Direct application of international criminal law in national courts
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Chapter VII
Synthesis

1 Introduction

This study has set out to describe the present state of the international legal framework governing direct application of the international criminalizations of genocide, crimes against humanity and war crimes (the core crimes) in national courts. Direct application in the context of this study means that a national court applies an international rule, without it being transformed into a rule of national law, because it is binding law for the court.\textsuperscript{1582} It thus includes cases where national courts apply international norms on the basis of a rule of reference (renvoi) in national law. The previous chapters have analyzed the practice of selected States in this regard, the underlying considerations shaping that practice, and the international rules that govern it. This chapter aims to bring all strands together and give a concise appraisal of international law's regulation of direct application of core crimes law, as well as an assessment of the prospects of direct application and its relevance for international law in general. It will address four principal questions. First, does international law as a general rule prohibit, allow or impose direct application of core crimes law? Second, how does international law require national courts to handle the aggregate of national and international rules that govern direct application of core crimes law? Third, what are the prospects and limits of direct application of core crimes law for the future? Fourth, what are its broader implications for international criminal law and public international law in general?

2 The International Rules on Direct Application

International law allows national courts to directly apply international law for core crimes prosecutions. As described in Chapter 6, the principle of legality in international law, unlike many national formulations of the principle, does not preclude customary international law or even general principles as a basis of criminality. Neither does the international principle of legality demand a specific penalty provision for core crimes. Thus, the international criminalizations of genocide, crimes against humanity and war crimes, whether contained in treaty or custom, can constitute a legal basis for prosecutions in national courts in conformity with international law.

In principle, direct application is voluntary rather than mandatory. There is a certain tendency to subject international law of a humanitarian character or \textit{jus cogens} status, thus including at least part of core crimes law, to a more stringent regime of implementation. At this stage, however, practice does not allow the inference of a firm international rule to that effect. The language of some national judgments suggests more narrowly that core crimes law is subject to a specific regime that is largely independent

\textsuperscript{1582} See above, p. 20.
from national law, and should be applied more or less parallel to it. However, such suggestions are not matched by corresponding practice. Even those judgments themselves by and large follow the normal constitutional rules governing the position of international law in the national legal order. Hence, international law allows, but does not as a general rule require national courts to directly apply international criminalizations of the core crimes.

3 Reconciling National and International Law

In practice, as set out in Chapter 2, national courts demonstrate widely divergent attitudes towards direct application of core crimes law. While they all sanction direct application where national law contains a specific rule of reference to international criminalizations, they differ considerably on its acceptability in the absence of such a specific rule (general direct application). Some courts accept general direct application for treaties but not for custom, others for custom but not treaties, for both, or for neither of the two. But even in legal systems that in principle accept general direct application of core crimes law, national courts are hesitant to rely on it. Actual prosecutions of genocide, crimes against humanity or war crimes directly on the basis of international law in the absence of a specific rule of reference in national law are rare.

In determining their position, national courts mainly look towards national law, in particular the constitutional framework for the implementation of international law and the principle of legality. Refusals of direct application generally result from a limiting role of national law. It may therefore be asked how international law requires national courts to handle the variety of national and international rules governing direct application of core crimes law and solve conflicts between them.

The fact that international law does not prescribe direct application of core crimes law as a general rule does not mean it leaves the matter entirely to the discretion of national courts. As described in Chapter 5, States have extensive obligations under international law with regard to core crimes prosecutions. First, they have a duty to criminalize: an obligation to ensure the punishability of most core crimes under their national law. Second, they have a duty to prosecute at least all core crimes committed within their jurisdiction as well as those for which prosecution is required under the law of State responsibility.

International law requires national courts to take these international obligations into account, regardless of their implementation in national law, or lack thereof. The principle of consistent interpretation imposes an obligation on national courts to interpret national law in conformity with relevant international obligations. This has far-going consequences for core crimes prosecutions that various national courts have so far disregarded.

