

**THE PRINCIPLE OF LEGALITY AND THE PROSECUTION OF
INTERNATIONAL CRIMES IN DOMESTIC COURTS: LESSONS FROM
UGANDA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS OF THE DEGREE LLM (HUMAN RIGHTS AND
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Plagiarism declaration

I SYLVIE NAMWASE do hereby declare that the dissertation '**The principle of legality and the prosecution of international crimes in domestic courts: Lessons from Uganda**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CIPEV report	Report of the Commission of inquiry into post election violence in Kenya
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division of the High Court of Uganda
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal of Yugoslavia
LRA	Lord's Resistance Army
UDHR	Universal Declaration of Human Rights

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Chapter One: Introduction

The entire Nuremberg process, from the London Conference through the Nuremberg judgement, was shot through with ambiguities on the issues of legality and retroactivity of criminal law. The fact that the judgement was unanimous did not eliminate the ambiguities – it merely saved them for another day.¹

1.1 Background of the study

On 18 November 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) held that legal reforms² adopted by Senegal in 2007 to incorporate international crimes into the national Penal Code to enable its domestic courts to prosecute Hissene Habre for, among others, crimes against humanity committed in Chad twenty years before, violated the principle of legality, specifically the principle against non-retroactivity of criminal law.³ The court held that such crimes could be prosecuted only by a hybrid tribunal with the jurisdiction to try Habre for the international crimes based on general principles of law common to the community of nations.⁴ Some scholars opined that the ECOWAS decision was wrong, stating that the crimes in question were criminalised already under international law and that Senegal's legal reforms simply served jurisdictional purposes.⁵ Given that, as a core component of the principle of legality, the role of non-retroactivity is to prohibit the creation of new crimes and their application to past conduct,⁶ the opinions of such scholars may hold true.

¹ KS Gallant *The principle of legality in international and comparative law* (2009)155.

² See Law no. 2007-02 of 12 February 2007 amending the Penal Code, *Journal Officiel de la République du Sénégal* no. 6332, 10 March 2007, at 2377, available at <http://rds.refer.sn/IMG/pdf/07-02-12CODEPENALMODIF.pdf> (accessed on 30 July 2011); Law no. 2007-05 of 12 February 2007 (relative to the implementation of the Rome Statute creating the International Criminal Court), at 2384, available at http://www.iccnw.org/documents/Loi_2007_05_du_12_Fev_2007_modifiant_le_Code_de_Procedure_pena_le_senegal_fr.pdf (accessed on 30 July 2011); Constitutional Law no. 2008-33 of 7 August 2008 amending arts 9 and 25 and supplementing arts 562 & 92 of the Constitution), *Journal Officiel de la République du Sénégal* no. 6420, 8 August 2008, available at <http://www.jo.gouv.sn/spip.php?article7026> (accessed on 30 July 2011).

³ *Hissein Habre v République Du Senegal* Economic Court of West African States, (ECOWAS ruling), ECOWAS (18 November 2010) ECW/CCJ/JUD/06/10.

⁴ As above.

⁵ V Spiga 'Non-retroactivity of criminal law: a new chapter in the Hissene Habre saga' (2011) 9 *Journal of International Criminal Justice* 13.

⁶ Gallant (n 1 above) 1-3.

The Habre episode manifests the unspoken confusion surrounding the principle of legality in the prosecution of international crimes in Africa's national courts.

In August 1996, Rwanda implemented an Organic Law on the Organisation of Prosecutions for Offences Constituting the Crimes of Genocide or Crimes Against Humanity committed since 1 October 1990 (Organic Law Number 8 of 1996). While the law stipulated that it was applicable to international crimes, it cautioned that this was only the case for such crimes as were already prohibited under the country's Penal Code.⁷ Such caution was based on the fear of violating the non-retroactivity principle embedded in Rwanda's Constitution,⁸ which otherwise could have occasioned a constitutional challenge.⁹ Some have dubbed such hesitation unnecessary, arguing that Rwanda could simply have prosecuted the international crimes directly since they were already recognised as crimes under international law and by the general principles of law recognised by civilised nations.¹⁰

However, there is still no agreed position on the direct application of international criminal law in domestic courts.¹¹ It has been stated that international criminal law treaties require implementing legislation in order to have force in domestic courts, regardless of whether a state is monist or dualist.¹² Even Senegal, for all its monism, was still required by the ECOWAS court to have had prior implementing legislation as a basis for prosecuting Habre for torture and crimes against humanity.

Countries like Uganda and Kenya are caught in a state of doubt and hesitation over the principle of legality, Kenya continuing to grapple for a legal basis to prosecute international crimes domestically,¹³ Uganda limiting the prosecution to offences under its Penal Code Act,¹⁴ and both countries limiting the application of the implementing legislation for the Statute of the International Criminal Court (Rome Statute) to the

⁷ Organic Law No. 8 of 1996, art 1.

⁸ Constitution of Rwanda as amended by *Revision du 18 Janvier 1996 de la Loi Fondamentale*, art 12.

⁹ W A Schabas 'Justice, democracy and impunity in post-genocide Rwanda: searching for solutions to impossible problems' (1993) 7 *Criminal Law Forum* 536; O Dubois 'Rwanda's national criminal courts and the international tribunal' (1997) *International Review of the Red Cross*, No. 321 available at <http://www.icrc.org/eng/resources/documents/misc/57jnza.htm> (accessed on 30 July 2011).

¹⁰ Schabas (n 9 above) 537; Dubois (n 9 above).

¹¹ Dubois (n 9 above).

¹² G Olivi 'The role of national courts in prosecuting international crimes: new perspectives' 2006 (18) *Sri Lanka Journal of international Law* 87.

¹³ Open Society Initiative for Eastern Africa (OSIEA) 'Putting complementarity into practice: domestic justice for international crimes in the Democratic Republic of Congo, Uganda and Kenya. 2011 84 & 85. Available at http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf (accessed on 12 September 2011).

¹⁴ Putting complementarity into practice (n 13 above) 59.

future,¹⁵ for fear of a constitutional challenge on retroactivity.¹⁶ This has left unaddressed the periods during which atrocities were committed in both countries.¹⁷

Yet, in the Democratic Republic of Congo (DRC) military courts have prosecuted perpetrators for the very same atrocities committed in the past, by directly applying the Rome Statute on the sole basis of ratification, without any qualms about violating the principle of legality.¹⁸

This state of affairs reveals a lack of consensus surrounding the application of the principle of legality in the prosecution of international crimes in Africa's domestic courts. This tension may be articulated, in the words of some scholars, as a conflict between justice and certainty of law,¹⁹ acknowledging the importance of the law but cautioning that when the law occasions an intolerable level of injustice then it must yield to justice.²⁰

What is especially pertinent is that Africa has suffered gross atrocities and extreme destruction due to war and political turmoil caused by criminal acts of individuals.²¹ In Northern Uganda, a twenty-year war that started in 1986 saw the mass killing, rape, abduction and displacement of civilians.²² Rwanda experienced genocide in which it has been estimated that three quarters of the Tutsi population was killed.²³ In the DRC a war that extends as far back as 1998 saw the massive displacement, rape and killing of civilians,²⁴ which still continues in some parts of the country, with rape being used rampantly as a weapon of war.²⁵ Almost all countries in Africa have

¹⁵ The International Criminal Court Act (ICC Act of Uganda) 2010, & the International Criminal Court Act (ICC Act of Kenya) 2008, art 1.

¹⁶ International Center for Transitional Justice (ICTJ) 'Stock taking: complementarity (The Rome Statute Review Conference)' May 2010 3. Available at <http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Complementarity-Briefing-2010-English.pdf> (accessed on 3 September 2011).

¹⁷ As above.

¹⁸ *Tribunal militaire de garnison de Mbandaka, Affaire Songo Mboyo*, 12 April 2006 RP 084/2005; *Tribunal militaire de garnison de Bunia, Affaire Blaise Bongji*, 24 March 2006, RP 018/2006.

¹⁹ G. Radbruch, *Gesetzliches Unrecht und iibergesetzliches Recht* (1946) quoted by G Vassalli 'The Radbruch formula and criminal law notes on the punishment of crimes of State in post-Nazi and communist Germany' (2003) 1 *Journal of International Criminal Justice* 728, 729.

²⁰ As above.

²¹ See for example notes 22-25 below.

²² 'Northern Uganda: understanding and solving the conflict' 14 April 2004. Available at <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/077-northern-uganda-understanding-and-solving-the-conflict.aspx> (accessed on 1 August 2011).

²³ 'Genocide in Rwanda'. Available at http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (accessed on 1 August 2011).

²⁴ 'Democratic Republic of Congo: opinion survey and in-depth research' December 2009. Available at <http://www.icrc.org/eng/assets/files/other/drc.pdf> (accessed on 1 August 2011).

²⁵ 'Rape: weapon of war'. Available at <http://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx> (accessed on 1 August 2011).

experienced atrocities in the form of war crimes, crimes against humanity or genocide.²⁶ The need to end impunity through accountability for such atrocities has led to the creation of international criminal tribunals such as the International Criminal Tribunal of Yugoslavia (ICTY),²⁷ the International Criminal Tribunal for Rwanda (ICTR)²⁸ and the International Criminal Court (ICC).²⁹ The situations before the ICC currently are from Uganda, Kenya, DRC, Central African Republic (CAR), Sudan and Libya, which are all African countries.³⁰ This demonstrates the high level of importance of international criminal justice for African states.³¹ The demand for accountability has directed new attention to national courts as major agents for ending impunity, as the numerous cases to be decided cannot be handled exhaustively by the international courts.³²

However, African states are faced with several intractable challenges, ranging from the political and the economic to the institutional and the legal, making such a role seem unattainable.³³ The principle of legality, specifically the core element of non-retroactivity, is cited often as one such major legal challenge, alongside immunities and amnesties.³⁴

Given the extent of atrocities in Africa, combined with the call for accountability and justice, it may be asked whether African courts and legislators should hesitate at the road block of the principle of legality in the pursuit of accountability for atrocities. It may be argued that the despicable nature of the atrocities without a doubt elevates justice above legality and mere technicalities of law.

Yet, there are some who sternly warn against trivialising the law in the name of justice and advocate for a balanced application of both concepts.³⁵ This debate is central to the principle of legality in the domestic prosecution of atrocities and Africa's national courts cannot avoid it.

²⁶ Consider the situations in Liberia, Sierra Leone, Angola, Sudan, Kenya, to mention but a few.

²⁷ Statute of the International Criminal Tribunal for Yugoslavia, 25 May 1993, UN SC Res. 827.

²⁸ Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, UN SC Res. 955.

²⁹ Rome Statute of the International Criminal Court 17 July 1998, UN Doc. A/CONF 183/9.

³⁰ See generally, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed on 30 July 2011).

³¹ P Mochochoko 'Africa and the International Criminal Court' in E Anghumah & E Kwakwa (eds) *African perspectives on international criminal justice* (2005) 249.

³² Olivi (n 12 above) 84.

³³ See Putting complementarity into practice (n 13 above) 20, 59 & 84 for some such challenges faced by courts in Uganda, Kenya and DRC.

³⁴ See for example ICTJ release (n 16 above) 2.

³⁵ Gallant (n 1 above) 404.

1.2 Objectives, methodology and scope of the study

More precise questions may be asked: whether the principle of legality is really a challenge to prosecuting acts that have already been recognised as crimes under customary international law; are states “wasting time” in “legal gymnastics” and needlessly adhering to strict positivism, at the cost of accountability and justice for victims of atrocities; do the victims of these atrocities even care for the legal intricacies of definition and classification of crimes; can prosecutions not be based simply on predicate crimes such as murder, rape or assault since crimes against humanity, genocide and war crimes are constituted by these very crimes?

These are some of the questions that this study seeks to explore through an analysis of scholarly works, jurisprudence and international instruments, using desktop and library research. The study will focus on the debate surrounding the domestication of the Rome Statute in Uganda and the decision to prosecute domestically a former commander of the Lord’s Resistance Army (LRA) for atrocities committed during a twenty-year civil war in Northern Uganda. It should be mentioned here that Uganda’s Constitutional Court ruled recently that this prosecution would be illegal as the accused had applied for, but was not granted, amnesty under circumstances which the court found to be discriminatory.³⁶ Currently, this decision is under appeal to the Supreme Court.³⁷ The significant role played by blanket amnesty in hindering the first domestic prosecution of international crimes in Uganda is acknowledged. However, it should be clarified that this study discusses the prosecution with the sole purpose of illustrating the role of the principle of legality at the stage of indicting the accused. The discussion is not affected by whatever conclusion might be reached by the Supreme Court.

In discussing Uganda’s experience, the study will draw also on examples from other countries in and outside Africa that have dealt with the principle of legality in prosecuting international crimes.

