

1.5 Research methodology and scope

The study has applied both primary and secondary sources of literature obtained through the use of: desk review, library based research and a phone interview. The primary sources relied on include international treaties, agreements, cases, hansard and reports. Secondary sources have been obtained from, *inter alia* books, thesis, journals and working papers.

However, this methodology applied had its limitations, for example, the nature of information retrieved from the internet, for instance, cases from Uganda could not allow for proficient citation of lines, paragraphs or pages of a particular extract in a decision.

The study applied a unilateral approach. Therefore the study confined the analysis and findings to Uganda.

1.6 Preliminary Chapter overview

The research paper is laid out in five chapters. Chapter one states the introduction and background to the topic of study. Chapter two examines the legal concept of implementation of international criminal law in municipal law by establishing conceptual course for implementation from the theories of monism, dualism and co-ordination to options for incorporation to be considered by a State. Chapter three basically looks the relationship between international law and Uganda's legal framework and how the former integrates into Uganda's legal framework. Chapter four is the main subject of the paper and makes a feasibility study on the progress and challenges of implementing the substantive provisions of the Rome Statute of the ICC in light of the International Criminal Court Act. Chapter five bears the conclusion to the study and offers possible recommendations for the challenges to implementation realised in the study.

CHAPTER TWO

THE LEGAL CONCEPT OF IMPLEMENTATION IN INTERNATIONAL CRIMINAL LAW AND MUNICIPAL LAW

1.2 Introductory remarks

Legal theory suggests that each state is sovereign and equal.³³ International law is therefore founded on the consent of states, illustrated by legally binding rules: custom and treaty.³⁴ These binding rules to be given force of law, States tend to make legal and regulatory changes to allow the State to act in accordance with international obligations.³⁵ However, implementation of these binding rules varies among states, depending on the domestic legal system and treaty.

This chapter, therefore, examines the concept of implementation by defining implementation, addressing the monist and dualist concept of implementation of international law into domestic law, implementation in international criminal law and features of implementation in the domestic sphere.

2.2 Implementation defined

Implementation comes from the verb “to implement”, which means to ensure that what has been planned is done.³⁶ Implementation has been defined as the process of bringing any piece of legislation into force.³⁷ Shihata,³⁸ in stretching the definition from the immediate, states that a wider scope of implementation of an international agreement is therefore meant to encompass all

³³ Shaw (2008:129). Also see Cassese (2005: 153-5).

³⁴ Shaw (2008:131).

³⁵ International Centre for Criminal Law Reform and Criminal Justice Policy (2008: 12).

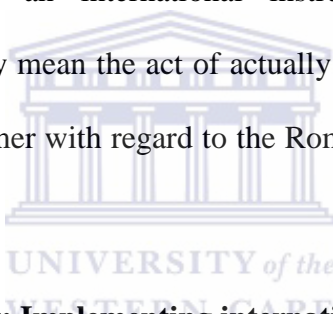
³⁶ *Collins Cobuild Advanced Dictionary of English* (2009). Cf. Humphrey(1978-1979: 34). The author quotes the *Oxford Dictionary* (1933) definition to “implement”, which is said to mean to “complete, perform, to carry into effect”

³⁷ *The Oxford Dictionary of Law* (2003: 442).

³⁸ Shihata (1996-1997: 37).

actions required to carry out commitment resulting from agreements. This would suggest implementation not only by enactment of legislation, but also implementation/enforcement of the provisions of the implemented legislation. However, Humphrey,³⁹ in defining implementation, distinguishes between implementation and enforcement. He states that the latter is peremptory. Shihata⁴⁰ states that enforcement is a more restrictive notion. It normally refers to measures jointly or unilaterally adopted by a competent authority to ensure respect for such commitments if they are not honoured voluntarily in practice.

In essence, the term implementation is basically a broader term, which not only means incorporating the provisions of an international instruments into domestic law, but, implementation would also literally mean the act of actually give effect to the enacted law. The paper however, focuses on the former with regard to the Rome Statute of the ICC implementing legislation in Uganda.



2.3 Monist and dualist dichotomy: Implementing international law in municipal law

Traditionally, domestication of international agreements is based on the relationship between international law and municipal law elucidated by the dualist and monist theories.⁴¹ The relationship between international law and municipal law is based upon the supremacy of the state, and the existence of wide differences between the two functioning orders of monism and dualism dichotomy.⁴² Monism and dualism posit that there is a common field in which the

³⁹ Humphrey (1978-1979: 34).

⁴⁰ Shihata (1996-1997: 37).

⁴¹ Generally Cassese (2005: 213-216); Shaw (2008: 131-132); Brownlie (2008:31-33).

⁴² Shaw (2008: 131).

international and municipal legal orders can operate simultaneously in regard to the same subject matter⁴³

The monist school posits that international and municipal law should be viewed as manifestations of a single conception of law;⁴⁴ that international law is automatically incorporated into municipal law without any need for act of adoption by courts or transformation by the legislature.⁴⁵ The monist position is therefore referred to as lending support for the doctrine of incorporation,⁴⁶ which holds that international law becomes part of municipal law automatically without the need for the interposition of a constitutional ratification procedure.⁴⁷

Conversely, the dualist approach stresses that the rules of the systems of international law and municipal law apply separately and cannot purport to have an effect on, or overrule, the other.⁴⁸ This means that the two systems are quite distinct systems of law⁴⁹ and regulate a different subject matter.⁵⁰ Shaw,⁵¹ further states that one expression of the positivist-dualist position is the doctrine of transformation, which is based on the precept that, a principle rule of international law can only have effect within the domestic jurisdiction when expressly and specifically transformed into municipal law by appropriate use of constitutional machinery, such as an Act of Parliament. Therefore, international law can then be applied by domestic courts only if adopted by such courts or transformed into national law by legislation.⁵²

⁴³ Brownlie (2008: 31).

⁴⁴ Gevers (2011: 22). See Cassese (2005: 213). The author states that the monist approach recognises the supremacy of the municipal law, which is in contrast with another monist view that recognises the primacy of international law.

⁴⁵ Dugard (2005: 47).

⁴⁶ Dugard (2005: 47).

⁴⁷ See Shaw (2008: 140 *et seq.*).

⁴⁸ Shaw (2008:131).

⁴⁹ Shaw (2008: 139).

⁵⁰ Brownlie (2008: 31).

⁵¹ Shaw (2008: 139).

⁵² Dugard (2005: 47). Also see Chapter 3, on the procedure of how Uganda a dualist State, implements international law instruments.

A departure from monist and dualist theory is the attempt by jurists to embrace the theory of co-ordination.⁵³ This theory is to the effect that international law and municipal law have a common field of operation and that the two systems do not come into conflict since they work in different spheres and each is supreme in its own field.⁵⁴ According to Rousseau who asserts the primacy of international law, characterises international law as a law of co-ordination, which does not provide for abrogation of internal rules when in conflict with obligations on the international plane.⁵⁵ Instead, a state is required to assume its responsibility on the international plane.⁵⁶ According to Shaw, this theory is to some extent a modification of the dualist position.⁵⁷

In conclusion, how a state opts to implement international law will depend on how its legal system embraces international law. However, for implementation in the context of the Rome Statute of the International Criminal Court, it has been argued that the theories of monism and dualism have proven to be less useful because of among others, the distinct nature of the treaty, with its extremely detailed co-operation provisions and a distinctive complementarity structure.⁵⁸ In my opinion, such an argument is left to be mooted because there is evidence of States Parties to the Rome Statute that have embraced either one of the theories in implementing the provisions of the Rome Statute.⁵⁹

⁵³ Brownlie (2008: 33).

⁵⁴ Brownlie (2008:33). Cf, Shaw (2008: 132).

⁵⁵ Brownlie (2008: 33).

⁵⁶ Brownlie (2008: 33).

⁵⁷ Shaw (2008: 132).

⁵⁸ See the International Centre for Criminal Law Reform and Criminal Justice (2008: 13).

⁵⁹ See Chapter 2, Sec. 2.4.2 for dualist countries Uganda and South Africa incorporation of the Rome Statute. Also See Advocates Sans Frontiers (2009: 10-14 et seq)on how Democratic Republic of Congo, a monist State implements the Rome statute.

2.4 Implementation of international criminal law

International criminal law is a branch of international law, and is the criminal law of the international community.⁶⁰ International criminal law embodies a new quality of international law, which is no longer limited to the rules of true interstate matters, but reaches deep into the state's domestic sphere.⁶¹ Since international law makes it the primary responsibility of states to punish for international crimes,⁶² the practicability then lies with states making international criminal law part of their domestic legal order, which comes through implementation of substantive international criminal law that is established in international agreements.

2.4.1 An insight to implementation under the Rome Statute of the International Criminal

Court

The post Nuremberg trials era, witnessed adoption of international criminal law treaties. Most of these treaties contain express provisions that require a that a member state enact legislation to give effect to the substantive criminal law provision of the treaty⁶³ Conversely, for the Rome Statute, the approach to implementation of provisions of the Statute differs. Although, the Rome Statute looks at direct enforcement of prosecuting international crimes as an exception rather than a rule,⁶⁴ where, amidst the commission of international crimes, states have the primary duty to prosecute,⁶⁵ neither the Rome Statute nor the principle of complementarity require that a State

⁶⁰ Zahar (2008: vii).

⁶¹ Werle (2009: 40 Marginal n 111).

⁶² See Werle (2009: 68-70).

⁶³ Art V of the Convention on Prevention and Punishment of Genocide, Art 4 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art 4 International Convention on the Suppression and Punishment of the Crime of Apartheid.

⁶⁴ Werle (2009: 80-81). The author distinguishes between direct and indirect enforcement; the latter being enforced by national courts and the former by international tribunals. In the statutes of the ICTY and ICTR, direct enforcement is primary.

⁶⁵ Bellelli (2010: 212).

Party domesticate the substantive provisions of the Statute by altering their national legislation.⁶⁶ The Rome Statute posits that implementation of the Statute can be achieved using already existing national legislation as long as it can effectively be compliant with the Statute provisions. However, Bellelli⁶⁷ states that the Statute establishes a comprehensive legal system, such that a full implementation through domestic enactment of obligations introduced by the Rome Statute regarding substantive criminal law and co-operation is unavoidable. In other words a state must implement the crimes as they are spelled out in the Rome Statute.⁶⁸ Werle and Jessberger have attributed the wording of the ICC that states should be “willing and able,”⁶⁹ to regard to the quality of domestic legislation insofar as prosecuting the crime of genocide, crimes against humanity and war crimes. This read with the preamble to the Rome Statute, paragraph four, which affirms that states must take measures at national level to ensure effective prosecution of crimes of international concern, would by implication require that: States Parties to the Rome Statute examine their legal framework, adapt in their national laws or enact laws to bring national criminal law in line with the Rome Statute.

2.4.2 Options for implementation of international criminal law

Whichever the theory of international law, whether monism or dualism that a State embraces, a State that chooses to make international criminal law part of its domestic legal order has broad options in deciding how to adopt substantive international criminal law.⁷⁰ Werle⁷¹ identifies the

⁶⁶ See Werle and Jessberger (2002: 194); Werle (2009:118 Marginal n 312); Roscini (2007) on the non self executing nature of the Rome Statute. Conversely, see the Rome Statute: Art. 70 on the requirement that states criminalise offences against the administration of justice, and Part 9, that states must ensure that there are national procedures for state co-operation in place.

