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Chapter III
Underlying Considerations: What Crime, What Law?

1 Introduction

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

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

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

[574] Compare e.g. Germany and Senegal to France and Hungary in Chapter 2.
[575] See e.g. Ambos 2002b, p. 492-493; Benillouche 2002, p. 174; Strijards 2000, p. 2115; Bremer 1999, p. 396; Triffterer 1966, p. 10 and 38.

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

Still, this Chapter includes some legal analysis where necessary for a full understanding of the policy considerations. Moreover, it is not always possible to separate legal arguments and policy considerations when analyzing legislative and judicial practice.[576] For example, when a legislature or court refers to arguments regarding legal certainty to justify a particular legislative or judicial decision, it is not always clear whether it is referring to legal rules regarding the principle of legality *requiring* that particular outcome or solely to policy considerations that justify the outcome as the exercise of a certain discretion. This overview therefore focuses on policy considerations but values a fuller analysis of related points over a rigid separation of law and policy.

The considerations set out here vary greatly in relevance, specificity and the extent to which they are explicitly expressed in practice. Some are so central that they surface in almost every decision and debate on direct application, others are apparently less important. In the appraisal of the different considerations, there are significant differences between different States and legal systems, as well as between practitioners and academics of different backgrounds.[577] Some considerations pertain to direct application of all international rules, while others are relevant only for the criminalizations studied here. Some are explicitly discussed in judgments and legislative debates, while others can be deducted only from a broader analysis of national practice and doctrine.

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

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

[576] Cf. Mundis 2004, p. 4; Dupuy 1999, p. 118.
[577] Compare the different country reports above, Chapter II, para. 3.3.

towards more practical ones like the penalties attached to the different legal bases for prosecution.

2 Minimalism and Selectivity in Core Crimes Prosecution

An important characteristic of national practice regarding the core crimes is the persistent lack of prosecutions.[578] While recent years have seen a notable increase in the activity of national courts, the level of national core crimes prosecutions is still minimal.[579] As will be explained more fully below, this situation brings questions concerning direct application to the fore.[580] The global lack of prosecutions has much to do with the fact that many core crimes are "system crimes."[581] Such crimes are not simply the result of the criminal impulses of individuals on the loose, but rather the product of State machineries at work. Genocide and numerous war crimes can by their very nature only be committed either with active or passive involvement of the State or, at the very least, an armed group with a significant degree of organization. Crimes against humanity, as originally conceived during WWII, could only be committed with active or passive State involvement.[582] Today, customary international law broadens the category of possible perpetrators to include organizations,[583] but it appears these must have certain State-like features.[584] Most often, crimes against humanity are characterized by at least

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

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

[580] See below, p. 106 *et seq.*

[581] See Cassese 2003a, p. 295-298; Swart 2002c, p. 244; Jäger 1995, p. 327; Röling 1979, p. 164-166. Cf. Nollkaemper 2003a, p. 624; Nollkaemper 2000, p. 18. For a short time after WW II, the ILC expressed this characteristic by referring to "offences which contain a political element." In light of its obvious definitional complications, however, this term was quickly abandoned. See Triffterer 1966, p. 201-210.

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

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

[584] See ICTY, Trial Chamber, *Kupreskic*, 14 January 2000, para. 551-555, in particular at 552:

> "The need for crimes against humanity to have been at least tolerated by a State , Government or entity is also stressed in national and international case-law. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding *de facto* authority over a territory."

But see ICTY, Trial Chamber, *Tadic*, 7 May 1997para. 645-648 and 654-655, in particular at 654:

passive State involvement.[585] To be sure, there certainly are core crimes of an individual rather than systemic nature, in particular isolated war crimes.[586] But on the whole, support or acquiescence of State institutions is an important characteristic of the core crimes.[587]

Core crimes prosecutions form an unpopular undertaking for several reasons. First, core crimes prosecutions are often controversial because they involve State officials and implicate State institutions like armies or governments. Although core crimes prosecutions formally have no bearing on questions of State responsibility,[588] it is true at least to some extent that a "judgment against an individual perpetrator can be considered as a (partial) remedy against the state."[589] Second, their character as system crimes also means that core crimes are seldomly committed in isolation. Therefore, a succesful prosecution may pave the way for an unwanted influx of related cases, leading to an overburdening of the legal system.[590] Third, prosecutions of core crimes are complicated, costly and time-consuming. In most core crimes prosecutions, both the law to be applied and the facts of the case are extensive and complex, requiring considerable expertise and time of the actors involved. Prosecutions involving foreign victims or perpetrators, which is regularly the case for core crimes, add many complications. Already difficult assessments of law and facts become even more complex due to cultural and linguistic barriers.[591] Foreign defendants, victims or witnesses may require expensive translation services and visits to foreign sites, both with uncertain outcomes.[592]

> "The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity."

It is thus open to debate whether entities like ETA and Al-Quaeda can commit crimes against humanity. See Schabas 2002b, p. 257-259.

[585] See Schabas 2002b, p. 259 ("The very reason why the concept of crimes against humanity was originally developed, at Nuremberg, was so that atrocities that went unpunished by the judicial authorities of the State in question would not escape prosecution."); Cassese 2001a, 356-360.

[586] This may occur on a larger scale when every form of effective State authority is absent. However, even in failed States there usually are some entities that claim institutional authority.

[587] It should be noted that often, States put the blame for their war crimes entirely on the individuals who physically committed them, while they themselves in fact bear responsibility for, at the very least, contributing factors like a lack of adequate training and supervision, unclear combat instructions and/or a failure to adequately punish such crimes.

[588] See e.g. Art. 25 (4) ICC Statute.

[589] Nollkaemper 2003a, p. 638.

[590] See Wolfrum 1996, p. 245 (explaining the divergence between the numerous national prosecutions for [pre-2001] terrorism and the scarcity of such prosecutions for war crimes by the fact that "[w]hereas the prosecution of war crimes would require dealing with several or many cases, terrorist attacks can be regarded as isolated cases where the prosecution of one does not necessarily result in the prosecution of other similar cases."). Furthermore, the global lack of core crimes prosecutions may lead to an influx of cases in the few States that actively pursue prosecutions, especially when they have large immigrant communities and grant victims the competence to initiate proceedings. See e.g. Wouters and Panken 2003, p. 2-4 and 26 (on the extensive list of proceedings concerning core crimes in Belgium before the adaptation of the law on international crimes in 2003, and the resulting financial and organizational consequences).

[591] See e.g. Switzerland, Military Court of Cassation, *In re N.*, 27 April 2001, para. 6b and 8c :

All in all, the many complexities involved make core crimes prosecutions daunting tasks with unsure results, and States therefore generally avoid rather than welcome them.[593] Some of the legal and practical complications, which will be discussed more fully below, may justify a cautious approach.[594] Yet, others are of a more dubious nature. In particular, States are not only minimalist but also selective when it comes to the prosecution of core crimes. Prosecution of own nationals generally requires judging the wars and crimes of one's own government, which is not a popular task.[595] The prosecution of foreign citizens, let alone State officials, or even the prospect of such prosecutions, can lead to serious political tensions between the different States involved.[596]

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

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> "Se référant au jugement de première instance, le Tribunal d'appel a tenu compte de la situation particulière des témoins qui ont vécu les événements sanglants du printemps 1994 au Rwanda, qui ont souvent perdu des proches, qui ont subi des traumatismes, qui sont parfois illettrés ou ne connaissent pas le calendrier. Ces circonstances ne sont pas usuelles pour les tribunaux suisses. [...]
> Il est à l'évidence délicat pour un tribunal d'un pays étranger d'apprécier, plusieurs années après les faits, l'étendue des pouvoirs d'un magistrat de l'administration civile du Rwanda pendant une période de quelques semaines dans des circonstances dramatiques."

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

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

[593] See Kirby 2004, p. 250; Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, 2004, Human Rights Watch; Wouters and Panken 2003, p. 25-26; Kamminga 1998, p. 574. See for documented instances of reluctance to prosecute extraterritorial core crimes when the suspect was present on State territory e.g. Schabas 2003a, p. 35-36; Posner 2002, p. 416.

