Direct application of international criminal law in national courts
Ferdinandusse, W.N.

Citation for published version (APA):
Ferdinandusse, W. N. (2005). Direct application of international criminal law in national courts

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Chapter VI
The Principle of Legality and Direct Application of Core Crimes

1 Introduction

In this Chapter, I will analyze the tension between the principle of legality (*nullum crimen, nulla poena sine lege praevia*) and direct application of international criminalizations of core crimes in national courts. As established in Chapter 5, States are, at least to some extent, under a duty to prosecute core crimes, regardless of the shape of their national law in this respect. As shown in Chapter 2, several national courts have confronted the question whether core crimes can be prosecuted directly on the basis of international law where relevant national law is absent or defective. In various cases, these courts denied direct application. Of the many different (including practical) considerations that play a role in decisions on direct application, described in Chapter 3, a key legal obstacle appears to be the principle of legality. Learned writers also point to the principle of legality as a cardinal obstacle to direct application.\(^{1298}\)

I will now analyze the demands of the principle of legality under international law regarding national prosecutions of core crimes. This analysis concerns solely those requirements of the international principle of legality that are potentially decisive for the question of direct application of core crimes law in national courts.\(^{1299}\) Accordingly, I will leave aside the question whether the international principle prohibits analogy and extensive interpretation\(^{1300}\), as it exceeds the scope of this study. Where appropriate, I will distinguish between treaty-based and customary criminalizations, as these raise different concerns with regard to the principle of legality.

Analyzing the role of the international principle of legality in national core crime prosecutions is no easy task. There are many dichotomies that influence the content ascribed to *nullum crimen*: national law – international law, national courts – international courts, ordinary crimes – core crimes. Most judgments do not elaborate on the way in which these factors determine their view of the principle of legality. Therefore, it is not always clear which precedents are determinative for the international rules applicable to core crimes prosecutions in national courts and which ones are less relevant. Moreover, as soon will become clear, there are considerable disagreements among States on this topic. Due to these factors, the law set forth here is subject to some uncertainty.

The following analysis requires several steps. First, I will map the purpose and legal basis of the principle of legality under international law (para. 2). Second, I will consider whether the core crimes take up a special position or are subject to the principle of

\(^{1298}\) See above, notes 10-11.

\(^{1299}\) Note, however, that the principle of legality certainly affects direct application of core crimes law as the basis for a national prosecution, but not necessarily other instances like direct application in order to refuse application of national statutes of limitations. See below, p. 227.


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legality in the same way as ordinary crimes (para. 3). Third, I will scrutinize the relationship between the international principle and the principle of legality in national legal systems (para. 4). Fourth, I will discuss in turn the demands of the principle in customary international law on the specific points of applicable law (para. 5.1), its accessibility (para. 5.2), its foreseeability (para. 5.3), and the applicable penalties (para. 5.4). Fifth, I will apply these general demands to specific international criminalizations (para. 6). Sixth, I will discuss what role international law leaves for national principles of legality in core crimes prosecutions in national courts (para. 7). Finally, I will summarize the conclusions of this Chapter (para. 8).

2 Legal Basis and Purpose of the Principle of Legality

The principle of legality is found both in national law1301 (hereinafter national principle of legality) and international law (hereinafter international principle of legality), the latter including custom1302 as well as treaties.1303 An early recognition of the principle of legality by an international court appears in the PCIJ’s Advisory Opinion in the Danzig case.1304 The national and international principles share the same two essential goals. The first is to guarantee the legal certainty of the individual. Legal certainty requires criminalizations to be specific and forbids their retroactive application. These are essential conditions for individuals to know in advance both the “moral quality” (acceptable or unacceptable) and the legal consequences of their behavior.1305

Second, the principle of legality delimits and separates the powers of the institutional actors involved in the (international) criminal justice system.1306 It prevents the legislature from punishing past acts by legislation, instead of criminalizing future conduct.1307 It also stops the judiciary, national or international, from imposing arbitrary punishment and effectively drawing up new criminalizations. In international criminal law, the principle has the added function of ensuring that the law is specific enough for States to fulfill their obligations regarding the enforcement of ICL and the cooperation with international tribunals.1308 Thus, it prevents international criminal courts from

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1302 See Werle 2003, p. 38; Barboza 2000, p. 148.
1303 See Art. 22 and 23 ICC Statute; Art. 15 ICCPR; Art. 7 ECHR; Art. 9 ACHR; Art. 7 (2) African Charter on Human and People’s Rights; Art. 59 GC III; Art. 65, 67 GC IV; Art. 75 (4) (c) AP I; Art. 6 (2) (c) AP II.
1304 See also Art. 11(2) Universal Declaration of Human Rights; Art. 49 Charter of Fundamental Rights of the European Union, 7 december 2000.
1308 Cf. Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, per Mason, CJ, para. 23-41 (discussing and dismissing the argument that the retroactive character of Australian war crimes legislation amounts to punishment by legislation and therefore infringes on the judicial powers of the courts).
demanding transferal of, or cooperation in, prosecutions where States have no obligation to do so under international law. These institutional ramifications, like the legal certainty of the individual, require core crimes law to clearly separate criminal from non-criminal conduct.\textsuperscript{1309}

The demands of specificity and non-retroactivity make up the core of the principle of legality. Doctrine generally assumes that the principle of legality requires prosecution and punishment of individuals to be based on a legal norm that (1) existed at the time of the offense (\textit{nullum crimen sine lege praevia}), (2) is accessible to the individuals it addresses and (3) is so clear as to make the possibility of prosecution and punishment foreseeable (the requirement of \textit{lex certa}).\textsuperscript{1310} In addition, the requirement of an indication of the applicable penalties is often seen as an intrinsic part of the principle (\textit{nulla poena sine lege}), but, as will be shown below, its scope in international law is uncertain.\textsuperscript{1311}

The legal basis and foreseeability of a prosecution should be judged for the time the crime was committed. Between the commission of the crime and its prosecution, the scope of the criminalization may not be expanded, nor may the penalty be increased. However, other conditions of the prosecution that are not material for the determination of the “moral quality” of the act, such as statutes of limitation and rules on jurisdiction, are not subject to the international principle of legality. Thus, they can be determined and changed after the commission of the crime. While some States extend the principle of legality to cover such conditions, neither treaty law nor State practice provides a basis for a corresponding international rule.\textsuperscript{1312} There is ample evidence, furthermore, that the international principle of legality is substantially different from the standards in many national laws, and far more minimalistic.\textsuperscript{1313} Before setting out to map the different requirements of the international principle of legality for core crimes prosecutions, I will inquire whether the core crimes are treated different from or similar as ordinary crimes in this regard.

\begin{itemize}
\item See on the topic of separation of powers further above, Chapter III, para. 5.\textsuperscript{1309}
\item Cf. Cassese 2003a, p. 141-142; Jones and Powles 2003, p. 401.\textsuperscript{1310}
\item See below, para. 5.4.\textsuperscript{1311}
\item See e.g. Poland, Constitutional Tribunal, \textit{Case of 6 July 1999}, 6 July 1999, para. II (2):

\textquotebegin{quote}
"[The principle of legality] does not encompass situations when that act was prohibited at the moment of commitment and then due to different reasons it stopped being punishable. The moment of commitment of the act is the point of reference for that principle. Everything what happens later is off the range of its application."
\textquoteend

See also Swart 2002b, p. 584-586. Cf. Fletcher 1998, p. 10-23. But see Safferling 2001, p. 87-88 (contending that the international principle of legality requires the existence of the court that will judge the crime before it occurs).\textsuperscript{1312}
\item See Kittichaisaree 2001, p. 269-272; Paust 2000, p. 8; Vyver 1999, p. 316 ("[T]he same standard of specificity required for the circumscription of criminal offences by some criminal justice systems does not apply in international law");\textsuperscript{1313}
\end{itemize}
3 A Special Position for the Core Crimes?

Are prosecutions of the core crimes, including those in national courts, subject to the international principle of legality in the same way as prosecutions of ordinary crimes, or are they governed by different standards? The answer to this question determines to what extent State practice on the principle of legality in general, including cases of ordinary crimes, is relevant for the particular category of core crimes prosecutions.

Some older authors have maintained that the principle of legality does not apply to international crimes at all because it is not compatible with the structure of international criminal law. They supported the negation of an international principle of legality generally by reference to post WWII prosecutions. Indeed, the language of some of those judgments suggests a complete disregard of the principle of legality. In United States v. Altstötter (1947), a U.S. Military Tribunal stated that “[i]t would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth.” However, despite this categorical language, the Tribunal ultimately opted for a restrictive interpretation of the principle of legality rather than its non-application.

On closer scrutiny, post-WWII prosecutions generally rejected a rigid reading of the nullum crimen principle, rather than the principle in its entirety. In United States v. Von List (1947), for example, the Tribunal found that “it is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally.” Clearly, the condition that the crime should be recognized under international law signifies a recognition of the principle. Similarly, in many post-WWII prosecutions the principle of legality was interpreted in a restrictive manner, but still treated with considerable deference. On balance, therefore, it seems more

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1314 See Woetzel 1960, p. 112-116 and references cited there.
1316 Id., at 977-978: “As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught.”
1318 Id., p. 635; “If the acts charged were in fact crimes under international law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements.”
accurate to say that these prosecutions recognized a minimal core of the principle, than not at all.\textsuperscript{1320}

A similar picture emerges from various more recent judgments of national courts. Several of those judgments suggest that the principle of legality does not apply at all to particular crimes or situations. Examples include the German \textit{Borderguards} cases, in which both German courts and the ECTHR effectively set aside the principle of legality, in a manner which arguably amounts to a violation of international law.\textsuperscript{1321} An explicit departure from the principle of legality is also found in the jurisprudence of the Indonesian Ad hoc Human Rights Tribunal. In the case of \textit{Abilio Soares} (2002), the Tribunal first reiterated the international origin and non-derogability of the principle of legality.\textsuperscript{1322} But then, the Tribunal mentioned the jurisdictional scheme of the ICTY and ICTR and concluded "that the legality principle is not absolutely valid and there may be exceptions to this principle."\textsuperscript{1323} In the case of \textit{Domingos Mendonca} (2003), East-Timor's Special Panel for Serious Crimes held that "under customary international law crimes against humanity are criminal under general principles of law recognized by the community of nations, and thus constitute an exception to the principle of retroactivity."\textsuperscript{1324} But while again sweeping in language, these judgments all make sure to establish the criminality of the conduct under international law, or at the very least verify the foreseeability of its punishment.\textsuperscript{1325} Thus, they do not set aside the principle of legality but instead adopt more flexible standards for international crimes.

\textsuperscript{1320} Compare Boot 2002, p. 219 ("In war crimes trials conducted after the Second World War, the \textit{nullum crimen sine lege} principle has been interpreted and applied in a more liberal way than in current national criminal laws.") with Paust 1997a, p. 666 (concluding that "it is doubtful, then, that either the IMT at Nuremberg or the subsequent Tribunal under Control Law. No. 10 considered \textit{nullum crimen sine lege} to be a principle of international law"). See also Triffterer 1966, p. 40-41.

\textsuperscript{1321} See below, note 1441 and accompanying text. See also note 1462 (on the question whether the borderguards cases involved core crimes).

\textsuperscript{1322} Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, \textit{Abilio Soares}, 14 August 2002, unnumbered paragraph, p. 64 of 82:

"In considering, that the prohibition of retroactive law (ex facto) is a basic right that is a non derogable right, as stipulated in Article 28 (i) 2nd Amendment 1945 Constitution and Article 4 Law No.39 year 1999 concerning Human Rights, is universal and is derived from Article 11 of the Universal Declaration of Human Rights." (The Tribunal made further references to the ICCPR and ECHR.)

\textsuperscript{1323} Id., p. 65:

"Therefore the retroactive principle may also be valid to examine and try serious human rights violations cases in the prescribed periods, in particular as in the Penjelasan Undang-undang [commentary accompanying the law] it is clearly stated that: "in other words the retroactive principle may be applied to protect human rights itself under Article 28 jo verse (2) Undang-undang Dasar 1945 [i.e. the 1945 Constitution]";"

\textsuperscript{1324} East-Timor, Special Panel for Serious Crimes, \textit{Domingos Mendonca}, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment, 24 July 2003, para. 20.

\textsuperscript{1325} See on the Borderguards cases below, notes 1445, 1461 and accompanying text; Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, \textit{Abilio Soares}, 14 August 2002, p. 59 (stating that the "crime against humanity has become part of general legal principles recognized by a community of nations, [so] that violence by commission or omission may be charged retroactively"); East-Timor, Special Panel for Serious Crimes, \textit{Domingos Mendonca}, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment, 24 July 2003, para. 22-30.
A differentiation in the standards of the principle of legality for ordinary crimes and international crimes has been adopted also by various other national courts. Argentinean case law to this effect has been described above. The Colombian Constitutional Court found in its 2002 judgment on the constitutionality of the ICC Statute that the standards of the principle of legality are not identical for international and national criminal law. Various national courts have relied on Art. 15 (2) ICCPR and Art. 7 (2) ECHR to adopt this differentiation. In *Barbie* (1984), the French courts rejected appeals to the principle of legality by reference to the general principles provisions of the ECHR and the ICCPR, finding that crimes against humanity are exempted from the principle of legality as formulated in French law. A like reasoning was applied by the Slovenian Constitutional Court in several cases in the 1990’s. The Court struck down certain *ex post facto* criminalizations of acts committed during WWII for violating the principle of legality in the Slovenian Constitution. Under reference to Art. 15 (2) ICCPR and Art. 7 (2) ECHR, however, the Court left unaffected all acts which “attract a penalty by the general legal principles recognized by civilised nations.”

In Hungary, the Constitutional Court in 1993 also found that prosecutions for crimes against humanity and war crimes are not governed by the national principle of legality, again under reference to the mentioned articles of the ICCPR and the ECHR. The Constitutional Court held that the general principles exception in these treaties “makes possible the prosecution of the aforesaid and described *sui generis* criminal offenses defined by international law even by those member states whose domestic system of law does not recognize the definition or does not punish that action or omission.”

