THE PRINCIPLE OF LEGALITY AND THE PROSECUTION OF INTERNATIONAL CRIMES IN DOMESTIC COURTS: A CASE STUDY OF KAMPALA UGANDA

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DECLARATION

I, Kirungi Dinah undersigned declare that this dissertation entitled "*the principle of legality and the prosecution of international crimes in domestic courts: a case study of Kampala Uganda*" is my own original compilation and has never been presented to any organization or institution of higher learning either as a paper or for any academic award. It has been done through extensive research and consultations from reliable resources and advisers under the same field of professional.

Signature:..... Date: 5th July 2019

KIRUNGI DINAH

APPROVAL

I Diana Rutabingwa do hereby confirm that I have supervised and read this study that in my opinion, it confirms to acceptable standards of scholarly presentations and is fully adequate in scope and quality as a dissertation in partial fulfillment of requirement for the degree of bachelors of laws at Kampala International University.

Signature:..... Date: 05.07.19.

DIANA RUTABINGWA (Supervisor)

DEDICATION

I dedicate this to my parents the Mr. Nyakoojo Wilson, Mrs. Beatrace Nyakoojo and to my Auntie Mrs. Winfred Ijebor who dedicated all their resources to educating me, let it optimize the level of knowledge and guidance and have led me attain this big smile.

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ABSTRACT

The study examined *the principle of legality and the prosecution of international crimes in domestic courts*. The study was guided by the following objectives;- to find out whether the principle of legality is really a challenge to prosecuting acts that have already been recognized as crimes under customary international law, to find out whether states are "wasting time" in "legal gymnastics" and needlessly adhering to strict positivism, at the cost of accountability and justice for victims of atrocities, to find out whether the victims of these atrocities even care for the legal intricacies of definition and classification of crimes, and to find out whether prosecutions cannot be based simply on predicate crimes such as murder, rape or assault since crimes against humanity, genocide and war crimes are constituted by these very crimes. Under methodology the study adopted a doctrine research approach this aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity.

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

The study established that the principle of legality is absolute it is not waived for any crime and especially not for international crimes. However, for these crimes, given their prior recognition under customary international law, their inherently evil and proscribed nature are presumed to be foreseeable facts accessible by all states and, in consequence, all citizens within those states. As a result, while a strict application of the principle of legality would be understandable in the prosecution of national crimes, it would not be in the prosecution of international crimes, even where the prosecution occurs in a domestic court. This is because the crime remains an international crime, retaining its unique attributes as such a crime, regardless of the court in which it is being prosecuted. The study posits that all the foregoing recommendations can be implemented in domestic courts by local judges who are familiar with the cultural, social and political context of their states,[1] without the need for expensive ventures that might make international criminal justice seem expensive for and foreign to African states and which may serve only to postpone the realisation of accountability.

[1] C Bassiouni & Z Motola *The protection of human rights in African criminal proceedings* (1995) 361

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 Background of the study

On 18 November 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) held that legal reforms[2] adopted by Senegal in 2007 to incorporate international crimes into the national Penal Code to enable its domestic courts to prosecute Hissene Habre for, among others, crimes against humanity committed in Chad twenty years before, violated the principle of legality, specifically the principle against non-retroactivity of criminal law.[3] The court held that such crimes could be prosecuted only by a hybrid tribunal with the jurisdiction to try Habre for the international crimes based on general principles of law common to the community of nations.[4] Some scholars opined that the ECOWAS decision was wrong, stating that the crimes in question were criminalised already under international law and that Senegal's legal reforms simply served jurisdictional purposes.[5] Given that, as a core component of the principle of legality, the role of non-retroactivity is to prohibit the creation of new crimes and their application to past conduct,[6] the opinions of such scholars may hold true. The Habre episode manifests the unspoken confusion surrounding the principle of legality in the prosecution of international crimes in Africa's national courts.

In August 1996, Rwanda implemented an Organic Law on the Organisation of Prosecutions for Offences Constituting the Crimes of Genocide or Crimes Against Humanity committed since 1 October 1990 (Organic Law Number 8 of 1996). While the law stipulated that it was applicable to international crimes, it cautioned that this was only the case for such crimes as were already

[2] See Law no. 2007-02 of 12 February 2007 amending the Penal Code, *Journal Officiel de la Republique du Senegal* no. 6332, 10 March 2007, at 2377, available at *http://rds.refer.sn/IMG/pdf/07-02- 12CODEPENALMODIF.pdf* (accessed on 30 July 2017); Law no. 2007-05 of 12 February 2007 (relative to the implementation of the Rome Statute creating the International Criminal Court), at 2384, available at *ttp://www.iccnow.org/documents/Loi_2007_05_du_12_Fev_2007_modifiant_le_Code_de_Procedure_pena le_senegal_fr.pdf* (accessed on 30 July 2017); Constitutional Law no. 2008-33 of 7 August 2008 amending arts 9 and 25 and supplementing arts 562 & 92 of the Constitution), *Journal Officiel de la Republique du Sénégal* no. 6420, 8 August 2008, available at *http://www.jo.gouv.sn/spip.php?article7026* (accessed on 30 July 2017).

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

[4] Ibid 2

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

[6] Gallant (n 1 above) 1-3.

prohibited under the country's Penal Code.[7] Such caution was based on the fear of violating the non-retroactiivity principle embedded in Rwanda's Constitution,[8] which otherwise could have occasioned a constitutional challenge.[9] Some have dubbed such hesitation unnecessary, arguing that Rwanda could simply have prosecuted the international crimes directly since they were already recognised as crimes under international law and by the general principles of law recognised by civilised nations.[10]

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

Countries like Uganda and Kenya are caught in a state of doubt and hesitation over the principle of legality, Kenya continuing to grapple for a legal basis to prosecute international crimes domestically,[13] Uganda limiting the prosecution to offences under its Penal Code Act,[14] and both countries limiting the application of the implementing legislation for the Statute of the International Criminal Court (Rome Statute) to the future,[15] for fear of a constitutional challenge

[7] Organic Law No. 8 of 1996, art 1.
[8] Constitution of Rwanda as amended by *Revision du 18 Janvier 1996 de le Loi Fundamental*, art 12.
[9] W A Schabas „Justice, democracy and impunity in post- genocide Rwanda: searching for solutions to impossible problems" (1993) 7 *Criminal Law Forum* 536; O Dubois „Rwanda's national criminal courts and the international tribunal" (1997) *International Review of the Red Cross*, No. 321 available at *http://www.icrc.org/eng/resources/documents/misc/57jnza.htm* (accessed on 30 July 2017).
[10] Schabas (n 9 above) 537; Dubois (n 9 above).
[11] Dubois (n 9 above).
[12] G Olivi „The role of national courts in prosecuting international crimes: new perspectives" 2006 (18) *Sri Lanka Journal of international Law* 87.
[13] Open Society Initiative for Eastern Africa (OSIEA) „Putting complementarity into practice: domestic justice for international crimes in the Democratic Republic of Congo, Uganda and Kenya. 2011 84 & 85. Available at *http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf* (accessed on 12 September 2017).
[14] Putting complementarity into practice (n 13 above) 59.
[15] The International Criminal Court Act (ICC Act of Uganda) 2010, & the International Criminal Court Act (ICC Act of Kenya) 2008, art 1.

on retroactivity.[16] This has left unaddressed the periods during which atrocities were committed in both countries.[17]

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

This state of affairs reveals a lack of consensus surrounding the application of the principle of legality in the prosecution of international crimes in Africa's domestic courts. This tension may be articulated, in the words of some scholars, as a conflict between justice and certainty of law,[19] acknowledging the importance of the law[20] but cautioning that when the law occasions an intolerable level of injustice then it must yield to justice.[21]

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

[16] International Center for Transitional Justice (ICJ) „Stock taking: complementarity (The Rome Statute Review Conference)" May 2010 3. Available at *http://ictj.org/sites/default/files/ICTJ-RSRC-Global- Complementarity-Briefing-2010-English.pdf* (accessed on 3 September 2017).

[17] As above.

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

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

[20] As above

[21] See for example notes 22-25 below

[22] „Northern Uganda: understanding and solving the conflict" 14 April 2004. Available at *http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/077-northern-uganda-understanding-and-solving-the-conflict.aspx* (accessed on 1 August 2017).

[23] „Northern Uganda: understanding and solving the conflict" 14 April 2004. Available at *http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/077-northern-uganda-understanding-and-solving-the-conflict.aspx* (accessed on 1 August 2017).

[24] „Genocide in Rwanda". Available at *http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm* (accessed on 1 August 2017).

[25] „Rape: weapon of war". Available at *http://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx* (accessed on 1 August 2017).

country, with rape being used rampantly as a weapon of war.[26] Almost all countries in Africa have experienced atrocities in the form of war crimes, crimes against humanity or genocide.[27]

The need to end impunity through accountability for such atrocities has led to the creation of international criminal tribunals such as the International Criminal Tribunal of Yugoslavia (ICTY),[28] the International Criminal Tribunal for Rwanda (ICTR)[29] and the International Criminal Court (ICC).[30] The situations before the ICC currently are from Uganda, Kenya, DRC, Central African Republic (CAR), Sudan and Libya, which are all African countries.[31] This demonstrates the high level of importance of international criminal justice for African states.[32] The demand for accountability has directed new attention to national courts as major agents for ending impunity, as the numerous cases to be decided cannot be handled exhaustively by the international courts.[33] However, African states are faced with several intractable challenges, ranging from the political and the economic to the institutional and the legal, making such a role seem unattainable.[34] The principle of legality, specifically the core element of nonretroactivity, is cited often as one such major legal challenge, alongside immunities and amnesties.[35]

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

[26] „Rape: weapon of war". Available at *http://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx* (accessed on 1 August 2017).
[27] Consider the situations in Liberia, Sierra Leone, Angola, Sudan, Kenya, to mention but a few.
[28] Statute of the International Criminal Tribunal for Yugoslavia, 25 May 1993, UN SC Res. 827.
[29] Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, UN SC Res. 955.
[30] Rome Statute of the International Criminal Court 17 July 1998, UN Doc. A/CONF 183/9.
[31] See generally, *http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/* (accessed on 30 July 2017).
[32] P Mochochoko „Africa and the International Criminal Court" in E Ankhumah & E Kwakwa (eds) *African perspectives on international criminal justice* (2005) 249.
[33] Olivi (n 12 above) 84.
[34] See Putting complementarity into practice (n 13 above) 20, 59 & 84 for some such challenges faced by courts in Uganda, Kenya and DRC.
[35] See for example ICTJ release (n 16 above) 2.

Yet, there are some who sternly warn against trivializing the law in the name of justice and advocate for a balanced application of both concepts.[36] This debate is central to the principle of legality in the domestic prosecution of atrocities and Africa's national courts cannot avoid it.

1.2 Purpose of the Study

The purpose of the study examined the principle of legality and the prosecution of international crimes in domestic courts.

1.3 Objectives

1. To find out whether states are "wasting time" in "legal gymnastics" and needlessly adhering to strict positivism, at the cost of accountability and justice for victims of atrocities.
2. To find out whether the victims of these atrocities even care for the legal intricacies of definition and classification of crimes.
3. To find out whether prosecutions cannot be based simply on predicate crimes such as murder, rape or assault since crimes against humanity, genocide and war crimes are constituted by these very crimes.

