DOMESTIC PROSECUTION OF INTERNATIONAL CRIMES IN TANZANIA: THE STATE OF THE LAW

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Abstract

This article examines Tanzania's ability to domestically prosecute international crimes following its ratification of the Rome Statute. The Article also analyses the possibility of relying on the provisions of customary international law to prosecute these crimes in the absence of domestication of the Rome Statute. The article probes into the reasons for the non-domestication of the Statute, highlights the strengths and weaknesses of the current legal framework to prosecute international crimes, and proffers a set of recommendations for the identified legal flaws. It finds that although Tanzania is a State Party to the Rome Statute, it has not yet domesticated the Statute. Despite the absence of a direct legal obligation to domesticate or nationally incorporate the provisions of the Rome Statute, the articles states that it is fundamental that Tanzania indicates its ability and willingness to

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prosecute international crimes within its domestic legal framework. While there are two approaches to prosecuting crimes of the Statute at the national level, this article has discussed the effectiveness of Tanzania's legal framework to prosecute those crimes through the ordinary crimes approach. It contends that while some of the core crimes can be prosecuted domestically and through customary international law, the current domestic legal framework in Tanzania is incapable of prosecuting the Statute's core crimes effectively in the absence of domestication or adoption of serious legal amendments in the relevant domestic legislation.

Key words: Customary International Law - International Crimes - International Crimes Approach - Ordinary Crimes Approach - Penal Code - Rome Statute

1. INTRODUCTION

The adoption and entering into force of the Rome Statute of the International Criminal Court (ICC)[1] represents a momentous milestone in the development of international criminal law from its turbulent historical origin.[2] At the time of writing this Article, the ICC has a total of 123 States Parties that have ratified the Rome Statute, including the United Republic of Tanzania.[3] Despite the challenges

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1 Rome Statute of the International Criminal Court, 37 ILM (1998), 999, 2187 UNTS 3 (1998). Hereinafter: the Rome Statute.

2 As to the history of international criminal law, especially leading to the establishment of the International Criminal Court, see Sadat LN., "Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute", 49(4) *DePaul Law Review*, 2000, p. 909, at pp. 909-917.

3 International Criminal Court, "States Parties to the Rome Statute", information available at

the ICC faces, it is currently the only permanent international court with jurisdiction over the core crimes of international law.[4] Within the jurisdiction of the ICC, the core crimes refer to genocide, war crimes, crimes against humanity and the crime of aggression.[5] These core crimes, also referred to as crimes under international law or international crimes,[6] are considered the "most serious crimes of concern to the international community" which cannot "go unpunished" because they "shock the conscience of humanity" by threatening the protected values of the international community, namely, "the peace, security and well-being of the world."[7] Unlike the so called transnational crimes,[8] the core crimes are crimes regarded as part of international law whose criminalisation and punishment do not depend on their recognition as such by any domestic legal framework and which attract direct individual criminal responsibility.[9]

Although the Rome Statute does not provide for an express legal obligation on the States Parties to implement its substantive

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<https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en> (accessed 28 September 2020).

4 Article 1 of the Rome Statute. See as well Triffterer O. and Bohlander M., "Establishment of the Court" in Triffterer O. and Ambos K. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edn), Oxford: Beck/Hart, 2016, at p.18.

5 Article 5(1) of the Rome Statute. See Bassiouni M.C., *Introduction to International Criminal Law,* New York: Transnational Publishers, 2010, at pp. 506-507.

6 Elderkin R., "The Impact of International Criminal Law and the ICC on National Constitutional Arrangements", 4(2) *Global Constitutionalism,* 2015, p. 227, at p. 232.

7 Paragraphs 2, 4 and 9 of the Preamble as well as Article 5(1) of the Rome Statute. See as well Gioia F., "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", 19 *Leiden Journal of International Law*, 2006, p. 1095, at p.1096.

8 Ambos K., "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?" 24 *Leiden Journal of International Law*, 2011, p. 655, at pp. 667-668.

9 Werle G. and Jessberger F., *Principles of International Criminal Law*, (3rd Edn.), New York: Oxford University Press, 2014, at p.32.

criminal law provisions[10] in their domestic legal regimes,[11] a purposive reading of the Rome Statute offers substantial evidence to assert its necessity.[12] A purposive reading of paragraphs 4 and 5 of the Preamble which require effective prosecution of international crimes of the Rome Statute by "taking measures at the national level" so as to ensure international cooperation to "end impunity for the perpetrators" as well as paragraph 6 which imposes an obligation on a State Party to "exercise its criminal jurisdiction over those responsible for international crimes" and paragraph 10 which recognises the jurisdiction of the ICC as supplementary to "national criminal jurisdictions" entails an implied necessity of domestic implementation of the substantive criminal law provisions of the Rome Statute.[13] In the context of its complementarity principle,[14] the primary obligation to investigate, prosecute and

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10 Substantive criminal law is interpreted broadly here to include international crimes of the Rome Statute, its general principles of criminal law and the establishment of jurisdiction, see Broache M.P., "Bringing Home Rome: Explaining the Domestication of the Rome Statute of the International Criminal Court", *SSRN Electronic Journal*, 2015, p.1 at pp. 5-6.

11 On the lack of the direct legal obligation to implement substantive provisions of the Rome Statute, see Nouwen S.M.H., *Complementarity in the Line of Fire: The Catalyst Effect of the International Criminal Court in Uganda and Sudan* Croydon: Cambridge University Press, 2013, at pp. 37-40.

12 Already Articles 70(4)(a) and 88 obligate states parties to criminalise offences of the administration of justice and establish forms of international cooperation. For further support of this position, see Laplante L.J., "The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence", 43 *J. Marshall Law Review*, 2010, p. 635 at pp. 648-649.

13 More so, states, through their competent authorities such as courts, represent the "the primary entry points" through which any form of crime, let alone international crimes, can be investigated and prosecuted.

