Collective and collisional properties of the rubidium quantum gas

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Chapter V
The Framework of Implementation for the Core Crimes

1 Introduction

The previous Chapter set forth the general demands of international law for the implementation of international obligations in the national legal order. It noted that international law, as a default rule, leaves States free to implement their international obligations in the way they see fit. It also noted that, despite significant practice of national courts to this effect, the freedom of implementation does not extend to a freedom to violate international obligations. All liberties of States flowing from the freedom of implementation, such as the limitation of the judicial application of international law in national courts, are subject to the condition that the State ultimately adheres to its international obligations. Chapter 4 further showed that there is practice to suggest that the general international framework of implementation is subject to modification for certain kinds of international law, in particular that of a humanitarian character and/or jus cogens status. Yet, it concluded that State practice is mostly aspirational, and at best divided, on the question whether international law subjects those particular categories of international law to a more stringent regime of implementation and application.

The question then arises whether the general framework of implementation applies in its entirety to international core crimes law. Core crimes law is not only of a humanitarian character and jus cogens status, but has additional characteristics that have been interpreted in practice and doctrine to influence its implementation. In this Chapter, I will analyze whether international law imposes different demands on States for the implementation of core crimes law than the general framework outlined in Chapter 4. To this end, I will analyze the relevant characteristics of core crimes law and the way national courts treat the particularities of core crimes law in practice.

Taking a broad approach, I will explore the characteristics of both international criminal law in general (para. 2) and the core crimes in particular (para. 3), insofar as these are relevant for the question of implementation. I will examine in some detail the particularly

1033 Cf. ICTY, Appeals Chamber, Erdemovic, 7 October 1997, Joint Separate Opinion of Judges McDonald and Vohrah, para. 78:

"It is clear to us that whatever is the distinction between the international legal order and municipal legal orders in general, the distinction is imperfect in respect of the criminal law which, both at the international and the municipal level, is directed towards consistent aims."

See also Stein 1994, p. 450 (cited above, note 936) and Lauterpacht 1944, p. 64 ("In no other sphere does the view that international law is binding only upon States and not upon individuals lead to more paradoxical consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war.").

1034 It should be noted at the outset that none of the characteristics to be mentioned here is in itself unique for core crimes law. The goal here is to analyze whether and to what extent the framework of implementation of core crimes law differs from international law's general framework, not to what extent core crimes law can be distinguished from other particular fields of international law. Certainly, there are other fields for which the viability of the general framework of implementation may be questioned, in part for similar reasons as those set out here.
grave character of the core crimes (para. 3.1), their *jus cogens* status (para. 3.2) and the mandatory character of their prosecution, which flows not only from international criminal law, but also from human rights law and the law on State responsibility (para. 3.3). This part continues the analysis of paragraph 5.3 of the previous Chapter on the more specific level of core crimes law. Next, I will ask whether international law requires States to reflect the international character of the core crimes in national prosecutions or allows them to prosecute core crimes as if they are ordinary crimes like murder (para. 4). Having thus examined the particularities of core crimes law, I will analyze to what extent national courts in practice adhere to or deviate from the general framework of implementation for international law where it concerns the core crimes (para. 5). Finally, I will describe the influence of the ICC Statute on the implementation of core crimes law (para. 6), before making up the balance of the current international framework of implementation for core crimes law (para. 7).

2 Characteristics of International Criminal Law

What then, are the characteristics of international criminal law that influence its implementation in the national legal order? Chapter 1 defined international criminal law as ‘the accumulation of international legal norms on individual criminal responsibility’, in other words: the penal aspects of international law.1035 This definition indicates a first characteristic that, even if it is obvious, requires mentioning: ICL primarily focuses on and addresses individuals.1036

Second, and logically following from the first, the intended effects of ICL take place primarily within States and not between States. Therefore, ICL explicitly employs the national legal orders, and is essentially dependent on them, for its effectuation. The fact that ICL aims to stop individuals from performing certain acts does not mean it addresses only individuals. To regulate individual behavior, ICL issues a dual set of rules.1037 One addresses the individual and attaches criminal responsibility directly to certain acts. Another set of rules addresses States and authorizes or obliges them to prosecute infractions of certain norms.1038 The utilization of States, and thus their national courts, to prosecute international crimes is known as the *indirect model* of enforcement, as opposed to the *direct model* which employs international courts.1039 Importantly, the obligations of States are not limited to ensuring the effectuation of individual criminal responsibility, but often include separate obligations to enact necessary legislation.1040 Therefore, lacunae in the national legal system that obstruct core crimes prosecutions are

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1035 See above, p. 22.
1036 See on the implications of this point, above, Chapter IV, para. 5.3.a.
1038 The norms of the first and the second set do overlap only partially. ICL also addresses the responsibility of States to react to certain infractions for which it does not impose criminal responsibility directly on individuals, as for example in the case of environmental crimes. See also above, note 188.
1039 See Mantovani 2003, p. 27; Werle 2003, p. 78-79; Bassiouni 1999b, p. 110.
1040 See e.g. Art. 5 GC; Art. 49 (1) GC I; Art. 50 (1) GC II; Art. 129 (1) GC III; Art. 146 (1) GC IV; Art. 4 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; Art. 5 CAT. See also Fichet-Boyle and Mossé 2000.
internationally wrongful in and of themselves, not solely in connection to an actual instance of impunity in practice.\textsuperscript{1041}

Third, it is generally accepted that States are, as a default rule, free to implement and effectuate their obligations under ICL in any way they see fit, like is the case for public international law in general.\textsuperscript{1042} ICL articulates relatively clearly which crimes must be prosecuted, but is far less detailed on the manner in which these prosecutions should take place. There is, for example, no general international rule that obligates States to prosecute international crimes directly on the basis of international law, or on the basis of any particular ground of jurisdiction.\textsuperscript{1043} In theory, this freedom allows States to choose the most effective way of implementing their international obligations.\textsuperscript{1044} In practice, the lack of specific implementing obligations often results in incomplete or otherwise imperfect implementation of the law, contributing to the widespread impunity for international crimes.

The fact that ICL leaves States considerable freedom of implementation should not obscure the fact that international criminalizations themselves are relatively precise. From the perspective of a national (penal) lawyer, international criminalizations may be ambiguous and confusing. From an international law perspective, however, they are among the international norms that articulate the clearest standards.\textsuperscript{1045} They do not, for example, require States to “establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible,”\textsuperscript{1046} but straightforwardly prohibit certain acts, threaten punishment to transgressors and obligate States to enforce these norms. There is only limited room for interpretation.

Human rights law specifies further demands, determining \textit{inter alia} that prosecution may take place only in independent courts.\textsuperscript{1047} The combination of ICL and human rights law gives a clear indication of the State organs which are responsible for the implementation of these treaty obligations, and sets limits on the way they may do so. Although numerous choices in the implementation process remain, for example which courts are to

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\textsuperscript{1041} See ICTY, Trial Chamber, \textit{Furundzija}, 10 December 1998, para. 149. Cf. IACtHR, Certain Attributes of the Inter-American Commission on Human Rights (\textit{Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights}), 16 July 1993, Advisory Opinion OC-13/93, (Ser. A) No. 13, para. 26 (“A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2.”); Harris, \textit{et al.} 1995, p. 19-20.

\textsuperscript{1042} See Lambert-Abdelgawad 2003, p. 541. See on the freedom of implementation in general international law above, Chapter IV, para. 3.

\textsuperscript{1043} See Cassese 2003a, p. 301. See on the question whether core crimes may be charged as ordinary rather than international crimes below, Chapter V, para. 4.

\textsuperscript{1044} See above, p. 140.

\textsuperscript{1045} Cf. Paust 1991, p. 368 (who may be slightly overstating the point in asserting that “it is difficult to imagine a more mandatory, controlling, detailed, definable, universal, and useful set of treaty standards” than those contained in the Geneva Conventions).

\textsuperscript{1046} Art. 11 (5) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 Dec 1979).

\textsuperscript{1047} See e.g. Cassese 2003a, p. 309-310.
apply what law, the interplay of different international obligations significantly curtails the freedom of States in practice. Also, ICL is becoming more and more detailed and comprehensive. It increasingly regulates defenses, forms of participation, general principles governing prosecutions and related matters.1048

Moreover, international law requires States to give full effect to their international obligations.1049 In interpreting these obligations, States must take into account their object and purpose.1050 The object and purpose of international criminal law, or at least a pivotal aspect of it, is to prevent these crimes and, in order to achieve that goal, to punish international crimes when they occur.1051 States have, in treaties, other international instruments and declarations of various kinds, consistently maintained that punishment of international crimes is an essential and necessary step for their prevention.1052 International courts take the same view.1053 Therefore, States must take into account the goal of punishing core crimes perpetrators in every step of implementation they take. Where choices are to be made, be it in the interpretation of international law and national

1048 See e.g. Mantovani 2003; Safferling 2001. Note, however, that ICL’s regulation of such matters is still far from complete. See Sassoli 2002, p. 121-123.
1049 Cf. Art. 26 VCLT, widely believed to reflect customary law.
1050 Cf. Art. 31 VCLT, widely believed to reflect customary law.
1052 See e.g. Preamble Rome Statute, para. 5 (“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”);

Preamble 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, para. 5:
“Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security.”

See also Bothe 1995, p. 241.
1053 See e.g. ICTR, Trial Chamber, Niyitegeka, 16 May 2003, para. 484:
“In reaching its decision on an appropriate sentence to be imposed on the Accused, the Chamber has taken due consideration of the well-established principles of retribution, deterrence, and protection of society. Specific emphasis is placed on general deterrence, so as to demonstrate ‘that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights.’” (footnote omitted);

ICTR, Trial Chamber, Akayesu, Sentencing Judgment, 2 October 1998, unnumbered para.:
“[T]he establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace. It is therefore clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed on the one hand at - - attribution (sic) of said accused who must see their crime punished and on the other hand as deterrence, namely dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights.”;


ICTY, Trial Chamber, Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18 (“The object and purpose of the [ICTY] is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.”).
law or in legislative action, States are required to choose the option which best guaranteees punishment of core crimes perpetrators.

Fourth, ICL is a strongly normative body of international law. Like human rights law, international criminal law differs from the traditional Westphalian conception of public international law in that it sets a normative standard as opposed to the “agnostic, procedural international law whose merit consisted in its refraining from imposing any external normative ideal on the international society.” ICL is, in a sense, a set of values rather than a language for participants. Even stronger than human rights law, the very act of criminalization expresses a powerful, negative judgment. Its normative character may influence ICL’s enforcement in national courts. After all, the notion that the intrinsic value of the rule to be applied or the issue at stake can alter the balance between conflicting rules is not foreign to international law.

3 Characteristics of the Core Crimes

3.1 The Grave Character of the Core Crimes

It will not be easy to find a text dealing with core crimes law that fails to mention their exceptional gravity. Legal instruments and judgments regarding these crimes are replete with references to their odious nature. The core crimes concern acts that threaten the peace and security of mankind. They are of a particular heinous character, indeed, even “inhumane” and “shocking for the conscience of humanity.” It is widely accepted that core crimes law, in this sense including the crime of aggression, tops the normative hierarchy of international law.

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1054 Koskenniemi 2003, p. 90.
1055 See Safferling 2001, p. 58 (stating that “only the gravest acts against the international community can be criminalized at the international level”). Cf. Seidman 2001, p. 187 and 202.
1057 See Art. 17, 18 and 20 Draft Code 1996. Cf. preamble ICC Statute, para. 3 (“Recognizing that such grave crimes threaten the peace, security and well-being of the world”). See also Triffterer 1966, p. 195-217. Historically, international criminal law was strongly focused on protecting the international community, i.e. ensuring the unimpeded functioning of States. The goal of protecting civilians from grave suffering has emerged more recently with the advent of human rights law. See Zoller and Reshetov 1990, p. 100 (“There was no offense against the law of nations when – however serious the offense committed by the individual – states could conduct their regular affairs along orderly and predictable lines.”).
1058 See e.g. ICC Statute Art. 7 (1) sub k. Cf. Kritz 1996, 151 (“There will be cases of crimes so horrific that the international community will be obliged, for its own sake and for the preservation of fundamental universal principles, to hold the key planners or perpetrators accountable to all of humanity.”).
1059 See e.g. Preamble ICC Statute, para. 2.
Many of these statements effectively declare the criminalizations of the core crimes to be norms of natural law. Qualifications such as "inhumane" and "shocking for the conscience of humanity" exude the idea that the law on core crimes is not simply a choice of the relevant actors in international law, but rather an objective standard which imposes itself on everyone who wishes to partake in civilized society.\footnote{1061} That they are "crimes against the peace and security of mankind" suggests that their prevention and punishment is not just desirable but necessary to ensure the continued existence of mankind.\footnote{1062}

The criticism of appeals to natural law notions like "the conscience of humanity," relayed in Chapter 4, also applies in the context of core crimes law.\footnote{1063} There are many acts which - hardly anyone will dispute - are incompatible with basic notions of humanity. Yet, our failure to apply such standards in a consistent manner undermines the authority of their invocation. The application of double standards to different core crimes surpasses simple factual denials of, or popular support for particular crimes in situations of conflict. It also takes the shape of more reasoned positions. An eminent modern philosopher has argued that there is a "supreme emergency exception" which "allows us to set aside - in certain special circumstances - the strict status of civilians that normally prevents their being directly attacked in war."\footnote{1064} Therefore, he posits, the British bombing of German cities in WW II was justifiable in the period that Great-Britain alone opposed Germany and "had no other means to break Germany's superior power."\footnote{1065}

\footnote{1061} See preamble Genocide Convention, para. 1 and 3 (stating that genocide is "condemned by the civilized world" and "an odious scourge"). Cf. ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 1951 ICJ 23, reiterated in ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), preliminary objections, 11 July 1996, para. 31:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946)." (emphasis added); Israel, Supreme Court, Attorney General of Israel v. Eichmann, 29 May 1962, 36 ILR 277, at 291, 293 ("Those crimes entail individual criminal responsibility because they [...] affront the conscience of civilized nations.").

\footnote{1062} See ICTY, Trial Chamber, Erdenovic, Sentencing Judgment, 29 November 1996, para. 28:

"Crimes against humanity [...] are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.".

See also Schwarzenberger 1950, p. 272-273 ("In any social group in which a criminal law exists the highest values and interests are protected by rules of criminal law. International crimes would, therefore, be in all likelihood only acts of subjects or objects of international law which strike at the very roots of international society.").

\footnote{1063} See above, p. 165.

\footnote{1064} Rawls 1999, p. 98.

\footnote{1065} Id.
Clearly, core crimes law categorically excludes such means-ends reasoning, regardless of how important or noble the end may be. To introduce it, no matter in how limited a manner, relativizes the inhumane character of the core crimes. If one accepts that Allied violations of humanitarian law in WW II may have been justified by a supreme emergency exception, one opens the door to a similar means-end defense for other core crimes. Even though such a defense will generally fail, its very possibility severely undermines the notion that some acts are so odious that they can never be permitted.

Still, such criticism amounts to a relevant qualification of appeals to natural law notions, but not a repudiation of the grave character of the core crimes. Courts and scholars have conceptualized the grave nature of core crimes law not only as a claim to natural law status, but also as merely a particularly strong normative content, or as an alternative articulation of its non-consensualist character expressed in more positivistic terms by reference to its customary and peremptory status. Whatever the label one attaches to it, the implications are substantially the same. The grave character of genocide, crimes against humanity and war crimes are frequently invoked as a justification to interpret or even adapt procedural and other relevant rules in such a way as to ensure their prevention and punishment to the fullest extent possible.