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

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

[596] See e.g. Kirby 2004, p. 253; Zeidy 2003, p. 860-861; Röling 1979, p. 184.

[597] See Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, 2004, Human Rights Watch, p. 9-10 (on ethnic bias in national war crimes prosecutions in the States of the Former Yugoslavia); ICJ, International Court of Justice, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 32:

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

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

> "Da die besonders schwer wiegenden Fälle des Völkermords häufig durch den Heimatstaat der Opfer oder wenigstens mit dessen Duldung begangen werden, ist in der Regel eine effektive Strafverfolgung im Tatortstaat nicht zu erwarten.";

in the courts of the State involved while the regime responsible is still in power are few at best, and mostly symbolic.[598] Such prosecutions normally charge the defendants with ordinary crimes, which negates the broader context of the core crimes,[599] and result in low sentences.[600] Despite occasional suggestions to the contrary,[601] democracies have no better track record in the prosecution of their own core crimes than other States.[602]

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

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

U.K., House of Lords, R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3), 24 March 1999, [2000] 1 A.C. 147 at 199, per Lord Browne-Wilkinson:

> "[T]he fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed.";

Canada, Supreme Court, *R. v. Imre Finta*, 24 March 1994, per La Forest J. (dissenting), para. 253:

> "It would be pointless to rely solely on the state where such a crime has been committed, since that state will often be implicated in the crime, particularly crimes against humanity."

See also Steinhardt 2004, p. 21; Jessberger 2003, p. 285; Schabas 2003b, p. 43 and 60; Seiderman 2001, p. 209; Bassiouni 1998, p. 141-142; Swart 1996, p. 6-7.

[598] See Cassese 2002, p. 565. Cf. Steinhardt 2004, p. 14; Rowe and Meyer 1996, p. 480.

[599] See on the context and international dimension of the core crimes below, para. 8.

[600] See for examples of such cases above, Chapter II, para. 2.1 and Lauterpacht 1944, p. 84. Cf. Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, *Abilio Soares*, 14 August 2002; Bertodano 2004, p. 922-925 and Bertodano 2003, p. 234-236. (Indonesia prosecutes its former Governor of East-Timor for crimes against humanity, but in an inadequate manner leading to a sentence of a mere three years imprisonment which was annulled by the Indonesian Supreme Court on 4 November 2004).

[601] See e.g. Cassel 2001, p. 440-441.

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

[603] The case of Rwanda is well-described, but not the only one. After the fall of Mengistu's regime, for example, Ethiopia was faced with more than 5000 defendants of serious crimes, many of which apparently core crimes, as well as thousands of witnesses, and more than 300.000 pieces of documentary evidence. The resulting workload for the authorities, who lacked both resources and expertise, was formidable and included more than 1300 *habeas corpus* petitions alone. See Kidane 2003, p. 671-672 and 690-693; Haile 2000, p. 35-36; Gouttes 1998, p. 697. See generally Redae 1999; Mayfield 1995.

Minimalism and selectivity can be found in all governmental institutions concerned, even if they are seldomly formulated. National legislation on core crimes is often delayed, incomplete and restrictive, and falls well short of what is permitted or required under international law.[604] Most legislatures prefer to formulate narrow bases of jurisdiction and criminalizations over broader ones.[605] Some of them also add procedural barriers for core crimes prosecutions to take place. Several States, for example, require consent of certain State authorities for the institution of core crimes prosecutions, while such consent is not required for ordinary prosecutions.[606] Sometimes, legislatures simply have other priorities.[607]

Prosecutorial and judicial authorities are no different. Of course, there are notable exceptions like Belgian Judge Vandermeersch[608] and Spanish Judge Garzon.[609] Generally, however, both prosecutors and courts tend to minimize and carefully select their involvement in core crimes prosecutions.[610] Prosecutorial authorities are hesitant to use their available options to prosecute.[611] In many countries, foreign suspects of core

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

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

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

And p. 324-325, remarks Steven Lubet:

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

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

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

[608] See above, note 280 and accompanying text.

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

[610] See Belgium, Tribunal of First Instance (District of Brussels), *In re Pinochet Ugarte*, 6 November 1998, para. 3.3.3:

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

[611] See e.g. Ziegler 1997, p. 583 ("Switzerland's political authorities have mentioned on several occasions that they prefer extraditing war criminals over prosecuting them domestically.").

crimes are confronted by civil claims, exclusion from refugee status, denaturalization and/or deportation rather than by criminal prosecution.[612] Judges exert their influence through their, generally restrictive, interpretation and application of the law in core crimes prosecutions.[613] Here also, selectivity can play a role. The French courts, for example, have been noticeably stricter in their application of the principle of legality for core crimes committed by the French military in former colonies than for Axis crimes committed in WWII.[614]

Minimalism and selectivity affect all core crimes prosecutions, or lack thereof, no matter what their legal basis. They are important factors for a full understanding of national practice regarding core crimes prosecutions. At the same time, they also have their bearing on the specific question of direct application in several ways. First, minimalism of the legislature[615] explains both why the question of general direct application comes up regularly in national courts and why its answer is of great practical importance. It is generally the imperfect state of national legislation on core crimes that prompts the question whether general direct application can provide an alternative basis for a prosecution that can not otherwise take place. The description in Chapter 2 of national proceedings, for example in Australia, Senegal and Hungary, testifies to this fact.

Second, considerations of minimalism and selectivity influence national authorities on all levels to be critical of, and sometimes outright hostile to, direct application of international criminalizations.[616] As will be discussed in more detail below, this critical attitude is motivated in part by the complexities of international criminal law. But often legislators, prosecutors and courts also entertain a desire to exert maximal control over the applicable law so as to be able to curtail and select the resulting prosecutions. Direct application, especially general but also on the basis of a specific rule of reference, does not afford maximal control. The international criminalizations that are directly applied can not be changed as easily as those in a statute, nor be sidelined with measures like amnesty laws. Moreover, the precise extent of the international law incorporated in the national legal order is generally not readily apparent and open to, sometimes rapid, change.[617]

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[612] See Aceves 2000, p. 141-149. See also Handmaker 2003, p. 688-689 (on the disparity in the Netherlands between the exclusion from refugee protection of several hundreds of suspects of international crimes and the lack of subsequent criminal prosecutions); Schabas 2003b, p. 50-51; Elst 2000, p. 816; Schabas 1999, p. 531 ("[T]he lack of success of the Justice Department in prosecuting Nazi war criminals has resulted in a policy decision to remove war criminals from Canada under the Immigration Act rather than prosecute them in Canada."); Reydams 1996, p. 39-41; Hetherington and Chalmers 1989, p. 70-72 (on the U.S. policy to deport rather than prosecute war crimes suspects).

[613] See Cassese 2003a, p. 306 ("[N]ational courts have developed in their judicial practice a *restrictive tendency* to limit as much as possible the impact of international rules on the exercise of jurisdiction by national courts over international crimes.").

[614] See Lelieur-Fischer 2004, p. 236.

[615] See e.g. O'Keefe 2004, p. 758 (describing how political and practical considerations guided the Scottish and English legislatures in limiting the jurisdictional reach of their ICC implementing legislation).

[616] See Abdelgawad 2002, p. 393; Choukr 2002, p. 334.

[617] See Kirby 2004, p. 250; Röling 1979, p. 186.

National authorities hardly ever openly express their desire to control, curtail and select core crimes prosecutions. It is therefore impossible to say to what extent it influences their approach to direct application. Only occasionally do national authorities reveal that they are guided (also) by considerations of minimalism and selectivity in their approach to core crimes law. In *Tel-Oren v. Libyan Arab Republic* (1984), an American Circuit Court rejected direct application of the 1907 Hague Convention, relying heavily on the practical problems direct application would cause.[618] In *Handel v. Artukovic* (1985), an American District Court expressed even clearer that it found the same treaty to be non-self-executing, not for legal reasons but because its direct application would "create insurmountable problems."[619] While these cases concerned civil rather than criminal proceedings, they are relevant for the question of direct application in core crimes prosecutions both as precedents on the non-self-executingness of humanitarian treaties and because the considerations expressed by the courts largely pertain also to criminal prosecutions.