14 Generally see El Zeidy M.M., *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* Leiden: Martinus Nijhoff Publishers, 2008, at p. 157 and Stigen J., *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* Leiden: Martinus Nijhoff Publishers, 2008.

punish perpetrators of the core crimes is vested with the State of commission or nationality.[15]

According to the Rome Statute, the state of commission or territoriality means the State or territory within whose jurisdiction any of the crimes prohibited by the Rome Statute have been committed. Nationality means the national of the State Party who commits a crime prohibited by the Rome Statute. The ICC will only exercise its criminal jurisdiction when the nationality or territoriality criteria have been fulfilled and upon a clear indication of the unwillingness or inability of the state of commission or nationality to prosecute.[16] Impliedly, for complementarity to work, the State Party must have implemented within its domestic sphere the substance of the Rome Statute.[17] Otherwise, non-implementation not only defeats the complementarity principle itself, but also renders the State Party's case admissible before the ICC and actually reduces the ICC into a first instance court, contrary to the purpose of its establishment.[18] The practice of States Parties to the Rome Statute has also shown that the majority of them have taken domestic legal measures to give effect to the substantive provisions of the Rome Statute.[19] Although States can opt for the ordinary crimes approach

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15 Article 12(2)(a) and (b) of the Rome Statute. Further, see and Duff A., "Authority and Responsibility in International Criminal Law" in Besson S. and Tosioulas J. (eds.), *The Philosophy of Law* New York: Cambridge University Press.), 2010 at p. 590.

16 Articles 1 and 17 of the Rome Statute. See as well Benzig M., "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", 7 *Max Planck Yearbook of United Nations Law*, 2003, p. 591 at p. 592.

17 Benzig, as above, note 16, at p. 596.

18 The purpose of establishing the ICC was to give it "jurisdiction over persons for the most serious crimes of international concern" and such jurisdiction being "complementary to national criminal jurisdictions."

19 Ibanda-Nahamya E., "Complementarity in Practice and ICC Implementing Legislation: Lessons from Uganda" in Ankumah E.A., (ed.), *The International Criminal Court and Africa: One Decade On* Cambridge: Intersentia, 2017, 163 at pp. 174-180.

in the criminalisation and prosecution of international crimes,[20] the international crimes approach appears more compatible with the general purpose of the Rome Statute and assists States to actually and easily prosecute the Statute's crimes as evidence of their ability and willingness.[21]

Based on the foregoing, this article finds it necessary to assess Tanzania's position on the Rome Statute and its practice on the domestic prosecution of international crimes, both based on the Rome Statute and customary international law. The need for this assessment is based on the fact that the United Republic of Tanzania has played a pivotal role in the development of international human rights law and international criminal law, especially on the African continent. While today Tanzania hosts the African Court on Human and Peoples' Rights (ACHPR) and the East African Court of Justice (EACJ) in Arusha, it also hosted the International Criminal Tribunal for Rwanda (ICTR) which was dissolved on 31 December 2015. Following the ICTR's closure, Tanzania hosts in Arusha the Arusha branch of the United Nations International Residual Mechanism for Criminal Tribunals which inherited the functions of the ICTR.[22] Earlier on, Tanzania had also participated in the negotiations leading to the adoption of the Rome Statute and actually signed the Rome Statute on 29 December

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[20] This approach entails that a party to the Rome Statute, instead of criminalising international crimes as defined and prohibited under international law, criminalises and punishes international crimes on the basis of its existing domestic crimes.

[21] International crimes approach means that the state in question criminalises international crimes in its domestic legal framework as defined and criminalised in the Rome Statute. For this approach, see G.J., "International Criminal Justice at Domestic Level in Kenya: Reality on the Ground" 42(2) *Eastern African Law Review*, 2015 p. 84 at pp. 89-93.

[22] Thakur R., *The United Nations*, *Peace and Security: From Collective Security to the Responsibility to Protect* New York: Cambridge University Press, 2006, at 119.

2000 and ratified the same on 20 August 2002.[23] Further, Tanzania also signed the Agreement on Privileges and Immunities of the Court of 9 September 2002 on 27 January 2004[24] and also participated in the deliberations of the 2010 Kampala Amendments to the Rome Statute.[25]

For these international legal instruments to have the force of law and domestic enforceability, the Constitution of Tanzania requires their ratification to be accompanied by domestication.[26] Thus, while by ratification Tanzania is internationally bound to uphold and adhere to its commitment assumed under the Rome Statute, the Statute lacks direct domestic enforceability in Tanzania in the absence of domestication.[27] Domestication is achieved when the

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23 United Nations Treaty Collection, "Rome Statute of the International Criminal Court Ratification Status" available at *<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII10&chapter=18&lang=en>* (accessed 25 July 2019).

24 United Nations Treaty Collection, "Agreement on Privileges and Immunities of the Court Ratification Status", information available at *<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&clang=_en>* (accessed 27 July 2019).

25 However, Tanzania is yet to sign or ratify the Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court of 11 June 2010. See United Nations Treaty Collection, "Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court Ratification Status" available at *<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en>* (accessed 25 July 2019).

26 Article 63(3)(e) read together with Articles 34 and 35 of the Constitution of the United Republic of Tanzania, 1977, CAP 2 R.E 2002. See also Hisashi O., "Problems of Interaction Between the International and Domestic Legal Orders", 5 *Asian Journal of International Law*, 2015, p. 246 at p. 250.

27 Notwithstanding, the courts of law in Tanzania have to some extent taken the position that, ratified instruments, especially human rights instruments, should bind Tanzania even in the absence of domestication, see for example *Bernado Ephrahim v Holaria Pastory and Gervazi Kaizilege* (1981) TLR 122; *DPP v. Daudi Pete* (1993) TLR 22; and *Transport Equipment Ltd and Reginald John v. Devram P. Valambia* (1993) TLR 91. See as well the East African Court of Justice (EACJ)'s decision in *The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare*, EACJ-Appellate Division, Appeal No. 3 of 2014, decision of 29 July 2014 at para. 18

Parliament of Tanzania enacts an Act of Parliament incorporating the substance of the Rome Statute. The Parliament of Tanzania is yet to undertake this legislative step. Even the procedural legal framework through which Tanzania could implement cooperation provisions of the ICC is yet to be undertaken. Although the Tanzania International Criminal Court Draft Bill with the Rome Statute annexed to it was drafted by the Office of the Attorney General, it is yet to reach the Parliament.[28] It is important, therefore, to examine Tanzania's domestic legal framework and practice to determine whether Tanzania's legal framework is capable of prosecuting international crimes in the absence of implementation or domestication, the approach upon which this is or has been achieved, reasons for the Statute's non-domestication and proffer the way forward.

2. LEGAL FRAMEWORK FOR PROSECUTION OF CRIMES IN TANZANIA

Under the Constitution of Tanzania,[29] the powers to institute, prosecute and supervise all criminal prosecutions in Tanzania are vested with the Director of Public Prosecutions (DPP).[30] To better

(unreported). As far as international criminal instruments are concerned, the courts of law have not espoused such an approach.