First, the exceptional character of the core crimes has been invoked to defend a method of ascertaining the content of customary law which stresses the element of *opinio juris* over that of consistent state practice. This method has been applied to law of a humanitarian character more generally, and is conceptualized partly as a necessary consequence of the prevailing complications in the analysis of State practice. But considerable emphasis has also been put on the character of the norms involved, particularly in the specific context of core crimes law. The underlying idea appears to be that the importance and necessity of the norm, when accepted by the international community, can remedy deficiencies in state practice that would normally bar it from becoming a rule of customary international law.

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1066 See Triffterer 1989, 42-44; Röling 1979, p. 163:

"The underdeveloped international legal order obviously needs a criminal law for those carrying out certain acts within that order. Such a need will arise if the standards of the legal community are of such cogency that other and lesser sanctions, such as reparations, are not considered sufficient."


"[The] international status [of war crimes and crimes against humanity] derives from their definition on a supra-national level, either on the basis of natural law (invocation of basic principles above and beyond positive law within international law is also a guarantee against arbitrary international agreements), or by reference to the protection of the "foundations of the international community," or by citing the threat posed by these activities for all of humanity: its commissioners are "enemies of the human race". Thus, the significance of these offenses is too great to permit their punishment to be made dependent upon the acquiescence or general penal law policy of individual nation states."

1069 See above, Chapter IV, para. 5.3.a.

The *ad hoc* tribunals have frequently referred to the gravity of war crimes in internal armed conflicts to supplement the questionable legal foundation of their conclusion that these acts incurred individual criminal responsibility under customary law.¹⁰⁷¹ None of these references suggests that the gravity of these crimes obviates the need to establish their criminality under customary law altogether. However, they can reasonably be interpreted as a justification for the application of an "enlightened" ascertainment of customary law to the core crimes. While this proposition raises serious methodological concerns,¹⁰⁷² it has amassed considerable support. The fact that a great number of States embraced the concept of war crimes in internal armed conflicts in the ICC Statute, which was to contain only crimes with custom status, provides significant support for the reasoning in *Tadic* and similar cases.¹⁰⁷³

Second, the character of the core crimes implies a restriction of the element of reciprocity in this body of law.¹⁰⁷⁴ Violation by one State cannot excuse another non-compliance.¹⁰⁷⁵ Third, the character of the core crimes is regularly invoked as an argument to decide other questions of law in their prosecution. Numerous national courts have posited that it is the grave nature of the core crimes which makes them subject to universal jurisdiction, in departure from the principle that criminal law jurisdiction is as a general rule territorial.¹⁰⁷⁶ Such assertions find support in doctrine.¹⁰⁷⁷

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¹⁰⁷¹ See e.g. ICTY, Appeals Chamber, *Delalic 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."); ICTR, Trial Chamber, *Akayesu*, 2 September 1998 para. 616 ("[I]t is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds."); ICTY, Appeals Chamber, *Tadic*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995 para. 129 ("Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.").

¹⁰⁷² See for a critical analysis Heinegg 2003.


¹⁰⁷⁴ See ICTY, Trial Chamber, *Kupreskić*, 14 January 2000, para. 511 ("The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character.").

¹⁰⁷⁵ But see above, note 164.

¹⁰⁷⁶ See e.g. Belgium, Tribunal of First Instance (District of Brussels), *In re Pinochet Ugarte*, 6 November 1998, para. 3.3.3:

"It has got to be one thing or the other: either crimes of humanity are just incriminations among many other ones that do not transcend borders and their suppression is left to the discretion of each state, or these crimes are of an unspeakable and unacceptable nature and the responsibility for their repression is shared by all.");

Australia, High Court, *Polyukhovitch v. The Commonwealth of Australia and Another*, 14 August 1991 (), para. 34 (Toohey, J. : "Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail . . ."); U.S., District Court (D.C.), *United States v Yunis*, 12 February 1988, 681 F.Supp. 896 at 900 ("The Universal principle recognizes that certain offenses are so heinous and so widely condemned that [any State that captures the offender may prosecute]"); U.S., Court of Appeals (6th Cir.), *Demjanjuk v. Petrovsky*, 1985, 776 F.2d 571 at 582 ("This universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people."); Israel, Supreme Court, *Attorney General of Israel v. Eichmann*, 29 May 1962, 36 ILR 277 at 299:

¹⁰⁷⁷ International
courts and bodies have appealed to the particularities of core crimes law to justify modifications of defenses and due process rights. Most important in the context of this study, various national courts have invoked the nature of the core crimes to exempt their prosecution from particular rules and limitations in the national legal order. These cases will be discussed below, in paragraph 4.

3.2 The *Jus Cogens* Status of the Core Crimes

A further factor to be taken into account when analyzing the implementation, in particular the direct application, of core crimes law is its *jus cogens* status. Although I have concluded in Chapter 4 that international law does not at present impose a stricter implementation regime for all *jus cogens* norms, the peremptory status of core crimes law can still be a relevant factor for its implementation.

Immediately, however, it must be noted that the unclarity surrounding *jus cogens* in general certainly extends to the core crimes. In this regard, it is pertinent to reiterate here the conclusion that the Furundzija dictum of the ICTY does not actually in an unequivocal manner ascribe unique effects to the peremptory character of the prohibition of torture. More generally, it is often reiterated that genocide, crimes against humanity and war crimes are "*jus cogens* crimes," but less common to find an analysis of the precise scope and consequences of this status. Yet, such an analysis is indispensable, because a statement that genocide or torture is a *jus cogens* crime is too general to be

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"Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."

1077 See e.g. El Zeidy 2003, p. 838-839.
1078 See e.g. ICTY, Appeals Chamber, Erdevovic, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75 (rejecting duress as a defense for crimes against humanity and war crimes with an appeal to the grave character of those crimes) and below, Chapter VI, para. 5.3 (nature of the core crimes as an argument in the discussion on the principle of legality). See also ICTY, Appeals Chamber, Kovacevic, 2 July 1998, Separate Opinion of Judge Shahabuddeeen; ICTY, Trial Chamber, Tadic, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, para. 28-30 (finding that the interpretations of due process rights by other international judicial bodies in the context of proceedings regarding ordinary crimes are relevant but not decisive for the proceedings regarding international crimes before the ICTY); EComHR, X. v. Federal Republic of Germany, 6 July 1976, Application/Request No. 6946775, p. 115:

"[T]he exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles [regarding Art. 6 ECHR] developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences."

See further Schabas 2002a, p. 172-174.
1079 See above, Chapter IV, para. 5.3.b.
1080 See above, p. 176.
1082 See Meron 1986, p. 22.
meaningful. International law imposes different obligations regarding the core crimes on States and individuals. These obligations can not automatically be lumped together and all branded *jus cogens*.\(^{1083}\) In particular, the fact that the *jus cogens* status of the prohibition of genocide, crimes against humanity and war crimes may bring about a duty to prosecute those crimes, does not mean that this duty to prosecute is itself also a peremptory norm.

In practice and doctrine, at least three different obligations can be distinguished. First, the obligation not to contribute to core crimes, be it by act or omission, surely has *jus cogens* status.\(^{1084}\) In other words: both the prohibition for States to actively participate in, or allow core crimes in any way and the individual criminal responsibility for core crimes under international law are peremptory norms.\(^{1085}\) These norms make up the core of the international prohibition of these crimes. For individuals, it seems this *jus cogens* status has no *direct* consequences. They cannot themselves contract out of any of their international obligations or alter them in any way, so the peremptory character of those obligations does not actually change anything in this respect. Yet, there are *indirect* consequences for individuals, in particular the fact that States cannot agree to repeal individual criminal responsibility for the core crimes.

Second, States are under a customary obligation to prosecute core crimes.\(^{1086}\) Whether this obligation is a peremptory norm or not is an open question. On the one hand, there is considerable force in, and widespread recognition for, the argument that punishment of the core crimes is an intrinsic and necessary part of their prevention.\(^{1087}\) If that is the case, the duty to prosecute must enjoy the same peremptory character as the duty to prevent.\(^{1088}\) On the other hand, State practice suggests otherwise. It is generally accepted that the doctrine of immunity for (certain) State officials overrides the duty to prosecute, also in the case of *jus cogens* crimes.\(^{1089}\) Since States can derogate from the rules on immunity by treaty,\(^{1090}\) these rules cannot be *jus cogens* norms. It follows logically then, that the duty to prosecute can neither be a peremptory norm, since those norms can only be trumped by other peremptory norms.\(^{1091}\) Thus, the peremptory or non-peremptory

\(^{1083}\) Cf. Henzellin 2000, p. 434:

"La seule qualification de *jus cogens* de l’interdiction des crimes d’agression, d’apartheid, de génocide ou d’esclavage ne donne pas forcément le droit et n’oblige certainement pas, en soi, un Etat qui ne pratique pas lui-même l’agression, l’apartheid, le génocide ou l’esclavage, de poursuivre et de juger, selon le principe de l’universalité, un responsable d’un autre Etat agresseur, génocidaire, esclavagiste ou pratiquant l’apartheid."

See also below, note 1280 and accompanying text.

\(^{1084}\) See Dupuy 2000, p. 79.

\(^{1085}\) See Gil Gil 1999, p. 53-54.

\(^{1086}\) See below, para. 3.4.

\(^{1087}\) Both ICL and human rights law base the need for punishment precisely on this rationale. See above, notes 1052 and 1053 and below, para. 3.4.a.


\(^{1090}\) See e.g. Art. 27 (2) ICC Statute.

\(^{1091}\) Cf. Art. 53 VCLT.
character of the duty to prosecute the core crimes is uncertain. Yet, in light of current State practice and its numerous exceptions to the duty to prosecute - immunities, amnesties and prosecutorial discretion - the better view seems to be that the duty does not have \textit{jus cogens} status.

Third, under different human rights treaties and possibly under customary international law, States are under an obligation to provide civil remedies for core crimes victims.\textsuperscript{1092} Yet, there are no signs that the right to a remedy for core crimes victims has been accepted “by the international community of States as a whole as a norm from which no derogation is permitted.”\textsuperscript{1093} In proceedings before national and international courts, victims have invoked the \textit{jus cogens} status of the core crimes to attack the immunities that generally preclude the adjudication or enforcement of civil claims against foreign States and their officials. This line of reasoning, however, has been widely rejected in national and international courts.\textsuperscript{1094} Moreover, it can be doubted whether civil remedies are, like criminal prosecutions, an integral and necessary part of the prevention of core crimes.\textsuperscript{1095} Like the rules on immunity for State officials, the rules on State immunity are not (trumping) \textit{jus cogens} norms.\textsuperscript{1096} Accordingly, the obligation to provide civil remedies for core crimes is probably not of a peremptory character.\textsuperscript{1097}

Thus, the \textit{jus cogens} status of the core crimes does not automatically extend to all international obligations regarding those crimes. While the prohibition for States and individuals to commit core crimes is of a peremptory character, the obligation to provide civil remedies for those crimes is not. The status of the duty to prosecute core crimes is uncertain. This uncertainty is fed by a decided lack of rigor of national and international courts in their analysis of the \textit{jus cogens} status of core crimes law. Like is the case for peremptory norms in general,\textsuperscript{1099} national courts often invoke the \textit{jus cogens} status of the core crimes, but seldomly substantiate it or specify its implications. One commentator has observed that many national judgments of genocide contain “a purely gratuitous claim that [relevant] customary norms are also peremptory or \textit{jus cogens} principles. […]"

\textsuperscript{1092} See below, note 1111. See e.g. IACHR, \textit{Bulacio v. Argentina}, 18 September 2003, para. 70-73; ECtHR, \textit{Aktas v. Turkey}, 24 April 2003para. 329. See also Shirey 2004 (arguing that customary law imposes a duty to compensate victims of torture committed both in and outside armed conflict, while many of the sources she cites support a duty to provide civil remedies for core crimes more generally).

\textsuperscript{1093} Art. 53 VCLT.

\textsuperscript{1094} See above, notes 1013 and 1014 and accompanying text.

\textsuperscript{1095} Cf. below, note 1132 and 1133. But see Schaaack 2001, p. 155-159.

\textsuperscript{1096} See ECtHR, \textit{Al-Adsani v. United Kingdom}, 21 November 2001dissenting opinion Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para. 2:

> “The Court's majority do not seem, on the other hand, to deny that the rules on State immunity; customary or conventional, do not belong to the category of \textit{jus cogens}; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status.”

\textsuperscript{1097} See ECtHR, \textit{Al-Adsani v. United Kingdom}, 21 November 2001para. 61 and Concurring Opinion of Judge Zupancic (distinguishing criminal and civil liability for torture when discussing the effects of its peremptory character). But compare the dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, in particular para. 4.

\textsuperscript{1098} See above, Chapter IV, para. 5.3.b.
without explanation.”1099 This lack of substantiation is relatively unproblematic when it concerns the basic prohibitions of genocide, crimes against humanity and war crimes, given that their peremptory character is not seriously disputed. However, both national and international courts too often fail to distinguish between the different international obligations relevant to core crimes, and also leave unclear exactly what conclusions they draw from the *jus cogens* status of the core crimes. On the other hand, some attempts to address these matters in more detail result in conclusions that are difficult to comprehend.1100

While it is important to take note of the persisting unclarities surrounding *jus cogens* norms in general, there is neither place nor need here for their full analysis. Rather, I limit myself in this study to the import of *jus cogens* status for the enforcement of these rules in national courts. In this context, the unclarities just noted do not render the *jus cogens* status of core crimes law immaterial. The fact that this *jus cogens* status is regularly invoked in national prosecutions is in itself significant. It shows that national courts consider it a relevant factor, despite the fact that it is usually not regulated or even mentioned in their national law. Moreover, numerous judgments do ascribe clear effects to the peremptory character of the core crimes. These effects include, for example, a duty to prosecute1101 and imprescriptibility.1102 Most importantly in the context of this study,

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1099 Schabas 2003b, p. 61.
1100 See e.g. ECtHR, *Al-Adhani v. United Kingdom*, 21 November 2001, dissenting opinion of Judge Ferrar Bravo (asserting that as a consequence of the *jus cogens* status of torture, States must allow claims for civil damages in extraterritorial cases of torture because they are under “a duty to contribute to the punishment of torture,” but are “not, obviously, [under a duty] to punish, [such cases] since it was clear that the acts of torture had not taken place in the United Kingdom but elsewhere, in a State over which the Court did not have jurisdiction.”); U.K., House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others*, *Ex Parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 A.C. 147 at 198 and 204-205, where Lord Browne-Wilkinson contradicted himself in stating that:

“The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. [...] I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for punishment of the crime of torture could it really be talked about as a fully constituted international crime. What the Torture Convention did provide what was missing: a worldwide universal jurisdiction.”

See also above, Chapter IV, para. 5.3.b, on the ICTY’s obiter dictum in *Furundzija* regarding the consequences of the peremptory character of torture.

1101 See e.g. below, note 1151. Cf. Congo (the), Supreme Court, *Projet de loi portant définition et répression des crimes contre l'Humanité*, 24 March 1998, Au fond:

“Considérant que la République du Congo est également Partie à la Convention du 9 Décembre 1948 relative à la prévention et à la répression du crime de génocide en vertu de la théorie de la succession d’état d’une part et d’autre part en vertu de ce que les normes contenues dans ladite convention du 9 Décembre 1948 sont de nos jours considérées comme l’expression du droit des gens c’est-à-dire comme des normes impératives et obligatoires pour tous et auxquelles nul état ne peut valablement se soustraire...”.

1102 See e.g. Argentina, Supreme Court, *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros*, 24 August 2004, in particular para. 29 and vote of J. Boggiano, para. 30-32 and 40; above, notes 469-478 and several other cases cited in Cassese 2003a, p. 318.
various national courts have found that the peremptory character of the core crimes alters the normal balance between national and international law in their practice. These judgments will be discussed below, in paragraph 4.

