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Uganda’s Case of Thomas Kwoyelo: Customary International Law on Trial

Kim Thuy Seelinger*

Human Rights Center and International Human Rights Law Clinic
University of California, Berkeley, School of Law

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* Lecturer and Director, Sexual Violence Program, Human Rights Center, University of California, Berkeley, School of Law. This report was authored with generous contribution from Dr. Guenaël Mettraux and students from the UC Berkeley International Human Rights Law Clinic: Dannielle Antone, Sarah Hunter, and Jenna Klein. It was further enriched by feedback from Ms. Magali Maystre, Hon. Justice Richard Goldstone, Dr. Patricia Viseur Sellers, Prof. Beth van Schaack, Dr. Max du Plessis, Dr. Elvina Pothelet, and Ms. Naomi Fenwick. Finally, the report benefited from input from colleagues at Uganda’s Makerere University Faculty of Law: Dr. Christopher Mbazira, Dr. Ronald Kakungulu-Mayambala, Dr. Daniel Ruhweza, and Dr. Zahara Nampewo, with whom the UC Berkeley team developed a related amicus curiae brief for submission to the International Crimes Division of the Ugandan High Court in April 2017 (together with Justice Goldstone and Dr. du Plessis).

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INTRODUCTION

From 1987 to 2008,¹ an armed conflict seized Northern Uganda, as the Lord's Resistance Army (LRA) challenged the Ugandan government² in a contest that resulted in more than 100,000 dead³ and over 1.9 million people displaced.⁴

Since then, both the Ugandan government and the international community have invested significant effort in apprehending LRA leaders for prosecution for war crimes and crimes against humanity. The most widely followed efforts have included a protracted hunt for the group's enigmatic leader, Joseph Kony,⁵ and the long-awaited trial of Dominic Ongwen before the International Criminal Court (ICC).⁶ However, another critical case is quietly underway in Uganda's own judicial system: the prosecution of a mid-level LRA commander, Thomas

1. HUMAN RIGHTS WATCH, WORLD REPORT 2016: UGANDA (2016), <https://www.hrw.org/sites/default/files/uganda.pdf> [<https://perma.cc/Y64S-Y4BU>] (noting that as of 2015 LRA remains active in Central Africa but on a significantly lesser scale).

2. REFUGEE LAW PROJECT, COMPENDIUM OF CONFLICTS IN UGANDA 149–53 (2014) (chronicling the major conflicts in Uganda and their historical antecedents); see SARAH NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN 125 (2013) (noting that while the Acholi community suffered the brunt of the conflict, areas other than the Acholi region have been subjected to LRA violence); see also Tim Allen, *Understanding Alice: Uganda's Holy Spirit Movement in Context*, 61 AFRICA J. OF THE INT'L AFRICAN INST. 370, 373–74 (1991).

3. U.N. SECRETARY GEN., REPORT TO THE SECURITY COUNCIL ON THE ACTIVITIES OF THE UNITED NATIONS REGIONAL OFFICE FOR CENTRAL AFRICA AND ON THE LORD'S RESISTANCE ARMY (2013).

4. U.N. Office for the Coordination of Humanitarian Affairs, *Consolidated Appeals Process (CAP): Mid-Term Review of the Humanitarian Appeal 2005 for Uganda*, RELIEFWEB (June 22, 2005) <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HSU-6DL849?OpenDocument&rc=1&emid=ACOS-635PRQ&cc=uga> [<https://perma.cc/L73M-6VYW>].

5. See Associated Press, *U.S. special forces helping hunt for Joseph Kony*, CBS NEWS (Apr. 29, 2012, 9:32 PM), <http://www.cbsnews.com/news/us-special-forces-helping-hunt-for-joseph-kony> [<https://perma.cc/JZ3M-TQEN>]; Zack Baddock, *Uganda Ends Its Hunt for Joseph Kony Empty-Handed*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/world/africa/uganda-joseph-kony-lra.html> [<https://perma.cc/6ZS4-SLMS>]; J. David Goodman & Jennifer Preston, *How the Kony Video Went Viral*, N.Y. TIMES: THE LEDE (Mar. 9, 2012, 1:52 AM), <https://thelede.blogs.nytimes.com/2012/03/09/how-the-kony-video-went-viral> [<https://perma.cc/Y4Q8-JT9Y>].

6. See Press Release, International Criminal Court, Ongwen trial opens at International Criminal Court (Dec. 6, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1262> [<https://perma.cc/L4MW-VCX8>].

Kwoyelo, before the International Crimes Division (ICD) of the High Court of Uganda.

After a long and controversial procedural background in which the Supreme Court of Uganda ultimately denied his eligibility for amnesty, Mr. Kwoyelo's pre-trial process is finally expected to conclude in Kampala this week.⁷ Beginning May 9, 2017, the Honorable Susan Okalany will spend a week conducting what could be her final substantive task as pretrial judge: determining whether to confirm charges of war crimes and crimes against humanity brought on the basis of customary international law.⁸

This report introduces the International Crimes Division of the High Court of Uganda (ICD) and the case against Mr. Kwoyelo. It comes after a field mission to Kampala in March 2017 and the development of an *amicus curiae* brief drafted for submission to the ICD in April 2017. The report discusses the potential direct application of customary international law to domestic legal orders, even in "dualist" nations that traditionally require domestication of international law through explicit national legislation. Next, the report presents the view of international and Ugandan legal scholars applying for leave to appear as *amici curiae* in the case: the direct application of customary international law—even in the criminal context—is constitutional within the Ugandan legal order. They assert that the principle of legality is not compromised by the proposed charges as long as it is demonstrated that all charged offenses were established as crimes under customary international law at the time of alleged commission. The report then describes the current charges against Mr. Kwoyelo and demonstrates how specific crimes therein have constituted crimes under customary international law for decades. Finally, the report concludes with additional considerations raised by the trial of Thomas Kwoyelo and the legal framework challenges it has revealed.