1.4 Research question(s)

These are some of the questions that this study seeks to explore through an analysis of scholarly works, jurisprudence and international instruments, using desktop and library research. The study answered one main research question: whether the principle legality is a bar to the domestic prosecution of past atrocities in Africa?

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

[36] Gallant (n 1 above) 404.

1.5 Scope

1.5.1 Geographical scope

The study focused on the debate surrounding the domestication of the Rome Statute in Uganda and the decision to prosecute domestically a former commander of the Lord's Resistance Army (LRA) for atrocities committed during a twenty-year civil war in Northern Uganda. It should be mentioned here that Uganda's Constitutional Court ruled recently that this prosecution would be illegal as the accused had applied for, but was not granted, amnesty under circumstances which the court found to be discriminatory.[37] Currently, this decision is under appeal to the Supreme Court.[38]

1.6 Methodology

Methodology utilized adopted qualitative in nature as, according to Leedy[39], this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin (200:134) in Patton, it usually serves one or more of a set of four purposes: description, interpretation and evaluation of a hypothesis or problem.

1.6.1 Reliability of the instrument

Reliability is the measure of the degree to a research instrument yields consistent results after repeated trials. According to Christensen (1988), reliability of the questionnaire, the researcher employed the methods of expert judgment and pretest in order to test and improve the reliability of the questionnaire.

[37] *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 36 of 2011, para 605-610.
[38] „Government appeals against Kwoyelo release" 26 September 2011 *Daily Monitor*. Available at *http://mobile.monitor.co.ug/News/-/691252/1243006/-/format/xhtml/-/5o14gm/-/index.html* (accessed on 15 October 2017).
[39] Established on 2001:148

1.6.2 Data gathering procedures

According to Krishnaswami (2002:197) data are facts, figure and other relevant materials, past and present that serve as bases for the study and analysis. He further states that data may be classified into primary and secondary sources. The researcher obtained an introductory letter from the School of law of Kampala International University Kampala, Uganda, which she presented to the heads of legal institutions, heads of government ministries and authorities and leaders of Non Governmental Organizations which involved in the study. The researcher therefore developed rapport, sought for consent and appointments with respective respondents to obtain the information.

1.7 Significance of the study

The significant role played by blanket amnesty in hindering the first domestic prosecution of international crimes in Uganda is acknowledged. However, it should be clarified that this study discusses the prosecution with the sole purpose of illustrating the role of the principle of legality at the stage of indicting the accused. The discussion is not affected by whatever conclusion might be reached by the Supreme Court.

In discussing Uganda's experience, the study observed examples from other countries in and outside Africa that have dealt with the principle of legality in prosecuting international crimes.

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

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

1.8 Literature survey

There is a dearth of literature on the principle of legality in the prosecution of international crimes in domestic courts. The first book-length study of the principle of legality was undertaken by Gallant who espouses the principle as having acquired the status of international customary law whose application in the domestic prosecution of international crimes depends greatly on the framework of a given country's constitutional or statutory provisions.[40] Other scholars, without referring to the constitutional framework providing for it, have considered that the principle of legality simply does not apply to acts that have been recognised as crimes in international law and law recognised by civilised nations.[41] In this regard, scholars like Marks make a strong argument for the domestic prosecution of international crimes that were recognised under customary international law at the time of commission, even in absence of a binding treaty.[42] By contrast, Slaughter recognises the strict application of the principle of legality by national courts, especially as regards the direct application of customary law.[43]

The foregoing inconsistency is recognized by Ferdinandusse who acknowledges the difficulty in analysing the role of the principle of legality in national prosecutions of international crimes.[44] He recognises the existence of national and international versions of the principle of legality and observes that the content of the principle is influenced by several factors including national law, international law, international courts, national courts, ordinary crimes and core crimes.[45] He concludes that there is uncertainty, which arises from disagreement among the various countries, as to which rules or precedents determine the principle's role in the domestic prosecution of international crimes.[46]

Darryl Robinson (2008)[47] said that it is probably common ground on this panel that international decisions have refashioned and expanded international criminal law (ICL). Various arguments

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[40] See Gallant (n 1 above) 404.
[41] Schabas (n 9 above) 537; Dubois (n 9 above).
[42] SP Marks „The Hissene Habre Case: the law and politics of universal jurisdiction" in S Macedo (ed) *Universal Jurisdiction: national courts and the prosecution of serious crimes under international law* (2004) 151.
[43] AM Slaughter „Defining the Limits: universal jurisdiction and national courts" in Macedo (n 40 above) 178.
[44] W Ferdinandusse, *Direct application of international criminal law in national courts* (2006) 221.
[45] As above.
[46] Ferdinandusse (n 42 above) 222.
[47] These remarks draw from Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008). The article provides additional explanation and illustrations.

have been advanced to justify such expansion. The argument is the Nuremberg proposition that formal justice, enshrined in the principle of legality, must give way to the substantive justice of the need to convict these particular accused for reprehensible acts. Another example is the proposition that the accused has notice of "foreseeable judicial innovation. Judge Shahabuddeen and others have seized on this proposition as authority for continued progressive development. There is no question that the lines of reasoning employed by the ad hoc tribunals occasionally produced substantive justice at the expense of strict legality. A meta-critique of this jurisprudence is that judges were insufficiently self-conscious about their forays into judicial lawmaking. Where judges engage in lawmaking, they should acknowledge the dilemmas inherent in doing so and proceed in a rational and principled fashion with the recognition that there are certain institutional responsibilities attendants to this process. A more calibrate approach would be to adopt narrower rulings with respect to conduct that approaches the boundary between legality and illegality.

Rabinder Singh QC Alison Macdonald (2002)[48] "*Is there a right of anticipatory self-defence in international law?* State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful, or only in very pressing circumstances. There are numerous examples of States claiming to have used force in anticipatory self-defence, and being condemned by the international community. Examples of state practice are given by Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia, in International Law, (Oxford, 2001) at 309-31. One particularly relevant example is the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor:

[48] Rabinder Singh QC Alison Macdonald (2002) "Legality of use of force against Iraq" Matrix Chambers Gray's Inn London WC1R 5LN

'When the Israeli attack on the Iraqi nuclear reactor was discussed in the [Security Council], the USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the SC resolution condemning Israel (resolution 487/1991), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel's failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operative paragraph 1 of the resolution, whereby '[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct.' Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence. It is apparent from the statements of these States that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning 'without equivocation' the Israeli attack as 'a grave breach of international law', noted that the attack was not an act of self-defence. Nor [could] it be justified as a forcible measure of selfprotection'' (p310).

1.9 Overview of chapters

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

CHAPTER TWO

THE PRINCIPLE OF LEGALITY IN UGANDA

2.1 Introduction

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

As one famous playwright quizzed himself about what's in a name, so have legal scholars probed the meaning of the principle of legality,[49] leading one to conclude that: enforcement of the principle of legality is inherently imperfect (G Werle, 2005). Issues of interpretation of statutes and the evolution of criminal law by judicial decision will always remain, given the imperfections of human language.[50]

There are those, however, who express more optimism and strive for a sense of certainty as regards the principle of legality.[51] They emphasise its core elements and negate the idea that it is an arbitrary principle.

By way of simple definition, the principle of legality has been referred to as a combination of rules whose overall effect is the requirement that no one may be convicted for an act that was not a crime under some applicable law at the time it was done and no one may be subjected to a punishment greater than is designated for a crime under some applicable law.[52] From the foregoing provisions, a law may not be applied retroactively, as expressed in the maxim nullum crimen sine proevia lege poenali.[53]

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

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

[51] Westen (n 45 above) 234.

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

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

Some other rules making up the principle of legality include: the prohibition of punishment of an act by a court that did not have jurisdiction over the act at the time it was committed; prohibition of conviction based on more or less evidence than could have been required at the time of the offence; the requirement of clear definition and notice of a crime under the law before punishment;[54] consistent application of principles and of the law; the rule against collective punishment for individual crimes; and the broad concept that whatever is not prohibited by law is permitted.[55]

This study is restricted to the rule of non-retroactivity as one of the core components of the principle of legality,[56] which rule apparently poses a challenge to the domestic prosecution of international crimes.

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

Indeed, while many scholars note that the foregoing elements of the principle of legality are general principles of law recognised by the international community,[57] they acknowledge that the principle of legality is implemented in different versions under various legal systems.[58]

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

2.2 The national and international versions of the principle of legality

Two significant but varying versions of the principle of legality exist. The first is to be found in the Latin maxim nullum crimen, nulla poena sine lege, which translates as nothing is a crime

[54] See for example, on definition of war crimes, G J Simpson „War crimes: a critical introduction" in G J Simpson & LH Timothy *The law of war crimes: national and international approaches* (1997) 11.
[55] Gallant (n 1 above) 11-12.
[56] Westen (n 45 above) 234; Lamb (n 48 above) 742.
[57] Claire de Than & E Shorts *International criminal law and human rights* (2003) 136.
[58] Hall (n 45 above) 165; Westen (n 45 above) 229.

except as provided by law and no punishment may be imposed except as provided by law (hereinafter sine lege);[59] and the second is expressed in the maxim:

nullum crimen, nulla poena sine lege scripta, meaning "nothing is a crime and no punishment may be imposed except by a written law (hereinafter sine lege scripta)".[60]

These versions have influenced the national prosecution of international crimes in different ways and are the focus of this discussion. The fundamental difference between the sine lege and sine lege scripta versions of the principle of legality is that while the sine lege version simply requires that the crime and penalty be recognised by "some law", which could extend to all possible sources of law such as treaty law, common law and customary international law[61], the sine lege scripta version bears a strict requirement of prior recognition of any crime or penalty in a written statute.[62]

Explanations as to why countries opt for one version over the other have been made on the basis of their belonging to either the civil or common law systems. [63] In civil law jurisdictions, which require that a crime and the penalty be provided under a previously proclaimed statute, the strict sine lege scripta version of the principle is typical,[64] while common law jurisdictions, which allow creation of new crimes using case law, apply the broader sine lege version.[65]

However, this distinction is fast fading as most common law courts increasingly recognise the requirement of statutory provisions as the legitimate means of creating crimes.[66] It is submitted also that the civil-common law debate is of little significance in relation to the subject of international crimes, as the ability of judges in common law domestic courts to create "new international crimes" is nonexistent, otherwise the stability of international criminal law would

[59] See Lamb (n 48 above); Gallant (n 1 above) 12; H Robinson "Fair notice and fair adjudication: two kinds of legality" (2005) 154 *University of Pennsylvania Law Review* 336.
[60] A Cassesse, *International Criminal Law* (2003) 141; See also, notes 45 & 54 above.
[61] Gallant (n 1 above) 14.
[62] Cassesse (n 56 above) 141.
[63] B Broomhall „*Nullum crimen sine lege*" in O Triffterer *Commentary on the Rome Statute of the International Criminal Court. Observer's notes, article by article.* (1999) 453.33; Gallant (n 1 above) 13.
[64] Cassesse (n 56 above) 141-2.
[65] As above; See also for example, the creation of the "new offence" of marital rape in *C.R v the United Kingdom* 27 October 1995.
[66] Robinson (n 55 above) 342.