The overall objective of the study is to highlight the discourse surrounding the principle of legality and the domestic prosecution of international crimes, and to contextualise it in Africa. In the process, the study seeks to unpack the elements and versions of the principle of legality in order to understand and assess the reasons for the

³⁶ *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 36 of 2011, para 605-610.

³⁷ ‘Government appeals against Kwoyelo release’ 26 September 2011 *Daily Monitor*. Available at <http://mobile.monitor.co.ug/News/-/691252/1243006/-/format/xhtml/-/5o14gm/-/index.html> (accessed on 15 October 2011).

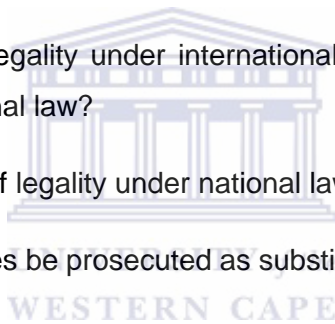
lack of consensus surrounding its application. The study seeks to demonstrate that, ultimately, the principle of legality, properly understood, does not and should not bar prosecution of international crimes in Africa, by exploring the concepts of crimes under customary international law, the international and national versions of the principle of legality and the option of prosecuting predicate crimes.

1.3 Research question(s)

The study seeks to answer one main research question: whether the principle legality is a bar to the domestic prosecution of past atrocities in Africa?

In answering this question the study will address four main sub-questions, namely:

1. Is the principle of legality absolute?
2. Is the principle of legality under international law different from the principle of legality under national law?
3. Does the principle of legality under national law apply to international crimes?
4. Can predicate crimes be prosecuted as substitutes for international crimes?



1.4 Literature survey

There is a dearth of literature on the principle of legality in the prosecution of international crimes in domestic courts. The first book-length study of the principle of legality was undertaken by Gallant who espouses the principle as having acquired the status of international customary law whose application in the domestic prosecution of international crimes depends greatly on the framework of a given country's constitutional or statutory provisions.³⁸ Other scholars, without referring to the constitutional framework providing for it, have considered that the principle of legality simply does not apply to acts that have been recognised as crimes in international law and law recognised by civilised nations.³⁹ In this regard, scholars like Marks make a strong argument for the

³⁸ See Gallant (n 1 above) 404.

³⁹ Schabas (n 9 above) 537; Dubois (n 9 above).

domestic prosecution of international crimes that were recognised under customary international law at the time of commission, even in absence of a binding treaty.⁴⁰ By contrast, Slaughter recognises the strict application of the principle of legality by national courts, especially as regards the direct application of customary law.⁴¹

The foregoing inconsistency is recognised by Ferdinandusse who acknowledges the difficulty in analysing the role of the principle of legality in national prosecutions of international crimes.⁴² He recognises the existence of national and international versions of the principle of legality and observes that the content of the principle is influenced by several factors including national law, international law, international courts, national courts, ordinary crimes and core crimes.⁴³ He concludes that there is uncertainty, which arises from disagreement among the various countries, as to which rules or precedents determine the principle's role in the domestic prosecution of international crimes.⁴⁴

1.5 Overview of chapters

The study has three more chapters. Chapter two contains an analysis of the development, elements, underlying theory of and versions of the principle of legality, its application to the prosecution of international crimes under international and national law and its status as a rule of customary international law. Chapter three contains a consideration of the debate surrounding the principle of legality and its influence on legislation and the prosecution of international crimes in Uganda. It also contains a discussion of the prosecution by Uganda of predicate crimes already existing in its local law as a solution to the problems posed by the principle of legality, and assesses the adequacy of this approach as a method of pursuing accountability for international crimes. Chapter four contains some concluding observations and recommendations.

⁴⁰ SP Marks 'The Hissene Habre Case: the law and politics of universal jurisdiction' in S Macedo (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (2004) 151.

⁴¹ AM Slaughter 'Defining the Limits: universal jurisdiction and national courts' in Macedo (n 40 above) 178.

⁴² W Ferdinandusse, *Direct application of international criminal law in national courts* (2006) 221.

⁴³ As above.

⁴⁴ Ferdinandusse (n 42 above) 222.

Chapter Two: The principle of legality - conceptual clarification

2.1 Introduction

In order to understand the basis for the divergent versions of the principle of legality in the domestic prosecution of international crimes and to assess and dispel those reasons found to be without merit, it is necessary to understand what the principle of legality is, its purpose, and its application to international crimes.

As one famous playwright quizzed himself about what's in a name, so have legal scholars probed the meaning of the principle of legality,⁴⁵ leading one to conclude that:

enforcement of the principle of legality is inherently imperfect. Issues of interpretation of statutes and the evolution of criminal law by judicial decision will always remain, given the imperfections of human language.⁴⁶

There are those, however, who express more optimism and strive for a sense of certainty as regards the principle of legality.⁴⁷ They emphasise its core elements and negate the idea that it is an arbitrary principle.

By way of simple definition, the principle of legality has been referred to as a combination of rules whose overall effect is the requirement that no one may be convicted for an act that was not a crime under *some* applicable law at the time it was done and no one may be subjected to a punishment greater than is designated for a crime under *some* applicable law.⁴⁸ From the foregoing provisions, a law may not be applied retroactively, as expressed in the maxim *nullum crimen sine proevia lege poenali*.⁴⁹

Some other rules making up the principle of legality include: the prohibition of punishment of an act by a court that did not have jurisdiction over the act at the time it was committed; prohibition of conviction based on more or less evidence than could have been required at the time of the offence; the requirement of clear definition and

⁴⁵ LL Fuller *The morality of law* (1964) 45; J Hall 'Nulla Poena Sine Lege' (1938) 47 *Yale Law Journal* 165,171; P Westen 'Two rules of legality in criminal law' (2006) 26 *Law and Philosophy* 231-34.

⁴⁶ Gallant (n 1 above) 408, commenting on Fuller and Hall's views.

⁴⁷ Westen (n 45 above) 234.

⁴⁸ G Werle *Principles of International Criminal Law* (2005) 32; S Lamb, ' *Nullum crimen, nulla poena sine lege* in international criminal law' in A Cassese et al *The Rome Statute of the International Criminal Court, A commentary* (2002) 1 733; Ferdinandusse (n 42 above) 223; Gallant (n 1 above) 9 (emphasis added).

⁴⁹ Vassalli (n 19 above) 728; see note 45 above. (Latin maxim directly translated as: no crime without a previous penal law).

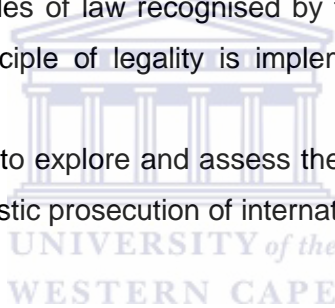
notice of a crime under the law before punishment;⁵⁰ consistent application of principles and of the law; the rule against collective punishment for individual crimes; and the broad concept that whatever is not prohibited by law is permitted.⁵¹

This study is restricted to the rule of non-retroactivity as one of the core components of the principle of legality,⁵² which rule apparently poses a challenge to the domestic prosecution of international crimes.

The question as to whether or not a law is being applied retroactively does not arise if such a law already exists. At first glance, this matter does not appear to be controversial, until it is appreciated that the determination of whether or not a certain form of law exists or is binding on a given state is a major cause of debate and has shaped how different states perceive the principle of legality, specifically, the component of non-retroactivity.

Indeed, while many scholars note that the foregoing elements of the principle of legality are general principles of law recognised by the international community,⁵³ they acknowledge that the principle of legality is implemented in different versions under various legal systems.⁵⁴

This chapter seeks to explore and assess the basis for these divergent versions of the principle in the domestic prosecution of international crimes.



2.2 The national and international versions of the principle of legality

Two significant but varying versions of the principle of legality exist. The first is to be found in the Latin maxim *nullum crimen, nulla poena sine lege*, which translates as nothing is a crime except as provided by law and no punishment may be imposed except as provided by law (hereinafter *sine lege*);⁵⁵ and the second is expressed in the maxim:

⁵⁰ See for example, on definition of war crimes, G J Simpson 'War crimes: a critical introduction' in G J Simpson & LH Timothy *The law of war crimes: national and international approaches* (1997) 11.

⁵¹ Gallant (n 1 above) 11-12.

⁵² Westen (n 45 above) 234; Lamb (n 48 above) 742.

⁵³ Claire de Than & E Shorts *International criminal law and human rights* (2003) 136.

⁵⁴ Hall (n 45 above) 165; Westen (n 45 above) 229.

⁵⁵ See Lamb (n 48 above); Gallant (n 1 above) 12; H Robinson 'Fair notice and fair adjudication: two kinds of legality' (2005) 154 *University of Pennsylvania Law Review* 336.

nullum crimen, nulla poena sine lege scripta, meaning nothing is a crime and no punishment may be imposed except by a *written law* (hereinafter *sine lege scripta*).⁵⁶

These versions have influenced the national prosecution of international crimes in different ways and are the focus of this discussion. The fundamental difference between the *sine lege* and *sine lege scripta* versions of the principle of legality is that while the *sine lege* version simply requires that the crime and penalty be recognised by “some law”, which could extend to all possible sources of law such as treaty law, common law and customary international law,⁵⁷ the *sine lege scripta* version bears a strict requirement of prior recognition of any crime or penalty in a written statute.⁵⁸

Explanations as to why countries opt for one version over the other have been made on the basis of their belonging to either the civil or common law systems.⁵⁹ In civil law jurisdictions, which require that a crime and the penalty be provided under a previously proclaimed statute, the strict *sine lege scripta* version of the principle is typical,⁶⁰ while common law jurisdictions, which allow creation of new crimes using case law, apply the broader *sine lege* version.⁶¹

However, this distinction is fast fading as most common law courts increasingly recognise the requirement of statutory provisions as the legitimate means of creating crimes.⁶² It is submitted also that the civil-common law debate is of little significance in relation to the subject of international crimes, as the ability of judges in common law domestic courts to create “new international crimes” is nonexistent, otherwise the stability of international criminal law would be jeopardised.⁶³

The other explanation relates to the difference between monist and dualist systems. In monist states, international and domestic laws are considered to be part of the same legal system,⁶⁴ while in dualist states, national and international laws are considered to fall under different systems.⁶⁵ The result is that while under the monist system international treaties and norms form part and parcel of domestic law, in dualist

⁵⁶ A Cassesse, *International criminal law* (2003) 141; See also, notes 45 & 54 above.

⁵⁷ Gallant (n 1 above) 14.

⁵⁸ Cassesse (n 56 above) 141.

⁵⁹ B Broomhall ‘*Nullum crimen sine lege*’ in O Triffterer *Commentary on the Rome Statute of the International Criminal Court. Observer’s notes, article by article.* (1999) 453.33; Gallant (n 1 above) 13.

⁶⁰ Cassesse (n 56 above) 141-2.

⁶¹ As above; See also for example, the creation of the “new offence” of marital rape in *C.R v the United Kingdom* 27 October 1995.

⁶² Robinson (n 55 above) 342.

⁶³ Ferdinandusse n (42 above) 274.

⁶⁴ D Sloss *The role of domestic courts in treaty enforcement* (2009) 6.

⁶⁵ As above.

states, implementing statutes are required in order to enforce international law as domestic law.⁶⁶ Most commonwealth states consider themselves to be dualist,⁶⁷ while it has been intimated that most francophone states are monist.⁶⁸

In a perfect and simple world, since international crimes are recognised already under international law, monist states would be able to prosecute them directly by recognising the crimes as creations of the relevant treaty or rule of customary law, without any qualms about the principle of legality.

However, it is submitted that the monist-dualist debate is not suited to a discussion regarding the domestic prosecution of international crimes. Indeed it is a misleading debate. Firstly, regardless of monism or dualism, international criminal law treaties, given their non-self-executing character, generally require implementing legislation in order to have force of law in domestic courts.⁶⁹ As already noted in the case of Senegal, even in monist systems, courts are reluctant to rely on treaty law as a basis for liability.⁷⁰ Secondly and more importantly, it is argued that the monist-dualist debate concerns mainly the effect of a treaty within a given state⁷¹ and not the recognition by that state of certain crimes that have been recognised already as binding on all states under customary international law and which crimes were only subsequently written into treaty law.⁷² As Cryer has pointed out, the domestic prosecution of international crimes is not a simple matter of monism versus dualism.⁷³ Moreover, the monist-dualist debate has been abandoned for more pragmatic approaches to the questions it raises.⁷⁴

It is also noteworthy that the monist-dualist divide between states is fast fading considering that most states no longer fall neatly into either category.⁷⁵

It is submitted that the most plausible reason for disparity is what Ferdinandusse has identified as the “national versus international law divide”. As some other scholars have observed also, the principle of legality is recognised differently under national law

⁶⁶ A Aust, *Modern treaty law and practice* (2007) 146 &150.