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1326 See above, Chapter II, para. 3.3.m.
1327 See Colombia, Corte Constitucional, Sala Plena, *Sentencia C-578 (in re Corte Penal Internacional)*, 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2292 (speaking of “un estándar diferente del principio de legalidad que orienta el derecho penal tanto en el ámbito nacional como en el contexto internacional”).
1328 See on these provisions also below, para. 5.1.
1329 France, Court de Cassation, *Barbie* (No. 2), 26 January 1984, Bull. crim., no. 34; 78 I.L.R. 132, at Bull. crim., no. 34, p. 92 (COUR de Cassation citing and affirming the Court of Appeals):
   "[Q]ue en définitive, l’incrimination de crimes contre l’humanité est conforme aux principes généraux de droit reconnus par les nations civilisées ; qu’à ce titre ces crimes échappent au principe de la non-rétroactivité des lois de répression..."
1331 See Art. 28 Constitution:
   “No person may be punished for an offence which was unknown to the criminal law, or which attracted no penalty, at the time the offence was allegedly committed.”
1332 Slovenia, Constitutional Court, U-I-6/93, 13 January 1994, para. 20. See also Slovenia, Constitutional Court, U-I-248/96, 30 September 1998, para. 14:
   “The Constitutional Court already in the cited decision No. U-I-6/93 found the retroactive application of the Decree on Military Courts allowed insofar as consistent with the general legal principles recognized by civilized nations. It compared the Decree’s retroactivity with the retroactive effect of the London Agreement reached on 8 August 1945, on the basis of which Nuremberg trials for war crimes had been carried out. The retroactivity of that time was legitimate due to the fact that during World War II such delicts were committed which could not have been imagined, nor even envisaged, by previous legislatures. For these very reasons the departure from the prohibition of the retroactive effect of criminal laws should be allowed and legitimate also in [this] case...”
1333 See above, note 1273.
Court found, "such acts must be prosecuted and punished in accordance with the conditions and requirements imposed by international law. The second section of both (International and European) Conventions evidently break through the penal law guarantees of domestic law."\textsuperscript{1334}

Some States, following the language of the ECHR and the ICCPR, have included an exception for international crimes in their formulation of the principle of legality in national law. An example can be found in Art. 42 (1) of the Polish Constitution of 1997 which determines that the principle of legality "shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law."\textsuperscript{1335} Similar provisions are found in the Criminal Code of Bosnia and Herzegovina\textsuperscript{1336} and the Canadian Constitution.\textsuperscript{1337} On the basis of the latter provision, the Canadian Commission of Inquiry on War Criminals concluded that general principles of law recognized by the community of nations can form the basis for war crimes prosecutions.\textsuperscript{1338}

The gist of these national decisions and provisions is that prosecutions of core crimes, also in national courts, are governed by the standards of the international principle of legality, which are more lenient than the standards of their national criminal law.\textsuperscript{1339} This approach appears to be in line with the position of contemporary human rights law. While the ICCPR and the ECHR declare the principle of legality to be non-derogable,\textsuperscript{1340} they also contain an exception clause for acts that are "criminal according to the general principles of law."\textsuperscript{1341} The ECtHR relied on this exception in Naletilic v. Croatia (2000)

\textsuperscript{1334} Id.
\textsuperscript{1335} See above, note 556.
\textsuperscript{1336} Art. 3 (2):
"No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law."
Draft Art. 4a:
"Articles 3 and 4 of this Code [containing the principle of legality] shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of international law."

\textsuperscript{1337} See above, text preceding note 374.
\textsuperscript{1338} See above, Chapter II, para. 3.3.i.
\textsuperscript{1339} See also Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, Justice Dawson, para. 18:
"[T]he ex post facto creation of war crimes may be seen as justifiable in a way that is not possible with other ex post facto criminal laws [... T]he wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law. [... T]his justification for a different approach with respect to war crimes is reflected in [Article 15 of] the International Covenant on Civil and Political Rights [...] War crimes [...] simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law."

\textsuperscript{1340} See Art. 4 (2) ICCPR and Art. 15 ECHR. See also Art. 27 (1) ACHR.
\textsuperscript{1341} See Art. 15 (2) ICCPR:
Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
to find a complaint based on Art. 7 ECHR inadmissible. The applicant complained against his transferal to the ICTY, where he stood accused of crimes against humanity and war crimes, asserting *inter alia* a violation of Art. 7 ECHR on the ground that he might be sentenced to a heavier penalty by the ICTY than by the domestic courts. The European Court noted concisely:

"As to the applicant's contention that he might receive a heavier punishment by the ICTY than he might have received by domestic courts if the latter exercised their jurisdiction to finalise the proceedings against him, the Court notes that, even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention. This means that the second sentence of Article 7 § 1 of the Convention invoked by the applicant could not apply." Thus, like the national courts cited above, the ECtHR makes a clear differentiation between core crimes and ordinary crimes with regard to the principle of legality.

But there is also contrary practice. Many national laws do not make an explicit exception for the prosecution of international crimes in their formulation of the principle of legality. Instead, a few States have made reservations to the exception clauses in the ECHR and the ICCPR in order to object to the prosecution of acts that were criminal according to general principles of law. When ratifying the ECHR, then West-Germany declared that it would only apply Art. 7 (2) within the limits of its national law. Since that national law contained a strict principle of legality, this statement essentially amounted to non-acceptance of Art. 7 (2). In a similar manner, Argentina made a reservation to Art. 15 (2) ICCPR, but this reservation has effectively been set aside by subsequent case law of the Argentinean courts.

In *Armando dos Santos*, East-Timor's Court of Appeal held that "even though the acts committed by the defendant in 1999 include the crime against humanity provided for under section 5.1 (a) of UNTAET Regulation 2000/15, the defendant may not be tried

and Art. 7 (2) ECHR:

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

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1343 Id., para. 2.
1344 Id.
1345 This position is in line with earlier findings of the EComHR that standards of due process developed for prosecutions of ordinary crimes can not automatically be transposed to war crimes prosecutions. See above, note 1078.
1346 See Reservation to Art. 7 ECHR contained in the instrument of ratification, deposited on 5 December 1952 (Original English: "The German Federal Republic makes the reservation that it will only apply the provisions of Article 7 paragraph 2 of the Convention within the limits of Article 103 paragraph 2 of the Basic Law of the German Federal Republic. This provides that any act is only punishable if it was so by law before the offence was committed."). Cf. Boot 2002, p. 159.
1347 Note, however, that the reservation has since been withdrawn. See Note Verbale from the Permanent Representation of the Federal Republic of Germany, dated 1 October 2001, registered at the Secretariat General on 5 October 2001.
1348 See above, Chapter II, para. 3.3.m.
and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively.\textsuperscript{1349} In cases like Bouterse (2001), and Habré (2001), the core crimes are not treated differently than ordinary crimes where it concerns the demands of the principle of legality.\textsuperscript{1350} In Habré, the Senegalese Court of Appeals found that in the absence of a criminalization of crimes against humanity in national law, the principle of legality in the Penal Code precludes the prosecution of those crimes in Senegalese courts.\textsuperscript{1351} In Bouterse, the Dutch Supreme Court found that the principle of legality as formulated in Dutch law does not make an exception for international crimes, but constitutes an "unreserved prohibition" of prosecutions that are not based on Dutch law.\textsuperscript{1352} Numerous other judgments do not contain such explicit statements on the role of the principle of legality, but appear to adhere to the same line of reasoning in a more implicit manner.\textsuperscript{1353} They see no reason to treat international crimes differently than ordinary crimes where it concerns the principle of legality.

In sum, the picture that emerges from State practice is divided. Despite sweeping language to the contrary in some judgments, the principle of legality does apply to the core crimes at least in some form. While there are strong legislative and judicial precedents for applying only a minimal \textit{nullum crimen} standard to the core crimes, also in national courts, practice is divided on this point. But beyond doubt, the precedents just mentioned do indicate that there can be significant differences between the national and the international principle of legality.

4 The International and the National Principle of Legality

National prosecutions are governed simultaneously by national and international law. Therefore, the question arises how the demands of the principle of legality under these two bodies of law relate to each other. Are the standards they postulate on the basis of their common core of specificity and non-retroactivity comparable? Or should we distinguish the international principle of legality from its national counterparts as imposing fundamentally different standards? For direct application of ICL in prosecutions of the core crimes, this is a crucial question. After all, it is a fundamental rule of international law that obligations under national law cannot excuse violations of international obligations. Thus, a national principle of legality that goes beyond the requirements of international law is not a valid reason to forego a mandatory prosecution of a core crime.

\textsuperscript{1349} East-Timor, Court of Appeal, \textit{Armando dos Santos, Applicable Subsidiary Law decision}, 15 July 2003, p. 14. Note, however, that this decision departs from several other judgments of the Court of Appeal and that the Special Panel for Serious Crimes has openly refused to adhere to it. See e.g. East-Timor, Special Panel for Serious Crimes, \textit{Domingos Mendonca, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment}, 24 July 2003.

\textsuperscript{1350} See above, Chapter II, para. 3.3.e and 3.3.k.

\textsuperscript{1351} See above, note 268.

\textsuperscript{1352} See above, note 435 and accompanying text.

\textsuperscript{1353} See above, Chapter II, in particular the paragraphs on Australia and Switzerland.
Practice indicates that States regard the international principle of legality as a minimal standard which differs considerably from the stricter standards many set in their national laws. First, this is reflected in the massive support for the ad hoc tribunals. If States demanding a written definition of both the crime and the penalty under their national law had seen these conditions as satisfying an international obligation, they could not have supported the ad hoc tribunals in their present form. The great majority of States accepts prosecutions for crimes in Rwanda and Yugoslavia on the basis that these crimes were well established in customary international law at the time of commission, which shows that also States with strict national principles of legality interpret the international principle as more lenient.

Second, the lack of congruence between the national and international principles of legality can be discerned in national legislative and judicial practice, as described in the preceding paragraph. In the Netherlands, for example, the Supreme Court acknowledged in Bouterse that the national principle of legality did not match the principle as formulated in Art. 7 ECHR.1354 Also, the West-German reservation to Art. 7 (2) ECHR and the Argentinean one to Art. 15 (2) ICCPR show that these States perceived their national principles of legality as more demanding than and thus distinct from the formulations of the principle in the human rights treaties. Meanwhile, national judgments refusing prosecution of core crimes generally refer only to national principles of legality without elaborating on the relationship between the national and the international principle.1355

Thus, there are good reasons to distinguish the international principle of legality from its national counterparts.1356 Even if they share a common core, the discrepancies between the national and the international formulations of the principle are considerable and of substantial effect. As the ICTY noted in Delalic, these discrepancies reflect differences between national and international law, inter alia in their nature, legislative policies and standards, and drafting process.1357

It follows, that in the analysis of the demands of international law regarding the nullum crimen principle for national prosecutions of core crimes, care should be taken to distinguish rules ascribed to national law from those ascribed to international law. This is a complex task. The simultaneous application of the international and stricter national principles of legality leads to the situation that much of State practice is relevant to ascertain what is allowed by the international principle of legality, but not what is required by it, unless expressly indicated otherwise. The finding of the Hungarian Courts that prosecution of core crimes on the basis of customary international law is permissible indicates that they interpret the principle of legality under international law as allowing

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1354 See Netherlands, HR, In re Bouterse, 18 September 2001, para. 4. See also Dutch legislative history acknowledging different standards of national principle of legality and Art. 7 ECHR, cited in para. 4.3.2.
1355 See above, Chapter II, e.g. para. 3.3.c and 3.3.d.
this practice. On the other hand, there is no indication that the Dutch Supreme Court understands its stricter interpretation of the principle of legality as required by international law. On the contrary, the Supreme Court expressly indicated that it based its decision on the Dutch principle of legality and not on the more lenient international principle.  

Meanwhile, it should be noted that various States have forwarded a more rigid view of the international principle of legality during the establishment of the ad hoc tribunals and the ICC. In this regard, there is a clear desire among certain States to elevate the international principle of legality to a stricter level, comparable to their national principles. This tendency could perhaps in the future reduce the divergence between the international principle and stricter national principles. At present, however, it seems that the push for a stricter principle has not resulted in an adaptation of the principle of legality under general international law.

Notably, the ICC Statute contains a strict principle of legality in Arts. 22 and 23. However, the import of these provisions is not clear-cut, since the Statute does not fully correspond to customary law. The ICC's lack of jurisdiction over core crimes committed before the entry into force of the Statute is not a consequence of the principle of legality, but a political choice. In fact, the Statute recognizes explicitly that neither its formulation of the principle of legality nor its sentencing provisions reflect the demands of general international law. Of course, the Statute's provisions may contribute to a more rigid interpretation of the principle of legality under general international law in the future. Yet, it appears that they currently neither reflect customary international law nor have a bearing on the prosecution of core crimes in national courts.

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1358 The Court declined to analyze whether the international principle would allow the prosecution of Bouterse where the national principle did not, as it could not discern a duty to prosecute in the case. See Netherlands, HR, In re Bouterse, 18 September 2001, para. 4.5-4.8.
1361 Art. 22:
"1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

Art. 23:
"A person convicted by the Court may be punished only in accordance with this Statute."
1362 See Jessberger 2003, p. 283-284. See also Art. 124, which allows States parties to postpone the Court's jurisdiction for war crimes for a period of seven years.
1363 See Art. 22 (3) and Art. 80:
"Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part."
Finally, it should be emphasized that the distinction between principles of legality in national and international law does not correspond to a separation between national and international courts. The international principle of legality governs proceedings in all courts, also national ones. Its focus is primarily on the individual that is to benefit from the principle, as can be readily seen in the formulations in different treaties. Thus, the interpretation by international courts of the required legal certainty could be relevant for the demands put upon national courts and will be included in the following analysis.

5 The Principle of Legality under Customary International Law

This paragraph will analyze the requirements of the principle of legality under customary international law with regard to the legal basis for the prosecution of core crimes, the accessibility of that law, its foreseeability, and the provision of applicable penalties. I will pay substantial attention to Art. 7 (2) ECHR and Art. 15 (2) ICCPR, as these provisions and their application in practice are generally seen as important indications for the principle of legality under customary international law.

5.1 International Criminal Law as Lex

The traditional sources of international criminal law are treaties, custom and general principles. Security Council resolutions constitute an additional source. As some authors contend that the principle of legality requires a written law, it is occasionally doubted whether custom and general principles constitute law in the sense of *nullum crimen sine lege*. Consequently, transformation into written national law would be necessary. This doubt is unwarranted.

The international principle of legality, whether under customary law or as defined in human rights treaties, does not exclude unwritten law from the notion of *lex*. Civil law states generally formulate a stricter national principle requiring written law, and frequently exclude international law as an independent basis for prosecution altogether, but this practice does not likely reflect customary law or a general principle of that nature. Various formulations of the principle of legality in international treaties to which many civil law states are parties, as well as the practice of

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1365 See Bassiouni 1999a, 4.
1366 See Lamb 2001, p. 734 and 749. Cf. Mattarollo 2001, p. 25-26 (asserting that the international principle of legality "requires the existence of a text, but only vis-

1367 See Triffterer 1989, p. 60.
1368 See Bassiouni 1996, p. 289 ("International criminal law currently requires the existence of a legal prohibition arising under conventional or customary international law"). See also ECHR, C.R. v. the United Kingdom, 27 October 1995, para. 33; ECHR, Sunday Times v. UK, 26 April 1979, para. 47.
the ad hoc tribunals, accept that customary law can provide a basis for substantive criminality. Moreover, the fact that many States in their national laws simply refer to international criminal law in general terms, e.g. "the laws and customs of war," suggests that they consider international criminalizations, including customary ones, a sufficient legal basis for prosecution.

