Direct application of international criminal law in national courts

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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and the resulting complications, and therefore I will include relevant jurisprudence and legislation even if they are no longer valid today.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.

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-martialled 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. 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. 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. Where a prosecution is based on national provisions like the ones described above, it must be ascertained that the alleged acts fullfil international criminalizations in order to establish extraterritorial jurisdiction. In other cases, international criminal law is applied as a means of interpretation.

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. In the Haitian trial for the Raboteau massacre, 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. This explicitation of the international dimension of the crimes was actively sought by the prosecution with the idea that it might facilitate

"(1) Subject to the provisions of this section, proceedings for murder ... may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
(a) was committed during the period beginning with 1 September 1939 and ending with 5 June 1945 in a place which at the time was part of Germany or under German occupation; and
(b) constituted a violation of the laws and customs of war.
(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8 March 1990, or has subsequently become, ... resident in the United Kingdom ... ."
the extradition of some of the defendants who were absent and had sought refuge in other countries.\textsuperscript{103}

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.

2.2 Prosecution as an International Crime

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.\textsuperscript{104} 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,\textsuperscript{105} whereas the generally accepted international definition requires them to be "part of a widespread or systematic attack."\textsuperscript{106} 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."\textsuperscript{107} In a few cases, the

\textsuperscript{103} 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.

\textsuperscript{104} See e.g. the Dutch International Crimes Act (2003).

\textsuperscript{105} 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}

\textsuperscript{106} See ICC Statute Art. 7 (emphasis added).

\textsuperscript{107} 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.
relationship between a national criminalization and its international counterparts is ambiguous. Germany, for example, criminalizes the preparation of a war of aggression.\(^{108}\) 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.\(^{109}\) 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.\(^{110}\) 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.”\(^{111}\) 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.\(^{112}\) Finally, the Ethiopian provision on war crimes clearly combines the two, as it both fully defines the crimes and refers to their international criminalizations.\(^{113}\)

\(^{108}\) 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) wilful 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.\textsuperscript{114}

2.2.b 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" groups\textsuperscript{115}, and the ICC Statute reproduces this definition.\textsuperscript{116} Many States follow this wording in their national legislation.\textsuperscript{117} Others, however, have altered the definition of genocide in their national legislation, making it either overinclusive or underinclusive \textit{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",\textsuperscript{118} "social groups"\textsuperscript{119} and various other groups.\textsuperscript{120}

\begin{itemize}
  \item or detention in concentration camps or forced labour camps; or
  \item (d) forcible enlistment in the enemy's armed forces, intelligence services, or administration; or
  \item (e) denationalization or forcible religious conversion; or
  \item (f) compulsion to acts of prostitution, debauchery or rape; or
  \item (g) measures of intimidation or terror, the taking of hostages or the imposition of collective punishments or reprisals; or
  \item (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,
  \item is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.
\end{itemize}

See also Art. 283-285 and Mayfield 1995, p. 573.

\textsuperscript{114} See Art. 136bis, 136ter and 136quater (inserted by the Law of 5 August 2003).

\textsuperscript{115} See 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:

\begin{itemize}
  \item (a) Killing members of the group;
  \item (b) Causing serious bodily or mental harm to members of the group;
  \item (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  \item (d) Imposing measures intended to prevent births within the group;
  \item (e) Forcibly transferring children of the group to another group.
\end{itemize}

See Schabas 2000b, p. 102-150.

\textsuperscript{116} See Art. 6 ICC Statute.

\textsuperscript{117} 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.

\textsuperscript{118} See e.g. Cote d'Ivoire, Code Penal, 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.”\textsuperscript{121} 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.\textsuperscript{122}

“Genocidio. El que con el propósito de destruir total o parcialmente un grupo nacional, étnico, racial, religioso o político...”; Poland, Penal Code (Kodeks Karny, Amended by Law of 6 June 1997), Art. 118 (1) (Ludobójstwo / Genocide, translation from http://preventgenocide.org/law/domestic):

“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, par t šu darb bu nol k püln gî vai da ji izn cîn 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, ethnical, 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, ethnical, 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 concerté 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...”;

121 See France, Code Pénal, Article 211-1:

“Constitue un génocide le fait, en exécution d’un plan concerté 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...”.

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

122 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):
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."\(^\text{123}\) Opinions differ on the extent to which these additional requirements separate the U.S. definition from its international counterpart.\(^\text{124}\) France requires acts to be "pursuant to a concerted plan" in order to amount to genocide,\(^\text{125}\) whereas the existence of a plan is neither required under the Genocide Convention nor under customary law.\(^\text{126}\) 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.\(^\text{127}\)

Actual prosecutions on the basis of national criminalizations of genocide, and attempts thereto, reflect the variation among these provisions.\(^\text{128}\) 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

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**"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...".

\(^\text{123}\) 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.