⁶⁷ See R Cryer *Prosecuting international crimes: selectivity and the international criminal law regime* (2005) 117.

⁶⁸ See D Olowu *An integrative rights-based approach to human development in Africa* (2009) 76.

⁶⁹ Olivi (n 12 above) 87.

⁷⁰ Cryer (n 67above) 119.

⁷¹ Aust (n 66 above) 143.

⁷² MC Bassiouni 'International crimes: *jus cogens* and *obligatio erga omnes*' (1996) 59 *Law Contemporary Problems* 65 & 68.

⁷³ Cryer (n 67 above) 117.

⁷⁴ Ferdinandusse (n 42 above) 131.

⁷⁵ Sloss (n 64 above) 7.

and international law,⁷⁶ hence the concepts of a “national principle of legality” (hereinafter national version) and an “international principle of legality” or “minimalist version” (hereinafter international version).⁷⁷ In Ferdinandusse’s analysis, the national version of the principle of legality is substantially different from the international version in the sense that the international version of the principle, like the *sine lege* requirement, is broad,⁷⁸ whereas the national version is like the strict *sine lege scripta* approach, requiring prior statutory law for recognition of a crime and penalty.⁷⁹ The national version applies under national law to the prosecution of predicate crimes while the international version is found generally under international law and applies to international crimes.⁸⁰ While both of these versions bear similarity to the *sine lege* and *sine lege scripta* principles, it is submitted that the concept of a national and international principle of legality contextualises better the current discussion on the prosecution of international crimes in national courts.

It is argued that, when faced with the domestic prosecution of international crimes, national courts apply erroneously the strict national version of the principle of legality and, in the process, find themselves at a “false impasse” which leads them to engage in needless legalese and delays in dispensing justice. Alternatively, as the ECOWAS court directed Senegal,⁸¹ states incur needless costs on legal and institutional reforms for prosecutions which can be conducted easily by domestic courts, regardless of monist-dualist or civil-common law jurisdictions.

The basis for this assertion is explained further below.

2.3 Foreseeability: locating the international version of the principle of legality for international crimes

The International Military Tribunal (IMT) at Nuremberg prosecuted war crimes on the basis that, although they were “new crimes” under the 1907 Hague Convention which was not ratified by all European nations at the time of the tribunal’s temporal jurisdiction in 1939, they had become recognised by all “civilised nations” as violations of the laws

⁷⁶ J Barboza *International criminal law* (2000)148; Cassesse (n 56 above) 142.

⁷⁷ See Ferdinandusse (n 42 above) 222-3.

⁷⁸ Ferdinandusse (n 42 above) 224.

⁷⁹ As above.

⁸⁰ As above.

⁸¹ See ECOWAS ruling (n 3 above).

and customs of war.⁸² Later, at the International Military Tribunal for the Far East (IMTFE/Tokyo tribunal), in prosecutions for war crimes and crimes against humanity, Justice Bernard stated, regarding the principle of legality, that:

The crimes committed against the peoples of a particular nation are also the crimes committed against members of the universal community. Thus the *de facto* authority which can organise the trial of crimes against peace and against humanity can ... prosecute for crimes against peoples of a particular nation ... the law to be applied in such cases, however, will not then be of a particular nation ... but will be that of all nations.⁸³

These concepts have metamorphosed into exceptions to the strict application of the principle of legality in relation to the prosecution of international crimes. They have been recognised under present international and regional treaties. To illustrate, the Universal Declaration of Human Rights (UDHR)⁸⁴ provides that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or *international law*, at the time when it was committed ...⁸⁵

“International law” as a source herein has been interpreted to mean both treaty and international customary law.⁸⁶ In fact, the drafting history of the non-retroactivity provision in the UDHR reveals that “international law” was included as a substitute for an express provision referred to by some scholars as the “Nuremberg-Tokyo sentence”,⁸⁷ which had been created as an exception to the strict application of the principle of legality to international crimes. The initial draft of the second session of the Commission on Human Rights stated:

Nothing in this article shall prejudice the trial and punishment of any person for the commission of any act which at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.⁸⁸

⁸² IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals* 467.

⁸³ 105 IMTFE Records, Dissenting opinion of Justice Bernard, quoted by Gallant (n 1 above) at 148.

⁸⁴ Universal Declaration of Human Rights (UDHR), 10 December 1948, UNGA Res. 217.

⁸⁵ UDHR (n 84 above) art 11 (emphasis added).

⁸⁶ Gallant (n 1 above) 158.

⁸⁷ Gallant (n 1 above) 170.

⁸⁸ Draft International Declaration on Human Rights, 17 December 1947, UN Doc. E/600 Annex A, art 7.

This provision was eventually eliminated from the UDHR on the basis that it was better suited under a covenant than a declaration and indeed it was reflected later in the International Covenant on Civil and Political Rights.⁸⁹

It should be noted further that under the UDHR drafting history, the inclusion of the “international law” provision affirmed the drafters’ rejection of the strict requirement of a written statute for prior notice of a crime.⁹⁰

As already mentioned, this threshold was maintained under the International Covenant on Civil and Political Rights (ICCPR),⁹¹ which retained the “international law”⁹² requirement and restored the “Nuremberg-Tokyo sentence,” using the same terminology as was used in the UDHR draft.⁹³

This broad recognition of “crimes under general principles of law”, tracing back to the times of Nuremberg and Tokyo, was interpreted by some legal scholars as creating a complete exception to the principle of legality for international crimes.⁹⁴ However, the provision as contained in the ICCPR was never intended to derogate from the application of the principle to international crimes,⁹⁵ but rather, as illustrated above, it was recognition that, given their universal nature, the prosecution of international crimes should not require a strict version of the principle of legality.⁹⁶

The “Nuremberg-Tokyo sentence” requires reference to general principles of law, as contained in customary international law or treaty law,⁹⁷ for acts considered criminal *at the time when committed*.⁹⁸ In so doing, it maintains the requirements of notice, and foreseeability which are major components of the principle of legality.⁹⁹

⁸⁹ D Weissbrodt *The right to a fair trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) 19.

⁹⁰ Letter of Lord Dukeston (UK) to UN Secretary-General, with draft international bill of human rights UN Doc. E/CN.4/21 Annex B 30, art 12 quoted by Gallant (n 1 above) 166.

⁹¹ International Covenant on Civil and Political Rights (ICCPR), 23 March 1976, UNGA Res, 2200, art 15,

⁹² ICCPR (n 91 above) art 15(1).

⁹³ ICCPR (n 91 above) art 15 (2).

⁹⁴ RK Woetzel *The Nuremberg trials in international law* (1960) quoted by Ferdinandusse (n 42 above) 224.

⁹⁵ See Gallant (n 1 above) 117.

⁹⁶ As above.

⁹⁷ See ‘Draft International Covenant on Human rights and measures of implementation, the general adequacy of the first eighteen articles,’ memorandum by the Secretary- General, 2 April 1951, UN Doc E/CN.4/528 at 164, for statement that “general principles of law” is used in reference to international law as recognised under the statute of the International court of Justice.

⁹⁸ ICCPR (n 91 above) art, 15 (2) emphasis added.

⁹⁹ See JJ Paust ‘Its no defence: *nullum crimen*, international crime and the gingerbread man’ (1997) 60 *Albany Law Review* 664.

2.4 The foreseeability and accessibility of international crimes

It has been observed that the national and international versions of the principle of legality share as an essential goal the assurance of legal certainty in a manner which renders the possibility of prosecution and punishment of individual conduct foreseeable, based on a law that is accessible.¹⁰⁰

Opponents of the international version of the principle of legality base their convictions on the assertion that the foreseeability of international crimes is doubtful. They posit that most international crimes as formulated by treaty law are not designed as classic prohibitions against criminal conduct and are addressed to states rather than individuals for action.¹⁰¹ For instance, the Genocide Convention enumerates conduct amounting to genocide,¹⁰² and immediately imposes an obligation upon states to enact laws to give effect to the provisions of the Convention.¹⁰³ Such provisions render doubtful the direct application of international criminal law to individuals without prior domestic legislation.¹⁰⁴

Further criticism has been made on the basis that the content of international crimes is not precise and offers no description of penalties.¹⁰⁵

However, despite all these criticisms, culpability for international crimes is considered foreseeable given the manifest illegality of such crimes. This concept was operative during the Nuremberg and Tokyo trials and over forty years later it was reflected in a Canadian domestic prosecution, *R v Imre Finta*,¹⁰⁶ in which Justice Cory remarked that:

[w]ar crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes is vague or uncertain.¹⁰⁷

The same sentiments were contained in Justice La Forest's remark that:

¹⁰⁰ Ferdinandusse (n 42 above) 222-223.

¹⁰¹ Paust (n 99 above) 664.

¹⁰² Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 9 December 1948, UNGA Res, 260 (III), art 2.

¹⁰³ Genocide Convention (n 102 above) art 5.

¹⁰⁴ See Paust (n 99 above) 664-5.

¹⁰⁵ W Ruckert & G Witschel 'Genocide and crimes against humanity in the elements of crimes,' in H Fischer et al (eds) *International and national prosecution of crimes under international law: current developments* (2001) 75, discussing extermination and crimes against humanity; Lamb (n 48 above) 735; Paust (n 99 above) 664.

¹⁰⁶ *R v Imre Finta*, Canada Supreme Court, 24 March 1994, Cory J, para 215.

¹⁰⁷ As above.

much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being *mala in se*.¹⁰⁸

In fact, some scholars have reached the bold conclusion that since Nuremberg and Tokyo, the international community has assumed that the prosecution of such crimes is common knowledge.¹⁰⁹

Such a conclusion is not far from the truth considering that war crimes, crimes against humanity and genocide have acquired the status of customary international law.¹¹⁰ Indeed, as intimated earlier, it was on the basis that war crimes and crimes against humanity were already part of customary international law before 1945, that the London Charter of 1945¹¹¹ vested the Nuremberg Tribunal with jurisdiction to prosecute them.¹¹²

Another reservation against applying the international version of the principle of legality to international crimes is the question of accessibility. As indicated above, it is an essential requirement of the principle of legality that a law be accessible.¹¹³ Scholars have interpreted the accessibility requirement to mean that the criminalising rules must be available to the individuals to whom they are addressed.¹¹⁴ Thus, justification for the strict version of the principle of legality might be made on the basis that treaty and unwritten customary laws are inaccessible to citizens without prior domestic legislation.

However, criticisms based on accessibility are also minimised by the manifest illegality of international crimes,¹¹⁵ coupled with the argument that accessibility of a law should be considered in the light of the foreseeability principle and not as an independent requirement of the principle of legality since:

[i]t is inconceivable that the principle of legality would preclude the prosecution of a perpetrator who was aware of the illegality of his conduct but unable to access the relevant law.¹¹⁶

¹⁰⁸ *Finta* (n 106 above), La Forest J para 347.

¹⁰⁹ Paust (n 99 above) 665.

¹¹⁰ J Dugard *International law: a South African perspective* (2005) 160.

¹¹¹ London Charter of 1945, 8 August 1945, UNTS 251.

¹¹² London Charter (n 111 above) art 6.

¹¹³ See note 100 above.

¹¹⁴ Ferdinandusse (n 42 above) 236.

¹¹⁵ See Hall (n 45 above) 36-7; Paust (n 99 above) 664-5.

¹¹⁶ Ferdinandusse (n 42 above) 238.

2.5 The foreseeability of penalties for international crimes

Critics of the international version of the principle of legality also base their reservations on the principle of *nulla poena sine lege*. Matters are not helped by the fact that as with the *nullum crimen* principle the *nulla poena* principle is understood differently under various legal systems.¹¹⁷ Proponents of the national version of the principle of legality maintain that it requires a written law indicating a specific penalty for a specific crime.¹¹⁸ Their rejection of the international version of the principle of legality thus is based on the perception that international conventions and customary international law provide no corresponding penalties for international crimes.¹¹⁹

By contrast, proponents of the international version contend, as they have done in the case of the *nullum crimen* principle, that the *nulla poena* principle does not apply to international crimes.¹²⁰ They contend that a mere warning of a penalty for international crimes suffices, without the need for precise definition.¹²¹

The UDHR and ICCPR endorse neither of these versions. Both instruments simply state:

nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.¹²²

It has been assessed that both the foregoing strict and liberal versions of the *nulla poena* principle go beyond what is required under the international human rights regime indicated above.¹²³ The argument has been made that what the international instruments require is some sort of notice as to the *maximum penalty* for an offence and not a precise definition of the penalty in order to satisfy the foreseeability requirement.¹²⁴

It has been argued further that for war crimes and crimes against humanity, death or life imprisonment has been the maximum penalty available always,¹²⁵ even before the establishment of the Nuremberg and Tokyo tribunals, and these two penalties

¹¹⁷ Hall (n 45 above) 165.

