingen zonder specifieke nationale verwijzingsregel maar zelden direct worden toegepast. In het algemeen worden de “core crimes” maar spaarzaam vervolgd in nationale rechtbanken. Als men dan al tot strafvervolging overgaat, is directe werking van internationaal strafrecht een gecompliceerde rechtsbasis die doorgaans minder duidelijkheid en controle van de wetgever biedt over de categorie van verboden gedragingen dan nationaal strafrecht. Aan de andere kant vermijdt directe werking het veelvoorkomende probleem van discrepanties tussen het internationaal strafrecht en nationale uitvoeringswetgeving, wat kan leiden tot eenzijdige opreiking van internationale strafbaarstellingen, of juist het ontstaan van strafbaarheidsgaten in de nationale wet. Ook kan directe werking een bijdrage leveren aan de coherentie van het internationaal strafrecht doordat verschillende nationale rechtbanken hetzelfde internationale recht toepassen en daardoor gemakkelijker elkaars uitspraken kunnen gebruiken dan wanneer zij ongelijksoortige nationale uitvoeringswetgeving toepassen. De praktijk om genocide, misdrijven tegen de menselijkheid en oorlogs misdrijven te vervolgen als commune delicten zoals moord en verkrachting, tenslotte, wordt niet eenduidig verboden door het internationaal recht, maar moet toch in principe van de hand worden gewezen. Het commune strafrecht vormt een weliswaar relatief eenvoudige, maar ook onvolledige rechtsbasis die tot verschillende complicaties in de vervolging kan leiden. Bovendien weerspiegelt het commune strafrecht in onvoldoende mate het aparte, internationale karakter van zowel het misdrijf als de strafrechtelijke reactie daarop.

Internationaal recht staat nationale rechtbanken toe internationale strafbaarstellingen direct toe te passen, maar verplicht hen daar in beginsel niet toe. In dit opzicht verschilt internationaal strafrecht niet wezenlijk van ander internationaal publiekrecht. In de praktijk is een zekere ontwikkeling zichtbaar om internationale rechtsnormen van humanitaire aard en/of jus cogens status aan een strenger implementatieregime te onderwerpen. Deze ontwikkeling heeft echter nog niet geleid tot een voldragen internationale rechtsregel van dien aard. De suggestie in enkele nationale vonnissen dat internationaal strafrecht door nationale rechtbanken onafhankelijk van, en min of meer parallel aan nationaal strafrecht moet worden toegepast, vindt eveneens onvoldoende steun in de praktijk. Voor de strafbaarstellingen van genocide, misdrijven tegen de menselijkheid en oorlogs misdrijven geldt dan ook in beginsel de hoofdregel voor de toepassing van internationaal recht in de nationale rechtsorde, namelijk dat het staten vrij staan om hun internationale verplichtingen na te komen op elke manier die zij willen, zolang deze maar effectief is.

Het legaliteitsbeginsel in het internationaal recht vormt in principe geen belemmering voor directe werking van internationaal strafrecht. In tegenstelling tot veel nationaalrechtelijke interpretaties van het legaliteitsbeginsel, erkent het internationaalrechtelijke beginsel gewoonstrecht, en zelfs algemene rechtsbeginselen, als bron van strafbaarheid. Daarbij vereist internationaal recht wel een duidelijke voorafgaande indicatie van strafbaarheid, maar niet een precisering van de op te leggen straf. Het internationaal legaliteitsbeginsel staat dan ook niet in de weg aan directe werking van de internationale strafbaarstellingen van genocide, misdrijven tegen de
menselijkheid en oorlogsmisdrijven, of deze nu stammen uit verdragen of ongeschreven internationaal recht.