Likewise, it can safely be assumed that the nullum crimen principle allows general principles to serve as a source of substantive criminality. Several authors have argued that the reference to general principles in Art. 7 (2) ECHR and Art. 15 (2) ICCPR cover only the admissibility of post-WWII prosecutions or the Nuremberg Principles, and have no broader relevance in modern international law. Both a correct interpretation of these treaties and subsequent State practice, however, require a firm rejection of this assertion. First, it is an elementary rule of treaty interpretation that the travaux preparatoires cannot alter the ordinary meaning of the text of a treaty. A normal contextual analysis of these provisions obviates the need to resort to the drafting history altogether, especially when taking into account the character of these human rights treaties as "living instruments."

Even if they are to be consulted, the travaux preparatoires of the ICCPR indicate that Art. 15 (2) was indeed inspired by the wish to safeguard the legitimacy of post-WWII prosecutions, but they do not warrant the conclusion that the effect of this provision is limited to those proceedings. On the contrary, while some States understood the second paragraph to cover only post-WWII prosecutions, numerous parties expressed their view that it should cover future cases. The representative of Yugoslavia, for example, stated that Art. 15 (2) "provided that crimes against humanity should always be punished, whenever and wherever they had been committed."

According to Ghana it

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1373 See Ziegler 1997, p. 573. See also above, Chapter II, para. 3.2.
1375 See Dutertre 2003, p. 240 and Simma and Paulus 2000, p. 64.
1376 See Peyró 2003, p. 81-83.
1377 Cf. VCLT Arts. 31 and 32, widely believed to reflect customary law.
1378 See Weissbrod 2001, p. 75-91.
1379 See e.g. U.N. Doc. E/CN.4/SR.159 (1950) at 12-13 (Representative of the United Kingdom stated that: "It was important to emphasize in the covenant that acts which might not so far be the subject of express provisions in international law, could nevertheless be contrary to the general principles of law recognized implicitly in both national and international legislation." This position was explicitly supported by Lebanon, Greece, France and Yugoslavia; U.N. Doc. A/C.3/SR.1008 (1960) at 133-134 (Representative of Poland stated that "she could not agree with [those] who had attempted to deny the existence of the general principles of international law...the Polish delegation wished to declare publicly that if war crimes like those which had been punished at Nürnberg should be perpetrated in the future, they must be judged with the same severity and in accordance with the same principles of international law." (para. 2-3), support for the applicability of Art. 15 (2) to future situations was expressed by India and Cuba).
1380 U.N. Doc. A/C.3/SR.1008 (1960), at 135: "Thus article 15, paragraph 2, of the draft Covenant merely strengthened and confirmed the fundamental principles of the United Nations. He was firmly opposed to its deletion and to any amendment which might weaken it. Such a provision should be included in the Covenants, and should form an integral part of an international instrument; that might perhaps prevent a repetition
"represented a saving clause introduced in the interest of the States parties to the Covenant, enabling them, despite paragraph 1, to convict or acquit defendants and fix penalties for offences in accordance with their own legislation." Thus, the parties clearly did not agree to give a “special meaning” to the term general principles which restricted its scope to post-WWII prosecutions. The same can be concluded for Art. 7 (2) ECHR, for example from the German reservation to that provision, which pertains to its future application.

Moreover, the general applicability of Art. 7 (2) ECHR and Art. 15 (2) ICCPR has been accepted in practice. Resort to these provisions is limited but consistent. Some national laws explicitly recognize general principles as a source of substantive criminality and various national courts have applied them in recent cases. The ECtHR has relied on Art. 7 (2) ECHR in Naletilic v. Croatia, and several separate opinions in other cases have also interpreted this provision as meaning just what it says, rather than as an obsolete reference to past WWII prosecutions. In the Borderguards case (2001) for example, Judge Pellonpää phrased as one of the relevant questions whether the killing of a fugitive in Berlin in the 1970’s “constituted an offence under international law (paragraph 1 of Article 7) or was “criminal according to the general principles of law recognised by civilised nations” (paragraph 2).” Likewise, the ICTY in Delalic rejected an alleged violation of the principle of legality under referral to Art. 15 (2) ICCPR, thus confirming its general applicability. In Furundzija, the ICTY even

of past events and deprive war criminals of any opportunity of escaping justice on the ground that their offences were not provided for under the laws of their country or under international law.” Support for this position was expressed by the Philippines and the USSR (p. 136-137). Saudi-Arabia stated that it “saw no reason for basing paragraph 2 of Article 15 on the Nürnberg and Tokyo trials alone. [...] Dictatorial regimes and colonial wars had been and still were the occasion for crimes similar to those referred to in paragraph 2 of the article under discussion.” (p. 137, para. 30) U.N. Doc. A/C.3/SR.1010 (1960) at 145, para. 17. Similar views were expressed by Czechoslovakia, Afghanistan and Romania (p. 146-147).

Cf. VCLT Art. 31 (4).

See Report of the Canadian Commission of Inquiry on War Criminals, 1986, Deschenes, p. 143 (“It is true that some delegations had expressed a deep concern for the protection of the past...[...] But many more had taken into consideration both the past and the future.”).


See above, para. 3 of this Chapter.

See above, note 1342.


See ECHR, K. - H. W. v. Germany, 22 March 2001, Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupancic. See also Partly Dissenting Opinion of Judge Cabral Barreto, para. 4. Cf. EComHR, S.W. v. the United Kingdom, 27 June 1994, Dissenting Opinion of Judge Loucaides, joined by Judge Trechsel, Judge Nowicki and Judge Cabral Barreto: “The travaux préparatoires indicate that [Art. 7 (2) ECHR] was intended to cover prosecution of crimes against humanity in the context of the post-second world war Nuremberg trials. While it cannot be excluded that other conduct might fall within the ambit of the paragraph, I am of the opinion that there is insufficient general consensus as regards marital rape...”

ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 313 (“[T]he caveats contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the
posed that the principle of legality does not rule out resort to general principles as a source of criminality but on the contrary may require so.\textsuperscript{1390}

In conclusion, customary law and general principles are both law as required by the maxim \textit{nullum crimen sine lege}.\textsuperscript{1391} Their application might raise issues with respect to accessibility and foreseeability, but their quality as a source of international criminal law is well established in general international law, as indicated by the provisions of the ICCPR and ECHR and the practice of a variety of States.\textsuperscript{1392}

5.2 Accessibility

The principle of legality requires not only that criminalisations are based on law, but also that this law is readily accessible.\textsuperscript{1393} Accessibility presupposes that the legal rules making the acts in question punishable must be obtainable for the person concerned. The accessibility of the law on core crimes constitutes a somewhat abstract if not fictitious test and is problematic in two respects. These are, first, the dependence on States to make international criminal law accessible for individuals, and second, the particularly poor accessibility of unwritten sources of international law.

\textsuperscript{1390} ICTY, Trial Chamber, \textit{Furundzija}, 10 December 1998, para. 177:

"The Trial Chamber [...] considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (\textit{Bestimmtheitgrundsatz}, also referred to by the maxim "\textit{nullum crimen sine lege stricta}"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws."

\textsuperscript{1391} ICTY, Appeals Chamber, Delalic \textit{et al}, 20 February 2001, para. 173:

"It is universally acknowledged that the acts enumerated in common Article 3 [Geneva Conventions] are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations.""

\textsuperscript{1392} ICTY, Appeals Chamber, \textit{Tadić}, Decision on the Defence Motion Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 128-134.

\textsuperscript{1393} See also ICTY, Appeals Chamber, \textit{Tadić}, \textit{Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction}, 2 October 1995, paras. 128-134.

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\textsuperscript{1391} ICTY, Appeals Chamber, \textit{Tadic}, Decision on the Defence Motion Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128-134.

See also ICTY, Appeals Chamber, \textit{Tadić}, \textit{Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction}, 2 October 1995, para. 128-134.

In this context, it should also be noted that uncertainties about the state of development of international criminal law were raised as an argument against inclusion of an explicit reference to international law in Article 15 (1) of the ICCPR, but were rejected. See Bossuyt 1987, p. 324.

See Shahabuddeen 2004; Pellet 2002, p. 1057-1058 ("Custom is a source of international law to the same extent as treaties and is just as apt to constitute the indispensable lex."); Barreto 2002, p. 3; Bremer 1999, p. 60-61; Morris and Scharf 1998, p. 124 ("The binding force of the relevant customary law on all States would ensure respect for the \textit{nullum crimen sine lege} principle since there would be no question as to whether the particular conduct was prohibited in the State where the crime was committed."); Triffterer 1966, p. 139. Cf. Schmidt 2001, p. 48-50 and 64-66. But see Bocket 2002, p. 628 ("At present, consensus among states about the criminality of conduct under international law beyond existing treaties is still absent.") However, this conclusion is hard to reconcile with the authors earlier observations that unwritten sources of criminality are accepted in various international treaties and in the practice of national and international courts. See pages 124-125, 176 and 626-627.

See ECtHR, \textit{C.R. v. the United Kingdom}, 27 October 1995, para. 33 ("[W]hen speaking of "law" Article 7 (Art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.").
The first problem follows from the fact that international law largely depends on national governments for its dissemination. It is up to States to make international law accessible for their citizens by translating and publishing treaties and other material sources of international law. Consequently, many States allow the direct application of treaty provisions against individuals only after the treaty has been published.\textsuperscript{1394} Some national courts prosecuting foreign suspects for core crimes ascertain that the relevant treaties were in force in the State of the crime, and thus accessible for the defendants.\textsuperscript{1395}

The advent of the information age has to some extent diminished the central role of the State in disseminating the content of international law. Today, there is a growing body of information that makes international law accessible independent of State action. Using the internet and other means of mass communication, international organizations like the U.N. and the Red Cross, as well as educational institutions and NGO's disseminate international law to a large audience. However, especially for groups that are hampered by lack of access to modern means of communication and/or language barriers, the State still plays a crucial role in the dissemination of international law. This dependence is problematic, since the applicability of core crimes law should as a matter of principle be independent from the efforts of the national government.\textsuperscript{1396}

The second problem concerns the accessibility of criminalizations based on customary law and general principles. As these are unwritten sources, they can not simply be published like treaties or statutes. As a result, they are less accessible for the general public. Of course, expressions of the customary norm are generally accessible. Individuals can inform themselves of customary rules through judgments of national and international courts, declarations and communications of States, as well as treaties, legislation and other sources.

For the core crimes in particular, an indication of the law can be derived from numerous readily available sources, such as treaties, relevant international documents, the

\textsuperscript{1394} See e.g. Art. 93 Dutch Constitution; Belgium, Court of Cassation, \textit{Publication of Treaties Case (Belgium)}, 25 November 1993; Germany, Reichsgericht in Strafsachen, \textit{Publication of Treaties Case (Germany)}, 25 September 1920, Partial translation in English in Annual Digest 1919-1922, No. 234, p. 323.

\textsuperscript{1395} See e.g. Swiss \textit{Tribunal Militaire de Division I}, 18 April 1997, para. En Droit, Compétence; Swiss \textit{Tribunal Militaire D'appel I A}, Niyonteze 2000, Chapitre 3 sub A; Swiss Tribunal Militaire de Cassation, Niyonteze 2001, para. II sub b (all establishing that the territorial States of the crimes were bound by the relevant Geneva Conventions and Protocols). Although these courts do not specify the relevance of their findings, it seems plausible that accessibility of the law is an important reason to establish the status of the treaties in the territorial State. After all, it is not relevant for the scope of the duty to extradite or prosecute under the Geneva Conventions, which extends to all alleged perpetrators, not only nationals of the Contracting parties.

\textsuperscript{1396} Cf. Art. 27 (2) and 33 ICC Statute (irrelevance of official capacity and superior orders); Nuremberg Principles II (fact that internal law does not impose a penalty does not relieve perpetrator from responsibility under international law) and IV (no defense of superior orders provided a moral choice was possible). See also Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, Julio Simon (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527, para. III (J).
widespread condemnation of crimes under international law, reports about proceedings against (alleged) perpetrators in national and international courts and the work of academics, governmental and non-governmental organisations. However, the fact that the ascertainment of a customary rule often requires the analysis of many sources combined, and the fact that most of these sources are not comprehensive, clearly diminishes the accessibility of customary rules. For example, the ICTY has relied upon many and diverse sources to ascertain certain customary rules - including case law, military manuals and legislation of numerous countries – which are not generally accessible to the average individual.

While the dependence on the State for dissemination and the poor accessibility of unwritten international law are real problems, they are greatly mitigated by the fundamental character of many of the core crimes. Whether one believes that the core crimes constitute a modern form of natural law or not, a successful plea of lack of accessibility of the law is hard to imagine for a crime like genocide. Still, one can conclude that proper concerns over accessibility plead for the codification of ICL in treaties.

In the practice of both national and international courts, claims about a lack of knowledge of the applicable law are relatively scarce and consistently denied. It appears that ultimately, accessibility of the law is not an independent requirement of the principle of legality, but rather a step in the scrutiny of the foreseeability of the norm. The legal certainty of the individual is safeguarded where she is aware of the rules to be followed, no matter how she has learned of them. In spite of the wording of some judgments of the ECtHR, which suggests that accessibility and foreseeability are two different coexisting demands, accessibility is not explicitly included in the various treaty provisions and seems relevant only in the context of the question to foreseeability. It is inconceivable that the principle of legality would preclude the prosecution of a perpetrator who was aware of the illegality of his conduct but incapable to access the relevant law. Therefore, the following analysis of the requirement of foreseeability will further clarify the relevance of the principle of legality for the direct application of the core crimes.

5.3 Foreseeability

The essence of the principle of legality, that an individual may not be surprised by prosecution for conduct she could not know was punishable, requires the law to be so clear as to make its consequences foreseeable. In this respect, the prosecution of core crimes gives rise to several problems, especially when the international criminalizations

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1397 See below notes 1416-1419.

1398 See above note 1393 ("accessibility and foreseeability").

1399 In other instances, the ECtHR has treated foreseeability as the only requirement to be satisfied. See e.g. ECtHR, C.R. v. the United Kingdom, 27 October 1995, para. 42-44.

1400 See e.g. ECtHR, G v. France, 27 September 1995, para. 24-25; ECtHR, Sunday Times v. UK, 26 April 1979, para. 48-49.
are directly applied.\textsuperscript{1401} The old warning that criminal proceedings before national courts are "a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy"\textsuperscript{1402} has not lost its cogency. The rudimentary state of ICL negatively impacts its foreseeability in numerous ways. Both international criminalizations themselves and the system of ICL in which they are enforced possess a number of characteristics that negatively influence their foreseeability. In addition, the interplay between ICL and national law can lead to divergent or even conflicting demands on individuals.