¹¹⁸ Cassesse (n 56 above) 157.

¹¹⁹ See Paust (n 99 above) 664.

¹²⁰ Cassesse (n 56 above) 157.

¹²¹ Paust (n 99 above) 667.

¹²² UDHR (n 84 above) art. 11(2); ICCPR (n 19 above) art 15 (2).

¹²³ Gallant (n 1 above) 384.

¹²⁴ As above (emphasis added).

¹²⁵ W Schabas '*Nulla poena sine lege*' in Triffterer (n 59 above) 463.

have continued as the maximum for genocide, as in the case of Rwanda,¹²⁶ and for war crimes and crimes against humanity.¹²⁷

Thus, a conclusion can be reached that, given the Nuremberg, Tokyo and subsequent prosecutions, it is recognised under customary international law that the international crimes of genocide, war crimes and crimes against humanity carry the same maximum penalty of death or life imprisonment, and that this is sufficient notice of a penalty as required by the *nulla poena* principle under international law.¹²⁸

Moreover, neither written treaty law nor customary international law precludes the prosecution of international crimes on the mere basis that there is no written statute prescribing a specific penalty. To do so would be to negate the international version of the principle of legality which international law endorses under the *nullum crimen* principle, where notice by statute is not a requirement.¹²⁹

2.6 The international version of the principle of legality under treaty law, national law and customary international law

The international version of the principle of legality, as contained in the UDHR and ICCPR, is widely reflected in other binding human rights instruments such as the United Nations Convention on the Rights of the Child (CRC),¹³⁰ and regional human rights instruments such as the African Charter on Human and Peoples' Rights (ACHPR)¹³¹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹³² The provision in the American Convention on Human Rights (ACHR)¹³³ favours the *sine lege scripta* version. However, international humanitarian law treaties recognise the international version of the principle of legality.¹³⁴

¹²⁶ Rwandan Organic Law No. 8 of 1996 (n 7 above) art 14 (b); Penal Code of Ethiopia 1957 art 281.

¹²⁷ Rome Statute (n 29 above), art 77; Penal Code of Ethiopia (n 126 above) art 282.

¹²⁸ Schabas (n 125 above) 463-4.

¹²⁹ See, Ferdinandusse (n 42 above) 255-6.

¹³⁰ Convention on the Rights of the Child (CRC), 20 November 1989, UNGA Res.44/25 (Annex), art 40.

¹³¹ African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981. OAU Doc. CAB/LEG/67/3/Rev 5, art 7(2).

¹³² European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950 .213 UNTS 221, art 7.

¹³³ American Convention on Human Rights (ACHR) 22 November 1969), 114 UNTS, art 9.

¹³⁴ See Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art 67; see also Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 art, 99.

Certain countries have recognised and applied the international version of the principle of legality in the domestic prosecution of international crimes, and in their constitutions. These states have recognised that there is a difference between the principle of legality as applied in the prosecution of international crimes and the version applied to national crimes.

In *Barbie*,¹³⁵ the French court referred to the principle of legality as contained in the ICCPR and ECHR in rejecting the application of the French version of the principle in a domestic prosecution for crimes against humanity.¹³⁶ The Constitutional Court in Colombia reached the same conclusion while considering the Rome Statute¹³⁷ and the Constitutional Court of Slovenia also relied on the same approach in its war crimes prosecutions.¹³⁸

The constitutions and criminal statutes of countries such as Canada,¹³⁹ Poland, and Croatia¹⁴⁰ recognise the international version of the principle of legality for international crimes.

A number of African countries has also followed this trend. The principle of legality under the Constitution of Rwanda, for instance, recognises international law as a basis for criminal prosecution¹⁴¹ and establishes Gacaca courts with jurisdiction over genocide and crimes against humanity committed in Rwanda between 1 October 1990 and December 1994.¹⁴² Kenya's new constitution abandoned the strict national version of the principle of legality which applied to all crimes under its old Constitution¹⁴³ and adopted the international version, allowing prosecution of acts that were considered criminal under "international law".¹⁴⁴ Senegal also took this direction in its 2008 constitutional amendment.¹⁴⁵

¹³⁵ France *Court de Cassation, Barbie (No.2)*, 26 January 1984, Bull, crim. No. 34; 78 I.L.R.132, at Bull.crim. no.34, 92. quoted by Ferdinandusse (n 42 above) 226.

¹³⁶ As above.

¹³⁷ Colombia, *Corte Constitucional, sala plena, sentencia C-578 (In re Corte Penal Internacional)*, 30 July 2002, 31 quoted by Ferdinandusse (n 42 above) 226.

¹³⁸ Slovenia Constitutional Court, *U-1-248/96* decision of 30 September 1998, quoted by Ferdinandusse (n 42 above) 226.

¹³⁹ Constitution Act of Canada, 1982, art 11 (g) & (i).

¹⁴⁰ The Constitution of the Republic of Croatia, 2001 art 31.

¹⁴¹ Constitution of Rwanda (n 8 above) art 20.

¹⁴² Constitution of Rwanda (n 8 above) art 152.

¹⁴³ Constitution of Kenya 2008 art 77 (8).

¹⁴⁴ Constitution of Kenya 2010, as amended, art 50 (2) (n).

¹⁴⁵ Constitution of the Republic of Senegal 2001, as amended, art 9.

However, a number of jurisdictions still retains the strict national version of the principle for all crimes, including international crimes. One of the most explicit in this regard is the Constitution of Nigeria which provides that:

....a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a *written law*; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a state, any subsidiary legislation or instrument under the provisions of a law.¹⁴⁶

There is also a category of states whose version of the principle is ambiguous. Such states simply proscribe retroactivity for acts that were not considered “criminal offences”, as in the case of Uganda,¹⁴⁷ or simply “crimes”, as in the case of Angola,¹⁴⁸ or “offences under the law”, as in the case of Tanzania,¹⁴⁹ with no clear indication as to whether international law is a source or can be used as a source of criminalisation.

The implications of such provisions for the domestic prosecution of international crimes are explored in greater detail in chapter three of this study.

What is significant, in spite of the apparent lack of consensus at the national level and, to some extent, the international level, is the argument that, for the prosecution of international crimes, it is the international rather than the strict national version of the principle of legality that has been recognised under International Humanitarian Law¹⁵⁰ and International Human Rights Law as being part of customary international law.¹⁵¹ Moreover, of all the countries that ratified the ICCPR, only Argentina reserved a right to subject the international version contained in the “Nuremberg-Tokyo sentence” to its constitution,¹⁵² which it later set aside through its jurisprudence.¹⁵³ So, whereas states are free to apply the strict national version of the principle in the prosecution of “ordinary crimes”, they are not bound to do so when confronted with the prosecution of

¹⁴⁶ Constitution of the Federal republic of Nigeria, 1999, art 36 (12) (emphasis added); see also the 1992 Constitution of the Republic of Ghana, art 19(11).

¹⁴⁷ Constitution of the Republic of Uganda 1995, art 28(7).

¹⁴⁸ Constitutional Law of the Republic of Angola 1992, art 36 (4).

¹⁴⁹ The Constitution of the United Republic of Tanzania 1998, art 13(6).

¹⁵⁰ JM Henckaerts & L Doswald-Beck *Customary international humanitarian law rules* (2005) Vol.1, rule 101, p 371.

¹⁵¹ Gallant (n 1 above) 370 & 404.

¹⁵² See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (accessed on 24 September 2011).

¹⁵³ Ferdinandusse (n 42 above) 229.

international crimes,¹⁵⁴ and, in fact, they may be in violation of international law if they do.

2.7 Conclusion

From this discussion, it is clear that the principle of legality is absolute and international law does not purport to waive it for any crime. However, the principle is applied in a flexible version in the prosecution of international crimes. This has yielded discrepancy in its application at the national and international levels. The basis for the divergent approaches is explained not so much by the civil-common law divide or monist-dualist debate, but rather by the apparent crystallisation of the concept of a “national principle of legality” and an “international or minimalist version of the principle of legality”.

One may consider also that there is indeed no need for such a distinction as it is the same principle of legality being applied at both levels. The difference really lies in the nature of crimes to which it is being applied. The universal nature and gravity of international crimes, as compared to national crimes, justify the argument that in the prosecution of such crimes states act on behalf of the international community¹⁵⁵ and, as such, are bound to apply the international version of the principle of legality in the domestic prosecution of international crimes. In fact, there are scholars who argue that those states that lack implementing legislation and yet insist on applying the national version of the principle of legality in prosecuting international crimes, violate their obligations under international law to prosecute such crimes.¹⁵⁶

This scenario has played itself out in Uganda, as well as in Kenya and Senegal, and will form the basis of discussion for the next chapters.

¹⁵⁴ Werle (n 48 above) 80.

¹⁵⁵ A Cassese, 'International criminal justice: is it needed in the present world community?' In G Kreijen et al *Sate, sovereignty, and international governance* (2002) 239, 258; Cryer (n 67 above) 85.

¹⁵⁶ Ferdinandusse (n 42 above) 264.

Chapter Three: The principle of legality and the prosecution of international crimes in Uganda

3.1 Introduction

As part of the effort to end a civil war which raged for over twenty years,¹⁵⁷ the Government of Uganda signed an agreement on accountability and reconciliation¹⁵⁸ with the Lord's Resistance Army (LRA), the rebel group accused of perpetrating war crimes and crimes against humanity during the war.¹⁵⁹ The agreement stipulated, among others, that the government, with a view to ensuring justice and accountability for atrocities committed during the war, was to create institutions and adopt an appropriate legal framework¹⁶⁰ to accommodate the gravity of the atrocities committed.¹⁶¹ An overview of the agreement demonstrates that the national rather than international jurisdiction was the forum preferred for implementing accountability.¹⁶² To this end, the government was to set up a special division of the High Court and stipulate the appropriate substantive law and rules of procedure to be applied by it. Such a division was established and designated the War Crimes Division of the High Court.¹⁶³ Recently it was re-designated the International Crimes Division of the High Court (ICD)¹⁶⁴ and, depending on the outcome of a current constitutional appeal to the Supreme Court,¹⁶⁵ it is set to preside over the first prosecution of a former LRA commander¹⁶⁶ for violations under the Penal Code Act (PCA)¹⁶⁷ and the Geneva Conventions Act.¹⁶⁸

However, the identification of a legal basis for the national prosecution of the atrocities committed in Northern Uganda was not an easy task. The application of the rigid national version of the principle of legality played a key role in inhibiting Uganda's

¹⁵⁷ See note 22 above.

¹⁵⁸ Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement (Juba Peace Agreement), 29 June 2007.

¹⁵⁹ See note 22 above.

¹⁶⁰ Juba Peace Agreement (n 158 above) parts 2 & 5.

¹⁶¹ Juba Peace Agreement (n 158 above) part 6.

¹⁶² As above.

¹⁶³ Annexure to the Agreement on Accountability and Reconciliation of 19 February 2008, art 7.

¹⁶⁴ The High Court (International Crimes Division) Practice Directions No. 10 of 2011 sec 3.

¹⁶⁵ See note 37 above.

¹⁶⁶ Refugee Law Project 'Witness to the trial: monitoring the Kwoyelo trial' 11 July 2011. Available at http://www.refugeelawproject.org/others/Newsletter_on_Kwoyelo_trial_progress_Issue_2.pdf (accessed on 3 August 2011).

¹⁶⁷ Penal Code Act Cap. 120 Laws of Uganda.

¹⁶⁸ Geneva Conventions Act Cap. 363 Laws of Uganda.

progress towards prosecution. This chapter illustrates this assertion and explores how Uganda could have used the international version of the principle of legality to enact its International Criminal Court Act with retrospective application or to apply customary international law directly to form a basis for the prosecution of the said atrocities.

3.2 Prosecuting past international crimes committed in Northern Uganda: the search for a legal basis

3.2.1 The Geneva Conventions Act

It has been argued that due to the grave nature and stigma attached to the crimes of genocide, crimes against humanity and war crimes, it is necessary for states to prosecute these international crimes as such, rather than relying on predicate crimes such as murder and rape in purporting to fulfil their treaty obligations.¹⁶⁹ These arguments are explored further in the discussion below. For many African states, the dilemma arising from such arguments is the often cited lack of legislation domesticating international crimes.¹⁷⁰ The narrow legal provisions proscribing “ordinary crimes” are all they have to fall back on in order to fulfil their duty to prosecute international crimes.¹⁷¹

For Uganda, the concept of international crimes under national law is not new. The Geneva Conventions Act, which was enacted in 1964, domesticates and criminalises grave breaches of the four Geneva Conventions.¹⁷² Given that it was enacted prior to the start of the conflict, the Act availed an almost obvious legal basis for prosecuting the atrocities committed in Northern Uganda without concerns about violating the principle of legality.

