

FACULTY OF LAW, UNIVERSITY OF WESTERN CAPE (UWC), SOUTH AFRICA

**THE RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL JURISDICTION FOR
'CORE CRIMES' UNDER INTERNATIONAL LAW-A CRITICAL ANALYSIS**



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A Research Thesis submitted in the Faculty of Law at the University of Western Cape, in partial fulfillment of the requirements for the degree of Masters of Laws (*Magister Legum*) in Transnational Criminal Justice and Crime Prevention.

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ABSTRACT

With regard to the establishment of legislative frameworks for investigating and prosecuting genocide, crimes against humanity and war crimes at both national and international level, a number of pertinent issues come up concerning the Court which should have primacy to deal with a particular case. States have had a variety of options at their disposal, such as complementarity, exclusivity, subsidiarity and concurrent jurisdiction principles. As a rule, these experiences find their limits in the full criminalisation of conduct that is also punishable before the international criminal tribunals under international law, ignoring the fact that international law does not provide definite guidance with respect to a number of questions in relation to interaction between national and international jurisdiction *vis-à-vis* the 'core crimes.' In addition, a considerable increase in the content of international law and divergences in various legal systems in criminal law, both general and special, since the end of World War II, influence the effective prosecution of 'core crimes.' Against this background; this work is organised into five chapters. Chapter one gives a general introduction and background to the study. Chapter two will set out the present international legal framework governing the prosecution of 'core crimes' in national courts and a description of the relevant practice in various states. Chapter three will examine critically the jurisdiction and overlaps of the international courts and *ad hoc* tribunals, along with the corresponding models of international criminal justice of exclusivity, subsidiarity, complementarity and concurrent jurisdiction. Chapter four seeks to discuss the optimal relationship based on interactions between national and international jurisdictions. It will also include the merits and limits of both jurisdictions, basing on existing precedents and legislation. Finally, Chapter five contains a summary of conclusions drawn from the whole study and winds up with a set of recommendations.

KEY WORDS

Highlighted below, are ten key concepts that are central to the entire study:

- International Criminal Law
- International criminal Court and *ad hoc* tribunals
- National Courts
- Primacy
- Complementarity
- Concurrent Jurisdiction
- Core Crimes
- Genocide
- Crimes against Humanity
- War Crimes



DECLARATION

I, Charity Wibabara, hereby declare that the work presented in this thesis entitled “The Relationship between National and International Jurisdiction for ‘Core Crimes’ Under International Law-A Critical Analysis” is original. It has never been presented before in UWC or any other University. Where other people’s works have been used, references have been provided.

Signature:

Charity WIBABARA

Date: 28 October 2009



LIST OF ABBREVIATIONS AND ACRONYMS

Art.	: Article
Ed(s).	: Edition or editor
<i>et al.</i>	: <i>et alii</i> (and others)
G.A/Res.	: General Assembly Resolution
<i>Ibid.</i>	: <i>Ibidem</i> (same book, same author, and at same page)
ICC	: International Criminal Court
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for the former Yugoslavia
<i>Id.</i>	: <i>Idem</i> (same book, same author, different page)
IHL	: International Humanitarian Law
<i>Inter alia</i>	: among other things
No.	: Number
NGO's	: Non Governmental Organisations
Para.	: Paragraph
RPE	: Rules of Procedure and Evidence
U.S.A	: United States of America

UWC	: University of Western Cape
UN Doc.	: United Nations Document
UN	: United Nations
IMT	: International Military Tribunal
VStGB	: German Code of Crimes against International Law (<i>Völkerfgesetzbuch</i>)
CAHWCA	: Crimes against Humanity and War Crimes Act
CCL	: Control Council Law
SCSL	: Special Court for Sierra Leone
STL	: Special Tribunal for Lebanon
StGB	: German Criminal Code (<i>Strafgesetzbuch</i>)
U.K	: United Kingdom
Vol.	: Volume
V.	: Versus



DEDICATION

To GOD, the Father, the Son and the Holy Spirit,

Who loved me and in His grace gave me unfailing courage

and a firm hope

2 Thessalonians 2:16.



To My parents in Rwanda,

Faith MUKAKALISA and Andrew KAGABO,

WESTERN CAPE

for the endless love, encouragement, and advice.

For everything you've done for

me, Mum, I thank you.

What more could I ask?

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Most importantly, my deepest gratitude goes to my immediate and extended family for their unflagging love and encouragement throughout my life; I am indebted to my mother *Abwori*; for her faith in me, I cannot ask for more from her. It was under her watchful eye that I gained so much drive and an ability to tackle challenges head on. I have no suitable word that can fully describe her as she is simply perfect. Mother, I love you.

I would like to express my heart-felt gratitude to my loving friend Fleury Davy ARAKAZA, for being there before, throughout, and till the very year in which this thesis was born. His unwavering love was undeniably the core upon which I relied. To all my friends, and classmates whom I could not mention due to the constraint of space, I am truly grateful. I greatly value the friendship and cherish the prayers and support between me and them.

Finally, the financial support of DAAD is gratefully acknowledged. The scholarship was not only a turning point in my life, but also a wonderful experience. I was delighted to interact with all the various world-class researchers organized by the program.

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CHAPTER ONE: GENERAL INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction

The extensive analysis of core crimes under chapter two and three of this research paper, indicates that 'core crimes' under international law are; genocide, crimes against humanity, war crimes, and in the event of future agreement, of the definition, the crime of aggression.¹ Their prosecution can be enforced both by international (direct enforcement) and national courts (indirect enforcement). The parallel existence of direct and indirect enforcement mechanisms can lead to situations in which national and international courts simultaneously claim jurisdiction to prosecute.² The jurisdictional relationship between national and international courts regarding core crimes is mainly governed by principles of complementarity, subsidiarity, exclusivity, concurrent or parallel jurisdiction. Basically, jurisdiction depends on whether domestic or international courts take precedence.

1.2 Statement of the problem

The relationship between national and international criminal justice systems has been regulated in various ways,³ such as **exclusive jurisdiction** where the International Military Tribunal (hereinafter the IMT) dealt with trials of the major German war criminals of World War II while

¹ See Art. 5, Rome Statute of the International Criminal Court (hereinafter the ICC Statute), adopted on 17 July 1998, which entered into force on 1 July 2002, (UN Doc. A/CONF.183/9).

² G. Werle, *Principles of International Criminal Law*, (2009), 2nd ed., Marginal no. 223, at 81.

³ A. Cassese, *International Criminal Law* (2008), 2nd ed., at 336 *et seq.*

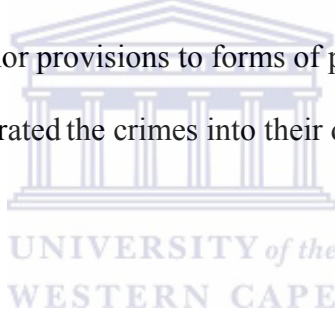
other perpetrators were to be tried in the countries of commission. As regards **concurrent jurisdiction**, established by the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), conflicts are resolved according to the principle that international tribunals have primacy over national courts, contrary to the **complementarity model** of the International Criminal Court (hereinafter the ICC), where national jurisdictions take precedence as a rule. Equally, states entitled to exercise jurisdiction have given priority to the territorial state, or the state of nationality of the offender, by virtue of the **subsidiarity principle**, which requires a state to defer its jurisdiction to a state with a closer nexus to the case.⁴

The novelty of these principles resides in the fact that the law distributes competences between national and international jurisdictions. Yet, for the rest, the law follows territoriality as well as nationality principles as the basis for determining competence. These interactions between national and international proceedings have sparked renewed interest in the possibility of identifying jurisdictional overlaps between the two judicial bodies. Can the overlaps between national and international courts therefore conceivably qualify as competing or overlapping jurisdictions? i.e. jurisdictions that have the potential of addressing in parallel, the same disputes, involving the same parties and issues. The issue revolves around which Court has priority and which is the optimal in a particular case and circumstance to deal with core crimes. Primarily, the responsibility for punishing international crimes lies with states even in cases where the

⁴ W. A. Schabbas, C. Stahn and M. M. El Zeidy, "The International Criminal Court and Complementarity: Five Years On," 19 *Criminal Law Forum* (2008), at 3. For a detailed discussion, see C. Ryngaert "Applying the ICC statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States acting under the Universality Principle" 19 *Criminal Law Forum* (2008), at 158.

“international character” of the crimes urged the creation of international mechanisms for repression.⁵

Consequently, the prosecution of international crimes by criminal courts raises numerous legal, practical and policy questions. Firstly, how do courts deal with inconsistencies between domestic laws and the international rules they are meant to implement? Secondly, what argument can be discerned in practice to determine the role of international law in national prosecutions? These questions become all the more important in the light of the fact that few, if any, national legal systems regulate the ‘core crimes’ in full accordance with international law. Many national laws are incomplete, from relatively minor provisions to forms of participation and complete crimes.⁶ Most states have either not incorporated the crimes into their domestic laws, or they have done so using different forms of wording.



Furthermore, many national laws diverge from international law in their formulation of the ‘core crimes’ and corresponding rules. For example, numerous national laws define the groups protected against genocide differently than do the relevant international instruments which protect national, ethnic, racial and religious groups. Where national laws are incomplete or divergent, the question arises whether direct application of international law in core crimes itself can provide the legal basis for national prosecution.⁷ In a world where national laws often proscribe international crimes in an incomplete or deficient manner, this question has

⁵ M. M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 *Michigan Journal of International Law* (2002), at 869.