\(^\text{125}\) See above note 121 ("en exécution d’un plan concerté").

\(^\text{126}\) 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."

\(^\text{127}\) 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.

\(^\text{128}\) See Schabas 2000b, p. 391-393.
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 Völkermond:
"(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 Jorigic (Germany, OLG Düsseldorf, Jorigic, 26 September 1997, 2 StE 8/96; Germany, Supreme Court (BGH), Jorigic, 30 March 1999, 3 StR 215/98, in 19 NStZ (1999), 396-404; BGHSt 45, 64-91; Germany, Constitutional Court (BVerfG), Jorigic, 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.\(^{133}\)

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.\(^{134}\) 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.\(^{135}\) 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.\(^{136}\) In doing so, the Audiencia gave a very broad interpretation of the term “national groups,” including such collectivities as AIDS patients and the elderly.\(^{137}\) 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.\(^{138}\) 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\(^{139}\) have been charged with crimes


\(^{134}\) See generally Wilson 1999.


\(^{136}\) 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.

\(^{137}\) Id. See also Wilson 1999, p. 959.


\(^{139}\) According to a news report 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.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).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...”142 While both the English and the Amharic versions of the Penal Code are authentic, the Amharic version overrides in case of discrepancies.143

The charges brought against the first group of defendants in the trials incorporated language from both versions.144 The first charge alleged genocidal conduct against “members of various political groups whom they arbitrarily designated as anti-people and anti-revolution elements.”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.”146 The defendants challenged the charge of genocide on two grounds.147 First, the defendants pointed to the Amharic version to argue that the

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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.
141 Art. 281. Genocide; Crimes against Humanity

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:
(a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
(b) measures to prevent the propagation or continued survival of its members or their progeny; or
(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance,

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

142 See Kidane 2003, p. 678, fn 60.
143 Id.
144 See Ethiopia, Central High Court, Indictment of Mengistu and 72 others, October 1994. Unofficial translation on file with the author.
145 Id., p. 7.
146 Id., p. 8.
Ethiopian 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.\footnote{See below, note 444.} 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.\footnote{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 \textit{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.} 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.\footnote{See above, p. 20.} 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 \textit{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.\footnote{See above note 96 and accompanying text.}

Thus, direct application of international criminalizations, including the definition of the crime, jurisdictional provisions and forms of participation,\footnote{See above note 73 and accompanying text.} 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...
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


\(^{154}\) 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, 128 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 Reydamns 2002.
161 See Roth and Jeannere 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
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

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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 Cárceel 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.\textsuperscript{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.\textsuperscript{174} This was the case in the Canadian prosecution of Finta and the British prosecution of Sawoniuk, mentioned above.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{178} Danish,\textsuperscript{179} French,\textsuperscript{180} German,\textsuperscript{181} Greek,\textsuperscript{182}

\textsuperscript{173} Cf. Modolell González 2003, p. 547.
\textsuperscript{174} See above para. 2.1.
\textsuperscript{175} See above notes 95 and 96.
\textsuperscript{176} See Fletcher 2002, p. 455-458.
\textsuperscript{177} See U.K., Court of Appeal, R. v. Anthony Sawoniuk, 10 February 2000, [2000] 2 Cr. App. R. 220 at 223:

\begin{quote}
"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."
\end{quote}

\textsuperscript{178} See Art. 9 New Chinese Penal Code 1997. See also Yuan and Jianping 2002, p. 350.
\textsuperscript{179} See Art. 8, para. 1, section 5 Danish Penal Code. See also Holdgaard Bukh 1994, p. 341-345.
\textsuperscript{180} See Art. 689 French Penal Code.
\textsuperscript{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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182 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").
183 See Art. 4 (3) Laotian Criminal Code.
184 See Art. 23-4 (g) Spanish Ley Orgánica del Poder Judicial. See also Buck 2002, p. 141.
185 See Art. 6bis Swiss CP.
187 See also above, para. 2.1.
188 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 (distinguishing international criminalizations from "Externe Strafpflichten nüt Umsetzungspflicht").
189 See Art. 64 Austrian Penal Code—Acts committed abroad punishable irrespective of the law of the place where they are 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;


"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."

191 See e.g. Ecuador, Code of Criminal Procedure, Art. 18 (6):

Ámbito de la jurisdicción penal.- Están sujetos a la jurisdicción penal del Ecuador:

6) Los ecuatorianos o extranjeros que cometan delitos contra el Derecho Internacional o previstos en Convenios o Tratados Internacionales vigentes, siempre que no hayan sido juzgados en otro Estado;

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;

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.'