28 Parliamentarians for Global Action, "United Republic of Tanzania – Campaign for the Rome Statute of the ICC," information available at<*https://www.pgaction.org/ilhr/rome-statute/africa/tanzania.html*> (accessed 25 July 2019).

29 Constitution of the United Republic of Tanzania, CAP 2 R.E 2002. Hereinafter: the Constitution of Tanzania or the Constitution. The Director of Public Prosecutions is hereinafter referred to as the DPP.

30 Arts. 59B(1) and 59B(2) of the Constitution of Tanzania. According to art. 59B(3) of the Constitution of Tanzania, the same powers vested in the DPP can be discharged as well by officers under him or any other officers under his instructions.

realise these powers of the DPP,[31] the Parliament of Tanzania enacted the National Prosecutions Service Act.[32] The National Prosecutions Service Act establishes the National Prosecutions Service (NPS) with the overall obligation of promoting and dispensing criminal justice through organisation, supervision, management, monitoring and coordination of all criminal investigations and prosecutions in mainland Tanzania.[33] Under the Act, the NPS has the mandate also to take necessary steps to secure the extradition of an offender, facilitate mutual legal assistance in criminal matters and perform all other functions to facilitate the prosecution of offences or any other criminal matter.[34] Thus, reading the Constitution and the National Prosecutions Service Act requires also the taking into account of several other laws and by-laws which all together have a bearing on the functions and duties of the DPP and the NPS.[35] In the discharge of these obligations, the DPP and the NPS are generally required to observe the principles that justice needs to be done, prevention of the abuse of the legal process and the taking into account of the public interest.[36]

Based on these provisions, it is clear that the powers of the DPP and the NPS encompass all crimes committed in mainland Tanzania by any person, including persons who have committed offences in Tanzania and fled the country. Although the laws

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31 Under art. 59B(5) of the Constitution.

32 The National Prosecutions Service Act, CAP 430 R.E 2019.

33 See the long title and ss. 2, 4, 9 and 16(1) of the National Prosecutions Service Act, CAP 430, R.E 2019.

34 S.11 of the National Prosecutions Service Act.

35 Such other laws and by-laws include for example, Office of the Attorney General (Discharge of Duties) Act, CAP 268 R.E. 2019, Mutual Legal Assistance in Criminal Matters Act, CAP 254 R.E. 2002, Extradition Act, CAP 368 R.E 2019, Penal Code, CAP 16 R.E. 2019, Criminal Procedure Act, CAP 20 R.E. 2019 and the Attorney General (Restructure) Order, GN. No. 48 of 2018.

36 Art. 59B(4) of the Constitution and Section 8 of the National Prosecutions Service Act.

discussed all seem to be silent on the domestic prosecution of international crimes, it is nonetheless clear that the investigation and prosecution of international crimes fall squarely within the mandate of the DPP and the NPS. This is because, international crimes, however their designations, if committed in Tanzania, amount to crimes within the authority of the DPP and the NPS to investigate and prosecute.[37] Thus, the absence of their clear designation as such does not negate their investigation and prosecution in Tanzania. It is also clear from the foregoing discussion that due to the absence of their clear stipulation as international crimes in our domestic legal framework, international crimes can only be prosecuted as domestic or ordinary crimes in Tanzania. The omission or failure of Tanzania to domesticate the substance of the Rome Statute appears to indicate that Tanzania follows the ordinary crimes approach, thereby prosecuting international crimes where they fit into the domestic criminal legal framework of Tanzania. Therefore, this calls for an examination to what extent the Tanzanian legal framework supports the prosecution of international crimes as domestic or ordinary crimes. To achieve this aim, the Article explores and analyses the Penal Code and several other laws and how their provisions might be used to prosecute international crimes as ordinary offences in Tanzania. In the course of the analysis, the Article also considers the possibility of Tanzania using customary international law to

[37] Sayi P.R., "Crime Victims' Remedy against a DPP Decision not to Prosecute in Tanzania" 1(10) *International Journal of Science, Arts and Commerce*, 2016, p.1 at pp. 1-5; and Tibasana L.M., "Effective Administration of the Police and Prosecution in Criminal Justice: The Practice and Experience of the United Republic of Tanzania" p.164 at pp. 170-180, the Article available at <*https://www.unafei.or.jp/publications/pdf/RS_No60/No60_19PA_Tibasana.pdf*> (accessed 2 October 2019).

prosecute international crimes even in the absence of domestication of the Rome Statute.

3. INTERNATIONAL CRIMES AS ORDINARY CRIMES IN TANZANIA

From a comparative perspective, the Article provides first a brief but considered overview of the core criminal provisions of the Rome Statute followed by an analysis of the Tanzanian domestic legal framework. Thereafter, the Article discusses the possibilities of Tanzania prosecuting international crimes under customary international law. As already remarked in the introductory part of this Article, the Rome Statute criminalises the core international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[38]

Under the Rome Statute, the crime of genocide is committed when a person, with a special intent to destroy, in whole or in part, a national, ethnical, religious or racial group, as such: kills members of the group; causes serious bodily or mental harm to members of the group; deliberately inflicts on members of the group conditions of life intending to bring its physical destruction in whole or in part; imposes measures calculated to prevent births within the group and forcibly transfers children of the group to another group.[39] The special intent to destroy the protected groups in whole or in part is the contextual element or the chapeau which elevates these otherwise normal crimes to international crimes.[40] The same crime

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38 Art. 5 of the Rome Statute.

39 Art. 6 of the Rome Statute.

40 Kreß C., "The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case", 7(2) *Journal of International Criminal Justice*, 2009, p. 297, at pp.300-305 and Ambos K., "What Does 'Intent to Destroy' in Genocide Mean?" 91(876) *International Review of the Red Cross*, 2009, p.833, at pp. 834-838.

is also criminalised by the Convention on the Prevention and Punishment of the Crime of Genocide in exactly the same wording as the Rome Statute.[41]

The Penal Code, which is the main penal and criminal law of Tanzania, does not criminalise the crime of genocide as such. The Penal Code, however, has several provisions for ordinary crimes which can be broadly interpreted as including the individual acts of the crime of genocide, although lacking the international element. The Penal Code criminalises the crimes of murder, causing grievous harm or wounding another person, administering poison or noxious substance to any person to endanger his life or causes grievous harm, attempting to procure abortion or supplying instruments or any other means to execute such an act with intent to destroy the life of a child, willful acts that cause the child to die before having an independent existence of its own, trafficking of children, child stealing and rape.[42] Furthermore, the Cyber Crimes Act[43] criminalises the crime of inciting, denying, minimising or justifying acts that constitute the crime of genocide through unlawful publication of any material through a computer system.[44] Rather than using the Rome Statute, the Cyber Crimes Act goes on to define genocide by a direct reference to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[45]

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41 Art. of the Convention on the Prevention and Punishment of the Crime of Genocide, 277 UNTS 78 (1948).