⁶⁷ Bellelli (2010: 212).

⁶⁸ Schaba (2010L: 181-182).

⁶⁹ Cf. Rome Statute, Art. 17.

⁷⁰ Werle(2009: 119 marginal n 314).

options for implementation to include: complete incorporation;⁷² non incorporation by applying ordinary criminal law,⁷³ modified incorporation⁷⁴ and combinations.⁷⁵ Developments in Uganda indicate that in a decision to implement the substantive international criminal law, Uganda opts for complete incorporation by copying the substantive criminal law provisions as provided for in the respective international criminal law agreements.⁷⁶ This has been so for, incorporation of the grave breaches of the four Geneva Conventions under the Geneva Conventions Act⁷⁷ and incorporation of the Rome Statute crimes under the International Criminal Court Act, 2010.⁷⁸ Werle, further establishes two forms of legislative incorporation of international criminal law. They are either amendment to already existing legislation or codification of a separate law.⁷⁹ The trend in Uganda shows that Uganda tends to codify specific legislation to implement respective international criminal agreements.⁸⁰ States such as South Africa⁸¹, Kenya⁸²



⁷¹ See Werle (2009: 116-121) for further elaboration on each of the options.

⁷² See Werle (2009: 119 *et seq.*, marginal n 315-318), for various options for incorporation. They include: direct application of customary international law; reference to the ICC Statute; and by copying the provisions of the ICC Statute verbatim.

⁷³ Werle (2009: 120, marginal n 319-321).

⁷⁴ Werle (2009: 121, marginal n 322).

⁷⁵ Werle (2009: 121, marginal n 323).

⁷⁶ Werle (2009: 1201, marginal n 322). The author states that complete incorporation can occur by adopting the offences verbatim into the domestic law.

⁷⁷ Geneva Conventions Act 1964, Cap. 363, Laws of Uganda (2000), Sec. 2. Also See Chapter 4, Secs. 4.4.1.1-4.4.1.3.

⁷⁸ See Secs 7, 8 and 9. Also See Chapter 4, Secs. 4.4.1.1-4.4.1.3.

⁷⁹ See generally, Werle (2009: 122, marginal ns 325-328).

⁸⁰ See the Geneva Conventions Act and the International Criminal Court Act.

⁸¹ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; Government Gazette, 18 July 2002.

⁸² International Crimes Act, 2008; available at http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf (accessed 8 October, 2012).

2.5 Conclusion

The chapter has addressed the concept of implementation insofar as giving effect to international treaties by states is concerned. That implementation involves how a state makes international law part of the domestic law. In narrowing the concept of implementation to the substantive provisions of the Rome Statute, the chapter points out the options of incorporation available to states. In a nutshell, which ever option is taken, such act can be by the state either amending legislation or codifying legislation. This chapter therefore feeds the subsequent chapters on implementation of international criminal law in Uganda and the assessment of implementing the Rome Statute of the ICC in Uganda.



CHAPTER THREE

IMPLEMENTING INTERNATIONAL CRIMINAL LAW IN UGANDA

3.1 Introductory remarks

It is now a settled trend in international criminal law that States have the primary duty to prosecute and punish perpetrators of international crimes.⁸³ The duty to prosecute creates a need for states to make checks and consider accommodating international criminal law in the domestic legal system. Uganda is and has been party to a number of international treaties relating to the prosecution of international crimes.⁸⁴ Therefore, since Uganda has a duty to prosecute international crimes on its territory, the legal basis of international criminal law and its application in the domestic legal system must be established.

The chapter identifies the sources of criminal law in Uganda in attempt to identify the legal basis of international criminal law. The chapter also looks into ways of integrating international criminal law agreements into the domestic legal system. This informs the next chapter insofar as that it gives a picture of the developments in Uganda's legal system. This will help to shed light on the arguments raised in the next chapter.

3.2 Sources of criminal law and procedure

The applied law in Uganda is derived from sources of written and unwritten law. These laws are applied in order of precedence. Written law includes: the Constitution, Principal Laws and Subsidiary Laws. Unwritten law includes: common law and doctrines of equity, and customs and practices.

⁸³ See Rome Statute, Preamble, para 4 and 6. Also see generally, Werle (2009: Part 1, Section E).

⁸⁴ Geneva Conventions and Additional Protocol I of 1977, Rome Statute of the ICC, Protocols to the Great Lakes Pact (protocol on Genocide and Protocol on Sexual Violence), Genocide Convention of 1948.

3.2.1 The Constitution

The Constitution of the Republic of Uganda, 1995 (as amended) (hereinafter “Constitution”), is the supreme law of Uganda.⁸⁵ Article 2(2) of the Constitution, further, provides that if any law or custom is inconsistent with the Constitution, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void.⁸⁶ In essence, all laws in Uganda derive their authority from the Constitution and must conform to the Constitution.⁸⁷

Notably, Chapter 4 of the Constitution contains principles that are to be applied in criminal law process. Pertinent is Article 28 on the right of a fair trial that sets out the principles of natural justice. This is important because the submission in the subsequent chapter will make reference to this provision.



3.2.2 Principle laws

Principle laws are enacted by Parliament. Parliament enacts these laws in response to implementing constitutional provisions for peace, order, development and good governance of the Country.⁸⁸ Principal criminal laws, *inter alia*, include: the Penal Code Act, Cap. 120; the Geneva Conventions Act, Cap. 363; and International Criminal Court Act No. 11/2010. The latter two are a product of international criminal law instruments that Uganda ratified and later enacted to allow Uganda comply with its respective obligations.

⁸⁵ See Constitution, Art. 2 (1).

⁸⁶ Cf. with judgments in *Uganda Women Lawyers et al vs Attorney General Constitutional Petition No. 2/2003(Unreported)*; *Susan Kigula et al vs Attorney General*, Constitutional Appeal No. 3/06 (SC) (Unreported). In both cases, provisions within the principle laws: the Divorce Act Cap. 249 Laws of Uganda and Penal Code Act Cap 120 respectively, were challenged as infringing on constitutional guarantees. The Court found such provisions to be unconstitutional contrary to Article 2(2) of the Constitution.

⁸⁷ See Handbook of Uganda Law Reform Commission (2010: 3) (hereinafter “ULRC handbook”).

⁸⁸ Constitution, Art. 79 (1). Also see ULRC handbook (2010: 3).

3.2.3 Subsidiary laws

Subsidiary laws generally implement principal laws and deal with matters of detail and procedure.⁸⁹ They are usually meant to implement principle laws. Article 79(2) of the Ugandan Constitution restricts the power to make provisions to have force of law in Uganda on certain persons. They are: (a) persons mentioned under the Constitution; (b) members of parliament; and (c) persons or bodies authorised by law. Subsidiary legislation includes: statutory instruments, ordinances, by-laws, regulations, rules, or orders.⁹⁰

3.2.4 Common law and principles of equity

Common law and principles of equity are considered next in hierarchy to written law.⁹¹ Common law refers to principles of the law of England developed over time through practice and court decisions.⁹² Uganda, a former British colony⁹³ has adopted and applies these rules. Courts, in adjudicating cases, may invoke these principles. Common law is used in Uganda where the subject matter is not covered by statutory law, that is, law made by the law making bodies of Uganda.⁹⁴

The principles of equity refer to values that promote fairness, justice and reasonableness in social relations.⁹⁵ Equity was developed to attend to inadequacies in the application of common law.⁹⁶

⁸⁹ See ULRC handbook (2010: 3).

⁹⁰ See the Criminal Procedure Code Act, Trial on Indictment Act and Evidence Act, subsidiary legislation established by Parliament to be applied to guide the process of criminal prosecutions in Uganda. For prosecution of international crimes, confer with Para. 8 of the High Court (International Crimes Division) Practice Directions 2010, which stipulates that the International Crimes Division shall apply rules of procedure and evidence applicable to criminal trials in Uganda.

⁹¹ Sec. 14(2) (i), Judicature Act, Chapter 13, Laws of Uganda 2000.

⁹² ULRC Handbook (2010: 7).

⁹³ Uganda obtained Independence from Great Britain on October 9, 1962.

⁹⁴ Judicature Act, Sec.14(2) (ii) and (3).

⁹⁵ ULRC handbook (2010: 3).

⁹⁶ See ULRC handbook (2010: 7).

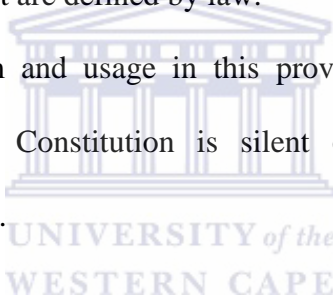
The Judicature Act provides for the concurrent applicability of common law and principles of equity. However, in case of conflict, the doctrines of equity shall prevail.⁹⁷

3.4.5 Custom or usage

Established custom or usage can be applied in the absence of written law.⁹⁸ This is only to the extent that the existing custom is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.⁹⁹

In as much as this is a recognised source of law, it is rare that it would be applied in criminal cases because Article 28(12) Constitution provides that one can only be charged for an offence if the crime and punishment are defined by law.¹⁰⁰

Noteworthy is that custom and usage in this provision do not extend to customary international law. The Ugandan Constitution is silent on the application of customary international law as a source of law.



3.4.6 Judicial decisions

Another important organ that makes laws is the judiciary. When a case is decided, it forms part of precedence. Courts in Uganda are divided into a two tier system: superior courts of record, and subordinate courts.¹⁰¹ Courts of record, also known as the courts of precedence include: the Supreme Court, which is the highest and final court of appeal; the Court of

⁹⁷ Judicature Act, Sec. 14 (4).

⁹⁸ Judicature Act, Sec. 14(2).

⁹⁹ Constitution, Art. 2(2); Judicature Act, Sec. 15.

¹⁰⁰ See sec. 2.3 on dualist approach on the relationship between international and municipal law.

¹⁰¹ See Constitution, Art. 129. Decisions of subordinate courts are not cited as precedent.

Appeal/Constitutional Court; and the High Court.¹⁰² The order of hierarchy dictates the precedence in citing the binding decisions. Section 14(2) of the Judicature Act, provides the law to be applied by courts in Uganda.¹⁰³ This section lists the sources of law courts that are expected to apply in adjudicating matters, and how they are to be applied in order of precedence, as discussed in Section 3.2.1-3.4.5 above.

Decisions from other jurisdictions including international criminal tribunals, may be cited by counsel in presentation of a case, but the discretion is upon the Court to embrace the respective decisions. Normally, when faced with international law in their midst, the courts will prefer to engage domestic sources of law to conclude matters.¹⁰⁴ The case of *Thomas Kwoyelo* is one in point.¹⁰⁵ The accused had been charged *inter alia*, with grave breach of the Geneva Conventions under the Geneva Conventions Act.¹⁰⁶ The case, being the first of its kind, before the courts with international criminal law dimension, would have probably been the first to establish precedent by Ugandan courts on prosecution of international crimes in Uganda had the trial not been stopped by the Constitutional Court in favour of granting of amnesty to the accused.