be jeorpadised.[67]

The other explanation relates to the difference between monist and dualist systems. In monist states, international and domestic laws are considered to be part of the same legal system,[68] while in dualist states, national and international laws are considered to fall under different systems.[69] The result is that while under the monist system international treaties and norms form part and parcel of domestic law, in dualist states, implementing statutes are required in order to enforce international law as domestic law.[70] Most commonwealth states consider themselves to be dualist,[71] while it has been intimated that most francophone states are monist.[72]

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

However, it is submitted that the monist-dualist debate is not suited to a discussion regarding the domestic prosecution of international crimes. Indeed it is a misleading debate. Firstly, regardless of monism or dualism, international criminal law treaties, given their non-self-executing character, generally require implementing legislation in order to have force of law in domestic courts.[73] As already noted in the case of Senegal, even in monist systems, courts are reluctant to rely on treaty law as a basis for liability.[74] Secondly and more importantly, it is argued that the monist-dualist debate concerns mainly the effect of a treaty within a given state[75] and not the recognition by that state of certain crimes that have been recognised already as binding on all states under customary international law and which crimes were only subsequently written into treaty law.[76] As Cryer has pointed out, the domestic prosecution of international crimes is not a

[67] Ferdinandusse n (42 above) 274
[68] D Sloss *The role of domestic courts in treaty enforcement* (2009) 6.
[69] As above.
[70] A Aust, *Modern treaty law and practice* (2007) 146 &150.
[71] See R Cryer *Prosecuting international crimes: selectivity and the international criminal law regime* (2005) 117.
[72] See D Olowu *An integrative rights-based approach to human development in Africa* (2009) 76.
[73] Olivi (n 12 above) 87.
[74] Cryer (n 67above) 119.
[75] Aust (n 66 above) 143.
[76] MC Bassiouni „International crimes: *jus cogens* and *obligatio erga omnes'* (1996) 59 *Law Contemporary Problems* 65 & 68.

simple matter of monism versus dualism.[77] Moreover, the monist-dualist debate has been abandoned for more pragmatic approaches to the questions it raises.[78]

It is also noteworthy that the monist-dualist divide between states is fast fading considering that most states no longer fall neatly into either category.[79]

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

and international law,[80] hence the concepts of a "national principle of legality" (hereinafter national version) and an "international principle of legality" or "minimalist version" (hereinafter international version).[81] In Ferdinandusse's analysis, the national version of the principle of legality is substantially different from the international version in the sense that the international version of the principle, like the sine lege requirement, is broad,[82] whereas the national version is like the strict sine lege scripta approach, requiring prior statutory law for recognition of a crime and penalty.[83] The national version applies under national law to the prosecution of predicate crimes while the international version is found generally under international law and applies to international crimes.[84] While both of these versions bear similarity to the sine lege and sine lege scripta principles, it is submitted that the concept of a national and international principle of legality contextualises better the current discussion on the prosecution of international crimes in national courts.

It is argued that, when faced with the domestic prosecution of international crimes, national courts apply erroneously the strict national version of the principle of legality and, in the process, find themselves at a "false impasse" which leads them to engage in needless legalese and delays in dispensing justice. Alternatively, as the ECOWAS court directed Senegal,[85] states incur

[77] Cryer (n 67 above) 117.
[78] Ferdinandusse (n 42 above) 131.
[79] Sloss (n 64 above) 7.
[80] J Barboza *International criminal law* (2000)148; Cassesse (n 56 above) 142.
[81] See Ferdinandusse (n 42 above) 222-3.
[82] Ferdinandusse (n 42 above) 224.
[83] As above.
[84] As above.
[85] See ECOWAS ruling (n 3 above).

needless costs on legal and institutional reforms for prosecutions which can be conducted easily by domestic courts, regardless of monist-dualist or civil-common law jurisdictions.

The basis for this assertion is explained further below.

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

The International Military Tribunal (IMT) at Nuremberg prosecuted war crimes on the basis that, although they were "new crimes" under the 1907 Hague Convention which was not ratified by all European nations at the time of the tribunal's temporal jurisdiction in 1939, they had become recognised by all "civilised nations" as violations of the laws and customs of war.[86] Later, at the International Military Tribunal for the Far East (IMTFE/Tokyo tribunal), in prosecutions for war crimes and crimes against humanity, Justice Bernard stated, regarding the principle of legality, that:

The crimes committed against the peoples of a particular nation are also the crimes committed against members of the universal community. Thus the de facto authority which can organise the trial of crimes against peace and against humanity can ... prosecute for crimes against peoples of a particular nation ... the law to be applied in such cases, however, will not then be of a particular nation ... but will be that of all nations.[87]

These concepts have metamorphosed into exceptions to the strict application of the principle of legality in relation to the prosecution of international crimes. They have been recognised under present international and regional treaties. To illustrate, the Universal Declaration of Human Rights (UDHR)[88] provides that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law, at the time when it was committed ...[89]

[86] IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals 467.*
[87] 105 IMTFE Records, Dissenting opinion of Justice Bernard, quoted by Gallant (n 1 above) at 148.
[88] Universal Declaration of Human Rights (UDHR), 10 December 1948, UNGA Res. 217.
[89] UDHR (n 84 above) art 11 (Emphasis Added).

"International law" as a source herein has been interpreted to mean both treaty and international customary law.[90] In fact, the drafting history of the non-retroactivity provision in the UDHR reveals that "international law" was included as a substitute for an express provision referred to by some scholars as the "Nuremberg-Tokyo sentence",[91] which had been created as an exception to the strict application of the principle of legality to international crimes. The initial draft of the second session of the Commission on Human Rights stated:

Nothing in this article shall prejudice the trial and punishment of any person for the commission of any act which at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.[92]

This provision was eventually eliminated from the UDHR on the basis that it was better suited under a covenant than a declaration and indeed it was reflected later in the International Covenant on Civil and Political Rights.[93]

It should be noted further that under the UDHR drafting history, the inclusion of the "international law" provision affirmed the drafters' rejection of the strict requirement of a written statute for prior notice of a crime.[94]

As already mentioned, this threshold was maintained under the International Covenant on Civil and Political Rights (ICCPR),[95] which retained the "international law"[96] requirement and restored the "Nuremberg-Tokyo sentence," using the same terminology as was used in the UDHR draft.[97]

This broad recognition of "crimes under general principles of law", tracing back to the times of Nuremberg and Tokyo, was interpreted by some legal scholars as creating a complete exception

[90] Gallant (n 1 above) 158.
[91] Gallant (n 1 above) 170.
[92] Draft International Declaration on Human Rights, 17 December 1947, UN Doc. E/600 Annex A, art 7.
[93] D Weissbrodt *The right to a fair trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) 19.
[94] Letter of Lord Dukeston (UK) to UN Secretary-General, with draft international bill of human rights UN Doc. E/CN.4/21 Annex B 30, art 12 quoted by Gallant (n 1 above) 166.
[95] International Covenant on Civil and Political Rights (ICCPR), 23 March 1976, UNGA Res, 2200, art 15,
[96] ICCPR (n 91 above) art 15(1).
[97] ICCPR (n 91 above) art 15 (2).

to the principle of legality for international crimes.[98] However, the provision as contained in the ICCPR was never intended to derogate from the application of the principle to international crimes,[99] but rather, as illustrated above, it was recognition that, given their universal nature, the prosecution of international crimes should not require a strict version of the principle of legality.[100]

The "Nuremberg-Tokyo sentence" requires reference to general principles of law, as contained in customary international law or treaty law,[101] for acts considered criminal at the time when committed.[102] In so doing, it maintains the requirements of notice, and foreseeability which are major components of the principle of legality.[103]

2.4 The foresee ability and accessibility of international crimes

It has been observed that the national and international versions of the principle of legality share as an essential goal, the assurance of legal certainty in a manner which renders the possibility of prosecution and punishment of individual conduct foreseeable, based on a law that is accessible.[104]

Opponents of the international version of the principle of legality base their convictions on the assertion that the foreseeability of international crimes is doubtful. They posit that most international crimes as formulated by treaty law are not designed as classic prohibitions against criminal conduct and are addressed to states rather than individuals for action.[105] For instance, the Genocide Convention enumerates conduct amounting to genocide,[106] and immediately imposes an obligation upon states to enact laws to give effect to the provisions of the

[98] RK Woetzel *The Nuremberg trials in international law* (1960) quoted by Ferdinandusse (n 42 above) 224.
[99] See Gallant (n 1 above) 117.
[100] As above.
[101] See „Draft International Covenant on Human rights and measures of implementation, the general adequacy of the first eighteen articles," memorandum by the Secretary- General, 2 April 1951, UN Doc E/CN.4/528 at 164, for statement that "general principles of law" is used in reference to international law as recognised under the statute of the International court of Justice
[102] ICCPR (n 91 above) art, 15 (2) emphasis added.
[103] See JJ Paust „Its no defence: *nullum crimen*, international crime and the gingerbread man" (1997) 60 *Albany Law Review* 664.
[104] Ferdinandusse (n 42 above) 222-223.
[105] Paust (n 99 above) 664.
[106] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 9 December 1948, UNGA Res, 260 (III), art 2.

Convention.[107] Such provisions render doubtful the direct application of international criminal law to individuals without prior domestic legislation.[108]

Further criticism has been made on the basis that the content of international crimes is not precise and offers no description of penalties.[109]

However, despite all these criticisms, culpability for international crimes is considered foreseeable given the manifest illegality of such crimes. This concept was operative during the Nuremberg and Tokyo trials and over forty years later it was reflected in a Canadian domestic prosecution, R v Imre Finta,[110] in which Justice Cory remarked that:

[w]ar crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes is vague or uncertain.[111]

The same sentiments were contained in Justice La Forest's remark that: *much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being mala in se.*[112]

In fact, some scholars have reached the bold conclusion that since Nuremberg and Tokyo, the international community has assumed that the prosecution of such crimes is common knowledge.[113]

Such a conclusion is not far from the truth considering that war crimes, crimes against humanity and genocide have acquired the status of customary international law.[114] Indeed, as intimated earlier, it was on the basis that war crimes and crimes against humanity were already part of

[107] Genocide Convention (n 102 above) art 5.
[108] See Paust (n 99 above) 664-5.
[109] W Ruckert &G Witschel „Genocide and crimes against humanity in the elements of crimes," in H Fischer et al (eds) *International and national prosecution of crimes under international law: current developments* (2001) 75, discussing extermination and crimes against humanity; Lamb (n 48 above) 735; Paust (n 99 above) 664.
[110] *R v Imre Finta,* Canada Supreme Court, 24 March 1994, Cory J, para 215.
[111] As above.
[112] *Finta* (n 106 above), La Forest J para 347.
[113] Paust (n 99 above) 665.
[114] J Dugard *International law: a South African perspective* (2005) 160.

customary international law before 1945, that the London Charter of 1945[115] vested the Nuremberg Tribunal with jurisdiction to prosecute them.[116]

Another reservation against applying the international version of the principle of legality to international crimes is the question of accessibility. As indicated above, it is an essential requirement of the principle of legality that a law be accessible.[117] Scholars have interpreted the accessibility requirement to mean that the criminalising rules must be available to the individuals to whom they are addressed.[118] Thus, justification for the strict version of the principle of legality might be made on the basis that treaty and unwritten customary laws are inaccessible to citizens without prior domestic legislation.