First, most international criminalizations, including the core crimes, are not formulated as "classic prohibitions." As relevant treaties are generally addressed to States and not individuals, the difference between a direct international criminalization and an order for States to do so is not always evident.\textsuperscript{1403} Further, the need to compromise in international law-making often inhibits the formulation of clear, unambiguous criminalizations. Consequentially, many international criminalizations lack a detailed description of the prohibited conduct,\textsuperscript{1404} applicable penalties,\textsuperscript{1405} and even references to its character as a crime or its intended prosecution.\textsuperscript{1406} A pertinent example of an international crime which lacks a clear definition is aggression.

Second, as stated above when discussing accessibility, even when leaving aside the matter of national implementation, the law on the core crimes is contained in a plurality of formal sources. These sources complement each other, but at times they are at variance or even contradictory. For the foreseeability of customary rules, a plurality of material sources poses further problems. Custom is ascertained by the synthesis of many diverse material sources, most of which are not readily accessible for the average individual.\textsuperscript{1407} These sources, both national and international, often differ to a certain extent, which can lead to confusion about the precise content of the rule. A pertinent example is torture as a war crime or crime against humanity. In Delalic, the ICTY resorted \textit{inter alia} to the Geneva Conventions and Protocols, CAT, 1975 Declaration on Torture, Universal Declaration of Human Rights, ICCPR, ECHR, ACHR, Inter-American Convention to Prevent and Punish Torture, African Charter on Human and Peoples' Rights, 1907 Hague Convention (IV), as well as jurisprudence of several international and regional judicial

\textsuperscript{1401} See e.g. Cassese 2002, p. 559; Yuan and Jianping 2002, p. 356; Hullu 2000, p. 334. Cf. Bassiouni, \textit{et al.} 1989, p. 326-327, remarks by Benjamin Ferencz: "Those who have criticized the [Genocide] Convention for vagueness are absolutely correct. Any prosecutor would face formidable, if not insurmountable, obstacles: was there requisite "intent," was the elimination of the target group "substantial," was it an "act of state" or "military necessity" or "putative military necessity," is it applicable in civil wars, and would prosecution be an illegal interference in internal affairs? [...] The international community has not yet reached the point of civilization where offenses are unambiguously and unequivocally condemned."

\textsuperscript{1402} Lauterpacht 1944, p. 74.

\textsuperscript{1403} That ICL relies predominantly on the indirect enforcement model is reflected in its limited content specificity. See Bassiouni 1999a, p. 5. See further below, para. 6.

\textsuperscript{1404} See e.g. Rückert and Witschel 2001, p. 75 (on the lack of a definition of extermination as a crime against humanity prior to the ICC Statute).

\textsuperscript{1405} See below para. 5.4.

\textsuperscript{1406} See Paust 1997a, p. 664.

\textsuperscript{1407} See above para. 5.2.
bodies, to arrive at a definition of torture.\footnote{ICTY, Trial Chamber, \textit{Delalic et al}, 16 November 1998, para. 452-497.} Taking into account the ICTY’s elaborate treatment of these divergent provisions, it cannot be said that the elements of torture must have been crystal clear to the defendants at the time of their acts. Moreover, custom can be formed and adapted by digressing from established rules. The gradual process whereby violations of existing customary rules gain enough support to change the law and establish a new rule, with all uncertainties of a transitional period, is not exactly beneficial for the legal certainty of the individual.

Third, an important distinction between national and international criminal law is the lack of a supreme judicial authority in the latter system. A coherent body of case-law can remedy vagueness in the law to a large extent.\footnote{See \textit{ECtHR, Kokkinakis v. Greece}, 25 May 1993, para. 40 ("In this instance there existed a body of settled national case-law [...] . This case-law, which had been published and was accessible, supplemented the letter of [the law] and was such as to enable Mr Kokkinakis to regulate his conduct in the matter.").} International criminal law lacks a judicial body with the competence of authoritative interpretation. The various national and international courts influence each other to a significant extent, but are not formally bound to follow each other’s precedents. Thus, they sometimes give different interpretations of the same customary rules.\footnote{See above, note 693-695.} The lack of a coherent body of case-law negatively affects the foreseeability of the core crimes.\footnote{See \textit{ECtHR, Kokkinakis v. Greece}, 25 May 1993, para. 52 ("An offence must be clearly defined in the law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable"). Cf. Wasilkowski 1996, p. 335 (stating that the case-law of the European Court of Justice is what gives European law the character of a system).}

The fourth problem concerns the interplay between national law and international criminalizations. This can take place in two different forms. National law can serve to implement international criminalizations, but it can also issue contradictory demands. While national implementing law spelling out the international crimes to be prosecuted will generally enhance foreseeability,\footnote{See Stahn 2000, p. 202.} both forms of interplay can actually diminish the foreseeability for the individual.

For all criminal law with an international component, rules of national law that are meant to clarify international norms, to complement them, or to enable their national enforcement, may well result in complex referrals to different bodies of law, doing little to enhance the individual’s legal certainty.\footnote{See for an instructive example Belgium, Court of Cassation, 2 June 1993 (endorsing a prosecution for illegal hunting of deer on the basis of "l’arrêté de l’Exécution régional wallon du 18 avril 1991 fixant l’ouverture et la fermeture de la chasse [...] pris en exécution de la loi du 20 avril 1982 portant approbation du Protocole signé à Luxembourg le 20 juin 1977 modifiant la Convention Benelux en matière de chasse et de protection des oiseaux signée à Bruxelles le 10 juin 1970 et approuvée par la loi du 29 juillet 1971," even though the mentioned 1982 law refers to a no longer existing hunting law from 1882 for the conditions of prosecution). See also Hullu 2000, p. 337-339.} In the particular case of core crimes law, such national rules can obscure the fact that it is ultimately international law that must determine the content of the rule. Regardless of the content of national law, core crimes
law always binds the individual on the international level. Thus, when an international criminalization is transformed into a national law that is incomplete or in deviation, reliance on that national law might lead individuals to erroneously assume that their conduct is in conformity with international law.\textsuperscript{1414}

Likewise, a focus on the legal framework that determines the national enforcement of core crimes can distract attention from the fact that enforcement of these crimes can also take place in other States or by international tribunals and is not dependent on any particular implementation regime.\textsuperscript{1415} Thus, even the most thorough study of one's own legal system is of limited value when one is later prosecuted in other States or by an international tribunal, as some citizens of the former Yugoslavia and Rwanda have learned.

In addition, national law can impose demands on individuals that contradict those of international criminalizations. In fact, as many core crimes are State-sponsored, this might happen more often than not. When soldiers under a legal obligation to follow orders are ordered to commit war crimes, this clearly raises doubts about the foreseeability of the consequences of their conduct. This is especially the case when they are younger and in a position of dependence.

However, in recent practice, arguments about a lack of foreseeability are systematically dismissed, predominantly on the basis of the manifest illegality of the core crimes in question.\textsuperscript{1416} In \textit{Delalic}, the ICTY found that "it strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment."\textsuperscript{1417}

In the \textit{Finta} case (1994), Justice Cory stated that "war crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes are vague or uncertain."\textsuperscript{1418} The Italian courts have rejected defenses of ignorance and mistake of law in several contemporary prosecutions of slavery, finding that slavery constitutes a "natural crime."\textsuperscript{1419}

\textsuperscript{1414} See Stahn 2000, p. 201.
\textsuperscript{1415} Cf. ICTY, Trial Chamber, \textit{Furundzija}, 10 December 1998, para. 155:

"Perpetrators of torture acting upon or benefiting from ... national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State.""

\textsuperscript{1418} Canada, Supreme Court, \textit{R. v. Imre Finta}, 24 March 1994, Cory J., para. 215:

"The definitions of crimes against humanity and war crimes include the gravest, cruellest, most serious and heinous acts that can be perpetrated upon human beings. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations."

See also para. 212.
\textsuperscript{1419} See Lenzeriner 2000, p. 275 and 277 (citing \textit{inter alia} cases from 1989 and 1993).
These cases show how national and international courts generally see appeals to a lack of foreseeability as incompatible with the gravity of many of the core crimes. They signal that an indication for the prohibition of genocide and crimes against humanity under international law can be found as much in positive sources as in their very nature as universal crimes.\textsuperscript{1420} Since Nuremberg and Tokyo, the international community has assumed that the prohibition of these crimes is common knowledge. This assumption is strengthened by the fact that the conduct that constitutes these crimes is criminalized by all legal systems in the world (as murder, assault, etc.). Because genocide, crimes against humanity and the more obvious war crimes are universally condemned, their prohibition can also be presumed to be known to everyone.

Consequently, foreseeability may not necessarily require knowledge of the exact definition of the crime. As one commentator rightly states, the negotiations on the ICC Statute show that the precise content of war crimes and crimes against humanity is not so well known and agreed upon as is often claimed.\textsuperscript{1421} Yet, the differences are generally technical rather than fundamental and more likely to exculpate suspects whose conduct is widely regarded as criminal than to incriminate conduct that is generally seen as innocent. Simply put: the foreseeability of crimes like rape and murder in a non-international armed conflict does not in the first place depend on their precise definition under international law. In \textit{Kunarac}, the ICTY affirmed its earlier holding in \textit{Furundzija} that international law prohibited torture as war crime without defining the specific content of that prohibition.\textsuperscript{1422} The assumption that the core crimes need not be defined in detail finds implicit support in various national laws that contain open rules of reference, for example to the laws and customs of war, and has been adopted in several national prosecutions.\textsuperscript{1423} Such cases often rely on the manifest illegality of the crimes in question as a more important factor for establishing the foreseeability of their prosecution.

An exception should be made for various war crimes, since not all war crimes are manifestly illegal. Some war crimes can hardly be said to be of a self-evident nature, for example certain acts that do not involve bodily harm.\textsuperscript{1424} It seems overoptimistic to

\textsuperscript{1420} See Canada, Supreme Court, \textit{R. v. Imre Finta}, 24 March 1994, \textit{La Forest J.} (dissenting), para. 347 ("much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being mala in se").

\textsuperscript{1421} See Haveman 2003a, p. 60.

\textsuperscript{1422} ICTY, Trial Chamber, \textit{Kunarac, Kovac and Vukovic}, 22 February 2001, para. 468-469.

\textsuperscript{1423} See e.g. U.S., Supreme Court, \textit{Ex Parte Quirin}, 1943, 317 U.S. 1 at 29-30: "It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. [...] Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course."

\textsuperscript{1424} Note however that in this regard one cannot make a categorical distinction between crimes involving bodily harm and those that do not, but should judge the manifest illegality of war crimes in the context of specific situations. See Lauterpacht 1944, p. 79 (warning that it is not helpful "to establish a rigid distinction between offences against life and limb and those against property. Pillage, plunder and arbitrary
assume that the general public recognizes the manifest illegality of e.g. the abuse of the
Red Cross signs, which constitutes a grave breach of the Geneva Conventions. 1425 Other
war crimes concern choices of a rather technical nature in large military campaigns, for
example in the selection of targets. The line between permissible and forbidden belligerent action is not always clear-cut.1426 Even well-trained armies can face complex
questions with debatable outcomes regarding the legality of their operational choices. The
fact that war crimes are not of the same status as the other core crimes in this regard finds
expression in the ICC Statute, which designates genocide and crimes against humanity,
but not war crimes, as "manifestly unlawful" for the defense of superior orders.1427 This
represents a retrogression from customary law for those war crimes that are manifestly
illegal and may well complicate their prosecution.1428 Yet, it seems appropriate for those
war crimes of a less self-evident nature.

In addition to manifest illegality, there is a second notion which mitigates problems of
foreseeability for core crimes law. Where defendants perform public functions, often
after expert trainings, they may be held to a higher standard of conduct than the average
individual. This is the notion of Garantenstellung.1429 Military personnel can be expected
to familiarize themselves with the laws of war, and State officials can be expected to have
more knowledge of international law than private citizens.1430 After all, law may still
satisfy the requirement of foreseeability if the person concerned has to take appropriate
legal advice to assess, to a degree that is reasonable in the circumstances, the
consequences which a given action may entail.1431 If that can be expected from a private
person1432, it can a fortiori be expected from individuals responsible for the conduct of
public affairs, who generally have the opportunity to consult legal advisors prior to the
implementation of a given policy. Having the possibility to do so also implies a higher
degree of foreseeability. At least to some extent, the same can be said with regard to
individuals who exercise de facto authority and thereby are in a position to order and
commit crimes under international law.1433 They can be expected to take special care in
assessing the risks that such activity entails.

destruction of private and public property may, in their effects be no less cruel and deserving of punishment
than acts of personal violence.").
1425 See Art. 85 (3) sub f AP I.
1426 See Röling 1979, p. 197 (noting that the destruction of houses may be either a lawful act of war or a
war crime, depending on the circumstances); Lauterpacht 1944, p. 74-80.
1427 See Art. 33 (2) ICC Statute.
1428 See Cassese 1999, p. 155-157. The lack of manifest illegality opens a way for a limited ground
excluding criminal responsibility on the basis of mistake of law or superior orders. See Arts. 32 (2) and 33
1429 See Sliedregt 2003, p. 237-238
1430 See Arts. 83 and 87 (2) AP I. See also Sliedregt 2003, p. 304.
1431 See, among other authorities, ECHR, Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, para.
37.
1432 Cf. ECHR, Cantoni v. France, 15 November 1996, para. 35, (supermarket owner was held to have had
the duty to seek legal advice in order to establish whether the sale of a given product was allowed). But
compare ECJ, Kolpinghuis Nijmegen BV, 8 October 1987 (principle of legal certainty precludes reliance on
unimplemented EC directive regarding the sale of mineral water for prosecution of café owner).
1433 See Art. 28 ICC Statute and Zegveld 2002a, p. 121-131.
Together, the manifest illegality of many core crimes and the heightened standard of knowledge required from military personnel and civilians in a position of authority leave little room for a successful defense on the basis of a lack of foreseeability. After all, these two notions complement each other. War crimes that are not manifestly illegal are often committed by military personnel which may be assumed to know the laws of war. Choices in target selection for military campaigns may be complex, but the people making those choices are expected to go to lengths in studying the relevant law in order to make the right decisions.

Still, the manifestly illegal character of the core crimes may be a pivotal factor in determining the foreseeability of their criminal prosecution, but should not be used as a standard answer to routinely deny all appeals to the principle of legality.\footnote{See e.g. Klabbers 2003, p. 67 ("[The] very impossibility of defining [the core crimes] comprehensively [...] dictates that the \textit{nullum crimen sine lege} defense need not be taken too seriously.".)} Care should be taken to address each \textit{nullum crimen} defense on its merits, taking into account the international nature and special characteristics of the core crimes. This requires an analysis that is not overly narrow, but at the same time respects the line between moral indignation and legal prohibition.\footnote{See Boot 2002, p. 177 ("[A]n arbitrary punishment cannot be atoned by moral judgment about the conduct concerned, as the principle of \textit{nullum crimen sine lege} exactly protects against such weighing of interests.").} While the former feeds the latter, the grave character of the conduct is not in itself enough to reject a \textit{nullum crimen} defense but can only support the legal analysis. In short, moral blame, criminality under national law and criminality under international law are three different qualifications of human behavior and should be distinguished as such. Admittedly, this is easier said than done.