195 See Art. I, section 8, clause 10 Constitution.


197 Id., 158-160.


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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.\footnote{See below, note 206.} 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.\footnote{See below, para. 3.3.j and 3.3.n.} 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.”\footnote{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.} This formulation could be interpreted to rule out direct application of international criminal law altogether.\footnote{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).} Yet, it merely expresses the desired codification of national law and has never prevented direct application of international law of any kind.\footnote{See Fleuren 2004, p. 334-336.}

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.”\footnote{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.”).} 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

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\begin{enumerate}
\item See below, note 206.
\item See below, para. 3.3.j and 3.3.n.
\item 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.
\item 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).
\item See Fleuren 2004, p. 334-336.
\item 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.”).
\end{enumerate}
Constitution,\textsuperscript{205} treaties "are part of [the] national legislation of Ukraine."\textsuperscript{206} 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."\textsuperscript{207} But here also, criminal law may not be so impenetrable to international influences as it seems on first sight. Russia’s Criminal Code aims \textit{inter alia} to “ensure the peace and security of mankind”\textsuperscript{208} and is “based upon the Russian Constitution and basic principles and norms of international law.”\textsuperscript{209} Some observers conclude that criminal law is not singled out from the general constitutional scheme\textsuperscript{210} and that international treaties are directly applicable also in criminal matters.\textsuperscript{211} 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.\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{205} Art. 9: \textquote{"International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."}
\item \textsuperscript{206} Ukraine, Constitutional Court, \textit{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 \textit{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”).
\item \textsuperscript{207} See Lukashuk 2001, p. 267.
\item \textsuperscript{208} See Art. 2 (1) Criminal Code, cited in Lukashuk 2001, p. 267.
\item \textsuperscript{209} See Art. 1 (2) Criminal Code (available on website ICRC):
\begin{quote}
“The present Code is based upon the Constitution of the Russian Federation and basic principles and norms of international law.”
\end{quote}
\item \textsuperscript{210} See Art. 15 (4) Constitution 1993:
\begin{quote}
“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.”
\end{quote}
\item See also Art. 5 (3) of the Federal Law on International Treaties of 15 july 1995 and Marie-Schwartzenberg 2002, p. 263.
\item \textsuperscript{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 Komarow 1980, p. 30-32 (on direct application in the Soviet Union).
\item \textsuperscript{212} See Marie-Schwartzenberg 2002, p. 274.
\end{itemize}
These examples demonstrate the difficulties in analyzing direct application of international criminalizations in the absence of judicial pronouncements on that very question.\textsuperscript{213} 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."\textsuperscript{214} 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

\textsuperscript{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.

\textsuperscript{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.216

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.217 After WW I, some of the prosecutions held in Leipzig relied not only on national but also directly on international criminal law.218 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.219 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.220 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.221

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.

218 See Germany, Reichsgericht in Criminal Matters, Publication of Treaties Case (Germany), 25 September 1920, Partial translation in English in Annual Digest 1923-24, No. 234; Germany, Reichsgericht in Strafsachen, The Llandovery Castle, 16 July 1921, Partial translation in English in Annual Digest 1923-24, No. 235. See also Hankel 2003, p. 66; Schmidt 2002, p. 12-14.

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 Beziehungsweise 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 Tabestandsmerkmale 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. 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." This formulation of the legality principle requires a written basis in national law for all prosecutions. 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. 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. The legislation also contains a reference to international law for the criminalization of war crimes. Yet, in the absence of such a specific rule of reference, the principle of legality opposes direct application of international criminalizations for the prosecution of core crimes. The failed attempt to charge a Rwandan bourgmestre with genocide under customary international law demonstrates this state of the law. 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. 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) incorporates both customary and treaty criminalizations pertaining to war, to be understood as an international armed conflict. Art. 108 (2) expands the direct application of treaty crimes, but not customary criminalizations, to internal armed conflicts. Because the Court of Appeals characterized

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223 Art. 103 (2):
"Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde"
See also Art. 1 Criminal Code.
228 See Art. 1 Penal Code, Art. 1 Military Penal Code.
230 See above note 160.
232 See above note 157.
233 Switzerland, Military Court of Appeal, In re N., 26 May 2000, Part. III, Chapitre 1 (b).
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'article 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.\footnote{Para. 22, Wilcox J.}

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.\footnote{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.”}

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.\footnote{See para. 26 (Wilcox J.): “[I]n the realm of criminal law "the strong presumption 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.”} 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.\footnote{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.”}

Dissenting Justice Merkel reached a different conclusion, namely that “genocide is an offence under the common law of Australia.”\footnote{Para. 186.} In doing so, he relied on the Eichmann case and the reasoning of Lord Millett in Pinochet.\footnote{Para. 154.} He rejected the arguments that this approach of incorporation via the common law would cause uncertainty or violate the separation of powers.\footnote{Para. 165-181.} 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.\footnote{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.”} Also, Justice
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.  

*Nulyarimma* has received broad criticism from commentators as an unclear decision that should be overturned. Yet, it has been followed by several state courts. 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 in Senegal leaned heavily on international law. 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. 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.

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. While Senegal has ratified numerous ICL treaties, it has adopted no provisions on international crimes in its

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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.”