Unfortunately, even with this advantage, other technical challenges arose. The grave breaches regime under the Geneva Conventions is applicable only to international

¹⁶⁹ See Ferdinandusse (n 42 above) 274; see also, *Prosecutor v Michel Bagaragaza*, International Criminal Tribunal for Rwanda (ICTR) (30 august 2006), case no. ictr-05-86-art 11 *bis*, decision on rule 11 *bis*.

¹⁷⁰ See, referring to the general lack of implementing legislation for the Rome statute in Africa; M Nkhata 'Implementation of the Rome Statute in Malawi and Zambia: progress, challenges and prospects' in Murungu & Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 283; see also, C Ferstman 'Domestic trials for genocide and crimes against humanity: the example of Rwanda' (1997) 9 *African Journal of International and Comparative Law* 863.

¹⁷¹ For the case of Uganda, see Putting complementarity into practice (n 13 above) 59.

¹⁷² Cap 363 (n 168 above) sec 2.

armed conflicts. In this regard, the ICTY stated expressly in *Prosecutor v Dusko Tadic* that:

[a]lthough the language of the Conventions might appear to be ambiguous and the question is open to some debate ... it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts.¹⁷³

Uganda's indictment against the first LRA accused, Thomas Kwoyelo, includes grave breaches of the Geneva Conventions as one of the charges.¹⁷⁴ Although the case against Kwoyelo is *sub judice*, it is very likely that the prosecution, by including such a charge, seeks to argue that the war in Northern Uganda was in fact an international armed conflict between Uganda and Sudan,¹⁷⁵ on the basis that Sudan was involved in offering armed support to the LRA.¹⁷⁶

In order to prove that a non-international armed conflict has been internationalised through a second state's support for a rebel group, the Appeals Chamber in *Prosecutor v Tadic*¹⁷⁷ stipulated the "overall control test" which requires proof of the second state's involvement in organising, coordinating or planning the military actions of the rebel group,¹⁷⁸ beyond evidence of mere financial assistance or provision of arms.¹⁷⁹

Given the government's lack of capacity and resources to undertake effective investigations for the crimes committed during the war in Northern Uganda,¹⁸⁰ it is quite obvious that it would be an impossible task to gather evidence that proves Sudan's involvement in the conflict to a degree that discharges the high burden of proof in criminal matters,¹⁸¹ and that meets the established international standards.¹⁸²

To the extent that Uganda's Geneva Conventions Act only criminalises grave breaches, and given the uncertainty surrounding the nature of the conflict in Northern

¹⁷³ *Prosecutor v Dusko Tadic a/k/a "Dule"* International Criminal Tribunal for Yugoslavia (ICTY) (2 October 1995), decision on the defence motion for interlocutory appeal on jurisdiction, para 79.

¹⁷⁴ 'Uganda: Kwoyelo-state prefers 53 Charges' *The Monitor* 12 July 2011. Available at <http://allafrica.com/stories/201107120020.html> (accessed on 10 September 2011).

¹⁷⁵ Putting complementarity into practice (n 13 above) 60.

¹⁷⁶ 'LRA rebel pins Sudan on support' *The New Vision* 5th April, 2010. Available at <http://www.newvision.co.ug/D/8/12/715274> (accessed on 12 September 2011).

¹⁷⁷ *Prosecutor v Tadic*, ICTY (15 July 1999), T-94-1-A, para 84.

¹⁷⁸ As above.

¹⁷⁹ *Tadic Appeals Judgement* (n 177 above) para 137.

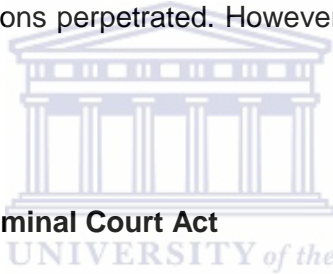
¹⁸⁰ Putting complementarity into practice (n 13 above) 63.

¹⁸¹ See *Woolmington v DPP* [1935] AC 462.

¹⁸² *Tadic Appeals Judgement* (n 177 above) para 137.

Uganda,¹⁸³ it is submitted that the Geneva Conventions Act offers no clear basis for a successful prosecution of the past atrocities committed in Northern Uganda. In fact, at the stage of the preliminary hearing, Kwoyelo's defence counsel raised an objection to the charge preferred under the Geneva Conventions Act, arguing that it was not backed by enough facts to show that the conflict in Northern Uganda was an international armed conflict.¹⁸⁴ Unfortunately, with no clear reasons, this objection was not pursued under the constitutional reference challenging Kwoyelo's prosecution.¹⁸⁵ In any case, it is submitted that this state of affairs diminishes the significance of the Geneva Conventions Act as a basis for prosecution.

It goes without saying that had Uganda domesticated the Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)¹⁸⁶ at the time of ratification in 1991,¹⁸⁷ technicalities surrounding the nature of the conflict in Northern Uganda would have been avoided, facilitating a focus on substantive issues of accountability for the violations perpetrated. However, no such action was taken, hence the foregoing dilemma.



3.2.2 The International Criminal Court Act

It has been said that the prosecution of international crimes in Uganda's domestic courts is tied to its International Criminal Court Act that was recently enacted to domesticate the Rome Statute.¹⁸⁸ However, the Act, in which so much hope was placed for the prosecution of past atrocities, in fact did not offer any solutions.¹⁸⁹ The Act defines and criminalises the core international crimes of genocide, crimes against humanity and war crimes.¹⁹⁰ Unfortunately, as noted in chapter one, the Act is of no relevance given that it

¹⁸³ C Mbazira 'Prosecuting international crimes committed by the Lord's Resistance Army in Uganda' in Murungu & Biegon (n 170 above) 215.

¹⁸⁴ RLP News letter (n 166 above).

¹⁸⁵ *Kwoyelo v Uganda* (n 36 above) para 55.

¹⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

¹⁸⁷ [http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) for date of ratification.

¹⁸⁸ Putting complementarity into practice (n 13 above) 59.

¹⁸⁹ See B Olugbo 'Positive complementarity and the fight against impunity in Africa' in *Murungu & Biegon* (n 170 above) 270.

¹⁹⁰ ICC Act of Uganda (n 15 above) secs 7, 8 & 9.

has no retrospective effect.¹⁹¹ The non-retrospectivity of the Act was justified on the basis that the principle of legality was embedded in article 28 of the Constitution of Uganda.¹⁹² This view is shared by many members of Uganda's legal fraternity, including some members of the judiciary.¹⁹³

The combined effect of the Geneva Conventions Act and the International Criminal Court Act is that Uganda's prosecution of international crimes is rendered more or less impossible.

However, it is submitted that, but for Uganda's application of the national version of the principle of legality, and to some extent, the role of political considerations, such eventuality could have been avoided. The International Criminal Court Act could have been enacted with retrospective application in compliance with the international version of the principle of legality, or in the alternative, customary international law could have been used as a basis for the prosecution of the international crimes. And all this would still have been in compliance with the principle of legality as encapsulated in article 28 of Uganda's Constitution. This argument is developed below.



3.3 Article 28, retrospectivity of the International Criminal Court Act and application of customary international law in Ugandan courts

The relevant paragraphs of article 28 of the Constitution of Uganda provide as follows:

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a *criminal offence* (emphasis added).

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum *penalty that could have been imposed* for that offence at the time when it was committed (emphasis added).

It has been observed that many countries adopt the international version of the principle of legality under the UDHR and the ICCPR even if they do not use the exact

¹⁹¹ Putting complementarity into practice (n 13 above) 60.

¹⁹² As above.

¹⁹³ Putting complementarity into practice (n 13 above).

language used in those instruments.¹⁹⁴ It has been observed also that simply because “international law” is not expressly mentioned in a country’s provisions on the principle of legality does not mean that the application of the international version of the principle in the prosecution of international crimes is not recognised,¹⁹⁵ and further that national provisions should not be “taken on face value but form one step in a more elaborate analysis” in locating the international version of the principle of legality.¹⁹⁶ It has been posited further that the international version of the principle, as contained in the UDHR and the ICCPR, was adapted to address non-retroactivity in common law states where written law is not a strict source of crime creation.¹⁹⁷ Indeed, two common law states, the United Kingdom and the Netherlands, have been noted to follow this international version in fulfilling their obligations to prosecute international crimes.¹⁹⁸

Uganda is a common law country.¹⁹⁹ The language used in article 28 of the Ugandan Constitution does not stipulate a strict requirement for written law in contrast to the express provisions in other constitutions such as that of Nigeria or Ghana.²⁰⁰ Furthermore, Uganda, unlike Argentina,²⁰¹ made no reservation to article 15 of the ICCPR. These facts provide a strong basis for an argument that article 28 of the Constitution of Uganda can be interpreted to by-pass the national version of the principle of legality, and accommodate the international version. Gallant even lists Uganda, alongside other countries like Malawi, Namibia, Benin, and Ethiopia, under that category of states which adopts the international version of the principle of legality although the language used under their constitutions does not state expressly so.²⁰² If such be the case, it follows that the international crimes of genocide, war crimes and crimes against humanity, being crimes under customary international law, were recognised as such under Ugandan law even prior to Uganda’s domestication of the Rome Statute. On an even broader reading, they were crimes under Ugandan law at the time the atrocities in Northern Uganda were committed.

¹⁹⁴ Gallant (n 1 above) 252.

¹⁹⁵ Ferdinandusse (n 42 above) 36.

¹⁹⁶ As above.

¹⁹⁷ Gallant (n 1 above) 253.

¹⁹⁸ As above.

¹⁹⁹ Uganda Joined the Commonwealth in 1962 when it gained independence from Britain. See Commonwealth Secretariat at <http://www.thecommonwealth.org/YearbookHomeInternal/139552/> (accessed on 9 September 2011).

²⁰⁰ See (n 146 above).

²⁰¹ See (n 152 above).

²⁰² Gallant (n 1 above) 252.

The foregoing proposition forms the basis of the argument that when Uganda adopted the International Criminal Court Act in 2010, it should have given the Act retrospective application. The retrospectively of the Act would serve to give the relevant Ugandan courts jurisdiction over international crimes already recognised under Ugandan law , without creating “new crimes” in violation of the principle of legality.

This proposition gains credence when it is appreciated that the definitions of the core crimes of genocide, crimes against humanity and war crimes under the Rome Statute are derived largely from the same crimes as they existed under customary international law, stretching as far back as the Nuremberg and Tokyo prosecutions.²⁰³

On this basis, it is argued that the essential content of the three core crimes under the Rome Statute is not substantially different from the position under customary international law.²⁰⁴ In fact, it has been posited that the need to determine whether the crimes under the Rome Statute are crimes under customary international law may soon be irrelevant.²⁰⁵

In view of the above, the retrospective application of ICC legislation has been implemented by countries such as Canada in its Crimes Against Humanity and War Crimes Act which was enacted in 2000.²⁰⁶ In a bold and innovative fashion, the Act criminalises crimes against humanity, genocide and war crimes, and defines these crimes to include acts that were recognised as criminal under customary international law.²⁰⁷ The Act then further stipulates as follows:

For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, *as of July 17, 1998*, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.²⁰⁸

This provision gives the Act retrospective application, allowing Canada to prosecute international crimes committed even prior to the entry into force of the Rome Statute.²⁰⁹ It also extends jurisdiction to international crimes committed prior to Canada’s signature

²⁰³ W Schabas *An Introduction to the International Criminal Court* (2007) 83-85.

²⁰⁴ Gallant (n 1 above) 369.

²⁰⁵ As above.

²⁰⁶ Crimes Against Humanity and War Crimes Act 2000 C 24. (Canada ICC Act). Available at <http://laws.justice.gc.ca/en/C-45.9/text.html> (accessed on 9 September 2011).

²⁰⁷ See the Canada ICC Act (n 206 above) Section 4 (3).

²⁰⁸ Canada ICC Act (n 206 above) sec 4(4) (emphasis added).