That wholesale reliance on manifest illegality can yield problematic results is demonstrated by the German Borderguards case (2001) before the ECtHR.\footnote{ECtHR, \textit{K. - H. W. v. Germany}, 22 March 2001 (hereinafter \textit{KHW. v. Germany}). See Rytter 2003 and Boot 2002, p. 161-170.} It should be noted that the following account concerns only the prosecution of the borderguard himself. The prosecution of policy makers responsible for the border regime is not comparable where it concerns the question of foreseeability and should thus be distinguished.\footnote{See ECtHR, \textit{Krenz et al v. Germany}, 22 March 2001.}

The applicant had been convicted of intentional homicide in Germany for shooting and killing a fugitive in 1972, when he served as a 20 year old borderguard in East-Germany. At that time, there was a clear gap between East-German law and policy. The law demanded proportionality and respect for the right to life and criminalized homicide even if committed pursuant to statute or orders, while State policy required the borderguard to act as he did: borderguards were instructed to shoot fugitives and non-compliance with these orders was punished as a negligence of duty.\footnote{\textit{KHW, v. Germany}, para. 71.} After the shooting, the borderguard was decorated and rewarded with a financial bonus. Some twenty years later, however, the regime changed and the borderguard was prosecuted for the killing. The German

\footnotesize{\begin{itemize}
  \item \footnote{See e.g. Klabbers 2003, p. 67 ("[The] very impossibility of defining [the core crimes] comprehensively [...] dictates that the \textit{nullum crimen sine lege} defense need not be taken too seriously.").}
  \item \footnote{See Boot 2002, p. 177 ("[A]n arbitrary punishment cannot be atoned by moral judgment about the conduct concerned, as the principle of \textit{nullum crimen sine lege} exactly protects against such weighing of interests.").}
  \item \footnote{See ECtHR, \textit{Krenz et al v. Germany}, 22 March 2001.}
  \item \footnote{\textit{KHW, v. Germany}, para. 71.}
\end{itemize}}
courts differed slightly in their reasoning but predominantly relied on Radbruch’s formula, which essentially posits that positive law should not be applied if this will lead to intolerable injustice. In all instances, the German courts found the shooting to be manifestly illegal and therefore punishment of the borderguard to be justified.

The ECtHR judged the prosecution of the borderguard not to be in violation of the principle of legality embodied in Art. 7 ECHR. In a confused and unclear judgment, the Court effectively suggested that the principle of legality can be interpreted as more lenient than normally where the most fundamental human rights are at stake and that individual criminal responsibility can be derived solely from human rights law. The Court grounded the permissibility of the prosecution on the illegality of the conduct both in national and international law, but at the same time seemed to perform a balancing act between the principle of legality and the right to life. It did not make a clear choice for any of these options, however, and thereby undermined the persuasiveness of all of them.

In answering the question whether the prosecution was foreseeable at the time of the shooting, the ECtHR relied on the manifest illegality of East-Germany’s border control policy. The Court took the view that “even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR’s own legal principles but also internationally recognised human rights.” It cited approvingly the German Bundesverfassungsgericht as stating:

“The decisive factor is that the killing of an unarmed fugitive by sustained fire was, in the circumstances of the case, such a dreadful act, not justifiable by any defence whatsoever, that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the proportionality principle and the elementary prohibition on the taking of human life.”

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1440 See for the facts, the relevant national law and the proceedings in the German courts KHW v. Germany, para. 10-33 and Rytter 2003, p. 41-45; Schmidt 2002, p. 73-78; Gropp 1996. References to German literature can be found in Arnold, et al. 2003.
1441 See para. 88-90:

“[R]egarding being had to the pre-eminence of the right to life in all international instruments on the protection of human rights […] the Court considers that the German courts’ strict interpretation of the GDR’s legislation in the present case was compatible with Article 7 § 1 of the Convention […] The Court considers that a State practice such as the GDR’s border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as “law” within the meaning of Article 7 of the Convention.”

1442 See para. 103 (“Even supposing that [individual criminal] responsibility cannot be inferred from the above-mentioned international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 of the GDR’s Criminal Code”).

1443 See for a lucid analysis on this point Rytter 2003, p. 43-59.
1444 KHW v. Germany, para. 76.
1445 Id., para. 80. See also Bothe 1996, p. 296.
It is submitted here that the finding that the borderguard could have foreseen the illegality of killing an unarmed fugitive in 1972 is, like the Court’s suggestion that individual criminal responsibility can be based solely on human rights instruments, mistaken. National law, which must always be assessed in its totality, including administrative regulations and relevant orders, did evidently not provide sufficient notice. On the contrary: it provided notice that disobedience of the order to shoot would be punished. As for international law, the Court found that the human rights to life and freedom of movement sufficiently established the illegality of the shooting. This argument fails for two reasons.

First, East-Germany was a party neither to the ECHR nor to the ICCPR at the material time. The Court therefore needed to take a two-step approach: it derived foreseeability from international human rights law, which should have been known by the borderguard because national law referred to it. Of course, this selective reliance on national law is unfair, as it disregards the fact that anyone looking to the totality of East-German law in 1972 would conclude that apparently the human rights law referred to did not preclude the border control policy under dispute.

Second, and more importantly, the assertion that the international rights to life and freedom of movement in 1972 unambiguously precluded the border control policy is questionable at least. Under the human rights conventions, both rights are subject to exceptions regulated by law and East-Germany was not the only State to provide such exceptions. Certainly at that time, but still today, several States restricted the right of their citizens to leave the country. The suggested international consensus on the illegality of the use of deadly force against an unarmed fugitive in 1972 is even more doubtful. This can be aptly demonstrated by reference to the American case Tennessee v. Garner (1985).

It should be noted in this regard that both Garner and KHW. v. Germany concerned the killing of fleeing suspects of non-violent crimes: whatever one may think of the GDR legal system at that time, it is undisputed that by crossing the border, fugitives committed an offence against GDR law.

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1446 In assessing the foreseeability of the law, regard should be had to all relevant sources, including e.g. administrative practice. Cf. ECHR, Leander v Sweden, 25 February 1987, para. 51 and ECHR, Silver and others v United Kingdom, 25 February 1983, para. 88-89.

1447 KHW. v. Germany, para. 92-101 and 105.

1448 Id., para. 104-105:

“[A]lthough the event in issue took place in 1972, and therefore before ratification of the International Covenant, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights, as he could not have been unaware of the legislation of his own country. In the light of all of the above considerations, the Court considers that at the time when it was committed the applicant’s act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.”


1450 See ECHR Art. 2 (2) and Protocol 4, Art. 2 (2); ICCPR Art. 6 (1) and 12 (3).


In *Garner*, the US Supreme Court judged the constitutionality of a statute which provided that after giving notice of an intent to arrest, a police officer "may use all the necessary means to effect the arrest." The specific case concerned the shooting and killing of a burglary suspect in 1974, two years after the shooting that gave rise to the borderguards case. While the lower courts were divided on the matter, the Supreme Court ruled that the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect violated the US Constitution. Three judges dissented, placing the public interest of law enforcement above that of the individual, and finding that "the legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt." At that time, numerous American states entertained a similar rule on the use of deadly force as Tennessee.

Although the US Supreme Court in *Garner* found the use of deadly force to be unreasonable, that conclusion was controversial. This can be seen in the lack of unity in the findings of the different courts and judges involved, the fact that a similar rule on the use of deadly force was in operation in many American states and the way the judgment was received in the legal community. Moreover, *Garner* was concerned with the constitutionality of the shooting and not the individual criminal responsibility of the police officer. Also, the holding in *Garner* is a narrow one. Even today, it is interpreted in the U.S. as ruling out the use of deadly force to prevent the escape of an unarmed, non-dangerous suspect, but not of an unarmed, non-dangerous detainee. Likewise, in South-Africa the killing of an unarmed, non-dangerous suspect of a minor crime was under circumstances regarded as justifiable homicide well into the 1990’s and its (i)legality is still a matter of some controversy. Although the situation might be different today, these examples indicate that in 1972 the illegality under international law of the killing of an unarmed, non-dangerous fugitive was questionable at best.

1453 Id., at 1696.
1454 Id., at 1701.
1455 Id., at 1710-1711:
"Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. [...] A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable...."
1456 See id., at 1703-1704.
1457 See e.g. Allen, *et al.* 1995, p. 882 (one of the questions following *Garner* asks "if a person who chooses to communicate by telephone in effect forfeits any privacy interest in the identity of the number dialed, [...] why should a person who chooses to be a fleeing burglar not forfeit the right to personal safety?").
1458 See U.S., Court of Appeals (Fifth Circuit), *Brothers v. Klevenhagen*, 1 August 1994, 28 F.3d 452 (killing of an unarmed, non-dangerous pretrial detainee to prevent his escape is not constitutionally unreasonable). See on this case *White I II 1995*.
1459 See Burchell 2000, p. 212.
1460 See ECtHR, *Nachova and others v. Bulgaria*, 26 February 2004, para. 103:
"[B]alanced against the imperative need to preserve life as a fundamental value, the legitimate aim of effecting a lawful arrest cannot justify putting human life at risk where the fugitive has committed a non-violent offence and does not pose a threat to anyone. Any other approach would be incompatible with the basic principles of democratic societies, as universally accepted today..."
While the circumstances of the cases were very different, both the borderguards case and Garner turned essentially on the legitimacy of killing an unarmed, non-dangerous fugitive to prevent his escape.\footnote{See KHW. v. Germany, para. 17 ("[T]he [German] Regional Court held that, even for a private soldier, it should have been obvious that firing at an unarmed person infringed the duty of humanity.") and Concurring Opinion of Judge Bratza, joined by Judge Vajic ("I can find no reason to depart from the considered opinion of the national courts that opening fire on a defenceless person, who was attempting to swim away from East-Berlin and who posed no threat to life or limb, so clearly breached any principle of proportionality that it was foreseeable that it violated the legal prohibition on killing.")).} It took the American judiciary more than ten years to find a final answer in that specific case, without even having mentioned the individual criminal responsibility of the police officer involved. In this light, it seems rather unreasonable to expect a 20-year old indoctrinated borderguard, at the bottom of the hierarchy and subject to disciplinary proceedings, to conclude that the border control policy regulated by national law evidently fell outside the legitimate exeptions to the right to life and freedom of movement and should therefore not be executed.

In sum, the borderguards case illustrates how anger over an immoral act or regime can tempt us to blur the line between moral indignation and legal prohibition under the guise of manifest illegality. At the same time, it is open to discussion whether his conduct can be classified as a crime against humanity.\footnote{The ECtHR did not reach a decision on this point. See KHW. v. Germany, para. 106. The judges were divided on this question in their individual opinions. Compare Concurring Opinion Judge Loucaides (concluding that the killing constituted a crime against humanity) with Partly Dissenting Opinion of Judge Cabral Barreto and Partly Dissenting Opinion of Judge Pellenpää, joined by Judge Zupancic.} This should warn us that even for core crimes, arguments concerning a lack of foreseeability cannot be rejected out of hand.\footnote{See Osiel 1999. Cf. Stirling-Zanda 2001, p. 91-94.}

But while the borderguards case cautions against automatic reliance on the manifest illegality of core crimes, it is not a reason to discard the notion altogether. The circumstances of the case - in particular its highly institutionalized setting, the law enforcement character of the act and the fact that the comparable use of deadly force is not uncommon in other situations - set it apart from the great majority of core crimes. Most core crimes involve acts of cruelty, discriminatory acts against particular groups, or other acts that are criminalized everywhere. Their manifest illegality is therefore a very different matter, as indicated by the fact that they are generally concealed rather than celebrated in public after the fact.\footnote{Although core crimes perpetrators, particularly those in the military, are regularly praised and rewarded in their own States, such public appraisal is normally confined to the individuals involved and not the specific crimes they have committed.} It is hard to disagree with the finding of the ICTR in judging the discriminatory acts of sexual violence, beatings and murders in Akayesu that "it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds."\footnote{ICTR, Trial Chamber, Akayesu, 2 September 1998, para. 616.} The same is true for most core crimes.
5.4 Penalties

The principle *nulla poena sine lege* prohibits retroactive penalties. It is undisputed that the principle forbids the imposition of heavier punishment than the one applicable at the time of the crime. The status of another requirement commonly attributed to the *nulla poena* principle is less clear under international law: the mandatory indication of the applicable penalties in law. Most human rights instruments do not formulate any demands regarding specificity or form of the determination of the penalty. The relevant provisions require a definition of the crime in law, but their demands regarding penalties are generally limited to the prohibition of heavier penalties than those applicable at the time of the crime. Since doctrine generally perceives the *nulla poena* principle as a major obstacle to direct application of international criminal law, I will treat it in some detail.

In practice, roughly four approaches can be discerned regarding the requirement of an indication of the penalty for core crimes. First, a strict approach to the *nulla poena* principle sees a clear indication in law of the penalty to be incurred as a prerequisite for prosecution, also for the core crimes. As an example of this approach, the preamble to Rwanda’s law on the national prosecution of the international crimes committed in the 1990’s states that prosecutions must be based on the national penal code because the relevant international conventions lack corresponding penalties. However, it should be

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1466 See Universal Declaration of Human Rights, Art. 11 (2); ECHR Art. 7 (1); ICCPR Art. 15 (1); IACHR Art. 9. See also e.g. HRC, *Casafranca v. Peru*, Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, (Communication No. 981/2001) (September 19, 2003), para. 7.4; ECHR, *Jamil v. France*, 25 May 1995, para. 34-36. But see ICTY, Trial Chamber, *Delalic et al*, 16 November 1998, para. 1210-1212. The prohibition of heavier penalties should not be confused with the mandatory application of lighter penalties enacted after the crime, the *lex mitior* principle. While the two are often grouped together, for example in Art. 15 (1) ICCPR, the *lex mitior* principle is distinct from the *nulla poena* principle.


1468 See provisions cited above, note 1466. But see Art. 7 African Charter on Human and Peoples’ Rights (“No penalty may be inflicted for an offence for which no provision was made at the time it was committed.”).