⁶ W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), at 16 *et seq.*

⁷ *Id.* at 17.

considerable practical relevance for the enforcement of international criminal law. Undoubtedly, the relationship between these two bodies of law is not always clear.

Ferdinandusse on one hand suggests that, core crimes can be prosecuted in national courts on the basis of national criminal law or through direct application of international criminal law. As to the first, core crimes prosecuted on the basis of national law can be charged both as ordinary crimes e.g. murder in a national penal code or as international crimes e.g. genocide in a national penal code. Ferdinandusse, on the other hand, asserts that direct application of international criminal law normally takes place through a rule of reference in national law which can be very specific or more general.⁸ However many countries have no recent case law on the specific question of direct application of core crimes law for a national prosecution.

In light of the above, it appears that the gaps in the allocation of judicial competence to prosecute core crimes, may lead to a situation where criminals are likely to escape prosecution, first at the national level, and, if need be, at the international level. This is contrary to the rationale laid down in various legal instruments of putting to an end the impunity for perpetrators of 'core crimes.'

1.3 Scope

A precise definition of the scope is needed in order to keep this research within a manageable magnitude. Thus, the scope of this research will be limited to focusing on the relationship

⁸ *Ibid.*

between national and international criminal justice approaches in regard to the international offences of genocide, crimes against humanity, war crimes and the crime of aggression, the so called 'core crimes.'

1.4 Significance of the study

The importance of this research paper lies in illustrating the available options of how national and international relationship can be structured. A critical analysis of the actual structure of the interaction between international and national courts tends to show that beyond the institutional question, the requirement to exhaust local remedies triggers a mechanism allowing internal jurisdictions to impose an obligation on their respective states to respect binding international obligations.



In addition, this work will demonstrate how inadequate domestication of the 'core crimes' in national legislation might prevent individual states from exercising their primary jurisdiction in criminal proceedings. To this end, this work looks to see whether flawed national legislative implementation of the core crimes amounts to unwillingness or inability of the state to prosecute genuinely.

The research paper seeks to encourage further critical research in this field, hereby helping to burgeoning literature that deals with the structural framework for the organisation of relations among overlapping jurisdictions in the contemporary international legal order. This study therefore aspires to serve as a useful tool for academics and practitioners alike.

1.5 Objectives

In view of the above-mentioned research questions, the objectives of this research include identifying the growing jurisdictional interaction between national and international jurisdictions, for example, their parallel involvement in the same or related disputes in the light of competing theoretical, ideological and methodological discourses on the nature of the relationship and the means to regulate it.⁹ In particular, it aims to look at what, if any, rules of international law could, or perhaps should govern such interactions.

1.6 Methodological approach



This work will largely be based on library research, which means that the primary and secondary sources, as well as references, will be international instruments, treaties and conventions, law reports, leading textbooks on international criminal law, law journal articles, comments and case notes, and internet sources bearing on the topic.

⁹ Y. Shany, *Infra* note 67 at 1 *et seq.*

CHAPTER TWO: STATES' PROSECUTION OF CORE CRIMES WITHIN THE INTERNATIONAL LEGAL ORDER

This chapter deals with the legal basis of prosecution of core crimes in selected states and the processes by which those states have implemented or are implementing the substantive offences under international law particularly those contained in the ICC and the *ad hoc* tribunals' statutes.¹⁰ Implementation is necessary due to the fact that, there is an international legal responsibility to protect against genocide, war crimes and crimes against humanity and national sovereignty does not preclude its exercise.¹¹ The duty and responsibility of states to protect targeted victims of such crimes, and indeed to prevent these atrocities from occurring, can be found in multiple international law instruments explicitly or by reasonable inference.¹² In line with this problematic duty to prosecute, is the question whether these crimes are covered by special criminal offense definitions in national criminal law, or simply by general criminal

¹⁰ ICC Statute, *Supra* note 1, Arts. 6-8 illustrate the ICC's jurisdiction over genocide, crimes against humanity and war crimes. See also ICTY statute, Arts. 2-5 and ICTR statute, Arts. 2- 4 which provide the tribunals with jurisdiction over genocide, crimes against humanity and war crimes.

¹¹ See D. Aronofsky, "The international legal responsibility to protect against genocide, crimes against humanity and war crimes," in 13 *ILSA Journal of International and Comparative Law* (2007), at 317. It is proposed that national and international practice does not unequivocally support a duty to prosecute by instituting criminal proceedings in all instances. Despite the fact that the core crimes of international law rest on the norms of *jus cogens* and as such give rise to obligations *erga omnes*; actual state practice does not support the position that states have a general duty to prosecute international crimes. In fact, national prosecutions take place rarely.

¹² Following the ICC statute, *Supra* note 1, Preamble 6; the establishment of an ICC is justified among other things in light of the fact that it is the duty of every state to exercise national jurisdiction over those responsible for international crimes. In the same way, under the statutes of the ICTY and ICTR, all member states of the UN have a duty to arrest and surrender defendants, and co-operate in gathering evidence. Similarly, the Geneva Conventions' principle of *aut dedere aut judicare* demonstrates a duty to prosecute or extradite. Furthermore, the 1948 Genocide Convention, specifically Art. 6 on subsidiarity, the Universal Declaration of Human Rights Conventions, and the International Covenant on Civil and Political Rights; all recognise the rights of innocent people to be free from atrocities conducted either in armed conflicts or under more covert circumstances where states lend support to unofficial illegal acts or, at times are unable or unwilling to protect their populations from their occurrence.

offense definitions in the criminal code or by reference to international law including customary international law or international treaty law such as the ICC statute.

From the above, reliance upon 'ordinary crimes' may fall short of criminalisation in international law, and thus the state may violate its duty to enact with manifestation of the seriousness that is embedded in the international crimes. In some cases, the special legislation that is introduced is unsatisfactory. And even if the definitions correspond to those of international law, other aspects such as the modes of liability set forth for example in the genocide convention are sometimes overlooked or inadequately addressed by the application of ordinary criminal law principles.¹³

The above problem is based on the assumption that the criminal law systems of individual countries treat international crimes differently. In many countries acts that can be classified as international crimes can only be punished according to criminal offences as defined in the general or ordinary criminal law, such as man's slaughter or assault offenses. This is the case, in Austria, Israel and Turkey and was also true for the Federal Republic of Germany until the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*, hereinafter the VStGB) went into effect, whereby it is remarkable that in implementing the genocide convention of 1948, Austria, and Israel established special criminal offences usually following the ratification of the Geneva conventions of 1949 covering war crimes in the general criminal code or in a special military criminal code. Yet in some other countries, punishment of crimes against humanity is only possible under provisions of the general criminal law. Among such countries are Finland, Italy, Russia, and the USA, to cite only a few examples. In contrast, France's

¹³ See, R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2007), at 61-63.

criminal law contains special criminal provisions prohibiting genocide and crimes against humanity, but not war crimes.¹⁴ As a restraint, a treaty such as the ICC statute binds Canada as a country, but in the Canadian view, its provisions do not affect internal law until they have been implemented by legislation. Even if the preamble of the ICC were perceived to state an international duty to prosecute, no direct obligation would automatically arise within the domestic legal order.

Notably, as regards the practicability of national trials, there are a number of examples of prosecution of crimes under international law by domestic courts. Most involve the application of domestic criminal law, but some apply international criminal law. For instance, crimes under international law perpetrated by Nazis were not only punishable by the IMT and allied military tribunals but were also prosecuted on a large scale by domestic legal systems after 1945. As in West Germany, crimes under international law were frequently prosecuted on the basis of general criminal law; that is killings, were classified as murder, not as crimes against humanity or war crimes.¹⁵ However, some proceedings against Nazi perpetrators were also conducted in express reliance on international criminal law.¹⁶ Like the IMT charter, Art. II of the Control Council Law (CCL) No. 10 granted the occupation tribunals jurisdiction over crimes against peace, war crimes, and crimes against humanity.¹⁷

¹⁴ A. Eser, U. Sieber and H. Kreiker (eds.), *National Prosecution of International Crimes* (2005), Vol. 5, at 6.

¹⁵ G. Werle and T. Wandres, *Auschwitz vor Gericht* (1995), in G. Werle, *Supra* note 2, Marginal no. 295, at 109.

¹⁶ *Ibid.* The trial of Adolf Eichmann before the District Court of Jerusalem in 1961 is particularly significant.

¹⁷ S. R. Ramer and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2001), 2nd ed., at 189.

Comparative experiences in the common law tradition with that of the civil law tradition confirm significant differences in terms of the manner in which countries address international crimes. As a result, basic differences in common and civil law traditions, on issues such as the finality of judgment, appeals against acquittals, and determination of the same act, influence the correlation. While some countries apply a narrow interpretation of the same act, covering only the conduct in law (the offence), other states give it a broader meaning whereby the conduct both in law and in fact is covered. While German VStGB formulates the criminal offense definitions independently and in great detail in order to satisfy the German constitutional principle of legality *nullum crimen, nulla poena sine lege*, which is relatively strict in international comparison, various codifications in other nations simply refer generally to customary international law.¹⁸

The above discussion provides a representative overview of the legal basis of national prosecution of core crimes while the states' practice nevertheless provides insight into the various ways in which domestic criminal law can be used to respond to such crimes.

