
**INVESTIGATING AND PROSECUTING INTERNATIONAL CRIMES
DOMESTICALLY: RETHINKING INTERNATIONAL CRIMINAL LAW**

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ABSTRACT: *International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the state of which the individual may act as organs). This article examines the concept of international crimes, universal jurisdiction and the accountability machineries. This article canvasses for building of local capacity for domestic prosecution of international crimes. The authors submit that internalization of justice should be the last resort.*

KEYWORDS: Investigating, Prosecuting, Crimes, Genocide, Jurisdiction, Africa.

INTRODUCTION

Certain crimes are intrinsically contrary to International Law so states either by Customary Law or Treaty Law entitled to try and punish guilty persons whether or not they are committed in their territories and irrespective of the nationality of the accused¹. If a society's essential values drive it to designate a conduct as a crime, the criminal law is a barometer of those values and is applicable to both domestic and international act that affront and disrupt the rule of law². Taken a step further, crimes construed to be egregious as to shock humanity, such as genocide, crimes against humanity, and war crimes,³ became international crimes, by consensus of the international community. As a result, such became subject to the universal jurisdiction.

This paper intends to holistically discuss the need to encourage domestic prosecution of international crimes to complement prosecution before both regional and global courts or tribunals. It also discusses elements of international crimes, transnational crimes, categories of crimes, accountability mechanisms, among others. Even though a lot has been written on the duty of states to prosecute and punish international crimes, there is a gap in the existing literature because none specifically discuss or emphasize on how pertinent domestic prosecution is. The gap is intended to be filled by this paper.

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¹ Umzurike, U.O., Introduction to International Law, (2007), Foludex Press Limited, Ibadan, P.86

² Nagie, L. E., "Terrorism and Universal Jurisdiction: Opening a Pandora's Box" (2010) *Georgia State University Law Review*, Vol.27, Issue 2 Art 13, P.3

³ As defined in Articles 5-8 of the Rome Statute of the ICC, July 1, 2002 2187 U.N.T.S 90, available at [http://untreaty.Un.org/cod/ICC/English?rome-statute\(e\)pdf](http://untreaty.Un.org/cod/ICC/English?rome-statute(e)pdf).

ELEMENTS OF INTERNATIONAL LAW

It should be specified that international crimes result from the cumulative presence of the following elements:⁴

- i. They consist of violations of international customary rules (as well as treaty provisions, where such provisions exist and either codify or spell-out customary law or have contributed to its formation).
- ii. Such rules are intended to protect values considered important by the whole international community and consequently binding all states and individuals. The values in issue are not propounded by scholar or thought up by starry-eyed philosophers. Rather they are laid down in a string of international instruments⁵.
- iii. There exists a universal interest in repressing these crimes. Subject to certain conditions, under International Law their alleged authors may in principle be prosecuted and punished by any state, regardless of any territorial or nationality link with the perpetrator or the victim⁶.
- iv. Finally, if the perpetrator has acted in an official capacity, i.e as a *de jure* or *de facto* state official, the state on whose behalf he has performed the prohibited act is barred from claiming enjoyment of the immunity from civil or criminal jurisdiction of foreign states accruing under customary international law to state officials acting in the exercise of their functions⁷.
Traditionally, international crimes⁸ are broadly defined as encompassing criminal acts⁸ that threaten the international community as a whole or acts that threaten its most fundamental values; In comparism, transnational crimes are more limited in scope, encompassing only crimes that take place across borders⁹.

TRANSNATIONAL CRIMES

Cassese¹⁰ argued that international crimes do not encompass piracy (a phenomenon that was important and conspicuous during the seventeenth to the nineteenth centuries). Piracy was (and is) not punished for the sake of protecting community values: all states were (and still are) authorized to capture on the high seas and bring to trial pirates in order to safeguard their interest to fight a common danger and consequent (real or potential) damage. This offence was codified in the 1958 Convention on the Law of the Sea which defines piracy as an act of violence committed for private

⁴ See Theodor, M. Customary Law, CRIME OF WAR, <http://www.crimesofwar.org/thebook/customaryl原因>.html; Cassese, A. (2003) International Criminal Law, Oxford University Press, USA

⁵ They include the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Covenants on Human Rights, the 1969 American Convention on Human Rights, the UN Declaration of Friendly Relations of 1970, and the 1981 African Charter on Human and Peoples Rights. Other treaties which enshrine those values are the 1948 Convention on Genocide, 1949 Convention on the Protection of Victims of Armed Conflict, and the two Additional Protocols of 1977, the 1984 Convention against Torture and so on. The Preamble to the Rome Statute of the ICC states that the parties to the statutes are "mindful that during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"

⁶ International Law provides for universality of jurisdiction for core crimes

⁷ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) (1999) 2 WLR 627*

⁸ Under this definition international crimes include war crimes, crimes against humanity, genocide, torture, aggression and some extreme forms of international terrorism.