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1583 See above, notes 1228-1229 and 1267-1273.
1584 See above, Chapter IV, para. 5.2.
First, when national courts are faced with the question of direct application of core crimes law while national criminal law lacks a specific provision on the crime in question, their answer determines whether or not the State complies with its obligation to ensure the punishability of that crime in the national legal order. The principle of consistent interpretation therefore obliges them to endorse direct application in order to effectuate the international duty to criminalize unless national law unambiguously rules it out.\textsuperscript{1585}

To find that the crime of genocide is not punishable under national law, that the permissibility of direct application of the customary international criminalization of genocide is a policy issue left open by national law and then decline such direct application, as one of the judges did in Nulyarimma,\textsuperscript{1586} is an open violation of the principle of consistent interpretation. The principle of consistent interpretation requires courts to accept general direct application of core crimes law if that is the only possible basis of criminalization.

Second, national courts must take the duty to prosecute core crimes into account. This duty imposes additional demands, independent from the duty to legislate. It may be the case that the State has fulfilled its duty to legislate in a general sense, but national criminal law nevertheless does not provide a legal basis for a particular core crimes prosecution. A national limitation like an amnesty law may provide an obstacle. Direct application can then provide an alternative basis for prosecution. If the prosecution in question is mandatory under international law, national courts must take into account the duty to prosecute core crimes and interpret national law in conformity with it.

Importantly, the principle of consistent interpretation extends to all aspects of national law that impede the effectuation of the duty to legislate on and prosecute the core crimes. Thus, national courts must interpret national provisions on jurisdiction, specific crimes, forms of participation and also the principle of legality in such a way as to enable the unimpeded effectuation of the different international obligations. The courts of various States have demonstrated that such consistent interpretation is a powerful and effective tool that can indeed be applied to a variety of national provisions.

Practice shows in particular, as set out in Chapter 6, that there are various ways to interpret the national principle of legality in such a way as to allow direct application of core crimes law. Where national law requires fixed penalties that are absent, courts can either interpret the \textit{nulla poena} principle as allowing the highest penalties for core crimes or resort to penalties for relevant ordinary crimes.\textsuperscript{1587} Where the national principle of legality requires conduct to be criminalized in “law”, courts can interpret “law” as including international law, in conformity with Art. 7 ECHR and Art. 15 ICCPR. Finally, courts can interpret the national principle of legality as covering only the prosecution of ordinary crimes and not extending to the core crimes at all.

\textsuperscript{1585} Of course, if the principle of consistent interpretation can provide no solution, breaches of a duty to criminalize will result in State responsibility.

\textsuperscript{1586} See above, note 1279.

\textsuperscript{1587} But see for criticism of the practice to “borrow” penalties from ordinary criminal law above, p. 259.
Perhaps an unexpected implication for the principle of consistent interpretation is its effect on the doctrine of self-executing treaties. As described above, this doctrine is a limitation on the direct applicability of treaty provisions imposed by national, not international law. Thus, like other impediments under national law, it must be interpreted in conformity with relevant international obligations. In other words, if the choice between declaring treaties like the Genocide Convention self-executing or non-self-executing determines whether a State will live up to its obligations to legislate for and prosecute the core crimes, and national law leaves a margin of discretion, courts must hold these treaties to be self-executing.

Of course, the principle of consistent interpretation has its limits. While various national courts have taken it beyond its normal meaning to effectively set aside unambiguous national law, the international principle requires no more than interpretation of national law in light of relevant international obligations. The line between proper and contra legem interpretation is thin, disputed and impossible to describe in general terms. What seems like permissible consistent interpretation to one, may well be impermissible judicial activism to the other. But in any case, where national law clearly rules out direct application of core crimes law, the principle does not normally provide a remedy for that situation.

Yet, it is by no means certain that the duties to legislate and prosecute have to go unvindicated where consistent interpretation provides no solution. The broad legal basis of the duties ensures that they are cognizable in almost every national legal system. They flow equally from customary law and treaties. As set forth in Chapter 5, they have a basis in human rights law as well as international criminal law. The duty to prosecute has an additional basis in the law of State responsibility. Most States have incorporated one or more of the relevant treaties, or parallel customary obligations, into their national legal order. General human rights treaties like the ECHR and the ICCPR are an especially relevant source of the duties, since numerous States have granted those treaties constitutional status. Decisions of international courts can give an additional imperative to recognize overriding international obligations.