3.3 The Duty to Prosecute Core Crimes

In the last few decades, international law has significantly increased its demands on States to prosecute perpetrators of core crimes. International legal practice, in particular that of the human rights bodies, and corresponding academic work on the duty to prosecute have proliferated. At the same time, various commentators question the extent to which the work of the human rights bodies and doctrine reflect an actual duty to prosecute in positive international law. Therefore, this paragraph will first outline the basis and (alleged) content of the duty to prosecute in international law, particularly treaties and the practice of the human rights bodies (para. 3.4.a), and then describe to what extent the duty has been accepted in State practice (para. 3.4.b). It will deal with the specific issue of amnesty laws (para. 3.4.c) before drawing conclusions on the current status of the duty to prosecute (para. 3.4.d).

It should be noted at the outset that the following analysis will distinguish the duty to prosecute in general from the admissibility of amnesty laws under international law. While these two questions are closely connected, they can not be fused. International law may well oblige States to prosecute as a general rule, which may yield in extreme circumstances. Simply said: that Rwandese courts may feel entitled at some point to sanction an amnesty law to save their criminal justice system from drowning can hardly justify the conclusion that prosecutors in the Netherlands are at liberty to install or forego core crimes prosecutions as they see fit. Of course, State practice in the field of amnesty laws is relevant for the ascertainment of the duty to prosecute, especially where legislatures or courts discuss that duty in general terms. Exclusion of amnesties for core crimes is a clear indication of a duty to prosecute. Yet, permission for such amnesties may well evidence an exception to rather than a wholesale negation of the duty to prosecute. Thus, a proper conceptual approach requires a distinction between a duty to prosecute in general and the permissibility of amnesty laws. Accordingly, sub-paragraph 3.4.b will examine State practice regarding the duty to prosecute core crimes in general, while sub-paragraph 3.4.c will appraise the implications of State practice regarding amnesty laws.


1104 See below, notes 1149 and 1153.

1105 See on the specific question of amnesties e.g. Sadat 2004; Robinson 2003; Seibert-Fohr 2003; Delmas-Marty 2002b, p. 626-637; O'Shea 2002; Wyngaert and Ongena 2001; Dugard 1999; Scharf 1996b; Hammel 1993.

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3.3. A Basis of the Duty to Prosecute in International Law

The duty to prosecute has three distinct bases in positive international law that differ in their territorial scope and the crimes they cover.\(^{1106}\) First, human rights law requires States to prosecute all serious human rights violations, including but not limited to most core crimes, committed in their jurisdiction.\(^{1107}\) This duty to prosecute finds its basis both in States' general obligation to respect and ensure\(^{1108}\) human rights like the right to life\(^{1109}\) and the right to be free from torture,\(^{1110}\) and in the procedural rights of victims, such as the right to an effective remedy and access to court.\(^{1111}\) It has been developed primarily in the case law of the international human rights bodies.

The IACtHR was at the forefront of the development of a duty to prosecute serious human rights violations. The seminal case in this regard is *Velasquez Rodriguez* (1988), in which the Court held that "States must prevent, investigate and punish any violation of the rights recognized by the [Inter-American] Convention."\(^{1112}\) Since then, the IACtHR has developed this line of reasoning in various cases.\(^{1113}\)

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1106 Additional indications for a duty to prosecute certain crimes can be found in international obligations to legislate for those crimes, not to apply statutes of limitations, pardons and immunities and, indeed, the very fact that international law criminalizes them. See above, note 309. See also Wise 1989, p. 933. These are, however, generally seen as additional support, but not a firm legal basis for a duty to prosecute. See Kieffner 2000, p. 16.

1107 In this regard, the term human rights violations broadly refers to acts of both State agents and private individuals, in accordance with the views of the human rights bodies that the duty to prosecute extends to crimes committed by private individuals. See e.g. ECHR, *M.C. v. Bulgaria*, 4 December 2003, para. 149-151; IACtHR, *Velasquez Rodriguez*, 29 July 1988, para. 173 ("What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible." – emphasis added). See also Seibert-Fohr 2002a, p. 326-327.

1108 See Art. 2 ICCPR; Art. 1 ECHR; Art. 1 ACHR; Art. 1 ACHPR.

1109 See Art. 6 ICCPR; Art. 2 ECHR; Art. 4 ACHR; Art. 4 ACHPR.

1110 See Art. 7 ICCPR; Art. 3 ECHR; Art. 5 ACHR (right to personal security and integrity); Art. 4 and 5 ACHPR (right to life and physical and moral integrity, respectively the prohibition of all forms of exploitation and degradation of man).

1111 See Art. 13 ECHR (right to an effective remedy); Art. 8 ACHR (right to due process); Art. 25 ACHR (right to due judicial protection). The human rights bodies differ somewhat in their appreciation of the different legal bases and have rejected several attempts to broaden the foundation of the duty to prosecute. For example, it has been argued unsuccessfully in cases before the HRC that a duty to prosecute also flows from the right to a fair trial (Art. 14 para. 1 ICCPR) and the qualification of the principle of legality (Art. 15 para. 2 ICCPR). See Seibert-Fohr 2002b, p. 313-314.


1113 See e.g. IACtHR, *Bulacio v. Argentina*, 18 September 2003, para. 38 and 110-121; IACtHR, *Barrios Altos* case 2001, below notes 1251-1253; IACtHR, Giraldo Cardona, Order of the Court of September 30, 1999, 30 September 1999, Ser. E, No. 2 (imposing a duty to prosecute as a necessary provisional measure in the sense of Art. 63 (2) IACtHR to safeguard the wellbeing of witnesses). See also IACOMHR, Mendoza et. al. v. Uruguay, 2 Oct. 1992, Report No. 29/92, 82nd session, OEA/LV/11.82Doc.25, para. 40: "What is denounced as incompatible with the [American] Convention are the legal consequences of the law with respect to the right to a fair trial. One of the law's effects was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced *[inter alia]* disappearances of persons and abduction of minors], determine criminal liability and impose punishment on those responsible, their accomplices and accessories after the fact."
Unlike the IACtHR, the ECtHR cannot order prosecution as a remedy.\textsuperscript{1114} But like its Inter-American counterpart, it has nonetheless developed a line of cases which reads a duty to prosecute in the Convention. In \textit{M.C. v. Bulgaria} (2003), the Court held that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions."\textsuperscript{1115} Therefore, the Court found, "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."\textsuperscript{1116} The ECtHR has taken this approach in numerous other cases and read a duty to prosecute in various provisions of the ECHR.\textsuperscript{1117}

The HRC follows a similar path in its communications.\textsuperscript{1118} The Committee has for example denounced certain amnesty laws as "an obstacle to the investigation and punishment of the persons responsible for offences committed in the past, contrary to article 2 of the Covenant."\textsuperscript{1119} The African Commission on Human and Peoples' Rights has taken only cautious steps in the same direction.\textsuperscript{1120}

The great majority of this case law concerns torture and homicidal acts. Since core crimes are by definition serious offenses and involve "fundamental values,"\textsuperscript{1121} it can reasonably be assumed that the duty to prosecute flowing from human rights law extends to all of them, with the possible exception of a few war crimes that do not involve bodily harm.\textsuperscript{1122} In keeping with its normal scope, human rights law obliges States to prosecute

\textsuperscript{1114} See \textit{ECtHR, Ireland v. UK}, 13 December 1977, para. 187 ("the Court finds that the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law."). See also Harris, \textit{et al.} 1995, p. 683-684.

\textsuperscript{1115} \textit{ECtHR, M.C. v. Bulgaria}, 4 December 2003, para. 150.

\textsuperscript{1116} Id., para. 153.

\textsuperscript{1117} See e.g. \textit{ECtHR, Aktas v. Turkey}, 24 April 2003, para. 329; \textit{ECtHR, Kiliç v. Turkey}, 28 March 2000, para. 93

\"[N]o effective criminal investigation can be considered to have been conducted in accordance with Article 13 [ECHR, right to an effective remedy] [...] The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother.\";


\textsuperscript{1118} See elaborately Seibert-Fohr 2002b and Seibert-Fohr 2002a.

\textsuperscript{1119} See e.g. HRC, Comments on Peru, Doc. CCPR/CO/70/PER, para. 9.

\textsuperscript{1120} See AfriComHPR, \textit{Commission Nationale des Droits de l'Homme et des Libertés v. Chad}, October, 1995, Communication No. 74/92, para. 22 ("Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter."). See also Murray 2000, p. 74 and 82.

\textsuperscript{1121} See \textit{ECtHR, X and Y v. The Netherlands}, 27 February 1985 para. 27 ("The Court finds that the protection afforded by the civil law in the case of [a sexual offence against a minor] is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions.").

\textsuperscript{1122} The question how far the duty to prosecute human rights violations extends beyond the core crimes is not relevant here and must be left aside.

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serious violations committed in their jurisdiction.\textsuperscript{1123} Thus, with only limited exceptions,\textsuperscript{1124} this duty to prosecute encompasses territorial, but not extraterritorial core crimes.

However, a possible widening of the duty to prosecute with broad implications lies in interpreting victims’ right of access to court in their State of residence to extend to core crimes committed elsewhere. In \textit{Al-Adsani} (2001), the ECtHR found the right of access to court in the United Kingdom applicable in a case regarding torture committed in Kuwait.\textsuperscript{1125} The ECtHR made a principled distinction between violations inside and outside the forum State to reject the applicability of the right to a remedy.\textsuperscript{1126} However, the Court did not accept the United Kingdom’s argument that the right of access to court could not extend to matters outside the State’s jurisdiction.\textsuperscript{1127} Thus, \textit{Al-Adsani} suggests that victims of core crimes violations abroad might have a right to see their attackers prosecuted on the basis of extraterritorial jurisdiction if the legal obstacles to such prosecutions are regarded as arbitrary or serving no legitimate aim.

More recently, the ECtHR continued this line of reasoning in \textit{Mutimura v. France} (2004), concerning the right of Rwandan genocide victims to see a genocideaire living in France prosecuted.\textsuperscript{1128} In this case, the ECtHR found a violation of Art. 6 (1) and 13 ECHR for an unreasonable delay in the handling of both the civil party complaint filed by the victims and the resulting prosecution. Significantly, neither the Court nor respondent France questioned the applicability of the right of access to court and right to a remedy to extraterritorial crimes. Several cases in national courts provide further support.\textsuperscript{1129} Note, however, that in this construction the duty to prosecute extraterritorial core crimes is not

\begin{footnotesize}
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\item[1125] See ECtHR, \textit{Al-Adsani v. United Kingdom}, 21 November 2001para. 46-49 and 52-67. It is to be noted that this case concerned a civil remedy rather than a criminal prosecution. However, the judgment suggests in para. 61 that its reading of the law applies \textit{a fortiori} to the obligation to prosecute.
\item[1126] Id., para. 40: “The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.”
\item[1127] Id., para. 44 and 46-49.
\item[1128] ECtHR, \textit{Mutimura v. France}, 8 June 2004.
\item[1129] See Luxembourg, Court of Appeal, \textit{Pinochet}, 11 February 1999, 119 ILR 360 at 362 (“It is not disputed that the offences allegedly committed by Augusto Pinochet Ugarte, a Chilean national, were committed in Chile against persons of Chilean nationality. Those persons of Chilean nationality, resident in Luxembourg with the status of political refugees, are entitled in Luxembourg to the same treatment as nationals in relation to access to the courts.”). See also the Dutch cases \textit{Bouterse}, above note 434, and \textit{Zorreguieta}, above note 439, concerning victims’ access to court for extraterritorial crimes.
\end{enumerate}
\end{footnotesize}
independent and general but attached to the presence (and legal participation) of victims of those crimes.

Commentators have long doubted whether the initially cautious language of the human rights bodies in fact required criminal punishment. Expressions like the need to “bring perpetrators to justice” or to “hold them responsible” appeared to leave room for other remedies than criminal prosecution, like civil damages, disciplinary measures and lustration. Such language also suggested that an investigation alone may suffice, for example through a truth commission, with no further need for sanctions of any kind. However, the human rights bodies have substantially expanded and clarified their outlook on these points in recent years, and it appears that both suggestions must now in principle be rejected. The duty to investigate is clearly distinct from the additional duty to prosecute. Punishment of serious human rights violations must be effective and proportionate, which requires, certainly for the core crimes, criminal sanctions.

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1130 See e.g. Scharf 1996a, p. 50–52; Roht-Arriaza 1990, p. 509-510.
1132 See IACHHR, Godinez Cruz, Compensatory Damages, 21 July 1989, para. 30 (“The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible.”); ECtHR, Hugh Jordan v. the United Kingdom, 4 May 2001, para. 130: “Notwithstanding the useful fact finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.”.

Cf. HRC, Comments on Cambodia, Doc. CCPR/C/79/Add.108, 1999, para. 6 (“The State party should take steps without delay to ensure that the alleged perpetrators of gross human rights violations and crimes against humanity are brought to trial before properly constituted independent courts ...”).

1133 See ECtHR, McShane v. the United Kingdom, 28 May 2002 para. 125: “While, civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of an award of damages, it is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.”;

IACHHR, Barrios Altos Case, (Chimbipuma Aguierrre v. Peru), Merits, 14 May 2001, (Ser. C) No. 75 (2001) and 41 ILM 93 (2002) at 118, para. 13 (Ramirez, Sergio Garcia, J., concurring and noting that “certain very serious human rights violations must be punished surely and effectively at the national and international level”); HRC, Bautista de Arellana v. Colombia, 27 October 1995, Doc. CCPR/C/55/D/563/1993, para. 8.2 and 8.6: “[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.

[...] [T]he State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.”;

Contrary to what has been suggested, the specific requirement of criminal sanctions does not contravene the drafting history of the ICCPR. Compare Seibert-Fohr 2002a, p. 321-322 with Scharf 1996, p.49.

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Second, States have in several treaty regimes accepted obligations to prosecute particular core crimes. The 1948 Genocide Convention obliges States to prosecute genocide, at least when committed on their territory. For crimes against humanity, several treaties governing specific crimes like slavery and apartheid impose affirmative obligations. The Geneva Conventions require States to either extradite or prosecute perpetrators of grave breaches. Other treaties establish additional obligations to prosecute war crimes.

The ICC Statute in its preamble “recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Thus, the Statute in a general sense recognizes an obligation for States to prosecute core crimes perpetrators. The term “recalling” indicates that this duty was already established under general international law and merely affirmed, not created, by the Statute. Yet, the

But see HRC, Thomas v. Jamaica, 1993, Doc. CCPR/C/49/D/321/1988, Para. 11 (finding an obligation to investigate allegations of torture “with a view to instituting as appropriate criminal or other procedures found responsible”, emphasis added).

Art. 1, 4 and 6. See also ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), preliminary objections, 11 July 1996, para. 31 (“the obligation [...] to prevent and to punish the crime of genocide is not territorially limited by the Convention”); ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 1951 I.C.J. Reports 1951, p. 23 (noting “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’”).

See Art. 4 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; Art. 2 and 6 1926 Slavery Convention; Art. 1, 3, 5 and 6 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; Art. 1-4 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Art. 4, 6 and 7 CAT; Art. 1 and 6 1985 Inter-American Convention to Prevent and Punish Torture.

See Art. 49 GC I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV; Art. 85 and 87 AP I. Compare further Reydam’s 1996, p. 34 (asserting also a duty to search, arrest and prosecute persons responsible for violations of common Article 3 Geneva Conventions) with Meron 1998, p. 23:

“The fact that the Geneva Conventions created the obligation of aut dedere aut judicare only with regard to grave breaches does not mean that significant other breaches of the Geneva Conventions may not be punished by any state party to the Convention, or by international criminal tribunals, provided that they reflect significant obligations and customary law. In my view, any third state has the right, although probably not the duty, to prosecute serious violations of the Geneva Conventions, including those of common Article 3, even when it has no special nexus with either the offender or the victim.”

See e.g. Art. 28 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (obliging States Parties “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”).

ICC Statute, preamble, para. 6:

“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,”
wording of the preamble leaves open to doubt the scope of this duty. In addition, a duty to prosecute core crimes flows from Security Council resolutions, for example from Resolution 1373 (2001) to the extent that core crimes overlap with terrorist acts.