⁹ Nagie. L.E. op. cit. p.6

¹⁰ Cassese, op. cit. p.12

ends by the crew or passenger of a private ship or aircraft on another ship or aircraft on the high sea¹¹.

It was further argued that the notion of international crime also does not include (a) illicit traffic in narcotic drugs and psychotropic substances; (b) unlawful arms trade ; (c) the smuggling of nuclear and other potentially deadly materials ; (d) money laundering ; (e) slave trade or (f) traffic in women¹². These range of crimes are only provided for in international treaties or resolutions of international organizations, not in customary law. According to Nail Boister quoted by Nagie¹³, in contrast regarding their political, social and economic interest “and” assertions about the harm caused to these interest’. For instance, money laundering is seen as a crime that erodes financial institutions, depresses economic instability¹⁴, while drug trafficking threaten public safety, economic productivity, public health, professional advancement and education, and public institutions¹⁵.

DEFINITIONAL PERSPECTIVE

Three international crimes that are of central importance to modern day international criminal law are genocide, crime against humanity and war crimes. Each of these crimes has its own peculiar features and demands.

i. Genocide¹⁶

Genocide involves the international mass destruction of entire groups, or members of a group. The crime of genocide has been committed throughout history and continues to plague humanity today. Examples of the crime include the Jews decimated by the Nazis, and the Cambodians destroyed by the Khmer Rouge. African examples include the genocide unfolding in Sudan, the genocide inflicted by the Hutus on the Tutsis in Rwanda, and the purges in Uganda under Idi Amin and Ethiopia under Mengistu.

Article 6 of the Rome Statute defines genocide as involving any act committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group; such as:

- a. Killing member of the group.
- b. Causing serious bodily harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the groups to another group¹⁷.

¹¹ *Re-Piracy Jure Gentium (1934) AC 586*

¹² Cassese, op. cit. p.12.

¹³ Neil Boister (2003) “Transnational Criminal Law” *14 European Journal of International Law*, 953, 957.

¹⁴ Brent, L. B. (2000) *The Negative Effects of Money Laundering on Economic Developments 3*, available at <http://www.adb.org/documents/others/agc-toolkits/anti-money/laundering/document/money-laundering-neg-effects.pdf>

¹⁵ Zarima, O. M., (2004) “Illicit Drug Trafficking and Security Implications,” *65 AKADEMIA*, 27, 32

¹⁶ Salim. A. Nakhjavani (2008) *International Crimes in African; Guide to International Justice* Max Du Plessis(ed) published by the Institute for Security Studies, Pretoria, South Africa, pp. 55-98; Alina Kaczorowska, (2003), *Public International Law*, Old Balle Press, London, 2nd (ed. PP., 25-134; Lemkin, R. (1947), *Genocide as a Crime under International Law*, *American Journal of International Law*, 41

¹⁷ See also Article II of the 1948 Convention on the Prevention and Punishment of Crime of Genocide.

Genocide is the most serious international crime as evidenced in the high threshold set for the mental element required for proof of genocide. Genocidal is an umbrella term for a closed list of six distinct sub-species of genocide acts.

ii. War Crimes¹⁸

Generally speaking, war crimes are committed in violation of international humanitarian law applicable during armed conflicts. The sources of international humanitarian law are vast, and are broadly divided into two categories of substantive rules: the Law of The Hague¹⁹ and the Law of Geneva²⁰, and which constitutes the rule concerning behavior that is prohibited in the case of armed conflict.

War crimes have been re-affirmed as crimes under International Law by the Charter of the International Military Tribunal at Nuremberg²¹.

Article 6(6) of the Charter of the International Military (1945) extended the jurisdiction of the Nuremberg Tribunal to:

War crimes namely, violations of the laws and customs of war. Such violation shall include, but not limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or person on the sea, killing hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

The subsequent international instruments have restarted and expanded these provisions²².

Crimes Against Humanity²³

The notion of crimes against humanity is intentionally broad and captures many concerns traditionally associated with International Human Right Law (protection of life, right not to be tortured, the right to liberty and bodily integrity, etc). The term was first used in its contemporary sense to condemn the atrocities committed by the Turkish forces against their own Greek and Armanian subjects during the First World War in 1915. Article 7 of the Rome statute of the ICC²⁴ defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack: (a) Murder, (b) Extermination, (c) Enslavement, (d) Deportation or forcible transfer of population, (e) Imprisonment or the other severe deprivation of physical liberty in violation of fundamental rules of International Law, (f) Torture, (g) Rape, sexual slavery: enforced prostitution;

¹⁸ Nakhjavani, op. cit. pp. 73-80

¹⁹ The Law of the Hague is made up of the Hague Conventions of 1868, 1899, which generally speaking, set out rules regarding the various categories of lawful combatants and which regulates the means and methods of warfare in respect of those combatants.