This case, in essence, reveals the reservations Ugandan courts have when the need to invoke international law arises. This was a decision made irrespective of the fact that Uganda had domesticated the Geneva Conventions. The courts also ignored the fact that the Juba Peace Agreement on Accountability and Reconciliation between the Government of Uganda and

¹⁰² See Constitution, Chapter 8. Also see parts I, II, and III of Judicature Act. Note that the Court of Appeal can convene as a Constitutional Court to hear constitutional matters.

¹⁰³ Chapter 13, Laws of Uganda 2000; Cf. Kabumba (2010: 84).

¹⁰⁴ See Kabumba (2010: 87-89 *et seq.*). Also see generally *Uganda vs Thomas Kwoyelo alias Latoni*, No. 36/11 for submissions by the Attorney General in favour of international criminal law against Uganda amnesty law, which the justices of the Constitutional Court did not adopt.

¹⁰⁵ See *Uganda vs Thomas Kwoyelo alias Latoni*, No. 36/11.

¹⁰⁶ See Geneva Conventions Act, Sec. 2 and *Uganda vs Thomas Kwoyelo alias Latoni* No.36/2011 HCT-100-ICD-case No. 02/10 (amended indictment).

LRA,¹⁰⁷ recognises the complementarity principle under the Rome statute and therefore, *inter alia*, indicates prosecutions a means through which accountability for the LRA conflict can be addressed.¹⁰⁸

3.4.7. Conclusion

One can conclusively state that although the Constitution makes mention of international law and treaty obligations in Uganda,¹⁰⁹ it is silent on the position of international law as a source of law.¹¹⁰ From the discussion, however, international criminal law as a source of criminal law in Uganda seems to be found only in parliamentary enactments as stated in section 3.2.2 above. This means that international law does not apply automatically in Uganda's legal system. It requires to be incorporated by a law of parliament.¹¹¹

3.5 Requirements for the implementation of international conventions and treaties in Uganda

3.5.1 Convention and treaty ratification process

For both monist and dualist states, implementation of international law provisions starts right from ratification or accession of a treaty. It is at this point that other domestic procedures can be considered to give effect the respective treaty. This is subject to the rights or obligations created under the treaty.¹¹²

¹⁰⁷ Signed 29 June 2007. See preamble para. 3, and Sec. 2.

¹⁰⁸ See preamble, para. 3, and Sec. 2.

¹⁰⁹ See Constitution, National Objectives and Directive Principles of State Policy XXVIII (i)(b) states that the foreign policy of Uganda shall be based on, among other things, respect for international law and treaty obligations.

¹¹⁰ Judicature Act, Sec. 14 (2).

¹¹¹ See Chapter 2 on the concept of implementation.

¹¹² See, Art. 2(1) (b) of the Vienna Convention on the Law of Treaties of 1969 (hereafter Vienna Convention) refers to "ratification", "acceptance", "approval" and "accession" to mean in each case, the international act whereby a State establishes on the international plane its consent to be bound by a treaty. Cf. with Article 14 of the

The process of incorporation of an international legal instrument in Uganda begins with the procedure to be followed in the event of ratification of treaties as laid down in the Ratification of Treaties Act¹¹³ (“Act”), and Article 123(1) of the Ugandan Constitution. Under Article 123(1), the President or a person authorised by the President reserve the right to make treaties, conventions, agreements or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter. Article 123(2) therefore, tasks parliament to make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) above.

Consequent to Article 123(1) and (2) of the Constitution, Section 2 of the Act provides for a two level process of ratification by Cabinet and by Parliament. Section 2(a) empowers Cabinet to ratify any treaty other than a treaty that shall be ratified by Parliament. Section 2(b) provides for treaties to be ratified by parliament by resolution. This is in the event that the treaty relates to armistice, neutrality or peace; or in the case of a treaty in respect of which the Attorney General has certified in writing that its implementation in Uganda would require an amendment of the Constitution. Irrespective of whether ratification is by Cabinet or Parliament, the instrument of ratification of treaty shall be signed, sealed and deposited by the Minister responsible for foreign affairs.¹¹⁴

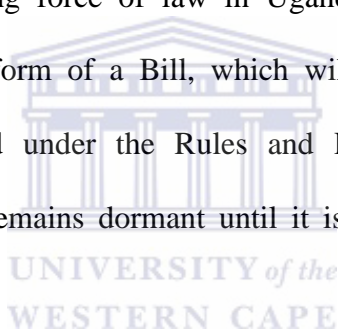
Convention, which states that consent to be bound by a treaty is expressed by ratification, acceptance or approval.

¹¹³ Cap 204, Laws of Uganda (2000), The Act defines “treaty” to include a convention, agreement or other arrangement made under article 123(1) of the Constitution.

¹¹⁴ Sec. 3, Ratification of Treaties Act.

3.5.2 Domestic implementation of conventional or treaty law

Uganda, a common law State¹¹⁵, maintains the dualist approach of incorporating international law.¹¹⁶ Therefore, valid ratification of conventions and treaties does not guarantee that the respective international instrument has automatic force of law in the domestic legal order.¹¹⁷ For the instrument to be considered to have force of law, it must be codified as part of Uganda's written law. Domestic implementation of a treaty is the reserve of a law-making authority, which is Parliament. Parliament is the primary legislative arm of government vested with the power to make law in Uganda.¹¹⁸ Article 79 (2) of the Constitution strictly confers upon Parliament powers to make provisions having force of law in Uganda. An intended law is therefore, introduced to Parliament in the form of a Bill, which will then go through the process of enactment of laws as prescribed under the Rules and Procedure of Parliament.¹¹⁹ After Parliament has passed a law, it remains dormant until it is assented to by the president and gazetted for it to have effect.¹²⁰



¹¹⁵ Uganda gained independence from Great Britain on 9 October 1962. See Cassese (2005: 214) on Britain's adoption of the dualist approach of international rules and treaties.

¹¹⁶ See Shelton (2011: 595).

¹¹⁷ See Chapter 2, Sec. 2.3 above.

¹¹⁸ See Art. 79 (1), Constitution provides that Parliament shall have the power to make laws on any matter for the peace, order, development and good governance of Uganda.

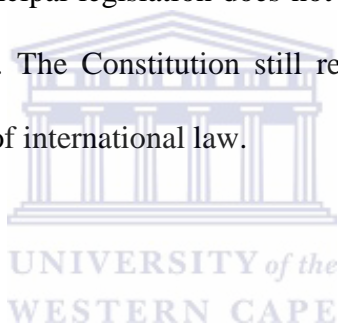
¹¹⁹ Rules and Procedure for Parliament of Uganda, June 2006, Rules 99-121.

¹²⁰ Decision of Mulenga in *Attorney General vs Paul K. Ssemogerere and anor*, SC. Constitutional Appeal no. 3 of 2004. Para 9. Also see *dictum* in *Attorney General vs. Dr. James Rwanyarare and Other*, Constitutional Appeal No.2/03, where the court in tackling the provisions of section 14(1) and (2) of the Acts of Parliament Act, (Cap.2) concerning commencement of an Act of Parliament, concluded that "Clearly according to those provisions an Act of Parliament... becomes a law when it is assented to by the President. However, we understand subsection (2) to imply that a law remains dormant until the day upon which it becomes enforceable and that day is the date of commencement."

3.6 Conclusion

This chapter establishes that Uganda, a state that has embraced the dualist approach, has legal processes through which international law becomes part of the domestic law. International treaties, like the Geneva Conventions of 1949 and the Rome Statute of the International Criminal Court, went through the domestic legislative process to have the force of law.¹²¹ Therefore, international criminal law In Uganda is contained in the respective parliamentary enactments.

Also established is that, Uganda's decision to implement international instruments happens only after ratification.¹²² However, it must be noted that the domestication of international criminal law into principal legislation does not necessarily mean that international law provision will reign supreme. The Constitution still remains a determining factor in the success of the application of rules of international law.



¹²¹ See Geneva Conventions Act, Cap. 36, and the International Criminal Court Act 200; Act 11/2010 respectively.

¹²² See International Centre for Criminal Law Reform and Criminal Justice Policy (Manual) (2008: 13), on the contrary practice of Australia a dualist State whose Constitutional requires that a comprehensive implementing legislation needs to first be prepared before an international treaty can be ratified or acceded to.

CHAPTER FOUR

PROGRESS AND CHALLENGES OF IMPLEMENTATING OF THE ROME STATUTE OF THE ICC IN UGANDA

4.1 Introductory Remarks

The implementation of the Rome Statute of the ICC by States Parties is the most vital step for combating impunity on a world-wide scale. Uganda, in bid to fulfil its obligations under the Rome Statute, has enacted the International Criminal Court Act, 2010 (hereafter “ICC Act”),¹²³ which comprehensively addresses both the principles of complementarity and co-operation.

However, this chapter limits the discussion to complementarity, namely implementation of the substantive provisions of the Rome Statute. The paper adopts this in the light of the enacted Uganda ICC Act by placing it as the main piece of legislation that gives effect to the Rome Statute. But one needs to take a critical look at what the challenges are that lie in the way to a successful implementation.

4.2 Embracing international criminal justice in Uganda- Enacting the International

Criminal Court Act, 2010

The attempt to domesticate the ICC Act began in 2004. But the process was delayed because the draft Bills turned out to exhibit major inconsistencies when considered against the contents of existing domestic laws.¹²⁴ Also there were ongoing peace negotiations between the Government of Uganda (hereafter “Government”) and the Lord’s Resistance Army¹²⁵ as well as the then

¹²³ ICC Act, No. 11/2010; *Uganda Gazette No. 39 Volume CIII* dated 25th June, 2010.

¹²⁴ Parliament of Uganda- Hansard (Wednesday 10 March 2010) at p 6-7, observations made by the Committee on Legal and Parliamentary Affairs on, *inter alia*, question of the death penalty and immunity.

¹²⁵ Parliament of Uganda- Hansards of (Thursday 26 May 2005) at p16 and (Wednesday 10 March 2010) at p18. See, Panos Eastern Africa (2010) at p 8-9) Human Rights and Peace Building: A media toolkit for journalists,

existing amnesty law.¹²⁶ These reasons were confirmed by the Chairperson of the Committee on Legal and Parliamentary affairs, Hon. Stephen Tashobya.¹²⁷

Between 2004 and 2010, two draft Bills were tabled before Parliament. The first Bill was the “International Criminal Court Bill”, 10/2004,¹²⁸ tabled before Parliament for first reading on 24 June 2004. It lapsed with the seventh parliamentary period and was not passed.¹²⁹ In December 2006, the government tabled a new draft Bill entitled “International Criminal Court Bill, 18/2006” (hereafter “ICC Bill”).¹³⁰ Even then it took the Committee on Legal and Parliamentary Affairs (hereafter “the Committee”) three and a half years to come up with a draft report.¹³¹ The findings of the report on the ICC Bill were presented by the Committee on 10 March 2010.¹³² The Committee highlighted the legal issues within the Bill for consideration by Parliament.¹³³ On 10 March 2010, the ICC Bill went through a momentous second and third reading, and the Parliament enacted the International Criminal Court Act.¹³⁴ It has been said that Uganda’s bid to host the Rome Statute of the ICC Review Conference is what re-ignited and fast-tracked the process of the enactment of the ICC Act.¹³⁵ This is because the expeditious enactment of the ICC Act happened two months prior to Uganda’s hosting of the Review

Kampala: Panos Eastern Africa. Also see the Juba Agenda Items No. 1, 2,3,4,5 and 6 Agreements (2006-2008); available at <http://www.beyondjuba.org/BJP1/peace_agreements.php> (accessed 27 September 2012).