250 See above note 240.

251 See Mitchell 2000, p. 43.


256 Id., part IV and V.
criminal law except for torture.\textsuperscript{257} 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.\textsuperscript{258} Yet, according to then Art. 79 of the Constitution, ratified and published treaties supersede national law.\textsuperscript{259}

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.\textsuperscript{260} 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.\textsuperscript{261} 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.\textsuperscript{262} 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.\textsuperscript{263} The victims further referred to the Belgian Pinochet decision and the Furundzija judgment of the ICTY. Lastly, the complaint requested the investigating judge (\textit{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.\textsuperscript{265} But on appeal, the Dakar Court of Appeals quashed the indictment and ruled that the Senegalese courts lacked competence

\textsuperscript{258} Id., p. 439-441.
\textsuperscript{259} Art. 98 of the new Constitution is exactly similar to then Art. 79:  
"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."
\textsuperscript{260} See Senegal, \textit{Plainte avec Constitution de Partie Civile Contre Hissène Habré, Présenté au Juge d'Instruction du Tribunal Régional hors classe de Dakar, 1999}, part IV and V.
\textsuperscript{261} Id., part IV ("[M]ême si le droit intere du Sénégal n'incrimine pas expressément les crimes contre l'humanité, l'incrimination coutumière de droit international fait normalement partie du droit pénal que le Sénégal peut appliquer;").
\textsuperscript{262} Id., part V. Art. 669 of the Code of Criminal Procedure (\textit{Code de procédure pénale}) provides:  
"Tout étranger qui, hors du territoire de la République, s'est rendu coupable soit comme auteur, soit comme complice, d'un crime ou d'un délit attentatoire à la sûreté de l'Etat ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, peut être poursuivi et jugé d'après les dispositions des lois sénégalaises ou applicables au Sénégal, s'il est arrêté au Sénégal ou si le Gouvernement obtient son extradition."

The plaintiffs acknowledged that this language suggests that \textit{a contrario}, there is no jurisdiction to prosecute other crimes committed outside of Senegal. See Senegal, \textit{Plainte avec Constitution de Partie Civile Contre Hissène Habré, Présenté au Juge d'Instruction du Tribunal Régional hors classe de Dakar, 1999}, part V.
\textsuperscript{263} See Brodly and Duffy 2001, p. 830-831.
\textsuperscript{264} Id., part VI.
\textsuperscript{265} See Brodly and Duffy 2001, p. 823. But see Cissé 2002, p. 442 (stating that Habré was indicted for torture as well as the other crimes).
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, incomparable 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

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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'êtres 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'autres 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 sanctionnateur 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. 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. 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 interference and points of law.

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 general but also adheres to a strict interpretation of the principle of legality.

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273 Attempts thereafter to initiate prosecutions in Chad failed. See Sharp 2003, p. 170; Brody and Duffy 2001, p. 825. The proceedings in Chad did apparently not rely on international criminal law.


275 Id.; “[Q]ui 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. Fanken, 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 prévus 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.”

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

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.”


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 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}

\textsuperscript{285} Art. 4 Penal Code:

“L’infraction commise hors du territoire du Royaume, par des Belges ou par des étrangers, n’est punie, en Belgique, que dans les cas déterminés par la loi.”

\textsuperscript{286} 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 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 déterminés par la loi.”


“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...”

\textsuperscript{288} See Labrin and Boslly 1999, p. 300 (“Elle mérite d’être approuvée sans réserve.”).

\textsuperscript{289} See Bremer 1999, p. 301-304 and references cited there.

\textsuperscript{290} See Vandermeersch 2004, p. 134; Vandermeersch 2002a, p. 70.
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.

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 Vázquez 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 offense.” 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”).
international criminal law is traditionally found in cases concerning war crimes, at least where the U.S. is in some way involved.\textsuperscript{310} 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.”\textsuperscript{311} 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.\textsuperscript{312}

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.\textsuperscript{313} The reliance on \textit{Hudson} as the main authority for the statute requirement

\textit{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.


\textsuperscript{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, \textit{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, \textit{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 \textit{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. [...] Kidnapping 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., \textit{Demjanjuk v. Meese}, 27 February 1986, 784 F.2d 1114 at 117:

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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.\(^{314}\) After all, customary international law is treated like federal common law,\(^{315}\) but differs from it in important respects.\(^{316}\) 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."\(^{317}\)

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.\(^{318}\) 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."\(^{319}\) 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."\(^{320}\)

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\(^{314}\) See Paust 1983, p. 220.

\(^{315}\) See *Filartiga v. Pena-Irala*, 630 F.2d 876 at 866 (2d Cir.1980); *Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring).


\(^{317}\) See U.S., Supreme Court, *United States v. Smith*, 1820, 18 U.S. 153 at 162 (the case itself, however, concerned a specific rule of reference to piracy, see above note 193 and accompanying text).