42 See for example, ss. 130-132, 195-198 and 241.

43 Act No. 14 of 2015.

44 S. 19(1) of the Cyber Crimes Act. See also Article III of the Genocide Convention.

45 The law states that "for the purpose of this section, "genocide" shall have a meaning ascribed to it under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948."

Tanzania ratified this Convention on 5 April 1984.[46] Nonetheless, just like the Rome Statute and several other treaties, Tanzania is yet to domesticate this instrument.[47] It is however recognised that by ratification, a country is internationally bound to observe the provisions of the treaty and is prevented from adopting any measure that defeats the purpose of the treaty.[48] It also needs to be emphasised that the Cyber Crimes Act does not have the effect of domesticating the content of the Genocide Convention. It only allows the courts of law in Tanzania to adopt and use the framework of the Genocide Convention in the punishment of the crime of inciting, denying, minimising or justifying acts constituting the crime of genocide only when such acts have been published through a computer system.[49] Thus, it is not the substance of the crime of genocide that is criminalised or punished by the provisions of the Cyber Crimes Act. Based on these provisions, we argue that Tanzania can, on a very limited legal basis, prosecute genocide as a group of several ordinary crimes only.

Notwithstanding, it is important to observe that customary international law recognises genocide as an international crime.[50]

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46 United Nations Treaty Collection, "Convention on the Prevention and Punishment of the Crime of Genocide, Ratification Status", information available at *<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en>* (accessed 23 September 2019).

47 Kamanga describes this situation as 'treaty constipation', see Kamanga K., ''Treaty Constipation as a Key Factor in Implementation of Human Rights Treaties in Kenya, Tanzania and Uganda", 2014 at pp. 1-15, available at *<https://www.academia.edu/13587731/Treaty_Constipation_As_a_Key_Factor_in_Implementation_of_Human_Rights_Treaties_in_Kenya_Tanzania_and_Uganda>* (accessed 23 September 2019). and Easton E.E. and Maliti S.T., *Tanzania Treaty Practice* Nairobi: Oxford University Press, 1973 at p. 110.

48 Art. 18 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

49 This crime is also punished by the Genocide Convention, although "publication through the computer system" is not mentioned as a requirement; art. III(c) of the Genocide Convention.

50 Like the Rome Statute, both the Statute of the International Criminal Tribunal for the Former Yugoslavia in its art. 4(2) and the Statute of the International Criminal Tribunal

In other words, before the Rome Statute criminalised the crime of genocide, it was already a crime prohibited by customary international law.[51] Therefore, the prosecution and punishment of the crime of genocide does not necessarily depend on its recognition or criminalisation as such at the domestic level. Since the substance of art. II of the Genocide Convention forms part of *jus cogens* and customary international law,[52] there is an obligation *erga omnes* for all states to prosecute and punish the crime on the basis of customary international law.[53] Considering that Tanzania is bound by customary international law[54], Tanzania can use the content of art. II of the Genocide Convention to prosecute the crime of genocide in Tanzania on the basis of customary international law instead of the Rome Statute. This way, Tanzania has the legal potential to indirectly meet its legal obligations under the Rome Statute and international law even in the absence of domestication.

The Rome Statute prohibits the crimes against humanity through the criminalisation of murder, extermination, enslavement,

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for Rwanda in its art. 2(2) criminalise genocide as a customary international crime following the same wording as the Genocide Convention. See further, Werle G. and Jessberger F., *Principles of International Criminal Law*, as above note 9, at p. 293.

51 International Court of Justice (ICJ), (*Democratic Republic of the Congo v. Rwanda*) Case Concerning Armed Activities on the Territory of the Congo (Ne Application: 2002), Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, ICJ Report [2006] 6, at para. 64.

52 Werle G. and Jessberger F., *Principles of International Criminal Law*, as above, note 9, at pp. 292-293.

53 See International Court of Justice (ICJ), (*Boznia and Herzegovina v. Yugoslavia*) Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment of 11 July 1996, ICJ Reports [1996] 616, at para. 31.

54 African Court on Human and Peoples' Rights, *In the Matter of Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment of 22 March 2018, Application No. 012/2015, at paras. 76,76,78, and 88. Also, see also Director of Public Prosecutions v. Peter Roland Vogel [1987] TLR 4, at p. 10.

deportation or forcible transfer of population, imprisonment and severe deprivation of physical liberty prohibited by international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other forms of sexual violence of comparable gravity, persecution, enforced disappearance, the crime of apartheid and other inhuman acts of a similar character.[55] These otherwise ordinary crimes become crimes against humanity through their contextual element which is their commission as part of a widespread or systematic attack directed against any civilian population in furtherance of a state or organisational policy, with knowledge of the attack.[56] With respect to the Penal Code, it contains no actual provisions criminalising the crimes against humanity. However, as with the crime of genocide, the Code's ordinary crimes and several other laws' provisions can be interpreted as capable of prosecuting the crimes against humanity, although lacking the necessary contextual element. For example, the Penal Code criminalises the acts of murder, buying and disposing of any person as slave, habitual dealing in slaves, rape, gang rape, sexual assaults, exploitation of children, grave sexual abuse, sexual harassment and enforced prostitution.[57]

Furthermore, the Anti-Trafficking in Persons Act[58] criminalises also the crimes of trafficking in persons, including children, for the

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55 Art. 7 of the Rome Statute. See further Haenen I.E.M.M, "Classifying Acts as Crimes against Humanity in the Rome Statute of the International Criminal Court", 14(7) *German American Law Journal*, 2013, p.796, at p. 807; and Hwang P., "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court", 22(2) *Fordham International Law Journal* 1988, at pp. 457-504.

56 Materu S.F., *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, The Hague: Asser Press, 2015 at pp. 89-90; Luban D., "A Theory of Crimes Against Humanity", 29(85) *Yale Journal of International Law*. 2004, p.85, at 97; *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, ICC Decision of 8 July 2019 at paras. 326-338; and *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision of 21 March 2016 at paras. 332-339.