¹²⁶ Amnesty Act, Cap. 294.

¹²⁷ Telephone interview which the author conducted with Hon. Stephan Tashobya, Hon. Member of Parliament-Uganda on Wednesday 24 October 2012 at 09:25am. Also refer to Rules and Procedure of Parliament of Uganda, June 2006, Rule 113 on the role of the Committee with regard to Bills.

¹²⁸ Parliament of Uganda- Hansard (Thursday 24 June 2004) at p 3.

¹²⁹ See comment of the Deputy Attorney General, Parliament of Uganda- Hansard (Wednesday 10 March 2010) at p 18. Also, Chairman of the Committee on Legal and Parliamentary Affairs, Hon. Stephen Tashobya, stated that the 2004 ICC Bill was withdrawn by government because it contained fundamental defects (Refer to phone interview 24 October, 2012 at 9:25am in note 115 above).

¹³⁰ Parliament of Uganda- Hansard (Tuesday, 05 December 2006) at p 3.

¹³¹ Parliament of Uganda- Hansard (Wednesday 10 March 2010), comment of the Deputy Attorney General at p17.

¹³² Report of the Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill, 2006 (2010) at p 2-3. Also see Parliament of Uganda- Hansard (Wednesday, 10 March 2010) at p 6-7.

¹³³ Parliament of Uganda-Hansard (Wednesday, 10 March 2010) at p 6-7.

¹³⁴ Parliament of Uganda-Hansard (Wednesday, 10 March 2010) at p 55.

¹³⁵ Otim and Wierda (2010: 4).

Conference.¹³⁶ The ICC Act was then assented to by the President on 25 May 2010,¹³⁷ five days before the Review Conference took place. The Act took effect on 25 June, 2010.¹³⁸

4.3 Introducing the International Criminal Court Act

The preamble to the Act provides that,

“An Act to give effect to the Rome Statute of the International Criminal Court; to provide for offences under the laws of Uganda corresponding to offences within the jurisdiction of the court; and for connected matters.”¹³⁹

Section 2 highlights the purpose of the Act, which is, *inter alia*, to give the ICC Act force of law in Uganda and to implement obligations assumed by Uganda under the Rome Statute.¹⁴⁰ In a nutshell, Section 2 provides for the purpose of the Act as being to facilitate the principles of complementarity¹⁴¹ and co-operation.¹⁴² Whereas the former concerns itself with making it possible for Ugandan courts to punish the international core crimes of genocide, crimes against humanity and war crimes, and the offences against the administration of justice,¹⁴³ the latter concerns itself with different procedure with respect to different forms of cooperation between the ICC and Uganda.¹⁴⁴

Embedded schedules to the Act are the Rome Statute¹⁴⁵ and the Agreement on Privileges and Immunities of the ICC (APIC).¹⁴⁶ Cross references of the ICC Act with respective

¹³⁶ The Review Conference was held in Kampala, Uganda, from 31 May to 11 June, 2010. Confirm at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/> (accessed 25 October 2012).

¹³⁷ See ICC Act at p 6.

¹³⁸ See ICC Act at p 6.

¹³⁹ ICC Act, preamble.

¹⁴⁰ ICC Act, Sec 2 (a) and (b).

¹⁴¹ ICC Act, Sec 2 (c) and (g).

¹⁴² ICC Act, Sec 2 (d-f) and (h-i).

¹⁴³ See ICC Act (Part II–Secs 7-19).

¹⁴⁴ See ICC Act, Requests for assistance (Part III–Secs 20-25); Arrest and surrender of persons to the ICC (Part IV–Secs 26-42); Domestic procedures for other types of co-operation (Part V–Secs 43-63); Enforcement of penalties (Part VI–Secs 64-80); Protection of national security/third party information (Part VII–Secs 81-89); Investigations or sittings of the ICC in Uganda (Part VIII–Secs 90-96); Requests for assistance (to the ICC) (Part IX–Secs 97-99); Miscellaneous (Part–Secs 100-102).

¹⁴⁵ ICC Act, Schedule I.

domestic laws are provided for at the end of the sections to the Act.¹⁴⁷ The effect is that, unless otherwise stipulated, the ICC Act is to be read in harmony with the referenced laws.

4.4 Defining and prosecuting international crimes in Uganda

The ICC regime came with a formal identification of international core crimes by the international community namely: genocide; war crimes; crimes against humanity; and aggression.¹⁴⁸ Due to their universal nature, it follows that these crimes, when committed, affect the international community as a whole.¹⁴⁹ States are therefore encouraged to attach primacy to the investigation and prosecution of the perpetrators of these crimes.¹⁵⁰ In doing so, states must implement crimes as they are spelled out in the Rome Statute.¹⁵¹ Prosecuting underlying ordinary crimes is not enough.¹⁵²



4.4.1 International crimes defined

Section 2 (c) of the ICC Act, provides that the purpose of the Act is to make provision in Uganda's law for punishment of the international crimes of genocide, crimes against humanity and war crimes. These have been prescribed under sections 7, 8 and 9, respectively, of the Act. The Act does not give force to the crime of aggression.

¹⁴⁶ ICC Act, Schedule 2. There exists an Agreement on Privileges and Immunities (APIC) between the ICC and Uganda, signed on 7 April 2004 and ratified the agreement on 21 January, 2009. APIC Article 3 generally provides that ICC shall enjoy privileges and immunities within the territory of each State party to allow for the fulfillment of its purpose.

¹⁴⁷ See Appendix, The ICC Act.

¹⁴⁸ Rome Statute, Art. 5. Werle (2009: 29) defines an International Crime as a norm that is part of the body of international law that entails individual criminal responsibility and subject to punishment.

¹⁴⁹ Rome Statute, preamble, paras 4 and 9, Art 5(1). Tomuschat (2002: 332,333 and 340) notes that not all these crimes have attained the status of universal jurisdiction.

¹⁵⁰ Rome Statute, Preamble, para. 10, Art. 1 and 17.

¹⁵¹ Schabas (2010: 182-182).

¹⁵² Schabas (2010: 182).

4.4.1.1 Genocide

The crime of genocide was for the first time formulated in 1948 under Convention on the Prevention and Punishment of the Crime of Genocide (hereafter “Genocide Convention”).¹⁵³ The crime was subsequently reflected in Statutes of the International Criminal Tribunal(s) for Yugoslavia (ICTY) (Art 4), Rwanda (ICTR) (Art 2) and the Rome Statute (Art 6). The crime has since gained the status of customary international law and *jus cogens*.¹⁵⁴

Article 5 of the Genocide Convention requires that States Parties to the Convention criminalise genocide. Uganda accessed the Genocide Convention on 14 November 1995.¹⁵⁵ It was however, only after enactment of the ICC Act that the crime of genocide was included as part of Uganda’s domestic law.

Before enacting the ICC Act, the definition of genocide under the Rome Statute,¹⁵⁶ would have been incapable of allowing for the punishment of Genocide. The rationale behind the crime of genocide is to protect specific groups and not an individual.¹⁵⁷ Protection of national, ethnic, racial and religious groups forms part of the material element of the crime of genocide.¹⁵⁸ The

¹⁵³ See the United Nations General Assembly Resolution 260 A (III) of 9 December 1948.

The Charter of the International Military Tribunal at Nuremberg did not expressly define the crime of genocide. The nature of the crime was considered to have been consumed with in elements-extermination and persecutions on political, racial or religious grounds of crimes against humanity. See Werle (2009: 254-255).

¹⁵⁴ The report of the International Law Commission on the work of its 48th Session, 1996, GAOR, 51st Session Suppl. No. 10(51/10). Also see Dugard (2005: 160).

¹⁵⁵ Available at

<http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&msgid=IV-1&Chapter=4&lang=en#Participants> (accessed 30 July 2012).

¹⁵⁶ Rome Statute, Art. 6. Genocide is defined as, any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹⁵⁷ Byron, (2004: 151 *et seq*).

¹⁵⁸ Werle (2009:258, marginal n 707).

Penal Code Act definition of the offences of murder and assaults cannot be said have meaning within provisions of Article 6 (a) and (b): to “kill members of a group” or “cause serious bodily or mental harm to members of the group” respectively. This is insofar as the special intent to kill a group in whole or in part is concerned. Murder is defined to mean, “...any person who causes the death of another person...”.¹⁵⁹ The definition does not include a special group. Part XXIII of the Penal Code Act lists different kinds of assaults. Section 236 on assault causing actual bodily harm is what could be close to the definition of Article 6(b). The discussion as to whether “causing actual bodily harm” includes serious bodily and mental harm is an aspect to be left for further analysis. However, the definitions of these offences fall short of including groups, a material element in the definition of genocide. Also to note is that acts prescribed in parts c-d of Article 6 can hardly be ascertained under any criminal law provisions.

The prosecution for the crime of genocide is now possible under Section 7 of the ICC Act, which copies the Rome Statute provision on Genocide.

The ICC Act in defining the scope of the criminal acts of genocide, extends it to include the crime of conspiracy.¹⁶⁰ Section 7(2) establishes individual criminal responsibility for those who conspire or agree to commit genocide in Uganda or elsewhere. It is worth noting that the crime of conspiracy is not new; it is one of the inchoate offences punishable under chapter XLI of the Penal Code Act. The Penal Code Act criminalises conspiracy to commit a felony or misdemeanour and other forms of conspiracy.¹⁶¹ The penalty of conspiracy to commit a felony for which genocide would fall is punishable by imprisonment for seven years. But the provision

¹⁵⁹ Penal Code Act, Sec. 188.

¹⁶⁰ ICC Act, Sec. 7 (1) (a) and Sec. 7(2).

¹⁶¹ Secs. 390, 391 and 392.

allows for other punishment to be applied if provided for.¹⁶² In this case, Section 7(3) of the ICC Act provides for a punishment of life imprisonment or a lesser term.

4.4.1.2. Crimes against humanity

Crimes against humanity were first devised in Article 6 of the Charter of the International Military Tribunal at Nuremberg. The crimes continued to appear in other international agreements though with modification and departure from original format of Nuremberg.¹⁶³ Unlike the crime of genocide and war crimes, crimes against humanity had not been defined in any treaty prior to their inclusion in Rome Statute. Nevertheless they have gained customary international law status.¹⁶⁴

Like the crime of genocide, crimes against humanity were not part of the Ugandan criminal law till the domestication of the ICC Act. The question whether the law as it was before the enactment of the ICC Act, would allow for prosecution of crimes against humanity is answered in the negative. The strict definition of crimes against humanity, "...any of the acts committed as part of a wide spread and systematic attack against a civilian population with knowledge of the attack",¹⁶⁵ would not furnish the prosecution under such a context. This is irrespective of the fact that some of the predicate offences of the crimes against humanity are

¹⁶² Sec. 390.