Surprisingly, even with the duty to prosecute which regrettably, national laws rarely feature a provision with the same compelling force as international law; state practice does not contain many cases of complaints or requests by members of the international community to prosecute persons without any link to the requesting state. The simple reason is that in their day-to-day dealings, states still tend to cling to the old dogma of respect for the internal affairs of other international subjects, and prefer prosecuting on the basis of traditional jurisdictional principles of territoriality and nationality.

¹⁸ See for example the Canadian Crimes against Humanity and War Crimes Act 2000 (CAHWCA) or to the offense definitions of the ICC statute in the English Criminal Court (2001).

2.1 The legal basis of national prosecution

As an alternative to international courts and tribunals, there are, various possibilities for national prosecution; trials in the offenders' or victims' country, in the country where the offence occurred, or in third-party countries. Notwithstanding this, a critical question will be which criminal law principles of jurisdiction, does the universal, territorial and personal scope of jurisdiction over international crimes base? This question lies on the hypothesis that the individual countries extend to different degrees their national criminal law over extraterritorial offenses. While the German VStGB subjects all international crimes to an unrestricted universality principle,¹⁹ most other criminal law systems do not go to these lengths, but rather assert solely a territorially and/or a personally limited national prosecutorial competence.²⁰

The problem of conflicting jurisdictions arises when one or more states may assert their criminal jurisdiction over a specific crime on the basis of one of the accepted heads of jurisdiction and at the same time the international tribunal is empowered to adjudicate the same crime by virtue of its statute.²¹ As a response, there are no general international rules determinative of this matter, just as there are no international customary rules designed to resolve the question of concurrent jurisdiction of two or more states, by giving pride of place to one legal ground of national jurisdiction (say, territoriality) over another such ground (say, passive nationality).²²

¹⁹ That is to say, the VStGB permits German jurisdiction over all international crimes regardless of the place of commission.

²⁰ For example over offences committed domestically and over offences committed by or against their own citizens

²¹ A. Cassese, 2nd ed., *Supra* note 3, at 338.

²² *Id.*, at 339.

2.1.1 Trial in the country where the offence occurred, (territoriality)

As an option, if the trial is conducted in the country where the offence occurred, which sometimes is also the domicile of the victim, third party witnesses and real evidence will be locally available.²³ Normally the territoriality principle is preferred, particularly for ideological reasons such as the need to affirm the territorial sovereignty. Remarkably, the struggle against impunity in states where crimes have been perpetrated has proven more successful in recent years. Also worthy of note have been investigations and prosecutions for crimes against humanity and genocide in Brazil, Peru, Guatemala, Uruguay and Rwanda, for instance the *Gacaca* trials.



2.1.2 Trial in the offender's or victims country (nationality)

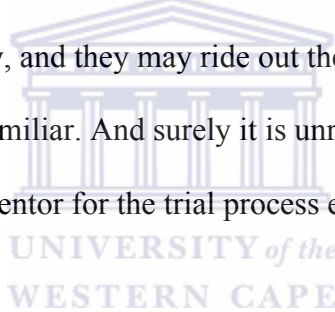
More often than not, individual criminality is repressed by the culprit's national authorities though by experience, system criminality is commonly repressed by international tribunals. Under traditional jurisdictional rules, of course, the state of the offender's or victim's nationality, or the state where the offence took place, could prosecute violations of the laws of war,²⁴ under theories of active and passive personality or protective principle though practically all its imaginable uses in relation to international criminal law overlap with territorial, nationality or

²³ G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law; The Experience of International and National Courts*, (2000), Vol. 1, at 395.

²⁴ *Id.*, at 402.

passive personality jurisdiction.²⁵ However, people should reasonably expect to be governed by the laws of the state in which they are found.

Significantly, a trial in the offender's own country has often been the only feasible alternative, where the defendant can be taken into custody without extradition or intrusions on foreign territory to make an arrest.²⁶ Countries that seek to preserve or restore their international standing will in fact wish to prosecute their own offenders, even if there is a potential political cost in doing so with local constituencies.²⁷ It is worth adding that trial in the victim's national courts is another important option due to the fact that victims gain the reassurance that their claims will be heard with sympathy, and they may ride out the traumatic events of trial with less human cost if the procedures are familiar. And surely it is unrealistic to expect a victim to travel willingly to the country of his tormentor for the trial process except in extraordinary circumstances.²⁸



2.1.3 The representative principle (vicarious administration of justice)

The representative principle is an auxiliary one, applying in case of a crime committed by a foreigner abroad who is present in a given territory and has not been extradited either due to lack of request by a foreign state or other possible grounds. Additionally, the principle in question applies only when the jurisdiction of the domestic courts over the perpetrator of the crime cannot be based on any of the principles recognised by domestic law. The representative principle is not

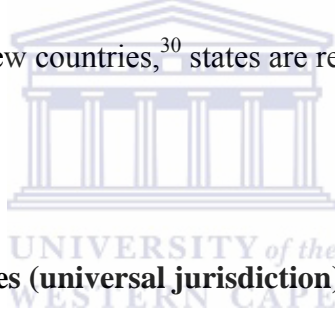
²⁵ R. Cryer *et al.*, *Supra* note 13, at 43.

²⁶ G. Kirk McDonald and O. Swaak-Goldman (eds.), *Supra* note 23 at 394.

²⁷ *Ibid.*

²⁸ *Ibid.*

provided for in most domestic provisions but can be traced in various international conventions.²⁹ Germany is among the few countries which include the representative principle (*Stellvertretend Strat Rechtspflege*) in domestic legislation. This is the principle according to which German criminal law applies to an offence committed abroad by a foreigner who is in Germany, but cannot be extradited as provided under the German Criminal Code section 7 (2) 2. In critically analysing the alternatives to international prosecution, the main underlying reason *inter alia*, for the lack of prosecutions, even based on the territoriality or nationality principles, is that serious violations of International Human Rights or International Humanitarian Law (hereinafter IHL) are usually committed on behalf of or with the complicity of the state. And consequently with exception of a few countries,³⁰ states are reluctant to incorporate core crimes in their national laws.



2.1.4 Trial in third-party countries (universal jurisdiction)

The new dynamic as mentioned above provides that, states may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim, and whether or not the accused is in custody in the forum state.³¹

International instruments, however, do not regulate which state has priority when the courts of

²⁹ For instance, Art.5(2) Law 1782/1988 on the ratification of the 1984 Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

³⁰ Countries with Universal Jurisdiction include *inter alia* Germany, Canada, Sweden, Netherlands and Spain.

³¹ A. Cassese, *International Law* (2005), at 452. Perhaps the most famous national war crimes trial asserting universal jurisdiction remains the Israel trial of Adolf Eichmann, who had been head of the Jewish office of the German Gestapo. Eichmann was charged with crimes against the Jewish peoples and crimes against humanity.

more than one country intend to exercise jurisdiction over the same offence.³² Actually offenders may miscalculate and travel to third countries, supposing that they are safe from legal process.³³

In summary, it is healthy as it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case. Although genocide, crimes against humanity and war crimes can be prosecuted as domestic offences, their definitions and implementation are not always in harmony with international law as discussed in the following section.

2.2 The core crimes under domestic law; trends in state practice

As presented below; it was deemed appropriate to focus on a relatively limited number of countries to provide a representative overview of the legal bases of national prosecution of core crimes. These crimes are suitably defined under international law, however when states implement these crimes they do not quite follow the model of international criminal law by either narrowing or broadening them which causes fragmentation:

2.2.1 Genocide

In Greece, when the conduct violates the life of the members of a group, as described in Art. 6 of the ICC statute, it falls within in the *actus reus* of murder. Like in many countries, a significant

³² H. Fischer, C. Kreß, and S. R Lüder, (eds.), *International and National Prosecution of Crimes under International Law, Current Developments* (2004), at 850.

³³ Cf. G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 395.

defect which arises from the application of domestic laws to genocidal acts of murder is the inability of the provisions to cover the intent to destroy in whole or in part, the members of the group. As a result, the genocidal intent, which is the *mens rea* element distinguishing genocide and murder, can be covered with great difficulty by any legal construction of domestic law.³⁴

In comparing the international genocide definition³⁵ with Estonian penal law,³⁶ the latter defines the crime of genocide as follows:

“A person who, with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, a group resisting occupation or any other social group, kills or tortures members of the group, causes health damage to members of the group, imposes coercive measures preventing child birth within the group or forcibly transfers children of the group, or subjects members of such group to living conditions which have caused danger for the total or partial physical destruction of the group, shall be punished by 10 to 20 years imprisonment or life imprisonment.”

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Analysing the text of the article, it appears that it differs from the pertinent provisions of the ICC statute and the 1948 Genocide convention on several points. The most crucial difference between the definitions consists in defining the circle of groups which extends its application to the genocidal acts committed against groups resisting occupation. Furthermore, by the phrase ‘or any other social group’, the nature of the crime of genocide is left open to cover a much wider scale of social groups than those enlisted in the international definition of this crime.

³⁴ A. Eser, U. Sieber and H. Kreiker, *Supra* note 14, at 198.