\(^{318}\) See above note 312.

\(^{319}\) See U.S., Supreme Court of Pennsylvania, *Commonwealth v. Kosloff*, 1820, 5 Serg. & Rawle 545, at 5: "The only argument attempted or that can be devised in support of the negative, is that no offence is cognisable in any court of the United States until congress has declared it to be an offence and prescribed the punishment. This is the only consideration which ever had the least weight in my mind. But upon mature reflection I am unable to deny that the courts of the United States can take cognisance, when I find it written in the constitution that the Supreme Court shall have jurisdiction in all cases affecting a consul. Is he not affected in criminal cases much more than in civil? How then can I say that the Supreme Court has no jurisdiction?"

\(^{320}\) See above note 311.
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


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 Osofsky 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 Styer*, 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. Arguably, the core crimes today are at least as clearly established in international law as piracy in 1820.

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.” However, this judgment was neither consistent in its rejection 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, as had another district court earlier. 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.”

The case of *U.S. v. Kearny* (1923), on the other hand, concerned an actual treaty-based prosecution. 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. 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.Q. 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 Novemberer 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."336 The court also cited examples of other treaty based criminalizations.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. 3231.338 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, 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."339 They have further consistently accepted compliance with international law as a determining factor in interpreting the territorial scope of their jurisdiction.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".341 Also, civil cases under statutes such as the Alien Tort Claims Act (ATCA)342 show that U.S. courts today are still willing and able to apply customary

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336 Id., at 671.
337 Id., at 674-675.
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.
339 U.S., Court of Appeals (9th Cir.), U.S. v. Vasquez-Velasco, 25 January 1994, 15 F.3d 833 at 839. See also U.S., Supreme Court, United States v. Bowman, 1922, 260 U.S. 94 at 97-98. But see U.S., District Court (D.C.), 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"

341 See U.S., Supreme Court, 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."


> "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."


> "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. England and Wales

This description of English law will not detail the English reception of international law in general or its treatment of international criminal law in particular, 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." 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 *Pinochet* case, which concerned the question whether the former dictator could be extradited to Spain *inter alia* for acts of torture likely amounting to crimes against humanity committed during his rule in Chile. In *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." 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. 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. While these Law Lords did not specifically discuss the possibility

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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.

349 See e.g. Shaw 2003, p. 128-143.


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.

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:

\textsuperscript{356} Id., at 276 (Lord Millet: “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.”).
\textsuperscript{358} See Jones 2002, p. 35-36, 59 and 66.
\textsuperscript{360} See O'Keefe 2002, p. 302.
\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.”).
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's 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 trum p 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 Deschenes 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.

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. 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'eu égard 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.\textsuperscript{385} Moreover, the French courts have in the past on several occasions directly applied treaty criminalizations, in particular concerning crimes against humanity. Klaus Barbie,\textsuperscript{386} Paul Touvier\textsuperscript{387} and Maurice Papon\textsuperscript{388} 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.\textsuperscript{389} These prosecutions relied largely on a law from 1964 that indirectly referred to the Nuremberg Charter and declared crimes against humanity imprescriptible.\textsuperscript{390}

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."\textsuperscript{391} 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."\textsuperscript{392} The Court of Cassation unequivocally rejected this argument, relying both on Art. 15 (2) ICCPR and Art. 7 (2), and on Art. 55 Constitution.\textsuperscript{393}

\begin{itemize}
\item [385] See in particular Art. 689 French Code of Criminal Procedure.
\item [386] See France, Court of Cassation, \textit{Barbie (No. 3)}, 3 June 1988, Bull. crim., no. 246; 100 ILR 330; France, Court of Cassation, \textit{Barbie (No. 1)}, 6 October 1983, Bull. crim., no. 239; 78 I.L.R. 125.
\item [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.
\item [391] France, Court of Cassation, \textit{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).
\item [392] Id., at 129.
\item [393] Id., at 131.
\end{itemize}
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.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."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."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."397 Thus, the reference to crimes against humanity in the Nuremberg Charter in the 1964 law was found to be declarative rather than constitutive.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 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."399 In 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.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 Barbie and 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

394 France, Court de Cassation, 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."

395 Id., at 135 (emphasis added).
396 Id.
397 Cited by the Court of Cassation, id., at 135.
398 See Lelieur-Fischer 2004, p. 236; Aubert 2000, p. 554.
399 France, Court of Appeals of Paris, Touvier, 13 April 1992, 100 ILR 337 at 350.
400 France, Court de Cassation, 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 confrer un caractère purement recognitif a la loi du 26 decembre 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 Elliot 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 caracter trop general pour creer directement des regles de competence extraterritoriale en matiere penale, lesquelles doivent necessairement etre redigees de maniere detaillee 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.\footnote{See also the similar case of RSF \textit{v. Milles Collines}: France, Tribunal de Grande Instance de Paris, Juge d'Instruction, \textit{Reporters sans Frontières \textit{v. Mille Collines, 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 \textit{v. Mille Collines}}, 6 November 1995, on file with the author: "[L]a Cour releve, qu'en absence de dispositions de droit interne, la coutume internationale ne saurait avoir pour effet d'étendre la compétence extra-territorale des juridictions françaises. 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."}