57 Ss. 196, 254, 255, 130, 131A, 135, 138B, 138C, 138D and 131(1)(f) of the Penal Code.

58 CAP 433, R.E. 2002

purpose of sexual exploitation, forced labour, slavery and involuntary servitude.[59] Noticeably, the Cyber Crimes Act punishes also the conduct of a person who unlawfully publishes through a computer system any material that incites, denies, minimises or justifies acts constituting crimes against humanity.[60] The Cyber Crimes Act, however, does not define what amounts to crimes against humanity nor make any direct reference to international law. Notwithstanding this limitation, it is possible to consider the crimes against humanity from the point of view of customary international law. Thus, like genocide, international law recognises crimes against humanity as part of international crimes prohibited by customary international law.[61] Although the wording, and somehow the content of what amounts to crimes against humanity differ from one legal instrument to another,[62] the most essential crimes and the contextual element have remained affirmed.[63] Although the Cyber Crimes Act punishes those acts that incite, deny, minimise or justify acts constituting crimes against humanity only when published through a computer system, thus providing a very limited scope of applicability, we contend that the Cyber Crimes Act takes the wider view of crimes against humanity according to customary international law.

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59 S. 4 of the Anti-Trafficking in Persons Act.

60 S. 19(1) of the Cyber Crimes Act.

61 Werle G. and Jessberger F., *Principles of International Criminal Law*, as above, note 9, at pp. 330-332.

62 See art. 3 of the ICTR Statue, art. 5 of the ICTY Statute, art. 7 of the Rome Statute. See also the art. 18 of the Draft Code of Crimes against the peace and Security of Mankind with Commentaries, Yearbook of the International Law Commission, 1996, vol. II, Part. Two.

63 Werle G. and Jessberger F., *Principles of International Criminal Law*, as above, note 9, at pp.331-332.

Like the crime of genocide, Tanzania can use the content of the provisions of customary international law to prosecute crimes against humanity in the absence of domestication of the Rome Statute.

Regarding war crimes, the Rome Statute criminalises war crimes committed in the context of international and non-international armed conflict when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[64] Some of the individual acts constituting the war crimes include grave breaches of the Geneva Conventions of 12 August 1949 which include acts against persons or property protected by the four Geneva Conventions;[65] willful killing, torture or inhuman treatment, willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property which is militarily unjustified, outrages upon personal dignity, rape, sexual slavery, enforced prostitution, forced pregnancy, starvation of civilians through depravation of the necessities of life and conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

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64 Art. 8 of the Rome Statute. See further, Van Der Wilt H., "War Crimes and the Requirements of a Nexus with an Armed Conflict", 10(5) *Journal of International Criminal Justice*, 2012, p.1113, at pp. 1113-1114;

65 Regarding the Geneva Conventions, Tanzania has not ratified these instruments. Rather, it has acceded to them. For the accession status, see United Nations Treaty Collection, "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" available at, *<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a>* and United Nations Treaty Collection, "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" available at *<https://treaties.un.org/Pages/showDetails.aspx?objid=080000028015847c>* (both accessed 23 September 2019).

The Penal Code prohibits acts such as murder, rape, sexual exploitation, setting fire to crops and growing plants and slavery.[66] In addition, the Anti-Trafficking in Persons Act outlaws the crime of trafficking of children or disabled persons for the purpose of engaging them in armed activities.[67] Thus, even under the ordinary crimes approach, certain individual acts on war crimes can be prosecuted in Tanzania. Further, war crimes are not limited in their scope and applicability as the Penal Code suggests. Apart from the Rome Statute, the law on war crimes is contained in the ICTY and ICTR Statutes, the Hague Conventions or Regulations of 1899 and 1907 and several other legal instruments adopted thereafter, the four Geneva Conventions of 1949 and the 1977 Additional Protocols, international humanitarian and criminal law in general as well as customary international law.[68] The content of war crimes and several other prohibitions as contained in the international humanitarian law and the Geneva Conventions has attained the status of customary international law.[69] This means that states are bound to observe and implement the provisions of this international legal framework even in the absence of treaty obligations. Although there is no any domestication yet, it is important also to note that Tanzania has ratified several legal instruments on war crimes.[70]

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66 Ss. 254, 255, 139(1)(f), 138B, 130, 131A, 135 and 196.

67 S. 4(1)(g)(ii) of the Anti-Trafficking in Persons Act.

68 Werle G. and Jessberger F., *Principles of International Criminal Law*, as above, note 9, at pp. 392-398.

69 International Court of Justice (ICJ), (*Nicaragua v. United States of America*) Case Concerning Military and Paramilitary in and against Nicaragua, Judgment of 27 June 1986, ICJ Reports [1986] 14, paras. 218, 220.

70 These include for example: the four Geneva Conventions of 1949, Additional Protocol (I) and (II) to the Geneva Conventions of 1977, Optional Protocol on the Involvement of Children in Armed Conflict of 2000, Geneva Protocol on Asphyxiating or Poisonous Gases, and Bacteriological Methods of 1925, Convention on the Prohibition of Biological Weapons of 1972, Convention Prohibiting Chemical Weapons of 1993, Anti-Personnel Mine Ban Convention of 1997, Hague Convention for the Protection

Therefore, although the Penal Code presents very limited avenues to prosecute war crimes, Tanzania can still rely on the rules of customary international law to prosecute international crimes in the absence of domestication of the Rome Statute.

Despite this expansive interpretation of the Penal Code and the other laws in the light of customary international law, it is clear that the domestic legal framework as it stands now is insufficient and incomprehensible to criminalise and prosecute international crimes solely by relying on the ordinary crimes approach. While arguably Tanzania can invoke the provisions of customary international law to prosecute international crimes, it is obvious that the domestic framework is not equipped as such. Even if Tanzania decides to prosecute international crimes as ordinary crimes through its insufficient domestic criminal law, there will not be any moral condemnation which international community attaches to these crimes. Labelling certain acts as international crimes whether as genocide, crimes against humanity or war crimes even when prosecuted as ordinary crimes matters. This is because crimes labelled as international crimes preserve the protected values of the international community—the peace, security and well-being of the international community.[71] It is for this reason that the Rome Statute considers these crimes "unimaginable atrocities" and "the most serious crimes of concern to the international community".[72]

This state of affairs in Tanzania is different from that found in other jurisdictions in the East African Community (EAC). For example, the

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of Cultural Property of 1954, and the OAU Convention on Mercenaries of 1977. Information available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=TZ&nv=4> (accessed 28 September 2020).