However, criticisms based on accessibility are also minimised by the manifest illegality of international crimes,[119] coupled with the argument that accessibility of a law should be considered in the light of the foreseeability principle and not as an independent requirement of the principle of legality since:

[i]t is inconceivable that the principle of legality would preclude the prosecution of a perpetrator who was aware of the illegality of his conduct but unable to access the relevant law.[120]

2.5 The foreseeability of penalties for international crimes

Critics of the international version of the principle of legality also base their reservations on the principle of nulla poena sine lege. Matters are not helped by the fact that as with the nullum crimen principle the nulla poena principle is understood differently under various legal systems.[121] Proponents of the national version of the principle of legality maintain that it requires a written law indicating a specific penalty for a specific crime.[122] Their rejection of the international version of the principle of legality thus is based on the perception that international

[115] London Charter of 1945, 8 August 1945, UNTS 251.
[116] London Charter (n 111 above) art 6.
[117] See note 100 above
[118] Ferdinandusse (n 42 above) 236.
[119] See Hall (n 45 above) 36-7; Paust (n 99 above) 664-5.
[120] Ferdinandusse (n 42 above) 238.
[121] Hall (n 45 above) 165.
[122] Cassesse (n 56 above) 157.

conventions and customary international law provide no corresponding penalties for international crimes.[123]

By contrast, proponents of the international version contend, as they have done in the case of the nullum crimen principle, that the nulla poena principle does not apply to international crimes.[124] They contend that a mere warning of a penalty for international crimes suffices, without the need for precise definition.[125]

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

nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[126]

It has been assessed that both the foregoing strict and liberal versions of the nulla poena principle go beyond what is required under the international human rights regime indicated above.[127] The argument has been made that what the international instruments require is some sort of notice as to the maximum penalty for an offence and not a precise definition of the penalty in order to satisfy the foreseeability requirement.[128]

It has been argued further that for war crimes and crimes against humanity, death or life imprisonment has been the maximum penalty available always,[129] even before the establishment of the Nuremberg and Tokyo tribunals, and these two penalties have continued as the maximum for genocide, as in the case of Rwanda,[130] and for war crimes and crimes against humanity.[131]

Thus, a conclusion can be reached that, given the Nuremberg, Tokyo and subsequent prosecutions, it is recognised under customary international law that the international crimes of genocide, war crimes and crimes against humanity carry the same maximum penalty of death or

[123] See Paust (n 99 above) 664.
[124] Cassesse (n 56 above) 157.
[125] Paust (n 99 above) 667.
[126] UDHR (n 84 above) art, 11(2); ICCPR (n 19 above) art 15 (2).
[127] Gallant (n 1 above) 384.
[128] As above (emphasis added).
[129] W Schabas „*Nulla poena sine lege*" in Triffterer (n 59 above) 463.
[130] Rwandan Organic Law No. 8 of 1996 (n 7 above) art 14 (b); Penal Code of Ethiopia 1957 art 281.
[131] Rome Statute (n 29 above), art 77; Penal Code of Ethiopia (n 126 above) art 282.

life imprisonment, and that this is sufficient notice of a penalty as required by the nulla poena principle under international law.[132]

Moreover, neither written treaty law nor customary international law precludes the prosecution of international crimes on the mere basis that there is no written statute prescribing a specific penalty. To do so would be to negate the international version of the principle of legality which international law endorses under the nullum crimen principle, where notice by statute is not a requirement.[133]

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

The international version of the principle of legality, as contained in the UDHR and ICCPR, is widely reflected in other binding human rights instruments such as the United Nations Convention on the Rights of the Child (CRC),[134] and regional human rights instruments such as the African Charter on Human and Peoples" Rights (ACHPR)[135] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[136] The provision in the American Convention on Human Rights (ACHR)[137] favours the sine lege scripta version. However, international humanitarian law treaties recognise the international version of the principle of legality.[138]

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

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[132] Schabas (n 125 above) 463-4.
[133] See, Ferdinandusse (n 42 above) 255-6.
[134] Convention on the Rights of the Child (CRC), 20 November 1989, UNGA Res.44/25 (Annex), art 40.
[135] African Charter on Human and Peoples" Rights (ACHPR), 27 June 1981. OAU Doc. CAB/LEG/67/3/Rev 5, art 7(2).
[136] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),4 November 1950 .213 UNTS 221, art 7.
[137] American Convention on Human Rights (ACHR) 22 November 1969), 114 UNTS, art 9.
[138] See Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art 67; see also Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 art, 99.

In Barbie,[139] the French court referred to the principle of legality as contained in the ICCPR and ECHR in rejecting the application of the French version of the principle in a domestic prosecution for crimes against humanity.[140] The Constitutional Court in Colombia reached the same conclusion while considering the Rome Statute[141] and the Constitutional Court of Slovenia also relied on the same approach in its war crimes prosecutions.[142]

The constitutions and criminal statutes of countries such as Canada,[143] Poland, and Croatia[144] recognise the international version of the principle of legality for international crimes.

A number of African countries has also followed this trend. The principle of legality under the Constitution of Rwanda, for instance, recognises international law as a basis for criminal prosecution[145] and establishes Gacaca courts with jurisdiction over genocide and crimes against humanity committed in Rwanda between 1 October 1990 and December 1994.[146] Kenya's new constitution abandoned the strict national version of the principle of legality which applied to all crimes under its old Constitution[147] and adopted the international version, allowing prosecution of acts that were considered criminal under "international law".[148] Senegal also took this direction in its 2008 constitutional amendment.[149]

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

....a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an

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[139] France *Court de Cassation, Barbie (No.2),* 26 January 1984, Bull, crim. No. 34; 78 I.L.R.132, at Bull.crim. no.34, 92.quoted by Ferdinandusse (n 42 above) 226.
[140] As above.
[141] *Colombia, Corte Constitutional, sala plena, sentencia C-578 (In re Corte Penal International)*, 30 July 2002, 31 quoted by Ferdinandusse (n 42 above) 226.
[142] Slovenia Constitutional Court, *U-1-248/96* decision of 30 September 1998, quoted by Ferdinandusse (n 42 above) 226.
[143] Constitution Act of Canada, 1982, art 11 (g) & (i).
[144] The Constitution of the Republic of Croatia, 2001 art 31.
[145] Constitution of Rwanda (n 8 above) art 20.
[146] Constitution of Rwanda (n 8 above) art 152.
[147] Constitution of Kenya 2008 art 77 (8).
[148] Constitution of Kenya 2010, as amended, art 50 (2) (n).
[149] Constitution of the Republic of Senegal 2001, as amended, art 9.

Act of the National Assembly or a Law of a state, any subsidiary legislation or instrument under the provisions of a law.[150]

There is also a category of states whose version of the principle is ambiguous. Such states simply proscribe retroactivity for acts that were not considered "criminal offences", as in the case of Uganda,[151] or simply "crimes", as in the case of Angola,[152] or "offences under the law", as in the case of Tanzania,[153] with no clear indication as to whether international law is a source or can be used as a source of criminalisation.

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

What is significant, in spite of the apparent lack of consensus at the national level and, to some extent, the international level, is the argument that, for the prosecution of international crimes, it is the international rather than the strict national version of the principle of legality that has been recognised under International Humanitarian Law[154] and International Human Rights Law as being part of customary international law.[155] Moreover, of all the countries that ratified the ICCPR, only Argentina reserved a right to subject the international version contained in the "Nuremberg-Tokyo sentence" to its constitution,[156] which it later set aside through its jurisprudence.[157] So, whereas states are free to apply the strict national version of the principle in the prosecution of "ordinary crimes", they are not bound to do so when confronted with the prosecution of international crimes,[158] and, in fact, they may be in violation of international law if they do.

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[150] Constitution of the Federal republic of Nigeria, 1999, art 36 (12) (emphasis added); see also the 1992 Constitution of the Republic of Ghana, art 19(11).
[151] Constitution of the Republic of Uganda 1995, art 28(7).
[152] Constitutional Law of the Republic of Angola 1992, art 36 (4).
[153] The Constitution of the United Republic of Tanzania1998, art 13(6).
[154] JM Henckaerts & L Doswald-Beck *Customary international humanitarian law rules* (2005) Vol.1, rule 101, p 371.
[155] Gallant (n 1 above) 370 & 404
[156] See *http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV- 4&chapter=4&lang=en#EndDec* (accessed on 24 September 2011).
[157] Ferdinandusse (n 42 above) 229.
[158] Werle (n 48 above) 80.

2.7 Conclusion

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

One may consider also that there is indeed no need for such a distinction as it is the same principle of legality being applied at both levels. The difference really lies in the nature of crimes to which it is being applied. The universal nature and gravity of international crimes, as compared to national crimes, justify the argument that in the prosecution of such crimes states act on behalf of the international community[159] and, as such, are bound to apply the international version of the principle of legality in the domestic prosecution of international crimes. In fact, there are scholars who argue that those states that lack implementing legislation and yet insist on applying the national version of the principle of legality in prosecuting international crimes, violate their obligations under international law to prosecute such crimes.[160] This scenario has played itself out in Uganda, as well as in Kenya and Senegal, and will form the basis of discussion for the next chapters.

[159] A Cassese, „International criminal justice: is it needed in the present world community?" In G Kreijen et al *Sate, sovereignty, and international governance* (2002) 239, 258; Cryer (n 67 above) 85.
[160] Ferdinandusse (n 42 above) 264.