7. After his arrest in 2009, Kwoyelo was charged with crimes under grave breaches of the Fourth Geneva Convention, Uganda's Penal Code of 1950, and Uganda's Geneva Conventions Act of 1964. Indictment [Sept. 2010] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author). The indictment has since been updated multiple times. See Indictment [July 2011] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author); Indictment [Sept. 2016] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author); Indictment [Dec. 2016] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author); Indictment [Feb. 2017] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author). In 2015, the Supreme Court denied Kwoyelo amnesty under the Amnesty Act of 2000. *Uganda v. Kwoyelo* (Constitutional Appeal No. 1 of 2012) (2015) UGSC 5; see also HUMAN RIGHTS WATCH, THOMAS KWOYELO'S TRIAL BEFORE UGANDA'S INTERNATIONAL CRIMES DIVISION: QUESTIONS AND ANSWERS (2011), https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf [<https://perma.cc/6Y4Q-C68A>] (providing a short background on the case through July 2011).

8. Additionally, the current indictment includes charges brought as violations of Common Article 3 of the Geneva Conventions and, or in the alternative, Uganda's Penal Code Act of 1950. Indictment [Feb. 2017] *Uganda v. Kwoyelo*, *supra* note 7.

I.

THE INTERNATIONAL CRIMES DIVISION FACES A HISTORIC AND COMPLEX MISSION

Established as an administrative division of Uganda's High Court in 2008, the War Crimes Division was renamed the International Crimes Division in 2011.⁹ It was conceived during the 2006–2008 Juba Peace talks, whose Agreement on Accountability and Reconciliation & Annex (A&R Accords) between the Lord's Resistance Army and the government of Uganda aimed to address the "serious crimes, human rights violations and adverse socio-economic and political impacts" of the more than twenty-year conflict in Northern Uganda.¹⁰ The Accords outlined various transitional justice options, including a framework for criminal prosecution.¹¹ As such, the A&R Accords envisaged the ICD as a critical accountability mechanism within the Ugandan judiciary that would try "individuals who are alleged to have committed serious crimes during that conflict."¹²

A draft International Crimes Division Bill, currently pending review by the Directorate of First Parliamentary Counsel, details jurisdiction and practice for the court.¹³ For now, though, the ICD's jurisdiction and applicable law are asserted in Practice Directions issued in Legal Notice No. 10 (2011). Specifically, Article 6 of the 2011 Legal Notice provides the ICD with jurisdiction over:

"any offence relating to genocide, *crimes against humanity*, *war crimes*, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva [sic] Conventions Act, Cap 363, the International Criminal Court Act, No. 11 of 2010 or under any other penal enactment."¹⁴ (emphasis added)

With respect to *which* war crimes or crimes against humanity can be prosecuted at the ICD, though, there appears to be a temporal gap in Uganda's statutory framework. Of the relevant international instruments, Uganda has only

9. The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 (2011), UGANDA GAZETTE SUPPLEMENT No. 38 (renaming the 'War Crimes Division' as 'the International Crimes Division').

10. Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (2007); Annexure to the Agreement on Accountability and Reconciliation (2008) [hereinafter A&R Accords].

11. A&R Accords, *supra* note 10 (speaking of a 'special division of the High Court'); Legal Notice No. 10 (2011) (Uganda) (renaming the 'War Crimes Division' as 'the International Crimes Division').

12. A&R Accords, *supra* note 10, ¶¶ 7, 10.

13. Author was able to access a copy current as of December 2016. Curiously, the draft included language referring to Additional Protocols of the Geneva Conventions as among sources of applicable law, despite Uganda's not having yet domesticated them. Unless reference to Additional Protocol II in the draft was an error, incorporation into an eventual International Crimes Division Act could reaffirm the statutory ability of the ICD to prosecute atrocities committed in the context of non-international armed conflict.

14. Legal Notice No. 10 (2011) (Uganda).

domesticated the 1949 Geneva Conventions¹⁵ and the Rome Statute of the International Criminal Court.¹⁶ Uganda's 1964 Geneva Conventions Act imports the "grave breaches" war crimes regime provided in the 1949 Geneva Conventions into the Ugandan legal framework.¹⁷ However, the regime's application is limited to crimes committed in the context of an *international* armed conflict, as opposed to non-international armed conflict.¹⁸ On the other hand, Uganda's International Criminal Court Act, passed in 2010, allows for the prosecution of war crimes and crimes against humanity committed in either international or non-international armed conflict. However, its application to offenses committed during the conflict in Northern Uganda during the 1980s and 1990s poses retroactivity challenges.

Mr. Kwoyelo's alleged actions occurred between 1992 and 2005, between the passage of the Geneva Conventions Act (1964) and the International Crimes Act (2010). This was a period for which Uganda's *written* law does not cover war crimes and crimes against humanity committed in the context of non-international armed conflict. For atrocities committed during this period in Northern Uganda, then, customary international law becomes a crucial source of law for the ICD.

II.

CUSTOMARY INTERNATIONAL LAW APPLIES DOMESTICALLY

In the case against Mr. Kwoyelo, Uganda's Office of the Directorate of Public Prosecutions has presented an indictment in which several war crimes and crimes against humanity are drawn from customary international law. Charges based on customary international law are accompanied by an alternate charge drawn under Uganda's Penal Code, which generally captures the specific act committed—such as murder—if not the broader contextual elements of "war crimes" or "crimes against humanity".¹⁹ This strategy of pairing a charge drawn

15. Geneva Conventions Act (1964) Cap. 363 (Uganda).

16. International Criminal Court Act (2010) UGANDA GAZETTE SUPPLEMENT No. 6.

17. Geneva Conventions Act (1964).

18. While it has ratified the Additional Protocols to the Geneva Conventions, the second of which criminalizes war crimes committed in the context of non-international armed conflict, Uganda has not yet domesticated them. Int'l Comm. of the Red Cross, *Protocol (I)*, TREATIES, STATE PARTIES, AND COMMENTARIES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 [https://perma.cc/FV3M-65DX]; Int'l Comm. of the Red Cross, *Protocol (II)*, TREATIES, STATE PARTIES, AND COMMENTARIES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 [https://perma.cc/YP5N-3LN4]; Int'l Comm. of the Red Cross, *Protocol (III)*, TREATIES, STATE PARTIES, AND COMMENTARIES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=615 [https://perma.cc/3CAR-SMVM].

19. Charges based on customary international law include several war crimes as violations of Common Article 3 of the 1948 Geneva Conventions, whose contextual or "chapeau elements" include (a) the existence of a non-international armed conflict; (b) a nexus between the acts of the accused and

from customary international law with a parallel charge drawn from domestic criminal law increases the chances that the Prosecution can secure a conviction on each count. This is true so long as the Prosecution can prove the elements of the underlying crime according to domestic penal law.