²⁰ The Law of Geneva, so called because it comprise Four Geneva Conventions of 1949 plus the Additional Protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded, the sick) and those who used to take part but no longer do (such as prisoner of war). See also Cassese, A. (2003) International Criminal Law. Oxford University Press, USA.

²¹ Article 6 of the Nuremberg Charter 1945

²² Statute of the International Criminal Tribunal for Yugoslavia, 1993; Statute of the International Criminal Tribunal for Rwanda 1994 etc; Article 8 (20)(a) of the Rome Statute of the ICC represents a compilation or compendium of the grave breaches provisions.

²³ Nakhjovani, op. cit. pp. 66-80

²⁴ Article 7 of Rome Statute of the ICC 2002

forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under International Law, in common with any act referred to in this paragraph or any crime within the jurisdiction of the court, (i) Enforced disappearance of persons, (j) The crime of apartheid, (k) Other inhuman act of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health. Again, crimes against humanity like genocide is an umbrella term describing one of the sixteen (16) inhuman acts committed with intent and knowledge (and specific discriminatory intent, in the case of persecution). Unlike genocide, the list of crimes against humanity is open to judicial expansion.

UNIVERSAL JURISDICTION AND THE DUTY TO PROSECUTE AND PUNISH²⁵

Crimes under International Law are directed against the interest of the international community as a whole. Since every legal system may defend itself with criminal sanctions against attacks on its elementary values, the international community is empowered to prosecute and punish these crimes under International Law, regardless of who committed them or against whom they were committed²⁶.

It follows from the universal nature of crimes under International Law that each state is affected by them. Each country is thus allowed to prosecute criminal in all cases without restriction, it is not important where the conduct in question took place, who the victims were, or whether any other link with the prosecuting state can be established. Thus the principle of universal jurisdiction applies to crimes under International Law²⁷. Once a crime has been identified as having *jus-cogens* status, it inevitably imposes obligations *erga omnes*, or obligations owed to all mankind²⁸. These obligations include the duty to prosecute accused perpetrators and to punish those found guilty²⁹.

²⁵ Gerhard, W. (2005) Principles of International Criminal Law, Bassiouni, M.C. (1999) The Sources and Content of International Criminal Law: A Theoretical Framework, in Bassiouni M.C(ed), International Criminal Law, Vol 1. 2nd ed; PP.1-10; Joyce D. (2004) "The Historical Function of International Criminal Trials: Rethinking International Criminal Law", *Nordic Journal of International Law*, 73, pp.461-484.

²⁶ Gerhard, W., (2010) Summary (Principles of International Criminal Justice) International Criminal Justice, *Sommer Semester, Humboldt-Universität Zu Berlin*, PP.1-5

²⁷ See the Hague Convention of 1899 and 1907 on the Conduct of War; Convention on the Prevention and Punishment of the Crime of Genocide 1948, Hague Convention for Unlawful Seizure of Aircraft 1971; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1973; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents 1977; the Geneva Red Cross Convention 1949 and the Additional Protocols 1977. See also *the Elchmann's case, Pinochet's case etc.*

²⁸ See *Presbyterian Church of Sudan v Talisman Energy Inc 244 F. Supp 2nd 289, 306 (SDNY 2003)*, where the court held that violation of *jus-cogens* norms constitute violations of obligations owed to all (*erga omnes*)

²⁹ Bassiouni M.C (196) "Searching for Peace and Achieving Justice: The Need for Accountability" *Law & Contemporary Problems*, 10. See also Ken Obura (2011) Duty to Prosecute International Crimes Under International Law, in, Prosecuting International Crimes in Africa, Murungu C & Blegon J (eds), Pretoria University Law Press, Pretoria, Pp.11-31.

SOURCES OF THE DUTY TO PROSECUTE AND PUNISH INTERNATIONAL CRIMES

The obligation of a state to punish or extradite the perpetrators of international crimes may be provided for by treaties of which the state is a party or by customary international law³⁰.

(a). International Conventions

There are several treaties that provide for obligation to prosecute and punish international crimes, the duty to prosecute is imposed on state (either state of commission or third states) For instance, for genocide (Article 4 of Genocide Convention), for Torture (Article 7 of the Torture Convention) and for certain grave breaches of the Geneva Conventions (Article 146 of the Geneva Conventions IV). An obligation on the part of states to investigate and prosecute core international crimes³¹ arguably also emanates from the Rome Statute of the ICC³². The ratification of the Rome Statute by more than 110 states constitutes significant evidence of an acknowledgment of the duty to prosecute and punish these crimes³³.