CHAPTER THREE

THE PRINCIPLE OF LEGALITY AND THE PROSECUTION OF INTERNATIONAL CRIMES IN UGANDA

3.1 Introduction

As part of the effort to end a civil war which raged for over twenty years,[161] the Government of Uganda signed an agreement on accountability and reconciliation[162] with the Lord's Resistance Army (LRA), the rebel group accused of perpetrating war crimes and crimes against humanity during the war.[163] The agreement stipulated, among others, that the government, with a view to ensuring justice and accountability for atrocities committed during the war, was to create institutions and adopt an appropriate legal framework[164] to accommodate the gravity of the atrocities committed.[165] An overview of the agreement demonstrates that the national rather than international jurisdiction was the forum preferred for implementing accountability.[166] To this end, the government was to set up a special division of the High Court and stipulate the appropriate substantive law and rules of procedure to be applied by it. Such a division was established and designated the War Crimes Division of the High Court.[167] Recently it was re-designated the International Crimes Division of the High Court (ICD)[168] and, depending on the outcome of a current constitutional appeal to the Supreme Court,[169] it is set to preside over the first prosecution of a former LRA commander[170] for violations under the Penal Code Act (PCA)[171]7 and the Geneva Conventions Act.[172]

However, the identification of a legal basis for the national prosecution of the atrocities committed in Northern Uganda was not an easy task. The application of the rigid national

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[161] See note 22 above.
[162] Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord"s Resistance Army/Movement (Juba Peace Agreement), 29 June 2007.
[163] See note 22 above
[164] Juba Peace Agreement (n 158 above) parts 2 & 5.
[165] Juba Peace Agreement (n 158 above) part 6.
[166] As above
[167] Annexure to the Agreement on Accountability and Reconciliation of 19 February 2008, art 7.
[168] The High Court (International Crimes Division) Practice Directions No. 10 of 2011 sec 3.
[169] See note 37 above.
[170] Refugee Law Project "Witness to the trial: monitoring the Kwoyelo trial" 11 July 2011. Available at *http://www.refugeelawproject.org/others/Newsletter_on_Kwoyelo_trial_progress_Issue_2.pdf* (accessed on 3 August 2011).
[171] Penal Code Act Cap. 120 Laws of Uganda
[172] Geneva Conventions Act Cap. 363 Laws of Uganda

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

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

3.2.1 The Geneva Conventions Act

It has been argued that due to the grave nature and stigma attached to the crimes of genocide, crimes against humanity and war crimes, it is necessary for states to prosecute these international crimes as such, rather than relying on predicate crimes such as murder and rape in purporting to fulfil their treaty obligations.[173] These arguments are explored further in the discussion below. For many African states, the dilemma arising from such arguments is the often cited lack of legislation domesticating international crimes.[174] The narrow legal provisions proscribing "ordinary crimes" are all they have to fall back on in order to fulfil their duty to prosecute international crimes.[175]

For Uganda, the concept of international crimes under national law is not new. The Geneva Conventions Act, which was enacted in 1964, domesticates and criminalises grave breaches of the four Geneva Conventions.[176] Given that it was enacted prior to the start of the conflict, the Act availed an almost obvious legal basis for prosecuting the atrocities committed in Northern Uganda without concerns about violating the principle of legality.

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

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

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

[176] Cap 363 (n 168 above) sec 2.

Unfortunately, even with this advantage, other technical challenges arose. The grave breaches regime under the Geneva Conventions is applicable only to international armed conflicts. In this regard, the ICTY stated expressly in ***Prosecutor v Dusko Tadic*** that:

[a]lthough the language of the Conventions might appear to be ambiguous and the question is open to some debate ... it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts.[177]

Uganda"s indictment against the first LRA accused, Thomas Kwoyelo, includes grave breaches of the Geneva Conventions as one of the charges.[178] Although the case against Kwoyelo is sub judice, it is very likely that the prosecution, by including such a charge, seeks to argue that the war in Northern Uganda was in fact an international armed conflict between Uganda and Sudan,[179] on the basis that Sudan was involved in offering armed support to the LRA.[180]

In order to prove that a non-international armed conflict has been internationalised through a second state's support for a rebel group, the Appeals Chamber in ***Prosecutor v Tadic***[181] stipulated the "overall control test" which requires proof of the second state's involvement in organising, coordinating or planning the military actions of the rebel group,[182] beyond evidence of mere financial assistance or provision of arms.[183]

Given the government's lack of capacity and resources to undertake effective investigations for the crimes committed during the war in Northern Uganda,[184] it is quite obvious that it would be an impossible task to gather evidence that proves Sudan's involvement in the conflict to a degree

[177] *Prosecutor v Dusko Tadic a/k/a "Dule"* International Criminal Tribunal for Yugoslavia (ICTY) (2 October 1995), decision on the defence motion for interlocutory appeal on jurisdiction, para 79.
[178] Uganda: Kwoyelo-state prefers 53 Charges" *The Monitor* 12 July 2011. Available at *http://allafrica.com/stories/201107120020.html* (accessed on 10 September 2017).
[179] Putting complementarity into practice (n 13 above) 60.
[180] "LRA rebel pins Sudan on support" *The New Vision* 5th April, 2010. Available at *http://www.newvision.co.ug/D/8/12/715274* (accessed on 12 September 2017).
[181] *Prosecutor v Tadic*, ICTY (15 July 1999), T-94-1-A, para 84.
[182] As above.
[183] *Tadic Appeals Judgement* (n 177 above) para 137.
[184] Putting complementarity into practice (n 13 above) 63.

that discharges the high burden of proof in criminal matters,[185] and that meets the established international standards.[186]

To the extent that Uganda's Geneva Conventions Act only criminalises grave breaches, and given the uncertainty surrounding the nature of the conflict in Northern Uganda,[187] it is submitted that the Geneva Conventions Act offers no clear basis for a successful prosecution of the past atrocities committed in Northern Uganda. In fact, at the stage of the preliminary hearing, Kwoyelo's defence counsel raised an objection to the charge preferred under the Geneva Conventions Act, arguing that it was not backed by enough facts to show that the conflict in Northern Uganda was an international armed conflict.[188] Unfortunately, with no clear reasons, this objection was not pursued under the constitutional reference challenging Kwoyelo's prosecution.[189] In any case, it is submitted that this state of affairs diminishes the significance of the Geneva Conventions Act as a basis for prosecution.

It goes without saying that had Uganda domesticated the Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)[190] at the time of ratification in 1991,[191] technicalities surrounding the nature of the conflict in Northern Uganda would have been avoided, facilitating a focus on substantive issues of accountability for the violations perpetrated. However, no such action was taken, hence the foregoing dilemma.

3.2.2 The International Criminal Court Act

It has been said that the prosecution of international crimes in Uganda's domestic courts is tied to its International Criminal Court Act that was recently enacted to domesticate the Rome Statute.[192] However, the Act, in which so much hope was placed for the prosecution of past

[185] See *Woolmington v DPP* [1935] AC 462.
[186] *Tadic Appeals Judgement* (n 177 above) para 137.
[187] C Mbazira "Prosecuting international crimes committed by the Lord's Resistance Army in Uganda" in Murungu & Biegon (n 170 above) 215.
[188] RLP News Letter (n 166 above).
[189] *Kwoyelo v Uganda* (n 36 above) para 55
[190] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[191] *http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf* for date of ratification.
[192] Putting complementarity into practice (n 13 above) 59.

atrocities, in fact did not offer any solutions.[193] The Act defines and criminalises the core international crimes of genocide, crimes against humanity and war crimes.[194] Unfortunately, as noted in chapter one, the Act is of no relevance given that it has no retrospective effect.[195] The non-retrospectivity of the Act was justified on the basis that the principle of legality was embedded in article 28 of the Constitution of Uganda.[196] This view is shared by many members of Uganda's legal fraternity, including some members of the judiciary.[197]

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

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

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

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

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

[193] See B Olugbo „Positive complementarity and the fight against impunity in Africa" in *Murungu & Biegon* (n 170 above) 270.
[194] ICC Act of Uganda (n 15 above) secs 7, 8 & 9.
[195] Putting complementarity into practice (n 13 above) 60.
[196] As above.
[197] Putting complementarity into practice (n 13 above).

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

It has been observed that many countries adopt the international version of the principle of legality under the UDHR and the ICCPR even if they do not use the exact language used in those instruments.[198] It has been observed also that simply because "international law" is not expressly mentioned in a country's provisions on the principle of legality does not mean that the application of the international version of the principle in the prosecution of international crimes is not recognised,[199] and further that national provisions should not be "taken on face value but form one step in a more elaborate analysis" in locating the international version of the principle of legality.[200] It has been posited further that the international version of the principle, as contained in the UDHR and the ICCPR, was adapted to address non-retroactivity in common law states where written law is not a strict source of crime creation.[201] Indeed, two common law states, the United Kingdom and the Netherlands, have been noted to follow this international version in fulfilling their obligations to prosecute international crimes.[202]

Uganda is a common law country.[203] The language used in article 28 of the Ugandan Constitution does not stipulate a strict requirement for written law in contrast to the express provisions in other constitutions such as that of Nigeria or Ghana.[204] Furthermore, Uganda, unlike Argentina,[205] made no reservation to article 15 of the ICCPR this is that Uganda adopted and considered the article 15. These facts provide a strong basis for an argument that article 28 of the Constitution of Uganda can be interpreted to by-pass the national version of the principle of legality, and accommodate the international version. Gallant even lists Uganda, alongside other countries like Malawi, Namibia, Benin, and Ethiopia, under that category of states which adopts the international version of the principle of legality although the language used under their

[198] Gallant (n 1 above) 252.
[199] Ferdinandusse (n 42 above) 36.
[200] As above.
[201] Gallant (n 1 above) 253.
[202] As above.
[203] Uganda Joined the Common wealth in 1962 when it gained independence from Britain. See Common Wealth Secretariat at *http://www.thecommonwealth.org/YearbookHomeInternal/139552/* (accessed on 9 September 2011).
[204] See (n 146 above).
[205] See (n 152 above).

constitutions does not state expressly so.[206] If such be the case, it follows that the international crimes of genocide, war crimes and crimes against humanity, being crimes under customary international law, were recognised as such under Ugandan law even prior to Uganda's domestication of the Rome Statute. On an even broader reflection, they were crimes under Ugandan law at the time the atrocities in Northern Uganda were committed.

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

This proposition gains credence when it is appreciated that the definitions of the core crimes of genocide, crimes against humanity and war crimes under the Rome Statute are derived largely from the same crimes as they existed under customary international law, stretching as far back as the Nuremberg and Tokyo prosecutions.[207]

On this basis, it is argued that the essential content of the three core crimes under the Rome Statute is not substantially different from the position under customary international law.[208] In fact, it has been posited that the need to determine whether the crimes under the Rome Statute are crimes under customary international law may soon be irrelevant.[209]

In view of the above, the retrospective application of ICC legislation has been implemented by countries such as Canada in its Crimes Against Humanity and War Crimes Act which was enacted in 2000.[210] In a bold and innovative fashion, the Act criminalises crimes against humanity, genocide and war crimes, and defines these crimes to include acts that were

[206] Gallant (n 1 above) 252.
[207] W Schabas *An Introduction to the International Criminal Court* (2007) 83-85.
[208] Gallant (n 1 above) 369.
[209] As above
[210] Crimes Against Humanity and War Crimes Act 2000 C 24. (Canada ICC Act). Available at *http://laws.justice.gc.ca/en/C-45.9/text.html* (accessed on 9 September 2017).

recognised as criminal under customary international law.[211] The Act then further stipulates as follows:

For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.[212]

This provision gives the Act retrospective application, allowing Canada to prosecute international crimes committed even prior to the entry into force of the Rome Statute.[213] It also extends jurisdiction to international crimes committed prior to Canada's signature and ratification of the Rome Statute.[214] The last part of the provision has been recognised also as providing for a wider definition of the crimes than the definitions under the Rome Statute,[215] thereby addressing concerns that the core crimes of the Rome Statute are defined too narrowly as compared to their definition under customary international law.[216]

This was not the first legislative initiative to be undertaken by Canada. On 16 September 1987, Canada amended its Criminal Code with retrospective effect, to incorporate the international crimes of genocide, crimes against humanity and war crimes.[217] A series of prosecutions based on these legal reforms ensued,[218] some even resulting in convictions for war crimes.[219]

Such bold enactments have been explained by the fact that since Canada applies the international version of the principle of legality,[220] these legal reforms did not operate to criminalise