1470 See Organic Law No. 40/2000 of January 26, 2001 setting up “Gacaca Jurisdictions” and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, Preamble:

"Given that the acts committed are offenses provided for and punished by the Penal Code as well as the crime of genocide or crimes against humanity; Given that the December 9, 1948 Convention on the Prevention and Suppression of the Crime of Genocide, the August 12, 1949 Geneva Convention, relative to the Protection of Civilian Persons in Time of War and its additional protocols, and the November 26, 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Given that Rwanda has ratified those three conventions and published them in the Official Gazette of the Republic of Rwanda without having provided penalties for these crimes; Whereas, consequently, prosecutions must be based on the Penal Code;"

See also Organic Law No. 08/96 of August 30, 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, preamble. Cited in Schabas 2003b, footnote 42.
noted that the sources referred to before reaching that conclusion include the national principle of legality in Rwanda’s 1991 Constitution, but not the international principle of legality.\textsuperscript{1471}

The second approach to the \textit{nulla poena} principle requires a clear indication of the penalty, but allows recourse to relevant ordinary crimes in force at the time of the offence to “borrow” such an indication.\textsuperscript{1472} Thus, it allows punishment for the core crimes under application of the penalties proscribed for ordinary crimes such as murder and assault. The drafters of the statutes of the ICTY and the ICTR, although divided on this question,\textsuperscript{1473} ultimately decided to demand both tribunals to “have recourse to the general practice regarding prison sentences” in the courts of the countries concerned.\textsuperscript{1474} While the language of these provisions leaves open the question whether this recourse to national penalties is binding or merely a policy choice, the drafting history indicates that the aim of the proposers was to satisfy the \textit{nulla poena} principle.\textsuperscript{1475}

Yet, both \textit{ad hoc} tribunals squarely rejected the notion that the \textit{nulla poena} principle requires recourse to national penalties.\textsuperscript{1476} In \textit{Erdemovic}, the ICTY stated that:

“It might be argued that the reference to the general practice regarding prison sentences is required by the principle \textit{nullum crimen nulla poena sine lege}. Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality...”\textsuperscript{1477}

In contravention of the intentions of the proposers of the provision, both the ICTY\textsuperscript{1478} and the ICTR\textsuperscript{1479} have consistently held that the recourse to national sentencing practice is not required by the \textit{nulla poena} principle, but constitutes solely a non-binding guideline.\textsuperscript{1480}

Other indications for support or opposition of the second approach are ambiguous. No recourse to national penalties is required under the ICC Statute. However, the Statute

\textsuperscript{1471} Id., referring to Rwanda’s 1991 Constitution, Art. 12, which reads in relevant part:

“[...]  
(2) The liberty of the human being shall be inviolable; no one may be prosecuted, arrested, imprisoned, or convicted other than in the cases prescribed by the law in effect at the time of the perpetrated act and within the forms prescribed by that law.  
(3) No infraction may be punished by penalties which were not prescribed by law before it was committed.”

\textsuperscript{1473} See Schabas 1997, p. 469-473.
\textsuperscript{1474} See Statute ICTY, Art. 24 (1) and Statute ICTR, Art. 23 (1).
\textsuperscript{1475} See Schabas 1997, p. 469-473 and 482.
\textsuperscript{1476} See Schabas 2000c, p. 528-536.
\textsuperscript{1480} See Lamb 2001, p. 758-762.
contains a general provision on penalties and has no retroactive application. Therefore, the *nulla poena* question does not present itself as it did for the *ad hoc* tribunals. Some national judgments assert that the *nulla poena* principle may be satisfied by application of the penalty provisions of national criminal law. Yet, the value of most of these pronouncements for international law is limited, as explained above, due to the convergence of national and international principles of legality. For example, the Belgian *Pinochet* judgment (1998) suggested recourse to the penalties provided for corresponding offences in national law, but explicitly based that requirement on the national principle of legality. It thus provides an indication of the content of the Belgian, but not necessarily the international formulation of the *nulla poena* principle.

The third approach minimizes the required indication of the penalty for the core crimes, sometimes to the point of discarding it altogether. What the principle requires, the argument essentially posits, is a warning that there will be a penalty, or perhaps a broad indication of its form or severity, but not a precise description. Thus, in its strongest form this approach effectively discards the strict condition of an indication of the penalty and merely requires an indication of criminality. After all, conduct can be criminalized without specification of a corresponding penalty. The ILC has in its work on the Draft Codes of Crimes Against the Peace and Security of Mankind adhered to the view that an indication of criminality, rather than a precise penalty, suffices for international crimes. Accordingly, the different Draft Codes contain only minimal penalty provisions. In its commentary on the 1996 Draft Code, the ILC asserted that "it is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment." Various States, however, objected to this position.

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1481 See Art. 77 ICC Statute.
1482 See Belgian *Pinochet*, para. 3.3.2.
1485 See Art. 3 Draft Code 1996:
   "An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime."
 Art. 3 (1) Draft Code 1991:
   "An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment."
 Art. 5 Draft Code 1951:
   "The penalty for any offence in this Code shall be determined by the tribunal exercising jurisdiction over the individual accuse, taking into account the gravity of the offence."
 (Deleted in 1954. See Triffterer 1966, p. 77-78.)
1486 See Art. 3 Draft Code 1996, Comment 7:
   "It is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgement and in article 15 (2) of the International Covenant on Civil and Political Rights."
Traditionally, many different States accepted a minimal indication of penalties, or even a lack thereof, for all crimes. Common law systems have long accepted the power of the courts to determine the applicable penalties where the law was silent.\textsuperscript{1488} In legal systems based on Islamic law, the courts still have discretion to apply unspecified penalties for a particular category of offenses (Ta'azir) whereas for other categories the penalties are fixed.\textsuperscript{1489} Yet, most States, including common law systems,\textsuperscript{1490} today take the view that not only the crime but also the applicable penalties require definition in law. The ECtHR has held unambiguously that, as a general rule, penalties must be defined by law.\textsuperscript{1491} The IACtHR, on the other hand, has suggested that a broad indication of the punishment to be incurred might suffice.\textsuperscript{1492}

For the core crimes, however, the "minimalist" approach finds support in practice until the present day. Several post-WWII prosecutions set aside the penalty requirement.\textsuperscript{1493} The Dutch prosecution of Rauter (1949), resulting in his death sentence, discarded the nulla poena argument because important interests of justice "do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous

\textsuperscript{1487} See Boot 2002, p. 319-321; Schabas 2000c, p. 523-524.
\textsuperscript{1488} See e.g. U.S., Court of Oyer and Terminer, at Philadelphia, Republica v. De Longchamps, October Sessions, 1784, 1 Dall. 111 at 116 ("Punishments [...] must be such as the laws expressly prescribe; or where no stated or fixed judgment is directed, according to the legal direction of the court.").
\textsuperscript{1490} See e.g. U.S., Cook v. Commonwealth, 1995, 20 Va. App. 510 (defendant could not be convicted for second-degree murder because legislator had prescribed conduct but by oversight omitted a corresponding penalty); U.S., Court of Appeal, State v. LaMaster, 1991, 811 S.W.2d 837; South-Africa, Transvaal Provincial Division, S v Theledi, 7 October 1991, [1993] 2 SA 402. But see Zambia, High Court, Thomas James v. State, 18 April 1974, 8 The comparative and international law journal of Southern Africa 152 at 154 (finding that a legal provision can amount to a criminalization in the absence of a penalty and that the breach of a prohibition in unambiguous and imperative terms regulating a matter of "public grievance," must be held an offence unless the contrary intention is manifest); U.S., Court of Appeal, Nunley v. State, 2001, 26 P.3d 1113.
\textsuperscript{1491} See ECtHR, Coëme and Others v. Belgium, 22 June 2000, para. 145 ("[O]ffences and the relevant penalties must be clearly defined by law."); ECtHR, C.R. v. the United Kingdom, 27 October 1995, para. 33 ("[O]nly the law can [...] prescribe a penalty").
\textsuperscript{1492} See IACtHR, Castillo Petruzzi et al., 30 May 1999, para. 121 ("This Court has stated that the principle of penal legality "means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment."").
\textsuperscript{1493} See Schabas 1997, p. 469; United Nations War Crimes Commission 1947, vol. 15, p. 166-169. See also Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496 at 504 ("Hague Convention No. IV of 1907 contains legal rules with penal sanctions and therefore there is no room for objection based on the principle nulla poena sine lege." It is, however, unclear from the judgment where the Polish court in this case found these penal sanctions, since the Hague Convention does not contain explicit provisions to that effect.).
threat of punishment was absent." Some more recent national judgments regarding core crimes have likewise dismissed objections based on the *nulla poena* principle.

The ECtHR adhered to the minimalist approach for core crimes in *Naletilic* (2000). As set out above, the ECtHR held that a defendant accused of crimes against humanity and war crimes before the ICTY could not rely on the prohibition of heavier penalties in Art. 7 (1) ECHR. Instead, the Court held, if the principle of legality in the ECHR applied to this case at all, Art. 7 (2) was the relevant clause. This clause does not contain any requirements about the penalty to be applied. It is noteworthy that the ECtHR has effectively left aside the *nulla poena* principle also in a few cases involving ordinary crimes. In its well-known judgments regarding the punishability of marital rape in the United Kingdom, the Court focused on the object and purpose of the principle of legality to avoid strict scrutiny of its different elements. In doing so, it minimized the *nulla poena* principle, concentrating instead on the question of foreseeability. The ECtHR appealed to the manifest illegality of the conduct in question, perhaps implying like the Dutch court in *Rauter* that the *nulla poena* principle should be interpreted less strictly for particular serious crimes, like the core crimes, if a strict interpretation would preclude their punishment altogether.

Finally, it has been argued that the *nulla poena* principle does require an indication of the penalty, but that this condition is satisfied for the core crimes by a general principle of international law laying down that the most serious crimes deserve the heaviest penalties available. Accordingly, this approach would allow national courts to punish the core crimes on the basis of international criminal law, under application of the heaviest penalties available in their national laws. Like the minimalist approach, the appeal to a general principle of the heaviest penalties for the gravest crimes can be traced back to post-WWII jurisprudence. The Norwegian Supreme Court, for example, held in *Klinge* (1946) that according to the laws and customs of war, “war crimes can be punished by the most severe penalties, including the death penalty. In other words, the criminal character of the acts dealt with in the present case as well as the degree of punishment are already laid down in International Law in the rules relating to the laws

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1495 See e.g. Austria, Supreme Court (Oberster Gerichtshof), Cvjetkovic, 13 July 1994, available at http://www.ris.bka.gv.at/ (finding that the acts in question were contrary to humanitarian law, *inter alia* the Geneva Conventions “sodaß - der Beschwerde zuwider - der Grundsatz "nulla poena sine lege" vorliegend gar nicht zutrifft”); Canada, Supreme Court, *R. v. Imre Finta*, 24 March 1994, Cory J., para. 218-227.
1496 See above, note 1342 and accompanying text.
1499 ECtHR, *C.R. v. the United Kingdom*, 27 October 1995, para. 42.
1500 See e.g. Peyró 2003, p. 83; Schabas 1997, p. 474. But compare Schabas 2003b, p. 62 (stating that the phrase “effective penalties” in the Genocide convention is “hardly enough to respect the principle of legality”).
1501 See United Nations War Crimes Commission 1947, vol. 15, p. 200 (citing several national prosecutions where the death penalty was imposed for non-homicidal crimes, such as torture and rape, and concluding that “[i]nternational law lays down that a war criminal may be punished with death whatever crime he may have committed.").
and customs of war."\textsuperscript{1502} This approach still finds support in practice. The ICTY relied on "the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity" in \textit{Erdemovic}\textsuperscript{1503} and on similar reasoning in \textit{Delalic}.\textsuperscript{1504} The ICTR seemed to endorse this approach in more implicit terms in \textit{Akayesu}.\textsuperscript{1505}

To sum up, there are strongly divergent interpretations of the \textit{nulla poena} principle. While some regard an indication in law of the specific penalty to be incurred as a \textit{conditio sine qua non} for core crimes prosecutions, others dispute the applicability of this requirement altogether. State practice reflects this divergence also in national legislation regarding the core crimes. A cursory survey reveals that national legal systems differ considerably in the specificity of penalties for the core crimes. Most States determine maximum penalties, many of them set minimum penalties\textsuperscript{1506} and they all allow for considerable, if differing degrees of discretion in the judicial determination of the penalty in specific cases.\textsuperscript{1507} Some national laws contain very broad penalty provisions.\textsuperscript{1508} The Swiss Military Penal Code, for example, provides in Art. 109:

\begin{quote}
"Violations of the Laws of War:
(1) Whoever acts contrary to the provisions of any international agreement governing the laws of war or the protection of persons and property, or whoever acts in violation of any other recognized law or custom of war shall be punished with imprisonment except in cases where other provisions involving more severe sanctions are applicable. For offences of high gravity the penalty is penal servitude.
(2) For offences of little gravity, the punishment can consist of a disciplinary sanction."\textsuperscript{1509}
\end{quote}

Obviously, the rather open categorization of offences according to their gravity, with different corresponding penalties and the fact that only the form of punishment is

\textsuperscript{1502} Norway, Supreme Court, Klinge, 27 February 1946, Annual Digest 1946, p. 262 at 263.
\textsuperscript{1504} ICTY, Appeals Chamber, \textit{Delalic et al}, 20 February 2001, para. 817:
"There can be no doubt that the maximum sentence permissible under the Rules ("imprisonment for [...] the remainder of a convicted person's life") for crimes prosecuted before the Tribunal, and any sentence up to this, does not violate the principle of \textit{nulla poena sine lege}. There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties."

\textsuperscript{1505} ICTR, \textit{Akayesu}, Sentencing Judgment, 2 October 1998 ("Rwanda like all States which have incorporated crimes against humanity or genocide in their domestic legislation has envisaged the most severe penalties in its criminal legislation for these crimes.").
\textsuperscript{1508} See e.g. Art. 127 Egyptian Penal Code (generally understood to cover cases of torture, indicating a penalty of imprisonment of unspecified duration for public officials imposing excessive or unlawful punishment); Art. 20 (2) Bangladesh's International Crimes (Tribunals) Act 1973 (Act No. XIX of 19 July 1973) (providing for a "sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper." Note, however, that no prosecutions have ever been undertaken on the basis of this act). See on Art. 127 Egyptian Penal Code also Abdelgawad 2002, p. 377.
\textsuperscript{1509} Translation taken from Ziegler 1998, note 7.
indicated but not the duration, starkly limit the predictability of the punishment to be incurred.1510

The same schism as in national legislation is found in the work of the ILC,1511 and the drafting process of the ICTY Statute, where some States proposed general penalty provisions in line with the minimalist approach, determining for example that “penalties shall be based on ‘general principles’ of law as they exist in the world’s major legal systems” or that the Tribunal would “have the power to sentence convicted persons to imprisonment or other appropriate punishment.”1512 Yet, other States found such general provisions unacceptable and wanted the ICTY to derive the penalties from the criminal law and practice of the Former Yugoslavia.1513 While a provision to that effect was ultimately included in the Statute, the ICTY in its judgments subsequently relativized the need for and binding character of recourse to national law.