Also, international human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR)³⁴, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)³⁵, the American Convention on Human Rights (Inter-American Convention)³⁶ and the African Charter on Human and Peoples Rights, (African Charter)³⁷ impliedly provide for a duty to prosecute and punish violations of the rights they seek to protect. Some commentators have argued that the duty to protect implies a duty to prosecute and punish violators³⁸.

(b). Customary law

Customary International Law today recognizes that the state in which a crime under International Law is committed has a duty to prosecute. So also a third state. Customary International Law which, unlike conventional (treaty) law, is binding on all states and cannot be derogated from³⁹, arises from a general and consistent practice of states followed by them from a sense of legal

³⁰ Ibid

³¹ Article 5 Rome Statute of ICC defines these crimes as crimes against humanity, war crimes, genocide and aggression.

³² For a discussion of the Rome Statute and the duty to prosecute and punish, see e.g Scharf M.P. (1999) "The Amnesty Exception to the Jurisdiction of the International Criminal Court" 32 *Cornell International Law Journal* 507;

³³ The Rome Statute requires state to either prosecute and punish the enshrined crimes domestically or submit suspects to ICC prosecution (Article 17 of ICC Statute dealing with complementarity).

³⁴ Adopted 19 December 1966 and entered into force 23 March, 1976.

³⁵ Signed 4 November 1950 and entered into force 3 September 1953.

³⁶ Adopted 7 January 1970, OAS official records, OEA/Ser/L/V/II, doc 65 rev. I, Corr I (1970)

³⁷ Adopted 26 June 1981, OAU Doc CAB/LEG/67/3 Rev.5 (entered into force 21 October, 1986) Article 22

³⁸ See Shue .H, *Basic Rights: Substance, Affluence and US Foreign Policy* (1980). Roht – Arizona, N. (1998) "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" 78 *California Law Review* 451, 467.

³⁹ See *Right of Passage over Indian Territory (Portugal v India)* 1960 ICJ 123,135 (12 April).

obligation⁴⁰. Customary International Law is composed of: (1) *Opinion juris*, that is, what states say they think is the law; and (2) state practice⁴¹.

ACCOUNTABILITY (ENFORCEMENT) MECHANISMS OF INTERNATIONAL CRIMINAL LAW

The rules in international criminal law can be applied and enforced by both international and national courts. The prosecution of crimes under International Law by international courts is called direct enforcement⁴² while the prosecution of crimes under International Law by national courts is called indirect enforcement. Until recently, international criminal law was almost entirely dependent on indirect enforcement mechanisms. Some precedents in international criminal law can be found in the time before the First World War⁴³. However, it was only after the war that a true international criminal tribunal was envisaged to try perpetrators of crimes committed at that period⁴⁴. Thus, the Treaty of Versailles stated that an international tribunal was to be set up to try Wilhelm II of Germany. In the event however, Wilhelm Kaiser was granted asylum in the Netherlands.

After the Second World War, the Allied power set up an International Tribunal at Nuremberg in 1945 to try not only war crimes but crimes against humanity and genocide committed under the Nazi regime. The Nuremberg Tribunal held its first session in October 1945 and pronounced judgments on 30th September / 1st October 1946⁴⁵. A similar tribunal was established to prosecute the Japanese war crimes (The International Military Tribunal for the Far East a.k.a Tokyo Tribunal). It operated from 1946-1948⁴⁶. The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in 1993 by the United Nations Security Council⁴⁷ to prosecute serious crimes committed during the war in the former Yugoslavia and to try their perpetrators. The tribunal which is an ad-hoc court is located at the Hague, in Netherlands. The ICTY has jurisdiction to try war crimes, genocide, and crimes against humanity⁴⁸.

Also International Criminal Tribunal for Rwanda (ICTR) was established in November, 1994 by the United Nations Security Council to prosecute⁴⁹ and punish people responsible for the Rwanda

⁴⁰ Re statement (Third). See also Article 38(1) (b) Statute of the International Court of Justice (sources of international law applied by court include international custom, as evidence of a general practice accepted as law)

⁴¹ See generally, Mallinder, L. (2008) Amnesty, Human Rights and Political Transition.