71 Werle G. and Jessberger F., *Principles of International Criminal Law*, as above, note 9, at pp. 34, 36.

72 Paras. 2 and 4 as well as art. 1 of the Rome Statute.

Republic of Kenya, which ratified the Rome Statute on 15 March 2005 and domesticated the same through the International Crimes Act of 2008, had since 1968 domesticated the four Geneva conventions of 1949 which embody the substantive criminal law on the war crimes. Uganda has similarly ratified the Rome Statute on 14 June 2002 and domesticated the same through the International Criminal Court Act of 2011. Uganda has even established a special Division within the High Court of Uganda, the International Crimes Division, which among others, has jurisdiction over international crimes as part of its response to fulfil the Rome Statutes' complementarity principle. For the case of Rwanda, Rwanda's Organic Law Instituting the Penal Code, N° 01/2012/01 of 02/05/2012 criminalises some of the international crimes such as the crimes against humanity under Article 119 (Section 2) and their contextual elements and punishments under Articles 120 and 121. Its Article 122 criminalises the crime of genocide while Section 3 thereto criminalises the war crimes.[73] All these cases indicate how ineffective and of limited value is the ordinary crimes approach and the current domestic legal framework of Tanzania for the effective prosecution of international crimes and actually renders it impossible to achieve the justice generally associated with international crimes.

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[73] For the case of Kenya, see further Materu S.F., *The Post-Election Violence in Kenya*, above note 56, at p.87. For the case of Rwanda, see Rugege S. and Karimunda A.M., "Domestic Prosecution of International Crimes: The Case of Rwanda" in Werle G., Fernandez L. and Vormbaum M., (eds.), *Africa and the International Criminal Court* The Hague: TMC Asser Press, 2014, at pp.1061-1072; and Sennet P.H. and Noone G.P. "Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes", 12(2) *Journal of Civil Rights and Economic Development*, 1997, at pp. 425-441.

While in areas such as sentencing and penal punishments the Penal Code seems to impose more severe punishments, such as the capital punishment for the crime of murder, the domestic legal framework is not well coiled to prevent and punish the core crimes under international law. In turn, this negatively impacts the capacity of Tanzania to prosecute international crimes as evidence of its willingness and ability.

4. REASONS FOR NON-DOMESTICATION OF THE ROME STATUTE

Several reasons, both legal and non-legal, can be cited to explain the predicament in which Tanzania is in with respect to its failure to domesticate the Rome Statute or have a well-crafted domestic framework to prosecute international crimes as ordinary crimes.

4.1 Political Indifference

From a political point of view, the Government of Tanzania has somehow manifested some indifference to the activities of the ICC. The President of Tanzania has condemned the activities of the ICC in a number of occasions, labeling and/or painting them as a 'setback to regional efforts aimed at resolving the prolonged crisis.'[74] This statement and similar others could somehow explain why Tanzania is reluctant and skeptical to domesticate and/or incorporate the Rome Statute into its municipal legal system. This indifference or the "tug of war" situation reflects an ongoing "misunderstanding" between some members of the African Union (AU), the AU itself as a regional organisation and the ICC in which

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[74] Kolumbia, L., "Magufuli Condemns ICC over Burundi Investigation", (available at *<https://www.thecitizen.co.tz/news/Magufuli-condemns-ICC-over-Burundi-investigation/1840340-4183330-95s6goz/index.html>* (accessed 8 July 2019). See also, "Presidents Museveni, Magufuli condemn International Criminal Court (ICC)", available at *<https://www.yowerikmuseveni.com/presidents-museveni-magufuli-condemn-international-criminal-court-ICC>* (both accessed 9 July 2019).

African member states feel that the ICC is unfairly targeting African leaders, thereby being used as a western governments' tool to distabilise Africa.[75]

4.2 Loss of State Officials' Immunities

Traditionally, state officials do enjoy immunity from legal proceedings and prosecutions. The sources of these immunities are both from national legal systems, international treaty law as well as customary international law.[76] From the international law perspective, there exist two types of immunities accorded to state officials, namely, functional immunities (*ratione materiae*) and personal immunities (*ratione personae*).[77] On the one hand, functional immunity is given to state officials for the state functions they perform for or on behalf of the state. Thus, because functional immunity is accorded to state acts done by state officials, it continues to be a substantive bar against prosecutions to retired state officials on the understanding that international law prohibits courts of other nations not to prosecute acts of a state performed by a state official of another state. It is understood, however, that functional immunities cannot be pleaded for the commission of

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[75] Makumbe D., "African Response to the International Criminal Court: Implications for International Legal Justice" 20(8) *IOSR Journal of Humanities and Social Science*, 2015, p.16, at p.17 and Pheko M., "The ICC is now an Instrument of Imperialism", the article available at *<https://www.pambazuka.org/governance/icc-now-instrument-imperialism>* (accessed 14 October 2019).

[76] Dodge W.S., "Foreign Official Immunity in the International Law Commission: The Meanings of 'Official Capacity"', 109 *American Journal of International Law*, 2015, 156, at pp.156-170.

[77] Wardle P., "The Survival of Head of State Immunity at the International Criminal Court", available at *<www.austlii.edu.au/au/journals/AUIntLawJI/2011/p.pdf>* (accessed on 7July 2019). See also Frulli M., "On the Existence of a Customary Rule Granting Functional Immunity to State Officials and Its Exceptions: Back to Square One", 26 *Duke Journal of Comparative & International Law*, 2016, p.479 at pp. 496-497.

international crimes because these crimes are not state functions under international law.[78] Furthermore, functional immunity is limited as it does not protect state officials from criminal prosecutions for acts performed in a private or personal capacity whether or not these were carried out prior or after their appointment or stepping into power.

Conversely, personal immunity attaches to state officials for their status and not their acts or functions. Personal immunity is given to a limited number of state officials such as presidents, heads of state and government, diplomats and ministers of foreign affairs who have to maintain international relations with other states under international law.[79] In essence, this immunity protects the office bearers in the exercise of their functions and is intended to facilitate the smooth conduct of international relations.[80] More so, personal immunity protects state officials even for the commission of international crimes prior to or while in office. However, it cannot be pleaded for once its holder vacates office and one can thereafter be prosecuted.