But in the final analysis, State practice suggests that the principle of legality under customary international law does not preclude the prosecution of the core crimes in the absence of specified penalties. When distinguishing the international principle of legality from its stricter national counterparts, it seems that no court has declared punishment of a core crime inadmissible on the basis of the nulla poena principle in international law.1514 Instead, there is ample authority for the propositions that a broad indication of the applicable punishment suffices for the prosecution of core crimes, or that these crimes by definition attract (up to) the highest available penalties. In practice, the result of these two approaches is more or less the same, namely far-going sentencing discretion for the courts. Moreover, there also is considerable support for the proposition that core crimes may be punished under recourse to the penalty provisions of relevant ordinary crimes. While various States argue for a stricter approach to the applicable penalties, at present their views seem to be no more than aspirational.1515

From a policy perspective, it may be questioned whether a stricter interpretation of the nulla poena principle is desirable. After all, the admissibility of prosecutions on the basis of unwritten law1516 has important consequences for the indication of the penalty. Since international law does not demand a written provision for the prosecution of core crimes, the required precision of the penalty can likewise only be limited. Thus, the characteristics of core crimes law oppose too strict a standard for the provision of

1510 See Ziegler 1997, p. 580 (“[T]he judge remains free to mete out a penalty from a mere three days of imprisonment to 20 years of penal servitude, according to whether he finds a case of ordinary or high gravity and the mitigating circumstances he establishes.”).
1511 See above, note 1487.
1513 See above, note 1475.
1514 One of the dissenting judges of the Argentinean Supreme Court in the extradition proceedings concerning Erich Priebke asserted that the nulla poena principle prevented extradition or prosecution under direct application of international criminal law. The majority of the Supreme Court, however, rejected this approach. See Mattarollo 2001, p. 36-37 and above, Chapter II, para. 3.3.m.
1515 See on the limited weight of the provisions of the ICC Statute in this regard above, text preceding note 1364.
1516 See above, para. 5.1.
penalties. This is not necessarily problematic. If States regard a broad indication of the sort of punishment as sufficient, as in Art. 109 Swiss Military Penal Code and some other national laws, it seems overly formalistic to hold the imposition of imprisonment under customary international law in violation of the principle of legality. While national law generally curtails the discretion of the courts by additional rules and jurisprudence, it often leaves them considerable latitude as well.

On the other hand, the principle that core crimes attract the highest penalties seems unfit for “minor” war crimes. While national laws generally impose the highest penalties for at least homicidal acts that amount to core crimes, this is often not the case for acts that do not involve bodily harm, such as property crimes (pillage) and abuse of internationally protected emblems. Most national laws impose considerably lower sentences than the maximum for such crimes, and some even impose solely a fine, instead of imprisonment. Therefore, complete discretion for national courts to punish such crimes with any penalty up to the maximum seems problematic. Yet, this problem may be mitigated to some extent by the possibility for national courts to derive sentencing directions for core crimes from the practice of international and other national courts, and the rules of the ICC.

Finally, it is submitted here that mandatory resort to penalties attached to relevant ordinary crimes has rightfully been rejected by the ad hoc tribunals. This sentencing approach is not only unnecessary, but even harmful for the development of international criminal law as it denies its ability to function independently. Moreover, it is doubtful whether this approach provides an appropriate answer to nulla poena concerns. The crimes from which penalties are “borrowed” might be superficially comparable, but ultimately they are different crimes. This is shown most clearly in cases based on universal jurisdiction, where the ordinary crimes which provide the penalties can simply not apply to the conduct to be punished. If, for example, General Pinochet had been prosecuted in Belgium under application of the penalties of corresponding crimes as suggested, his judges would have had to apply the penalty provisions of either Belgian ordinary crimes that did not apply to conduct in Chile, or Chilean ordinary crimes that could not be prosecuted in Belgium. It can be asked whether such a course furthers either the legal certainty of the individual or the delimitation of State power.

6 Which Criminalizations are Directly Applicable?

What now remains is a translation of the general international rule into a more specific assessment of core crimes law. In other words, when do international criminalizations of the core crimes meet the requirements of the international principle of legality? Since international law does not impose firm conditions for the direct application of its rules in

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1517 See e.g. Art. 13 of India’s Geneva Conventions Act, 1960.
1519 See above Chapter V, para. 4.
general,\textsuperscript{1520} the principle of legality constitutes international law's threshold test for the direct application of core crimes law in national courts.

International law's lack of more general demands for direct application finds illustration in the parallel applicability of international rules and national implementing laws. The fact that the legislature has adopted implementing legislation for a treaty does not rule out its simultaneous direct application through a general rule of reference.\textsuperscript{1521} Nor does a domestic implementation clause in a treaty prevent the direct applicability of its provisions.\textsuperscript{1522} There are good practical reasons why many treaties specifically call for legislative action by the States Parties, but that does not make domestic legislation a necessary condition for the effectuation of those treaties in national courts. In general, domestication of a treaty may improve its effectuation, and in various States legislative action is necessary to make the treaty effective. In the particular case of international criminalizations, the provision of specified penalties in national law is not necessary, but certainly desirable. Yet, those practical reasons to call for implementing legislation do not rule out the direct application of international rules in those States whose constitutional framework allows it, neither for general international law nor for international criminal law.\textsuperscript{1523} Thus, the fact that the Genocide Convention contains a domestic implementation clause in Art. 5 does not rule out the direct application of its criminalization of genocide.\textsuperscript{1524}

As concluded above, the principle of legality in international law requires both a sufficiently specific definition of an act and a clear indication that it attracts individual criminal responsibility.\textsuperscript{1525} It does, however, neither require a written law nor a specification of the precise penalty to be incurred. Where national criminal law contains a specific rule of reference to international core crimes law, these conditions will almost always be met.

The harder question is when international criminalizations are sufficiently developed to form the basis for core crimes prosecutions in the absence of a specific rule of reference in national law (general direct application). The test for answering it is complex and does certainly not lie in a comparison to the classic formulation of offences in national criminal law. International law can well define an act and make it punishable without explicitly mentioning criminal proceedings, courts or penalties.\textsuperscript{1526} But on the other hand, not every act that is prohibited under international law attracts individual criminal responsibility. Moreover, one must be careful to distinguish acts that are criminal under

\begin{footnotesize}
\textsuperscript{1520} See above, p. 20.
\textsuperscript{1525} Cf. Triffterer 1966, p. 30-34.
\textsuperscript{1526} See ICTY, Trial Chamber, Tadic, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 70 ("The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability."). See also Cassese 2003a, p. 50.
\end{footnotesize}
international law from those for which international law merely imposes an obligation on States to criminalize them without doing so itself.

For customary international law, one must look to a vast array of material sources.\textsuperscript{1527} In particular, one should note that the definition of the act and its criminalization may be contained in separate material sources. An act may be defined in a treaty, while its criminality stems from the fact that it has consistently been prosecuted in national courts or prohibited in military manuals.\textsuperscript{1528} At present, the ICC Statute and the corresponding Elements of Crimes provide a catalogue of core crimes under customary international law that is on the whole highly authoritative. Yet, these instruments contain some offences that are of doubtful customary status and omit others that are well-established.\textsuperscript{1529} Thus, the ICC Statute provides important guidance but can not substitute for the broader body of customary international law.

The analysis whether customary international law attaches individual criminal responsibility to a particular act is complicated and may lead to debatable outcomes. An apt illustration of this point is found in the ICTY case of \textit{Vasiljevic}, a rare example of a successful \textit{nullum crimen} defense in a core crimes prosecution.\textsuperscript{1530} In \textit{Tadic}, the ICTY had found that “the acts proscribed by common Article 3 [Geneva Conventions] constitute criminal offences under international law”\textsuperscript{1531} and in \textit{Blaskic} that the offence of violence to life and person, contained in Common Art. 3 Geneva Conventions, “is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences.”\textsuperscript{1532} In \textit{Vasiljevic}, however, the Trial Chamber departed from its earlier holdings and found the offence of violence to life and person to be insufficiently defined under customary international law.\textsuperscript{1533} Therefore, it could not be charged as a violation of the laws and customs of war under Art. 3 ICTY Statute.

The Trial Chamber noted that “[b]oth “life” and the “person” are protected in various ways by international humanitarian law.”\textsuperscript{1534} Yet, “[I]n the absence of any clear indication in the practice of states as to what the definition of the offence of “violence to life and person” identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists

\begin{footnotes}
\item[1527] See Cassese 2003a, p. 50-53.
\item[1529] See above, note 58.
\item[1530] ICTY, Trial Chamber, \textit{Vasiljevic}, 29 November 2002.
\item[1531] ICTY, Trial Chamber, Tadic, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 67. See also ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128-137.
\item[1532] ICTY, Trial Chamber, \textit{Blaskic}, 3 March 2000, para. 182.
\item[1533] ICTY, Trial Chamber, \textit{Vasiljevic}, 29 November 2002, para. 193-204.
\item[1534] Id., para. 195.
\end{footnotes}
under that body of law." The Trial Chamber did convict the defendant for his acts on charges of persecution as a crime against humanity and murder as a violation of the laws and customs of war. Thus, it disputed solely the criminality of violence to the life and person under customary international law, not the foreseeability of prosecution for the acts under scrutiny. It should further be noted that Vasiljevic is not representative for the case law of the ICTY and has been strongly criticized by several commentators. Still, the case illustrates the complexities of establishing individual criminal responsibility under customary international law.

If treaty-based criminalizations of the core crimes are to be directly applied in their own right, *id est* not as evidence of customary law, they must contain both the definition of the act and an indication of its criminality. But if that is the case, no other demands need to be fulfilled. The Genocide Convention, for example, defines genocidal acts (Art. 2 and 3) and declares them to be "crime[s] under international law" (Art. 1) and "punishable" (Art. 3). Of course, national law may well rule out direct application of the Genocide Convention and in practice national courts will more often than not regard it as an inadequate legal basis for prosecution. To satisfy the international principle of legality, however, a criminalization such as this one suffices, despite the fact that it is not formulated like the provisions found in most national criminal codes.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993), on the other hand, provides that each State Party shall "prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity" as well as "extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law." This language does not directly criminalize the use of and various other acts concerning chemical weapons, but merely obliges States Parties to do so. The 1993 Convention thus contains a duty to criminalize (Externe Strafpflicht mit Umsetzungspflicht), rather than a direct criminalization of such acts under international law. This does not rule out the direct applicability of the 1993 Convention, for example to furnish the definition of prohibited acts. However, it means that the 1993 Convention can not form the basis for prosecutions standing alone, but needs the support of customary international law, other treaties or national law to establish individual criminal responsibility.

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1535 Id., para. 203.
1536 Id., para. 307.
1538 See e.g. above, p. 76 (France) and note 1470 (Rwanda). But compare to p. 85 (Argentina).
1539 See above, note 1524.
1540 Art. VII (1) sub a.
1541 Art. VII (1) sub c.
1543 See Arts. I and II.
The line between actual criminalizations and duties to criminalize is not always a clear one. The CAT defines torture (Art. 1) and determines that each State Party shall “ensure that all acts of torture are offences under its criminal law” and “make these offences punishable by appropriate penalties which take into account their grave nature.” This formulation raises the question whether States must ensure that their national laws reflect a criminality of torture established by the treaty, or must establish such criminality themselves in their criminal laws. Several national proceedings clearly opted for the latter scenario, but again, these do not necessarily reflect the standards of international law. Still, while this question is open to debate, the language of the CAT on the whole appears to establish a duty to criminalize torture rather than a directly applicable criminalization.

A distinction must also be made between those acts that a treaty criminalizes, and those that it merely prohibits without attaching individual criminal responsibility. Some treaties contain both, as in the case of the Geneva Conventions. The provisions on grave breaches clearly define the acts in question, and can also be said to criminalize them. Although the language of these provisions could be more explicit, the declaration that these acts are grave breaches, the establishment of the duty to extradite or prosecute, and the obligation for States Parties to enact effective penal sanctions together indicate the criminalization of the acts in question. In this regard, it is significant that the States Parties are not required to criminalize the grave breaches, like is the case in the Chemical Weapons Convention, but merely to provide effective penal sanctions, which suggests that the acts are already criminal under international law. Moreover, Additional Protocol I of 1977 declares that all grave breaches shall be regarded as war crimes.

Common Art. 3 of the Geneva Conventions, on the other hand, prohibits certain acts in the context of an internal armed conflict, but does not indicate their criminalization.

1545 Art. 4 (1) and (2) respectively.
1546 See above, Chapter II, para. 3.3.e, 3.3.j and 3.3.k.
1548 See Art. 49 and 50 GC I, Art. 50 and 51 GC II, Art. 129 and 130 GC III and Art. 146 and 147 GC IV.
1549 Cf. Triffterer 1966, p. 84-88.
1550 See Art. 85 (5) AP I (“Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”)
1551 Common Art. 3:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;"
This does not preclude the prosecution of individuals who breach these norms. But individual criminal responsibility in such cases flows from either customary international law or a rule of national law, not from the treaty itself. Thus, the Geneva Conventions contain both directly applicable criminalizations of the grave breaches, and prohibitions of other acts which are not of a penal nature.

Finally, it may be asked whether criminalizations contained in the statutes of international courts are directly applicable in national courts. One may question to what extent the direct application on the national level of a legal framework drafted for a specific international context is compatible with the international principle of legality.

Practice does not provide a coherent picture in this regard. The Colombian Constitutional Court, on the one hand, has quite recently ruled out direct application of the ICC Statute in national prosecutions. Yet, a 2002 judgment of the Venezuelan Supreme Court appears to take the opposite view, as it states that “[c]riminal responsibility for crimes against humanity (regular crimes) will be determined according to the Constitution of the Bolivarian Republic of Venezuela and the Rome Statute of the International Criminal Court.”

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[...]”

1553 See ICTR, Trial Chamber, Akayesu, 2 September 1998 para. 608:
“It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.”;
ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98.
1554 See Art. 49 GC I, Art. 50 GC II, Art. 129 GC III and Art. 146 GC IV (“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches...”). See also ICTR, Trial Chamber, Kayishema and Ruzindana, 21 May 1999, para. 156-157:
“The Trial Chamber is cognisant of the ongoing discussions, in other forums, about whether [Common article 3] should be considered customary international law that imposes criminal liability for their serious breaches. In the present case, such an analysis seems superfluous because the situation is rather clear. Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. These instruments, therefore, were in force in the territory of Rwanda at the time when the tragic events took place within its borders. Moreover, all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda. The other Party to the conflict, the RPF, also had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law. Therefore, there is no doubt that persons responsible for the breaches of these international instruments during the events in the Rwandan territories in 1994 could be subject to prosecution.”
1555 Provisions denying immunity to serving State officials, for example, are clearly not transposable. See Art. 27 ICC Statute. See also above, p. 172.
1556 See Colombia, Corte Constitucional, Sala Plena, Sentencia C-578 (in re Corte Penal Internacional), 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2346 (holding that the provisions of the ICC Statute “no reemplazan ni modifican las leyes nacionales de tal manera” and that “el tratado no modifica el derecho interno aplicado por las autoridades judiciales colombianas en ejercicio de las competencias nacionales”).