[211] See the Canada ICC Act (n 206 above) Section 4 (3).
[212] Canada ICC Act (n 206 above) sec 4(4) (emphasis added).
[213] The Rome Statute entered into force on 1 July 2002.
[214] Canada signed the Rome Statute on 18 December 1998 and ratified it on 7 July 2000. See ICC Legal tools data base at *http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/* (accessed on 9 September 2017).
[215] See ICC Legal tools data base (n 210 above).
[216] Schabas (n 203 above) 85.
[217] S AWilliams "Laudable principles lacking application: the prosecution of war crimes in Canada" in L.H Timothy MacCormack et al (eds) *The Law of war crimes: national and international approaches* (1997) 159.
[218] See *Secretary of State v Luitjens* (1992); 48 F.T.R. 267; *R v Finta* (n 106 above).
[219] *Luitjens* (n 214 above).
[220] See Constitution Act of Canada (n 139 above).

retroactively conduct that was not already criminal at the time it was committed but, rather, simply extended retrospective jurisdiction by Canadian courts over already existing offences.[221]

The same argument has been made and, it is submitted, rightly so, with respect to similar legal reforms undertaken by Senegal in its quest to prosecute Hissene Habre for torture.[222] This concept was used also by the Secretary-General at the time to justify the retrospective jurisdiction of the ICTY,[223] and is no doubt the same concept underlying the retrospective jurisdictions of the ICTY and ICC. On this basis, the ECOWAS ruling that the same concept would not apply to domestic courts has been rightly criticised as flawed.[224]

The foregoing concept also enabled a successful prosecution in Attorney General of Israel v Eichmann,[225] in which it was stated, with respect to the retrospective application of the Israeli and Nazi Collaborators Punishment Law of 1950, that:

the crimes of which the appellant was convicted must be seen as having constituted, since `time immemorial,' a part of international law and that, viewed from this aspect, the enactment of the Law of 1950 was not in any way in conflict with the maxim nulla poena, nor did it violate the principle inherent in it.[226]

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

Any person charged with an offence has the right ... not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or

[221] Williams (n 213 above) 157.
[222] See Spiga (n 5 above); see also Marks (n 40 above) 151.
[223] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, presented on 3 May 1993, S/25704, para 34 & 38.
[224] Spiga (n 5 above) 18.
[225] *Attorney-General of Israel v Eichmann* [1961] 36 ILR277, 288-83 (1968).
[226] As above.

International law or was criminal according to the general principles of law recognized by the community of nations.[227]

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

In the light of the above, it is submitted that there is no sound legal reason why, at the time of domesticating the Rome Statute, Uganda did not take the same bold steps as those taken by Canada and apply the International Criminal Court Act retrospectively or even incorporate the same reforms under its Penal Code Act. Had this been done, combined with the harmonisation of penalties under the Rome Statute with those under Ugandan law to avoid constitutional challenges on inequality,[228] the International Criminal Court Act would have constituted a strong basis for the prosecution of the past atrocities committed in Northern Uganda.

3.3.1 The role of politics

While it is beyond the scope of this study to explore political inhibitions to prosecuting international crimes in domestic courts, it is noteworthy that the principle of legality may be manipulated politically to prevent prosecution. This has been suggested in respect of Senegal's failed attempt at prosecuting Habre[229] and, arguably, could be relevant to Uganda also.

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

[227] Constitution Act of Canada (n 139 above). Emphasis added.
[228] *Jowad Kezaala v Attorney General* Constitutional Petition No. 24 of 2010.
[229] See Marks (n 40 above) 159.

Movement (then the National Resistance Army), led by President Museveni, against the government of the Uganda People's Congress led by former president Milton Obote.[230]

In the same regard, it is instructive to note that when Kenya's International Criminal Court Act was finally enacted it had prospective[231] rather than retrospective application, contrary to expectations that it would apply retrospectively as a basis for the prosecution of crimes against humanity that were allegedly committed during Kenya's post-election violence in 2007.[232] Under its recommendations on curbing impunity and enabling the prosecution of those responsible for the post-election violence, the report of the Commission of Inquiry into the Post-Election Violence in Kenya clearly directed that the ICC Bill of 2008 be fast-tracked and implemented into law;[233] and that it be appliedby a special tribunal which was to be set up for the sole purpose of investigating and prosecuting those responsible for crimes committed during the post-election violence.[234] It is inconceivable how Kenya"s International Criminal Court Act, set to commence in 2009, was to be applied to atrocities committed in 2007 except by retrospective application. It is also curious to note that even under a new Constitution which embraces the international version of the principle of legality, there has been no amendment to the Act to ensure retrospective application and prosecution of the post-election atrocities.

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

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[230] Generally, "Otunnu demands investigation of Luweero triangle massacres" *Daily Monitor* 16 March 2010.Available *at http://africannewsanalysis.blogspot.com/2010/03/otunnu-demands-investigation-of-luwero.html* (accessed on 14 September 2017).

[231] See note 15 above.

[232] See generally, Report of the Commission of Inquiry into Post Election Violence in Kenya (CIPEV report) 16 October 2008. Available at *http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-319092.pdf* (accessed on 19 September 2017).

[233] CIPEV report (n 228 above) 476.

[234] CIPEV report (n 228 above) 472.

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

If the legislative approach proves unsuccessful, as it arguably did in the case of Uganda, customary international law itself remains a useful source for the courts to exploit the international version of the principle of legality and ensure the successful prosecution of international crimes. This option is desirable considering the view that if a state fails to fulfil its duty to criminalise international crimes by not legislating against them, it may remedy this failure through the direct application of international law in its domestic courts.[235]

However, such a suggestion is not made without hesitation. It is acknowledged that the views on direct application of international law by courts, including customary international law, are divergent.[236] Some states only permit it where national law provides a specific reference to international law, others only permit it in respect of treaty.

Law and not customary law, and still others expressly prohibit it.[237] The reservations against customary international law appear to be partly because of the misguided idea that it is inferior to treaty law,[238] a concept which has been rejected strongly by some scholars, who assert that the concept of a hierarchy of laws is alien to international law and that customary international law and treaty law are autonomous sources of law.[239]

The Australian Federal Court in ***Nulyarimma v Thompson***,[240] a case concerning the maltreatment of Aborigines, refused to recognise the customary international law offence of genocide in the absence of Australian law criminalising it at the time the acts sought to be prosecuted were committed. The court held that for genocide to be regarded as punishable nationally on the basis that it was a crime under international law, there had to be such an enabling provision under Australian law, failing in which, the principle of legality would be violated if the prosecution ensued.[241]

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[235] Ferdinandusse (n 42 above) 264.
[236] Ferdinandusse (n 42 above) 270
[237] As above.
[238] M E Villiger *Customary international law and treaties* (1985) 35.
[239] As above.
[240] *Nulyarimma v Thompson*, Federal Court of Australia, (1 September 1999), [1999] FCA 1192; See also *Buzzacott v Hill Federal Court of Australia*, (1 September 2000) 39 ILM (2000) 20.
[241] *Nulyarimma* (n 236 above) para 22.

By contrast, in Hungary's attempts to prosecute war crimes and crimes against humanity after the communist era, its Constitutional Court recognised the binding nature of customary international law, the unique nature of international crimes, and their status as jus cogens, separating them from national crimes.[242] The Court recognised that prosecution of international crimes was not dependent on national laws and that crimes under customary international law were governed by the international version rather than the national version of the principle of legality.[243] Later, the Constitutional Court suggested expressly the direct application of customary international law in the absence of clear national legislative measures for the domestic prosecution of international crimes.[244] This enabled numerous national prosecutions and convictions for international crimes in Hungary.[245]

Despite such contrasting approaches, it has been argued that for the consistent interpretation of international crimes, national courts are obliged to endorse the direct application of international law.[246]

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

The direct application of international law has been referred to as a process whereby a national court applies an international rule without it being transformed into a rule of national law.[247] Thus, where a court bases part of its decision on international law or uses international law to interpret national law, or refers to international law as a basis for definition of the crimes being prosecuted, this would amount to a direct application of international law.[248] In all cases, however, there has to be a rule of reference allowing the direct application.[249] Such rule of

[242] *Decision No. 53/1993, On War Crimes and Crimes Against Humanity*, Hungary Constitutional Court (13 October 1993) para 515-517 quoted by Ferdinandusse (n 42 above) 78.
[243] *Decision No. 53/1993* (n 238 above) para 518.
[244] *Decision No. 36/1996,* Hungary Constitutional Court, (4 November 1996), para II (2) quoted by Ferdinandusse (n 42 above) *Decision No. 36/1996,* Hungary Constitutional Court, (4 November 1996), para II (2) quoted by Ferdinandusse (n 42 above) 80.
[245] See Ferdinandusse (n 42 above) 80.
[246] Ferdinandusse (n 42 above) 271.
[247] AW Bradley & K Ewing *Constitutional and administrative law* (1993) 326; Werle (n 48 above) 76;
[248] Werle (n 48 above) 76.
[249] As-above

reference may be for the substantive definition of certain acts, for jurisdictional purposes, or just a general rule of reference.[250]

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

The first option raises concerns as to the jurisdictional basis for a prosecution in Ugandan courts based solely on customary international law. Unlike countries like Kenya[251] and South Africa,[252] international law is not listed as one of the sources of law available to Ugandan judges.[253] Uganda's High Court (International Crimes Division) Practice Directions confers upon the International Crimes Division jurisdiction over crimes stipulated under statutory law only.[254] The Ugandan legal system is steeped in a highly positivist culture, so much so that it has been noted that international customarylaw is virtually unknown in Ugandan courts.[255] In fact, some scholars have observed that while there has been some progress for the role of treaty law in Ugandan courts, there has been total silence on the role of customary international law.[256] Nevertheless, it has been suggested that some of the judges might, in theory, allow prosecutions using treaty law that has not been domesticated and may even be open to applying customary international law in the spirit of enforcing the Bill of Rights under the Constitution.[257] However, it is not clear whether they would be prepared to accept it as a basis for prosecution of international crimes or whether they intend to use it merely as an interpretative guide.

Unlike their Ugandan counterparts, Kenyan judges appear more receptive of customary international law.[258] Even before Kenya adopted its new Constitution, which recognises international law expressly,[259] the Kenyan Court of Appeal adopted a rather progressive approach to customary international law when deciding a case involving gender discrimination in

[250] As above
[251] Constitution of Kenya (n 144 above) art 2(5).
[252] Constitution of the Republic of South Africa 1996, sec 232.
[253] Judicature Act Cap 13 Laws of Uganda; B Kabumba „The application of international law in the Ugandan judicial system: a critical inquiry" in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 84.
[254] International Crimes Division Directions (n 164 above) sec 6.
[255] Putting complementarity into practice (n 13 above) 59 & 60.
[256] Kabumba (n 249 above) 105.
[257] As above.
[258] See JO Ambani "Navigating past the dualist doctrine: The case for progressive jurisprudence on the application of international human rights norms in Kenya" in Killander (n 249 above) 30.
[259] See (n 144 above) art 2.

the distribution of a deceased's property. The court stated that customary international law could be applied by courts even in the absence of implementing legislation as long as it did not conflict with domestic law.[260] The same principle has been applied in other Kenyan cases.[261] The principle is grounded in some scholars'' arguments that the customary international law is part of common law and national courts may apply it directly.[262]

However, the court used customary international law for interpretative guidance rather than as a basis for a remedy, maintaining it at a level inferior to statutory law.[263] Moreover, it should to be noted that this progress is in the field of international human rights law. Similar progress by African courts in the field of international criminal law remains to be seen.