Third, the law of State responsibility may in specific cases require punishment of perpetrators of crimes that violate international law, inter alia as part of the satisfaction to be given by the violating State. This obligation can extend to all crimes everywhere, as long as they constitute international wrongful acts attributable to the State, either directly or on the basis of due diligence.

These three different sources of the duty to prosecute share the same core. They establish the obligatory rather than discretionary character of the punishment of core crimes for States. Yet, there are two noteworthy differences between them. First, they have a different territorial scope. Human rights law principally requires States to prosecute core crimes committed within their territory. The treaties on specific crimes generally impose either a duty to prosecute territorial crimes, or a duty to prosecute or extradite. The law of State responsibility may require States to prosecute certain core crimes committed both within their jurisdiction and by their officials abroad.

Second, not all of these sources represent rules of customary law. The relevant rules of the law of State responsibility do. The relevant provisions of the general human rights

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1140 See Arbour 2003, p. 586-587. It can be questioned whether the preamble recognizes a duty to enact any legislation necessary to prosecute core crimes, or merely to utilize the legislation already in place ("its jurisdiction"). See on this question Cassesse 2003a, p. 302; Kleffner 2003, p. 92.


1142 See SC Resolution 1373 (28 September 2001), para. 1 and 2:

"1. Decides that all States shall:
(a) Prevent and suppress the financing of terrorist acts;
(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
[..]
2. Decides also that all States shall:
[..]
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;"

But compare ICTY, Trial Chamber, Delalic et al, 16 November 1998, para. 418 ("[T]he Security Council, not being a legislative body, cannot create offences."). See on the relationship between core crimes and terrorism, above, note 69.

1143 See Art. 37 (2) of the ILC's 2001 Articles on State Responsibility ("Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."). See als Commentary No. 5 to Art. 37 (stating that "disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act" may be one of the appropriate modalities).

treaties as well as treaties like the Genocide Convention, the Geneva Conventions and the CAT may also be thought to reflect custom on account of the broad ratification of these treaties and subsequent consistent State practice.\textsuperscript{1145} The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, on the other hand, with only twenty States Parties can not easily be assumed to codify customary law.

The question then arises to what extent these three different sources give rise to a duty to prosecute the core crimes under customary international law. Doctrine is divided on this point. Nonetheless, some base lines can be drawn. First, there is no general obligation to extradite or prosecute for \textit{all} extraterritorial crimes.\textsuperscript{1146} Second, there is a clear consensus that States are not under an obligation to prosecute extraterritorial core crimes in the absence of \textit{any} link to the crime, such as nationality or presence of the offender.\textsuperscript{1147}

Commentators further agree that international law is moving towards a general obligation on States to prosecute all core crimes perpetrators present in their jurisdiction.\textsuperscript{1148} Yet, they mostly concur that this development is on-going and has not yet resulted in a rule of positive law.\textsuperscript{1149} Although the duty to prosecute or extradite is included in many treaties


\textsuperscript{1146} See ICJ, Lockerbie Case (Libya v. United Kingdom), Provisional Measures, Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar, 9 April 1992, 1992 ICJ 24, para. 2:

"In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law there is no obligation to prosecute in default of extradition. Although since the days of Covarruvias and Grotius such a formula has been advocated by some legal scholars, it has never been part of positive law. This being so, every State is at liberty to request extradition and every State is free to refuse it. Should it refuse, a State is not obliged to prosecute.""

Yet, the declaration subsequently notes that numerous treaties have modified this situation for the States Parties thereto. Thus, despite the categorical language of this statement, it clearly represents the default rule rather than the state of the law for each and every crime. See also Cassese 2003a, p. 301.

\textsuperscript{1147} Rather, it is a matter of some debate whether there is even a right to prosecute in the absence of any link. Compare e.g. Belgium, Tribunal of First Instance Brussels (Kamer van Inbeschuldigingstelling), In re Sharon and Yaron, 26 June 2002, reproduced in Wouters and Panken 2003, p. 323-339 at 334 ("Qu'un droit qui consistait à un juger "in absentia" ne releve donc pas du ius cogens, car il est contraire aux [the Geneva Conventions, the Genocide Convention and the ICC Statute].") and Netherlands, Amsterdam Court of Appeals, In re Pinochet, 4 January 1995, 28 NYIL 363 (1997) at 364 to Belgium, Tribunal of First Instance (District of Brussels), In re Pinochet Ugarte, 6 November 1998, para. 3.3.3:

"[N]ational authorities have the right and even under certain circumstances the obligation to prosecute the authors of such crimes irrespective of where they are found. The fight against impunity of authors of crimes under international law falls [...] within the responsibility of all states of which the national authorities have the obligation or, at the very least, the right to take all measures in order to assure the prosecution and the repression of crimes against humanity."


\textsuperscript{1148} See Sadat 2003, p. 163; Cassese 2003a, p. 302; Delmas-Marty 2002b, p. 632-634; Ratner and Abrams 2001, p. 337 ("[R]ecent actions by states suggest that a general norm requiring investigation and punishment of gross abusers is gradually emerging."); Dugard 2001, p. 698; Kleffner 2000, p. 27; Dugard 1999, p. 1004;

\textsuperscript{1149} See Cassese 2003a, p. 301-303 (asserting that there is no customary obligation to prosecute the core crimes, but only a "general obligation of international cooperation for their prevention and punishment"); Tomuschat 2002, p. 342-343 (asserting that States have a customary duty to prosecute "grave crimes

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on specific crimes, both current State practice and the cautious language of the ICC Statute call into question its current viability as a general customary rule for all core crimes. The work of the ICC and the corresponding practice of States may well bring more clarity to this matter in the years to come.

Some scholars also deny a general customary obligation to prosecute territorial core crimes and thus appear to recognize only the specific obligations contained in ICL treaties. They assert that the duty to prosecute formulated in the work of the human rights bodies exists only on paper, while States do not actually accept it in their legislation and judicial practice. In the absence of firm State practice, the argument goes, there can be no customary duty to prosecute, no matter how many international judgments, communications, declarations, UN resolutions, draft codes and principles assert the contrary.

However, State practice regarding the duty to prosecute has to a significant extent followed the development of international bodies and instruments. Therefore, I will analyze this practice in order to ascertain whether international law imposes a positive duty on States to prosecute all core crimes committed within their jurisdiction. The following analysis will take into account only individual declarations of States, legislation, and judgments of national courts, these being generally perceived as the "make-or-break" element of State practice regarding the duty to prosecute. Without in

against the life, physical integrity and freedom of human beings committed in their respective territories,” but not for extraterritorial crimes); Swart 2000, p. 202. Bassiouni makes a strong case for a duty to prosecute all jus cogens crimes in sweeping terms, but at the same time asserts it is of an aspirational nature and lacks firm State practice. See Bassiouni 1999a, p. 219 and 374; Bassiouni 1996, p. 63 and 66.

Only a few national judgments provide support for a general duty to prosecute or extradite core crimes perpetrators. See e.g. Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, Whitlam J, para. 57:

"The emergence after the Second World War of the international crime of genocide no doubt imposes non-derogable obligations on Australia under the law of nations. The exercise of universal jurisdiction to prosecute such an offence is a matter for the Commonwealth..."

Merkel J., para. 81 and 141:

"It was also common ground between the parties, correctly in my view, that [...] the prohibition of genocide is a peremptory norm of customary international law (jus cogens) giving rise to non derogable obligations erga omnes that is, enforcement obligations owed by each nation State to the international community as a whole. [...] As explained earlier it is not in dispute that the acceptance under international law of a universal crime which has attained the status of jus cogens obliges a nation state to punish an offender or to extradite that offender, who is within its territory, to a state that will punish the offender."


See e.g. Scharf 1996a, p. 61. Presenting at a conference in Galway, Ireland, in 2004, Professor Scharf asserted that the duty to prosecute had still not matured in customary international law and adhered to the conclusions of his earlier writings. Cf. Ratner and Abrams 2001, p. 337.

See e.g. Gitti 1999, p. 75; Dugard 1999, p. 1003; Scharf 1996a, p. 56-59.
any way doubting their significance, joint declarations and other international instruments and practice will be left aside, as they have been elaborately described elsewhere.\textsuperscript{1155}

3.3.b Acceptance of the Duty to Prosecute in State Practice

Recent years have seen a growing number of States explicitly acknowledging a duty to prosecute core crimes committed within their jurisdiction. They have done so in different ways.

First, many States have accepted the duty to prosecute territorial core crimes in declarations to this effect, particularly communications to human rights bodies. This includes many States that have a poor human rights record, such as Paraguay,\textsuperscript{1157} Peru,\textsuperscript{1158} and various other Latin-American States.\textsuperscript{1159} These States do not adequately prosecute core crimes in practice, but implicitly or explicitly recognize a duty to do so while disputing the factual extent of their violations or citing practical problems as an excuse.\textsuperscript{1160} Apart from reports to human rights bodies, States have acknowledged a duty

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1155 See the literature mentioned above, note 1103.
1156 See e.g. Hungary, Report to the Human Rights Committee, 13 March 2001, CCPR/C/HUN/2000/4, para. 288 (explaining that action was taken "partly in response to obligations arising from the [ICCPR], which requires states to bring to justice the perpetrators of human rights violations"). See also Gitti 1999, p. 76-80; Roht-Arriaza 1990, p. 496-498.
1157 See Paraguay, \textit{Reply to the Inter-American Commission of Human Rights, March 2002, Chapter III on Impunity}:

"Los principales logros del actual sistema penal, y específicamente, en materia procesal son, 1) la eficiencia punitiva \textemdash\ (no a la impunidad) [...] En ésta oportunidad, se reitera a la Comisión que la justicia paraguaya conforme con sus atribuciones, facultades y deberes constitucionales y legales está obligada a investigar y sancionar a los culpables de hechos punibles tipificados en el ordenamiento interno y más aun de los crímenes contra los derechos humanos. [...] Como podrá apreciar la Comisión de la información suministrada por el Estado con respecto a la obligación de investigar y sancionar las violaciones de los derechos humanos cometidas durante la dictadura 1954-1989 queda de manifiesto que "A la presente fecha la mayoría de tales violaciones han sido investigadas y castigadas" y por ende, demostrado el cumplimiento efectivo por parte de la justicia paraguaya de los mandatos de la Constitución, de las obligaciones internacionales contraídas libremente y las leyes penales vigentes."

HRC, \textit{Comments on Paraguay, Doc. CCPR/C/79/Add. 48, 1995} para. 9 ("The Committee appreciates the declaration made by the delegation according to which the Government will not enact any amnesty law, and that, on the contrary, concrete steps have already or are being taken to make accountable perpetrators of human rights abuses under the past dictatorial regime.").

1158 In the \textit{Barrios Altos} case, Peru submitted a communication of acquiescence to the IACtHR and explicitly recognized "its international responsibility for the violation of the right to a fair trial and to judicial guarantees embodied in Articles 8 and 25 of the American Convention on Human Rights, because it had failed to conduct a thorough investigation of the facts and had not duly punished those responsible for the crimes." See IACtHR, \textit{Barrios Altos Case, (Chimbipuma Aguirre v. Peru)}, Merits, 14 May 2001, (Ser. C) No. 75 (2001) and 41 ILM 93 (2002), para. 35 and 39.
1160 See e.g. IACtHR, \textit{Lincoleo v. Chile}, 16 April 2001, para. 10-18; HRC, \textit{Periodic Report of Guatemala to the HRC, Doc. CCPR/C/GTM/99/2}, 5 April 2000, para. 35-40 and 78-91 ("Measures against Impunity" and "Public Prosecutor's Department"); HRC, \textit{Periodic Report of Chile to the HRC, 3 December 1998, Doc. CCPR/C/95/Add.11}, para. 80 ("Exceptionally, deaths which have been reported as possible instances of

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to prosecute in various other statements and communications. In Ethiopia, for example, the Special Prosecutor’s Office stated in a 1994 report on the ambitious and complex nature of its undertaking to prosecute thousands of suspects of international crimes committed under the Mengistu regime that the Transitional Government of Ethiopia accepted “their international legal obligations to investigate and bring to justice those involved in human rights crimes.”

Second, the duty to prosecute territorial core crimes is reflected in national legislation. Various kinds of national laws embody the principle that core crimes must be punished. On the highest level of legislation, this principle finds expression in the constitutions of several States, particularly those that have recently emerged from totalitarian rule. Among the States that include a duty to prosecute core crimes in their constitution are Ecuador, Ethiopia, and Venezuela. Numerous States have adopted amnesty

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excessive use of force by law enforcement officials have immediately been referred to the courts for investigation.”) and generally the Annual Reports of the Inter-American Commission on Human Rights, especially the chapters on “Follow-up on the compliance with recommendations of the IACOMHR” and “Follow-up of the recommendations formulated by the IACOMHR in its reports on the situation of human rights in member states”. See also Ambos 1999, p. 354.


116 See Art. 23 (2) Constitution 1998:
“[...] El Estado adoptará las medidas necesarias para prevenir, eliminar y sancionar, en especial, la violencia contra los niños, adolescentes, las mujeres y personas de la tercera edad.
Las acciones y penas por genocidio, tortura, desaparición forzada de personas, secuestro y homicidio por razones políticas o de conciencia, serán imprescriptibles. Estos delitos no serán susceptibles de indulto o amnistía. En estos casos, la obediencia a órdenes superiores no eximirá de responsabilidad.”

1163 See Article 28 (1) Constitution 1994 (Crimes Against Humanity):
“Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.”

1164 See Art. 29 Constitution:
“El Estado estará obligado a investigar y sancionar legalmente los delitos contra los derechos humanos cometidos por sus autoridades.
Las acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles. Las violaciones de derechos humanos y los delitos de lesa humanidad serán investigados y juzgados por los tribunales ordinarios. Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía”
(“The State will be obliged to investigate and legally sanction crimes against humanity perpetrated by its authorities.
The legal actions to prosecute crimes against humanity, grave human rights violations and war crimes will be without statute of limitation. Human rights violations and crimes against humanity will be investigated and judged by regular tribunals. Those crimes are excluded from any benefit that could lead to their impunity, including pardon and amnesty” - Translation by Zandra Valenzuela Delgado)

See for an elaborate interpretation of this provision Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002. Cf. Art. 10 of the 2002 Constitution of the Congo:
“[…]

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laws but explicitly excluded the core crimes from their scope, which points to the mandatory character of the prosecution of these crimes. Further recognition of the duty to prosecute can be found in many national criminal laws, some specific, other general. Many States have enacted provisions in their criminal codes that establish jurisdiction over all acts for which international law (or only treaties) demands prosecution. In so doing, States recognize that there is an international duty to prosecute, but the extent of this duty remains unclear. It also deserves mention that numerous legal systems impose an obligation to prosecute all, or certain categories of crimes within their jurisdiction. This is the situation, for example, in most Latin-American States and Switzerland. Although such long-standing national practice

Tout individu, tout agent de l’État, toute autorité publique qui se rendrait coupable d’acte de torture ou de traitement cruel et inhumain, soit de sa propre initiative, soit sur instruction est puni conformément à la loi.” (emphasis added);

Art. 29 Constitution of Argentina:

“El Congreso no puede conceder al Ejecutivo nacional, ni las legislaturas provinciales a los gobernadores de provincia, facultades extraordinarias, ni la suma del poder público, ni otorgarles sumisiones o supremacías por las que la vida, el honor o las fortunas de los argentinos queden a merced de gobiernos o persona alguna. Actos de esta naturaleza llevan consigo una nulidad insanable, y sujetarán a los que los formulen, consentan o firmen, a la responsabilidad y pena de los infames traidores a la Patria”

(“Congress may not vest on the National Executive Power - nor may the provincial legislatures vest on the provincial governors - extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland.”)