⁴² Gerhard, W. op. cit. p.4

⁴³ From Wikipedia, the free encyclopedia

⁴⁴ Ibid

⁴⁵ Though several key architects of the war such as Adolf Hitler, Helmrich Himmer and Joseph Goebbels had committed suicide before the trials began, others still got verdict e.g. Martins Bormann (death sentence), Kori Donitz (got life jail), Hans Frank (death sentence), Rudoff Hess (life imprisonment), Alfred Jodi (death sentence), Alfred Rosenbery (death sentence) Julius Streicher (death sentence) etc. see Wikipedia.com

⁴⁶ See [google.com;http://Worldwar2database.com/html/warcrimes.htm](http://Worldwar2database.com/html/warcrimes.htm)

⁴⁷ See United Nations Security Council Resolution 827 of May 25, 1993.

⁴⁸ The ICTY prosecuted Slobodan Milosevic who was accused of war crimes, crimes against humanity and genocide in the Yugoslavia War. Milosevic branded by the West as 'the Butcher of the Balkans' was found dead in his prison cell on March 12, 2006 while standing trial before ICTY.

⁴⁹ See the United Nations Security Council Resolution 955 of 8th November, 1994.

Genocide and serious violation of International Law⁵⁰. Both statutes of the ICTY and ICTR accepted the concurrent jurisdiction of national courts. Collisions are resolved according to the principle that international courts take precedence⁵¹.

The International Criminal Court (ICC) came into being on July 1st, 2002 when the ICC statute entered into force. On March 11, 2003 it began operation in The Hague. The Court is a permanent court with jurisdiction to prosecute individuals for genocide, crimes against humanity etc. the ICC is perhaps the most significant reform in the international criminal justice system since 1945. The court has opened investigation into over seven situations in Africa: the Democratic Republic of Congo, Uganda, the Central African Republic, Darfu (Sudan), Kenya, Libya, the Republic of Cote D' Ivoire etc. The court has issued several arrest warrants and commenced prosecution of suspects. On March 14th, 2012 the court pronounced its first judgment wherein Congolese Warlord Thomas Lubanga was found guilty of recruiting and employing child soldiers, genocide and crime against humanity⁵². The ICC is designed to complement existing national judicial systems. It aims at complementing rather than replacing national jurisdictions. It only acts-subsidary-if states are unwilling or unable to investigate or prosecute relevant crimes⁵³. The primary duty or responsibility to investigate and punish crimes is therefore left to individual states⁵⁴.

The establishment and operations since the beginning of the 90s of several international and hybrid tribunals, such as the ICTY, ICTR, the special court for Sierra-Leone⁵⁵(SCSL), hybrid tribunals in Kosovo⁵⁶, East-Timor⁵⁷, Lebanon⁵⁸, Bosnia and Herzegovina⁵⁹ and Extraordinary Chambers of the Criminal Court of Cambodia (ECCC)⁶⁰ are cited as evidence of an international resolve to ensure that those most responsible for core international crimes do not escape punishment⁶¹

RECOGNITION OF INTERNATIONAL CRIMINAL LAW IN DOMESTIC JURISDICTIONS

(a). Africa Perspectives

Domestication and Prosecution of international crimes has always been part of the domestic legislations of several African countries. This position was reflected in the Ugandan 1964 Geneva

⁵⁰ The ICTR tried Jean Paul Akayesu Kambanda Interim Prime Minister who pleaded guilty.

⁵¹ See Article 9 ICTY statute and Article 8 ICTR statute.

⁵² <http://amicc.blogspot.com/2012/03/ICC/convicts-Lubanga-in-first-ever.html>

⁵³ Article 12 & 13 of the Rome statute of the ICC

⁵⁴ Articles 17 & 20 of the Rome statute of the ICC.

⁵⁵ Established by UN Security Council Resolution 1400, UN Doc S/RES/1400 (28 March, 2002). SCSL in its historic verdict of 5th May, 2012 sentenced Charles Taylor to 50 years in jail for war crimes and crimes against humanity.

Available at <http://www.CharlsTaylor.org/2012/05/30/charls-taylor-sentences-50-years-in-jail>.

⁵⁶ SC.Res 1244, UN Doc S/RES/1244(10June 1999)

⁵⁷ SC Res 1272, UN Doc S/RES/1272 (25 October 1999)

⁵⁸ SC Res 1757, UN Doc S/RES/1757 (30 May, 2007)

⁵⁹ Established in 2003

⁶⁰ Established in 2004 via Royal Decree NS/RKM/1004/0062004) (Cambodia)

⁶¹ See Bassiouni, M.C. (1997), "From Versailles to Rwanda in Seventy-five years: The Need to Establish a Permanent International Criminal Court," *10 Harvard Human Rights Journal* 11, p.13

Conventions Act⁶² domesticating the 1949 Geneva Conventions. This Act punishes grave breaches of the Geneva Convention, when committed by any person whatever his or her nationality..... whether committed within or outside Uganda⁶³. The Act incorporates the principle of universal jurisdiction⁶⁴.