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Court, ratified by Venezuela, in its subject matter; and the Code of Organic Criminal Procedure in procedural matters.\footnote{1557} Venezuela had at the time of this judgment, and also at the time of this writing, not yet adopted implementing legislation for the ICC Statute. However, its Constitution does incorporate treaties that relate to human rights\footnote{1558} and requires the prosecution of crimes against humanity.\footnote{1559} Therefore, it appears that the Venezuelan Supreme Court was referring to general direct application of the ICC Statute,\footnote{1560} but its succinct holding provides no further guidance on this issue.

East-German, French and Polish courts have all directly applied the Nuremberg Statute’s provision on crimes against humanity for domestic prosecutions of crimes committed during WW II.\footnote{1561} More recently, the French courts have refused such direct application for crimes outside this context. Yet, they have based this refusal on the narrow wording of the provisions of the Nuremberg Statute, not on their place in the Statute of an international court.\footnote{1562} Likewise, the refusal of a Dutch Court of Appeal to apply the Nuremberg Statute in a case concerning alleged crimes against humanity in Argentina rested on a lack of universal jurisdiction, not on the character of the Statute.\footnote{1563}

From the viewpoint of international law, there seems to be no reason to prevent national courts from directly applying generally phrased criminalizations contained in the Statutes of international courts. After all, the statutes of the different international criminal courts all criminalize the core crimes in general language and indicate explicitly that those crimes are to be judged also by national courts.\footnote{1564} Thus, the criminalizations of genocide, crimes against humanity and war crimes contained in Art. 6 to 8 of the ICC Statute can possibly provide the basis for future national prosecutions, also if national law does not specifically refer to those provisions.

\footnote{1557}Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002, :
“La responsabilidad penal en las causas por delitos de lesa humanidad (delitos comunes) se determinará según lo disponen la Constitución de la República Bolivariana de Venezuela y el Estatuto de Roma de la Corte Penal Internacional suscrito por Venezuela, en cuanto a la parte sustantiva; y el Código Orgánico Procesal Penal en cuanto a la parte adjetiva.”

Translation by Zandra Valenzuela Delgado.
\footnote{1558}See Art. 23 Constitution:
“Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.”

See also Ambos 2002b, p. 504.
\footnote{1559}See Art. 29 Constitution, cited above, note 1164.
\footnote{1560}See Ambos and Malarino 2003, p. 564-565.
\footnote{1561}See above, Chapter II, para. 3.3.b and 3.3.j; note 1259-1262.
\footnote{1562}See France, Court of Cassation, Aussaresses, 17 June 2003, 108 RGDI P 754 at 756 (“Que les dispositions […] du Statut du Tribunal militaire international de Nuremberg […] ne concernent que les faits commis pour le compte des pays européens de l’Axe”); above, Chapter II, para. 3.3.j.
\footnote{1563}See Netherlands, Amsterdam Court of Appeals, \textit{In re Zorreguieta et al}, 25 April 2002, para. 5.5.
\footnote{1564}See preamble, para. 6 and 10, and Art. 17 ICC Statute; Art. 8 ICTR Statute; Art. 9 ICTY Statute; Art. 4 and 6 London Agreement 1945 as well as Art. 10 and 11 Nuremberg Statute.
Importantly, all international criminalizations must be analyzed not only on their direct applicability in general, but also on the foreseeability of their penal consequences for the defendant in the particular case. The manifest illegality of the core crimes is a pivotal factor for the determination of foreseeability. This explains why direct application of treaty-based criminalizations that are not phrased in clear-cut language does not necessarily run afoul of the principle of legality. It also suggests both that direct application of core crimes law will fail the foreseeability test only in exceptional circumstances and that direct application of international criminalizations can be extended beyond core crimes law only to a limited extent. Some international offences are, like the core crimes, manifestly illegal. For others, foreseeability will be ensured by publication of a treaty or national legislative action. Yet, in general the foreseeability test requires strict scrutiny of the law to be applied and creates a certain presumption against direct application of less “obvious” criminalizations.

7 The National Principle of Legality as an Obstacle to Core Crimes Prosecutions

As is readily apparent from both Chapter 2 and the preceding paragraphs, national formulations of the principle of legality are generally stricter than the international principle of legality. In many cases, they form a decisive obstacle to the prosecution of international crimes which are not fully implemented in national law, as they block prosecution directly on the basis of, at least customary, international law. National principles of legality can thus collide with States’ international obligations.

In general, States are free to adopt a stricter principle of legality than that under international law, as long as it does not interfere with their duty to criminalize and prosecute the core crimes. But when they fail in this duty, the stricter national principle becomes problematic. Of course, the State in such a case violates its duties not solely through its national principle of legality but rather through the combination of its lack of implementation and its inability to directly apply international law. It is up to the State to choose the way through which to make the international crimes prosecutable and thereby live up to its duty.

Nevertheless, a strict national principle of legality that is applicable to the core crimes can amount to a “measure which may be prejudicial to the international obligations in regard to the punishment of persons guilty of war crimes and crimes against humanity”

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1565 See U.S., District Court (D.C.), United States v Yunis, 12 February 1988, 681 F.Supp. 896 at 902: “While it might be too much to expect the average citizen to be familiar with all of the criminal laws of every country, it is not unrealistic to assume that he would realize that committing a terrorist act might subject him to foreign prosecution.”

1566 See Broomhall 1999, p. 461.

1567 See e.g. Prinssen 2004, p. 48-51 (on the lack of direct application of European Law in penal cases).

1568 See Bouterse and Nuyarimma, above, Chapter II, para. 3.3.d and 3.3.k. See also Bremer 1999, p. 148, 256, 303-304 and 396 (concluding that the national principles of legality block direct application of customary ICL in Belgium, Germany and Switzerland).

1569 See above Chapter V, para. 3.3.
from which States should refrain. So much was recognized by the UN Committee against Torture in 2002 when it called on Indonesia to ensure that its national principle of legality would not apply to international crimes like torture and crimes against humanity. When in a concrete case the national principle of legality blocks a prosecution that is mandatory under international law, the principle is simply a national impediment that must give way to international law, just like a national amnesty law. While national principles of legality and amnesty laws might be perceived differently in terms of legitimacy, international law treats them alike when they block mandatory prosecutions of the core crimes: as national obstacles which are to be removed.

Yet, it should be acknowledged that the legal framework just sketched does not find adequate reflection in State practice regarding the core crimes. While various judgments have confirmed the subordination of the national principle of legality to international obligations, others have taken a different view or ignored the issue. Why did the national principle of legality prevail over international law in cases like Nulyarimma and Habré? Do these cases amount to State practice that contradicts the conclusions drawn here or are they simply violations of the law?

Three factors may help to explain why national courts have not left aside the national principle of legality more often in order to allow core crimes prosecutions. First, national courts are generally bound by rather restrictive national rules on their ability to give effect to international law. Some courts, like the Argentinean and Hungarian ones, have showed themselves willing to go to considerable lengths to give effect to international law. Others have been more hesitant. Yet, even if arriving at a different result, these more conservative decisions do not deny the requirements of international law. None of them asserts that the international principle of legality blocks direct application in core crimes prosecutions. Rather, they refer exclusively to national principles of legality. Thus, these courts effectively declare themselves unable to adhere to their international obligations.

\[1570\] See General Assembly resolution 3074 (XXVIII) of 3 December 1973 on Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, Principle 8:

"States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

\[1571\] See CAT, Concluding Observations on Indonesia, Doc. A/57/44, 1 November 2002 at paras. 44 and 45:

"44. The Committee...expresses its concern about the following:

[...]

(c) The inadequacy of measures to ensure that the second amendment to the 1945 Constitution, relating to the right not to be prosecuted based on retroactive law, will not apply to offences such as torture and crimes against humanity which under international law are already criminalized;

[...]

45. The Committee recommends that the State party:

[...]

(f) Ensure that crimes under international law such as torture and crimes against humanity committed in the past are investigated and, where appropriate, prosecuted in Indonesian courts;"

\[1572\] See further below, Chapter VII, para. 3.
because of conflicting national law. As set out before, such practice does not oppose or modify the relevant international obligations.\textsuperscript{1573}

Second, for a variety of reasons, national courts generally approach the prosecution of core crimes in a minimalistic and selective way.\textsuperscript{1574} This attitude explains why courts often do not interpret or overrule the national principle of legality even where national law allows it and international law requires it. For example, in the Senegalese prosecution of Habré, it was open to the courts to prioritize the duty to extradite or prosecute under the CAT over the national principle of legality. In fact, it was even required under the Senegalese Constitution.\textsuperscript{1575} Yet, it was also clearly unwanted by the government. In this situation, the courts came up with different legal innovations (exception for direct application of international criminal law and exception for direct application of non-self-executing treaty law) to avoid the required prosecution. Significantly, however, the Senegalese courts ignored the international obligations rather than confronted them.

Third, in some high profile cases regarding the core crimes, there was no clear duty to prosecute. In cases involving crimes committed abroad while the suspect is not present in the country, such as Bouterse, it is generally assumed that international law does not impose a duty to prosecute.\textsuperscript{1576} It should also be noted that broader recognition of the duty to prosecute under general human rights law is a relatively recent phenomenon. It is not common knowledge and may therefore be disregarded by the courts if not argued convincingly. But again, unlike denial, sheer ignorance of international obligations does not amount to contrary State practice.

These three factors, it is submitted, largely explain why the outcomes of numerous national prosecutions do not reflect the rules of international law.

As the principle of legality is an important human rights guarantee, it may be questioned whether the bypassing of the national principle in core crimes prosecutions is desirable. For the legal certainty of the individual, bypassing the national principle is not fundamentally problematic, since the international principle that remains in place safeguards the core requirement of foreseeability. If the international principle of legality suffices to safeguard the individual's legal certainty in international prosecutions, there is no reason why it would not suffice for national prosecutions of the same crimes. Moreover, national principles are generally geared to regulating prosecutions of crimes which are incomparable to the core crimes in terms of foreseeability.

Applying the international rather than the national principle of legality is appropriate furthermore if one accepts that the foreseeability of core crimes should be judged first and foremost on the international level.\textsuperscript{1577} After all, the relevance of national implementing laws is ultimately limited. For national law can only inform the individual

\textsuperscript{1573} See above, note 1182.
\textsuperscript{1574} See above, Chapter III, para. 2.
\textsuperscript{1575} See above, Chapter II, para. 3.3.e.
\textsuperscript{1576} See above, Chapter V, para. 3.3.a and d.
\textsuperscript{1577} See Swart 2002b, p. 585.
about one particular system of enforcement among many (the legal regimes of national and international courts). Also, national prosecutions for these crimes are regularly held on the basis of universal jurisdiction against foreigners, who are not familiar with the national legal system and may not even speak the language. In such cases especially, it is only appropriate to look to international rather than national law.

Meanwhile, considerations of legal certainty should be a strong incentive for caution in the interpretation and development of core crimes. But where the criminality of an act under international law is well-established, the need for effective enforcement of ICL must be taken into account. Given the characteristics of the international law-making process, it is clear that ICL can satisfy only minimal *nullum crimen* requirements if it is to be effective.\textsuperscript{1578} The basic tension between international sources and the requirements of criminal law is something that needs to be acknowledged.\textsuperscript{1579} It can be alleviated by a more direct form of law-making, for example through treaties that unequivocally criminalize certain acts and determine the applicable penalties, but it will remain a structural feature of ICL. Custom will always be a necessary part of ICL\textsuperscript{1580} and treaties will always be weakened by the need to compromise.\textsuperscript{1581} If one believes this makes its norms unsuitable for adjudication, one limits the reach of ICL to a set of commands for States and denies it the status of a self-sufficient system of criminal law. This, however, is not something States are willing to do. Therefore, bypassing the national principle of legality may be a necessary and logical step for the effective enforcement of ICL.

8 Conclusion

The international principle of legality finds its source both in treaties and customary law. It requires foreseeability: the criminality of core crimes must have been apparent at the time of their commission. Therefore, their character as a crime must have a clear legal basis. Yet, this criminal character can be derived from a diffuse set of material sources, both written and unwritten. Instead of demanding one comprehensive criminalization, one must look to the totality of the law. Accessibility of the law is not an independent requirement, but merely a step in analyzing foreseeability. For most core crimes, their manifest illegality and/or the legal knowledge that may be expected of individuals in official positions is a more important factor in this analysis. No precise indication of the

\textsuperscript{1578} Rodley 1999, p. 77 ("a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition."). Cited approvingly in ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 469.

\textsuperscript{1579} See Ambos 2002a, p. 370-371. See also Canada, Supreme Court, *R. v. Imre Finta*, 24 March 1994, *La Forest J.* (dissenting), para. 338:

> "The nature of a decentralized international system is such that international law cannot be conveniently codified in some sort of transnational code. Its differing sources may alarm some strict legal positivists, but almost all international lawyers now recognize that such a crude analogy to the requirements of a domestic law system is simplistic"

\textsuperscript{1580} After all, "it takes only a small minority of sympathetic nations to thwart the most carefully planned attempts at international law-making," which inhibits in particular law-making through treaties. Komarow 1980, p. 35. See likewise Meron 1998, p. 27.

penalty is required, as long as it is clear that the act will be punished. If a penalty has been indicated in law, however, it may not be increased.

National law often contains stricter demands. In particular, many States require written criminalizations and precise penalties. Numerous States make additional matters such as statutes of limitations and rules of jurisdiction subject to the principle of legality where international law does not. Such additional demands under national law can not be invoked, however, to avoid compliance with international obligations regarding core crimes prosecutions. International law requires States to give priority to the duty to criminalize the core crimes and prosecute them, at the expense of national law. National courts can comply with this obligation through consistent interpretation or, where possible, overruling of the national principle of legality.

Where international law allows but not requires core crimes prosecutions, States are free to adhere to a stricter national principle of legality and refuse prosecution. While there are good policy reasons to apply the international rather than the national principle of legality to all core crimes prosecutions in national courts, including voluntary ones, there is no rule of international law requiring States to do so.

In general, the drawbacks of core crimes as to their accessibility and foreseeability pose no decisive obstacles for their application. Yet, they are not to be dismissed out of hand. Judging core crimes by the standards of national criminal law may lead too a view that is overly restrictive and unnecessarily impedes the enforcement of core crimes. On the other hand, emphasizing their fundamental character can lead us to dismiss some real problems too easily. Discussion of the application of core crimes in light of the principle of legality is too often confined to these two extremes. This is basically the conflict between the view of the national criminal lawyer, used to standards of legality that are unattainable for international criminal law, and the international lawyer, for whom every appeal to problems of accessibility and foreseeability represents a threat to the international system.