To prosecute Mr. Kwoyelo of war crimes and crimes against humanity, however, the Prosecution relies on customary international law. This is a first in Uganda. The question to be debated at the ICD this week, then, is whether customary international law can be directly applied in Uganda, specifically in the criminal context.

A. Overview of Customary International Law

Customary international law is a source of international law requiring “evidence of a general practice accepted as law.”²⁰ It has both an objective element—state practice—and a subjective element—*opinio juris*, or the belief that a state is obliged to follow the rule of law in question. Taken together, one might say that customary international law consists of state practice that is consistent, widespread, and obeyed out of a sense of legal obligation.²¹

States are bound by customary international law, even if it is not codified in a formal instrument.²² This is because international documents such as treaties and declarations often codify customary international law, providing evidence of general custom to which states must adhere.²³ Evidence of general custom can be found in a multitude of sources including decisions of international and national tribunals, national legislation or military doctrines and manuals, international treaties, diplomatic correspondences, the practice of international bodies, and official government statements.²⁴

the armed conflict; and (c) the accused’s knowledge of the factual circumstances that there is an armed conflict and that his acts are part thereof. *See, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, ¶¶ 55, 57 (June 12, 2002); *see also* Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 81-85 (Nov. 30, 2006); Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić Appeal Decision 1995]. Current charges against Mr. Kwoyelo also include various crimes against humanity, whose chapeau elements include (a) the existence of a widespread or systematic attack against the civilian population; (b) a nexus between the acts of the accused and the attack; and (c) the accused’s knowledge of the factual circumstances that there is such an attack and that his acts are part thereof. *See, e.g.*, Prosecutor v. Kunarac, *supra* ¶¶ 85, 99, 102; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶¶ 98, 100–02, 105–06, 124, 126 (July 29, 2004); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶¶ 93–97, 99 (Dec. 17, 2004).

20. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b) 59 Stat. 1055, 1060.

21. BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 20, 24–27 (James R. Crawford ed., 8th ed. 2012); North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 77.

22. BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 21 at 20.

23. *Id.*

24. *Id.* at 24; *see also* REPORT OF THE INTERNATIONAL LAW COMMISSION: WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE, [1950] 2 Y.B. Int’l L. Comm’n 368–72, U.N. Doc. A/CN.4/34.

B. International Crimes under Customary International Law

As a branch of public international law, international criminal law can be based on customary international law—which applies to the international community of states—and conventional international law—through which criminalization provisions apply only to states party to a particular treaty, such as the Rome Statute of the International Criminal Court.²⁵ For specific conduct to constitute a crime under customary international law, the violation must entail individual criminal responsibility.²⁶

One category of crime under international law is that of “war crimes.” These are violations of the “laws of war,” as articulated in the framework of international humanitarian law. International humanitarian law governs situations of armed conflict, regulates the means and methods of warfare, and addresses the legal protections owed to those who are not taking part in the hostilities.²⁷ The vast majority of codified rules of international humanitarian law establishing war crimes apply only in international armed conflict.²⁸ A more limited set of rules, codified both in Common Article 3 and Additional Protocol II to the Geneva Conventions, explicitly apply to non-international armed conflict.²⁹ However, it is increasingly recognized that most international humanitarian law rules equally apply to non-international armed conflicts as a matter of customary international law.³⁰

Crimes against humanity are another type of crime under customary international law. A number of specific underlying acts may be characterized as crimes against humanity if committed as part of a widespread or systematic

25. *Id.* at 9–11.

26. Tadić Appeal Decision 1995, *supra* note 19 at ¶ 94; *see also* ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW, CASSESE 65–66(3d ed. 2013).

27. INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES xv (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2009) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I].

28. *Id.* at xxxiv.

29. The term “Common Article 3” refers to language in a specific provision (Article 3) common to all four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention III]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention IV]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

30. It should be noted that many of the prohibitions contained in the Geneva Conventions now constitute war crimes regardless of whether they are committed in an international or a non-international armed conflict. *See* JEAN-MARIE HENCKAERTS, INT'L COMM. OF THE RED CROSS, ANNEX. LIST OF CUSTOMARY RULES OF INTERNATIONAL HUMANITARIAN LAW *in* CUSTOMARY LAW, 87 INT'L REV. OF THE RED CROSS 198, 212 (2005); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I, *supra* note 27, at 568.

attack directed against a civilian population, during wartime or not.³¹ In 1996, the International Law Commission issued a Draft Code which specified that the following acts could constitute crimes against humanity:

murder, extermination, torture, enslavement, persecution on political, racial, religious or ethnic grounds, institutionalized discrimination, arbitrary deportation or forcible transfer of population, arbitrary imprisonment, rape, enforced prostitution and other inhumane acts committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.³²

The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY),³³ the International Criminal Tribunal for Rwanda (ICTR),³⁴ and the International Criminal Court (ICC)³⁵ have largely followed suit by recognizing additional acts as crimes against humanity.

To assess whether violations of international humanitarian law were crimes entailing individual criminal liability under customary international law—such as war crimes or crimes against humanity—at time of alleged commission, courts look to other national and international tribunals, military manuals, national legislation of states or general principles of criminal justice, and the legislation and judicial practice of the state to which the accused belongs or where the crimes occurred.³⁶

In several instances, the international tribunals conducted this assessment. For instance, in *Prosecutor v. Tadić* in 1995, the Appeals Chamber of the ICTY made its assessment by reviewing military manuals, national legislation, national cases, and United Nations Security Council resolutions.³⁷ Similarly, in *Prosecutor v. Furundžija* in 1998, a trial chamber of the ICTY examined the development of the prohibition of rape between 1863 and 1946 and its criminalization by both national and international tribunals to conclude that the violation of the prohibition entailed criminal liability under customary international law.³⁸

31. CASSESE, *supra* note 26, at 89–92.

32. INT'L LAW COMM'N, DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND art. 18 (1996).

33. U.N. Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1203, art. 5 (1993).

34. U.N. Security Council Resolution 955, Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598, art. 3 (1994).

35. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute].