This article has been interpreted on numerous occasions by the Argentinean courts, including the Supreme Court, to prohibit amnesties for “acts involving the usurpation of public power or state terrorism.” See Brown 2002, p. 208-209. See also Coria 2003, p. 481 (on current constitutional reform in Peru which includes the proposal to rule out impunity for war crimes and crimes against humanity in the Constitution).

1165 See e.g. Cote d'Ivoire, Art. 4 Amnesty Law No. 2003-309 of 8 August 2003 (excluding from amnesty “infractions constitutives de violations graves des droits de l'homme et du droit international humanitaire” as well as “infractions qualifiées par le code pénal ivoirien de crimes et délits contre le droit des gens”). Art. 8 of the 1996 National Reconciliation Act of Guatemala explicitly excludes from amnesty “crimes of genocide, torture and forced disappearance, as well as those violations that do not have a statute of limitations or which do not permit the extinction of criminal responsibility, in accordance with the domestic law and the international treaties ratified by Guatemala.” See Aldana-Pindell 2002, p. 1480; HRC, Concluding Observations on Guatemala, 27 August 2001, Doc. CCPR/CO/72/GTMpara. 12 (2001).

Croatia has enacted several amnesty laws in the last decade which all exclude core crimes from their scope. See Konjecic 1998.

1166 See e.g. Colombia, Art. 14 Law 589 of 6 July 2000 defining genocide, forced disappearance, forced displacement and torture, and making certain other provisions ("Los delitos que tipifica la presente ley no son amnistiables ni indultables."). Cf. preamble to the Rwandese 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 (“Given the necessity to achieve reconciliation and justice in Rwanda, to eradicate forever the culture of impunity and enact laws allowing for the prosecution and sentencing of perpetrators”).

1167 See above, Chapter II, para. 3.2.b.

1168 See e.g. Art. 71 Argentinean Penal Code:

“Deberán iniciarse de oficio todas las acciones penales, con excepción de las siguientes:
1) las que dependieren de instancia privada;
2) las acciones privadas.”

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did not originate in a belief that it was obligatory under international law, it may be taken into account in when assessing whether more recent expressions of a State’s *opinio juris* on the international duty to prosecute are matched by corresponding legislative and judicial practice.

Third, the duty to prosecute territorial core crimes has been accepted by numerous national courts.\footnote{See Art. 103 and 114 Swiss Code of Military Criminal Procedure (requiring the investigation and prosecution of all criminal acts under the Military Criminal Code). See also Ziegler 1997, p. 575-576.} Often, courts rely on treaties covering specific core crimes to substantiate this duty.\footnote{See e.g. Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, Aambil Soares, 14 August 2002, p. 65 of 82 (‘‘Punishment of the perpetrators of [serious human rights violations covering genocide and crimes against humanity] is recognized as an obligation to the entire international community (erga omnes obligation).’’) and below, note 1269 (Hungary) and 1254 (Peru). See also Cassese 2003a, p. 314 (on Spanish cases).} But human right treaties are increasingly recognized as an additional or alternative basis. The Venezuelan Supreme Court held in 2002, under referral to the case law of the IACtHR, that amnesty provisions are inadmissible to grave violations of human rights because they contravene non-derogable rights recognized by international human rights law.\footnote{See e.g. Ukraine, Constitutional Court, *Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case)*, 11 July 2001, para. 2.2 (finding that the duty to prosecute the core crimes had been established by numerous treaties before the entry into force of the ICC Statute, including but not limited to the Geneva Conventions, the Apartheid Convention and the CAT).} ‘‘This is to say,’’ the *Tribunal Supremo de Justicia* explained, ‘‘that there is a material impossibility to apply [such norms], with the intention to impede or hinder the clarification of such facts, identify and prosecute those responsible for it, and prevent relatives and victims from knowing the truth and receive reparations.’’\footnote{Venezuela, Tribunal Supremo de Justicia, Sala Constitucional, 9 december 2002, para. III : ‘‘Recientemente la Corte Interamericana de Derechos Humanos sostuvo que son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralégales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos indereciables reconocidos por el Derecho Internacional de los Derechos Humanos (Caso Barrios Altos, sentencia de 14 de marzo de 2001). Es decir, existe imposibilidad material en la aplicación de aquellas normas dictadas con posterioridad a la ocurrencia de hechos de esta naturaleza, con la intención de vedar u obstaculizar su esclarecimiento, identificar y juzgar a sus responsables e impedir a las víctimas y familiares conocer la verdad y recibir la reparación, si a ello hubiere lugar.’’} Numerous other national courts, including ones in Argentina,\footnote{See Argentina, Supreme Court, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, 24 August 2004, in particular para. 13, and other cases below, para. 4.} Bolivia,\footnote{See Bolivia, Tribunal Constitucional, *Resolución 1190/2001-R*(Trujillo Oroza), 12 November 2001. See also Santalla Vargas 2003, p. 105-106.} Chile\footnote{See Chile, Court of Appeals (Santiago), *In re Fernando Laureani Maturana y Miguel Krassnoff Marchenko*, 5 January 2004, in particular para. 49 and 84 (referring inter alia to case law of the IACHHR). Confirmed in Chile, Supreme Court, *In re Miguel Angel Sandoval Rodriguez*, 17 November 2004.} Colombia\footnote{See e.g. Indonesia, Ad Ho c Huma n Right s Tribuna l a t th e Huma n Right s Cour t o f Justic e o f Centra l Indonesia, *Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Indonesia*, Resolution 1190/2001-R (Trujillo Oroza), 12 November 2001.} and Mexico,\footnote{See e.g. Ukraine, Constitutional Court, *Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case)*, 11 July 2001, para. 2.2 (finding that the duty to prosecute the core crimes had been established by numerous treaties before the entry into force of the ICC Statute, including but not limited to the Geneva Conventions, the Apartheid Convention and the CAT).} have similarly recognized the duty to
prosecute under international human rights law, and relied on it to set aside obstacles in national law that would otherwise block prosecution. In its first judgment in the *Bouterse* case (2000), the Amsterdam Court of Appeals found that prosecution of human rights violations is an obligation for the territorial State under the ICCPR, in this case Surinam, while prosecution in the Netherlands would, in the absence of the suspect, be merely “opportune.” In Haiti, the 1999 indictment of the Raboteau trial referred to the ACHR and the ICCPR before mentioning national law, and subsequently concluded that the perpetrators must be prosecuted.

What then is the contrary practice that casts doubt on the customary status of a duty to prosecute? Of course, the sad fact remains that most core crimes still go unpunished. But naked violations, even on a broad scale, do not by themselves alter international rules. On the contrary, violations often reinforce the rule, because the State involved tries to justify an exception to the rule rather than its very existence. As noted above, States defend their lack of core crimes prosecutions generally with denials of the crimes or practical excuses rather than legal arguments. Thus, most violations of the duty to prosecute core crimes reinforce the legal norm rather than contradict it. Explicit denials in national case law of the very existence of a duty to prosecute core crimes are scarce.

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118 See Mexico, Supreme Court, *In re Cavallo (Amparo en Revision 140/2002)*, 10 June 2002 at 909.

119 Netherlands, Amsterdam Court of Appeals, *In re Bouterse*, 3 March 2000, NJ 2000/266, para. 4.2: “Het hof stelt voorop dat het instellen van een strafrechtelijk onderzoek ter zake van de op eigen grondgebied mogelijk gepleegde strafbare feiten, die schendingen van mensenrechten opleverden, in beginsel een verplichting is die voor de Republiek Suriname voortvloeit uit het Internationaal Verdrag inzake burgerrechten en politieke rechten, waarbij het sinds 1977 partij is. […] Vervolging in Nederland zou […] opportuun zijn.”

120 See Haiti, Juge d'Instruction Jean Senat Fleur y of the Gonaïves Tribunal of First Instance, Ordonnance Raboteau Massacre, 27 August 1999, On file with the author, Conclusion, p. 159-160:

“Vu : les traités et conventions internationaux ratifiés par Haïti, notamment la Déclaration Universelle des droits de l'homme adopté le 10 décembre 1948; la Convention Américaine relative aux droits de l'homme adopté le 22 novembre 1969 et entrée en vigueur le 18 juillet 1978; le Pacte International relatif aux droits civils et politiques adopté le 16 décembre 1966 et ratifié par Haïti en 1991 et, éventuellement l’article 3 commun aux quatre conventions de Genève de 1949 ratifiées par la République d’Haïti,

[…]

Considérant que les actes arbitraires, attentatoires à la vie et à l’intégrité physique de la personne humaine perpétrés les 18 et 22 avril 1994 contre la population civile de Raboteau (Gonaïves) constituent des crimes graves et les auteurs doivent être poursuivis.” (emphasis in original)

121 See above, Chapter III, para. 2; Pasqualucci 2003, p. 339-340 (concluding that States in the Inter-American system have often failed to live up to their duty to prosecute); Jayawickrama 2002, p. 489-491. See for a detailed account of impunity in Guatemala Aldana-Pindell 2002, p. 1480-1498.

122 See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, para. 186: “If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”

123 See above, notes 1156 to 1160.

124 See below, note 1188.
It should also be noted that the question whether general human rights law imposes a duty to prosecute territorial core crimes is primarily one of interpretation of existing customary rights and obligations, rather than an assessment of a brand new customary rule. Due to the widespread ratification and implementation of human rights instruments, primarily the ICCPR, ACHR and ECHR, there is little doubt that States are under a customary obligation to respect and ensure human rights like the right to life, freedom of torture and access to court. If States and human right bodies alike interpret those rights as encompassing a duty for the State to prosecute territorial core crimes, which they generally do, violations of that duty cannot easily change that conclusion. In other words, the customary status of the broader international norms that give rise to the duty to prosecute – such as the right of access to court and the right to life - is not dependent on the practice of actual prosecutions, but already well-established. It seems numerous commentators fail to take this point into account in their assessment of State practice.

3.3.c Amnesty Laws

So scarce as national judgments that deny a duty to prosecute the core crimes in general, so plentiful are national laws that grant broad amnesties after situations of conflict or war. Many of these amnesty laws extend the impunity they grant to core crimes perpetrators. Consequently, commentators often see these laws as decisive contrary State practice that precludes the finding of a general duty to prosecute the core crimes. However, this assertion is, certainly today, questionable for several reasons.

First, as set out above, in light of the specific and exigent circumstances that generate them, amnesties should be seen as possible exceptions to a duty to prosecute, rather than as wholesale denials of that duty. Indeed, the South African Constitutional Court in the famous Azapo case (1996) did not take position against a duty to prosecute serious human rights violations in general, but instead accepted the South African amnesty law in light of the exceptional character of both the situation of transition and the conditions for amnesty.

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1185 See Cassese 2003a, p. 312.
1188 See South-Africa, South African Constitutional Court, Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, 25 July 1996, para. 28-36, in particular 31: “It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself.” Note also that the Constitutional Court did not deny an international duty to prosecute serious human rights violations committed outside armed conflicts in general, but only that such a duty would flow from the
Thus, while their non-application or prohibition certainly reinforces a duty to prosecute, phenomena like amnesty laws, and also prosecutorial discretion for that matter, do not collide head-on with such a duty. More likely, they are indicative of an exception to that duty. As one commentator notes, amnesties may well be reconciled with a general duty to prosecute, provided the circumstances require such a step and the conditions of the amnesty reflect a proper balance between the different interests involved.1189 This fact is aptly demonstrated by the ICC Statute, which in a general sense recognizes the necessity to prosecute but at the same time allows for prosecutorial discretion, and is silent on the legality and effects of amnesties because the negotiating States could not reach agreement on that point.1190

Second, it seems that many commentators overestimate the actual weight of existing amnesty laws in their assessment of State practice. Simply listing all amnesties in different States obscures the fact that they are very different in their scope and application. Various amnesty laws explicitly exclude the core crimes from their scope, while others are ambiguous in this respect but have not prevented core crimes prosecutions in practice.1191 Some amnesty laws that are regularly cited as contrary

Geneva Conventions. Apparently, the applicants in the case did not invoke human rights law as a basis for the duty to prosecute. See para. 25, 30 and 32.

1189 See Harris, et al. 1995, p. 39-40:
“The duty to enforce the law to protect life also requires the proper investigation of all suspicious deaths [...] and the prosecution of both public and private offenders, subject to the normal rules as to prosecutorial discretion. [...] An amnesty for persons convicted or suspected of homicide is not inconsistent with Article 2 [ECHR] provided that it reflects a proper balance between the interests of the state in the particular circumstances in which the amnesty is declared and the general need to enforce the law to protect the right to life.”

See also Holdgaard Bukh 1994, p. 348.

1190 See preamble, para. 6 and Art. 53 (1) sub c ICC Statute. See also Robinson 2003, p. 483; Seibert-Fohr 2003.

1191 See above, note 1165.

1192 Haiti’s 1994 amnesty law, for example, applied only to “political matters” and not to the serious crimes that followed. Apparently, it has never been invoked by a defendant in a coup-era human rights trial while several perpetrators of international crimes have been prosecuted and punished. See Concannon 2000, note 54. Cf. Scharf 1996b, p. 15-18. Note also that the French Court of Cassation has on several occasions upheld amnesty laws for French crimes committed in Algeria and Indochina on the basis that these crimes did not amount to crimes against humanity. See Lelieur-Fischer 2004, p. 241-242. In particular the Court’s holding in Aussareses (17 June 2003) that “since the alleged acts cannot be prosecuted as crimes against humanity, they are subject to the provisions of the amnesty law,” suggests that crimes against humanity can not be amnestied but must be prosecuted. See Lelieur-Fischer 2004, p. 242. Compare to France, Cour de Cassation, Ely Ould Dha, 23 October 2002, Bull. crim., no. 195 (refusing to apply a Mauritanian amnesty law in the prosecution of alleged acts of torture, holding inter alia that French prosecutions on the basis of universal jurisdiction are governed by French, not foreign law, and that application of foreign amnesty laws would cancel the purpose of universal jurisdiction); France, Conseil Constitutionnel, Traité portant statut de la Cour pénale internationale, 22 January 1999, para. 34 (holding that France’s obligation to arrest and hand over to the ICC anyone responsible for acts which, under French law, are covered by an amnesty or a time-limit infringed the essential conditions for the exercise of national sovereignty as articulated in the Constitution, thus implying that the core crimes could be the subject of amnesties and statutes of limitations). Note, however, that a subsequent revision of the Constitution changed this situation to ensure its compatibility with the ICC Statute and thus ruled out the possibility of an amnesty for the core crimes. See Casse 2003a, p. 315.
practice are contested more than ever in the States that have adopted them. For example, the amnesty laws in Argentina have both been set aside by several (lower) courts and revoked by the legislature. In many States which have adopted amnesty laws, the complicated political situation delays the dialectical process between amnesties and prosecutions. We might therefore have to wait some time before we can pass final judgment on the authoritative value of many amnesty laws for core crimes.

The international legality of amnesty laws covering core crimes is highly complicated, not least because of the great diversity of amnesty regimes. There is considerable uncertainty of the law on this point, as can be seen in the lack of consensus on the implications of amnesty laws in the negotiation of the ICC Statute. International law is in rapid development in this area and corresponding academic work is rich and proliferating. No attempt will be made here to address the more intricate issues of amnesty laws for core crimes. Clearly, current international law contains a strong presumption against amnesties for core crimes, but probably no more than that.

In practice, a rigid ban of all amnesties seems simply unrealistic, given the practical exigencies in a State such as Rwanda. In any case, amnesty laws do not generally constitute contrary practice to the very existence of a duty to prosecute the core crimes.

3.3.d Conclusion: Current Status of the Duty toProsecute

A customary duty to prosecute core crimes finds its basis in human rights law, treaties concerning specific crimes, the law of State responsibility and corresponding State practice. While international law appears to be moving towards a more comprehensive duty to prosecute serious crimes, at present a general duty to prosecute or extradite all core crimes perpetrators is not firmly established. Of course, such a duty does exist for specific core crimes such as grave breaches of the Geneva Conventions and torture as a crime against humanity, taking into account the relevant treaties and their status as evidence of customary law.