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

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

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

[619] U.S., District Court, *Handel v. Artukovic*, 31 January 1985, 601 F.Supp. 1421, at 1425:

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

[620] U.K., Court of Appeal, *Al-Adsani v. Al-Sabah and Kuwait*, 12 March 1996, Lord Justice Stuart-Smith:

> "... A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those

in this case accepted that the prohibition of torture has *jus cogens* status, but refused to find that the immunity of Kuwait violated the right of access to court of the applicant.[621] At least two of the judges conveyed that they had been influenced to a considerable extent by the practical implications of the matter. In a separate opinion, they noted that "there is much wisdom" in the considerations of Lord Justice Stuart-Smith and added that another outcome of the case would have as a result "that precisely those States which so far have been most liberal in accepting refugees and asylum seekers, would have had imposed upon them the additional burden of guaranteeing access to court for the determination of perhaps hundreds of refugees' civil claims for compensation for alleged torture."[622] Again, this example concerns civil rather than criminal proceedings. Still, it is not difficult to see how similar considerations may lead courts to reject direct application of international criminal law, which would at the very least complicate numerous States' policy of deportation instead of prosecution of foreign suspects of core crimes. All in all, a negative attitude towards core crimes prosecutions is not at all uncommon among national prosecutors and courts.[623] As a result, the possibility of direct application is regularly ignored, or treated with a negative bias.

3 Sovereignty

The prosecution of core crimes regularly gives rise to considerations about State sovereignty.[624] The administration of criminal justice has always been and still is one of the most fundamental tasks of the State and is a core component of its sovereignty.[625]

> who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination. ..."

Cited in ECtHR, *Al-Adsani v. United Kingdom*, 21 November 2001, para. 18.

[621] ECtHR, *Al-Adsani v. United Kingdom*, 21 November 2001.

[622] Id., Concurring Opinion of Judge Pellonpaa, joined by Judge Bratza.

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

[624] See Ferdinandusse 2004, p. 1050 and references cited there (on sovereignty based arguments in core crimes law).

[625] See e.g. Spain, Tribunal Supremo, Guatemalan Genocide Case, 25 February 2003, 42 ILM 686, para. II sub 1:

> "La jurisdicción es una de las expresiones de la soberanía del Estado. Es entendida como la facultad o potestad de juzgar, es decir, de ejercer sobre determinadas personas y en relación a

General direct application of core crimes law, *id est* in the absence of a specific rule of reference, thus may be thought to infringe at least to some extent on the sovereign right of the State to shape its criminal law process to its liking. Appeals to sovereignty in the context of core crimes law fit into the broader discussion on the concept of sovereignty in contemporary international law.[626]

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

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

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determinados hechos, uno de los poderes del Estado, sometiéndolas, en el caso del derecho penal, al ius puniendi que la ley le atribuye."

See also Cartuyvels 2002; Aubert 2000, p. 494; Osofsky 1997, p. 213; Ballard 1997, p. 218. Cf. Fletcher 1998, p. 21-22; Bowett 1982, p. 1 and 15-18.

[626] See Rubenfeld 2003; Kälin 2000, p. 118-128. Note in this regard that numerous writers have criticized the contemporary use of the notion of sovereignty as imprecise and confused. See Henkin 1999; Koskenniemi 1997, p. 225; Lauterpacht 1997; Henkin 1994. Cf. Koskenniemi 1989, p. 192-263.

[627] Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, para. 52, *per* Whitlam J.

[628] Cf. Luxembourg, Court of Appeal, *Pinochet*, 11 February 1999, 119 ILR 360 at 363:

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

Ukraine, Constitutional Court, *Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case)*, 11 July 2001, para. 2.4; U.S., District Court, *Handel v. Artukovic*, 31 January 1985, 601 F.Supp. 1421 at 1428:

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

See also Cassese 2001c, p. 168:

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

Perkins 1997, p. 483.

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

4 Democratic Legitimacy

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

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

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

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[629] Cf. Wouters 2004, p. 30-31; Ferdinandusse 2003, p. 123-125.

[630] See e.g. Belgium, Court of Arbitration, 10 July 2002:

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

See also Henzelin 2002, p. 80. See for a more general discussion of democratic accountability and ICL Morris 2001.

[631] Cf. Kirby 2004, p. 243-246 and 248-249.

[632] See Pescatore 1987, p. 276.

[633] See Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, *per* Merkel J., dissenting, para. 136 ("[U]niversal crimes directly impact upon and attack "the international legal order" and cannot be considered purely internal matters of sovereign States."). See for a discussion of the characteristics of core crimes law below, Chapter V, para. 3.

[634] See for a particularly strong analysis Zakaria 2003, p. 239-256. Cf. Wouters 2004, p. 29-30.

[635] See Wouters 2004, p. 31.

making statements on issues of international law.[636] Furthermore, they also have considerable powers to override the judiciary's contributions to international law, *inter alia* through legislation.[637] The balance between those organs is decidedly different on the national and international plane, and the democratic legitimacy of international law may be less than that of many national laws or at least more indirect, but it is not entirely absent.

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

5 Separation of Powers

Closely linked to the issues of sovereignty and democratic legitimacy are considerations about the separation of powers. Direct application of international criminalizations in the absence of a specific rule of reference in national law can distort the balance between the different national actors involved in the making and application of criminal law.[638] It reduces the influence of the legislature and gives more power to the executive to regulate penal matters through treaty law, as well as more discretion to the judiciary through the application of customary law.[639] In federal States, it may allow the federal government to regulate through treaties penal matters that are otherwise reserved for the states.[640]

In practice, separation of powers considerations appear to play a significant role in the rejection of direct application of various international criminalizations. Particularly in common law States, the rejection of direct application of treaty law and the requirement of statutory authorization of extraterritorial jurisdiction are inspired considerably by the wish to preserve the position of the legislature.[641] Other States, predominantly civil law

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

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

[638] Cf. Kirby 2004, p. 243-246 and 248-249.

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

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

[641] See the paragraphs on England and Wales, the United States and Australia in Chapter 2. See also Kirby 2004, p. 245-246; Collins 2002, p. 493.

ones, with the same goal in mind ban custom rather than treaty from direct application.[642] But while separations of powers considerations and their implications in practice take various forms in different States, as Chapter 2 indicates, it is apparent that they have their bearing on practice.

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

A vivid illustration of the different possible approaches to separation of powers concerns is provided by, again, *Nulyarimma v Thompson* (1999). In this case, the Australian government successfully urged its Federal Court to reject direct application of the customary international criminalization of genocide, arguing *inter alia* that "the creation of new crimes is a matter of policy for the legislature, rather than the courts, to determine."[643] Therefore, the government contended, "the extent to which international criminal law is to be incorporated into domestic law and also whether Australia's international obligations are to be implemented domestically, is for the legislature alone to determine."[644] While the impact of this argument on the outcome of the case is unclear, the majority seemed to endorse it.[645] Dissenting Justice Merkel, however, firmly rejected the argument that a proper separation of powers required the courts to ignore the crime of genocide in the absence of implementing legislation. He accepted the contention that Australian courts can no longer create offences, as used to be the case under the common law.[646] Yet, he posited that the incorporation of existing international crimes in municipal law must be distinguished from the creation of new crimes, and is within the proper ambit of the courts' functions.[647]

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

[642] See e.g. Ferdinandusse, *et al.* 2002, p. 344.
[643] Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, para. 166.
[644] Id.
[645] Id, para. 57.
[646] Id., para. 176.
[647] Id., para. 177-179.

either through legislative approval of the treaty itself or a rule of reference in national law. However, the judicial recognition of genocide, crimes against humanity and war crimes can hardly be said to amount to the creation of new offences, even if direct application may well contribute to their further development. States, including Australia, have consistently rejected the argument that they were making new crimes when adopting retrospective war crimes legislation and setting up the *ad hoc* tribunals.[648] It is not easy to see why that would be different for national courts, as long as they apply core crimes law within its international boundaries. Where courts go beyond those boundaries, the legislature can issue overriding legislation to correct them.[649]

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

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

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

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

[650] See on this point below, note 710 - 716 and accompanying text.