36. CASSESE, *supra* note 26, at 68.

37. Tadić Appeal Decision 1995, *supra* note 19, ¶¶ 128–34.

38. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶¶ 168–69 (Dec. 10, 1998): 168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallized out of the express prohibition of rape in Article 44 of the Lieber Code and the general provisions contained in Article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens

C. Domestic Application of Customary International Law

To determine whether customary international law is directly applicable in a domestic legal order, national courts often look to their respective constitutional and legal frameworks, the legality principle, and jurisprudence from the ICTY and the ICTR. The common law theory is that customary international law can be directly applied when there is nothing in a domestic legal order that prohibits its application.³⁹

The English common law approach to customary international law is that of “incorporation.” Under the presumption of conformity, international customary law may be incorporated directly into domestic law, without the need for legislative action, provided there is no valid legislation that clearly conflicts with the customary rule.⁴⁰ Put simply, domestic law shall not conflict with international law.⁴¹

Despite their traditional differences regarding the primacy of codified, written law, both civil and common law countries have adopted and applied customary international law in their domestic courts. Dualist countries such as

clause’ laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of “outrages upon personal dignity” laid down in Common Article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

39. See Joel Mithika M’ibuathu v. Margaret Ciomaua M’ibuathu (2007) E.K.L.R. 5 (H.C.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/42051> [<https://perma.cc/6L5W-SMSP>] (“However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law.”); see also BROWNIE’S PRINCIPLES, *supra* note 21, at 66–67. For a similar example from the civil law context, see Prosecutor v. Nuon, Case No. 002/01, Appeals Judgment, ¶ 763 (Extraordinary Chambers of the Courts of Cambodia) (Aug. 7, 2014) (finding that even where the State is dualist, application of international law does not violate legality).

40. BROWNIE’S PRINCIPLES, *supra* note 21, at 67; DAVID SLOSS & MICHAEL VAN ALSTINE, INTERNATIONAL LAW IN DOMESTIC COURTS 32 (2015) (forthcoming in HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 2017), available at <http://digitalcommons.law.scu.edu/facpubs/889> [<https://perma.cc/M3B7-SF5X>].

41. BROWNIE’S PRINCIPLES, *supra* note 21, at 67; SLOSS & ALSTINE, *supra* note 40.

Botswana,⁴² Canada,⁴³ England,⁴⁴ Hungary,⁴⁵ India,⁴⁶ and Kenya⁴⁷ have tended to require that international law and treaties undergo explicit codification in national legislation before having domestic effect. However, even these countries have employed a more automatic or monist approach to the application of customary international law, by integrating it without prior domestication or an explicit constitutional provision.

For example, in the landmark case *Trendtex Trading Corp. v. Central Bank of Nigeria* in 1977, the Court of Appeal in England established that the rules of customary international law formed part of English law.⁴⁸ Although English courts had in the past typically deferred to the doctrine of transformation—requiring international law to be domesticated before it can be enforced in national courts⁴⁹—in *Trendtex*, the court explicitly diverged from *stare decisis* and declared that the doctrine of incorporation is instead the proper mode of application of international norms in English law.⁵⁰ The court explained that the doctrine of incorporation better integrates the inevitable changes in international law into English law.⁵¹

In Kenya, the Court of Appeal reached a similar finding in *Rono v. Rono* in 2005. The Court of Appeal held that domestic courts could apply customary international law even in the absence of implementing legislation as long as it did not conflict with domestic law.⁵² The court stated that “the current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation.”⁵³

42. Republic of Angola v. Springbok Invs. (Pty) Ltd. (2005) 2 B.L.R 159 (HC) (Bots.).

43. R. v. Finta, [1994] 1 S.C.R. 701 (Can.); *See also* R. v. Hape, [2007] 2 S.C.R 292, para. 39 (Can.).

44. Trendtext Trading Corp. Ltd. v. Cent. Bank of Nigeria [1977] Q.B. 529 (UK); *see also* R. v. Jones (Margaret) and ors [2006] UKHL 16, [2007] 1 AC 136.

45. Alkotmánybíróság (AB) (Constitutional Court), October 13, 1993, MK.147 Decision No. 53/1993 (X. 13.) (Hung.).

46. Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey & Ors, (1984) 2 S.C.R. 664 (India).

47. Rono v. Rono (2008) 1 K.L.R. 803 (Kenya).

48. Trendtext Trading Corp. Ltd. [1977] QB 529 at 888 (Lord Denning).

49. *See id.*; *see* Chung Chi Cheung v. The King [1939] AC 160 at 167–68 (“So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.”); *see also* Reg. v. Secretary of State for the Home Dep’t, Ex parte Thakrar [1974] 1 QB 684 at 701 (Lord Denning himself accepting the doctrine of transformation in an earlier decision).

50. Trendtext Trading Corp. Ltd. [1977] QB 529 at 888 (Lord Denning).

51. *Id.*

52. Rono v. Rono (2008) 1 K.L.R. 803 (Kenya).

53. *Id.*

Although not universal,⁵⁴ customary international law has also been applied domestically in the criminal context. In several countries, national courts have adjudicated war crimes and crimes against humanity directly under customary international law. For example, in Decision No. 53/1993, the Hungarian Constitutional Court held that war crimes can be prosecuted directly on the basis of customary international law.⁵⁵ The court cited to Article 7(1) of the Hungarian Constitution, which states that “the legal system of the Republic of Hungary accepts generally recognized rules of international law, and shall harmonize the country’s domestic law with obligations assumed under international law,” which is understood to include customary international law and unwritten international law.⁵⁶ In acknowledgment that “the rules generally recognized by international law” are accepted within the Hungarian legal order without separate transformation or incorporation, the court emphasized the intrinsic gravity of war crimes and crimes against humanity, their *jus cogens* status, and the fact that international law imposes a duty on states to prosecute these crimes.⁵⁷

Similarly, despite taking a dualist approach to international treaties, Canadian courts have taken a monist approach toward applying customary international law. In the *Finta* case in 1994, the Canadian Supreme Court found that customary international law forms a basis for the prosecution of “war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place.”⁵⁸ In a more recent case in 2004, *Bouzari v. Islamic Republic of Iran*, the Court of Appeal of Ontario stated that “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.”⁵⁹

Criminal prosecution on the basis of customary international law is also an accepted practice in Argentina. In the 1995 *Priebke* extradition, the court found customary international law to be directly applicable in the domestic legal order.⁶⁰ Furthermore, in the 1999 pretrial detention of Jorge Videla, the court clarified that in the prosecution of crimes against humanity, the international

54. *Nulyarimma v. Thompson* (1999) 96 FCR 153 (Austl.) (rejecting the direct incorporation of customary international law into the common law of Australia through a judicial act to create a criminal offence).