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78 *Regina v. Bartle and Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet*, UK (1999) HL 2 WLR 827, 38 ILM. 581 (1999) 594-595; Akande D., "International Law Immunities and the International Criminal Court", 98 *American Journal of International Law*, 2004, p.407, at pp.413; and Filbert N., "The Immunity Clause in the Statute of the 'African Criminal Court' and its Impact in the Exercise of the Court's Jurisdiction over the Crimes", LLM Dissertation, University of the Western Cape, at pp. 24-25, available at <http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/6348/2696-3238-1 RV.pdf?sequence=1&isAllowed=y> (accessed 15 October 2019).

79 Murungu C.B., "Towards a Criminal Chamber in the African Court of Justice and Human Rights", 9 *Journal of International Criminal Justice*, 2011, p. 1067, at p.1070, ICJ Judgment of 14 February 2000, case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), (2000) ICJ Reports 3 at para. 54; and art. 13 of the Vienna Convention on Diplomatic Relations, 500 UNTS 95 (1961).

80 Akande and Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", above note 64, at pp. 815-852; and Filbert N., *id*, at p.23.

State officials in Tanzania and in particular, the President, enjoy immunity from criminal proceedings and prosecutions. Article 46 of the Constitution of Tanzania grants personal and functional immunities to the President such that he cannot be prosecuted while in office during his tenure and out of office for acts he did in the capacity of the President of Tanzania. Article 46(1) of the Constitution states:

> During the President's tenure of office in accordance with this Constitution it shall be prohibited to institute or continue in court any criminal proceedings whatsoever against him. "Article 46(3) likewise cements: "Except where he ceases to hold the office of President pursuant to the provisions of Article 46A(10), it shall be prohibited to institute in court criminal or civil proceedings whatsoever against a person who was holding the office of President after he ceases to hold such office for anything he did in his capacity as President while he held the office of President in accordance with this Constitution.

While the general import of Article 46(1) seems to suggest that the President of Tanzania can be prosecuted after he vacates office in a situation where he committed or allowed international crimes to be committed, the effect of Article 46(3) of the same Constitution qualifies Article 46(1) *supra* by offering a full-fledged shield to the President of Tanzania against any criminal prosecutions for

whatever he did while in office unless he was removed from office through impeachment by the National Assembly.[81]
The state of affairs under the Rome Statute is quite different. Article 27 of the Rome Statute states:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. (Underlining is ours)

The effect of the provision above is to remove and deny any form of immunity to leaders of any of the state parties to the Rome Statute even when in office. The Rome Statute and the jurisprudence from the ICC have made it clear that perpetrators of international crimes cannot seek refuge under the umbrella of 'state officials' immunities'.[82] Article 27 as cited above, was also well

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[81] On the harmonious import of Article 46(1) and 46(3) of the Constitution of Tanzania, see: *Ado Shaibu v. Hon. John Pombe Joseph Magufuli (The President of the United Republic of Tanzania) and Others*, Misc. Civil Cause No. 29 of 2018, High Court of Tanzania, Main Registry, Dar es Salaam, (Unreported).

[82] Akande D., "International Law Immunities and the International Criminal Court", 98(3) *American Journal of International Law*, 2004, at pp.407-433, and Kaur S.,

interpreted by the Pre-Trial Chamber II of the ICC in the *Prosecutor v. Omar Hassan Ahmad Al-Bashir* case as completely removing away any defence of immunity for the commission of international crimes, including the immunity from arrest.[83] Thus, domesticating the Rome Statute in Tanzania will, as well, completely take away the so called 'state officials' immunities' provided under the Constitution and international law, unless the domestication purposely excludes Article 27 of the Statute.[84] In essence, the Constitution and customary international law will no longer be a shield against domestic prosecutions for international crimes in respect of officials who may want to claim immunity. This is reflected also by Article 27 of the Vienna Convention on the Law of Treaties which prohibits states from invoking internal law to justify non-compliance or failure to honour treaty obligations.[85]

4.3 Need to Adopt Legal Reforms

Domesticating the Rome Statute would require serious legislative changes to Tanzania's criminal justice system. One of such reforms might be the abolition of the death penalty. At the international level, a number of international human rights' campaigns have been initiated calling upon states to do away with the death penalty. However, Tanzania is far from responding. Tanzania is a state party to the International Covenant on Civil and Political Rights (ICCPR), 1966 but is not a state party to the Second Optional Protocol to the

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"Immunity for Heads of State at the ICC", available at <*www.saijournal.org/posts/on-the-issue-of-immunity-for-heads-at-the-icc*> (accessed 9 July2019).

83 ICC-02/05-01/09, Decision of 6 July 2017 at paras. 74 and 75.

84 See also, the decision of the Appeals Chamber in the same case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, No. ICC-02/05-01/09 OA2 of 6 May 2019 at para 132 where it was held that, by ratifying or acceding to the Statute, States Parties have consented to the inapplicability of Head of State immunity for the purpose of proceedings before the ICC.

85 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1991.[86] Thus, death penalty by hanging in Tanzania is still legal.[87] One of the capital offences in Tanzania is murder. Section 197 of the Penal Code[88] provides for a punishment of murder which is sentence to death. It should be noted that, the constitutionality of the death penalty was once tested in the Court of Appeal of Tanzania in *Mbushuu Alias Dominic Mnyaroje and Another v. R*[89] in which the Court of Appeal unequivocally declared the death penalty not arbitrary and hence constitutional. [90]

Besides, in a very recent constitutional case of *Jebra Kambole v. The Attorney General of the United Republic of Tanzania,*[91] the petitioner appeared before the High Court 'blindly' and unsuccessfully challenging the constitutionality of the same provision (section 197 of the Penal Code) on the ground that it offends Article 12(2) on the equality of human beings; Article 13(1) (2) (6)(a) on the equality before the law; Article 14 on the right to

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86 Tanzania ratified the Covenant on Civil and Political Rights, 171 UNTS 999 (1966) on 11 June 1976, available at United Nations Treaty Collection, "Ratification Status" available at *<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&clang=_en>* (accessed 25 September 2019). Tanzania is yet to sign and ratify the Second Protocol to the Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 414 UNTS 1642 (1989), See, United Nations Treaty Collection, information available at *<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV12&chapter=4&clang=_en>* (accessed on 25 September 2019).