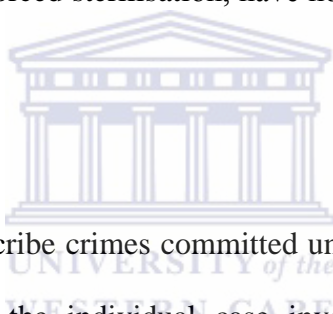
¹⁶³ ICTY, Art. 6; ICTR, Art. 5; Rome Statute, Art. 7.

¹⁶⁴ Dugard (2005: 160) quoted from Bassiouni M.C. (1999) "Crimes against humanity in international law" in McComack and Simpson G. J (eds) *The law of war crimes*. Also see the Statutes of the ICTY, Art. 6; ICTR, Art. 5; ICC, Art. 7 that reaffirm the customary law status of crimes against humanity.

¹⁶⁵ Rome Statute, Art. 7(1). Also see Rome Statute Art 30 for mental element, "intent and knowledge."

crimes under the domestic law,¹⁶⁶ while some others have been recognised as guaranteed human rights under the Constitution.¹⁶⁷

Section 8(2) of the ICC Act, therefore, introduces crimes against humanity as a novel crime in Uganda's domestic system. The section incorporates completely the definition of crimes against humanity as stipulated under Article 7 of the Rome Statute.¹⁶⁸ However, the new offences and terms, *inter alia*, include: Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; extermination; deportation or forcible transfer of population; apartheid, and some of the sexual crimes like enforced prostitution, forced pregnancy, enforced sterilisation, have not been visible in Uganda's criminal law.



4.4.1.3 War crimes

The term war crime is used to describe crimes committed under international law in connection with an armed conflict, even if the individual case involves crimes against humanity or genocide.¹⁶⁹ A war crime is a violation of a rule of international humanitarian law that creates criminal responsibility under international law.¹⁷⁰ Following their codification in the Charter of the International Military Tribunal at Nuremberg,¹⁷¹ they were later included in the four Geneva Conventions of 1949.

Prior to the enactment of the ICC Act, war crimes were punishable under the Ugandan criminal law. Uganda had in 1964 passed the Geneva Conventions Act (hereafter "GCA").

¹⁶⁶ Penal Code Act, murder (Section 188 and 189) and Rape (123 and 124).

¹⁶⁷ Constitution, Art. 23 on protection of personal liberty, Art 24 on prohibition from any form of torture or cruel, inhuman or degrading treatment or punishment" and Art 25 on protection from slavery, servitude and forced labour. Also see Art. 44 that provides that Art. 24 and 25 are absolute rights.

¹⁶⁸ See Rome Statute Art. 7 (1) (a)-(k).

¹⁶⁹ Werle (2009: 346, Marginal n 929).

¹⁷⁰ Werle (2009:346 Marginal n 929 *et seq*).

¹⁷¹ Art 6(b).

Section 2 of the GCA criminalises the grave breaches articles of the four Geneva Conventions.¹⁷² However, Section 9 of the ICC Act also criminalises war crimes by incorporating totally Article 8 of the Rome Statute, which, *inter alia*, contains provisions on grave breaches as stipulated under Section 2 of the GCA.¹⁷³ Therefore, it can be stated that the war crimes provision under the ICC Act, broadens the criminal jurisdiction of war crimes to include: an improved list on grave breaches;¹⁷⁴ serious violations of article 3 common to the four Geneva Conventions;¹⁷⁵ serious violation of laws and customs applicable in both international armed conflict and armed conflict not of an international character.¹⁷⁶ The ICC Act actually expresses this by the proviso that its provision on war crimes does not affect or limit the operation of Section 2 of the GCA as discussed above. This means that the two laws are to be applied in tandem.

4.4.1.4 Conclusion

In conclusion, in giving force to crimes under the Rome Statute, Uganda has adopted the crime of genocide, crimes against humanity and war crimes by completely copying the provision of the Rome Statute. Therefore, one can state that Uganda has made a great stride in implementing the Rome Statute in as far as that it is possible to punish international core crimes in Uganda as .

¹⁷² See Arts 50, 51, 130, 147 of Geneva Conventions I, II, III, and IV respectively (Grave breaches involves the following acts if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).

Note that In light of the complementarity regime, the GCA was for the first time invoked in 2010, in an attempt to prosecute one Thomas Kwoyelo, a former low level commander in the Lord's Resistance Army. The non-retroactivity principle prevented invoking the provisions of the ICC Act. Cf. *Uganda vs Thomas Kwoyelo alias Latoni* No. 02/10 (amended indictment).

¹⁷³ See Rome Statute, Art. 8 (i)-(iv).

¹⁷⁴ Rome Statute, Art 8 (2) (v)-(vii).

¹⁷⁵ Rome Statute, Art 8 (2) (c). Article 3, Common to the Geneva Conventions is specifically in respect to conflict not of an international character. Cf. Geneva Conventions 1949.

¹⁷⁶ Rome Statute, Art 8(2) (a) and (e).

4.4.2 Principles of jurisdiction

The exercise of legislative and adjudicative jurisdiction is an important part of state sovereignty.¹⁷⁷ The ICC therefore, provides for a mechanism where states are actually encouraged to use their sovereignty.¹⁷⁸ The Rome Statute reaffirms the international criminal law principle that it is the duty of States to exercise criminal jurisdiction over those responsible for international crimes.¹⁷⁹ Failure by States to do so warrants the ICC to invoke the complementarity principle in the context of admissibility.¹⁸⁰

Jurisdiction by Ugandan courts to punish international core crimes was only provided for under the Geneva Conventions Act, which provides for universal jurisdiction over commission of grave breaches of the Geneva Conventions.¹⁸¹ Section 2(g) of the ICC Act states that the purpose of the Act is to give Ugandan courts jurisdiction over persons who commit crimes under the ICC Act. Section 18 of the ICC Act grants extra territorial jurisdiction to courts over the offences listed under sections 7-16 of the Act.¹⁸²

Distinct from the Geneva Conventions Act that grants universal jurisdiction, the ICC Act provision on jurisdiction highlights circumstances under which Ugandan courts may exercise jurisdiction with regards to the punishment of the crime of genocide, crimes against humanity and war crimes. The section stipulates that, if an act has been committed outside Uganda, Ugandan courts shall have jurisdiction not only on the basis of active and passive nationality jurisdiction,¹⁸³ but also, if a person is employed by Uganda in a civilian or military capacity, and

¹⁷⁷ Cryer (2005: 986).

¹⁷⁸ Cryer (2005: 986) quoted from Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the International Criminal Court', in Nuremberg.

¹⁷⁹ Preamble, Para 6.

¹⁸⁰ Preamble, Para 10, Art 1 and Art 17. Also see Schabas (2010: 171-193).

¹⁸¹ Geneva Convention Act, Sec 2.

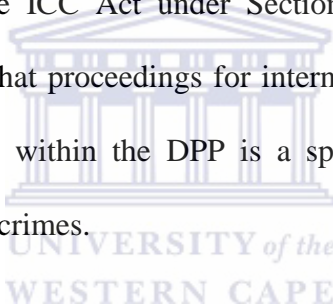
¹⁸² International crimes (Secs. 7, 8 and 9), and offences against the administration of justice (Sec 10-16).

¹⁸³ See generally Shaw (2011) Chapter 12 on Criminal Jurisdiction.

if the person after the commission of the offence is present in Uganda. This means that the perpetrator does not have to be a Ugandan, what matters is that he /she is found within the confines of Uganda. In essence, in view of the LRA war, the ICC Act would allow for Uganda to initiate proceedings against LRA rebels for committing atrocities not only in Uganda, but, in the Democratic Republic of Congo, Central African Republic and Southern Sudan by virtue of the fact that the LRA are citizens of Uganda.

4.4.3 Procedure for domestic prosecution

Commencement of criminal proceedings in Uganda is generally the reserve of the Director of Public Prosecutions (DPP).¹⁸⁴ The ICC Act under Section 17 confers to the Constitutional provision and specifically directs that proceedings for international crimes be initiated with the consent of the DPP.¹⁸⁵ Currently, within the DPP is a special unit that has been set up to specifically deal with international crimes.



4.5 General principles of criminal responsibility

In Uganda, the general principles of criminal responsibility are not harmonised in one law as laid down in the Rome Statute. The Ugandan ICC Act under Section 19 makes the first attempt to harmonise the general principles of Ugandan criminal law. However, Section 19 does not replica Part III of the Rome Statute. It incorporates some of the principles to be applied with modification. However, note that these principles as stipulated under the ICC Act have a limited application to the crime of genocide; crimes against humanity; and war crimes.

¹⁸⁴ Constitution, Art. 120(3) (c). However, also see Art. 120 (3) (b)(C) which by inference also allows for individuals or any other authority to institute criminal proceeding. Cf. Magistrates Court Act Cap 16 Laws of Uganda 2000, Part V on “institution of criminal proceedings”, by persons other than the DPP.

¹⁸⁵ ICC Act, Secs. 7-16. Note that the draft ICC Bill, 2006 had given the mandate to the Attorney General, which was reconsidered by parliament to confer with Art. 120 of the Constitution that gives the mandate to the DPP; at Parliament of Uganda– Hansard (Wednesday, 10 March 2010: 3.02).

4.5.1 Principle of legality

The idea that criminal law should deal fairly and justly with the individual is expressed in the principle of legality as stated in a number of maxims namely: *nullum crimen sine lege; nulla poena sine lege; nulla poena sine praevia lege poenali*.¹⁸⁶ Generally, the maxims express that for one's conduct to be punished, both the conduct and the punishment must be prescribed by law. Further, that such prescribed offence or punishment should not be retrospectively enacted. These maxims have constitutionally been part of Uganda's legal system.¹⁸⁷ This leaves one to assume that this is reason why the ICC Act in tackling the principle of legality only highlights two clauses within the provisions from the Rome Statute.¹⁸⁸ Article 22(2), which relates to principles of interpretation applied to definition of crimes, to be in favour of the person being investigated, prosecuted and convicted, and Article 24(2) which stipulates that in case of change of law before judgment, favourable law shall be to a person being investigated, prosecuted and convicted.

However, the provision on non-retroactivity of the law has poses a challenge and disappointment to victims and pro international criminal justice advocates who had hope that the ICC Act would allow for the prosecution of perpetrators of the LRA conflict from 1986 to date.¹⁸⁹ However, Namuwase in her thesis argues that non-retroactivity principle for the case of Uganda cannot be pleaded with respect to international crimes,¹⁹⁰ a matter to be addressed in the next chapter.

¹⁸⁶ Burchell (1970: 53).

¹⁸⁷ See Art 28(7) and (12).

¹⁸⁸ Sec. 19 (1) (a) (ii) and (iii).

¹⁸⁹ See Chapter 1, Sec.1.1.

¹⁹⁰ See Namuwase (2011: 33).

Therefore, one can literally state that complementarity in practice for the LRA conflict within and out of Uganda for the post ICC era, period between 1st July 2002 and 2010, when the Act was enacted is not to be possible. The Act is therefore only suitable for future application.