It has been argued that in the prosecution of international crimes, courts are bound to interpret all national requirements, including jurisdictional requirements, in a manner that allows for the "unimpeded effectuation of the different international obligations".[264] However, it is still very doubtful whether Ugandan courts would be prepared to take so bold a step as to entertain an indictment based on customary international law without clear legislative backing, given their conservative approach to the principle of legality and considering that the prosecutors themselves have not demonstrated a readiness to be creative with international law in conducting their prosecutions.[265]

Moreover, at the very least, the need for a rule of reference either in the state's Constitution or a statute is recognised as necessary for courts to apply international law directly.[266] Even the progressive approach adopted by Hungary was premised on a general rule of reference to international law in the Hungarian Constitution.[267]

To this end, the jurisdiction of Uganda's International Crimes Division could be extended to crimes under customary international law with a view to encouraging curial innovation and

[260] *Mary Rono v Jane Rono* (2005) AHRLR 107 (KeCA 2005) para 21.
[261] *Re The Estate of Lerionka Ole Ntutu* (Deceased) (2008) eKLRM; *RM v Attorney General* (2006) AHRLR 256 (KeHC 2006).
[262] Ambani (n 254 above); Bradley & Ewing (n 243 above) 326.
[263] Ambani (n 254 above) 30.
[264] Ferdinandusse (n 42 above) 271.
[265] Putting complementarity into practice (n 13 above) 60-61; see also Kabumba (n 249 above) 89-90 on the general reluctance of Ugandan lawyers to use international law in their case strategies.
[266] Ferdinandusse (n 42 above) 7.
[267] Constitution of Hungary 1949, art 7 (1).

confidence in relying on it to prosecute international crimes. The courts would rely also on the international version of the nulla poena sine lege principle to guide them at the sentencing stage.

Given the rigid rules of drafting of indictments under Ugandan law,[268] concerns may arise relating to the format of an indictment based on customary international law. However, such concerns may be regarded as procedural matters which can be dealt with under the International Crimes Division regulations.[269]

The second option, which is less radical than the first, allows courts to use customary international law through the retrospective re-characterisation of national crimes as international crimes. This method is not prohibited by customary international law.[270] However, it has been criticised as being prone to abuse, as judges are wont to exceed their jurisdiction by designating as criminal acts that are otherwise not criminal under customary international law.[271] To avoid abuse, it has been suggested that the judge has to ensure that the act was a crime under international law at the time it was committed, and at the time it is being prosecuted, and that the sentence imposed must meet the requirements of the nulla poena sine lege principle.[272]

If the case against Kwoyelo proceeds, the International Crimes Division could use the above formula and recharacterised the fifty or so charges preferred against him, including counts of murder and kidnap with intent to murder, as war crimes or crimes against humanity. The international version of the nulla poena sine lege rule would guide the court similarly at the stage of sentencing. The court would have to pay close attention to whether the conduct of which the accused stands charged is prohibited under customary international law, by examining the relevant opinio juris and state practice.[273]

However, it is not clear what real value such a re-characterisation would have on the prosecution or how it actually would manifest. The technical rules under Uganda's Trial on Indictments Act require that an indictment must state the specific offence with which an accused is charged and the particulars thereunder.[274] A conviction will be based, therefore, on the contents of the

[268] Trial on Indictments Act Cap 23 Laws of Uganda, secs 22-27.
[269] See regulations at (n 164 above) sec 8.
[270] Gallant (n 1 above) 367-68.
[271] As above
[272] As above.
[273] As above.
[274] Trial on Indictments Act (n 264 above)-sec 22.

indictment. Thus, if an indictment is drawn for murder, an accused will be convicted of murder and not "a war crime of murder". It is difficult to imagine how a judgment condemning "war crimes" and concluding with a conviction for "murder" under the Penal Code Act would be of substantial impact. Perhaps the added value would lie in the nature of the court's reasoning, the use of facts relevant to determine the existence of the international crime, the reliance on customary international law and considerations of the atrocious nature of the offence in determining the gravity of the penalty imposed.

On the whole, the concept of direct application of international law is admittedly problematic and bound to be rejected instinctively by conservative courts.[275] In Ferdinandusse's words, what may be permissible under some jurisdictions may be viewed as impermissible judicial activism in others.[276]

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

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

With an International Criminal Court Act that is not retrospective, a Geneva Conventions Act that only criminalises grave breaches, and no legal basis for the application of customary international law, Uganda found itself in a situation that has been dubbed the "zero solution",[277] having to rely on ordinary criminal law to prosecute international crimes.[278] The Penal Code Act seemed to be the best available basis for prosecuting the international crimes committed in Northern Uganda without complications regarding the principle of legality. Indeed, the indictment against Kwoyelo was based almost entirely on the Penal Code Act, except for one count under the Geneva Conventions Act.[279]

However, some issues arise in relation to prosecuting predicate crimes in place of international crimes. The first is whether such a prosecution would be the same as a prosecution of

[275] Paust (n 99 above) 672.
[276] Ferdinandusse (n 42 above) 272.
[277] Werle (n 48 above) 77.
[278] As above.
[279] See RLP news letter (n 166 above).

international crimes per se, and the other is whether such prosecution satisfies the requirements of complementarity under the Rome Statute.

3.5.1 Predicate crimes, accountability and complementarity under the Rome Statute

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

Such an argument may be understood better if viewed in the light of the principle of complementarity under the Rome Statute. This context is especially significant for Uganda, given the concerns that persist over Uganda's ability to prosecute the war crimes allegedly committed in Northern Uganda,[280] and the crucial question of whether the case it referred to the ICC against top LRA commanders, including Joseph Kony, can be referred back to the national courts on the basis that Uganda's legal system is now able to prosecute the accused persons.[281] Such an inquiry is also pertinent considering the high support for holding the LRA accountable before domestic courts.[282]

It is interesting to note that although the significance of predicate crimes was discussed during the negotiation process of the Rome Statute, it arose under the rule against double jeopardy and not the principle of complementarity.[283] Nevertheless, it is submitted that the conclusions that were reached give some insight into the intention of the drafters with regard to the significance of predicate crimes under the principle of complementarity. The issue arose as to whether accused persons could be tried by the ICC if they had been prosecuted previously by other courts for "ordinary crimes".[284] It was concluded, in effect, that a prosecution and conviction for an "ordinary crime" was sufficient and was excluded from the exceptions to the rule against double

[280] Olugbuo (n 189 above) 273.
[281] As above.
[282] P Pham &P Vinck „Transitioning to peace: a population-based survey on attitudes about social reconstruction and justice in Northern Uganda December 2010 39. Available at *http://www.law.berkeley.edu/HRCweb/pdfs/HRC_Uga2010final_web.pdf* (accessed on 12 September 2017).
[283] RS Lee *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results* (1999) 56-58.
[284] Lee (n 286 above) 57.

jeopardy.[285] In fact, arguments as to the deterrent effect of the ICC prosecuting the accused for international crimes per se were not convincing to the majority of the negotiators.[286]

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

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.[287]

This provision, coupled with article 1[288] of the Rome Statute, has been considered to contain the principle of complementarity.[289]

The concern raised in relation to the prosecution of predicate crimes can be answered by a definition of "the case" in the above provision. This was considered recently by the ICC in Kenya"s challenge on admissibility for crimes against humanity allegedly committed during the post-election violence, in The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.[290] In determining the validity of Kenya's admissibility challenge under article 19 of the Statute, the Court held as follows:

Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.[291]

Although the decision turned on a determination of whether Kenya was actually investigating the impugned conduct at the time summons and arrest warrants were issued against the accused persons,[292] it is submitted that the case does provide an insight into the adequacy of prosecuting

[285] Lee (n 286 above) 58.
[286] As above.
[287] Rome Statute (n 29 above) (emphasis added).
[288] Article 1 provides that the ICC jurisdiction is complementary to national jurisdiction.
[289] Lee (n 286 above) 42 & 43; Olugbuo (n 189 above) 251.
[290] *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali (Kenya's challenge on admissibility,)* International Criminal Court (30 August 2011), No. ICC-01/09-02/11 O A.
[291] *Kenya's challenge on admissibility* (n 293 above) para 39 (emphasis added).
[292] *Kenya's challenge on admissibility* (n 293 above) para 40.

predicate crimes instead of the core international crimes themselves. The minimum requirement to investigate "substantially the same conduct" means that the state is not obliged to investigate and prosecute exactly the crime of genocide, war crimes or crimes against humanity, but rather the same conduct that is proscribed under these crimes, such as murder, rape or kidnap with intent to murder.

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

Moreover, it should be appreciated that most victims of atrocity are not the sophisticated or elite. Few of them know the intricacies of the formal justice system, let alone the technicalities of defining crimes. According to a recent survey done in Northern Uganda, nearly half of the respondents have had no contact with the formal justice system.[293] And yet, many agreed that accountability in the form of holding trials was necessary for the sake of justice.[294] It is inconceivable that for people who have had almost no interaction with formal criminal justice, the prosecution of a rape or murder of a loved one would be of any less significance if pursued as a predicate crime instead of an international crime. Furthermore, it is contended also that in certain cases, such as Uganda, prosecution using domestic legislation might offer a stronger sense of justice for victims, given that local legislation designates a maximum penalty of death for underlying crimes such as murder[295] and rape,[296] while the highest penalty for international crimes under the International Criminal Court Act and the Geneva Conventions Act is life imprisonment.[297]

[293] Transitioning to peace (n 285 above) 40.
[294] As above.
[295] PCA (n 167 above) sec 189.
[296] PCA (n 167 above) sec 124.
[297] ICC Act of Uganda (n 15 above) secs 7, 8 & 9; Geneva Conventions Act (n 168 above) sec 2.

3.5.3 Logistical considerations

For African countries, prosecuting predicate crimes could mean avoiding the financial and other challenges associated with prosecuting international crimes, such as legal and institutional reforms needed for setting up of special tribunals, training of judges, and sometimes even employing of international judges as many have recommended.[298] Such reforms exert pressure on states" already fragile economies or, where such reforms are dependent on donor funds, may render them vulnerable to donor influence,[299] which in turn may compromise the independence of the transitional justice process. For example, Senegal's budget to effect similar legal reforms amounted to 28 million Euros,[300] while Uganda's International Crimes Division's budget depends largely on donor support.[301]

However, it is cautioned that reliance on underlying crimes should not be used as a first or long term option for states,[302] for it is indeed desirable that international crimes be prosecuted per se for the reasons already given above. In addition, reliance on underlying crimes poses a risk of retarding the development of international crimes in domestic jurisdictions, and may be used as a tool to entrench the hesitation of national judges to venture beyond the familiarity of their national criminal codes.[303]

3.6 Conclusion

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

It is clear that countries such as Canada have taken bold and innovative steps towards ensuring that international crimes per se are prosecuted in domestic courts by giving overt constitutional

[298] Olugbuo (n 189 above) 274; Putting Complementarity into practice (n 13 above) 67.
[299] See Putting complementarity into practice (n 13 above) 81-82.
[300] K Neldjingaye „The trial of Hissene Habre in Senegal and its contribution to international criminal law" in Murungu & Biegon (n 170 above) 189.
[301] See Putting complementarity into practice (n 13 above) 81-82.
[302] Werle (n 48 above) 77.
[303] Ferdinandusse (n 42 above) 276.

recognition to the international version of the principle of legality in relation to international crimes. Other countries like Hungary have applied customary international law progressively in the domestic prosecution of war crimes and crimes against humanity, backed by the express constitutional reference to the role of international law in domestic law. Uganda's legal system lacks similar structures, which may explain its resistance towards the international version of the principle of legality.