Dat Staten vrij zijn om internationaal strafrecht te implementeren zoals zij dat willen, betekent niet dat internationaal recht nationale rechtbanken volledig vrij laat in hun toepassing, of gebrek daaraan, van internationale strafbaarstellingen. Internationaal recht legt Staten verschillende verplichtingen op met betrekking tot de core crimes. Staten zijn verplicht om de strafbaarheid van in ieder geval de meeste van deze misdrijven te waarborgen in hun nationale recht. Ook hebben zij de plicht om tenminste alle core crimes die in hun jurisdictie worden gepleegd te vervolgen, evenals die waarvoor strafvervolging vereist wordt door het Staatsaansprakelijkheidsrecht. Het is een algemeen rechtsbeginsel dat nationaal recht waar mogelijk geïnterpreteerd dient te worden in overeenstemming met internationaal recht. Dat betekent dat nationale rechtbanken de strafbaarheid en vervolgingsverplichtingen van hun Staten in aanmerking moeten nemen in hun oordeel over de toelaatbaarheid van direkte werking van internationale strafbaarstellingen. Dit kan ertoe leiden dat nationale rechtbanken verplicht zijn internationale strafbaarstellingen van genocide, misdrijven tegen de menselijkheid of oorlogsmisdrijven direct toe te passen als nationaal recht tekort schiet voor de vervulling van internationale strafbaarstelling- en vervolgingsverplichtingen maar direkte werking van internationaal strafrecht openlaat.

Direkte toepassing van internationaal strafrecht is een lastige exercitie die tijd en expertise vereist die in nationale rechtbanken niet altijd aanwezig is. Zij doet echter wel recht aan de eigen aard van het internationaal strafrecht. Ook biedt zij een belangrijke alternatieve rechtsbasis voor strafvervolgingen die door onvolledige of onjuiste implementatie van het internationaal strafrecht niet goed kunnen plaatsvinden op basis van nationaal recht. Direkte werking van internationale strafbaarstellingen biedt doorgaans minder duidelijkheid en zekerheid over het toe te passen recht dan de nationale strafwet. Daartegenover staat dat genocide, misdrijven tegen de menselijkheid en oorlogsmisdrijven, zowel door hun ernstige karakter als het feit dat zij doorgaans worden gepleegd met betrokkenheid of instemming van de overheid, van andere aard zijn dan commune delicten. Bij de beoordeling van de mogelijkheid dan wel noodzaak van direkte werking zou meer aandacht besteed moeten worden aan de baten daarvan en de eigen aard van de core crimes.
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292
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294

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295
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Ukraine

Venezuela

296
Zambia
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Zimbabwe
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Index

A

absentia, trial in......39, 59, 80, 198, 277
access to court, right of......108, 192, 194, 205
aggression ......13, 25, 34, 49, 67, 70, 71, 183, 242, 317
Akayesu case ......55, 126, 129, 182, 186, 212, 251, 257, 264, 285, 320
amnesty laws....................191, 207
apartheid ..20, 24, 42, 180, 196, 198, 203

B

Barbie case......74, 75, 77, 120, 121, 213, 220, 230, 289, 320
borderguards case................247–51
Bouterse case 80, 81, 116, 204, 217, 233, 234, 235, 266, 268, 277, 292, 306, 327

C

chemical weapons.........................262
command responsibility.............16, 128
complementarity, principle of......13, 306, 312
consistent interpretation, principle of
..............................................154–60
core crimes law

deterrence..........................211–12
grave character......................183–87
hierarchy of crimes.................122
indirect model of enforcement......180
jus cogens status ....................191
manifest illegality .244, 245, 246, 247, 248, 251, 256, 266, 269

D

dédoublement fonctionnel, theory of .277
democratic legitimacy..............110–11
double criminality..............26, 85, 130, 134
dualism...............27, 137, 138, 139, 325
duress .........................187
duty to prosecute..................191–208

E

East–Timor, Special Panel 104, 115, 229, 232, 233, 286
Elements of Crimes.23, 42, 48, 122, 123, 261, 305, 319
erga omnes obligations......161, 199, 203, 217, 300, 310
extradition .26, 29, 33, 56, 59, 63, 64, 74, 84, 85, 95, 118, 130, 134, 166, 175, 198, 213, 214, 217, 258, 267, 304, 318