²⁰⁹ The Rome Statute entered into force on 1 July 2002.

and ratification of the Rome Statute.²¹⁰ The last part of the provision has been recognised also as providing for a wider definition of the crimes than the definitions under the Rome Statute,²¹¹ thereby addressing concerns that the core crimes of the Rome Statute are defined too narrowly as compared to their definition under customary international law.²¹²

This was not the first legislative initiative to be undertaken by Canada. On 16 September 1987, Canada amended its Criminal Code with retrospective effect, to incorporate the international crimes of genocide, crimes against humanity and war crimes.²¹³ A series of prosecutions based on these legal reforms ensued,²¹⁴ some even resulting in convictions for war crimes.²¹⁵

Such bold enactments have been explained by the fact that since Canada applies the international version of the principle of legality,²¹⁶ these legal reforms did not operate to criminalise retroactively conduct that was not already criminal at the time it was committed but, rather, simply extended retrospective jurisdiction by Canadian courts over already existing offences.²¹⁷

The same argument has been made and, it is submitted, rightly so, with respect to similar legal reforms undertaken by Senegal in its quest to prosecute Hissene Habre for torture.²¹⁸ This concept was used also by the Secretary-General at the time to justify the retrospective jurisdiction of the ICTY,²¹⁹ and is no doubt the same concept underlying the retrospective jurisdictions of the ICTY and ICC. On this basis, the ECOWAS ruling that the same concept would not apply to domestic courts has been rightly criticised as flawed.²²⁰

²¹⁰ Canada signed the Rome Statute on 18 December 1998 and ratified it on 7 July 2000. See ICC Legal tools data base at <http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/> (accessed on 9 September 2011).

²¹¹ See ICC Legal tools data base (n 210 above).

²¹² Schabas (n 203 above) 85.

²¹³ S AWilliams 'Laudable principles lacking application: the prosecution of war crimes in Canada' in L.H Timothy MacCormack et al (eds) *The Law of war crimes: national and international approaches* (1997) 159.

²¹⁴ See *Secretary of State v Luitjens* (1992); 48 F.T.R. 267; *R v Finta* (n 106 above).

²¹⁵ *Luitjens* (n 214 above).

²¹⁶ See Constitution Act of Canada (n 139 above).

²¹⁷ Williams (n 213 above) 157.

²¹⁸ See Spiga (n 5 above); see also Marks (n 40 above) 151.

²¹⁹ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, presented on 3 May 1993, S/25704, para 34 & 38.

²²⁰ Spiga (n 5 above) 18.

The foregoing concept also enabled a successful prosecution in *Attorney General of Israel v Eichmann*,²²¹ in which it was stated, with respect to the retrospective application of the Israeli and Nazi Collaborators Punishment Law of 1950, that:

the crimes of which the appellant was convicted must be seen as having constituted, since 'time immemorial,' a part of international law and that, viewed from this aspect, the enactment of the Law of 1950 was not in any way in conflict with the maxim *nulla poena*, nor did it violate the principle inherent in it.²²²

It is suggested that perhaps the confident reforms undertaken by Canada are grounded in the clarity of its constitutional provision which endorses unequivocally the international version of the principle of legality. Article 11 (g) of the Constitution Act of Canada provides expressly as follows:

Any person charged with an offence has the right ... not to be found guilty on account of any act or omission *unless, at the time of the act or omission, it constituted an offence under Canadian or International law or was criminal according to the general principles of law recognized by the community of nations.*²²³

Countries such as Uganda which have ambiguous constitutional provisions for so controversial an issue as the principle of legality do not benefit readily from the same assurance of expression, which may, to some extent, explain their timid approach to the principle in the domestic prosecution of international crimes. The appropriate remedy would be a constitutional amendment, or an appreciation of the versatile nature of the principle of legality rather than a rigid and unapprised insistence on a blanket application of its national version.

In the light of the above, it is submitted that there is no sound legal reason why, at the time of domesticating the Rome Statute, Uganda did not take the same bold steps as those taken by Canada and apply the International Criminal Court Act retrospectively or even incorporate the same reforms under its Penal Code Act. Had this been done, combined with the harmonisation of penalties under the Rome Statute with those under Ugandan law to avoid constitutional challenges on inequality,²²⁴ the International

²²¹ *Attorney-General of Israel v Eichmann* [1961] 36 ILR277, 288-83 (1968).

²²² As above.

²²³ Constitution Act of Canada (n 139 above). Emphasis added.

²²⁴ *Jowad Kezaala v Attorney General* Constitutional Petition No. 24 of 2010.

Criminal Court Act would have constituted a strong basis for the prosecution of the past atrocities committed in Northern Uganda.

3.3.1 The role of politics

While it is beyond the scope of this study to explore political inhibitions to prosecuting international crimes in domestic courts, it is noteworthy that the principle of legality may be manipulated politically to prevent prosecution. This has been suggested in respect of Senegal's failed attempt at prosecuting Habre²²⁵ and, arguably, could be relevant to Uganda also.

Perhaps the real explanation behind Uganda's prospective application of the International Criminal Court Act could be the political implications of its retrospective application. If Uganda in fact did consider the retrospective application of the Act, a pertinent question would have arisen as to how far back in history the Act was to be applied. This question is crucial considering that the present government has been accused of perpetrating atrocities in Luweero as far back as the 1981 military coup that was launched by the now ruling National Resistance Movement (then the National Resistance Army), led by President Museveni, against the government of the Uganda People's Congress led by former president Milton Obote.²²⁶

In the same regard, it is instructive to note that when Kenya's International Criminal Court Act was finally enacted it had prospective²²⁷ rather than retrospective application, contrary to expectations that it would apply retrospectively as a basis for the prosecution of crimes against humanity that were allegedly committed during Kenya's post-election violence in 2007.²²⁸ Under its recommendations on curbing impunity and enabling the prosecution of those responsible for the post-election violence, the report of the Commission of Inquiry into the Post-Election Violence in Kenya clearly directed that the ICC Bill of 2008 be fast-tracked and implemented into law,²²⁹ and that it be applied

²²⁵ See Marks (n 40 above) 159.

²²⁶ See generally, 'Otunnu demands investigation of Luweero triangle massacres' *Daily Monitor* 16 March 2010. Available at <http://africannewsanalysis.blogspot.com/2010/03/otunnu-demands-investigation-of-luweero.html> (accessed on 14 September 2011).

²²⁷ See note 15 above.

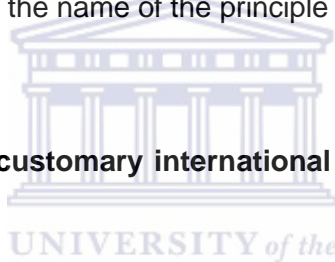
²²⁸ See generally, Report of the Commission of Inquiry into Post Election Violence in Kenya (CIPEV report) 16 October 2008. Available at http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-319092.pdf (accessed on 19 September 2011).

²²⁹ CIPEV report (n 228 above) 476.

by a special tribunal which was to be set up for the sole purpose of investigating and prosecuting those responsible for crimes committed during the post-election violence.²³⁰ It is inconceivable how Kenya's International Criminal Court Act, set to commence in 2009, was to be applied to atrocities committed in 2007 except by retrospective application. It is also curious to note that even under a new Constitution which embraces the international version of the principle of legality, there has been no amendment to the Act to ensure retrospective application and prosecution of the post-election atrocities.

The implication of the above observation is that, depending on the country's historical context, the principle of legality may be manipulated by political forces. It can be used as a weapon of attack by victors against the vanquished, as was the case in the Nuremberg and Tokyo prosecutions, or as a shield against prosecution, as is arguably the case in Uganda, Senegal and Kenya. Thus, in the prosecution of international crimes, one has to be skeptical of some of the reasons given for the non-retroactivity of legislation or prosecution in the name of the principle of legality.

3.4 Direct application of customary international law: a viable option in Ugandan Courts?



If the legislative approach proves unsuccessful, as it arguably did in the case of Uganda, customary international law itself remains a useful source for the courts to exploit the international version of the principle of legality and ensure the successful prosecution of international crimes. This option is desirable considering the view that if a state fails to fulfil its duty to criminalise international crimes by not legislating against them, it may remedy this failure through the direct application of international law in its domestic courts.²³¹

However, such a suggestion is not made without hesitation. It is acknowledged that the views on direct application of international law by courts, including customary international law, are divergent.²³² Some states only permit it where national law provides a specific reference to international law, others only permit it in respect of treaty

²³⁰ CIPEV report (n 228 above) 472.

²³¹ Ferdinandusse (n 42 above) 264.

²³² Ferdinandusse (n 42 above) 270.

law and not customary law, and still others expressly prohibit it.²³³ The reservations against customary international law appear to be partly because of the misguided idea that it is inferior to treaty law,²³⁴ a concept which has been rejected strongly by some scholars, who assert that the concept of a hierarchy of laws is alien to international law and that customary international law and treaty law are autonomous sources of law.²³⁵

The Australian Federal Court in *Nulyarimma v Thompson*,²³⁶ a case concerning the maltreatment of Aborigines, refused to recognise the customary international law offence of genocide in the absence of Australian law criminalising it at the time the acts sought to be prosecuted were committed. The court held that for genocide to be regarded as punishable nationally on the basis that it was a crime under international law, there had to be such an enabling provision under Australian law, failing in which, the principle of legality would be violated if the prosecution ensued.²³⁷

By contrast, in Hungary's attempts to prosecute war crimes and crimes against humanity after the communist era, its Constitutional Court recognised the binding nature of customary international law, the unique nature of international crimes, and their status as *jus cogens*, separating them from national crimes.²³⁸ The Court recognised that prosecution of international crimes was not dependent on national laws and that crimes under customary international law were governed by the international version rather than the national version of the principle of legality.²³⁹ Later, the Constitutional Court suggested expressly the direct application of customary international law in the absence of clear national legislative measures for the domestic prosecution of international crimes.²⁴⁰ This enabled numerous national prosecutions and convictions for international crimes in Hungary.²⁴¹

²³³ As above.

²³⁴ M E Villiger *Customary international law and treaties* (1985) 35.

²³⁵ As above.

²³⁶ *Nulyarimma v Thompson*, Federal Court of Australia, (1 September 1999), [1999] FCA 1192; See also *Buzzacott v Hill* Federal Court of Australia, (1 September 2000) 39 ILM (2000) 20.

²³⁷ *Nulyarimma* (n 236 above) para 22.

²³⁸ *Decision No. 53/1993, On War Crimes and Crimes Against Humanity*, Hungary Constitutional Court (13 October 1993) para 515-517 quoted by Ferdinandusse (n 42 above) 78.

²³⁹ *Decision No. 53/1993* (n 238 above) para 518.

²⁴⁰ *Decision No. 36/1996*, Hungary Constitutional Court, (4 November 1996), para II (2) quoted by Ferdinandusse (n 42 above) 80.

²⁴¹ See Ferdinandusse (n 42 above) 80.

Despite such contrasting approaches, it has been argued that for the consistent interpretation of international crimes, national courts are obliged to endorse the direct application of international law.²⁴²

Using the international version of the principle of legality, the same argument that the core crimes of genocide, crimes against humanity and war crimes already existed under Ugandan law prior to the implementation of the International Criminal Court Act and the Geneva Conventions Act, could be used to justify the direct prosecution of the crimes as they exist under customary international law.

The direct application of international law has been referred to as a process whereby a national court applies an international rule without it being transformed into a rule of national law.²⁴³ Thus, where a court bases part of its decision on international law or uses international law to interpret national law, or refers to international law as a basis for definition of the crimes being prosecuted, this would amount to a direct application of international law.²⁴⁴ In all cases, however, there has to be a rule of reference allowing the direct application.²⁴⁵ Such rule of reference may be for the substantive definition of certain acts, for jurisdictional purposes, or just a general rule of reference.²⁴⁶

In the context of Uganda, one envisages two options: using customary international law as the legal basis for the substantive definition and direct prosecution of international crimes; or re-characterising underlying crimes as international crimes.

The first option raises concerns as to the jurisdictional basis for a prosecution in Ugandan courts based solely on customary international law. Unlike countries like Kenya²⁴⁷ and South Africa,²⁴⁸ international law is not listed as one of the sources of law available to Ugandan judges.²⁴⁹ Uganda's High Court (International Crimes Division) Practice Directions confers upon the International Crimes Division jurisdiction over crimes stipulated under statutory law only.²⁵⁰ The Ugandan legal system is steeped in a highly positivist culture, so much so that it has been noted that international customary

²⁴² Ferdinandusse (n 42 above) 271.

²⁴³ AW Bradley & K Ewing *Constitutional and administrative law* (1993) 326; Werle (n 48 above) 76;

²⁴⁴ Werle (n 48 above) 76.

²⁴⁵ As above.

²⁴⁶ As above.

²⁴⁷ Constitution of Kenya (n 144 above) art 2(5).

²⁴⁸ Constitution of the Republic of South Africa 1996, sec 232.

²⁴⁹ Judicature Act Cap 13 Laws of Uganda; B Kabumba 'The application of international law in the Ugandan judicial system: a critical inquiry' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 84.