55. Alkotmánybíróság (AB) (Constitutional Court), October 13, 1993, MK.147 Decision No. 53/1993 (X. 13.) (Hung.).

56. *Id.* at 6.

57. *Id.*

58. *R. v. Finta*, [1994] 1 S.C.R. 701, 807 (Can.) (“Section 11(g) of the *Charter* allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place.”).

59. *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R. 3d 675, para. 65 (Can.).

60. Corte Suprema de Justicia [CSJ] [Supreme Court of Justice], 2nd November 1995, “Office of the Prosecutor c. Priebke (Erich),” Request of Extradition, P/457/XXXI (Arg.).

principle of legality is binding on Argentina, with reference to the International Covenant on Civil and Political Rights (ICCPR) 15(2).⁶¹

In the United Kingdom, the approach has been more nuanced. In *R v. Jones* (2006), the House of Lords in England resisted the idea that any new crimes under international customary law automatically become crimes under domestic law.⁶² Despite this conclusion, the court stated that it would be “at least arguable that war crimes, recognized as such in customary international law, would now be triable and punishable under the domestic criminal law of this country irrespective of any domestic statute.”⁶³

In sum, the direct application of customary international law into domestic legal orders is very much a nuanced and evolving question. There is simply no universal way states have approached the question. As experts in a largely dualist country following the English common law tradition, Ugandan judges can chart their own course with respect to the domestic application of customary international law in civil and criminal cases.

III.

CUSTOMARY INTERNATIONAL LAW CAN BE DIRECTLY APPLIED INTO UGANDA’S LEGAL ORDER

Central to this week’s pretrial hearing at the ICD is the question of whether customary international law is directly applicable in a Ugandan court, specifically in the criminal context. In the view of African legal experts offering to appear as *amici curiae*, it is.

Leading Ugandan legal scholars in particular have indicated that their country’s Constitution appears neutral on the issue of customary international law and thus should not be read to prohibit its domestic application.⁶⁴ They posit

61. Cámara Federal de Apelaciones (CFed.) (federal court of appeals), 9/9/1999, “Jorge Rafael Videla / Resolución de la Cámara Federal,” (Ruling on Pretrial Detention) (Arg). For an English translation, see Rodolfo Mattarollo, *Recent Argentine Jurisprudence in the matter of crimes against humanity, in* IMPUNITY, CRIMES AGAINST HUMANITY AND FORCED DISAPPEARANCE, REVIEW No. 62–63 11 (Louise Doswald-Beck ed., 2001) (reasoning that the principle of legality as laid down in Article 15 of the ICCPR was binding on Argentina and that it could not disregard laws established by the international legal system which takes precedence over internal laws ‘even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the internal regulations and the weight of the obligations arising from the other sources of international legal norms.’).

62. *R. v. Jones* (Margaret) and ors [2006] UKHL 16 [28].

63. *Id.* at [22]. The court did not conclusively answer this question in the case as it determined it was not at issue (distinguishing the crime of aggression from war crimes).

64. The application to appear as *amici curiae* was drafted in April 2017 by the Human Rights Center and the International Human Rights Law Clinic at the University of California, Berkeley School of Law, in consultation with, and on behalf of, four Ugandan scholars at Makerere University, Dr. Christopher Mbazira, Dr. Ronald Kakungulu-Mayambala, Dr. Daniel Ruhweza and Dr. Zahara Nampewo, and two South African scholars, Justice Richard Goldstone and Dr. Max du Plessis. At the time of publication, the *amicus curiae* brief has not yet been filed.

that the text of the Constitution does not explicitly regulate whether customary international law is applicable in the Ugandan legal order. Thus, constitutional interpretation should be permissive of any law so long as it does not run contrary to the express constitutional order.⁶⁵ To support their position, the Ugandan professors highlight Article 2(2) of the Constitution, which provides that “if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”⁶⁶ Article 2(2), they argue, can be read to indicate that the application of customary international law would only be prohibited where it is contrary to a provision of the Constitution.

The one possible conflict the pretrial judge must thoroughly review when assessing whether to allow charges based on customary international law relates to the legality principle, as enshrined in Article 28(7)⁶⁷ and Article 28(12)⁶⁸ of the Constitution.

In order to ensure the protection of the rights of the accused, a court must abide by the legality principle, which requires that there be no crime or punishment without law.⁶⁹ The principle of legality asserts that a person may only be held individually criminally responsible for an act if, at the time of its commission, that act was regarded as a criminal offence by the relevant legal order.⁷⁰ The purpose behind this principle is to protect citizens from the arbitrary exercise of state power, such as a state’s attempt to punish them for actions that were legal when committed.⁷¹ This principle is expressed in the majority of criminal law systems and is codified in key international human rights treaties, including the Article 15 of the ICCPR, Article 7(2) of the African Charter on Human and People’s Rights (ACHPR), Article 7 of the European Convention on Human Rights (ECHR), and Article 9 of the American Convention on Human Rights (ACHR).⁷²

To satisfy this requirement, criminal liability and punishment must be established with sufficient clarity and specificity. Specifically, this principle

65. Constitution, art. 2(2) (1995) (Uganda). (“If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”).

66. *Id.* art. 2(2).

67. *Id.* art. 28(7).

68. *Id.* art. 28(12).

69. CASSESE, *supra* note 26, at 22.

70. *Id.* at 23–24.

71. *Id.*

72. See International Covenant on Civil and Political Rights art. 15, 16 December 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and Peoples’ Rights art. 7(2), 27 June 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, 4 November 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 9, 22 November 1969, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

requires it to be foreseeable that the conduct at issue will result in criminal sanctions.⁷³

The Ugandan Constitution reflects these principles in Article 28(7) and Article 28(12), which provide the following:

“[n]o 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” (Art. 28(7)).⁷⁴

“[n]o person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law” (Art. 28(12)).⁷⁵

In the view of the Ugandan legal scholars, the legality principle enshrined in these provisions would not be violated by the application of customary international law for at least three reasons.