Yet, customary international law today does impose a duty on States to prosecute all core crimes committed within their jurisdiction. The preceding analysis reveals that State practice has developed significantly in the last decades, and especially in recent years. While actual prosecutions are still limited, many States have recognized their duty to prosecute in a broad sense in the preamble of the ICC Statute and more specifically in national legislation, communications to human rights bodies and judicial practice. It can

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1193 See e.g. Artucio 2001 (on proceedings contesting amnesty laws in Chile).
1194 See above, Chapter II, para. 3.3.m.
1195 See above, note 1105.
1196 See Special Court for Sierra Leone, Appeals Chamber, Prosecutor against Kallon and Kamara, Decision on Challenge to Jurisdiction (Lomé Accord Amnesty), 13 March 2004, para. 66-71.
1198 Compare e.g. the imperative language of recent national laws and judgments with the preamble to Bangladesh’s International Crimes (Tribunals) Act 1973 (Act No. XIX of 19 July 1973) (“Whereas it is expedient to provide for the detention, prosecution and punishment of the persons for genocide, crimes against humanity, war crimes and other crimes under international law…” – emphasis added).
no longer be said that the duty to prosecute is limited to “paper practice.” A proper assessment of the duty to prosecute under human rights law as a matter of interpretation of existing customary norms rather than the ascertainment of brand new ones, reveals a duty to prosecute all territorial core crimes. Amnesty laws constitute evidence of a possible exception rather than a negation of the duty to prosecute in general.

As paragraph 5 of this Chapter will show, the duty to prosecute the core crimes can have substantial implications for the direct application of their international criminalizations in national courts. The breadth and diversity of the international law involved makes the duty to prosecute hard to ignore. In fact, such disregard is realistic only in national legal systems which exclude international law from the national judicial process altogether. This, however, would be contrary to the principle of consistent interpretation, as I will set out in some detail in Chapter 7.

4 The International Character of Core Crimes Prosecutions

Given the characteristics of the core crimes just explored, it may be asked whether or not international law allows States to prosecute core crimes as if they are ordinary crimes. On the one hand, core crimes prosecutions must take place in conformity with international law.1199 Notably, Art. 75 (7) AP I dictates that “in order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes and crimes against humanity [...] persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law.” It appears that this provision does not lay down the mandatory application of international law, but it does require that the law applied “must be strictly in conformity with the respective rules of international law.”1200 Generally, ordinary criminal law does not reflect all relevant international rules on core crimes prosecutions and will thus not fulfil this requirement.

Accordingly, practice provides some indication that core crimes prosecutions may not take place on the basis of ordinary criminal law.1201 In 2001, the Colombian Constitutional Court unambiguously rejected the ordinary crimes approach,1202 as did the

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1201 See above, note 221.
1202 See Colombia, Corte Constitucional, Sala Plena, Genocidio, Sentencia C-177, 14 February 2001, 30 Jurisprudencia y Doctrina 707 at 713-714:

“Ciertamente, esta Corte considera inadmisible la tesis según la cual las conductas de aniquilación de los grupos que actúan al margen de la ley, podrían recriminarse acudiendo a otros tipos penales, verbigracia el homicidio, pues ella desconoce la especificidad del genocidio y la importancia de incriminar las conductas constitutivas de crímenes de lesa humanidad [...] En efecto, esta tesis degrada la importancia del bien jurídico que se busca proteger al penalizar el genocidio, que no es tan sólo la vida e integridad sino el derecho a la existencia misma de los grupos humanos...”
Belgian government in amending its legislation on core crimes in 1998. The ad hoc tribunals do not take into account national prosecutions on the basis of ordinary crimes in their application of the ne bis in idem principle, signifying that they not regard such prosecutions as satisfactory responses to core crimes. Taking a similar stand, the ILC has in its Draft Codes and Statute for an International Criminal Court long favored a similar ne bis in idem rule as those of the ad hoc tribunals.

The case against ordinary crimes charging is particularly strong for prosecutions on the basis of universal jurisdiction. After all, it is generally assumed that international law grants States universal jurisdiction to prosecute the core crimes, but not ordinary ones like murder and assault. Regarding core crimes prosecutions involving foreigners more generally, one may note the assertion of the Dutch Special Court of Cassation in Ahlbrecht I (1947) that “[i]t would be unreasonable to apply to members of the military and civil services of the enemy the provisions of Dutch criminal law which had never been intended to govern their conduct, instead of applying to them the international rules of war which were intended to govern it.” This point may have broader significance.

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1203 See Belgium, Law for the punishment of Genocide, Report of the Justice Commission, Belgian Senate, 1 December 1998, No. 1-749/3, para. II (A) and (B) sub 2:

“[L]e grand intérêt qu'elle [the inclusion of a criminalization of genocide in national criminal law] présente tient à sa valeur symbolique, en ce sens que les auteurs d'un génocide pourront être punis sur la base de cette incrimination spécifique, sans que le juge pénal doive se baser, pour les condamner, sur d'autres qualifications pénales telles que l'homicide intentionnel ou le meurtre. L'effet d'une condamnation pour génocide et son caractère préventif s'en trouveront renforcés.

[...]

L'introduction d'une incrimination explicite relative aux crimes de génocide et aux crimes contre l'humanité ne constitue donc qu'une confirmation du droit existant, en en assurant une meilleure visibilité, attirant l'attention sur la spécificité de ces faits et la nécessité, d'une part, de les poursuivre et, d'autre part, de les poursuivre en tant que tels.”

1204 See Statute ICTY Art. 10 (2) and Statute ICTR Art. 9 (2). See also ICTY, Appeals Chamber, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83:

“[The ICTY's jurisdictional primacy over national courts] recognises the right of all nations to ensure the prevention of such violations by establishing international criminal tribunals appropriately empowered to deal with these matters, or else international crimes would be dealt with as ordinary crimes and the guilty would not be adequately punished.”

1205 See Art. 42 (2) ILC Draft Statute for an International Criminal Court 1994; Art. 9 (3) ILC Draft Code 1991; Art. 12 (2) ILC Draft Code 1996; Commentary no. 10 to Art. 12 Draft Code 1996 (stating that if an “individual was tried by a national court for an “ordinary” crime rather than one of the more serious crimes under the Code […] the individual has not been tried or punished for the same crime but for a “lesser crime” that does not encompass the full extent of his criminal conduct.”). See also Zappala 2002, p. 196; Wouters and Panken 2003, p. 7.

1206 Cf. Reydams 2003, p. 21 (pointing out that prosecution on the basis of universal jurisdiction prima facie infringes on the non-intervention principle and therefore requires a permissive rule of international law, which international law grants for certain crimes only). See also below, note 1147.

1207 See Netherlands, Bijzondere Raad van Cassatie (Special Court of Cassation), Ahlbrecht I, 17 February 1947, Annual Digest 1947, p. 198 (NJ 1947/87, p. 188: “[D]at het ook onredelijk zou zijn, vreemde militairen en ambtenaren te berechten naar Nederlandse normen die niet voor hen geschreven zijn, in plaats van hen te berechten naar de wél voor hen geschreven normen die de oorlogsvoering beheerschen…”). Cf. Australia, High Court, Polyukhovich v. The Commonwealth of Australia and Another, 14 August 1991, per Brennan J., para. 3 (“[I]t is artificial to apply a municipal system of law designed for the preservation of the King's peace to acts done by or on behalf of belligerents in war.”)

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than just for the laws of war. One could think that it is “unreasonable” more generally to judge defendants of extraterritorial core crimes on the basis of national norms that were not known to them and not written for international crimes, instead of applying the international norms that govern these offences.

But there is considerable practice to the contrary. In practice, full descriptive power of the charges must often be sacrificed to the demands of time, evidence and competing priorities, and prosecutions that charge genocide, crimes against humanity and war crimes as ordinary crimes like murder and assault are not at all uncommon. In 2001, an Argentinean court ruled explicitly that core crimes may be charged as ordinary crimes. Several States have explicitly stated that they regarded their ordinary criminal law as a sufficient basis for the prosecution of war crimes, and many others appear to follow this approach. Unlike the Statutes of the ICTY and the ICTR, the ICC Statute blocks a second prosecution if the accused has effectively been prosecuted by another court “for conduct also proscribed under” the Statute, thus leaving the characterization of the crime open to national courts. Numerous States have expressed their opposition to the more stringent **ne bis in idem** proposals of the ILC and their wish to preserve the freedom to prosecute on the basis of ordinary crimes. Hence, it appears that the **ne bis in idem** principle in general international law prohibits repeated prosecution and punishment regardless of the law applied for the first prosecution.

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1208 See Special Court for Sierra Leone, Trial Chamber, *Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision’s Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinini Fofana and Allieu Kondewa*, 2 August 2004, para. 29.
1209 See 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, at 590, para. IV B (“En efecto, en la mayoría de los procesos seguidos ante cortes de diversos países que juzgaron crímenes de esta naturaleza [crimes against humanity] se han aplicado tipos penales creados por la ley de ese país.”). See also above, Chapter II, para. 2.1.
1210 *Id.*:

“Esta subsunción en tipos penales locales de ningún modo contradaría ni elimina el carácter de crímenes contra la humanidad de las conductas en análisis (cuestión que establece el derecho de gentes a través de normas ius cogens) ni impide aplicarles las reglas y las consecuencias jurídicas que les cabe por tratarse de crímenes contra el derecho de gentes.”

“[Prosecution on the basis] of local criminal offenses, would not in anyway contradict, nor eliminate the nature of the crimes against humanity of the conduct analyzed in this case (this as established in international law, throughout the peremptory norms of *jus cogens*) nor impede the application of the rules, and the correlating legal consequences related with its nature, being crimes against international law.” – unofficial translation by Zandra Valenzuela-Delgado.

1214 See Bassiony and Manikas 1996, p. 335 (“It can be said ... that a general principle of law exists that prohibits repeated punishment and repeated prosecution for the same facts irrespective of the specific criminal charges.”). Note however that the **ne bis in idem** principle in general international law does not prohibit repeated prosecution in different States. See Kleffner and Nollkaemper 2004, p. 374.

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For core crimes prosecutions on the basis of universal jurisdiction, practice is not much different. Numerous such prosecutions have charged core crimes as ordinary crimes.\footnote{See inter alia the Finta and Sawoniuk cases above, Chapter II, para. 2.1; Germany, BGH, Kusljic, 21 February 2001, 3 StR 244/00, in 54 NJW (2001), 2732-2734 and Germany, BayObLG, Kusljic, 15 December 1999, 6 St 1/99 (conviction for both genocide and murder); Djajic, above, note 656. In Finta, the Canadian courts extensively analyzed the manner in which ordinary crimes would form the basis for a prosecution on the basis of universal jurisdiction, yet never even considered the possibility that international law would disallow this practice. See also Baxter 1973, p. 67-69.} In some instances, national courts have disallowed such charges, but done so solely on the basis of obstacles in national law.\footnote{In the Swiss prosecution of Niyonzima, a Rwandan bourgmestre was convicted for both the ordinary crimes of murder and instigation of murder, and war crimes. See Switzerland, Tribunal militaire, Division 2, Lausanne, In re N., 30 April 1999. The military court of appeal, however, found that as a matter of Swiss law military courts have no jurisdiction over ordinary crimes committed by civilians, and upheld only the conviction for war crimes. See Switzerland, Military Court of Appeal, In re N., 26 May 2000, Chapitre 1 (c). See also Reydams 2002, p. 234.} Most national courts do not regard the prosecution of core crimes as ordinary crimes to be prohibited \textit{per se} by international law, whether on the basis of universal jurisdiction or not. Neither have States publicly protested against this form of charging. Thus, while there are sound reasons to believe that ordinary crimes do not meet all requirements of international law when it comes to core crimes prosecutions, practice does not on the whole reflect the premise that international law prohibits the prosecution of core crimes as ordinary crimes.

Still, even if international law allows it, to prosecute a core crime as an ordinary crime is quite unsatisfactory. It ignores important aspects of the prosecuted act, like its broader context and the particular intent of the perpetrator. To prosecute a genocidal killing as murder is at least as wide of the mark as prosecuting a carefully planned murder as manslaughter.\footnote{See for a non-legal but apt explanation Gourevitch 1998, p. 201 ("What distinguishes genocide from murder, and even from acts of political murder that claim as many victims, is the intent. The crime is wanting to make a people extinct. The idea is the crime.").} The criminalizations of ordinary crimes do simply not express the criminality of the conduct to be prosecuted in an adequate manner.\footnote{See Abi-Saab 2003, p. 598; Dickinson 2003, p. 305; Stahn 2000, p. 201. Cf. Canada, Supreme Court, \textit{R. v. Imre Finta}, 24 March 1994, Cory J., para. 72 ("[A] war crime or a crime against humanity is not the same as a domestic offence. [...] There are fundamentally important additional elements involved in a war crime or a crime against humanity.").} Rather, it is often said that the prosecution of core crimes as ordinary crimes banalizes them to a certain degree.\footnote{See Klabbers 2003, p. 59 ("To reduce genocide or crimes against humanity to multiple murder or multiple assault and battery cases is to somehow misconstrue them and turn them into banalities."); Sadat Wexler 1994, p. 326-327 ("To state that a crime against humanity is just like any other crime, but with something extra added, banalizes it."). Cf. Fletcher 1998, p. 11; Koering-Joulin 1997, p. 150.} This can be unsatisfying, particularly for the victims, as one of the goals of these prosecutions is to expose the crimes for what they are in the context that made them possible,\footnote{Note that the goal of exposition meant here is limited to the broader context \textit{insofar} as relevant for the crimes under consideration. It does not extend to the fundamentally problematic and oft-criticized proposition that criminal trials should aim to establish a complete historical record of an entire conflict or era. See on the latter point Special Court for Sierra Leone, Trial Chamber, \textit{Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinini Fofana and Allieu Kondua}, 2} not simply to impose punishment on the defendants.\footnote{Rather, it is often said that the prosecution of core crimes as ordinary crimes banalizes them to a certain degree.} It may also undercuts...
the deterrent value of core crimes prosecutions. As these crimes are generally instigated or condoned by the State or committed in the absence of effective State authority, the deterrent effect of prosecutions hinges in part on their ability to convey the message that it is the international community, not just national authorities, that will not tolerate these crimes.\footnote{1222} This, in turn, requires an adequate reflection of their international character.

Of course, the deterrent effects of international criminal law are unclear and disputed.\footnote{1223} In part, the scepticism of the academic community in this regard appears tied to an overly simplistic notion of deterrence as being dependent on an explicit cost-benefit analysis of prospective offenders on their way to the scene of the crime.\footnote{1224} A more refined conception which focuses on the effect of international criminal justice on the structures and patterns that facilitate core crimes may lead to a more optimistic assessment.\footnote{1225} But regardless of the doubts and misgivings of many scholars - courts and other actors in international criminal law firmly adhere to the idea of prosecutions as a deterring mechanism.\footnote{1226} In this regard, there is a significant gap between practice and (at least a part of) academia.

In summary, international law does probably not prevent States from trying the core crimes as ordinary crimes. Yet, there are both principled and practical reasons to reject ordinary criminalizations like murder as a basis for core crimes prosecutions for their failure to capture the international character of the crimes. Of course, practical constraints often count heavily, and any prosecution is better than none whatsoever. Also, it should be noted that the international character of a prosecution does not depend entirely on the particular charges, but can be expressed through other means, like references to the case law of international tribunals. Still, the charges laid are an important factor in this regard.