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

However, in no case should the underlying crimes option be allowed to inhibit Uganda's or any other state's efforts to extricate itself from the clutches of the national version of the principle of legality in the prosecution of international crimes. In such context, the national version should be viewed as an impediment to the fulfilment of a state's obligations under international law,[304] which contravenes the principles of the Vienna Convention on the Law of Treaties.[305]

[304] Ferdinandusse (n 42 above) 264
[305] See, The Vienna Convention on the Law of Treaties, (23 May 1969), UNTS 331, art 27.

CHAPTER FOUR

CHALLENGES FACED BY DOMESTIC COURTS IN TRYING TO RESOLVE INTERNATIONAL CRIMES

4.0 Introduction

This chapter looked at the challenges encountered by the domestic courts in trying to practice the international crimes.

4.1 Legislative inadequacy

The establishment of the ICD through a legal notice meant a lack of comprehensive policy and legislative framework to deal with the scope of violations the unit was to address. This gap has played out most clearly on two issues: lack of substantive law to prosecute cases and a conflict of laws.

4.2 A gap in substantive law

The conflict in Northern Uganda qualified to be termed as an internal armed conflict. As such, the violations that occurred within this context were proscribed both by the Geneva Convention, particularly Additional Protocol II, 50 and the Rome Statute. Unfortunately Uganda's Geneva Convention Act, which domesticates and criminalizes grave breaches of the Four Geneva Conventions, applies only to international armed conflict.

Although the first case before the ICD ***Thomas Kwoyelo Vs Uganda***, on an LRA matter, cites the Geneva Convention Act, its applicability is tenuous. Perhaps in recognition of this, the Ugandan DPP has also instituted alternative charges against the defendant, Thomas Kwoyelo. Although in August 2010, Kwoyelo was charged with 12 counts of violating Uganda's 1964 Geneva Convention Act, including grave breaches of willful killing, the DPP subsequently amended the indictment to reflect 53 alternative counts of crimes under the Uganda Penal Code. The counts included murder, attempted murder, kidnapping, kidnapping with the intent to murder, robbery, and robbery using a deadly weapon."

However, the International Criminal Court Act, which criminalizes war crimes more broadly, was domesticated after the Northern Uganda conflict occurred. It cannot therefore be applied retrospectively. The consequences of a failure to address the retrospectivity question in policy or legislation beforehand have now become evident.

4.3 Inconsistencies in international law and domestic law

The creation of a division within the High court of Uganda, through administrative action, to address international crimes, failed to legislatively address the interaction between international law standards and domestic law. It therefore could not predict the conflict of laws that emerged.

Firstly, Uganda subscribes to the death penalty, which is prescribed in the Penal Code and therefore available within the ICD for application. In line with the preference in international law for abolition of the death penalty, the death penalty has not been a punishment available to international and hybrid war crimes courts. Secondly Uganda only provides legal representation for accused persons whose charges attract the death penalty upon conviction. Thirdly, with the passage of the Amnesty Law, amnesty could be granted to perpetrators of war crimes. Uganda's Amnesty Act provides that any rebel who "renounces and abandons involvement in the war or armed rebellion" may receive amnesty. By its terms, the Act appears to include all cases of LRA members so long as they reject rebellion, irrespective of the ICD or the crimes in which LRA members may be implicated.

Over 12,000 LRA members have received amnesty since the Amnesty Act was adopted in 2000, including more senior members than Kwoyelo, and LRA members have continued to be granted amnesty since the ICD's inception. Notably, Lt. Col. Charles Arop, the LRA's former director of operations, surrendered to Ugandan troops in November 2009, and was granted amnesty in late 2009. Arop is accused of leading the Christmas Massacres part of a series of attacks in 2008 and 2009 resulting in the deaths of at least 620 civilians and the abduction of more than 160 children in the DRC.

These three practices are in contradiction with international law standards and practice for prosecuting international crimes.

4.4 Impartiality

The ICD so far, has not made a move to prosecute Ugandan Defence forces for their role in the violations.

Its prosecution therefore has been one-sided. Further, other than choosing to prosecute only the LRA former soldiers, the granting of amnesty has also been arbitrary. Despite Thomas Kwoyelo applying for amnesty, it has not been granted. Yet perpetrators of more grievous violations were granted amnesty.

In preference to Justice it does not only need to be done under criminal courts but to prove it. The impartiality of judicial officers are to act justly to accused persons in criminal court. Although only one case concerning the northern Ugandan conflict has been instituted in the ICD, this institutional question is important.

4.5 Capacity

The judges position within the ICD is not permanent and they can be transferred to other divisions of the High Court and replaced by other less qualified judges. Consequently there can be a lack of capacity amongst the judicial officers to adjudicate international criminal cases. International and regional partners have targeted the capacity building of the judges presently assigned to the ICD, oblivious of the transfer possibility. The legal assistants assigned to High Court Judges are not exclusively assigned to specific judges either, but are shared among judges.

Secondly, the reality of the case backlog in the Ugandan judiciary means the judges not only deal with the cases within the ICD but with other cases within the Judiciary. This arrangement has interfered with institutional integrity in the sense that a unit established specifically to address the violations in northern Uganda had its scope widened to address international and transnational crimes. This arrangement has diverted attention from the fact that only one case from the Northern Ugandan conflict has been addressed and even then not to completion.

4.6 A Developing System of International Justice

Soon after the end of the Cold War, with the horrors in the former Yugoslavia and Rwanda and the stark failures of national court systems freshly in mind, the United Nations, a number of governments, and many citizens groups and international nongovernmental organizations (NGOs) worked to create international criminal courts. The Security Council created two ad-hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, to try alleged perpetrators of genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law in those particular conflicts.

4.7 International Environment on justices

The backlash against the developing international justice system, while dismaying, is hardly surprising given the extent to which the significant advances of the past decade have begun to constrain the prerogatives of abusive state officials. The challenge now is to work effectively in a more difficult international environment while many national courts remain unable and unwilling to prosecute the most serious human rights crimes. The gains engendered by international justice institutions need to be preserved and the international system strengthened until many more national courts assume their frontline role in combating impunity.

4.8 Challenges in Prosecuting senior officials

Prosecuting senior officials for serious human rights crimes where there are a large number of victims is a complex and expensive process regardless of whether the cases are tried before national or international courts. These prosecutions tend to involve massive amounts of evidence that must be analyzed and classified by crime scene, type of crime, and alleged perpetrator. Such cases require a sophisticated prosecution strategy. Trials must comply with international human rights standards to ensure their legitimacy and credibility. Ensuring the fairness of these trials including their compliance with human rights standards often results in a slow process.

4.9 Lack of familiarity with the cultural and historical context

Cases brought before international criminal tribunals or in national courts (based on universal jurisdiction) are often tried far away from the crime scene and thus are less accessible to victims and those in whose name the crimes were committed. These trials sometimes lack the visibility in the country where the crimes occurred that a local trial would have. The state where the crimes occurred, whose government may include accused war criminals or their confederates, may oppose the prosecutions, resisting cooperation and making it difficult to obtain custody of the defendants or obtain evidence. Gathering evidence for crimes that occurred hundreds or thousands of miles away makes it more difficult to meet the level of proof required for a conviction and for the accused to develop a comprehensive defense. Another downside to distance includes a lack of familiarity with the cultural and historical context in which the crimes occurred. The need for translation services also slows the pace of trials and makes them more costly.

CHAPTER FIVE

CONCLUDING REMARKS AND RECOMMENDATIONS

5.0 Introduction

This study has sought to investigate whether the principle of legality is a bar to the domestic prosecution of past atrocities in Africa.

5.1 Conclusions

The ECOWAS court ruling against Senegal[306] seems to have silenced this inquiry in the affirmative. However, viewed in the context of the preceding discussion, the ECOWAS court ruling is but a typical representation of the resistance against applying the international version of the principle of legality in the prosecution of international crimes in domestic courts.

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

The study uses the case of Uganda to argue that constitutional provisions that do not require expressly the application of the national version of the principle of legality can be interpreted

[306] ECOWAS ruling (n 3 above).

progressively, so as to accommodate the international version of the principle and enable the domestic prosecution of international crimes within the bounds of the constitution.

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

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

This study recognises the role that politics has to play in the realisation of these recommendations. This is especially true in the case of Kenya where proposals for a special tribunal to prosecute the post-election atrocities have been voted down continuously by members of Kenya"s political circles who resist accountability.[307] Indeed it was this lack of political will to ensure domestic accountability that eventually prompted the UN Secretary-General at the time to turn to the prosecutor of the ICC for an international remedy. The study cautions that the principle of legality may be used sometimes to mask political considerations that may be the real hindrance to domestic prosecutions of international crimes.

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

[307] ICTJ „The Kenya transitional Justice Brief Criminal Accountability, the ICC and the Politics of Succession" 1 April 2011. Available at *http://ictj.org/sites/default/files/ICTJ-KEN-Transitional-Justice-Brief-1-1-2011.pdf* (accessed on 24 September 2017).

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

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

5.2 Recommendation

The study posits that all the foregoing recommendations can be implemented in domestic courts by local judges who are familiar with the cultural, social and political context of their states,[308] without the need for expensive ventures that might make international criminal justice seem expensive for and foreign to African states and which may serve only to postpone the realisation of accountability. It is acknowledged that there may be a need for extensive training of the local judges, prosecutors and investigators in the application of new international law principles,[309] but the cost of such an undertaking by no means compares with the cost that setting up a hybrid or special court or the remuneration of foreign judges would entail.

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

Given the extent of atrocities they have witnessed, of all the reasons given by African states as impediments to holding perpetrators of such atrocities accountable in domestic courts, the principle of legality should occupy the last place or ought to be struck off such a list. States like

[308] See C Bassiouni & Z Motola *The protection of human rights in African criminal proceedings* (1995) 361
[309] See Putting complementarity into practice (n 13 above); Kabumba (n 249 above) 106.

Uganda, which find themselves in a situation where domestic legislation offers no firm basis or no basis at all to enable a domestic prosecution of international crimes, should not hesitate to explore the international version of the principle of legality using the options discussed above. In so doing, they appreciate the unique nature of international crimes and the attendant innovation that prosecuting them may require. As one scholar puts it[310]:

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

[310] H Lauterpacht „Law of nations and the punishment of war crimes" (1994) 21 *British Year Book of International Law* 67(emphasis added).

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