[651] See below notes 662 and 678 for examples of such mistakes.

6 Manageability of the Law

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

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

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

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[652] See Lambert-Abdelgawad 2003, p. 569; Rowe 1991, p. 226.
[653] See Yuan and Jianping 2002, p. 356.
[654] See Nollkaemper 2003b, p. 292; Lukashuk 2001, p. 275.
[655] See Kirby 2004, p. 255-256; Haile 2000, p. 35.
[656] See e.g. Germany, Bavarian Higher Court (BayObLG), *Djajic*, 23 May 1997, 3 St 20/06, in 51 NJW (1998), 392-395, where the defendant was convicted on counts of murder and attempted murder but cleared from the charge of complicity in genocide since genocidal intent could not be proven. Cf. Colombia, Corte Constitucional, Sala Plena, *Sentencia C-578 (in re Corte Penal Internacional)*, 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2273 (finding that Art. 20 (2) ICC Statute leaves States the possibility to prosecute suspects who have been acquitted by the ICC on the basis of ordinary crimes, implying that ordinary crimes may be proven where core crimes can not). See also Bremer 240-242.

Therefore, it is generally more efficient and successful to prosecute on the basis of ordinary rather than international crimes where a choice is available.[657]

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

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

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

[658] See numerous contributions on the application of international custom in national courts in 4 Non-State Actors and International Law, issue 1 (2004) and Wouters and Eeckhoutte 2002, p. 229-232.

[659] See Stahn 2000, p. 201.

[660] See Bertodano 2004, p. 99-920; Bertodano 2003, p. 232 and 239-241; Dickinson 2003, p. 305; Bohlander 2001 and various critical assessments of the case law of the Special Court for Sierra Leone in 2 Journal of International Criminal Justice iss. 4 (2004).

[661] See Bertodano 2003, p. 241; Dickinson 2003, p. 307.

[662] In the curious case of *Ex parte Thring* (2000), a British Court of Appeal held in no uncertain terms that the notion of an indiscriminate attack was too complicated for judicial review.See U.K., Court of Appeal (Civil Division), R. v. Secretary of State ex parte Thring, 20 July 2000, ICRC website, Clarke LJ:

> "The court would face what seems to me to be an almost insuperable problem. In order to determine whether an attack was indiscriminate within art 51 (5)(b) of the Geneva Convention, it would be necessary to consider whether an attack or attacks might be expected to cause:

leading to a general preference for national law over international law and ordinary crimes over international crimes.

Some of the more active national authorities tacitly acknowledge the complexity of international core crimes law through the different measures they take to facilitate prosecutions. Several legislatures take measures to concentrate core crimes prosecutions in specific courts or districts, and install special prosecutorial units, both in order to foster expertise.[663] National courts often hear expert-witnesses to inform them on the requirements of international law when dealing with the core crimes.[664] Occasionally, they analyze the differences among the various possible legal bases explicitly. In the Canadian *Finta* case, one of the justices paid considerable attention to the manageability of the law underlying the prosecution. Justice La Forest considered the prosecution of war crimes and crimes against humanity on the basis of ordinary crimes to yield "obvious advantages."[665] Especially for the jury, which consists of lay men, the familiarity of

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

Bennett J:

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

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

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

See also Kirby 2004, p. 251.

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

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

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

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

national law was to be preferred over the complexities of international law, Justice La Forest found.[666]

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

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

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

[666] Id. See also para. 322-323:

"[E]ven among the authorities, much confusion exists as to the distillation of the contents of international law. No clear articulation of the physical and mental elements of the international offences of war crimes and crimes against humanity and their defences is found among scholars in this area. This confusion is understandable and unavoidable in our system of international law among sovereign nations. Although some aspect of these offences are delineated in conventions, this is not the case for all; another important source of international law is custom. To establish custom, an extensive survey of the practices of nations is required.

It is, of course, not an answer to this complicated task to say that the contents of international offences are too difficult to distill and, therefore, that the accused cannot be found guilty; the confusion is the reality of the international law which Canada has obliged itself to observe and apply. This abandonment of international obligation, however, is likely to occur where the jury is called upon to determine the contents of the international offences. The necessary confusion could mislead the jury into believing that international norms are not really law and opens the door to manipulative lawyering."

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

[668] See Mendelson 2004, p. 80; Burke-White 2002, p. 67-68.

Second, the extent to which national law can remedy the complexities of core crimes law is limited. National law can only clarify or replace international criminalizations within the boundaries set by international law. Whatever legal basis one chooses for a core crimes prosecution, questions about the content of the relevant international rules will often come up in one way or another. The *Finta* case provides a suitable illustration.[669] The choice to prosecute WWII war crimes and crimes against humanity on the basis of ordinary crimes like robbery, kidnapping and manslaughter did not relieve the prosecutor and court from confronting the difficult question whether the international criminalizations were met, with fatal consequences in this particular case.[670] The usefulness of interposing rules of national law to mitigate the hard questions of international law may therefore be questioned.

Third, the argument that international core crimes law is too complex to form the basis for national prosecutions is put in perspective by the fact that national courts regularly apply it in other contexts. National courts of various, but certainly not all, States are quite comfortable directly applying complex concepts of international criminal law in many cases concerning the exclusion of asylum seekers from refugee status,[671] civil damage claims for core crimes,[672] various forms of civil disobedience against the military[673] and even the occasional libel case.[674] Quite a few of those cases apply core crimes law in detail in a manner that is not fundamentally different from their application in a criminal proceeding.[675]

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[669] See above, note 75 and accompanying text.

[670] In short, the Canadian Supreme Court required proof of the *actus reus* and *mens rea* of both the ordinary crimes under Canadian criminal law and the underlying international crimes. The high requirements of proof of the knowledge of the defendant that he was committing international crimes, as well as the broad acceptance of defences like superior orders and mistake of fact, led to the acquittal of the defendant. See Turns 2004, p. 356-358; Fletcher 2002, p. 455-458; Cotler 1996.

[671] See Handmaker 2003; Schabas 2003b, p. 50-51; Zegveld 2001.

[672] See numerous cases under the U.S. Alien Tort Claims Act, e.g. U.S., District Court (Cal.), Sarei v. Rio Tinto PLC, 9 July 2002, 221 F.Supp.2d 1116 (finding that Papua New Guinea residents provided *prima facie* evidence of war crimes and crimes against humanity, including genocide, against international mining group) and U.S., Court of Appeals (Second Circuit), *Kadic v. Karadzic*, 13 October 1995, 70 F.3d 232. See also Japan, Tokyo District Court, *Shimoda et al. v. The State*, 7 December 1963(examining at length the legality of the atomic bombing of Hiroshima and Nagasaki under international humanitarian law).

[673] See e.g. U.K., Court of Appeal, *Jones & Milling, Olditch & Pritchard, Richards v. Gloucestershire Crown Prosecution Service*, 21 July 2004, [2004] EWCA Crim 1981; Scotland, High Court of Justiciary Appeal Court, *Angela Zelter v. Bodil Ulla Roder, Ellen Moxley*, 30 March 2001, para. 65-99; U.K., Queens Bench Division, Hipperson v DPP, 3 July 1996, [1996] C.L.Y. 1445.

[674] See U.K., High Court of Justice Queen's Bench Division, *Ken Lukowiak v. Unidad Editorial SA*, 6 July 2001, para. 30-38 (libel case for accusation of war crime committed in the Anglo-Argentinean war over the Falkland/Malvinas Islands).