²⁵⁰ International Crimes Division Directions (n 164 above) sec 6.

law is virtually unknown in Ugandan courts.²⁵¹ In fact, some scholars have observed that while there has been some progress for the role of treaty law in Ugandan courts, there has been total silence on the role of customary international law.²⁵² Nevertheless, it has been suggested that some of the judges might, in theory, allow prosecutions using treaty law that has not been domesticated and may even be open to applying customary international law in the spirit of enforcing the Bill of Rights under the Constitution.²⁵³ However, it is not clear whether they would be prepared to accept it as a basis for prosecution of international crimes or whether they intend to use it merely as an interpretative guide.

Unlike their Ugandan counterparts, Kenyan judges appear more receptive of customary international law.²⁵⁴ Even before Kenya adopted its new Constitution, which recognises international law expressly,²⁵⁵ the Kenyan Court of Appeal adopted a rather progressive approach to customary international law when deciding a case involving gender discrimination in the distribution of a deceased's property. The court stated that customary international law could be applied by courts even in the absence of implementing legislation as long as it did not conflict with domestic law.²⁵⁶ The same principle has been applied in other Kenyan cases.²⁵⁷ The principle is grounded in some scholars' arguments that the customary international law is part of common law and national courts may apply it directly.²⁵⁸

However, the court used customary international law for interpretative guidance rather than as a basis for a remedy, maintaining it at a level inferior to statutory law.²⁵⁹ Moreover, it should to be noted that this progress is in the field of international human rights law. Similar progress by African courts in the field of international criminal law remains to be seen.

It has been argued that in the prosecution of international crimes, courts are bound to interpret all national requirements, including jurisdictional requirements, in a

²⁵¹ Putting complementarity into practice (n 13 above) 59 & 60.

²⁵² Kabumba (n 249 above) 105.

²⁵³ As above.

²⁵⁴ See JO Ambani 'Navigating past the 'dualist doctrine': The case for progressive jurisprudence on the application of international human rights norms in Kenya' in Killander (n 249 above) 30.

²⁵⁵ See (n 144 above) art 2.

²⁵⁶ *Mary Rono v Jane Rono* (2005) AHRLR 107 (KeCA 2005) para 21.

²⁵⁷ *Re The Estate of Lerionka Ole Ntutu* (Deceased) (2008) eKLRM; *RM v Attorney General* (2006) AHRLR 256 (KeHC 2006).

²⁵⁸ Ambani (n 254 above); Bradley & Ewing (n 243 above) 326.

²⁵⁹ Ambani (n 254 above) 30.

manner that allows for the “unimpeded effectuation of the different international obligations”.²⁶⁰ However, it is still very doubtful whether Ugandan courts would be prepared to take so bold a step as to entertain an indictment based on customary international law without clear legislative backing, given their conservative approach to the principle of legality and considering that the prosecutors themselves have not demonstrated a readiness to be creative with international law in conducting their prosecutions.²⁶¹

Moreover, at the very least, the need for a rule of reference either in the state’s Constitution or a statute is recognised as necessary for courts to apply international law directly.²⁶² Even the progressive approach adopted by Hungary was premised on a general rule of reference to international law in the Hungarian Constitution.²⁶³

To this end, the jurisdiction of Uganda’s International Crimes Division could be extended to crimes under customary international law with a view to encouraging curial innovation and confidence in relying on it to prosecute international crimes. The courts would rely also on the international version of the *nulla poena sine lege* principle to guide them at the sentencing stage.

Given the rigid rules of drafting of indictments under Ugandan law,²⁶⁴ concerns may arise relating to the format of an indictment based on customary international law. However, such concerns may be regarded as procedural matters which can be dealt with under the International Crimes Division regulations.²⁶⁵

The second option, which is less radical than the first, allows courts to use customary international law through the retrospective re-characterisation of national crimes as international crimes. This method is not prohibited by customary international law.²⁶⁶ However, it has been criticised as being prone to abuse, as judges are wont to exceed their jurisdiction by designating as criminal acts that are otherwise not criminal under customary international law.²⁶⁷ To avoid abuse, it has been suggested that the judge has to ensure that the act was a crime under international law at the time it was

²⁶⁰ Ferdinandusse (n 42 above) 271.

²⁶¹ Putting complementarity into practice (n 13 above) 60-61; see also Kabumba (n 249 above) 89-90 on the general reluctance of Ugandan lawyers to use international law in their case strategies.

²⁶² Ferdinandusse (n 42 above) 7.

²⁶³ Constitution of Hungary 1949, art 7 (1).

²⁶⁴ Trial on Indictments Act Cap 23 Laws of Uganda, secs 22-27.

²⁶⁵ See regulations at (n 164 above) sec 8.

²⁶⁶ Gallant (n 1 above) 367-68.

²⁶⁷ As above.

committed, and at the time it is being prosecuted, and that the sentence imposed must meet the requirements of the *nulla poena sine lege* principle.²⁶⁸

If the case against Kwoyelo proceeds, the International Crimes Division could use the above formula and recharacterise the fifty or so charges preferred against him, including counts of murder and kidnap with intent to murder, as war crimes or crimes against humanity. The international version of the *nulla poena sine lege* rule would guide the court similarly at the stage of sentencing. The court would have to pay close attention to whether the conduct of which the accused stands charged is prohibited under customary international law, by examining the relevant *opinio juris* and state practice.²⁶⁹

However, it is not clear what real value such a re-characterisation would have on the prosecution or how it actually would manifest. The technical rules under Uganda's Trial on Indictments Act require that an indictment must state the specific offence with which an accused is charged and the particulars thereunder.²⁷⁰ A conviction will be based, therefore, on the contents of the indictment. Thus, if an indictment is drawn for murder, an accused will be convicted of murder and not "a war crime of murder". It is difficult to imagine how a judgment condemning "war crimes" and concluding with a conviction for "murder" under the Penal Code Act would be of substantial impact. Perhaps the added value would lie in the nature of the court's reasoning, the use of facts relevant to determine the existence of the international crime, the reliance on customary international law and considerations of the atrocious nature of the offence in determining the gravity of the penalty imposed.

On the whole, the concept of direct application of international law is admittedly problematic and bound to be rejected instinctively by conservative courts.²⁷¹ In Ferdinandusse's words, what may be permissible under some jurisdictions may be viewed as impermissible judicial activism in others.²⁷²

In this regard, an argument may be made that in the prosecution of international crimes, states need not bother with the intricacies of customary international law when they simply can prosecute predicate crimes.

²⁶⁸ As above.

²⁶⁹ As above.

²⁷⁰ Trial on Indictments Act (n 264 above) sec 22.

²⁷¹ Paust (n 99 above) 672.

²⁷² Ferdinandusse (n 42 above) 272.

3.5 Prosecuting predicate crimes: a viable way out for Uganda?

With an International Criminal Court Act that is not retrospective, a Geneva Conventions Act that only criminalises grave breaches, and no legal basis for the application of customary international law, Uganda found itself in a situation that has been dubbed the “zero solution”,²⁷³ having to rely on ordinary criminal law to prosecute international crimes.²⁷⁴ The Penal Code Act seemed to be the best available basis for prosecuting the international crimes committed in Northern Uganda without complications regarding the principle of legality. Indeed, the indictment against Kwoyelo was based almost entirely on the Penal Code Act, except for one count under the Geneva Conventions Act.²⁷⁵

However, some issues arise in relation to prosecuting predicate crimes in place of international crimes. The first is whether such a prosecution would be the same as a prosecution of international crimes *per se*, and the other is whether such prosecution satisfies the requirements of complementarity under the Rome Statute.

3.5.1 Homicide *per se* is not a war crime

Although international law does not prohibit the practice,²⁷⁶ there is near unanimity against the concept of prosecuting underlying crimes in substitution for international crimes, based on the simple fact that these crimes fall under different categories. This view was expressed clearly in *Prosecutor v. Bagaragaza*,²⁷⁷ where the ICTR appeals chamber stated that:

[i]n the end, any acquittal or conviction and sentence would still only reflect conduct legally characterised as the “ordinary crime” of homicide ... The penalisation of genocide protects specifically defined groups, whereas the penalisation of homicide protects individual lives.²⁷⁸

The case involved a request under rule 11 *bis* of the ICTR rules of procedure and evidence, for a referral to Norway of the case against the accused for prosecution by Norwegian courts. Under this rule, the ICTR could make such a referral only if it was

²⁷³ Werle (n 48 above) 77.

²⁷⁴ As above.

²⁷⁵ See RLP news letter (n 166 above).

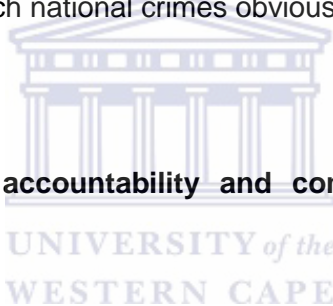
²⁷⁶ Werle (n 48 above) 77.

²⁷⁷ *Bagaragaza* (n 169 above).

²⁷⁸ *Bagaragaza* (n 169 above) para 17.

satisfied that the state to which the referral was being made had jurisdiction over the crimes with which an accused was charged.²⁷⁹ As Norway lacked a specific law proscribing genocide, which was the charge against the accused, its request for referral was denied.

The overall simple effect of *Bagaragaza* is that a prosecution for murder is not the same as a prosecution for war crimes, genocide or crimes against humanity. The distinction between the two categories of crimes has also been made on the basis of the nature and gravity of international crimes. Prosecutions for underlying crimes have been criticised for failing to capture the gravity of international crimes which have been said to be “far more grievous” than underlying crimes.²⁸⁰ Criticism has been made also that reducing international crimes to multiple predicate crimes has the overall effect of “turning them into banalities”.²⁸¹ States are also bound to prosecute international crimes on the basis that they are impugned by all states as shocking and against human conscience,²⁸² a status which national crimes obviously do not enjoy.



3.5.2 Predicate crimes, accountability and complementarity under the Rome Statute

Even with such strong resistance against predicate crimes, an argument could be made that if the objective of international criminal law is to ensure accountability and end impunity, it really does not and should not matter in what form the impugned conduct is prosecuted.

Such an argument may be understood better if viewed in the light of the principle of complementarity under the Rome Statute. This context is especially significant for Uganda, given the concerns that persist over Uganda’s ability to prosecute the war crimes allegedly committed in Northern Uganda,²⁸³ and the crucial question of whether the case it referred to the ICC against top LRA commanders, including Joseph Kony,

²⁷⁹ ICTR Rules of procedure and evidence 29 June 1995, Rule 11 *bis*.

²⁸⁰ Slaughter n (41 above) 175.

²⁸¹ J Klabbbers ‘The spectre of international criminal justice: third states and the ICC’ in A Zimmermann & UE Heinz (eds) *International criminal law and the current development of Public International law: proceedings of an international symposium of the Kiel Walther Schucking Institute of International law* (2002) 59.

²⁸² Slaughter n (41 above) 175.

²⁸³ Olugbuo (n 189 above) 273.

can be referred back to the national courts on the basis that Uganda's legal system is now able to prosecute the accused persons.²⁸⁴ Such an inquiry is also pertinent considering the high support for holding the LRA accountable before domestic courts.²⁸⁵

It is interesting to note that although the significance of predicate crimes was discussed during the negotiation process of the Rome Statute, it arose under the rule against double jeopardy and not the principle of complementarity.²⁸⁶ Nevertheless, it is submitted that the conclusions that were reached give some insight into the intention of the drafters with regard to the significance of predicate crimes under the principle of complementarity. The issue arose as to whether accused persons could be tried by the ICC if they had been prosecuted previously by other courts for "ordinary crimes".²⁸⁷ It was concluded, in effect, that a prosecution and conviction for an "ordinary crime" was sufficient and was excluded from the exceptions to the rule against double jeopardy.²⁸⁸ In fact, arguments as to the deterrent effect of the ICC prosecuting the accused for international crimes *per se* were not convincing to the majority of the negotiators.²⁸⁹

The ICC later had to contend with a similar discussion in context of the principle of complementarity. Article 17 (1) (a) of the Rome Statute provides that a case is inadmissible where:

*The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.*²⁹⁰

This provision, coupled with article 1²⁹¹ of the Rome Statute, has been considered to contain the principle of complementarity.²⁹²

The concern raised in relation to the prosecution of predicate crimes can be answered by a definition of "the case" in the above provision. This was considered recently by the ICC in Kenya's challenge on admissibility for crimes against humanity

²⁸⁴ As above.

²⁸⁵ P Pham & P Vinck 'Transitioning to peace: a population-based survey on attitudes about social reconstruction and justice in Northern Uganda December 2010 39. Available at http://www.law.berkeley.edu/HRCweb/pdfs/HRC_Uga2010final_web.pdf (accessed on 12 September 2011).

²⁸⁶ RS Lee *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results* (1999) 56-58.

²⁸⁷ Lee (n 286 above) 57.