Customary criminalizations, on the other hand, are completely barred from general direct application in core crimes prosecutions.\footnote{See Lelieur-Fischer 2004, p. 234-237 and Stern 1999, p. 529. Cf. Benillouche 2002, p. 171-176.} The different judgments in the \textit{Barbie} case, in particular the recurrent application of the general principles clauses of the ICCPR and ECHR\footnote{See also France, Court of Cassation, \textit{Glaezer}, 30 June 1976, Bull. crim., no. 236, p. 623: "[II] convenait d'examiner si l'auteur des crimes dénonces, a les supposer etables, ne se trouvait pas exclu du benefice de la non-retroactivite de la loi penale, en vertu des dispositions de l'article 7, alinea 2 [ECHR];"} 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."\footnote{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)} 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.\footnote{France, Court of Cassation, \textit{Aussaresses}, 17 June 2003, 108 RGDI 754. See also Lelieur-Fischer 2004.} 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."\footnote{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. Thus, as a general rule, all international law is domestically valid in the Netherlands. Many writers overlook the fact that Art. 93 and 94 of the Dutch Constitution 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. 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. Art. 94 determines that only such treaties and instruments supersede national law, including the Constitution itself, thus a contrario excluding custom and non-self-executing treaties from superior rank.

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415 See e.g. Strijards 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.

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.

420 See Netherlands, HR, Nuygat, 6 March 1959, NJ 1962/2.
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), Ahdbrecht I, 17 February 1947, NJ 1947/87 (“...dat de Nederlandsche rechter hetzij 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 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 Bouterse itself, though, because the courts assumed there was neither a duty to prosecute \textit{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 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 Zorreguieta, the Amsterdam Court of Appeals further reiterated that Dutch courts can not derive jurisdiction from international custom


\textsuperscript{433} See generally Zegveld 2002b; Elst 2002.

\textsuperscript{434} See Netherlands, Amsterdam Court of Appeals, \textit{Bouterse 2000}, 20 November 2000, NYIL., para. 8.2.

\textsuperscript{435} See Netherlands, Supreme Court, \textit{In re Bouterse}, 18 September 2001, English translation in the Netherlands Yearbook of International Law, para. 4.5.

\textsuperscript{436} While it is debatable whether the alleged torture and murder of a relatively small group of opposition leaders amounted to crimes against humanity, the Amsterdam Court of Appeals endorsed this qualification, following the advice of Prof. John Dugard. See Netherlands, Amsterdam Court of Appeals, \textit{Bouterse 2000}, 20 November 2000, NYIL., para. 5.1. This holding finds support in case law of the ICTY. See ICTY, Trial Chamber, \textit{Sikirica et al.}, 3 September 2001, Case No. IT-95-8, para. 76-77; ICTY, Trial Chamber, \textit{Jelisic}, 14 December 1999, para. 82.

\textsuperscript{437} See above note 434 and Netherlands, Supreme Court, \textit{In re Bouterse}, 18 September 2001, English translation in the Netherlands Yearbook of International Law, para. 6.4.
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}

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 MvA 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 Fleuren 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 Strijdars 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. Strijdars 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.\textsuperscript{447} As is well known, the principle of legality in international instruments includes custom and general principles as a basis for criminality.\textsuperscript{448} 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\textsuperscript{449} for cases that are not covered by the Penal Code.\textsuperscript{450} Another writer is more cautious in this regard.\textsuperscript{451} 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.\textsuperscript{452}

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.\textsuperscript{453} 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

\textsuperscript{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.”

\textsuperscript{448} See below, Chapter VI, para. 5.1.

\textsuperscript{449} See above, para. 2.2.b (iii).


\textsuperscript{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.”).

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

and effectiveness of international law.\textsuperscript{454} Several constitutional revisions have cemented this trend, so that the Constitution now clearly expresses not only the direct applicability of treaty law,\textsuperscript{455} but also its higher rank than that of statute law and even the constitutional rank of selected human rights treaties.\textsuperscript{456} It is further settled case law that customary international law is also directly applicable,\textsuperscript{457} and that treaties must be interpreted in accordance with the case law of international courts.\textsuperscript{458}