³⁵ Like Art. 2 of the 1948 Genocide Convention, Art. 6 of the ICC statute defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within a group and forcibly transferring children of the group to another group

³⁶ Estonian Penal Law, §90 of the Penal Code passed on 6 June 2001 and entered into force 1 September 2002, as amended to date.

2.2.2 Crimes against humanity

It is submitted that though the drafters of the VStGB were excessively cautious on drafting core crimes, admittedly there are some differences with the Rome statute. The definition of crimes against humanity in the VStGB departs in several respects from the definitions in Art.7 of the ICC statute, in regard to both the chapeau and certain specific offences. In the chapeau, the VStGB does not define the phrase widespread or systematic attack directed against any civilian population as closely as Art.7 (2) (a), which specifies that such attack must also be pursuant to or in furtherance of a state organisational policy to commit such attack.³⁷ Besides that slight difference, the treatment of apartheid (a crime which did not previously exist in German law) in the new VStGB departs somewhat from the approach of the Rome statute, again because of a perceived lack of certainty in the ICC statute, Art.7(2)(h) explains that apartheid is constituted, as a separate crime against humanity..... In German law, by contrast, the acts constituting apartheid are treated as an aggravating factor if the intent defined in Art.7 (2) (h) is present in relation to any other crime against humanity.

However, divergent challenges are manifested in hybrid courts. An example being the internationalised court system in Kosovo, which *inter alia* has jurisdiction over genocide, crimes against humanity and war crimes. It applies Kosovo's domestic law, which unfortunately leaves some gaps. For instance, there are no provisions on crimes against humanity.

³⁷ D. McGoldrick, at Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal And Policy Issues* (2004), at 381.

2.2.3 War crimes

Though the French penal code (*code pénal*) authorises the punishment of acts amounting to war crimes, for example, crimes of homicide, torture and rape, all of which are war crimes if committed in a situation of armed conflict, as indeed is the case in the criminal laws of all states; there is no reference to war crimes as such. On addition to making a declaration under Art.124, refusing to accept the jurisdiction of the ICC for seven years in cases of alleged war crimes committed on its territory or by its nationals, French law still has inconsistencies with Art. 8 of the ICC statute: In particular, the lack of any provisions concerning violations of humanitarian law occurring in non-international armed conflicts.

On the contrary, even when a country's legislation on the repression of grave violations of IHL has been widely cited as a model of national implementation of the criminal aspects of the statute, its enforcement in most cases is distinctively controversial, i.e. Belgium. Hence one can affirm that there are many treaties to which countries are bound as states, but which have no applicability in national law.

2.2.4 Aggression

The lack of definition of the crime of aggression in the ICC statute certainly poses difficulties regarding the selection of the appropriate domestic provision applicable thereto. This criminal offence has had little practical significance, and thus the researcher deems it appropriate to have no further discussion concerning its domestic applicability.

In conclusion of this chapter, the crime of genocide, crimes against humanity and war crimes are international crimes whose elements cannot be changed by one of the states without affecting the legal consequences attached to the corresponding crime. In other words, if universal jurisdiction is attached to a certain crime as defined by international law, a change in the definition could also change the scope of the jurisdiction attached to this crime. This is why there is always a necessity of a coordinated relationship between international courts and domestic tribunals to intervene in dealing with the aforementioned crimes.



CHAPTER THREE: THE ESTABLISHED RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL JUSTICE

This chapter examines the relationship of national courts with the international criminal tribunals in prosecution of the core crimes, all of which emerged after World War II. After briefly describing the relationship of the two courts that arose directly from the war and that long ago completed their work, the Nuremberg and Tokyo tribunals, it turns to two ongoing tribunals that emerged from horrific contemporary conflicts, the tribunals for the former Yugoslavia and Rwanda. The chapter further examines the ICC complementary relationship and concludes with a brief note on the overlaps between the international order and municipal legal systems.

Whenever two legal systems or regimes can each exercise jurisdiction over the same issues, some mechanism will usually be developed in order to determine which one precedes first. A more recent mechanism is that in the case of core crimes, the ICC acts in parallel with national justice systems, which are also positioned to prosecute the offences in question.³⁸

3.1 The jurisdictional models and their extent of hostility *vis-à-vis* each other

Under this section, the underlying question is “to what extent can a situation be better addressed by the international tribunal or court’s model?” This question is attributed to the recognised relationships within the international legal arena. As pointed out by Schabbas, at times what is established as a relationship between international justice and national justice is far from

³⁸ W. A. Schabbas, *An Introduction to the International Criminal Court*, (2007), 3rd ed., at 171.

complementary. Rather, the two systems function in opposition and to some extent with hostility *vis-à-vis* each other,³⁹ as elaborated in the following sub-sections.

3.1.1 The Principle of Exclusivity (The Nuremberg scheme)

Like the Tokyo tribunal,⁴⁰ the Nuremberg charter regulated the jurisdiction of the IMT according to the principle of exclusivity, as far as trials of the major German war criminals of World War II were concerned.⁴¹ Jurisdiction was only granted to the country of commission for other perpetrators.⁴² Under this scheme an international court was entrusted with the task of dealing with the major leaders accused of international crimes, whereas national courts were called upon to handle the criminal offences of minor culprits.⁴³ Minor Nazi war criminals would be judged and punished in the countries where they committed crimes, while the major war criminals, whose offences had no particular geographical localisation would be tried and punished by a joint decision of the government of allies.⁴⁴ Major or minor status depended on rank rather than the seriousness of the crime charged.

³⁹ *Id.*, at 175.

⁴⁰ R. John Pritchard, "The International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia, 3 *International Criminal Law Journal (ICLJ)*, at 1 *et seq.*

⁴¹ See Art.1 of the London agreement (Agreement for The Prosecution and Punishment of Major War Criminals of the European Axis).

⁴² *Id.*, Art. 4.

⁴³ A. Cassese (2008) 2nd ed. *Supra* note 3, at 344.

⁴⁴ "Anglo-Soviet-American Communiqué", From the Tripartite in Moscow, 1/11/ 1943, (Supp), (1994) 38 *AJIL* 3.

3.1.2 The principle of Subsidiarity (the nexus scheme)

Under the principle of subsidiarity as understood here, bystander states, when asserting universal jurisdiction, defer to the territorial state or the state of nationality of the presumed offender if the latter is genuinely able and willing to prosecute. As already cited, it resembles the principle of complementarity, set forth in Art.17 of the ICC statute, pursuant to which the ICC only declares a case admissible in case a state fails to genuinely investigate and prosecute it. This article is strongly in favour of the application of a subsidiarity test. This test implies that, at a normative level, bystander states should give priority to states with a stronger nexus to the situation, either the territorial or the national state, as far as reasonably possible, i.e., insofar as that state honors the interests of justice. The subsidiarity test differs from the complementarity test because the former operates at a horizontal inter-state level, whilst the latter operates at a vertical international institution *v.* state level. However, recent developments in national state practice demonstrate that prosecutors and courts in various countries such as Germany, Spain, France, and Belgium tend to apply the principle of subsidiarity in various forms.

From case law, the Spanish court in its decision of December 2000 stresses that this principle of subsidiarity is part of international *jus cogens*, and that it has crystallized in Art.6 of the genocide convention, and more recently in Art.17 *et seq.* of the ICC statute.⁴⁵ The court then requires that for applicability of the principle of subsidiarity; the prosecution has to provide sufficient evidence showing that either there are legal obstacles to proceedings in the territorial state, or that the judiciary of that state is inactive because of pressure, harassment or intimidation.

⁴⁵ Decision of 4 November 1998 of the Criminal Division of the National Court, Plenary Session, Appeal Record 84/98. For a detailed discussion, see H. Fischer, C. Kreß, and S. R Lüder, *Supra* note 32, at 846-857.

3.1.3 The principle of Concurrent jurisdiction (*Ad hoc* tribunals' scheme)

The creation of the *ad hoc* international criminal tribunals in the 1990s has also preserved a central role for national courts.⁴⁶ Each of the international tribunal has jurisdiction over genocide, crimes against humanity and war crimes. In contrast to the Nuremberg model, the ICTY and ICTR statutes recognise the concurrent jurisdiction of national courts. Conflicts are resolved according to the principle that the international tribunals take precedence:⁴⁷

“The international tribunal shall have primacy over national courts. At any stage of the procedure, the international tribunal may formally request national courts to defer to the competence of the international tribunal.”⁴⁸

The relevant rules however do not lay down the absolute primacy of the tribunal, they provide that concurrent jurisdiction of the tribunal and national courts may lead to the prevalence of the latter, and that the tribunal may divest itself of a case when it considers that the case may more appropriately be tried by a national court.⁴⁹ In sum, primacy is not automatic even in the *ad hoc* tribunals,⁵⁰ because the prosecutor must still seek an order from the trial chamber. Nonetheless, as a rule, both *ad hoc* international tribunals can exercise “primacy” over national courts, that is, the right to require national courts to defer to the international tribunal in a particular case. This

⁴⁶ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 401.

⁴⁷ See ICTY statute, Art. 9(1), see also ICTR statute, Art. 8(1). For more details visit the Yugoslavia tribunal, webpage available at <<http://www.un.org/icty>>, accessed in July 2009. Also visit the Rwanda tribunal, available at <<http://www.ictt.org>>, accessed in August 2009. Important to note is that the ICTR's jurisdiction over the core crimes is limited to where they occurred in Rwanda, or were committed by Rwandans in neighboring states, between 1 January and 31 December 1994. The ICTR has primacy in the same way as the ICTY which has jurisdiction over core crimes committed after 1 January 1999 on the territory of the former Yugoslavia.