²⁸⁸ Lee (n 286 above) 58.

²⁸⁹ As above.

²⁹⁰ Rome Statute (n 29 above) (emphasis added).

²⁹¹ Article 1 provides that the ICC jurisdiction is complementary to national jurisdiction.

²⁹² Lee (n 286 above) 42 & 43; Olugbuo (n 189 above) 251.

allegedly committed during the post-election violence, in *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.²⁹³ In determining the validity of Kenya's admissibility challenge under article 19 of the Statute, the Court held as follows:

Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and *substantially the same conduct* as alleged in the proceedings before the Court.²⁹⁴

Although the decision turned on a determination of whether Kenya was actually investigating the impugned conduct at the time summons and arrest warrants were issued against the accused persons,²⁹⁵ it is submitted that the case does provide an insight into the adequacy of prosecuting predicate crimes instead of the core international crimes themselves. The minimum requirement to investigate "substantially the same conduct" means that the state is not obliged to investigate and prosecute *exactly* the crime of genocide, war crimes or crimes against humanity, but rather the same *conduct* that is proscribed under these crimes, such as murder, rape or kidnap with intent to murder.

Viewed in this light, it is argued that since the ICC, an institution whose purpose is to end impunity for international crimes, considers the prosecution of predicate crimes as sufficient to meet the principle of complementarity then, by all means, for the sake of ending impunity, if a state is able to prosecute only predicate crimes and not international crimes *per se*, as may be the case in Uganda, Kenya or Senegal, it should be at liberty to do so without criticism.

Moreover, it should be appreciated that most victims of atrocity are not the sophisticated or elite. Few of them know the intricacies of the formal justice system, let alone the technicalities of defining crimes. According to a recent survey done in Northern Uganda, nearly half of the respondents have had no contact with the formal justice system.²⁹⁶ And yet, many agreed that accountability in the form of holding trials was

²⁹³ *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali (Kenya's challenge on admissibility)*, International Criminal Court (30 August 2011), No. ICC-01/09-02/11 O A.

²⁹⁴ *Kenya's challenge on admissibility* (n 293 above) para 39 (emphasis added).

²⁹⁵ *Kenya's challenge on admissibility* (n 293 above) para 40.

²⁹⁶ *Transitioning to peace* (n 285 above) 40.

necessary for the sake of justice.²⁹⁷ It is inconceivable that for people who have had almost no interaction with formal criminal justice, the prosecution of a rape or murder of a loved one would be of any less significance if pursued as a predicate crime instead of an international crime. Furthermore, it is contended also that in certain cases, such as Uganda, prosecution using domestic legislation might offer a stronger sense of justice for victims, given that local legislation designates a maximum penalty of death for underlying crimes such as murder²⁹⁸ and rape,²⁹⁹ while the highest penalty for international crimes under the International Criminal Court Act and the Geneva Conventions Act is life imprisonment.³⁰⁰

3.5.3 Logistical considerations

For African countries, prosecuting predicate crimes could mean avoiding the financial and other challenges associated with prosecuting international crimes, such as legal and institutional reforms needed for setting up of special tribunals, training of judges, and sometimes even employing of international judges as many have recommended.³⁰¹ Such reforms exert pressure on states' already fragile economies or, where such reforms are dependent on donor funds, may render them vulnerable to donor influence,³⁰² which in turn may compromise the independence of the transitional justice process. For example, Senegal's budget to effect similar legal reforms amounted to 28 million Euros,³⁰³ while Uganda's International Crimes Division's budget depends largely on donor support.³⁰⁴

However, it is cautioned that reliance on underlying crimes should not be used as a first or long term option for states,³⁰⁵ for it is indeed desirable that international crimes be prosecuted *per se* for the reasons already given above. In addition, reliance on underlying crimes poses a risk of retarding the development of international crimes in

²⁹⁷ As above.

²⁹⁸ PCA (n 167 above) sec 189.

²⁹⁹ PCA (n 167 above) sec 124.

³⁰⁰ ICC Act of Uganda (n 15 above) secs 7, 8 & 9; Geneva Conventions Act (n 168 above) sec 2.

³⁰¹ Olugbuo (n 189 above) 274; Putting Complementarity into practice (n 13 above) 67.

³⁰² See Putting complementarity into practice (n 13 above) 81-82.

³⁰³ K Neldjingaye 'The trial of Hissene Habre in Senegal and its contribution to international criminal law' in Murungu & Biegon (n 170 above) 189.

³⁰⁴ See Putting complementarity into practice (n 13 above) 81-82.

³⁰⁵ Werle (n 48 above) 77.

domestic jurisdictions, and may be used as a tool to entrench the hesitation of national judges to venture beyond the familiarity of their national criminal codes.³⁰⁶

3.6 Conclusion

The inhibiting role played by the national version of the principle of legality in Uganda's quest for prosecution of international crimes is evident in the legislature's application of the Rome Statute with prospective effect, the courts' reluctance to apply customary international law and the prosecutors' extensive use of the Penal Code Act to prosecute underlying crimes in Uganda's first domestic prosecution before the International Crimes Division.

It is clear that countries such as Canada have taken bold and innovative steps towards ensuring that international crimes *per se* are prosecuted in domestic courts by giving overt constitutional recognition to the international version of the principle of legality in relation to international crimes. Other countries like Hungary have applied customary international law progressively in the domestic prosecution of war crimes and crimes against humanity, backed by the express constitutional reference to the role of international law in domestic law. Uganda's legal system lacks similar structures, which may explain its resistance towards the international version of the principle of legality.

However, Uganda's experience also demonstrates that when viewed in the context of justice and accountability for atrocities, the prosecution of predicate crimes may suffice and, in some instances, may even provide a better option to prosecuting international crimes, in view of a state's economic and social capacities.

However, in no case should the underlying crimes option be allowed to inhibit Uganda's or any other state's efforts to extricate itself from the clutches of the national version of the principle of legality in the prosecution of international crimes. In such context, the national version should be viewed as an impediment to the fulfilment of a state's obligations under international law,³⁰⁷ which contravenes the principles of the Vienna Convention on the Law of Treaties.³⁰⁸

³⁰⁶ Ferdinandusse (n 42 above) 276.

³⁰⁷ Ferdinandusse (n 42 above) 264.

³⁰⁸ See, The Vienna Convention on the Law of Treaties, (23 May 1969), UNTS 331, art 27.

Chapter Four: Concluding remarks and recommendations

This study has sought to investigate whether the principle of legality is a bar to the domestic prosecution of past atrocities in Africa. The ECOWAS court ruling against Senegal³⁰⁹ seems to have silenced this inquiry in the affirmative. However, viewed in the context of the preceding discussion, the ECOWAS court ruling is but a typical representation of the resistance against applying the international version of the principle of legality in the prosecution of international crimes in domestic courts.

The study establishes that the principle of legality is absolute - it is not waived for any crime and especially not for international crimes. However, for these crimes, given their prior recognition under customary international law, their inherently evil and proscribed nature are presumed to be foreseeable facts accessible by all states and, in consequence, all citizens within those states. As a result, while a strict application of the principle of legality would be understandable in the prosecution of national crimes, it would not be in the prosecution of international crimes, even where the prosecution occurs in a domestic court. This is because the crime remains an international crime, retaining its unique attributes as such a crime, regardless of the court in which it is being prosecuted. The study situates this dichotomy in the national and international versions of the principle of legality, the national version requiring the existence of a prior domestic statute proscribing a crime and the international version recognising the existence of international crimes under both treaty and customary international law even in the absence of a prior domestic statute.

The study uses the case of Uganda to argue that constitutional provisions that do not require expressly the application of the national version of the principle of legality can be interpreted progressively, so as to accommodate the international version of the principle and enable the domestic prosecution of international crimes within the bounds of the constitution. For those African states which have clear constitutional provisions that impose the national version of the principle of legality in respect of all crimes, including international crimes, constitutional amendments could be made to accommodate the international version, as has been done already by some African states such as Rwanda and Senegal. Kenya's new Constitution expressly embraces the

³⁰⁹ ECOWAS ruling (n 3 above).

international version, but it remains to be seen whether the provision will be put to use to secure the prosecution of atrocities committed during the 2007 post-election violence.

Once this approach is endorsed, the principle of legality becomes a perceived rather than real challenge to the domestic prosecution of international crimes. Using the international version, states can proceed to enact legislation incorporating international crimes with retrospective effect. In this regard, it is recommended that in order better to ground the intended prosecution of atrocities allegedly committed in Northern Uganda, the International Criminal Court Act of Uganda could be amended and given retrospective effect so as to grant the International Crimes Division jurisdiction over the alleged atrocities. This approach would render unnecessary the discussions about the nature of the conflict in Northern Uganda and would enable the prosecution of the atrocities that were perpetrated there with the same level of stigma and gravity as are associated with international crimes.

The same course of action can be taken by Kenya to enable the prosecution of crimes against humanity that allegedly were perpetrated during its 2007 post-election violence.

This study recognises the role that politics has to play in the realisation of these recommendations. This is especially true in the case of Kenya where proposals for a special tribunal to prosecute the post-election atrocities have been voted down continuously by members of Kenya's political circles who resist accountability.³¹⁰ Indeed it was this lack of political will to ensure domestic accountability that eventually prompted the UN Secretary-General at the time to turn to the prosecutor of the ICC for an international remedy. The study cautions that the principle of legality may be used sometimes to mask political considerations that may be the real hindrance to domestic prosecutions of international crimes.

By using the international version of the principle of legality, states can also prosecute directly the crimes as they existed under customary international law at the time they were committed. However, this may require certain legislative measures to confer upon courts the necessary jurisdiction and may also require a degree of progressiveness from the courts. Failing this, courts simply could re-characterise

³¹⁰ ICTJ 'The Kenya transitional Justice Brief Criminal Accountability, the ICC and the Politics of Succession' 1 April 2011. Available at <http://ictj.org/sites/default/files/ICTJ-KEN-Transitional-Justice-Brief-1-1-2011.pdf> (accessed on 24 September 2011).

national crimes as crimes under customary international law. However, the full benefit of such re-characterisation is not so clear.

The implementation of these suggestions requires a considerable amount of innovation from a state's lawmakers, judges and prosecutors. Should innovations with the international version of the principle of legality prove to be not feasible for a given state, there is always the option of prosecuting predicate crimes, as Uganda opted to do in the first prosecution of a former commander of the LRA. As has been argued, the ICC does not regard this approach as an unacceptable measure for ensuring accountability. In fact, had there been the political will, prosecuting predicate crimes should have been the first option for Kenya's 2007 post-election violence before any considerations of legal reforms or the creation of a special tribunal. It would have prevented the referral of the case to the ICC for Kenya's inability to prosecute.

The study posits that all the foregoing recommendations can be implemented in domestic courts by local judges who are familiar with the cultural, social and political context of their states,³¹¹ without the need for expensive ventures that might make international criminal justice seem expensive for and foreign to African states and which may serve only to postpone the realisation of accountability. It is acknowledged that there may be a need for extensive training of the local judges, prosecutors and investigators in the application of new international law principles,³¹² but the cost of such an undertaking by no means compares with the cost that setting up a hybrid or special court or the remuneration of foreign judges would entail.

Considering all the options available to African states, the major question posed by this study is answered in the negative: the principle of legality does not and certainly should not bar the domestic prosecution of international crimes in Africa.

Given the extent of atrocities they have witnessed, of all the reasons given by African states as impediments to holding perpetrators of such atrocities accountable in domestic courts, the principle of legality should occupy the last place or ought to be struck off such a list. States like Uganda, which find themselves in a situation where domestic legislation offers no firm basis or no basis at all to enable a domestic prosecution of international crimes, should not hesitate to explore the international version of the principle of legality using the options discussed above. In so doing, they

³¹¹ See C Bassiouni & Z Motola *The protection of human rights in African criminal proceedings* (1995) 361.

³¹² See Putting complementarity into practice (n 13 above); Kabumba (n 249 above) 106.

appreciate the unique nature of international crimes and the attendant innovation that prosecuting them may require. As one scholar puts it:

Once it is realised that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to the inadequacy of the municipal law of any given state *determined to punish war crimes* recedes into the background.³¹³

17,967 words excluding bibliography



³¹³ H Lauterpacht 'Law of nations and the punishment of war crimes' (1994) 21 *British Year Book of International Law* 67(emphasis added).

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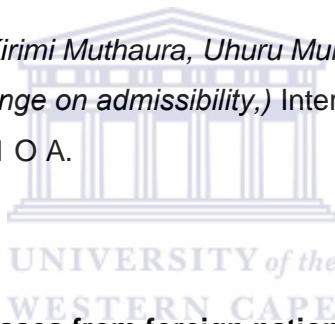
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