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\footnote{August 2004para. 31. See also Aldana-Pindell 2002, p. 1473-1474; Koskenniemi 2002, p. 3-5; Crocker 1999, p. 51-52; Arendt 1963, p. 205 and 232.}

\footnote{1222 Cf. Chinkin 2003, p. 138 ("The cases before the ad hoc Tribunals [...] confirm that rape and sexual abuse of the civilian population are public crimes of violence inherent to the aims of the warring parties. They are not the random, private or personal acts of individual fighters that can somehow be distanced from the broader picture."). See also ICTR, Trial Chamber, Akayesu, 2 September 1998para. 731-732.}

\footnote{1223 Cf. ICTY, Trial Chamber, Erdemovic, Sentencing Judgment, 29 November 1996, para. 64-65: "One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. [...] The International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity."; ICTY, Trial Chamber, Blaskic, 3 March 2000, para. 761-764. See also Jørgensen 2000, p. 98 ("It cannot be denied that hierarchical terms or quality labels serve a deterrent function by sending out a warning signal that the international community will not accept violations of certain "higher" obligations.").}


\footnote{1225 See e.g. Zimmerman 2003, p. 203 (remarks Jan Klabbers); Tallgren 2002, p. 567 and 584; Brierly 1927, p. 84.}

\footnote{1226 See e.g. Aldana-Pindell 2002, p. 1470-1476; Ambos 2002c, p. 320-321. Cf. Röling 1979, p. 190.}

\footnote{1227 See below, notes 1052 and 1053.}
5 The Characteristics of Core Crimes in the Practice of National Courts

Having examined the various characteristics of the core crimes, what remains is an appraisal of their relevance for the balance between national and international law in the practice of national courts. The courts of different States have invoked various of the characteristics examined above as determining factors in national prosecutions of core crimes. They have attached tangible consequences in particular to the grave and international character of the core crimes, their *jus cogens* status and the international obligation to prosecute them. To a significant degree, this practice can be explained as an interpretation of core crimes law in light of its object and purpose. However, in several cases this “interpretation” in practice amounts to a modification or rejection of established rules of national and international law and raises the question whether the particular characteristics of the core crimes require the direct application of their international criminalizations.

It is difficult, if not impossible, to determine the weight attached in national judgments to each individual characteristic that distinguishes core crimes prosecutions from other (criminal) proceedings. National courts generally reiterate characteristics like the grave character and *jus cogens* status of core crimes without specifying which they see as determinative for their conclusions and which constitute merely additional factors. Apparently, it is often the combination of different characteristics that leads courts to carve out a special position for core crimes law. They have done so in different ways.

Some national courts have asserted that particular rules of national (criminal) law do not apply at all to core crimes prosecutions. The French Court of Cassation, for example, stated in its 1983 judgment in the Barbie case that “by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal criminal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.” Likewise, one of the judges of the Argentinean Supreme Court asserted in *Schwammberger* (1990) that “neither time, borders nor the law of any particular State” could impede the punishment of crimes against humanity. Such holdings evince what one commentator has called a “radical cosmopolitan view on international criminal justice.”

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1227 See above, note 1050 and accompanying text.
1228 France, Court of Cassation, *Barbie* (No. 1), 6 October 1983, Bull. crim., no. 239; 78 I.L.R. 125 at 128 and 130 (citing and confirming the Court of Appeal, emphasis added).
1229 Argentina, Supreme Court, Extradition Josef Franz Leo Schwammberger, 20 March 1990, 313 Fallos de la Corte Suprema de Justicia de la Nacion 256 at 265-266, per Judge Roger (“Ni el tiempo, las fronteras o la ley de determinado país, pueden impedir esta razonable avance del Derecho punitivo ante actitudes tan repudiables y que tan hondamente degradan al hombre y socavan la convivencia civilizada.”).
1230 Reydams 2003, p. 137.
Somewhat more cautiously, the Supreme Court of Costa Rica found in 2000 that the core crimes are at least to some extent exempted from the general regime of criminal law.\footnote{1231} In judging the compatibility of the ICC Statute with the Costa Rican Constitution, the Supreme Court determined that the constitutional provisions on the non-extradition of nationals\footnote{1232} and the immunities of members of parliament\footnote{1233} did not apply to proceedings before the ICC. It held that those constitutional guarantees are not absolute but compatible with the development of human rights law and that the Constitution does not oppose new developments in this regard but rather promotes them.\footnote{1234} The Court referred, \textit{inter alia}, to the nature of the core crimes in denying the applicability of these constitutional provisions to proceedings involving the ICC.\footnote{1235} Comparable progressive interpretations of constitutional provisions in light of the nature of the core crimes have been endorsed by the courts and governments of several other States Parties to the ICC Statute.\footnote{1236} This line of reasoning has also been employed to set aside constitutional obstacles to direct application such as the principle of legality, for example in Hungary.\footnote{1237}

Other national courts have found that the particular characteristics of core crimes law elevate it to a superior rank, sometimes in deviation from the normal status of international norms in the national legal order. Thus, even if the ordinary rules of national (criminal) law do generally apply, they can not obstruct core crimes prosecutions.

In Argentina, various judgments of federal courts have upheld the supremacy of international criminal law in core crimes proceedings.\footnote{1238} Particularly noteworthy is the case of \textit{Julio Simon} (2001).\footnote{1239} In the \textit{Simon} case, federal judge Gabriel Cavallo found that the crimes of kidnapping and forced disappearance in question constituted crimes against humanity, the criminality and punishability of which are determined by the international community and not left to the discretion of individual States.\footnote{1240} In his decision of more than 100 pages, the judge dwelled extensively on the \textit{jus cogens} status of the norms involved, the grave character of crimes against humanity and the duty to

\footnote{1231} Costa Rica, Supreme Court of Justice (Constitutional Chamber), \textit{Advisory Opinion on the constitutionality of the draft law of approbation of the Rome Statute on the International Criminal Court}, 1 November 2000. See Lambert-Abdelgawad 2003, p. 545.
\footnote{1232} See Art. 32 of Costa Rica's 1949 Constitution ("Ningún costarricense podrá ser compelido a abandonar el territorio nacional.").
\footnote{1233} See Art. 32 of Costa Rica's 1949 Constitution.
\footnote{1234} Costa Rica, Supreme Court of Justice (Constitutional Chamber), \textit{Advisory Opinion on the constitutionality of the draft law of approbation of the Rome Statute on the International Criminal Court}, 1 November 2000, para. 11.
\footnote{1235} Costa Rica, Supreme Court of Justice (Constitutional Chamber), \textit{Advisory Opinion on the constitutionality of the draft law of approbation of the Rome Statute on the International Criminal Court}, 1 November 2000, para. 12.
\footnote{1236} See Lambert-Abdelgawad 2003, p. 545-548, 555-556 and 566.
\footnote{1237} See above, Chapter II, para. 3.3.n.
\footnote{1238} See above, Chapter II, para. 3.3.m.
\footnote{1240} Id., para. II (C) and III (J).
prosecute the crimes under consideration. In regard of the latter, Judge Cavallo cited *inter alia* the CAT, the ACHR and the ICCPR, as well as relevant case law of the IACtHR and other human rights bodies. Throughout the entire opinion, the judge referred constantly to numerous sources of international law, including the ICC Statute. Judge Cavallo asserted that the recognition of crimes against humanity and the conditions of their prosecution follow not only from Art. 118 of the Argentinean Constitution, but also, *inter alia*, from Argentina’s role in the international community, and its recognition of *jus cogens* through the VCLT. Finally, he declared both amnesty laws incompatible with Art. 1, 2, 8 and 25 ACHR, Art. 2 and 9 ICCPR, the object and purpose of the CAT, as well as national law.

On appeal, the Federal Chamber of Appeals upheld the decision of Judge Cavallo, following his reasoning closely and relying equally on a breadth of international sources and case law. The Court of Appeals reiterated *inter alia* that the qualification and punishability of the crimes was not up to the State, but governed by international principles of a peremptory character. The appeals judgment also discussed the duty to prosecute under human rights law at length, and concluded that there was no alternative for the invalidation of the amnesty laws. Like Judge Cavallo, the Federal Chamber of Appeals relied both on national and international law in reaching its decision.

The highest military court of Peru reached a comparable outcome as the Argentinean courts in *Simon*, relying primarily on a combination of the duty to prosecute, national law and the Vienna Convention of the Law of Treaties. The *Barrios Altos* case (2001) arguably concerned crimes against humanity. In 1991, six members of the Peruvian army attacked a group of civilians in a neighborhood in Lima known as Barrios Altos, killing fifteen civilians. Two amnesty laws subsequently deterred investigation and prosecution of the matter. Yet, when the case reached the IACtHR, Peru recognized its international responsibility in the case and declared its willingness to reach a friendly

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1241 Id., *inter alia* para. III (E) and (I), as well as IV (B).  
1242 Id., para. III (E), (F) and (I).  
1243 Id., e.g. para. III (I).  
1244 Id., at 598:  
   "Entonces, el reconocimiento de los crímenes contra la humanidad así como las condiciones para su juzgamiento que impone el derecho de gentes a través de sus normas más encumbradas, no sólo se deriva de la recepción que realiza el Art. 118 de la Constitución Nacional, tal como se ha expresado más arriba, sino, además, del hecho de formar parte de la comunidad internacional, de aceptar sus normas, de formar parte de la Convención de Viena sobre el Derecho de los Tratados (que consagra una de las funciones del *ius cogens*) y el hecho de haber contribuido a la consolidación del derecho penal internacional."  
1245 Id., operative paragraph ("Resuelvo").  
1247 Id., *inter alia* para. XVIII (2).  
1248 Id., *inter alia* para. XV and XVIII.  
1249 It is to be noted that numerous human rights treaties are incorporated in the Argentinean Constitution. See above, note 456.  
1250 See on this case generally Ferdinandusse 2003, p. 89-93 and Cerna 2002.  
settlement with the petitioners. The IACtHR decided unanimously that Amnesty Laws No. 26479 and No. 26492 were “incompatible with the American Convention on Human Rights and, consequently, lack[ed] legal effect.”

Just weeks after the judgment of the Inter-American Court, the Peruvian Consejo Supremo de Justicia Militar ordered the military courts to give effect to the judgment, “which resulted in the reopening of the Barrios Altos case at the national level and the rendering of the amnesty laws without effect.” In doing so, the highest military court relied both on the authorization in Peruvian law to execute international court judgments, and the Vienna Convention of the Law of Treaties. This Peruvian judgment uses several of the same arguments as the Argentinean judgments in the Simon case, but lacks any discussion of the *jus cogens* status and the grave character of the core crimes. Their outcomes are, however, substantially the same.

Other judgments, on the other hand, rely emphatically on the *jus cogens* status of core crimes law. A relatively early example dates back to 1959, when the Polish Voivodship Court of Warsaw directly applied the Fourth Hague Convention of 1907 and the Nuremberg Charter for the prosecution of crimes against humanity, war crimes and crimes against peace committed during WWII. The Polish Court held *inter alia* that the Fourth Hague Convention “constitutes *jus cogens*, i.e., it contains rules the application of which does not depend on the free discretion of any State.” The Supreme Court of Poland affirmed this judgment, holding that “[t]he basis of

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1253 *Id.* at para. 51(4). See for an analysis of the scope of this holding Ferdinandusse 2003, p. 90-91.

> “Las sentencias expedidas por los Tribunales Internacionales, constituidos según Tratados de los que es parte el Perú, son transcritas por el Ministerio de Relaciones Exteriores al Presidente de la Corte Suprema, quien las remite a la Sala en que se agotó la jurisdicción interna y dispone la ejecución de la sentencia supranacional por el Juez Especializado o Mixto competente.”

1256 See above, p. 152.
1257 Note that the Argentinean judgments also relied on Art. 27 VCLT, albeit it gave them less emphasis. See Argentina, Federal Chamber of Appeals, *Incidente de Apelacion de Julio Simon*, 9 November 2001, para. XI; Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, Julio Simon (Case no. 8666/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustraccion de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527, para. VI (A).
1258 Although the notion of *jus cogens* was not codified in a treaty until the VCLT of 1969, it appeared in doctrine, and to a lesser extent practice, before that date. See Hannikainen 1988, p. 23-156; Robledo 1981, p. 17-36; Kunz 1945, p. 187-193.
1259 Poland, Voivodship Court of Warsaw, In re Koch, 9 March 1959, 30 ILR 496. See in particular 504:

> “The [London Agreement of 8 August 1945 and the annexed Nuremberg Charter] are obligatory in Polish municipal law, while at the same time they define the content of war crimes and crimes against humanity, and also fix the sanctions therefore; as multilateral international treaties, they have legal force in many States.”

Note, however, that the accused was found guilty of crimes summarily set out in a Polish decree of 1944, while the international instruments were apparently applied to furnish the definitions of those crimes. See p. 497 and 509.
responsibility for war crimes rests on two international instruments,” namely the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, including the annexed Nuremberg Charter. The Supreme Court further distinguished extradition of common criminals from extradition of war criminals, stating that “[t]he above international treaties regulate in a different way from our own law of extradition the procedure of punishing war criminals, and they provide for responsibility for all war crimes and crimes against humanity.”

In Argentina, various penal judgments on different levels before the Simon case have asserted that no national law, not even the Constitution, can prevent the effectuation of international norms of _jus cogens_ status. In several other States, precedents of limited authority also credit peremptory norms with an enhanced status in the national legal order in rather general terms. In the Bouterse case, the Dutch Attorney-General suggested in 2001 that all _jus cogens_ norms might supersede national law in deviation of the normal implementation framework in the Netherlands, which gives supremacy only to treaties but not to custom. However, this assumption did not affect the outcome of the case since the Attorney-General did not believe that the prohibition of prescription of torture constitutes a _jus cogens_ norm and the Supreme Court did not reach a holding on this point. A similar but more ambiguous holding is found in the Belgian Pinochet ruling of 1998.

In one of the most detailed and elaborately motivated examples, the Hungarian Constitutional Court by and large exempted war crimes and crimes against humanity from the regular framework of national criminal law in its 1993 decision that allowed direct application of the international criminalizations for the prosecution of these crimes. In doing so, the Constitutional Court relied extensively on their particular characteristics. It noted that “these crimes threaten the foundations of humanity and international coexistence” and that “the rules of non-applicability of statutory limitations

1261 Poland, Supreme Court, _In re Koch_, 10 November 1959, 30 ILR 509 at 510.
1262 Id.
1263 Examples are cited in the _Simon_ case in both instances. See also Mattarollo 2001, p. 21-22, 35-36 and 40.
1264 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. 94: “Bij het hierna volgende wordt er van uitgegaan dat ook ongeschreven ius cogens bij onverenigbaarheid met de wet deze laatste verdringt, zulks in afwijking van wat overigens naar gangbare opvatting voortvloeit uit Art. 94 Grondwet.”
1265 Id., para. 105: “[G]een regel van ongeschreven volkenrecht, laat staan van ius cogens, [verbiedt] verjaring van het recht tot strafvordering inzake foltering […].”
1266 Belgium, Tribunal of First Instance (District of Brussels), _In re Pinochet Ugarte_, 6 November 1998, para. 3.3.2: “[T]here are grounds to consider that before being codified into treaties or acts, crimes against humanity were sanctioned by international custom and are, as such, part of the international _jus cogens_ which imposes itself on the internal legal order with restrictive effect ‘erga omnes’.”
1267 See generally above, Chapter II, para. 3.3.n.
are closely related to the nature of war crimes and crimes against humanity."\textsuperscript{1268} It reiterated that both specific treaties and human rights law require their prosecution.\textsuperscript{1269}

The Hungarian Constitutional Court also found that "the regulations on the punishment of war crimes and crimes against humanity" are peremptory norms of general international law and "those states which refuse to assume these obligations cannot participate in the community of nations."\textsuperscript{1270} Furthermore, it held that in the context of national prosecutions of international crimes "[n]o domestic law confronted with a conflicting and express peremptory rule of international law (jus cogens) may be given effect."\textsuperscript{1271} After all, "[t]he gravity of war crimes and crimes against humanity, the fact that by their commission international peace, security and, indeed, humanity itself was placed in danger, cannot be reconciled with making their punishment subject to domestic law."\textsuperscript{1272}

Therefore, the Hungarian Constitutional Court concluded, the core crimes are "\textit{sui generis} criminal offenses" that can be punished "even by those member states whose domestic system of law does not recognize the definition or does not punish that action or omission," namely under direct application of their international criminalizations.\textsuperscript{1273} This decision effectively exempted core crimes law from the general national framework governing criminal proceedings altogether, instead authorizing its application parallel to national criminal law. Its basic argument is that in core crimes prosecutions, national courts must function as organs of the international community rather than as enforcers of national criminal law.\textsuperscript{1274}

These judgments of national courts all point in a similar direction. They differ somewhat in their reasoning and the characteristics they ascribe to the core crimes. They also draw slightly varying conclusions from their analysis of core crimes law. But they share the conviction that core crimes must be effectively prosecuted in national courts, where necessary through an alteration of the normal balance between national and international law in favor of the latter.