⁴⁸ ICTY and ICTR Rules of Procedure and Evidence (RPE), Rule 9.

⁴⁹ *Id.*, Rule, 11*bis* ICTY RPE.

⁵⁰ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 405.

power was used by the ICTY to obtain jurisdiction over Omarska camp-guard Duško Tadić, a prosecution originally brought forward in German national courts, and to discourage the government of the Muslim-Croat Federation in Bosnia and Herzegovina from attempting to indict former Bosnian Serb President Radovan Karadžić and Bosnian Serb General Ratko Mladić when the ICTY was itself preparing indictments.⁵¹ Critically, it was argued that the establishment of the international *ad hoc* tribunals with primacy over national courts infringes national sovereignty.⁵²

The Security Council did not though suppose that these international tribunals could handle all war crimes from the Yugoslav prosecutions and Rwandan conflicts, thus leaving some cases under national courts' prosecutions. Several European states have prosecuted cases arising out of the Yugoslav conflict, where defendants were discovered among refugee populations, although the success of these prosecutions is limited.⁵³ In Rwanda, hundreds of thousands of Hutus took part in the slaughter of almost a million Tutsis. This huge number of criminal participants in the genocide definitely hindered the idea of delegating all cases to the ICTR.

The court most similar to the *ad hoc* tribunals is the special court for Sierra Leone, (SCSL) which is a separate legal entity with primacy over the national courts of Sierra Leone and encompasses jurisdiction over the core crimes.⁵⁴ While the *ad hoc* tribunals enjoy primacy over

⁵¹ *Id.*, at 403.

⁵² G. K. Sluiter, in H. Fischer *et al.*, (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (2001), at 681. A contrary opinion is that in R. Cryer *et al. Supra* note 13, at 107, where in the Tadić case; the tribunal also determined that owing to the membership of the former Yugoslav states in the UN, primacy did not violate the sovereignty of the former Yugoslav states.

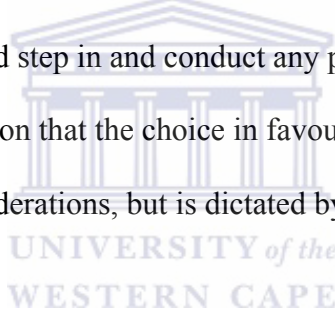
⁵³ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 401.

⁵⁴ See SCSL, Arts. 1-5. See web page of the Special Court for Sierra Leone, available at <<http://www.sc-sl.org>>, accessed in August 2009.

any national court, the SCSL and the special tribunal for Lebanon (STL) have been granted treaty based primacy only over the courts of Sierra Leone and Lebanon respectively.

It is important to note that concurrent jurisdiction and right of primacy of the *ad hoc* tribunals have led to anomalies arguably inconsistent with an equal standard of justice, because of the differences in punishment available in the international and national courts.

From the above, the possibility of disparate sentences also exists under the Geneva conventions' universal jurisdiction, where it may be a matter of chance in which country an offender is arrested and prosecuted, the U.N tribunals' right of primacy creates a dramatic challenge to equal justice, since the U.N tribunal could step in and conduct any particular prosecution.⁵⁵ This therefore affirms Kelsen's conclusion that the choice in favour of primacy of international law cannot be based on scientific considerations, but is dictated by ethical or political preferences.⁵⁶



Conclusively, primacy for the ICTY and ICTR was designed to prevent state parties from conducting sham proceedings absolving their own nationals,⁵⁷ in the shadow of the memory of the notorious Leipzig trials after World War I.

⁵⁵ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 403.

⁵⁶ H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts-Beitrag zu einer reinen Rechtslehre* in A. Cassese, (2008) 2nd ed., *Supra* note 3, at 216.

⁵⁷ *Cf.* Statute of the ICTR, Art.9 (2) (b) (principle of *non bis in idem* or double jeopardy does not apply where national court proceedings were designed to shield the accused from international criminal responsibility, ICTY Statute, *Supra* note 47, Art. 10 (2)(b).

3.1.4 The principle of Complementarity (ICC scheme)

The ICC statute seems to give a more central role to national courts, reversing the doctrine of primacy found in the *ad hoc* tribunals. The treaty creates jurisdiction of the ICC over genocide, war crimes and crimes against humanity,⁵⁸ but always subject to the principle of complementarity, that the ICC is only meant to supplement national court proceedings. In fact, international jurisdiction does not replace national jurisdiction, even for core crimes, but only supplements it.⁵⁹ The Court may well have jurisdiction over a case, in the sense that the alleged international crime was committed subsequent to 1 July 2002, on a territory of a state party to the statute, or by a national of a state party, or where there has been a Security Council referral or a declaration accepting jurisdiction by a non-party state. But if the case is being investigated or prosecuted by a state with jurisdiction over the crime, the prosecutor must demonstrate that it is 'unwilling or unable genuinely.'⁶⁰

The question of course, arises as to what is meant by 'unwillingness' or 'inability' of a state to prosecute or try a person accused or suspected of international crimes. Accordingly, be it as it may, the content of both "unwillingness" and "inability" remains rather unclear and it could create problems in applicability, for no indication is given as to the methods or standards to be used, in order to prove those concepts. Darfur is the single situation to come before the Court

⁵⁸ However, the jurisdiction of the ICC over the crime of aggression is conditional upon the adoption of its definition.

⁵⁹ See, G. Werle, *Principles of International Criminal Law* (2005), at 69.

⁶⁰ W. A. Schabas, *Supra* note 38, at 171. For detailed information, see the International Criminal Court, available at <<http://www.icc-cpi.int>>, accessed in June 2009. See also Prosecutor v. Germain Katanga, Para 82, *infra* note 62.

where complementarity is likely to be challenged by the state itself.⁶¹ However, in case of controversies, as indicated in the recent Katanga case; the ultimate and binding choice is the decision taken by the ICC.⁶²

It is right that the ICC statute provides for a relation of complementarity between different criminal jurisdictions, but only insofar as the relationship between the ICC proceedings and the exercise of domestic jurisdiction is concerned. Arts.17 *et seq.* do not in any way deal with the horizontal relationship between different domestic jurisdictions, such fears have been voiced in the U.K before, notably during the protracted legal proceedings in relation to the extradition of General Augusto Pinochet to Spain for offences allegedly committed in Chile; however that case did not involve an international jurisdiction like the ICC, but competing national jurisdictions.⁶³ According to Art.17, prosecution by the ICC is only permissible when and to the extent that effective prosecution is not possible at the national level because of legal or factual obstacles. The article hence harbors huge tensions; it offers no guidance as to how complementarity is supposed to function in the face of potentially significant differences between international and national systems.

In many countries, therefore, the question has been raised as to whether and to what extent adaptation of national criminal law may be necessary or in any case reasonable in light of the

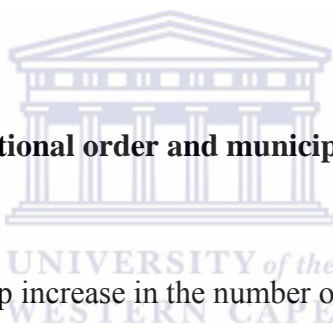
⁶¹ *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur*, UN Doc. S/2005/060, Para. 568.

⁶² *The Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*, Case No. (ICC-01/04-01/07 OA 8), 25 September 2009, Para 73: "The Appeals chamber is not persuaded by the appellant's arguments because..., the case against the appellant is admissible irrespective of the correctness of the trial chamber's interpretation of the term "unwillingness" and irrespective of whether the list in Art. 17(2) of the ICC statute is exhaustive.

⁶³ D. McGoldrick, at Rowe and E. Donnelly, *Supra* note 37, at 348.

substantive criminal norms of the Rome statute and in light of customary international law.⁶⁴ In some states this debate has already led to additions to and (or) modifications of national criminal laws. Thus, for example in Germany, a self contained code of crimes against international law (VStGB) went into effect in June 2002.⁶⁵ Among other things, the objective of the VStGB is to make sure that Germany can always itself prosecute crimes that fall under the jurisdiction of the ICC. Australia supplemented its criminal code with criminal offense definitions based on the language of the ICC statute and the elements of crimes in compliance with Art.9 of the ICC statute. In other countries, expert committees have convened to discuss amending national criminal laws.⁶⁶

3.2 Overlaps between the international order and municipal legal systems



Recent years have witnessed a sharp increase in the number of international courts and tribunals and a greater willingness on the part of states and other international actors to subject themselves to the compulsory jurisdiction of international adjudicative mechanisms.⁶⁷ However, because of the uncoordinated nature of these developments, overlaps between the jurisdictional ambits of the different judicial bodies might occur, i.e. the same dispute could fall under the jurisdiction of more than one forum. This raises both theoretical and practical issues of coordination between the various jurisdictions.⁶⁸

⁶⁴ A. Eser, U. Sieber and H. Kreiker, *Supra* note 14, at 3.

⁶⁵ Similarly, Canada's crimes against humanity and war crimes act (CAHWCA) was adopted 24, June, 2000. Furthermore, in 2001, a new legal basis for national prosecution of international crimes was also created in the U.K. with two international criminal acts (one for England and Wales and one for Scotland).