Whether this direct applicability extends to international criminal law is a matter of debate.\textsuperscript{459} 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."\textsuperscript{460} Several commentators interpret this provision as a recognition of the direct

\begin{itemize}
  \item 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...").
  \item Art. 75:
  \begin{quote}
  "Congress is empowered: 
  \begin{itemize}
  \item To approve or reject treaties concluded with other nations and international organizations, and concords with the Holy See. Treaties and concords have a higher hierarchy than laws.
  \item 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. [...]
  \end{itemize}
  \end{quote}
  See also Raimondo 2003, p. 118-120; Alvarez \textit{et al.} 2002, p. 329 (asserting that this provision has created "un bloc de constitutionnalité ou le droit interne et le droit international sont pratiquement confondus."); Sancinetti and Ferrante 2002, p. 352-357; Mattarollo 2001, p. 13.
  \item See Alvarez \textit{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 susfunciones procederán aplicando la Constitución como ley suprema dela Nación, las leyes que haya sancionado o sancione el Congreso,los Tratados con Naciones extranjeras, las leyes particulares delas Provincias, las leyes generales que han regido anteriormente una Nación y los principios del derecho de gentes, según lo exijan respectivamente los casos que se sujeten a su conocimiento en elorden de prelación que va establecido." See also Sancinetti and Ferrante 2002, p. 376-380, 385 and 392; Sancinetti and Ferrante 1999, p. 432-451 (concluding it is an open question).
  \item Art. 118 Constitution:
  \begin{quote}
  "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."
  \end{quote}
\end{itemize}
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 *Schwammberger*, 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

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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 (“declararse insanablemente 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. 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 *jus cogens* status that can not be altered by the States involved. 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. 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. The majority of the Supreme Court, however, did not share this objection and accepted in general terms direct applicability of international criminal law. 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.

In a 1999 decision regarding the pre-trial detention of former head of the *junta* Jorge Videla, 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

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470 *Argentina, Supreme Court, Extradition Josef Franz Leo Schwammberger*, 20 March 1990, 313 Fallos de la Corte Suprema de Justicia de la Nacion 256.

471 *Argentina, Supreme Court, Extradition of Erich Priebke*, 2 November 1995, 1996-1 Jurisprudencia Argentina 324 at 331, per Judges Boggiano, López and Fayt, para. 4:

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, et al. 2002, p. 309.

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

474 Id., per Judges Nazareno and Moliné O’Connor, para. 39 and Judge Bossert, para. 51:


against humanity.\(^{477}\) The federal court held that crimes against humanity are not subject to statutes of limitations, regardless of any national provisions to the contrary.\(^{478}\) 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.\(^ {479}\) 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."\(^ {480}\) 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."\(^ {481}\) Several other judgments of federal courts contain similar or even identical holdings.\(^ {482}\)

Of particular interest is the case of Julio Simon (2001), in which an Argentinean federal judge nullified two amnesty laws\(^ {483}\) to allow prosecution for the alleged kidnapping and disappearance of several victims, including a child that was subsequently raised by a military couple.\(^ {484}\) 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.\(^ {485}\) 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.\(^ {486}\) The judgment was upheld on appeal.\(^ {487}\) The case is pending before the Argentinean Supreme Court at the time of this writing.

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\(^{478}\) See Mattarollo 2001, p. 39.

\(^{479}\) Id., p. 40.

\(^{480}\) Id., p. 39-40.

\(^{481}\) Id., p. 41.

\(^{482}\) See Argentina, Federal Court of Buenos Aires, *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 deconstruido que implicara recortes o excepciones a la normatividad que sería aplicable en el ámbito internacional."

See further Mattarollo 2001, p. 41, note 63.

\(^{483}\) See above, note 468.


\(^{485}\) Id., at 587 (para. IV A).

\(^{486}\) 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 operationality." 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.

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"[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,

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500 See Art. 57 (4) Hungarian Constitution 1949:
"No one shall be declared guilty and subjected to punishment for an offense that was not a criminal offense under Hungarian law at the time such offense was committed."
501 See Decision No. 11/1992, para. 5:
"[L]egal certainty cannot be limited to the determination of the elements of a crime and the punishment. The same constitutional requirements are imposed on every aspect of criminal liability – from the conditions of punishability to the regulation of sentencing."
502 See Decision No. 11/1992, para. 5:
"The principle of reliance requires that once a reason for the termination of punishability is realized there may be no new statute making the same offence punishable once again."
from the statute of limitations altogether.\textsuperscript{504} In line with its earlier decisions, the Constitutional Court declared this statute unconstitutional insofar as it concerned ordinary crimes.\textsuperscript{505} 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.\textsuperscript{506} In short, custom is incorporated through a rule of reference in the Constitution, while treaties are incorporated through their promulgation or publication.\textsuperscript{507} Importantly, Art. 7 (1) Constitution 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,\textsuperscript{508} the duty to harmonize the national law with international obligations extends to all international law, including treaties.\textsuperscript{509} 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."\textsuperscript{510} 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.


\textsuperscript{506} Id., at 276-277. See for an analysis of the judgment Zimmermann 1997, p. 288-295; Mohácsi and Polt 1996. See also Sonnevend 1997.