Again, on 10 March, 2010 the Ugandan Parliament passed the International Criminal Court Bill, domesticating the Rome statute after almost eight years since Uganda ratified the Rome statute. The ICC Act of Uganda makes provisions of the Rome Statute applicable in Uganda. It defines and makes applicable the offences of genocide, crime against humanity and war crimes as defined by the Rome statute.

The Republic of South Africa incorporated the Rome statute into its domestic law by way of the ICC Act which entered into force on 18th July, 2002. What is interesting is that the ICC Act adopted the Rome statute in its entirety thereby allowing South African Courts to have regard to the relevant substantive and procedural provisions⁶⁵.

The South Africa ICC Act incorporates the Rome statute's definitions of core crimes as well as the elements which make up the crimes of genocide, war crimes, and crime against humanity⁶⁶. These crimes now form part of South African Law through the Act.⁶⁷

The Rwandan government enacted the Organic Law 08.96 of 30 August, 1996 on the organization of prosecution for crimes constituting the crime of genocide, or crimes against humanity committed since 1st October 1990. The first law to establish Gacaca Courts is known as Organic Law 40/2000 of January 2011 (The law deals with establishment, organization, competence and functioning of Gacaca courts charged with prosecuting and punishing the perpetrators of the crime of genocide and other crimes against humanity, committed between 1st October 1990 and December 31, 1994)⁶⁸. Both ICTR and Gacaca have concurrent jurisdiction over crimes of genocide and crimes against humanity committed on Rwanda soil by Rwandans and foreigners residing in Rwanda⁶⁹

In Democratic Republic of Congo (DRC) military courts have exclusive jurisdiction over genocide, war crimes and crimes against humanity even if perpetrated by civilian. Shortly after the

⁶² Chapters 363 Laws of Uganda, 2000. See generally Christopher Mabziro, (2011), Prosecuting International Crimes Committed by the Lords Resistance Army in Uganda, in Prosecuting International Crimes in Africa, Pretoria University law Press 197-220

⁶³ Section 2(1) 1964 Geneva Conventions Act

⁶⁴ Section 2(2) Ibid. Magistrate Court Act, Chapter 16 Laws of Uganda, 2000 gives Magistrate Courts Jurisdiction to try offences under the Geneva Conventions Act.

⁶⁵ Lee Stone, (2011) Implementation of the Rome Statute of the International Criminal Court the South Africa, In Prosecuting International Crimes in Africa; Pretoria University Law Press, Pretoria, 305-330

⁶⁶ See section 1 of the ICC Act Law of South Africa 2002.

⁶⁷ Du Plessis (2008) International Criminal Law in an African Context. In M.du Plessis(ed) African Guide to International Law, Institute fir Security Studies 43.

⁶⁸ See Human rights Watch Law And Reality: Progress in Judicial Reform in Rwanda (2008)

⁶⁹ An example is father Guy Theunis, a foreigner indicted by the Gacaca court. See "Priest Faces Rwanda genocide trial" <http://www.theage.com.au/news/world/priest-faces-rwandan-genocide-trial/2005/09/12/1126177255807.html>

DRC ratified the Rome statute of the ICC, the Congolese Parliament amended the country's military criminal code, and granted military courts exclusive jurisdiction over international crimes⁷⁰.

As a monist state, international instruments ratified by the DRC apply directly to the country as long as these are not contrary to the law and custom⁷¹. The military courts in DRC have invoked the provision of the Rome statute in cases like Mbandaka, Songo Mboyo, Bongi, Kahawa, Bavi, and Thoma Lubanga Dyilo⁷². Both Malawi⁷³ and Zambia⁷⁴ have signed and ratified the Rome statute of ICC. The Penal Code of Malawi⁷⁵ permits Malawian courts to try crimes under the Rome statute should the perpetrator be found in Malawi and where it is proved that the offence was committed in Malawi or partly in Malawi and partly outside Malawi.

In the case of Zambia, the Zambian Penal Code Act is the primary source of criminal law in Zambia. Both Malawi and Zambia could rely on International Law and the principle of universal jurisdiction to prosecute the core international crimes. Therefore, both Malawi and Zambia need to domesticate the Rome statute. It is pertinent to mention that both Malawi and Zambia are dualist states.

Many other African countries are fast falling on line in this regard. For instance, a bill domestically domesticating the Rome Statute of the ICC is currently before the Nigerian Parliament⁷⁶. It is interesting to note that Nigeria has since signed and ratified the Rome Statute what remains is domestication thereof. Again, Ethiopia has domesticated law on core international crimes. Hence, Ethiopia Federal High Courts convicted former Ethiopia President Megistu Haile Mariam of genocide, and crime against humanity under Article 281 of the 1957 Ethiopia Penal Code⁷⁷. Also, Hissene Habre former President of Chad is currently being held in Senegal for war crimes, genocide, torture and crimes against humanity. In February 2007, the Senegal government signed into law measures permitting Senegal to prosecute cases of genocide, crimes against humanity, war crimes and torture⁷⁸.