⁶⁶ A. Eser, U. Sieber and H. Kreiker, *Supra* note 14, at 3.

⁶⁷ Y. Shany, *Regulating Jurisdictional Relations between National and International courts* (2009), at 8.

⁶⁸ *Ibid.*

In fact, the establishment of the international criminal courts and tribunals has posed the tricky problem of how to coordinate their action with that of national courts. Whenever both classes of courts are empowered to pronounce on the same crimes, which should take precedence, and under what conditions? More so, would the overlaps between national and international courts therefore possibly meet the criteria of competing jurisdictions? It is suggested by Robert Cryer that where extraterritorial jurisdiction is asserted, sovereignties overlap, and general international law has not yet developed any principles to determine any hierarchy of lawful jurisdictional claims.⁶⁹ Obviously, the problem does not arise in the area where those courts do not have concurrent jurisdiction, that is, with regard to crimes that fall under the exclusive jurisdiction of national courts for example piracy and large scale drug trafficking.⁷⁰

Essentially, there may be overlaps between exclusive and concurrent jurisdiction. Unlike the ICTR, the ICTY, whose first prosecutor did not envisage at the prosecutorial level a distinction between major and minor offenders, gradually moved to the Nuremberg scheme, in that it has now firmly decided to concentrate on major cases, concerning political and military leaders or other major defendants, and it has increasingly asked national courts of the states concerned to try the lesser accused.⁷¹

Politi and Gioia submit that the ICTY itself has come to apply a sort of complementarity. The ICTY came to the complementarity from an opposite direction as the ICC. Despite the fact that the ICTY statute is based on the principle of primacy, at a certain point in time the ICTY

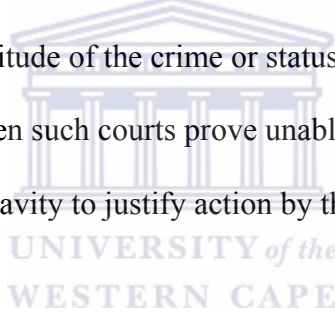
⁶⁹ R. Cryer *et al.* *Supra* note 13, at 37. See also, A. Cassese, (2008) 2nd ed., *Supra* note 3, at 336.

⁷⁰ *Ibid.*

⁷¹ *Id.*, at 345.

proposed and the Security Council accepted that certain cases should be referred back to domestic jurisdiction when, and to the extent, that, domestic jurisdictions would be in the position to take up the cases. This is done after an assessment regarding the capacity of the national jurisdiction to try the case and on the basis of the rank of the accused, on the assumption that the domestic jurisdiction will be able to deal with low-ranking accused persons but is not generally able to deal with high-ranking accused.”⁷²

This is similar to the Nuremberg scheme of exclusivity, but a different division of labor is provided for in the statute of the ICC. As highlighted before, all crimes may be brought before national courts, whatever the magnitude of the crime or status, rank, or importance of the accused. The ICC steps in only when such courts prove unable or unwilling to do justice, and provided the case is of sufficient gravity to justify action by the Court.⁷³



⁷² See M. Politi and F. Gioia (eds.), *The International Criminal Court and National Jurisdictions* (2008), at 138.

⁷³ Art. 17, ICC Statute, *Supra* note 1.

CHAPTER FOUR: DOMESTIC AND INTERNATIONAL LAW INTERACTIONS: WHICH MODEL SERVES THE OPTIMAL RELATIONSHIP?

4.1 Optimal approach

Importantly, interaction between domestic and international courts has been at the heart of global criminal justice since the creation of the international criminal tribunals, and clearly remains an issue for the ICC. Like the *ad hoc* tribunals' statutes but in clearer terms, the ICC statute encourages the Court to take domestic law into account and also requires the Court to apply not only the principles and rules of international law, but "... in the event of imprecision or a gap in international law, general principles of law derived by the Court from national laws of legal systems of the world provided that those principles are not inconsistent with the statute and with international law and internationally recognised norms and standards."⁷⁴ It may prove useful that the definitions within the domestic laws are not static, but flexible enough to expand and capture new developments in the definition of those crimes under international law.⁷⁵

It follows among other things, that the proliferation of international adjudicating bodies and the increasing activities of national courts pronouncing on international law give rise to the question of how to address potential conflicts between the jurisdiction of different courts and tribunals. In other words what should the relationship be between the international and national prosecutions?

⁷⁴ *Id.*, Art. 21(1)(c).

⁷⁵ A. Eser, U. Sieber and H. Kreiker, *Supra* note 14, at 69. For certainty, crimes described in Arts.6, 7 and 8(Para 2) of the ICC 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 in accordance with Art.10 of the ICC statute.

The answer depends upon the general relationship between the jurisdictions. Certain rules exist in different contexts, for example the ICC relationship to national courts of member states is governed by Art.1 and preamble 9 of the ICC statute.⁷⁶ The concept is very much more contrary of the scheme established for the *ad hoc* tribunals, referred to as 'primacy', where by the *ad hoc* tribunals can assume jurisdiction as of right, without having to demonstrate the failure or inadequacy of domestic systems.⁷⁷

In line with their primary jurisdiction *vis-à-vis* states, the reasons for claiming the international tribunals' primacy were clear, in the case of the former Yugoslavia, the ongoing armed conflict among the successor states and the deep-seated animosity between the various ethnic and religious groups made national courts unlikely to be willing or able to conduct fair trials. It was considered that the authorities would have hesitated to bring their own people (Moslems, Croats, or Serbs) to book, whereas had they initiated proceedings against their adversaries, probably such proceedings would have been highly biased.⁷⁸ As for other states, the experience built up until that time showed that they shield away from bringing to trial alleged perpetrators of crimes committed elsewhere. Hence the need was felt to affirm the overriding authority of the international tribunal.⁷⁹ Similar considerations held true for Rwanda, where the national judicial justice system had collapsed due to the war and consequently in line with the idea of complementarity, Rwandan national courts seemed unable to secure cooperation from countries where the suspects had fled in the same manner as the tribunal.

⁷⁶ See ICC statute, *Supra* note 1, preamble 9, emphasizing that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions.

⁷⁷ W. A Schabas, *Supra* note 38, at 175.

⁷⁸ A. Cassese, (2008) 2nd ed., *Supra* note 3 at 339.

⁷⁹ *Ibid.*

As has just been indicated, it follows that the optimal relationship will vary from one situation to another depending on whether national or international courts have primacy obviously taking into account the particular circumstances existing at the time, in a given situation. Clearly, it is for each state, within its national legal system, to find the approach to best settle conflicts and tensions that may arise in respect for the fundamental rights of individuals and political discretion of governments in the conduct of international affairs.⁸⁰

In the context of the ICC, even if, according to the statute, the absence of national prosecution results only in the admissibility of the case before the ICC, it is nonetheless in the interest of the individual states to be able to prosecute international crimes at least to the same extent as the ICC. This accommodates not only the idea of primary punishment of international crimes by national courts but also the interests of national sovereignty.⁸¹ Kleffner suggests that it serves to ensure state sovereignty and takes advantage of the benefits of decentralised prosecution by states closest to the crime and directly affected by it.⁸² These state organs thus “*kill two birds with one stone*”. While still acting within the framework of their competence as it is defined in the national legal order, they also play a part in the application of international law. In effect the ICC is designed to be a backstop to national courts, rather than itself on the front lines of prosecution of the core crimes. Subsequently, flawed implementation of core crimes by states can amount to unwillingness or inability of a given state to genuinely prosecute.

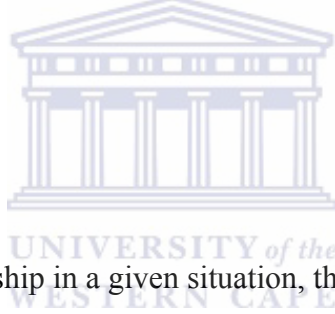
⁸⁰ See M. Politi and F. Gioia (eds.), *Supra* note 72, at 138 which mentions that “However, nobody can deny that states and legal systems differ one from the other; while some states may be in a position to take up these cases, others may be unable or unwilling to do that. I would like to stress that this is not simply a matter of legal capacity; there is also a political side of it.” See also A. Cassese, (2005), *Supra* note 27, at 232.

⁸¹ A. Eser, U. Sieber and H. Kreiker, *Supra* note 14, at 2.

⁸² J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), at 70 *et seq.*

There are underlying reasons for this complementarity approach. First, states saw a practical ground: they considered it inappropriate for the Court to be flooded with cases from all over the world. Secondly, there was perhaps a principled motivation; namely the intent to respect state sovereignty as much as possible.⁸³ This possibly explains why complementarity may be the optimal relationship where there is a prevalence of national courts other than the absolute primacy of the international Court which should intervene only in exceptional circumstances. In dealing with the concept of 'optimal relationship', it is essential to first understand the associated general significance of the enforcement mechanisms as well as their challenges in combating impunity for the most serious crimes to the international community, which are cited hereunder.

4.2 Opportunities and challenges



To clearly discern the best relationship in a given situation, there is need to examine the nature,⁸⁴ implications and merits of national and international criminal justice along with their respective challenges and limits to reaching the designed purpose.