Therefore, the duty to prosecute may well override national obstacles to direct application where consistent interpretation cannot reconcile the two. For the national principle of legality, however, that chance is limited, since the legality principle often has constitutional status itself. Thus, as can be seen in practice, there are certainly cases where obstacles in national law preclude direct application of international core crimes law and neither the principle of consistent interpretation nor international norms with a superior rank in the national legal system provide a solution. In such cases, the State will most likely violate its international obligations and only the, often unsatisfactory, remedies on the international plane remain to remedy that situation.

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1588 See above, note 827.
1589 See above, note 986.
The relevance of direct application of international core crimes law is, however, not limited to those instances where international law imposes it. Direct application of core crimes law has important functions, which should be taken into account when assessing its feasibility in future cases. First, it provides a means to remedy the lacunae and incongruities of national laws. As described in Chapter 2 and 3, most if not all national legal orders fail to regulate core crimes in full accordance with international law. Irregularities range from minor linguistic adaptations, which can still have significant consequences, to the omission of entire crimes. Where national law does not meet the terms of international law, direct application enables core crimes prosecutions that could not otherwise take place, or at least not in the correct fashion.

Second, direct application both effectuates and emphasizes international criminal law’s principled autonomy from national law. An eminent scholar wrote in 1944 that “[o]nce it is realized that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State determined to punish war crimes recedes into the background.”\(^{1590}\) This observation has not lost its cogency, but it leaves unsaid the other side of the medal. If it is indeed international law that ultimately governs core crimes prosecutions, then the inadequacies of that law should be solved on the international level. The mediating and “repairing” role of national law can only provide a second-best solution. This is most apparent in prosecutions on the basis of universal jurisdiction, where defendants of core crimes generally have no knowledge of the national law of the forum State whatsoever.

Thus, national courts have good reason to consider direct application of international core crimes law also where it is not mandatory. Conversely, there are grounds to be sceptical about the role of national law as a basis for core crimes prosecutions. In particular the widespread practice to charge core crimes as ordinary crimes like murder and rape has serious disadvantages. Admittedly, it is not entirely clear whether international law allows or prohibits this practice, and there may be cases where national courts lack the means and expertise to choose a different course. But in general, it should be noted that the discrepancies between ordinary criminal law and the core crimes lead to numerous practical complications. Moreover, such prosecutions fail to capture the full extent of the acts in question and often do not reflect the international character of both the crimes committed and the legal response thereto.

Specific criminalizations of genocide, crimes against humanity and war crimes in national law are far more acceptable. Yet, in practice also these criminalizations often diverge from the demands of international law. This may be seen as an acceptable form of State practice, even necessary for the development of customary core crimes law. However, such divergences can also be impediments to the effectuation of the international norms, to be circumvented through direct application of those international norms themselves.

\(^{1590}\) Lauterpacht 1944, p. 67.
Still, national courts are reticent about the direct application of core crimes law and in part they have legitimate reasons to be cautious. Core crimes law is imperfect, complex and its proper application requires expertise and time, both of which are not always available in national courts. But courts are driven also by other motives, including political considerations and a hesitation to venture beyond the familiarity of their national criminal codes. However, one judges its legitimacy, the hesitation of national courts to directly apply international criminalizations is a reality that will not change anytime soon. While the influence of the ad hoc tribunals and the ICC, particularly through the resulting implementing legislation in many States, has enhanced the position of core crimes law in the national legal order, it will not dispel all hesitations that currently inhibit national courts.

Therefore, mandatory direct application might one day provide a suitable crown on the development of core crimes law, but not any time soon. Until that time, national courts should be more vigorous in their enforcement of core crimes law, including through its general direct application where necessary to remedy the deficiencies of national criminal law. They might be encouraged to do so by the realization that direct application has received the sanction of many national legislatures through explicit rules of reference and has been accepted by the courts of different States also in the absence of such rules. The increasing familiarity of national actors with international criminal law as well as that law’s growing specificity should provide another incentive for national courts to lose some of their reticence about direct application.