First, the principle is applicable only in instances where a new offence is created. Therefore, offences that were criminalized under international law at the time of their commission and domestically criminalized on a later date would not offend this principle. This exception is recognized in both international and domestic human rights law. According to the ICCPR, to which Uganda is a party, “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”⁷⁶ Further, Article 15(2) specifically qualifies this statement in respect to international crimes, noting that “[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”⁷⁷

Second, in applying customary international law to this case, judges of the ICD—like the judges at the ICTY and ICTR before them—would still be bound by their constitutional, legal, and professional obligations to ensure that the specific offences charged constituted criminal offenses under customary international law at the relevant time. The judges must determine, based on state practice and *opinio juris*, whether a rule of customary international law had crystallized at the time of the facts, thus criminalizing relevant acts or omissions.⁷⁸ In making this assessment, judges are fully entitled to consider the decisions of other courts (domestic and international), which have already passed

73. WARD FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 238 (1st ed. 2006).

74. Constitution, art. 28(7) (1995) (Uganda).

75. *Id.* art. 28(12).

76. ICCPR, *supra* note 72, art. 15(1).

77. *Id.* art. 15(2); *see also* ECHR, *supra* note 72, art. 7(2) (making the prohibition on retrospectivity subject to the following proviso: “[t]his Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”).

78. *See* discussion *supra* Part III.

judgment on these specific offences and established that they were constitutive of international crimes under customary international law at the time relevant to this case.

With respect to Article 28(12) of the Ugandan Constitution, which concerns the definition of the offence and the prescription of penalty, it is the responsibility of the Office of the Directorate of Public Prosecutions to demonstrate that each of the offences charged against the accused were sufficiently defined under customary international law at the time of the alleged commission.

The jurisprudence from national and international courts satisfies the requirements as to penalty set forth in Article 28(12). As specified in the International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols, “although the principle of legality is a pillar of domestic criminal law, the *lex* should be understood in the international context as comprising not only written law, but also unwritten law, since international law is in part customary law.”⁷⁹ Regarding the requirement that the penalty must be “prescribed by law,” it is accepted as a matter of international law that this expression refers not just to “written law” but also encompasses unwritten law. In *S.W. v. The United Kingdom* in 1995,⁸⁰ the European Court of Human Rights (ECtHR) interpreted Article 7 of the ECHR,⁸¹ which has nearly identical language to ICCPR Article 15 and has been interpreted to have the same meaning,⁸² to be “a concept which comprises written as well as unwritten law

79. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3104 (1987); *see also* INT'L LAW COMM., PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NÜRNBERG TRIBUNAL AND IN THE JUDGEMENT OF THE TRIBUNAL, Principle II (1950) (“The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”).

80. *SW & CR v. United Kingdom*, 21 Eur. Ct. H.R. 363, ¶¶ 32–35(1996). (“Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him criminally liable.”) It is significant in that regard that the United Nations *ad hoc* Tribunals for Yugoslavia and for Rwanda apply customary international law to define the crimes and modes of liability coming within their jurisdictions, thereby making it clear that customary international law is specific enough in principle to meet the requisite elements of the principle of legality.

81. ECHR, *supra* note 72, art. 7. (“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”)

82. *See* Alkotmánybíróság (AB) (Constitutional Court), October 13, 1993, MK.147 Decision No. 53/1993 (X. 13.) (Hung.) (“Article 15(2) of the International Covenant on Civil and Political Rights

and implies qualitative requirements, notably those of accessibility and foreseeability.”⁸³

Further, this requirement must be read in the context of Article 15(2) of the ICCPR, ratified by Uganda on June 21, 1995, which evaluates the legality principle against the body of international law, rather than a more limited national legal framework.⁸⁴

Finally, although charges against the accused may be based on customary international law, nothing prevents Ugandan judges from assessing the penalty based on domestic sentencing guidelines. Judges can simply use the sentencing practice of the international criminal tribunals as interpretative guidelines. In fact, they will likely have to do so, even with cases that may actually be brought under the 1964 Geneva Conventions Act. Aside from providing a life sentence for war crimes involving “wilful killing” and a maximum of fourteen years for other grave breaches,⁸⁵ the 1964 law—which squarely constitutes part of ICD’s applicable statutory framework—does not provide specific penalties for the individual crimes outlined therein. Had the Kwoyelo case been presented under the 1964 law, the pre-trial judge would be in much the same position in terms of assessing penalty in case of conviction.

IV.

CUSTOMARY INTERNATIONAL LAW CAN PROVIDE THE BASIS FOR CHARGES AGAINST THOMAS KWOYELO

The current indictment against Mr. Kwoyelo includes over ninety charges.⁸⁶ They include allegations of crimes committed by Mr. Kwoyelo and his subordinates between 1992 and 2005 in his home area of Kilak County, formerly part of the Gulu district and currently part of the Amuru district in

– which, in its content, matches Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the distinction that Article 7(2) substitutes “civilized nations” for the term “community of nations” – obligates member states to uphold unconditionally the principles of *nullum crimen sine lege* and *nulla poena sine lege* . . . For those states which incorporate the international legal norms concerning war crimes and crimes against humanity subsequent to the commission of these crimes, section 2 of the aforementioned articles authorize the retroactive application of statutorily enacted penal laws in the state’s domestic legal system.”).

83. *SW & CR v. United Kingdom*, *supra* note 80.

84. ICCPR, *supra* note 72, art. 15.

85. Uganda’s 1964 Geneva Conventions Act, Article 2, reads, “in the case of a grave breach involving the wilful killing of the person protected by the convention in question, to imprisonment for life; in the case of any other grave breach, to imprisonment for a term not exceeding fourteen years.” Geneva Conventions Act (1964) art. 2.

86. Barbra Kabahumuza & Michael Odeng, *Kwoyelo lawyers object to 92 charges slapped against him*, NEW VISION (Mar. 15, 2017, 4:55 PM), http://www.newvision.co.ug/new_vision/news/1448680/kwoyelo-lawyers-object-92-charges-slapped [<https://perma.cc/W4LQ-49TJJ>].