4.2.1 Merits and setbacks from the offspring of Nuremberg: International criminal tribunals and courts

On one hand, international courts present a number of advantages over domestic courts, particularly; international courts proper may be more impartial than domestic courts, for they are

⁸³ See A. Cassese, (2005), *Supra* note 31, at 343.

⁸⁴ Chapter three of this research examined the nature of the major relationships of subsidiarity, exclusivity, complementarity and the *ad hoc* tribunal's model of concurrent jurisdiction.

made up of judges having no link with the territory or the state where the crimes were perpetrated. Cassese puts forward that even the so-called mixed or internationalised courts may avoid pitfalls of national territorial tribunals, for the international component in these courts ensures the needed impartiality.⁸⁵ Kirk and Swaak-Goldman further highlight that an international court seeks to provide an impartial forum and a transparent trial process, avoiding the parochialism of local criminal procedure.⁸⁶ More so, international courts, more easily than national judges, are able to try crimes with ramifications in many countries. Often witnesses reside in different countries, and other evidence needs to be collected, requiring the cooperation of several states, along with special expertise which is always needed to handle the often complex and difficult legal issues raised in the various national legislations involved.⁸⁷

On the other hand, these courts encounter setbacks in their goal of achieving international justice. For instance, even though these courts have the power to issue warrants for the seizure of evidence and of searching premises, and also to issue *sub poenas* or arrest warrants, they cannot enforce the acts resulting from the exercise of those powers, for lack of enforcement functions, notably *vis-à-vis* individuals acting as state officials. This is the major stumbling block of these courts and tribunals. They lack an autonomous police judiciary overriding national authorities. They are like giants without arms and legs, who therefore need artificial limbs to walk and work.

⁸⁵ A. Cassese (2008) 2nd ed., *Supra* note 3, at 439.

⁸⁶ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 393. R. Cryer *et al.*, *Supra* note 13, at 57 *et seq.* asserts that 'There are also other political considerations which, either prevent national prosecutions altogether or make them highly selective. Serious questions of legality present themselves (selectivity, vagueness of the law, retroactivity, and very long time periods between crime and prosecution).' National prosecutions have regularly taken place long after the event. This may make live evidence impossible to obtain or may affect the reliability of the statements made; key witnesses may have forgotten critical events and misidentified the accused, as in the Demjanjuk case.

⁸⁷ A. Cassese, (2005), *Supra* note 31, at 460.

These are the state authorities.⁸⁸ If the co-operation of states is not forthcoming directly over individuals living in a given state, these tribunals are paralysed.

Still, even a well designed international criminal tribunal or Court has sharp limitations, especially in handling a high volume of criminal prosecutions. A shortage of funds and personnel, the dilution of attention, the high requirements of criminal proof and even an unspoken reluctance to take on too many difficult battles at once limit the capacity of any particular judicial system.⁸⁹ Consequently, the fact that trials sometimes extend over a very long period indicates the complexity and protracted nature of proceedings before the tribunal. Thus for example, it took 240 days to complete the trial of Kordić and Čerkez in the trial chamber.⁹⁰ The trial against Slobodan Milošević commenced on 12 February 2002 and ended on 14 March 2006.⁹¹ In the ICTR, the duration of some trials has been extremely very long for example hearings in the Butare trial, have taken 714 days.⁹²

In addition to the above, international courts and tribunals are limited capacity wise. The activity of the ICTR dramatically demonstrates the limits on the capacity of international criminal justice. Though it is assumed that there were more than 800,000 participants, the ICTR, since the tribunal's creation, has completed proceedings against only 41 persons (as of march 2009), in the same period, approximately 50.000 suspects have been brought on trial in Rwanda, mostly

⁸⁸ *Id.* at 461.

⁸⁹ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 394.

⁹⁰ See *prosecutor v. Dario KORDIĆ and Mario ČERKEZ*, Case No. ICTY- IT-95-14/2-T (Trial Chamber), 26 February 2001.

⁹¹ See *Prosecutor v. Slobodan MILOŠEVIĆ*, Case No. IT-02-54-T, (Trial Chamber) 14 March 2006.

⁹² See *Prosecutor v. Pauline NYIRAMASUHUKO et al.*, Case No. ICTR -97-29-T, (Trial Chamber II), 15 May 2006.

before *Gacaca* courts.⁹³ Even after the creation of the ICC, its statute is guided by the realistic assessment that direct enforcement of international criminal law through international courts will continue to be the exception rather than the rule.⁹⁴ Nevertheless, for all their inconsistencies and practical pitfalls; the international criminal justice bodies have had a significant impact. They brought new emphasis to the role of international law as a controlling factor of state conduct.

4.2.2 National trials; main merits, inconsistencies and practical pitfalls

National courts represent the primary forum for prosecuting human rights abuses. When trials take place in the country with a closer nexus to the case, the entire process becomes more deeply connected with the society, providing it with potential to create a strong psychological and deterrent effect on the population. This factor, combined with greater access to evidence, witnesses, victims and perpetrators, gives such courts a significant potential advantage over international tribunals. It is therefore submitted that even where a prosecution is brought to an international tribunal, national courts will retain a vital role in the process of arresting defendants, taking testimony under oath, authorising searches and seizures, and freezing the proceeds of crimes, in cooperation with both the *ad hoc* tribunals and the ICC.⁹⁵ Further, the prosecutions before national tribunals are also relatively inexpensive and generally easy to institute.⁹⁶ Yet, the establishment of an international tribunal simply might not be an option

⁹³ This is a traditional justice mechanism based on the Organic Law N°16/2004 of 19/6/2004 establishing the Organization, Competence and Functioning of *Gacaca* Courts charged with prosecuting the crime of Genocide and other Crimes against Humanity, committed between October 1st 1990 and December 31st 1994, as amended to date. Available at <<http://www.inkikogacaca.gov.rw/En/Enintroduction.htm>> accessed in June 2009.

⁹⁴ G. Werle, *Supra* note 2, Marginal no. 229, at 82.

⁹⁵ G. Kirk McDonald and O. Swaak-Goldman, *Supra* note 23, at 409.

⁹⁶ S. R. Ramer and J. S. Abrams, *Supra* note 17, at 182.

because of lack of political will within the relevant international organisations or, the unwillingness of the major powers to provide necessary funds.⁹⁷

However, national trials also present legal inconsistencies in application of international law and practical pitfalls in dealing with the crimes under discussion in this research. As it is widely accepted that trials held in the country where the crime has been committed or where the victims or their relatives live could arouse animosity and conflict; by the same token, it may turn out to be difficult for judges to remain impartial. In particular, when crimes are very serious and large scale and have been committed either by the central authorities or with their tacit or explicit approval or acquiescence, it will be difficult for a national court to prosecute the alleged planners or perpetrators. It has been well established that, as concerns crimes committed by nationals in the state territory, courts may be reluctant to bring them to trial whenever they happen to be senior state officials or persons strongly supported by such officials.⁹⁸ This was the case in Cambodia, where the presence in the government of persons who were allegedly closely linked to the perpetrators of genocide,⁹⁹ together with concerns over the independence of the judiciary, raised concerns regarding the fairness of the trial process. This explains why there was need for establishment of a mixed tribunal¹⁰⁰ to avoid the aforementioned challenges.

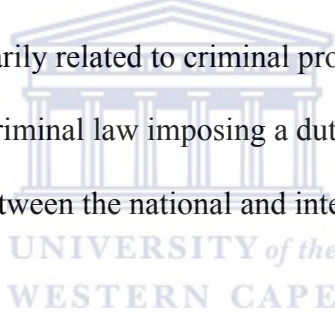
⁹⁷ Also it is mentioned in M. Politi and F. Gioia, *Supra* note 72, at 138, that "...For example, I am not sure that only developing countries, which do not have financial and material resources to set up these types of trials will actually be the only ones refusing to take up these cases. There may as well be developed countries that will be unwilling to try cases for various reasons, in particular political ones." Similarly see, A. Cassese, (2005), *Supra* note 31, at 459.

⁹⁸ A. Cassese, (2005), *Supra* note 31, at 460. See McCormack in R. Cryer *et al.*, *Supra* note 13, at 57-58.

⁹⁹ *Id.*, at 459.

¹⁰⁰ See Cambodia, extra ordinary chambers law (2001), Arts. 4-8, available at <<http://www.eccc.gov.kh/english/law.list.aspx>>, accessed in August 2009.

One should also add cases where the national court is unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as, the statute of limitations, immunity and amnesty laws which fall under alternatives to dispute resolution, making it impossible for the national judge to commence proceedings against the suspect or accused. For example, the South African approach which offered amnesty in return of truthful confession, would be dismissed as evidence of a state's unwillingness or inability to prosecute, while the disgraceful amnesties accorded by South American dictators themselves, like that of former Chilean president Augusto Pinochet cannot escape being classified under legislative impediments of national systems. In effect, the growing use of truth commissions which are not necessarily related to criminal prosecutions on one hand and the burgeoning body of international criminal law imposing a duty to prosecute core crimes on the other hand creates controversies between the national and international interaction.