[675] See e.g. U.S., District Court, Mehinovic et al v. Vuckovic, 2 May 2002, 198 F.Supp.2d 1322, described above, Chapter II, para. 3.3.g. Cf. Netherlands, HR, *In re Kesbir*, 7 May 2004 (In this case concerning the extradition of an alleged PKK-leader to Turkey, both the Attorney-General and the defense argued extensively on the applicability of the humanitarian law of internal armed conflicts to the situation in Turkey as well as the question whether the Turkish military could be a legitimate target under that body of law, but the Supreme Court did not reach a decision on these points.).

Criminal proceedings generally require higher standards than non-criminal ones, but in practice the difference is not always obvious.[676] Also, procedural variations like those in the standard of proof do not touch on the question whether the law is sufficiently clear for direct application. These non-criminal cases show that national courts regularly consider core crimes law to be sufficiently manageable to form the legal basis for judgments that stigmatize individuals as core crimes perpetrators and attach practical consequences that can be as severe as criminal penalties.[677] Still, the import of such non-criminal proceedings should not be overstated. Numerous of those administrative and civil proceedings apply core crimes law in a cursory or incorrect manner and thus support the argument of international law's complexity, rather than contradict it.[678]

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

7 Development and Coherence of Core Crimes Law

The legal basis enacted and applied for national prosecutions has implications for the development and coherence of core crimes law. After all, the formation and development of legal rules take place through their formulation, interpretation and application.[679] These are more fundamental considerations that do not often seem to play a role in practice. Yet, occasionally they may figure directly or indirectly in the decision making processes of the different actors involved.[680] Also, with the continuing development of ICL these more fundamental systemic considerations may gain significance. Therefore, they will be treated here.

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[676] Cf. Wagner 1989, p. 895-897 (concluding that denaturalization and deportation proceedings in the U.S. often require the government to prove that the individual actually committed a war crime or crime against humanity while the U.S. Supreme Court has determined that the burden of proof in these proceedings is "substantially identical with that required in criminal cases").

[677] See above, notes 343 and 345.

[678] For example, Dutch proceedings regarding the exclusion of refugees on the basis of Art. 1F Refugee Convention regularly conflate crimes against humanity with human rights violations, or summarily and questionably assume that the latter amount to the former. See e.g. Netherlands, The Hague District Court, 29 August 2003; Netherlands, The Hague District Court, 11 July 2002; Zegveld 2001. See also above, note 662.

[679] While this process is inherent in the very nature of customary international law, it is also of obvious importance for the clarification and development of treaty law.

[680] See e.g. Canada, Supreme Court, *R. v. Imre Finta*, 24 March 1994, La Forest J. (dissenting), para. 323 ("Not only is the judge better trained than the jury in evaluating international law, but, in fact, his or her interpretation of international law bears some force internationally.").

First, it may be asked how the legal basis for core crimes prosecutions affects their contributive value for the development of ICL. Formulating specific national legislation on the core crimes gives the legislature not only the power to control the implementation of core crimes law on the national level but also a voice in its development on the international level. It leads to State practice and contributes to the development of customary ICL. The broadening of protected groups in many national definitions of genocide, for example, fuels a corresponding trend in customary international law that would not otherwise take place, or at least not with the same force.[681]

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

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

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

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[681] See above, Chapter II, para. 2.2.b and, on the current status of this trend in contemporary international law below, note 732.
[682] See Schabas 2003b, p. 63 ("More diversity and debate as the [national and international] levels of jurisdiction interact can only stimulate legal clarity."); Burke-White 2002, p. 90-95; Crawford 2001, p. 30; note 2001, p. 2061-2062; Buergenthal 1992, p. 394. But see for criticism of the international judicial dialogue in general Rosenkrantz 2003.
[683] Cf. Criddle 2004, p. 497-498.
[684] See Nollkaemper 2003b.

> "While instructive, it should be noted that the court in the *Barbie* case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter..."[685]

In *Furundzija*, the Trial Chamber warned that "for a correct appraisal of [the] case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value."[686] It then commented on the case law of British military courts that "the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration."[687]

So, there are signs that the legal basis of national prosecutions indeed makes up a significant determining factor for their value as a legal precedent for other courts, and thus for their contribution to the development of core crimes law. Then again, the differences in this regard should not be overstated as the reliance by international and other national courts on national judgments depends on many other factors besides their legal basis.[688] Also, a desire to strengthen the national rule of law rather than worry about the development of international criminal law may result in a conscious decision to prosecute on the basis of ordinary crimes, especially for States with an underdeveloped or threatened legal system.[689]

Second, there is the question how the legal basis for national prosecutions affects the coherence of core crimes law. The multitude of national and international voices, both legislative and judicial, involved in the development of core crimes law can easily lead to a lack of harmony. This is only a particular variant of the classical tension between development and coherence of (customary) international law. Yet, the penal character of core crimes law makes this tension decidedly intense, and heightens the need for coherence.[690] After all, coherence of the law partly determines the legal certainty of the

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[685] ICTY, Trial Chamber, *Tadic*, 7 May 1997para. 642. Note that this reading ignores the declarative rather than constitutive nature of the reference to the Nuremberg Charter in French law. See above, Chapter II, para. 3.3.j.

[686] ICTY, Trial Chamber, *Furundzija*, 10 December 1998para. 194.

[687] ICTY, Trial Chamber, *Furundzija*, 10 December 1998para. 196. See also ICTY, Appeals Chamber, *Erdemovic*, 7 October 1997para. 52-55.

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

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

[690] See ICTY, Appeals Chamber, *Aleksovski*, 24 March 2000, para. 113 :

> "The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing , and

individual, which is a fundamental concern in criminal law.[691] Therefore, both the development of core crimes law and the legal certainty of the individual require at least a minimal measure of coherence of the law used in national prosecutions.[692]

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

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

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where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced."

[691] See further below, Chapter VI, para. 5.3 (on the foreseeability of core crimes law).

[692] Cf. Delmas-Marty 2003, p. 21.

[693] See e.g. Ziegler 1998, p. 81 (on the divergent interpretation of the international or non-international nature of the armed conflict in the former Yugoslavia by the Swiss courts and the ICTY).

[694] See respectively Chinkin 2003, p. 144-149; Haveman 2003b and Dörmann 2001, p. 131 (rape); Stuckenberg 2001, p. 573-585 (cumulative charging); Nemitz 2001, p. 615 and Seiderman 2001, p. 230-232 (hierarchy of crimes) and Cumes 2003, p. 53-55 (premeditation).

[695] See Netherlands, Bijzondere Raad van Cassatie, *Ahlbrecht II*, 11 April 1949, NJ 1949/425; Partial English translation in Annual Digest 1949, No. 141, at p. 396-397 (on the different forms of homicide in national laws and their consequences for the interpretation of murder as a crime against humanity).

[696] See ICTY, Trial Chamber, *Kupreskic*, 14 January 2000, para. 540. See also Ferdinandusse 2004, p. 1048-1051.

[697] See Art. 21(2) ICC Statute ("The Court *may* apply principles and rules of law as interpreted in its previous decisions." - emphasis added). The *ne bis in idem* rule requires acceptance of specific judgments as final, but does not make them legal precedents in a wider sense. See Art. 20 ICC Statute, Art. 10 ICTY Statute and Art. 9 ICTR Statute.

[698] See e.g. UK, Art. 50 International Criminal Court Act 2001:

"(1) In this Part:

"genocide" means an act of genocide as defined in article 6 [ICC Statute],

"crime against humanity" means a crime against humanity as defined in article 7, and

"war crime" means a war crime as defined in article 8.2.

(2) In interpreting and applying the provisions of those articles the court shall take into account:

law will be interpreted in conformity with the case law of the ICC and other international courts during the drafting process rather than in the implementing legislation itself.[699] National courts occasionally correct the legislature in order to safeguard harmony in core crimes law.[700] In general, both national and international courts foster coherence of the law where possible and even recognize an informal hierarchy of precedents, topped by the international courts that carry most authority and expertise.[701]

Coherence of the law is a relevant consideration, but it does not unambiguously plead for national or international law as a basis for core crimes prosecutions.[702] On the one hand, direct application of ICL ensures that national and international courts apply the same law and facilitates the judicial dialogue.[703] At this point, it is pertinent to note the subtle

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

[...]