87 Shaidi, L. P., "The Death Penalty in Tanzania: The Law and Practice", at pp. 1-5 (available at *<https://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdft >* (accessed 9 July 2019). See also, Gaitan A. and Kuschnik B., "Tanzania's Death Penalty: An Epilogue on Republic v. Mbushuu", 9 *African Human Rights Law Journal,* 2009, p.459-481.

88 [Cap. 16 R.E 2019].

89 [1995] TLR 97.

90 Shaidi L.P, *as above*, note 87, at pp.115 and 117.

91 Miscellaneous Civil Cause No. 22 of 2018, High Court, Main Registry – Dar es Salaam (Unreported).

life; and Article 29(1) (2) on fundamental rights and duties. The petitioner prayed for, among others, a declaration that the said penal provision was unconstitutional. The High Court dismissed the petition for lack of merits and concluded that the case is *res judicata*. At page 17, the High Court stated that:

> On a different note, we have closely scrutinized the petitioner's pleadings to ascertain whether there are new developments or facts pursuant to the determination in the Mbushuu's case. We have found nothing new pleaded. In the absence of any new material or change of circumstances, we are of the respectful view that, this matter is res judicata and it is not open for this court to rehear it on the same facts.

The Rome Statute does not impose death penalty for the core crimes under international law. Rather, it provides for the maximum sentence of life imprisonment. In this context, Tanzania will need to adjust its laws to do away with the death penalty for ordinary acts of murder and other capital offences to comply with the spirit of the Rome Statute, because, it would be absurd for ordinary acts amounting to murder to receive death penalty by hanging while 'similar' acts of murder which constitute international crimes receive life imprisonment sentence. Therefore, domesticating the Rome Statute in Tanzania might have the implication of forcing Tanzania to do away with the death penalty and several other legal provisions.

4.4 'Not Our Issues' Perception

It has been the view of the Government leaders and the majority of citizens in Tanzania that the ICC and the international crimes in general are foreign matters and are therefore "not our issues" in Tanzania. Fundamental to the view is the perception that Tanzania is "an island of peace" and cannot thus be plagued by such crimes as crimes against humanity, war crimes or the crime of genocide. At best, the perception is grounded in the belief that this whole project of domestic prosecution of international crimes is a 'western priority.'[92] For that reason, there exists no any impetus to amend the Penal Code and/or domesticate the substance of the Rome Statute or international criminal law in general in Tanzania. While the commission of these crimes in Tanzania appears impossible due to its political stability, it is worth having an effective criminal justice legal system capable of prosecuting crimes under the Rome Statute and customary international law. The presence of such an effective legal framework acts as a barricade against future commission and achieves a deterrence and preventive effect as well.

4.5 Limited Resources and Unsupportive Infrastructure

Even under the ordinary crimes approach, the prosecution of international crimes is still not simple. This is even obvious from countries such as Kenya and Uganda that have implemented specific legislation on international crimes.[93] The investigation and prosecution of international crimes require resources and a proper,

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[92] Plessis M. and Ford J. (eds.), "Unable or Unwilling?: Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries," the Institute for Security Studies, Monograph No. 141 at p.77, available at *<https://www.africaportal.org/publications/unable-or-unwilling-case-studies-on-domestic-implementation-of-the-icc-statute-in-selected-african-countries/>* (accessed on 14 October 2019).

[93] Kweka G.J., "International Criminal Justice at Domestic Level in Kenya: Reality on the Ground" 42(2) *Eastern African Law Review*, 2015 p. 84, at pp.105-111.

well-functioning criminal justice infrastructure. Successful prosecution of these crimes requires well trained criminal justice personnel from state prosecutors, the police and legal practitioners to magistrates and judges. Gathering evidence for the commission of international crimes and their subsequent prosecution takes time and a painstaking effort. Establishing the contextual elements of the international crimes, for example, demand expertise, enough evidence and the ability to establish and prove them to the required standard of beyond reasonable doubts. All these do directly imply that financial resources are also needed in the whole process from the gathering of evidence, preparing witnesses and prosecuting the crimes.

The experience shows that ordinary domestic crimes like murder and economic offences have taken very long to conclude due to lack of, among others, enough expertise in investigation and prosecution. For example, in *Tesha Rwiza Murshid and another v. DPP and Others*[94] the Applicants sought leave of the court to apply for prerogative orders, to compel the DDP to complete investigation in respect of their murder charges pending before the District Court since 2014 to 2020. Thus, the inclusion of the core international crimes and their complicated proof requirements such as the contextual elements will be a too tough uphill assignment to Tanzania's current prosecution and investigation machinery. At the moment, most of the tertiary institutions in Tanzania do not even offer any legal courses on international criminal law in general as a core course.[95]

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94 Misc. Cause No. 95 of 2019, High Court of Tanzania, District Registry, Mwanza (Unreported).

95 Prospectuses of the major Universities in Tanzania such as the University of Dar es Salaam, University of Dodoma and Tumaini University Dar es Salaam College do not contain any course on international criminal justice. Even the Law School of Tanzania

5. CONCLUSION

Although Tanzania has played and continues to play a very important role in the progressive development of international criminal law in the world and especially on the African continent, the country is yet to domesticate the Rome Statute or amend its Penal Code to enable the prosecution of international crimes in Tanzania. Although the current legal framework is silent on the domestic investigation and prosecution of international crimes, it indirectly affords Tanzania the limited avenues to prosecute international crimes under the ordinary crimes approach. Further, since customary international law sets obligations *erga omnes* which bind States even in the absence of ratification or domestication, Tanzania can rely on the provisions of customary international law to also prosecute international crimes.

Nonetheless, this article finds that most of the individual acts forming part of the international crimes regime together with their contextual elements are absent in the Tanzanian legal framework and this curtails the legal capacity of Tanzania to effectively and efficiently investigate and prosecute international crimes domestically as evidence of its ability and willingness. The article has established that both political and legal reasons are at play behind Tanzania reluctant stance in this direction. Based on the identified shortcomings, the Article recommends that Tanzania either domesticate the Rome Statute or amends the Penal Code to grant its criminal justice legal framework the ability to investigate and prosecute international crimes; encourages the tertiary institutions to introduce and teach international criminal justice as a

Curriculum lacks such an important course, see The Law School of Tanzania (Curriculum) By-Laws, GN. 171 of 2011.

core course in their curricular. It is also recommended and that Tanzania adopts extensive legal reforms in other areas such as jurisdiction, procedural frameworks for cooperation with the ICC as well as amend several other laws whose provisions might curtail its ability and willingness to prosecute international crimes.