⁷⁰ Lol 023/2002 du 18 November 2002 Portant code judiciaire militaire and Lol 024/2002 du 18 Nov. 2002. Portant Code Penal Militaire. See generally Benson Olugbuo, (2011), Positive Complementarity And The Fight Against Impunity In Africa, Pretoria University press, P.249-74

⁷¹ Articles 153 and 215 Constitution of Democratic Republic of Congo.

⁷² Thomas lubanga was charged under Articles 164-169 DRC Military Code for genocide, crime against humanity etc.

⁷³ Malawi signed the Rome statute on 3 March 1999 and deposited its instrument of ratification on 19 September, 2002.

⁷⁴ Zambia signed the Rome statute on 17 July, 1999 and deposited its instrument of ratification on 13 November 2002.

⁷⁵ Chapter7:01 Laws of Malawi. See also Mwiza Nkhota, (2011), Implementation of the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects, in Prosecuting International Crimes in Africa. Pretoria University Law Press, Pretoria. Pp.277-302.

⁷⁶ The PUNCH Newspaper, 31st May, 2012.

⁷⁷ Tiba, F. Kebede, (2007), "The Mengistu Genocide Trial in Ethiopia", *Journal Of International Criminal Justice*, May.

⁷⁸ Jallow, H. and Bensouda, F. (2007) International Criminal Law in an African Context, African Guide to International Criminal Justice. M. du Plessis (ed) Institute for Security Studies, PP. 15-55

Recently an Egyptian court sentenced 84 years old former president Hosni Mubarak to life imprisonment on June 2, 2012. Former Interior Minister Habib al-Adly got life sentence from the same Egyptian domestic court⁷⁹.

(b) Situation in Other Continents

Under Section 5(1) of the International Criminal Court Act 2001, genocide, and crime against humanity committed either in the United Kingdom or by United Kingdom (UK) nationals abroad can be prosecuted⁸⁰. In Canada, the Crimes Against Humanity and War Crimes Act, SC. 2000 (CAHW) has incorporated the following as domestic crimes: genocide, crimes against humanity, war crimes etc. CAHW invokes universal jurisdiction as defined in customary international law. In France, the new Criminal Code include a series of provisions describing crimes against humanity, genocide and war crimes⁸¹

Norwegian municipal law incorporates specific areas of International Law. Norway prosecutes international crimes using domestic penal law e.g genocide, torture etc⁸².

Because the US courts do not subscribe to the doctrine of universal jurisdiction, the relevant International Law must have been incorporated directly into US criminal law through congressional legislation. Congress has enacted statutes covering genocide, war crimes, torture, piracy, slavery, trafficking.

Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law 1993 confers Belgian's Courts with universal jurisdiction over suspects/perpetrators of international crimes⁸³.

Germany, Spain, Sweden, Switzerland, Russia and other countries have legal instruments domesticating the core international crimes as municipal crimes.

The importance of prosecuting international crimes is to ensure enforcement of international criminal law and deliver justice to victims.

ARGUMENT IN FAVOUR OF DOMESTIC PROSECUTION

Prior to the creation of ICC in 2002 and the advent of ad-hoc and hybrid criminal tribunals, it was left to the domestic criminal courts of states to investigate and prosecute international crimes. Even with the creation of the world's first permanent International Criminal Court- The ICC is not expected to supercede national prosecutions of international crimes. Again, ICC cannot prosecute crimes committed prior to July, 2002.

In addition to the foregoing, support for domestic prosecution is premised on a good number of reasons. According to World Bank⁸⁴, national – level justice contribute to legitimate institutions

⁷⁹ Jide, O, (2012) Taylor, Mubarak and Lessons for African Leaders, Opinion Column in PUNCH. P.16

⁸⁰ Section 51(1) ICC Act, Laws of the United Kingdom 2001

⁸¹ Article 213 of the new Criminal Code

⁸² See the Norwegian Military Penal Code of 1902 No 13, Article 108

⁸³ Unfortunately the Belgian Law on Universal Jurisdiction has been repealed and new legislation promulgated in its place

⁸⁴ World Bank; World Development Report 2011, P.2

and governance that are crucial to break cycles of violence. National level prosecution helps to educate communities about past conflicts and foster supports for rule of law. National- Level prosecution creates cadres of professionals who learn how to manage complex cases against people in power⁸⁵.