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

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

"[...]

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

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

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

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

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

Unofficial translation from website ICRC.

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

[702] Cf. Bridge 1964, p. 1260.

[703] See Wible 2002, p. 266 and 295:

"Domestic courts should incorporate as much international law, including both substantive and procedural standards, as possible into prosecutions for international crimes. [...] Because the crimes at issue are violations of universal norms, it is essential that national prosecutions maintain an international character and that there be formal mechanisms to prevent divergence from certain core universal touchstones. Harmonizing international criminal law will lead to a more coherent

difference between a rule of reference to an international criminalization and a seemingly identical national criminalization of an international crime. It may be thought that it makes no difference whether a national law refers to an international criminalization like Art. 2 Genocide Convention or contains a verbatim reproduction of it, and often this will be true. Still, there can be a significant difference in the way national courts interpret unclarities in these criminalizations.[704] In many States, provisions of national law are interpreted according to national rules of interpretation, while directly applicable treaty provisions are interpreted according to international rules of treaty interpretation as codified in the VCLT.[705] While it is not self-evident that the general rules of treaty interpretation are suitable for ICL,[706] national courts may look primarily to international sources to decide questions of interpretation for directly applicable international criminalizations, but turn to national sources like the drafting process of the national law to interpret homonymous national provisions.[707] Therefore, incorporation of international provisions may provide greater coherence of international law than transformation.

On the other hand, the coherence stemming from direct application should not be idealized. National courts can render very divergent interpretations of international law, particularly custom. Where this is the case, national legislatures may lay down a more authoritative interpretation of international rules in national law. Although legislatures can also differ in their reading of the law, they will often bring unity to diverging case law and thus provide a welcome increase of coherence, at least within the national legal order. Plus, the difference between national and international rules of interpretation set out above will in practice often be minimal or even none. After all, when interpreting national implementing laws courts often resort to international law in order to ascertain either the intent of the legislature, which is normally to give effect to the underlying international law, or the spirit or purpose of the law.[708] Conversely, national courts

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

Cf. Wouters and Panken 2003, p. 13-14 and 37. But see Delmas-Marty 2003, p. 23.

[704] Cf. Criddle 2004, p. 449-463.

[705] See e.g. Argentina, Supreme Court, 23 December 1997, CODICES ARG-1998-1-002 (International treaties must be interpreted in accordance with Art. 31 and 32 VCLT). See also Ferdinandusse 2001, p. 281; Bremer 1999, p. 362; Buergenthal 1992, p. 362-363; Partsch 1992, p. 250-251. Cf. Criddle 2004 (analyzing how U.S. courts have traditionally adhered to international rules of treaty interpretation but are currently divided); Zemanek 1998, p. 191.

[706] See Tournaye 2003, p. 454; Schabas 2002a, p. 167-171; Schabas 2000a, p. 541-543. See also ICTY, Trial Chamber, *Vasiljevic*, 29 November 2002, para. 193-204. See for criticism of this decision Cassese 2004b and Weckel and Chaouch Helel 2003, p. 751-759.

[707] Cf. Partsch 1992, p. 246; Sinclair 1984, p. 274-275.

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

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

See Haile 2000, p. 48-49. Likewise, the classification of national provisions, for example in a title of the penal code concerning offenses against the law of nations, may indicate recourse to underlying international law. See Haile 2000, p. 53. See also U.K., House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 A.C. 147 at 163:

regularly pay lip-service to the international rules of treaty interpretation while they do not in fact follow them, adopting a more nationalist interpretation instead.[709] Thus, whether national or international law as a basis for core crimes prosecutions brings greater coherence in practice depends on different factors, *inter alia* the clarity of the international norms and national courts' practice of interpretation.

The need for coherence plays out not only for core crimes law in general, but also in individual cases. A case in point is the prosecution of the Rwandan *bourgmestre* N. in Switzerland.[710] The different courts in this case frequently referred to the international character of the prosecution and the practice of the ICTR, also when deciding points that were regulated by Swiss law. Yet, a leading principle in striking the balance between Swiss and international law, however, seemed to be lacking, as can be seen in the judgment of the Military Court of Cassation (2001). In ruling that the defendant could be charged with the murder of unnamed victims, the Court stated that whatever the procedure of the ICTR may be on that point, the Swiss courts would follow their own.[711] Yet, when the credibility of the testimony of traumatized and illiterate survivors was contested, the Court relied heavily on the practice of the ICTR to justify the use of partly inaccurate statements.[712] Similarly, the Court treated the findings of the ICTR as decisive for the question whether the situation in Rwanda amounted to a non-international armed conflict, but subsequently dismissed its authority when analyzing the nexus between the crimes and the armed conflict.[713] Unlike the Court of Appeal, however, the Court of Cassation considered it convenient to apply the criteria of the ICTR on this point.[714]

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

[709] See Lambert-Abdelgawad 2003, p. 566-567 ("[L]es interprétations nationalisées du droit international sont la règle courante").

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

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

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

[712] Id., para. 6b.

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

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

[714] Id., para. 9d :

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

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

8 Underinclusion and Overinclusion

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

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

[715] Id., para. 13b :

> "Il est vrai que les Chambres de première instance du TPIR ont prononcé des peines plus sévères à l'encontre de responsables du génocide ou des massacres au Rwanda, notamment à l'encontre du bourgmestre de Taba, Jean-Paul Akayesu, mais cet élément n'est pas déterminant. Il n'est pas certain d'une part que les critères adoptés dans le Statut de ce Tribunal international pour la fixation de la peine correspondent à ceux de l'Art. 44 CPM..."

[716] See Bridge 1964, p. 1260.

[717] See Schabas 2003b, p. 62; Jessberger 2003, p. 283; Cassese 2002, p. 561; Swart 2002b, p. 569; Wolfrum 1996, p. 242; Fugard 1989, p. 43-44. See on the situation in particular States e.g. Benillouche 2002, p. 173 (France); Lambert-Abdelgawad 2002, p. 529 and 535 (Islamic States); Hettinger 1965, p. 123 (Germany). Cf. Ambos 2002b, p. 499 (Latin-American States).

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

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

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

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

[718] See Vandermeersch 2004, p. 135 and 137; Segall 2003, p. 267; Wouters and Panken 2003, p. 10-11; Stahn 2000, p. 202; Holdgaard Bukh 1994, p. 349; Lauterpacht 1958, p. 137-139.
[719] See Art. 85 (4) sub b AP I.
[720] See Art. 7 (1) sub h ICC Statute.
[721] See Malarino 2003, p. 61-63 (on the limited extent to which ordinary Argentinean criminal law covers core crimes); Schabas 2000b, p. 352-353; Bremer 1999, p. 159-249 (showing in a detailed analysis how the reliance of Germany on ordinary crimes prior to the adoption of the 2003 Code on International Crimes failed to ensure the effective prosecution of all war crimes); Bothe 1996, p. 294-295; Wolfrum 1996, p. 243; Bothe 1995, p. 242-243. Cf. numerous recommendations of the Committee against Torture, noting that parties to the CAT have failed to enact torture as a specific crime while their ordinary criminal law does not cover all acts of torture. See e.g. Lambert-Abdelgawad 2002, p. 533 and United Nations Committee against Torture and Holmström 2000, p. 4 (Country Report on Algeria, 1996); 30 (Colombia, 1995) and 42 (Cuba, 1997: "The failure to establish a specific crime of torture as required by the Convention leaves a gap in the application of its provisions that is not filled by any of the existing offences directed against violations of the bodily integrity or the dignity of the individual.").
[722] See Wyngaert 2003, p. 211; Bremer 1999, p. 246; Bothe 1996, p. 295. Cf. Rowe and Meyer 1996, p. 479.
[723] See above, Chapter II, para. 2.2.b.