F

Finta case ......26, 30, 32, 41, 45, 72, 104, 113, 116, 118, 119, 211, 220, 244, 245, 256, 269, 288, 304
Furundzija case ...56, 121, 171, 174, 175, 176, 181, 187, 190, 238, 239, 244, 245, 286

G

Garantenstellung ..................246
general principles of law.34, 72, 75, 164, 186, 229, 231, 232, 237, 238, 239, 254
genocide
definition.........................23
forcible transfer of children .......37
intent ..................24, 39, 114
protected groups..................35–41
good faith..................141, 143, 161
H
Habré case...25, 55, 56, 57, 58, 153, 233, 267, 268, 293, 294, 302, 322

I
immunities...54, 103, 107, 108, 134, 149, 158, 172, 177, 188, 189, 190, 192, 214, 219, 264, 316
impresscriptibility...........See statutory limitations
incorporation...................19
Islamic law.....................34, 300

J
jus cogens.........170–77, 187–91, 214–18

L
Lieber Code.......................63
life, right to...192, 195, 205, 206, 247, 248, 251

M
mistake of law.................244, 246
monism.............27, 76, 137, 138, 139

N
national criminal law
ordinary crimes as basis for core crimes prosecutions.30–33, 208–12
relationship to international humanitarian law...........129–32
ne bis in idem principle.........122, 134, 209, 210
necessity...........35, 127, 185, 202, 206, 242
nulla poena sine lege...........See principle of legality, penalties
nullum crimen sine lege...........See principle of legality
Nulyarimma case...53, 55, 104, 109, 110, 112, 199, 219, 221, 266, 267, 273, 287, 305, 315
Nuremberg Charter.....25, 51, 67, 74, 75, 76, 78, 95, 121, 216, 265

O
opinio necessitatis..............164

P
pacta sunt servanda principle...137, 143, 144, 147, 149, 151
penalties.......................134–35
Pinochet cases
Belgium................56, 59, 217, 254
England................26, 69, 71, 219, 221
Netherlands.................108
Spain.........................39
piracy.................47, 62, 64, 66, 97, 319
Polyukhovich case...111, 128, 131, 186, 208, 209, 219, 226, 231, 287
Priebke case....85, 87, 258, 287, 304, 321
principle of legality...........100, 225–70
accessibility..................239–41
foreseeability...............241–51
penalties......................259
rule against common law crimes...54, 62, 64, 65, 72

R
rape...........31, 35, 43, 122, 127, 134, 193, 212, 238, 239, 245, 256, 275
reciprocity, in international law of a humanitarian character.........161–70
remedy, right to...............189, 194
reprisals......................35, 162, 164
rule of reference
definition.......................19
general.......................47–95
specific......................42–47

S
Security Council.12, 160, 182, 197, 236, 308
self-executing treaties...........21, 144–47
separation of powers.............113
Sierra Leone, Special Court......115, 133, 210, 211, 286, 299, 312, 319
slavery........24, 34, 63, 128, 174, 196, 244
sovereignty....................108–11, 140

332
stare decisis, lack of in international criminal law ...................... 122
State responsibility, law of .44, 102, 142, 176, 180, 197, 207, 272, 274, 319
statutory limitations ..59, 74, 84, 87, 135, 190, 217
superior orders ........... 84, 113, 118, 246
system crimes ................ 101, 224

T
terrorism.......25, 102, 166, 197, 202, 316
Touvier case.....30, 74, 75, 220, 289, 320
treaties
automatic succession ........... 163, 164
interpretation .................. 123–25
reservations ...................... 163, 232

U
universal jurisdiction ..25, 38, 54, 56, 57, 59, 69, 70, 76, 80, 86, 132, 175, 186, 187, 190, 199, 206, 209, 211, 259, 265, 269, 275, 277, 306

V
Velasquez Rodriguez case........192, 285

W
war crimes
definition.............................. 24
grave breaches of the Geneva Conventions ............. 127, 246
in internal armed conflict....24, 90, 92, 129, 130, 132, 164, 263, 264, 315
violence to life and person............ 262
WTO law ................................ 160, 310