The issue of internationalized justice is bedeviled by some problems. The notion of justice anchored on universal norms was found to be at variance with local norms and sentiments. For example: the people of Rwanda were dissatisfied with the outcome of the ICTR that they have resurrected Gacaca, a traditional form of justice system. The above bring to the fore the prevailing socio-cultural conditions of the society involved, namely: the people, who they are, their notion of justice, their feelings and sentiment about how the issue about the conflict should be handled⁸⁶.

The issue of foreign judges and staffs gives rise to certain dynamics. There is the barrier of foreign judges not understanding the social, cultural and languages dynamics in which the alleged offence took place as well as their interpretation⁸⁷. Again, there is the lack of passion of foreign judges who are not in any way affected by the outcome of this trial to see that justice is done. There is also the sense of betrayal that the accused persons feel when they standing trial before foreigners. In Sierra – Leone, one of the indicates before the special court decried this situation when he asserted thus: “If I have offended my people, they should sit in judgment over me and not hand me over to strangers”⁸⁸

Moreover, the set up alienates people(victims) from the process. Proceedings are detached from the communities in respect of whom the proceedings were taken⁸⁹. Some of the accused were tried in Hague or foreign land with the people not having physical access to it. For instance, ICTR was situated in Arusha in Tanzania outside the shores of Rwanda so Rwandans did not have physical access to it. According to Holmes “justice as an ideal is localized rather than universalized and thrives on emotion for its effectiveness. As the passion wanes, justice loses its meaning and offenders get less punishment”⁹⁰.

This is probably confirmed by Kofi Annan the former UN Secretary General Thus:
No rule of law reform, justice construction, or transitional justice initiative imposed from outside can hope to be successful or sustainable.⁹¹

⁸⁵ David, A. Kaye (2011) “Justice Beyond the Hague – Supporting the Prosecution of International Crimes in National Courts”. *Council Special Report No 61. P.6*

⁸⁶ Lydia Apori Nkansah (2011), “International Criminal Justice in Africa: Some Emerging Dynamics” *Journal of Politics and Law, Vol. 4, No 2, PP.11-15*, available: www.Ccsenet.org/jpl.

⁸⁷ Ibid

⁸⁸ Ibid. Apart from operating far from the scene of crimes, and lack of resources to hold more than a handful of senior officials accountable for atrocities, international courts also lack the police force of their own so they cannot compel evidence and apprehend suspect.

⁸⁹ Bigi; G. (2007) The Decision of the Special Court for Sierra-Leone to Conduct the Charles Taylor’s Trial in The Hague.

⁹⁰ Holmes, S. (2002). Why International Justice Limp. *Social Research*, 69(4), 1055-1077.

⁹¹ Kofi Annan, Report of the UN Secretary General on Transitional Justice and Rule of Law(2004).

WHAT DOMESTIC SYSTEMS NEED TO SUCCEED

No two national systems present the same challenges. They vary significantly in terms of political will, from governments that seek support for national prosecution to ones that reject any form of justice, at international or domestic levels. They vary in stages of development, from those with strong preexisting legal system to those decimated by conflict⁹².

Where there is national willingness to deliver justice but limited capacity, international support can be essential to bridge the gap. The support can be essential to bridge the gap. The support starts from institutional building. Also, legal assistance may be required where a country lacks the basic legal frame work for crimes prosecution, foreign government, intergovernmental and institutions as well as donors pursuing domestic trial of atrocity crimes are well – suited to help draft national legislation to provide the legal basis for prosecution. Also, there can be support in the area of training and education, witness protection, provision of resources needed to promote affective outreach and communications effort⁹³. To be able to yield good result, this assistance must be provided in effective and efficient manner.

CONCLUDING REMARK

This paper has examined the nature of international crime, universal jurisdiction, duty to prosecute under treaty and customary law. Enforcement mechanisms, recognition of International Law in domestic jurisdiction and arguments in favour of domestic prosecution were also examined. The justification for this paper is its novel contribution to knowledge as evidenced from the content thereof. Evidence from this article suggests that the world is moving away from the notion of internationalized justice to domestic justice system. No wonder the statute of the ICC provides for complementarity which by implication means that the ICC only complements national courts but does not supersede national courts. Hence, the international community and the UN need to be sensitive to the national dynamics in their pursuit of international justice. Hence, there is a need to strengthen domestic institution and also encourage states to domesticate relevant international instruments to create legal basis for domestic prosecution in addition to customary law basis. This would truly make internationalized prosecution the very last resort.

⁹² David, A. Kaye, op. cit. p. 12

⁹³ Justice for Atrocity Crimes of International Support for trials before the State Court of Bosnia and Herzegovina in Human Rights watch, 2012 op. 5-7 <http://www.hrw.org>