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

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

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[724] See e.g. Vandermeersch 2004, p. 138-141 (on the discrepancies between the ICC Statute and corresponding Belgian law); Elst 1998, p. 1587-1593 (on the discrepancies between the Geneva Conventions and corresponding criminalizations in Dutch criminal law before the Code on International Crimes 2003); Komarow 1980, p. 32-33. Cf. Modolell González 2003, p. 537 (on the Venezuelan criminalization of "condititions analogous to slavery"); Abdelgawad 2002, p. 374-375 (Egyptian criminalization of torture more restrictive than CAT definition); Lenzerini 2000 (on the Italian criminalization of "condititions analogous to slavery" interpreted in light of the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery).

[725] Compare e.g. Section 5 of Canada's Crimes against Humanity and War Crimes Act and Art. 13 and 14 of Germany's Code of International Crimes to Art. 28 ICC Statute.

[726] See Schabas 2000b, p. 351 (citing a Candadian legislative committee as stating that "we believe that the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents").

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

[728] See above, Chapter II, para. 3.2.a.

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

[730] Note, however, that it can also make such prosecution easier by requiring less elements to be proven.

[731] See on the legal basis and extent of the duty to proscribe and prosecute core crimes below, note 1040 and Chapter V, para. 3.3.d.

[732] See above, Chapter II, para. 2.2.b. While most of the acts in question fall outside the scope of the Genocide Convention, it is open to debate whether customary international law nowadays recognizes a broader definition of genocide which would encompass, *inter alia*, political groups as possible victims. On the one hand, the recognition of political groups is reflected in various national laws and judgments and goes back to GA Resolution 96-1 of 1946:

permitted under international law to prosecute crimes committed by its nationals on its territory, even if these crimes do probably not fall within the definition of genocide under international law. Yet, there are several ways in which prosecutions on the basis of overinclusive national law can violate international law.

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

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> "Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds --are punishable;"

On the other hand, political groups were consciously excluded from the Genocide Convention and attempts to expand the definition of genocide along these lines have been unambiguously refused in the drafting of the ICC Statute. See respectively Heintze 2000, p. 227 and Rückert and Witschel 2001, p. 66. Moreover, the *ad hoc* tribunals have, questionably, interpreted the protected groups to extend to other stable ones, but not to political groups. See ICTR, Trial Chamber, *Akayesu*, 2 September 1998para. 511 and 516 and ICTY, Trial Chamber, *Jelisic*, 14 December 1999, para. 69. Thus, while there may be a nascent trend in this respect, it appears that the crime of genocide under customary international law does not currently include acts committed against political groups. See Mexico, Supreme Court, *In re Cavallo (Amparo en Revision 140/2002)*, 10 June 2002 at 892-896. See also Reydams 2003, p. 187; Schabas 2000b, p. 150. But see Schaack 1997, p. 2280-2281.

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

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

[735] See Colombia, Corte Constitucional, Sala Plena, *Genocidio, Sentencia C-177*, 14 February 2001, 30 Jurisprudencia y Doctrina 707 at 710:

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

See also Kleffner 2003, p. 100; Green 2000, p. 293.

shows both that numerous States do so, and a lack of protest from other States against this practice.

In *Kesbir* (2004), the Dutch Supreme Court analyzed the relationship of national criminal law and international humanitarian law governing internal armed conflicts in some detail.[736] The petitioner in this case appealed to the Supreme Court to block her extradition to Turkey, where she was suspected of various crimes connected to her alleged involvement in the Kurdish organization PKK. She argued that several of the accusations against her concerned acts committed in an internal armed conflict which did not constitute crimes under international humanitarian law, and therefore not under Dutch law either.[737] The desired outcome of this argument was that Turkey's extradition request would be rejected for lack of double criminality of the acts in question, which was required by Dutch law.[738] The broader claim underlying it was that the application of humanitarian law to internal armed conflicts is exclusive and rules out more extensive criminalizations in national criminal law.[739] The Supreme Court rejected the argument in careful language, limiting its findings to situations of internal armed conflict. The Court held that the application of international humanitarian law to internal armed conflicts is not exclusive and that Common Art. 3 of the Geneva Conventions contains only minimum standards.[740] Because Common Art. 3 does not "legitimize" the alleged violent acts in question, the Court found, the State retains the competence to punish them on the basis of its ordinary criminal law.[741] In other words, overinclusion of national criminal law does not violate international law where it concerns acts committed in internal armed conflict.

However, it seems that the situation is different where it concerns humanitarian law governing international armed conflicts. In internal armed conflicts, international humanitarian law merely provides a minimum standard that complements national criminal law.[742] In international armed conflicts, on the other hand, it constitutes the *lex specialis*. It has this position of *lex specialis* in relation to international human rights law,[743] and arguably also *vis-à-vis* national criminal law. States may of course proscribe

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[736] Netherlands, HR, *In re Kesbir*, 7 May 2004.

[737] Dutch law regarding war crimes refers in general terms to the laws and customs of war. See above, note 163.

[738] Netherlands, HR, *In re Kesbir*, 7 May 2004, para. 3.3.

[739] Id., para. 3.3.3.

[740] Id., para. 3.3.6 and 3.3.7.

[741] Id., para. 3.3.7:

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

[742] See Green 2000, p. 319.

[743] See ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para. 25 ("In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."). Cf. ICJ,

acts connected to international armed conflict for their own citizens, for example aiding the enemy,[744] as well as acts that are not regulated by humanitarian law. But logically, they may not unilaterally impose stricter rules of warfare on their adversaries by prosecuting acts under national criminal law that are governed but not prohibited by international humanitarian law. In this sense, international humanitarian law does have a legitimizing function for lawful combatants.[745] If a pilot on a bombing mission in an international armed conflict adheres to international humanitarian law's demands, such as the principles of proportionality and distinction, her prosecution on charges of manslaughter and criminal damage would violate international humanitarian law.[746]

Several judgments of national courts show that the question to the admissibility of an overinclusive national criminal law governing acts comitted in international armed conflict is not without controversy. In *Public Prosecutor v. Koi* (1967), a divided Privy Council quashed the conviction of several Indonesian soldiers who had been found guilty of the possession of explosives in Malaysia on the basis of Malaysia's Internal Security Act 1960. The soldiers were captured during an armed conflict between Indonesia and Malaysia. The majority found that "members of regular forces fighting in enemy country [...] are not subject to domestic criminal law."[747] Two dissenting Lords, on the other hand, stated that they knew "of no rule of international law which suggests that the national laws may not be applied to the armed forces of an enemy which invade the national territory."[748] In *Polyukhovich* (1991), dissenting judge Brennan of the Australian High Court rejected the idea that international humanitarian law has a legitimizing function, yet seemed to accept its quality of *lex specialis.*[749]

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

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

[744] See above, note 99.

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

[746] See Rowe 1991, p. 226. Cf. Wyngaert 2003, p. 661.

[747] Malaysia, Privy Council, Public Prosecutor v. Koi, 4 December 1967, [1968] A.C. 829 at 860, per Lord Hodson.

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

[749] Australia, High Court, *Polyukhovich v. The Commonwealth of Australia and Another*, 14 August 1991, per Brennan J. dissenting, para. 4-5 and 45:

> "[The laws and customs of war] limit the belligerents' choice of means of injuring enemy forces, controlling enemy prisoners of war and treating enemy civilians, but are silent as to acts which do not contravene those limitations. [...I]t is clear that the draftsman misunderstood the effect of the laws, customs and usages of war, for they give no permission for acts which would otherwise be forbidden; they simply forbid particular means of injuring enemy forces, controlling enemy prisoners of war or treating enemy civilians. [...] The real objection to the validity of the [Australian War Crimes Amendment Act 1988] is that the Act rejects international law as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal law definition which operates retrospectively."

international and internal armed conflict[750] and the difference in legitimizing function of those regimes found above. Yet, it appears that this trend has so far not led to a recognition of armed opposition groups in internal armed conflict as lawful combatants, with a corresponding right to participate in hostilities.[751] Therefore, the conclusion is warranted that with regard to international, but not internal armed conflict, prosecutions on the basis of overinclusive national criminal law can violate international law, even if they take place on the basis of territorial jurisdiction.