Northern Uganda.⁸⁷ Charges include the murder and torture of internally displaced persons, the enslavement and hostage-taking of civilians, the pillaging of private homes, and the rape and sexual slavery of women and girls. Most of the current charges against Mr. Kwoyelo are based on customary international law, with alternate charges drawn from the Ugandan Penal Code.⁸⁸

If she finds that customary international law can be directly applied in Uganda and serve as the basis of criminal charges, the pretrial judge, the Honorable Susan Okalany, has a subsequent task: to determine whether the specific crimes charged against Mr. Kwoyelo were established as war crimes and crimes against humanity at the time of alleged commission. This must include sufficiently clear definitions and elements for each underlying crime. A historical analysis, including the findings of the ICTR and ICTY with respect to the status of similar crimes committed throughout the 1990s, should indicate that the offenses charged were crimes under customary international law by the time Mr. Kwoyelo was allegedly active with the LRA.

For example, murder was established as a crime under customary international law a century before Mr. Kwoyelo's alleged acts. Murder is set out as a crime under the 1899 and 1907 Hague Conventions,⁸⁹ which protect the lives of civilian populations, as well as the Fourth Geneva Convention (Article 3(1)(a))⁹⁰ and Additional Protocol I.⁹¹ State practice is also quite consistent; arguably all the world's major criminal justice systems prohibit murder. Customary state practice, as evidenced in international and national military law prosecutions, repeatedly defines murder as intentional killing, without lawful justification. Customary international law also provides sufficient specificity as to the definition and elements of murder. The ICTY and ICTR consistently define the crime of murder as the death of a victim resulting from an act or omission of the accused committed with the intent to kill, or with the intent to

87. Otilia Anna Maunganidze, *Uganda: Kwoyelo in the Dock - Better Justice Delayed Than No Justice At All*, (Apr. 15, 2016), INST. FOR SECURITY STUDIES, <http://allafrica.com/stories/201604150941.html> [<https://perma.cc/YE2E-RXLY>].

88. This was not always the case. Charges against Mr. Kwoyelo were initially drawn under the 1964 Geneva Conventions Act with alternatives based on the domestic penal provisions. Indictment [Sept. 2010] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author). In August 2016, the Office of the Directorate of Public Prosecutions added charges of sexual and gender-based violence. Indictment [Sept. 2016] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author). In January 2017, charges based on the 1964 Geneva Conventions Act were replaced with charges based on customary international law. Indictment [Feb. 2017] *Uganda v. Kwoyelo* (Case No. 02 of 2010) (HC) (on file with author). Alternate charges based on Uganda's domestic penal law were included at every stage.

89. Hague Convention (II) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(b)-(c), July 29, 1899, 32 Stat. 1803, Treaty Series 43; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(b)-(c), Oct. 18, 1907, 187 CTS 227, 1 Bevans 631.

90. Convention IV, *supra* note 29, art. 3(1)(a).

91. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(2)(a), June 8, 1977, 1125 U.N.T.S. 3.

cause serious bodily harm, which the perpetrator should reasonably have known might lead to death.⁹²

Other crimes have crystallized as war crimes and crimes against humanity over time. For example, rape was established as a crime under customary international law prior to the 1980s—even though it was often couched in euphemistic terms or treated as a sub-crime under broader crimes such as inhumane acts, inhuman treatment, or outrages upon personal dignity. For example, in terms of war crimes, rape has long been characterized as a form of “torture and inhuman treatment,” a grave breach of the Geneva Conventions of 1949.⁹³ Rape was also nested within the war crime of “outrage upon personal dignity,” in a violation of Common Article 3 of the 1949 Geneva Conventions.⁹⁴

Rape was understood to be a war crime even before the Geneva Conventions. United States Army General Order No. 100 of 1863, also known as the “Lieber Code,” asserted individual and independent criminalization of rape in the context of armed conflict. Article 44 of the Lieber Code expressly prohibited “all rape, wounding, maiming, or killing . . . under the penalty of death.”⁹⁵ Though originally drafted for domestic application, the Lieber Code became a foundational part of customary international law regarding conduct in war.

After the First World War, the 1919 Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties included rape and forced prostitution on a list of thirty-two crimes constituting violations of the customary international laws of war.⁹⁶ Rape was ranked as fifth in terms of gravity.⁹⁷ The United Nations War Crime Commission (UNWCC) that was active from 1943 to 1948 relied on the 1919 Commission’s definition of war crimes and explicitly found rape to be such a crime. The UNWCC assisted national governments in trying war criminals after World War II.⁹⁸ A number of UNWCC-related war crime trials in Europe, the United States, and Australia were brought based on sexual violence charges alone, indicating the status of rape as a war crime under

92. Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgement, ¶ 259 (Feb. 28, 2005) (quoting Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgement, ¶ 132 (Nov. 2, 2001)); see also, e.g., Prosecutor v. Kordić, *supra* note 19, ¶ 113 (referring to Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 236 (Feb. 26, 2001)).

93. See, e.g., Prosecutor v. Delalić, Case No. IT-96-21/T, Judgment, ¶¶ 936–943, 955–65, 1010–11, 1237, 1253, 1262–63, 1285 (Nov. 16, 1998).

94. See, e.g., Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Judgement and Sentence, ¶¶ 2781, 6183, 6186 (June 14, 2011).

95. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 44 (Apr. 24, 1863).

96. Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. OF INT’L L. 95, 112–114, 127 (1920) [hereinafter *Peace Conference Report*].