\textsuperscript{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, \textit{Report to the Committee on the Elimination of Racial Discrimination}, 17 May 2002, CERD/C/431/Add.1, para. 3 and Hungary, Constitutional Court, \textit{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.

\textsuperscript{508} There is some unclarity as to the exact body of unwritten law incorporated through Art. 7 (1). Compare Udvaros 2002, p. 282 and Küpper 1998, p. 243 ("die allgemein anerkannten Regeln des Völkerrechts"); Sólyom and Brunner 2000, p. 276-277 ("the generally recognized rules of international law") with the translation of the ICRC ("the generally recognized principles of international law") and Mohácsi and Polt 1996, p. 334 ("the universally recognized rules and regulations of international law"). Yet, it can safely be assumed that Art. 7 (1) in fact incorporates both (universal, not regional) custom and general principles. See Küpper 1998, p. 243-248; Sonnevend 1997, p. 210.

\textsuperscript{509} \textit{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.

\textsuperscript{510} \textit{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. 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.” 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. It rigorously separated international criminal law from its national counterpart, and emphasized that the two could not be fused. 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." 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 Salgotarján 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

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 attire l'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.\textsuperscript{529} 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.\textsuperscript{530} 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.\textsuperscript{531}

In the \textit{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.\textsuperscript{532} On appeal, however, the judgment was vacated and remanded for trial.\textsuperscript{533} Several comparable cases equally accepted the direct application of GC IV, but were halted for practical complications.\textsuperscript{534} Others are apparently on-going,\textsuperscript{535} 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.\textsuperscript{536} 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.

\begin{itemize}
  \item \textsuperscript{529} \textit{Id.}, p. 276-277 and 281-283.
  \item \textsuperscript{530} \textit{Id.}, p. 299.
  \item \textsuperscript{531} \textit{Id.}, p. 278-279 and 287-288.
  \item \textsuperscript{532} \textit{Id.}, p. 277 and 283-284.
  \item \textsuperscript{533} \textit{Id.}, p. 279.
  \item \textsuperscript{534} \textit{Id.}, p. 284-287.
  \item \textsuperscript{536} See also Hungary, \textit{Report to the Committee against Torture}, 17 June 1998, CAT/C/34/Add.10, para. 2 and 21:
  \begin{quote}
    "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."
  \end{quote}
\end{itemize}
3.3.o 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\(^{537}\) and many Islamic States.\(^{538}\) 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\(^{539}\) and Tanzania.\(^{540}\)

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.\(^{541}\) Still, doctrine is divided, with some writers accepting direct application while others reject it, often without specifying the perceived obstacles that would preclude it.\(^{542}\) 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."\(^{543}\) Yet, the language of the decision suggests that criminal law is not exempted from the general incorporation of international custom, and that a mandatory

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\(^{537}\) See Holdgaard Buch 1994, p. 341.


\(^{539}\) See Nserekko 2000, p. 178.

\(^{540}\) See Kamanga 1998, p. 77 ("[G]enocide, strictly speaking, is yet to be proclaimed a crime under Tanzanian laws, and logically, not penal sanctionable.").

\(^{541}\) See Section 232 and 35 (3) (1) Constitution.

\(^{542}\) 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.

\(^{543}\) 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.\footnote{See Gartner 2000, p. 52.}

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 \textit{Haiti}, for example, the \textit{Ordonnance} (indictment) of the Raboteau trial,\footnote{See Ambo 2002a, p. 500-502.} suggested that war crimes could be prosecuted directly on the basis of the Geneva Conventions.\footnote{See Discalopoulou-Livada 2000, p. 118. See more generally Kareklas and Papacharalambous 2001, part C and Spirakos 1990, especially p. 76 and 135-137.} However, in the end all defendants were charged with ordinary crimes. General direct application of treaty-based criminalizations appears to be possible also in \textit{Austria},\footnote{See above note 207 and accompanying text.} \textit{Chile},\footnote{See Buck 2002, p. 146-149. Cf. Yáñez-Banuevo and Roldán 2000, p. 203-206.} \textit{Greece},\footnote{See above note 206 and accompanying text.} \textit{Russia},\footnote{See Gartner 2000, p. 52.} \textit{Spain},\footnote{See Gartner 2000, p. 52.} and \textit{Ukraine}.\footnote{See above note 206 and accompanying text.} 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
in general. Such divergence between the constitutional framework and actual practice has been noted e.g. for Brazil and Iran.

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, some writers conclude that the constitutional formulation of the principle of legality signifies an acceptance of general direct application for all international criminalizations.

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. Finally, the state of the law on general direct application in China, Croatia, Egypt, Finland, Italy, Morocco, Portugal is diffuse, disputed or unclear, at least for this author.

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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.


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.


558 See Lockwood 1977.


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


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


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

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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.

\footnote{Cf. Cassese 1985, p. 441.}