4.5.2 *Ne bis in idem* rule

The *Ne bis in idem* rule or principle against double jeopardy is based on the pleas of previous conviction *autrefois convict* and previous acquittal *autrefois acquit*. The ICC Act incorporates this principle among the provision on general principles of criminal law as opposed to its location under the Rome Statute.¹⁹¹ The principle of double jeopardy has been part of Uganda's domestic legal provisions. Article 28(9) of the Ugandan Constitution prohibits the trial of an individual for the same offence more than once, whether acquitted or convicted or for any other criminal offence of which, he or she could have been convicted at the trial for that offence. The provision however, creates an exception to waiver of the defence in cases where a superior court in the course of appeal or review proceedings relating to the conviction or acquittal has ordered a trial. The question, therefore, is whether national courts in Uganda would apply this to international decisions considering that the courts have jurisdiction to try the ICC crimes.¹⁹²

Perhaps, in case such an issue arose, one may invoke the Rome Statute provision, which in essence attempts to be true to the complementarity principle in as far as the relationship between the ICC and national courts are concerned in prosecuting international crimes. In this provision, the principle of double jeopardy is to be invoked by the ICC in two instances: in cases where the ICC crimes have been prosecuted by another court; the reverse has been said to also be

¹⁹¹ ICC Act, art 20.

¹⁹² ICC Act, Sec. 7, 8 and 9.

true for other courts in respect to the ICC decisions on the same.¹⁹³ However, in as much as the ICC Act incorporates in totality the Rome Statute provision on double jeopardy, it is my view that this could raise a future constitutional challenge on the matter especially considering that international law decisions are rather persuasive and not binding on national courts as discussed in chapter two of this thesis. A further argument would be that the Rome Statute seems to set the ICC at the pick of the hierarchy of courts in Uganda when it gives exceptions, under which the ICC can waive the principle of double jeopardy following decisions made by other courts, which could include Uganda national courts. Article 20 (3) of the ICC Act allows for the ICC to review decisions in instances where trials were carried on in such a way that the person was being shielded from criminal responsibility and that the conduct of the trial was not compatible with international criminal law standards.¹⁹⁴ Food for thought would then be whether this provision of the ICC Act is inconsistent with chapter thirteen of the Constitution in as far as the hierarchy of courts in Uganda and their roles are concerned vis-à-vis the ICC. This therefore calls for a further analytical research on the application of the double jeopardy in light of the evolution of international criminal tribunals particularly in the ICC complementarity regime.

¹⁹³ Art. 20(2) and (3).

¹⁹⁴ Art. 20(3).

4.5.3 Criminal responsibility

4.5.3.1 Individual criminal responsibility

Individual criminal responsibility refers to an individual being responsible for his/her unlawful actions.¹⁹⁵ The principle of individual criminal responsibility under international law was first clarified at the Nuremberg trials of the German major war criminals. It was stated that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can international law be enforced.”¹⁹⁶ Article 25(1) of the Rome Statute, reaffirms the Nuremberg statement when it establishes individual responsibility for international core crimes. The article, under part (3) regulates the modalities of individual criminal responsibility and distinguishes several modes of criminal participation.¹⁹⁷ The ICC Act, completely incorporates Article 25 of the Rome Statute, therefore, creating individual criminal responsibility for the international crimes incorporated under the Act.¹⁹⁸ Notably, individual criminal responsibility had already been created for grave breaches of the Geneva Conventions in Uganda as discussed in section 4.4.1.3 above.¹⁹⁹ The modes of participation stipulated under the Geneva Conventions Act include: the act of commission, or aiding, abetting or procuring the commission of an offence by another person. Therefore, the incorporation of the modes of participation into the ICC Act from the Rome Statute expands the scope to embrace the entire body of international core crimes.

Further, Section 19(b) allows for the application of further principles under Ugandan criminal law. This means that individual criminal responsibility can be attributed to an individual

¹⁹⁵ Damgaard (2010: 12).

¹⁹⁶ International Military Tribunal at Nuremberg, *Goring et al* Judgment of 1 October 1946.

¹⁹⁷ Werle (2009:168).

¹⁹⁸ Art 19(1) (a) (iv).

¹⁹⁹ Geneva Conventions Act, Sec 2(1).

on grounds of conspiracy.²⁰⁰ This component is not included under the modes of participation under the Rome Statute, but, is among the inchoate offences under the Uganda Penal Code Act.²⁰¹

4.5.3.2 Exclusion of jurisdiction over persons under 18years

The ICC Act, Section 19(1) (5), incorporates Article 26 Rome Statute that prevents the courts from having jurisdiction over a person who committed one of the international core crimes while he/she was under the age of 18 years.²⁰² This is contrary to various domestic provisions on the criminal responsibility of children. Section 88 of the Children Act²⁰³ puts the minimum age of criminal responsibility at 12 years. Section 89, further, provides for the procedure for the arrest and charge of a child and states among others that no child shall be detained with an adult person. This corresponds with the Constitutional provision under Article 34(6). The Trial on Indictment Act provides for a special procedure to be taken in lieu of a sentence of death on person under 18 years.²⁰⁴ The unevenness in application of the law, created by the ICC Act is being challenged in the petition filed before the Constitutional Court in the case of *Jowaad Kazaala vs the Attorney General*.²⁰⁵ The petitioner alleges that the ICC Act provision is discriminatory. Though the matter is *sub judice*, it is my opinion that regard should be given to

²⁰⁰ See discussion on Genocide, Sec 4.4.1.1 above.

²⁰¹ See Sec.4.4.1.1 above.

²⁰² During the debate of the ICC Bill, a concern was raised that this provision vis-à-vis Article 8 (2)(b) of the Rome Statute that makes it an offence for a person to enlist children under the age of 15 to take part in hostilities, creates an opportunity for children between 16 and 17 years to be enlisted to take part in hostilities without the enlists committing crimes and the children not being criminally responsible for their actions; See Parliament of Uganda-Hansad (10 March 2010: 6-7).

²⁰³ Cap 56, Laws of Uganda (2000).

²⁰⁴ Sec 10, Cap 23, Laws of Uganda (2000).

²⁰⁵ Quoted from, Mbazira (2010:218).

the nature in which children get involved in international crimes.²⁰⁶ The LRA conflict was of such nature in which children were abducted and forced to commit grave atrocities.²⁰⁷

4.5.3.3 Responsibility of commanders and other superiors

Responsibility of commanders and other superiors under Article 28 of the Rome Statute is linked to the fact that the ICC only tries those who hold the greatest responsibility.²⁰⁸ For Uganda, the criminal responsibility attributed to commanders and superiors is under section 19(1) (a) (vi) of the ICC Act. Prior to the ICC Act, remedy for acts committed by commanders or superiors in the normal course of duty lay in civil law for damages against the Attorney General. This did not include acts by non-state actors.

This provision is, therefore, vital to attributing responsibility in the Greater Northern Uganda conflict. The Pre-Trial Chamber II in issuing an arrest warrants for Joseph Kony and his cohorts, cites the status of the relevant individuals as commanders with respect to participation in the conflict under Article 25 (3) (b) of the Rome Statute.²⁰⁹

4.5.4 Dealing with bars to prosecution

On this subject, the findings are limited to three components that would prevent the prosecution of international core crimes. They include: immunity for officials, amnesty/pardon and statute of limitation.

²⁰⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC Pre-Trial Chamber I judgment of 14 March 2012, paras 607-618.

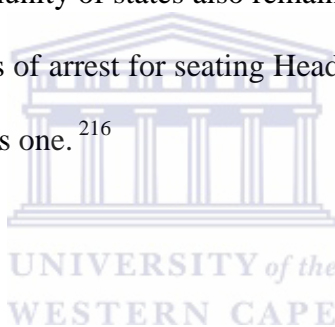
²⁰⁷ See ICC Pre-Trial Chamber II Warrant of arrest for Joseph Kony, ICC-02/04-01/05-53 13-10-2005, Count 5 and Count 13.

²⁰⁸ Cf. Rome Statute, Art. 25 on establishing individual criminal responsibility modes of participation.

²⁰⁹ Warrants of Arrest for Joseph Kony, Vicent Otti, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05

4.5.4.1 Irrelevance of official capacity

Irrelevance of official capacity is under the Rome Statute is synonymous with the term immunity.²¹⁰ Immunity has its ancient roots in international law.²¹¹ Developing from customary international law, into conventional and treaty international law,²¹² immunity allows for an accused to evade prosecution for criminal offences.²¹³ The defence of immunity under international law is raised either on grounds of *ratione materie* or *ratione personae*.²¹⁴ However, with the evolution of international criminal justice on the subject of disregard for immunity for international core crimes, jurisprudence by courts indicates that there remains discourse on this subject.²¹⁵ The international community of states also remains divided on the question. This has been evident with the ICC warrants of arrest for seating Head of State of Sudan Omar Hassan Al Bashir continues to be a contentious one.²¹⁶



²¹⁰ See Rome Statute, Art. 27.

²¹¹ Gevers (2011) *Immunity and the Implementation Legislation in South Africa, Kenya and Uganda*; quoted from Cryer (2007: 422) *An introduction to international criminal law and procedure*.

²¹² Murungu (2010: 36).

²¹³ Cf. decisions in *Regina v. Evans and another and the Commissioner of Police for the Metropolis and others (appellants) ex parte Pinochet (respondent)* (on appeal from a divisional court of the queen's bench division) on 24 March 1999 (herein after *ex parte Pinochet*); *DRC v. Belgium*, ICJ Judgement of 14 February 2002; available at <<http://www.icj-cij.org/docket/files/121/8126.pdf>> (accessed 29 September 2012).

²¹⁴ Murungu (2010: 42).

²¹⁵ In *ex parte Pinochet*, the House of Lords held in Appeal decision 3 that immunity for incumbent head of state is absolute. In the post-Pinochet case, the *Democratic Republic of Congo v. Belgium*, the International Court of Justice held that Incumbent state officials are immune from criminal trials abroad regardless of the severity of the charges. However, in the joint separate opinions of Judge Rosalyn Higgins, Judge Koijmans and Buergenthal argued that though they agreed with the majority ruling, '[the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant for the arrest did not as such violate international law] available at <<http://www.pacii.org/journals/fJSPL/vol07no1/4.shtml>> (accessed 30 September 2012).

Conversely, the Special Court for Sierra Leone held in the case of *Prosecutor v. Charles Gghankay Taylor* SCSL-2003-01-I, that the official position of the Applicant as an incumbent Head of State at the time when criminal proceedings were initiated against him was not a bar to his prosecution by the court. The Applicant was therefore subject to criminal proceedings before the Court. The applicant had been charged with committing crimes against humanity and war crimes.

²¹⁶ *The Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09-1 04-03-2009 and ICC-02/05-01/09-95 12-07-2010. See Aceng (2011) "African States Parties to the ICC at crossroads" in *The Forum The ICC and Africa* Issue 2 at p 24-26.

In Uganda, the question of immunity is said to be one of the reasons that stalled the passing of the ICC Act;²¹⁷ the intricacies are discussed below.

Article 27 of the Rome Statute disregards immunity for prosecution of international crimes with emphasis on the irrelevance of official capacity of Head of State or Government, a member of a Government or parliament, an elected representative or a government official. The article further states that immunity shall not be considered for the reduction of sentence.

