Direct application of international criminal law in national courts
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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, ethnic, 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

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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 aplicacion directa de normas (penales) internacionales o una transformacion 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.”); Bohlender 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.”\textsuperscript{11} 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.\textsuperscript{12} 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.”\textsuperscript{13}

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.\textsuperscript{14} 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.\textsuperscript{15} 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.\textsuperscript{16}

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.

\begin{itemize}
  \item \textsuperscript{11} Stirling-Zanda 2004, p. 6. See also Gardocki 1989, p. 94:
\begin{quote}
  “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.”
\end{quote}

  \item \textsuperscript{12} All of the following cases are described in more detail in Chapter 2, para. 3.3.
  \item \textsuperscript{13} See below, note 367.
  \item \textsuperscript{14} See below, Chapter II, para. 3.3.b, g and k.
  \item \textsuperscript{15} Cf. Swart 2000, p. 204 and Kirby 1995, footnotes 15-21 and accompanying text.
  \item \textsuperscript{16} Cf. Meron 1996, p. 247.
\end{itemize}
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.

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 explicitly 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 Henrykaerts 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\textsuperscript{32} or the crime of apartheid to be regulated by certain paragraphs of the
Apartheid Convention,\textsuperscript{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.\textsuperscript{34}

Incorporation and transformation are two different ways to give effect to a rule of
international law, but do not exclude each other.\textsuperscript{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.\textsuperscript{36}

When an international rule is incorporated into national law, it acquires \textit{domestic}
validity. A rule of international law is domestically valid when it has force of law in the
national legal order.\textsuperscript{37} It is then binding law, in principle to be applied by the national
courts. When this actually happens, I speak of \textit{direct application}.\textsuperscript{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

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

\begin{quote}
(1) [...] 
(2) The person who commits a crime of apartheid shall be punished with imprisonment
lasts from 5 to 10 years.
(3) 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) 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{quote}

\textsuperscript{34} See Cassese 2001c, p. 172.
\textsuperscript{35} Some authors speak of the contrast between transformation and adoption: see e.g. Rack 1979 and Seidl-
and incorporation); Iwasawa 1986, p. 638.
\textsuperscript{38} Cf. Peyró 2003, p. 81 ("l'application 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
notations from that field. For many, the term direct effect signifies questions about the quality of a rule,
its substance, \textit{id est} whether it creates rights or duties for individuals, or the standing of individuals to
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.\textsuperscript{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.'\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{44}

There can be different reasons why an international rule that is domestically valid may not be directly applied,\textsuperscript{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 \textit{non-self-executing}.\textsuperscript{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.\textsuperscript{47} Thus, direct application is to be distinguished from the optional use of international law as a non-binding source, which is comparable

\textsuperscript{39} Compare Jackson 1992, pp. 313 and 321.
\textsuperscript{40} See below, p. 155 on the principle of consistent interpretation.
\textsuperscript{42} See Knop 2000, p. 501-505 on the pitfalls of defining the direct application of international law in an all-or-nothing fashion.
\textsuperscript{43} See e.g. Knop 2000 and below, note 792.
\textsuperscript{44} See also above, note 27 and accompanying text.
\textsuperscript{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.
\textsuperscript{47} Cf. Nollkaemper 2002, p. 159.
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.48 Even if that assertion may be questioned, as I will do in Chapter 4,49 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)’.50 These norms can be found in treaties, custom and general principles.51 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*.52

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’,53 crimes against the peace and security of mankind,54 supranational crimes,55 international crimes *sensu stricto*,

49 See below, p. 148 et seq.
51 See below, Chapter IV, para. 5.1.
53 Fourth preamble and Art. 5 ICC Statute.
international crimes proper or simply international crimes, as opposed to transnational crimes.\textsuperscript{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 \textit{inter se}, and with the practice of international courts. Third, the core crimes are generally believed to be governed by rules of \textit{jus cogens} status.\textsuperscript{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 \textit{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 \textit{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.\textsuperscript{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.\textsuperscript{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, ethnic, racial or religious. Genocidal acts include killing as well as several

\textsuperscript{55} See Haveman and Kavran 2003; Röling 1979, p. 169.

\textsuperscript{56} See on the various definitions of such crimes Triffterer 1989, p. 47 and Hollán 2000.

\textsuperscript{57} See below, Chapter V, para. 3.3.

\textsuperscript{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.

\textsuperscript{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.  

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. 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. 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. Today, certain organizations also qualify as potential perpetrators, but there is no consensus on their required characteristics.

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). 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. 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, and the more recent category of war crimes committed in internal armed conflict.

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

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60 See below, Chapter II, para. 2.2.2.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.


64 See below, notes 583 and 584; Lattanzi 2001, p. 485-486 and Cassese 2001a, p. 375-376.


66 See for an overview of relevant treaties Sassoli 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.\(^6^9\) 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.\(^7^0\) 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,\(^7^1\) 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.\(^7^2\)

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.\(^7^3\) 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.\(^7^4\) 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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\(^6^9\) See Keijzer 2003 and Delmas-Mart\-y 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, 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).


\(^7^1\) See Art. 6 Nuremberg Charter.


\(^7^4\) This indictment was subsequently annulled by the higher courts, see below, Chapter II, para. 3.3.e.
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. 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. 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 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. In practice, the two proceedings are treated differently both in international law and in many national legal systems. 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 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. 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,

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75 Canada, Supreme Court, R. v. Imre Finta, 24 March 1994.
76 Id., para. 58 (Supreme Court confirms holding of the Court of Appeal that “s. 7(3.71) of the 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.
78 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).
80 See below, notes 649-650 and accompanying text.
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 too 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.81

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.

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.