\textsuperscript{1269} Id. at 278:

"The states committed themselves by international agreements to the punishing of such crimes. During the past ten to fifteen years, the activities of international organizations (committees and tribunals) established to monitor and ensure compliance with the comprehensive human rights conventions have come to articulate with increasing vigor the condemnation of those states which in their domestic law fail to comply with their international obligations. (It is primarily the decisions and resolutions of the Inter-American Court of Human Rights and the Inter- American Commission of Human Rights which developed the international law based duty of states to initiate criminal prosecution which may not be avoided even by amnesty)."

\textsuperscript{1270} Id., at 281.
\textsuperscript{1271} Id., at 282.
\textsuperscript{1272} Id., at 279.
\textsuperscript{1273} Id., at 279.
\textsuperscript{1274} Cf. id., at 278:

"[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."
However, the picture drawn so far requires qualification. First, there is significant contrary practice. Numerous national judgments reject the idea that the particular characteristics of the core crimes affect their justiciability in the national legal order. Several judgments do so implicitly. For example, legal opinions on the constitutionality of the ICC Statute in Belgium, Luxembourg and France have found the absence of immunity incompatible with their constitutional provisions on the inviolability of high State officials, thus rejecting the approach of Costa Rica and Ukraine which makes an exception for the core crimes in this regard.\textsuperscript{1275} Other national judgments refuse to apply a different test to establish jurisdiction for the core crimes than for crimes of a non-peremptory character.\textsuperscript{1276} An illuminating implicit rejection of the particular character of core crimes law is found in the decision on the constitutionality of Australian war crimes legislation in \textit{Polyukhovich} (1991). Dissenting Judge Brennan of the Australian High Court considered the legislation under scrutiny to be unconstitutional for exceeding the foreign affairs power of parliament. Ignoring appeals to the grave and international character of war crimes, Judge Brennan issued a lengthy and technical analysis on the separation of powers involved, culminating in the question whether a law would be "properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person who, being a citizen and resident of France, had dropped litter in a Parisian street forty years ago?"\textsuperscript{1277}

Some national judgments state explicitly that traits of the core crimes like their \textit{jus cogens} status and grave nature have no special consequences on the municipal law level. In \textit{Nulyarimma} (1999), for example, the Federal Court of Australia held that in the absence of implementing legislation, Australian courts cannot punish genocide "simply because it has now become recognised as an international crime with the status of \textit{jus cogens} under customary international law."\textsuperscript{1278} One of the justices first accepted both the peremptory character of the international prohibition of genocide and the fact that international law commands its prosecution, and subsequently described the choice to enforce the international criminalization of genocide as "a policy issue" which should be decided in the negative.\textsuperscript{1279} Similarly, in \textit{Pinochet III}, the House of Lords accepted that torture is a

\textsuperscript{1275} See Lambert-Abdelgawad 2003, p. 544 and 546. See also Correa 2003 (on the 2002 judgment of the Chilean Constitutional Court declaring the ICC Statute unconstitutional).

\textsuperscript{1276} See for examples of such case law Chapter 2.


\textsuperscript{1278} Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, para. 57, Whitlam J.:

"The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of \textit{jus cogens} under customary international law."

See also para. 53

\textsuperscript{1279} Australia, Federal Court, Nulyarimma v Thompson, 1 September 1999, [1999] FCA 1192, para. 18 and 26, Wilcox J.
jus cogens crime, but found that this status could not remedy a lack of implementing legislation, holding inter alia that jus cogens "is not a rule of jurisdiction."\textsuperscript{1280}

Some judgments and dissenting opinions reject outright the assertion that the grave and international character of the core crimes makes them fundamentally different than ordinary crimes. These include judgments from the very same courts that in other cases ascribed a far-going autonomy to core crimes law. The French Cour de Cassation had, just eight years before finding in 

Barbie (1983) that "crimes against humanity do not simply fall within the scope of French municipal criminal law but are subject to an international criminal order,"\textsuperscript{1281} asserted in Touvier (1975) that "crimes against humanity are ordinary crimes committed under certain circumstances and for certain motives specified in the text that defines them."\textsuperscript{1282} Also, in several later decisions the Cour de Cassation adhered more to its line of reasoning in Touvier than to its bold statement in Barbie about an international criminal order.\textsuperscript{1283} In Canada, a dissenting judge in the Finta case (1994) issued an opinion of the same tenor as the holding in Touvier.\textsuperscript{1284}

Second, it should be noted that most of the judgments which assert an enhanced position for the core crimes in the national legal order rely not only on the particular characteristics of core crimes law, but also, simultaneously, on their State’s constitutional framework regarding the incorporation of international law. The judgment of the Hungarian Constitutional Court leaned to a great extent on a constitutional clause which requires harmonization of national and all international law, not only core crimes law.\textsuperscript{1285} The Argentinean cases mentioned above, including the Simon case, likewise leaned

\textsuperscript{1281} See above note 1228.
\textsuperscript{1283} See above, Chapter II, para. 3.3.j.
\textsuperscript{1284} Canada, Supreme Court, R. v. Imre Finta, 24 March 1994, La Forest J. (dissenting), para. 258 and 290: 

"[T]he acts comprised in war crimes and crimes against humanity are in this country in essence crimes that fall under the familiar rubrics of our law such as confinement, kidnapping, and the like. They would be equally blameworthy if done by private individuals or criminal groups for other similar vile motives. The additional circumstances are added to crimes against humanity to tie them to the international norm and permit extraterritorial prosecution by all states. […]

More serious was that the trial judge at several points referred to the accused's actions having "risen up" to the quality of a war crime or crime against humanity. This is not strictly accurate; there may be different considerations for the offences under international law, and they may have some additional requirements to those for domestic offences, but these are not always higher and may not be related to individual culpability. To use language that suggests that somehow there is a higher degree of culpability required in relation to the international crimes is misleading."
heavily on constitutional provisions. Both in *Nulyarimma* and *Pinochet III*, the dissenting judges who accepted direct application of the customary criminalizations of genocide and torture respectively, based their minority views on incorporation through the common law rather than the *jus cogens* status or heinous nature of these crimes.\(^{1287}\)

Then again, the fact that these judgments do not rely *solely* on the particular characteristics of the core crimes does not diminish the authoritative value of their holdings, which in explicit language assert a special position for the core crimes. In addition, a relativization of the contrary practice is also in order. Many judgments do neither embrace an autonomous position for the core crimes nor reject it explicitly. While such judgments do amount to implicit contrary practice, they do not carry the same weight as judgments which explicitly discuss and decide the matter, especially if the position of the core crimes has not been brought up or (adequately) argued in the case. Some of the judgments that explicitly reject a special position for the core crimes, such as *Nulyarimma*, clearly violate international law.\(^{1288}\)

Finally, it should be noted that several of the precedents mentioned above, both *pro* and *contra* a special position, are strong in language but limited in authority. Dissenting opinions, *obiter dicta* and older precedents of courts that have since then changed their stance do not carry the same weight as recent decisions that turn on the very question discussed here. Of course, the place of the courts involved in their national judicial hierarchy also counts.

On balance, the stance of national courts is divided. Various national courts have directly applied core crimes law in order to exempt the core crimes from (at least part of) the national legal framework governing ordinary criminal proceedings,\(^{1289}\) but others explicitly or implicitly reject this line of reasoning. While the involvement of the highest courts of different States gives some momentum to the tendency to exempt core crimes law from national limitations that would ordinarily prevent its enforcement in national courts, practice is too limited and inconsistent to support a corresponding rule of positive international law in this regard. Still, this tendency is a noteworthy development, and

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1286 See above, Chapter II, para. 3.3.m.
1287 See Australia, Federal Court, *Nulyarimma v Thompson*, 1 September 1999, [1999] FCA 1192, para. 183-186 (While Justice Merkel loosely suggests in para. 183 that the *jus cogens* character of genocide is an additional reason to endorse this form of incorporation, stating that "genocide is an *a fortiori* example of where a rule of international law is to be adopted as part of municipal law," his elaborate analysis of the criminal aspects of the Australian common law makes clear that the peremptory character of the norm is not in itself enough to override the national implementation framework); U.K., House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte* (No. 3), 24 March 1999, [2000] 1 A.C. 147 at 276. See further above, Chapter II, para. 3.3.d and 3.3.h.
1288 Apart from the actual result of such cases, it should be acknowledged that national courts themselves violate their duty to interpret national law in conformity with international obligations when they recognize an international obligation, characterize the decision to adhere to that obligation or not as a "policy choice" and then decline to adhere to it. See on the principle of consistent interpretation above, Chapter IV, para. 5.2.
1289 Note that the use of a rule of internationale law in order to refuse application of a rule of national law meets the definition of direct application as set out above, p. 21.
finds additional support in the enactment of the ICC Statute and the resulting implementing practice of several nations, to which I now turn.

6 Implications of the ICC Statute and its Implementation

The coming into force of the ICC Statute provides additional support for the tendency of some national courts to enforce international core crimes law regardless of shortcomings in relevant national law. First, the Statute contains a detailed and very complete regulation of core crimes law which many States have incorporated into their national legal orders. The Statute sets out definitions of the crimes and forms of participation, as well as applicable penalties, and predominantly reflects international customary law. Therefore, the ability of many national courts to rely on international law for the prosecution of core crimes has greatly improved. Moreover, since the Statute in a general sense confirms the customary duty to prosecute core crimes perpetrators, it also brings an (additional) source of explicit recognition of this duty into many national laws.

Second, the way some States have implemented the ICC Statute in their domestic law, or are in the process of doing so, provides support for an autonomous position of core crimes law. As set out above, several constitutional courts have carved out an exception for core crimes law in the constitutional framework governing criminal proceedings. Other States have explicitly made exceptions for the ICC Statute through amendments to their constitutions. Generally, the purpose of these amendments was merely to allow quick ratification of the ICC Statute without having to do a thorough revision of the

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1290 See above p. 58.
1291 Some national judgments have accordingly recognized a duty to prosecute flowing from the ICC Statute. See Belgium, Tribunal of First Instance Brussels (Kamer van Inbeschuldigingstelling), In re Sharon and Yaron, 26 June 2002, reproduced in Wouters and Panken 2003, p. 323-339 at 332 ("[Q]ue le Statut de Rome comporte ainsi des obligations a caractere juridictionel" - The implications of this rather terse statement are unclear, but it is noteworthy that the Belgian court referred to jurisdictional obligations flowing from the ICC Statute in proceedings concerning alleged extraterritorial core crimes.); France, Paris Court of Appeals (Cour d'appel de Paris), In re Gaddafi, 20 October 2000, 105 RGDI P 475-476 at 476: "Qu'au demeurant, la convention portant statut de la Cour pénale internationale, […] indique dans son préambule, 'qu'il est du devoir de chaque Etat de soumettre à sa juridiction criminelle les responsables de crimes internationaux', […] Qu'il est ainsi reconnu par cette convention qu'il est du devoir pour les Etats l'ayant ratifié de juger les crimes internationaux, lesquels ne sauraient, aux termes de l'article 22 [ICC Statute] susvisé, être limités aux crimes contre l'humanité, de génocide, d'apartheid et de guerre, ce quand bien-même la personne poursuivie aurait la qualité officielle de chef d'Etat ou de gouvernement."
("Moreover, the preamble to the convention constituting the Statute of the International Criminal Court, […] says that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." […] That convention recognizes a duty on the part of ratifying states to try defendants for international crimes, as Article 22 [ICC Statute] provides, including but not limited to crimes against humanity, genocide, apartheid and war crimes, even if the accused is an official head of state or government;")
1292 See notes 1231 - 1236.
entire constitution. The result, however, is a distinction between core crimes law and other criminal law. For example, Luxembourg has explicitly placed its obligations under the ICC Statute above constitutional requirements by providing in its Constitution that “the provisions of the Constitution do not hinder the approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein.” France has expressed in its Constitution that it may recognize the ICC under the conditions stipulated in the Statute. Other States have adopted similar constitutional provisions regarding the ICC. The practice of various States to exempt the ICC Statute from the normal constitutional framework governing criminal proceedings, both through judicial interpretation and legislation, provides support for an autonomous position of core crimes law.

7 Conclusion

Several characteristics of international criminal law in general, and the core crimes in particular, sit uncomfortably with international law’s general framework of implementation. It may be questioned to what extent (the combination of) the jus cogens status of core crimes law, its disqualification of contrary national law, its focus on

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“Les dispositions de la Constitution ne font pas obstacle à l'approbation du Statut de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998, et à l'exécution des obligations en découlant dans les conditions prévues par ledit Statut.”
(Official translation ICRC)
1295 France, Art. 53-2 Constitution, modified by Decision 98-408 DC of 22 January 1999:
“La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998.”
1296 See Colombia, Art. 93 Constitution:
“[...] El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución. La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él.”
Ireland, Art. 29 (9) Constitution:
“The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.”
Portugal, Art. 7 (7) Constitution:
“Portugal pode, tendo em vista a realização de uma justiça internacional que promova o respeito pelos direitos da pessoa humana e dos povos, aceitar a jurisdição do Tribunal Penal Internacional, nas condições de complementaridade e demais termos estabelecidos no Estatuto de Roma.”
Although most of these provisions do not explicitly single out the obligations flowing from the ICC Statute from normal constitutional limitations, they were all adopted with this goal in mind. See Lambert-Abdelgawad 2003, p. 562-563 (also reporting similar initiatives in Cameroon and Brasil) and Duffy 2001, p. 9-10.
individuals, the grave nature of the core crimes, the duty to prosecute them and their character as system crimes can be reconciled with the freedom of States to block judicial enforcement of international law in the national legal order, make that enforcement dependent on national implementing law, or subject it to the principle of reciprocity.

Various national courts have exempted core crimes law from different rules and principles that normally govern the judicial application of international law. Together, these cases suggest that core crimes law, on account of the characteristics mentioned above, takes up a particular position in the national legal order. This suggestion of a more or less autonomous position reflects the international character of the core crimes in a heightened focus on the relevant international rules and a corresponding limitation of the extent to which national law can constrain their effectuation. It finds support in the significant but divided case law of national and international courts on the particular position of all international law of a humanitarian character.\textsuperscript{1297} The practice in various States to exempt the ICC Statute from certain constitutional provisions may add further momentum to this development.

However, there are also numerous national judgments that refuse to give full effect to international core crimes law through an internationalist approach to obstacles in national law. Some of these contrary judgments constitute clear violations of international law and serve principally as a reminder that national courts are too often unaware of their international obligations, or unwilling to heed them. International law demands to be given full effect, where necessary through direct application. Nonetheless, the practice of national courts in core crimes prosecutions is divided, so that it can not be concluded that international law subjects core crimes law to a more stringent regime than other international norms. Still, it is noteworthy that numerous national courts have taken a decidedly internationalist stance on the implementation and effectuation of core crimes law.

\textsuperscript{1297} See above, Chapter IV, para. 5.3.a.