The Uganda ICC Act is silent on this particular provision. One would then posit that since in defining the crimes, the ICC act refers to, “[a] person”, by implication, this would include all persons covered under Article 27 of the Rome Statute. However, such an argument would not hold for the Head of State, in light of Article 98(4) of the Uganda Constitution that exempts the Ugandan Head of State from liability in criminal proceedings in any court. The ICC Act in this context would be null and void according to Article 2(2) of the Constitution.²¹⁸ In the case of *Prof. Gilbert Baliseka Bukonya vs The Attorney General*,²¹⁹ the Constitutional Court confirmed the Constitutional provision on immunity of the Head of State. The Court stated that that Article 98(4) is the exclusive preserve of the Head of State, Head of Government and Commander-in- Chief of the People’s Defence Forces and Fountain of Honour.

However, the research reveals that it was not the intention of the Parliament to exclude the provision on irrelevance of official capacity from the ICC Act. The debate in Parliament reveals that parliament agreed to retain Clause 25 of the ICC Bill, which provided for irrelevance

²¹⁷ See Parliament of Uganda– Hansard (Wednesday, 10 March 2010) para. 3.22, 4.11, 4.18, and 2nd reading debate clause 25. Also see “Ugandan parliament may pass bill that will challenge President's immunity”; available at <http://humanrightshouse.org/noop/page.php?p=Articles/1040.html&print=1> (accessed 29 September, 2012).

²¹⁸ It states that any law that is inconsistent with the Constitution is null and void to the extent of its inconsistency.

²¹⁹ Constitutional Petition No. 30 of 2011.

of official capacity.²²⁰ This raises food for thought as to why the provision was excluded in the published ICC Act.

It worth noting that the absence of Article 27 in the ICC Act would only favour the Ugandan Head of State as explicitly provided by the Constitution, and not any other individuals.²²¹ As to whether, foreign nationals can raise this defence while before Ugandan courts, is left to be addressed by the broad base of the immunity question under international law.²²²

Further, to note is that, Section 25 of the ICC Act, rejects official capacity of a person as a bar to request for surrender or assistance made by the ICC.²²³ The interpretation with the prior submission would be that, the Ugandan Head of State cannot be tried before Ugandan Courts as stated in Article 98(4) of the Constitution, but, under this provision, he/she could be transferred to the ICC, which will be hardly practicable. However, on a positive note, pleading *ratione personae* or *ratione materie* will not suffice for other individuals including Heads of States from other jurisdictions. One could therefore state that the Ugandan law would allow for the arrest and surrender of Omar Hassan Ahmed Al Bashir, against whom the ICC has issued warrants of arrest, if he was found present in Uganda.²²⁴

²²⁰ Cf. Parliament of Uganda– Hansard (Wednesday, 10 March 2010) debate on clause 25 of the ICC Bill on irrelevance of official capacity at p. 26-27.

²²¹ See the case of *Uganda vs Akbar Hussein Godi*, Criminal case No. 124 of 2008 where a former Member of Parliament who while serving as a Member of Parliament, was charged with murder and sentenced to 25 years in prison. Also see the case of *Prof. Gilbert Baliseka Bukenya vs The Attorney General* No.30/11.

²²² Refer to Sec. 4.4.2 of this chapter on jurisdiction.

²²³ (1) The existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for-

(a) refusing or postponing the execution of a request for surrender or other assistance by the ICC;

(b) holding that a person is ineligible for arrest or surrender to the ICC under this Act; or

(c) holding that a person is not obliged to provide the assistance sought in request by the ICC.

²²⁴ See *The Prosecutor v. Hassan Ahmed Al Bashir*, First arrest warrant issued 4 March 2009, and second arrest warrant issued 12 July 2010; available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109> (accessed 14 October, 2012).

4.5.4.2 The question of pardon/amnesty

Article 29 (10) of the Uganda Constitution prohibits the trial for a criminal offence for which one has been pardoned. Therefore, grant of pardon exonerates one from prosecution and punishment in respect to the said offence for which one was pardoned. Pardon within the confines of the Ugandan law includes prerogative of mercy granted by the President under Article 121(4) (a) of the Constitution, and then the grant of amnesty. However, the subject for discussion will only delve into the question of amnesty as a bar to prosecution since prerogative of mercy is only available to one who has already been convicted.²²⁵

Amnesty is considered a form of immunity because it bars any future prosecutions against the person for whom amnesty has been given.²²⁶ It is wider than pardon, which merely relieves the offender from punishment.²²⁷ The justices of the Constitutional Court in the case of *Uganda vs Thomas Kwoyelo*²²⁸ concurred with the applicant's argument that amnesty under the Amnesty Act was a form of pardon recognised by the Constitution. However, precedents from regional courts and criminal tribunals detach amnesties from international core crimes.²²⁹

²²⁵ Cf. < <http://oxforddictionaries.com> > (accessed 29 August 2012); prerogative of mercy refers to the right and power of a sovereign, state president, or other supreme authority to commute a death sentence, to change the mode of execution, or to pardon an offender thereby relieving the defendant of all the consequences of conviction. In *Kooky Sharma and Anor vs Uganda*, Supreme Court Criminal Appeal No.44/2000. The appellant was convicted for murder and sentenced to death by the Supreme Court, however, in March 2012, he was granted presidential pardon available at < http://www.newvision.co.ug/article/fullstory.aspx?story_id=629895&catid=1&mid=53 > (accessed 29 August 2012).

²²⁶ Amnesty Act, Sec 1(a). defines amnesty to mean “a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by a State.

²²⁷ *Oxford Dictionary of Law* (2003: 25). Also see *Prosecutor v. Moris Kallon and another*, Case No. SCSL-2004-15/16-AR72 (E); Judgment of 13 March, 2004, para. 66 for further definitions on amnesty.

²²⁸ Constitutional Petition No. 36/2011 (Reference) (unreported) lines 480-495.

²²⁹ *Almonacid-Arellano et al. vs Chile* Inter-American Court of Human Rights, Judgment of 26 September, 2006, Paras 107-110; *Prosecutor vs Moris Kallon and another*, Case No. SCSL-2004-15/16-AR72 (E), Judgment of 13 March, 2004, paras 67, 71 and 74.

From the year 2000 to May 2012, the Amnesty Act made it possible for reporters who renounced rebel activity to be granted amnesty.²³⁰ Amnesty could be applied for at any stage,²³¹ irrespective of the offence committed.²³² Such a provision made it possible for other senior perpetrators of the LRA conflict to apply for and be granted amnesty,²³³ even after, it was established by the ICC that the crimes perpetrated during the LRA conflict consisted of the international core crimes of war crimes and crimes against humanity.²³⁴ The amnesty law, therefore, was until May 2012, a challenge for possible prosecution of even the top LRA leadership wanted by the ICC. Although section 2A of the Act, allowed the Minister²³⁵ by Statutory instrument, with the approval of Parliament to declare persons not eligible for grant of amnesty, the Minister throughout the span of the Act, never made any such exemptions.²³⁶ This used to probe questions whether the top LRA commanders wanted by the ICC would have been granted amnesty had they applied.²³⁷ One can state that the decision would have been a rather contentious one subject to legal battles. It would be so, first, considering that the enactment of the amnesty law was a desperate move by the Government to end mainly the Greater Northern

²³⁰ Amnesty Act, Sec 2 and 3. Also see Sec. 1, "Reporter" is defined as any person seeking to be granted amnesty.

²³¹ See *Uganda vs Thomas Kwoyelo Alias Latoni* No. 36/2011 where it was indicated that the accused applied for amnesty after being captured and while in custody awaiting trial.

²³² Amnesty Act, Sec 2(2), prohibited prosecution and punishment upon any person to whom amnesty has been granted for participation in the war or rebellion or for any crime committed in the cause of the war or armed rebellion.

²³³ See *Uganda vs Thomas Kwoyelo*, No. 36/2011, affidavit in support of reference, para 6, 11 and 12 on Senior LRA commanders captured by the UPDF who were granted amnesty-Brig Kenneth Banyana (2004) and Brig. Sam Kolo (2005).

²³⁴ Available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/situation%20index?lan=en-GB> (accessed 30 September 2012).

²³⁵ Amnesty Act, Sec 1, "Minister" means, Minister responsible for Internal Affairs.

²³⁶ The provision to allow the Minister to exempt from amnesty was included in the Amnesty Act by the Amnesty (Amendment) Act, 2006, an Act to amend the Amnesty Act, Cap 294. This was a move carefully and conveniently done subsequent to the unsealed arrest warrants for the top LRA commanders issued by the ICC in October 2005. Uganda was also at this time having peace talks with the LRA; the famous Juba Peace Agreements that collapsed in November 2008.

²³⁷ See list of ICC indicted LRA commanders; available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/situation%20index?lan=en-GB> (accessed 19 September 2012).

Ugandan war. The intention of the Amnesty Act was to discourage rebel activity, particularly those involved in the LRA war to freely surrender without fear of being prosecuted.²³⁸ Secondly, in light of the Amnesty Act, the rebels were free to apply for amnesty and be granted. Thirdly, the Constitutional Court ruling in the case of *Uganda vs Thomas Kwoyelo alias latoni* provides the tip of the iceberg of how the courts would have approached the issue. The Justices of the Court, subject to the Amnesty Act and Constitution, ordered that the trial Court stop the trial of the applicant, who was charged with committing grave breaches under the Geneva Conventions Act and Penal Code Act offences. The Court further ordered that the Directorate of Public Prosecution and the Amnesty Commission grant the applicant amnesty. The Court disregarded any precedents presented by the respondent with respect to the international law position on amnesty for international core crimes.²³⁹ Perhaps this position will be settled by the Supreme Court in a pending appeal filed in the case of *Uganda vs Thomas Kwoyelo alias Latoni* on the question of the Amnesty Act as it then was vis-à-vis the prosecution for international core crimes in Uganda.

Positive to note is that the Amnesty Act expired on 25 May 2012.²⁴⁰ Despite the discretion the Minister had to extend the Act, he extended the span of the Act to the exclusion of provisions of part II of the Amnesty Act, which refers to the application for and grant of Amnesty.²⁴¹ This has been a milestone for advocates against amnesty and pro prosecution of ICC crimes. It means therefore that for now, there is clear path for prosecuting perpetrators of international crimes in particular the LRA.

²³⁸ Cf. Constitutional Petition No. 36/2011 lines 510-535.

²³⁹ See discussion in Chapter 3, Sec. 3.4.6 above.

²⁴⁰ See the Amnesty Act (Extension of Expiry Period) Instrument, No. 2010 that extended the span of the Amnesty Act for 24 months beginning 25th May, 2010.

²⁴¹ Available at <http://www.newvision.co.ug/news/631450-no-more-amnesty-r-lra-rebels-as-law-expires.html> (accessed 30 September 2012).

4.5.4.3 Statute of limitations

Article 19(1) (a) (vii) of the ICC Act, restates Article 29 of the Rome Statute on statute of limitations. It is to the effect that the crime of genocide, crimes against humanity and war crimes shall not be subject to statute of limitations. This confers with Uganda's penal laws, which as a general rule, do not allow for statute of limitations. Even then, offences that Section 28 of the Penal Code Act allows for the application of the statute of limitations period do not include offences within the scope of the crimes under the ICC Act.