Second, when overcharging takes place in a prosecution on the basis of universal jurisdiction, it may well exceed international law's limitations on the exercise of extraterritorial jurisdiction.[752] Whether a particular case indeed amounts to a violation depends principally on the availability of an alternative basis of jurisdiction for prosecution. Even if Spanish courts are wrong to classify certain political murders in Latin-American States as genocide, they may still have universal jurisdiction to prosecute those murders if these do in fact constitute other international crimes such as crimes against humanity. Note further that such a violation can stem not only from overinclusive national law, but also from the wrongful application of international criminalizations to acts that do not amount to the crimes charged. Both points are illustrated by the French case *MC Ruby* (1995), in which the French *Cour de Cassation* based jurisdiction over acts of assault committed on a ship on the high seas on a provision providing for universal jurisdiction for torture as defined by the CAT.[753] The acts in question did clearly not fit that definition of torture, since they were neither perpetrated or condoned by a public offical, nor committed for one of the goals enumerated in the CAT.[754] Yet, this prosecution arguably did not violate international law, since jurisdiction could also be based, as the Court of Appeals in this case had done, on the concept of an indivisible link between the acts committed on the high seas and acts committed in French territorial seas.[755] Of course, avoiding overinclusion of national law will not prevent all cases of overcharging, but it certainly provides an important step in that direction.

In practice, the inconsistencies and unclarities in the national criminalizations of the core crimes often remain without direct consequences. Even where resulting prosecutions depart from international law, as likely was the case in Germany, Spain and Ethiopia,[756] this does not necessarily affect their outcomes in a practical sense. On occasion, however, the discrepancies between national criminalizations and their international counterparts inhibit or delay the prosecution of core crimes. In Hungary, the Constitutional Court more than once annulled legislation which erratically formulated criminalizations of war

[750] Cf. Sassòli, *et al.* 2003, p. 152-153; Nollkaemper and Zegveld 2002, p. 411-415.
[751] Cf. Art. 8 (3) ICC Statute ("Nothing in paragraph 2 (c) and (e) [governing war crimes in internal armed conflict] shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."). Prosecutions on the basis of national criminal law would seem to constitute a legitimate means to re-establish law and order in the sense of this provision.
[752] See above, note 1206 and O'Keefe 2004, p. 759.
[753] France, Court of Cassation, MC Ruby, 3 May 1995, Bull. crim., no. 161.
[754] See Art. 1 (1) CAT. See also Koering-Joulin 1997, p. 146-150.
[755] See Koering-Joulin 1997, p. 144 and 152-153.
[756] See above, note 732.

crimes to be applied to crimes committed during the communist era for being inconsistent with international law. With considerable delay, the intended prosecutions later took place based directly on international criminalizations.[757] In Estonia, a prosecution for genocide and crimes against humanity was annulled and referred back to the courts of first instance, because the result reached on the basis of the national criminalization of these crimes was deemed inconsistent with international law.[758]

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

9 Rank and Effects of the Crime and the Law

A next, rather practical, consideration to take into account concerns the rank and effects of the different legal bases for core crimes prosecutions. First, directly applicable international law may have a different rank in the national legal order than statutory law.[759] The rank of the different sources of international (criminal) law differs in various States, depending on the hierarchy set by national law.[760] Thus, whether substantive criminality is based on national law, treaty law or customary international law may have implications for its hierarchical position *vis-a-vis* other relevant norms, such as amnesty laws and the principle of legality.[761]

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

[757] See above, Chapter II, para. 3.3.n.
[758] See Saar and Sootak 2003, p. 269-274.
[759] It should be noted that the considerations regarding the rank of international law set out here principally concern general direct application. International law that is directly applied on the basis of a specific rule of reference generally has the same rank in the national legal order as the national provision that refers to it.
[760] See above, Chapter II, para. 3.3. Cf. Cassese 1985.
[761] See e.g. the position of the Dutch Supreme Court on this point, above, Chapter II, para. 3.3.k. Compare the practice of the Special Court for Sierra Leone, which has jurisdiction both over certain international crimes and ordinary crimes under the national criminal law of Sierra Leone. The Prosecutor of the Special Court decided early on to charge only international crimes in his indictments as this, in his view, would minimize both succesful challenges to the jurisdiction of the Court on the basis of the amnesty provision in the Lome Peace Accord and complications stemming from Sierra Leonean criminal jurisprudence. Interview with Mr. David Crane, Prosecutor of the Special Court for Sierra Leone, held in The Hague, 9 december 2003.

constitute political crimes,[762] and are not subject to statutes of limitations and the *ne bis in idem* rule.[763] There is also authority for the proposition that these crimes trump official immunities,[764] as well as double criminality requirements and other obstacles to extradition,[765] but these effects are more contested. Apart from the legal effects, the designation of certain acts as international rather than ordinary crimes may in practice put more political pressure on other States to render cooperation where needed.

Thus, the choice of the legal basis for the charges can have practical implications for the outcome of a core crimes prosecution.[766] It should be noted, however, that the derogation of obstacles in national law is not entirely dependent on the rank of and effects ascribed to the criminalizations in question. National obstacles like amnesty laws have been overcome in numerous cases where core crimes have been charged as ordinary crimes.[767] Yet, even if they are not always decisive, the rank and effects of the different criminalizations certainly make up a relevant consideration, in particular for legislators and prosecutorial authorities.

10 Penalties

A final consideration of a practical nature concerns the available penalties. Within national law, the choice between international and ordinary crimes as a basis for prosecution can have significant consequences in this regard. A recent study on the punishment of serious crimes in the States making up the Former Yugoslavia and 23 other countries from all over the world paints the following picture.[768] Regarding homicidal crimes, the applicable penalties do not differ substantially for ordinary and international crimes.[769] This can be explained by the fact that most legal systems already reserve their highest penalties for ordinary homicidal crimes such as murder. For non-homicidal crimes, however, the differences can be considerable. In general, penalties for crimes like torture and rape are substantially higher when these are criminalized

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

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

(Unofficial translation cited in ICTY, Appeals Chamber, *Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995para. 57). But compare Lauterpacht 1944, p. 91.

[763] See Cassese 2003a, p. 316-320; Alvarez, *et al.* 2002, p. 319-320; Mattarollo 2001, p. 33 and 38-39.

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

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

[766] Cf. Schabas 2003b, p. 62.

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

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

[769] See Sieber 2004, Vol. I, p. 91-97.

specifically as an international rather than an ordinary crime.[770] The differences are especially significant for international crimes that have no real counterpart in national law, such as persecution.[771] While different elements of these crimes may be covered by ordinary criminalizations, these do not reflect their grave context and as a result allow only penalties that do not compare to those of international crimes.[772]

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

11 Conclusion

The choice between national and international law as a basis for core crimes prosecutions is often framed as a choice between well-known but rigid law and a body of largely unfamiliar rules which is more flexible in its adaptation to new circumstances.[773] The above analysis shows that the picture is both more complex and more refined than that. There are many different considerations to be balanced in the comparison of national and international law, practical as well as principled ones. These considerations in part explain the limited occurrence of direct application in practice, due primarily to the minimalist and selective attitude of national actors involved and the complexity of international criminal law. They also show that international law neither categorically prohibits or proscribes any particular legal basis for core crimes prosecutions, nor is completely neutral in its assessment of these different possible legal bases.

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

[770] Id., p. 98-113.
[771] Id., p. 114-124.
[772] Cf. ICTY, Appeals Chamber, *Mucic et al.*, 20 February 2001 para. 758:
> "The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal's Statute."

[773] See e.g. Kamminga 1998, p. 570.

international character of the crimes, and should, it is submitted here, therefore be in principle rejected and used only as a second-best solution in a transitory situation.