97. *Id.*

98. Dan Plesch, Susana Sácouto & Chante Lasco, *The Relevance Of The United Nations War Crimes Commission To The Prosecution Of Sexual And Gender-Based Crimes Today*, 25 CRIMINAL L. FORUM 349, 350–52 (2014).

customary international law.⁹⁹ State practice was consistent with these judicial developments: between 1945 and 1960, a number of countries including Australia, China, Ethiopia, the Netherlands, and the United Kingdom passed legislation or issued rules of military conduct specifically criminalizing rape as a war crime.¹⁰⁰

Rape was also acknowledged as a crime against humanity as early as 1919. The report of the World War I Crimes Commission explicitly included rape in a list of “violations . . . of the laws of humanity.”¹⁰¹ Further, domestic courts oversaw the prosecution of rape as a crime against humanity well before the acts charged against Mr. Kwoyelo. For example, in the case of *Takashi Sakai* from 1946, a war tribunal conducted under Chinese jurisdiction found a Japanese military commander guilty of war crimes and crimes against humanity for allowing his brigade to engage in rape, amongst other acts.¹⁰²

The elements of the offence have been defined by various international tribunals. Judges of the ICTY and ICTR have clarified that under customary international law during the 1990s, rape’s *actus reus* required the sexual penetration, however slight, of (a) the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.¹⁰³ Consent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances, and the *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.¹⁰⁴

In justifying these charges, the prosecution must demonstrate that the other war crimes and crimes against humanity included in the indictment were criminalized under customary international law at the time of the alleged commission. This should not be difficult for the Prosecution to do. This is

99. *Id.* at 359–60 (citing to the following examples: Japanese man charged for the rape and related torture of a woman (Australia); Bulgarian man charged with raping two women (Greece); Case against Japanese soldiers for rape and assault with intent to commit rape on an American Nurse (United States); Lieutenant in charge of food distributions raped thirteen-year-old girl, noting that the latter was charged as a violation of Yugoslav Penal Code and Article 46 of Hague Convention of 1907 (Yugoslavia)).

100. INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME II: PRACTICE 2193–200 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) (citing to the following examples: Argentina, *Law of War Manual* § 4.010 (1969); United Kingdom, *Military Manual* § 626 (1958); China, *Law Governing the Trial of War Criminals* art. 3(3), 17 (1946); Ethiopia, *Penal Code* article 282(f) (1957); Netherlands, *Definition of War Crimes Decree* art. 1 (1946)).

101. *Peace Conference Report*, *supra* note 96, at 127.

102. 14 UNITED NATIONS WAR CRIMES COMM’N, *Trial of Takashi Sakai*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 7 (1949).

103. Prosecutor v. Kunarac, *supra* note 19, ¶¶ 127–28 (quoting Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 460 (Feb. 22, 2001)).

104. *Id.*; see also, e.g., Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-A, Judgement, ¶¶ 151–57 (July 7, 2006).

particularly true for the charges based on *jus cogens* violations for which the international community accepts no derogation, such as slavery and torture.

V.

FAILURE TO APPLY CUSTOMARY INTERNATIONAL LAW RAISES ADDITIONAL
CONSIDERATIONS AND QUESTIONS

Although the charges against Mr. Kwoyelo warrant close examination by the pretrial judge this week, they also trigger a question critical to the development of law in Uganda generally, namely whether Ugandan criminal courts can apply customary international law as a basis for the prosecution of war crimes, crimes against humanity, and genocide.

One concern is that failure to directly apply customary international law could deprive the Ugandan courts of the ability to prosecute some categories of crimes or to prosecute them to the fullest extent. War crimes and crimes against humanity have an expressive purpose that is not achieved by their characterization as mere penal code offenses.¹⁰⁵ Failure to apply customary international law with respect to atrocities committed in the conflict in Northern Uganda may constitute a denial of justice to which victims are entitled, in contradiction with constitutional guarantees.

Second, the Ugandan judiciary should interpret the Constitution in such a way as to be consistent with Uganda's international obligations. Throughout the past several decades, Uganda has indicated an intention to investigate and prosecute various categories of international crimes. For example, Uganda has ratified the Convention Against Torture, which requires a state party to extradite or prosecute any person within its jurisdiction who has allegedly committed an offense under the treaty.¹⁰⁶ Uganda also acceded to the ICCPR on June 21, 1995 without making any reservations. Articles 2(1) and 2(3)(a) of the ICCPR require each State party "to ensure to all individuals . . . the rights" recognized in the Covenant and provide that any person whose rights or freedoms recognized in the ICCPR are violated shall have an "effective remedy."¹⁰⁷ The International Human Rights Committee has interpreted this article to impose an affirmative duty to prosecute presumed perpetrators, "notably in respect of those violations recognized as criminal under either domestic or international law."¹⁰⁸

Third, failure to prosecute atrocities committed in the conflict in Northern Uganda may have implications with respect to Uganda's relationship with the International Criminal Court (ICC). Under the principle of complementarity

105. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L. J. 119, 121–22 (2008).

106. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

107. ICCPR, *supra* note 72, arts. 2(1), 2(3)(a).

108. HUMAN RIGHTS COMM., GENERAL COMMENT NO. 31: THE NATURE OF THE GENERAL LEGAL OBLIGATION IMPOSED ON STATE PARTIES TO THE COVENANT ¶¶ 15, 18 (2004).

provided in Article 17 of the Rome Statute,¹⁰⁹ the ICC can exercise jurisdiction over core international crimes where a state party is unwilling or genuinely unable to investigate and prosecute the same conduct. Interpreting the Ugandan Constitution as allowing direct application of customary international law in pursuit of accountability for international crimes would thus diminish the risk of challenges vis-à-vis the ICC with respect to crimes committed after 2002.

Finally, in light of the current legal framework governing core international crimes prosecutions in Uganda, failure to apply customary international law risks undermining the mandate of the ICD itself. As noted earlier, the ICD was created to serve as a mechanism for acquiring legal accountability for atrocities committed during the conflict in Northern Uganda.¹¹⁰ However, the current statutory framework at the ICD's disposal seems to present a temporal gap with respect to the prosecution of war crimes and crimes against humanity committed in non-international armed conflicts between 1964 and 2010.¹¹¹ Unless law reform allows for either the domestication of Additional Protocol II of the Geneva Conventions—which covers war crimes committed in the context of internal armed conflict¹¹²—or other legislation specifically applying to atrocities committed prior to the passage of the 2010 International Criminal Court Act,¹¹³ direct application of customary international law is one way to enable the domestic prosecution of atrocities committed in Northern Uganda during the 1980s and 1990s as war crimes or crimes against humanity.

109. Rome Statute, *supra* note 35, arts. 1, 17(1)(a).

110. *See* discussion *supra* Part II.

111. Uganda's 1964 Geneva Conventions Act of course contains Common Article 3's prohibition of war crimes in non-international armed conflicts. However, it is unclear whether this effectively criminalizes these offenses within the Ugandan legal order. *See supra* Part III.

112. Additional Protocol II, *supra* note 29.

113. International Criminal Court Act (2010).