Also, the domestic approach to classify international crimes, as ordinary criminal offences, presupposes a deliberate or unintentional tendency to misrepresent the very nature, hence belittle the seriousness, of international crimes. Put, differently, the national court shows that, either intentionally or innocently, it is not aware of both the international dimension and the gravity of the criminal offence. A related issue presented itself recently to the ICTR in the context of its attempts to transfer cases to national courts as part of its completion strategy. Norway had offered to prosecute the case of an accused who was also an informer and who was being held in protective custody. The trial chamber rejected the application holding that, although Norway

could prosecute murder, it was unable to deal expressly with the crime of genocide, because this offence had never been implemented in its national law.¹⁰¹

To conclude, national and international core crimes trials serve a variety of purposes, such as punishment, accountability, deterrence, rehabilitation and reconciliation, historical record and education. But some of these purposes may conflict or appear to conflict at particular times.¹⁰²



¹⁰¹ *Prosecutor v. Michel BAGARAGAZA*, Case No. (ICTR-2005-86 *bis*), 19 May 2006, decision on the prosecution’s Motion for referral to the Kingdom of Norway, 19 May 2006.

¹⁰² *Cf.* LE Fletcher and HM Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation” (2002) *HRQ* 573. See A D’Amato “Peace vs. Accountability in Bosnia” (1994) 88 *AJIL* 500-6.

CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusion

The purpose of this entire research was to examine the rapport between national and international criminal jurisdictions in prosecution of core crimes under customary international law and particularly in regard to the ICC and *ad hoc* tribunals' statutes. As already demonstrated in chapter one and two, this compatibility varies depending on the different categories of crimes and their implementation in different countries. With exception of some states, the criminalisation of core crimes in national laws is either over inclusive or under inclusive *vis-à-vis* international law. It is therefore submitted that while the core crimes are covered under both national and international law, there are still several of their substantive elements that are either widely or partially not covered.

Interestingly, even in situations where the general offenses can be interpreted to cover the relevant conduct, they do not suffice in order to adequately stress the anti-sociality and the special severity of the conduct, when committed in situations constituting genocide, crimes against humanity and war crimes. In most cases, however, deficits in the prosecution of international crimes are not clearly grounded in a lack of national jurisdiction because even where sufficient jurisdiction is established, the prosecutions themselves are deemed unsatisfactory.

As earlier discussed under chapter three and four, the challenges and limitations of prosecuting international crimes through domestic law enforcement institutions have led states, international organisations, and non-governmental organisations periodically to contemplate the creation of international criminal courts that could directly try individuals for such crimes.¹⁰³ And always, each international tribunal goes along with a corresponding relationship to govern interaction with national courts. Such relations include; the Nuremberg model of exclusivity, states' subsidiarity model, the *ad hoc* tribunals' model of concurrent jurisdiction with primacy of the international tribunal and ultimately the new ICC complementarity scheme with supervised priority for national courts. As a result, it has led to diverse levels of enforcement; the ICC and *ad hoc* tribunals, internationalised or hybrid criminal courts, and national courts of which their jurisdiction often overlaps and their scope is not always clear due to the parallel jurisdiction to prosecute crimes under international law. Nonetheless, although gains have been made at the level of international law, this does not mean that individual states, citing the possibility of punishment of international crimes by the international courts, can wash their hands of responsibility and that national regulation for the punishment of international crimes are no longer necessary. In fact, national and international jurisdictions may thus together provide the means of bringing offenders to justice.

Finally, in analysing the optimal relationship, it is the author's contention that the creation of new architecture for enforcing international humanitarian law and international criminal justice must be realistic, able to accommodate the political stress and imperfect will that accompany most international efforts. In fact, there is no single order of match that will fit all battles to

¹⁰³ S. R. Ramer and J. S. Abrams, *Supra* note 17, at 187.

enforce the law. Rather, a concurrency of jurisdiction *inter alia* is likely to continue through the expansion of universal jurisdiction, the creation of new international criminal tribunals and the good judgment of states that they should open their own courts to defend the common interest in enforcing the laws. Admittedly, this limited research cannot provide a full analysis of the relevant international and national law instruments and may therefore leave some questions comprehensively unanswered.

5.2 Recommendations

The discussion below surveys possibilities for future improvement to some of the problems and the more realistic proposed measures in light of the findings reached above, and also towards the realisation of which this research hopes for.



5.2.1 The need for cooperation

For effectiveness of the judicial process of international criminal courts, there is need for state cooperation. Only other bodies or entities; that is, national authorities or international organisations, can enforce the decisions, orders, and requests of such criminal tribunals. Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal; without the intermediary of national authorities, they cannot seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants.¹⁰⁴ For all these purposes, international courts must turn to state

¹⁰⁴ A. Cassese (2008), 2nd ed., *Supra* note 3, at 346.

authorities and request them to take action to assist the Court's officers and investigators. It can be rightly argued that without the help of these authorities, international courts cannot operate. A more modest proposal is that the goal of the international jurisdictions should be that of establishing international net-works that would include national investigators and prosecutors, and of encouraging national authorities and multilateral institutions, non-governmental organisations and civil society more generally, to take ownership of the administration of justice.

5.2.2 The necessity of harmonisation

The idea of international criminal justice should not be to build a supranational system that excludes national courts, but to provide an example by contributing to the progressive interactions, thus harmonisation of national criminal justice systems.¹⁰⁵ Such an objective is obviously difficult to attain given the considerable differences between national systems, on such major issues as the nature of crimes and their punishment. However, a serious legislative effort by the states' law making body should be put in place in countries in order to properly incorporate these crimes' specific offences that will assure the adherence to the principle of the rule of law. This reform will also help to ensure that states internally take the proper measures to guarantee that their policies do not violate international law.

It is further proposed that there should be national and international coordination of laws to avoid national legislation being contrary to international rules, since international law is effective to the extent that it is applied within domestic legal systems. States should therefore ensure that

¹⁰⁵ M. S. Ellis and R. J. Goldstone, (eds.), *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* (2008), at 77.

municipal law must always conform to international law. When national interests are regarded as prevalent, states should not go so far as to frustrate the legal worth of international prescriptions by refraining from implementing them at domestic level. Members of the international community are therefore called upon to change their national systems so as to ensure that international rules are properly implemented.

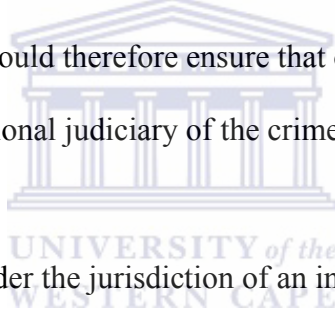
5.2.3 The requirement for implementation

National implementation of international rules is of crucial importance. In this regard, there should be some form of international regulation of the matter or at least certain uniformity in the ways in which domestic legal systems put international law into effect. National prosecutions will yield benefits only if the judicial system is generally fair and effective. Based on the precedents examined, a fair and effective judiciary requires four fundamental conditions: a workable legal framework through well crafted statutes of criminal law and procedure, a trained cadre of judges, prosecutors, defenders, and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities, and, most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.¹⁰⁶ Clearly for these rules, the passing of national implementing legislation only serves to strengthen their effectiveness. If they are matched by national rules, their impact on the conduct of individuals becomes even stronger. Certainly, although not a solution, a comprehensive legal framework is the starting point towards alleviating the problem.

¹⁰⁶ S. R. Ramer and J. S. Abrams, *Supra* note 17, at 183.

5.2.4 The call for national prosecutions

On a practical level, it should be emphasised that the purpose of the state legislation should not just be to implement the international law statutes, but arguably and more importantly, at least on a primary level to ensure that domestic courts will be able to prosecute the core crimes. For this to be realised; the national criminal codes of states should be amended to ensure that genocide, crimes against humanity and war crimes can be fully prosecuted in domestic courts. This would help preclude a situation in which the ICC determines that a given state is unable to investigate and prosecute a particular suspect because the suspect's alleged offense is not a crime punishable under its own law. Hence, states should therefore ensure that on a legislative level, no obstacle exists to the prosecution by the national judiciary of the crimes alleged to have been committed.



Regarding cases that do not fall under the jurisdiction of an international court, judicial and legislative organs of every country should give effect to criminal interdictions and bring the criminals to trial. Though the principle of passive personality also played a role, Eichmann's grave offences against the law of nations merited the application of universal jurisdiction. As it is clear from the case law, the absence of trustworthiness and efficiency of the domestic tribunals can be remedied by other tribunals on the basis of the principle of universal jurisdiction over the most serious crimes against fundamental human rights. Notwithstanding this paragraph, states, prosecutors, investigating judges, and courts of countries whose legislation upholds this broad notion of universality should invoke it with great caution, and only if they are fully satisfied that compelling evidence is available against the accused, moreover that states with a link to the case

are not about to prosecute. In case states with a nexus to the crime are able and willing to prosecute, third party states should refrain from any prosecution.

In sum, the recommendations cited above underscore that jurisdictional relationships between domestic and international courts must not function as principles that separate national jurisdiction from international jurisdiction or put them in conflict with each other, but as principles that in fact require interaction between them while keeping the courts in a progressive position. The author of this research ends with the optimism that international courts and states will indeed do so appropriately and comprehensively.



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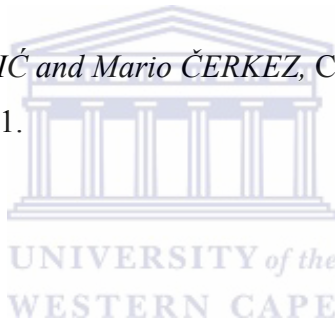
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