5 Implications of Direct Application of Core Crimes Law

Direct application of international core crimes law in national courts is a topic rooted not only in international criminal law, but also in the fields of public international law and criminal law more generally. Accordingly, various of the specific topics treated here have a broader relevance for international or criminal law. The legal framework for the implementation of international obligations, set forth in Chapter 4, is obviously relevant for international law in general. The principle of consistent interpretation constitutes an important safeguard for the effectuation of those international obligations that have not been properly implemented in national legislation also for other international norms than those concerning core crimes. Likewise, that the principle of legality is not as stringent and absolute as doctrine often portrays it to be, as demonstrated in Chapter 6, has implications for criminal law more generally.

That the topic of this study lies at the crossroads of international and criminal law also explains to a considerable extent why it encounters such diametrically opposed reactions both in practice and doctrine. The viewpoint of (national) criminal law on the direct application of international criminalizations differs fundamentally from that of international law. In fact, the different outcomes of national proceedings reflect different underlying assumptions about both the proper role of national courts in the enforcement of international law, and the current state and proper role of core crimes law.
First, direct application provides something of a yardstick to measure the development of core crimes law. The reticence of national courts is a clear sign that this development still has a long way to go. On the other hand, the fact that direct application actually takes place shows that this development occurs not only in international but also in national courts, and that core crimes law has passed its most rudimentary stage.

Second, the question of direct application of core crimes law provides a vivid illustration of an enduring schism in national courts’ appraisal of their proper role in the enforcement of international law in general. While some scholars assert that national courts should act as organs of the international community in their enforcement of international law, others emphatically reject this view. The practice of national courts regarding the direct application of core crimes law demonstrates that these opposing viewpoints are not merely of theoretical interest, but have a considerable bearing on the outcome of national proceedings. Those courts that conceptualize their role as being an organ of the international community reach markedly “internationalist” results, ensuring diligent adherence to international obligations. By contrast, courts that explicitly reject this notion focus predominantly on national rather than international law.

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1591 The most famous conceptualization of national courts as organs of the international community is found in George Scelle’s famous theory of dédoublement fonctionnel. See for a concise description of this theory and further references Cassese 1990. See in the particular context of international criminal law Burke-White 2002, p. 14 and 16-17 and Wolfrum 1996, p. 236 and 250. See for notable criticism ICJ, International Court of Justice, Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, Separate Opinion of President Guillaume, para. 15 (“[To confer universal jurisdiction in absentia on national courts would] be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community.’”).


“[E]l estado que tome intervención en el juzgamiento de una persona acusada de haber cometido un crimen contra el derecho de gentes, estará actuando en interés de toda la comunidad internacional.”


“[T]he state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the community of nations, according to the conditions imposed by international law.”

1593 See Netherlands, Attorney-General to the Supreme Court, Voordracht en vordering tot cassatie in het belang der wet door de Procureur-Generaal (Petition for Cassation in re Bouterse), 8 May 2001, NJ 2002/559, para. 6:

“Treedt de Nederlandse rechter [bij de bestraffing van een internationaal misdrijf op basis van universele juridiciteit] op als internationale of als nationale rechter? Bij het opstellen van de middelen is van dat laatste standpunt uitgegaan.”


“We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court.”

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Finally, the conditions required for direct application provide a valuable indication for the role we assign to international criminal law in general. Is international criminal law merely a centralized counterpart to national criminal law, formulated at the international level but otherwise subject to similar conditions for its enforcement? Or does the fight against the most serious crimes committed with State involvement require an international criminal law that must be restricted in its subject matter but more flexible in the conditions of its enforcement? It is submitted here that the latter view must prevail. Therefore, the attempt to enhance the foreseeability and quality of international criminal law enforcement, while in itself legitimate and important, should not result in the undifferentiated adoption of national criminal law standards, for that will ultimately undermine international criminal law’s effectiveness and even its very rationale.