4.5.4.4 Defences

Defences are used to denote all grounds for which, for one reason or another hinder the sanctioning of a criminal charge.²⁴² The Rome Statute makes provision for procedural defences to be raised or considered by the Court to exempt one charged with crimes under the Rome Statute from criminal responsibility. Article 31 "[g]rounds for excluding criminal responsibility" provides a list of grounds namely: insanity; involuntary intoxication; self defence or defence of others or, in case of war crimes, defence of property; duress and necessity. Other grounds are listed in the subsequent Articles. Articles 32 and 33 are in regard to mistake of fact and law, and superior orders and prescription of law respectively. Some these listed do not differ from the already existent list of general defences stipulated under the Uganda Penal Code Act: Mistake of fact (Section 9); Insanity (Section 11); Intoxication (Section 12); and the defence of person and property (Section 15). The ICC Act under Section 19(1) (a) (ix), (x) and (xi) nevertheless adopts the defences as provided for in Articles 31-33 of the Rome Statute, thereby including what the Penal Code does not provide for.

²⁴² Schabas (2010:226).

The defence of superior orders is not appreciated by courts in Uganda.²⁴³ Other defences under the ICC Statute contained in other provisions include: abandonment and prevention (Article 25 (3) (f)) and exclusion of jurisdiction of persons under 18 (Article 26). These have been incorporated under Section 19 (1) (iv) and (v) of the ICC Act.

However, the Rome Statute further permits for the Court to consider applying other defences that have not been codified by the Statute guided by the provisions of Article 21.²⁴⁴

Article 21 states that:

“[The Court shall apply:
 (b)...where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 (c)... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.]”

With this provision, in particular Article part (c), other general principles excluding criminal responsibility stipulated by the Uganda Penal Code Act and those established by precedent could be considered by the court during proceedings.²⁴⁵ Section 19(1) (b) of the ICC Act, further, allows for a person when charged with genocide, crimes against humanity and war crimes, to rely on any justifiable excuse or defence available under the laws of Uganda or under international law.

However, Section 19(3) provides that, in case of a conflict between the Rome Statute defence provisions and those stipulated under section 19(b), the former shall prevail.

²⁴³ *Uganda vs A1.Hh/g no. 2324 Sgt Lukecha Justine, A2. H/g Pte Opira Tula and A3. H/g no. 3222 Pte Ookwera Simon* Case No: HCT-02-CR-SC-0039 OF 2003(Unreported).

²⁴⁴ Article 31(3).

²⁴⁵ Penal Code Act: Claim of right (Sec. 7); Intention and motive (Sec. 8); Compulsion (Sec. 14); Defence of rash, reckless and negligent acts (Sec.15); Use of force in effecting arrest (Sec. 16); Compulsion by husband (Sec. 17). For the defence of Alibi, the burden rests on the prosecution to disprove the defence put up by the accused as decide in *Uganda vs George Kasya [1988-1990] HCB 48*. Cf. *Vincent Rwamwaro vs Uganda, High Court. Criminal Appeal No. 13 of 1988*.

It can be stated that the provision on the accused's right to raise a defence under Article 67(e) of the Rome Statute has greatly been complied with.

4.6 Penalty and sentencing

Defining punishment for a crime that has been established is a rule under the principle of legality *maxim nulla poena sine lege*.²⁴⁶ Both the Rome Statute and Ugandan Constitution confer to this principle.

Article 77 of the Rome Statute provides for the penalty of person found guilty of committing the international core crimes within the jurisdiction of the Court. A person may receive a sentence of imprisonment for specified number of years, which may not exceed a maximum of 30 years [Article 77(1) (a)]; or imprisonment for life in exceptional circumstances [Article 77(2) (b)]. Other possible penalties are a fine, and forfeiture of proceeds, property and assets derived directly or indirectly from that crime [Article 77(2) (a) and (b)]. The ICC Act prescribes the penalty for the similar crimes as imprisonment for life or a lesser term.²⁴⁷ This provision of the ICC Act in stipulating lesser penalty for offences that would otherwise at the discretion of the Court, carry the death penalty under the Ugandan law becomes debatable.²⁴⁸

The question would have been, whether Article 80 of the Rome Statute accommodates the national provision. This is because the article allows for states to impose penalties as prescribed by national laws even where the law of the State does not provide for penalties as prescribed by the Statute. At the drafting of the Statute, it was not the intention of the drafters to

²⁴⁶ Burchell (1983:53).

²⁴⁷ Articles 7(3), 8(3) and 9(3).

²⁴⁸ Uganda's penal law allows for punishment up to the death penalty for the offences of murder (Sec 188 and 189, Penal code Act), rape (sec 124, Penal code Act). Also see the Magistrates Courts (Amendment), Act, 2007 for the death penalty for aggravated defilement. These offences are, *inter alia*, common to some of the predicate crimes contained within the Rome Statute. Cf. the Rome Statute, Article 6(a), Article 7(a) and (g), Article 8(2) (a)(i) and 2(c)(i).

include the death penalty since the death penalty violates the right to life and is a form of torture or to cruel, inhuman or degrading treatment or punishment therefore, going against the human rights standards upon which the Rome Statute was being founded.²⁴⁹ Similarly, parliament of Uganda was aware of the Constitutional provision on the death penalty,²⁵⁰ but, opted not to include it in the ICC Act because it was not in line with Art 77(1) (b) of the Rome Statute.²⁵¹

However, one must note that such variances in punishment for similar offences under the ICC Act vis-à-vis the other penal provisions on the same offences will definitely create discrepancy. The basis being that Article 21 of the Constitution calls of equality before and under the law. Further, Article 22 of the Constitution allows for one's life to be taken away in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. In the case of *Attorney General vs Susan Kigula and 417 others*²⁵², the Supreme Court confirmed that the death penalty is not unconstitutional, save for the fact that it is imposed at the Court's discretion. Therefore, the fact that one is liable to suffer death under one law while under another to suffer life imprisonment or lesser term for similar offences creates a possible constitutional question.

²⁴⁹ Arts 3 and 6, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

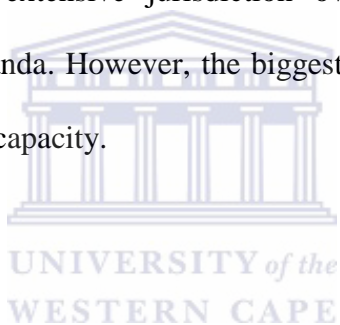
²⁵⁰ Constitution, Art 22(1).

²⁵¹ See Parliament of Uganda-Hansad (Wednesday, 10 March 2010) at p. 23 and 24. Clause 8 sub-clause 3(a) on crimes against humanity and Clause 9 sub-clause 3(a) on war crimes of the ICC Bill contained provisions on the death penalty, which parliament agreed to amend to confer with Article 77(1)(b) of the Rome Statute.

²⁵² Supreme Court-Constitutional Appeal No. 03 OF 2006 (Unreported).

4.7 Conclusion

The analysis of the chapter reveals that Uganda has to a great extent implemented the substantive provisions of Rome Statute to allow effective prosecution and punishment of the international core crimes. This is not only with regards to directly importing into ICC Act the crimes as they are stipulated in the Rome Statute, but also adopts other provisions of the Rome Statute to some extent in tandem with other domestic laws. This is to allow for the effective prosecution and punishment of the international core crimes in compliance with the Rome Statute. The Act contains special provisions on prosecution and exercise of jurisdiction for these crimes. The latter gives the national courts extensive jurisdiction over the international core crimes committed within and outside Uganda. However, the biggest setback in the ICC Act is the non inclusion of irrelevance of official capacity.



CHAPTER 5

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary of research findings

Chapter one sets the pace by establishing the relationship between the ICC and Uganda. This is important because it justifies Uganda's obligation to implement the Rome Statute provisions. For Uganda the most pressing being the need to enable accountability for the atrocities committed during the Greater Northern Ugandan Conflict both at the ICC and in Uganda.

Chapter two addresses the concept of implementation of international treaties. It is established that the nature of international criminal law, whether or not it subscribes to dualism or monism, a State in implementing the substantive provisions of international criminal law may opt either implement by incorporation or by non-incorporation and instead choose to apply ordinary criminal law.²⁵³ However, if a State chooses to implement by incorporation, then the State may choose to either amend the existing criminal legislation or enact a new law.

The chapter three reveals that international law becomes part of Ugandan law through enacting implementing legislation and by courts setting precedence. However, in light of the case of *Thomas Kwoyelo*, courts do not seem to appreciate the principles of international criminal law even when they are conflict with domestic law. Therefore, enactment remains somewhat the most available option of implementation of international law. However, whatever law that is enacted must not be inconsistent with the Ugandan Constitution, because that law will be considered null and void to the extent of its inconsistency.²⁵⁴

²⁵³ See Chapter 2, Sec. 4.2.2 above.

²⁵⁴ See Chapter 3, Sec. 3.2.1 above.

Chapter four in examining the progress and challenges of implementing the Rome Statute in Uganda establishes that Uganda has made great progress domesticating a Rome Statute implementing legislation, the ICC Act. In mainly dealing with the substantive provisions of the Rome Statute, this paper, in this chapter, reveals that Uganda has comprehensively implemented the Rome Statute provisions to allow for effective prosecution and punishment of international core crimes. The Act completely incorporates the crimes by copying the provisions of the Rome Statute. The Act also incorporates to a great extent the general principles of criminal law under the Rome Statute with necessary modification. In a nutshell, the research analysis reveals that the existing domestic legal frameworks prior to the ICC Act would have hardly accommodated the effective performance of Uganda's duty to prosecute and punish obligations under the Rome Statute. The analysis also reveals challenges that present. Lack of inclusion of a provision of irrelevance of official capacity²⁵⁵ is a weakness of the Act that presents for implementing the Rome Statute. Threats to the Act from prior established domestic laws are also pointed in the analysis. These will affect the possible implementation of the Act because variances in application of the law is created, which would possibly probe constitutional interpretation.

5.2 Concluding Remarks

It is evident that a State that ratifies an international agreement consents to be bound by obligations created by the treaty.²⁵⁶ However, the evolution of international criminal law creates even a far greater obligation for States to oblige. This follows the internationally developed norm that States have the primary responsibility to prosecute international crimes.²⁵⁷ The provisions on the principles of complementarity and co-operation under the Rome Statute hardly leave any

²⁵⁵ See Chapter 4, Sec. 3.5.5.1.

²⁵⁶ See Vienna Convention, Art. 2(1)(b) and Art. 14.

²⁵⁷ See Rome Statute, Preamble, Para 4 and 6.

option for a country like Uganda that has been engulfed in conflict characterised by the commission of international core crimes not to enact a statute implementing the Rome Statute. Basing on the study focus, one can state that Uganda in adhering to the complementarity principle has substantially complied with the substantive provisions of the Rome Statute, which will ensure adequate prosecution and punishment of perpetrators of international core crimes. What remains to be seen is the how courts will deal with the challenges discussed in the paper, when in their midst. It is hoped that the case of *Jowaad Kazaala vs Attorney General No. 24/2010* will set a landmark when decided upon by the Uganda Constitutional Court.

5.3 Observations and possible recommendations

5.3.1 Absence of provision on irrelevance of official capacity

This sets a draw back to the purpose of not only the Act, but the foundations for criminal justice. Statistics from the situations before the ICC, involve indictments for Heads of States considered to bare the greatest responsibility for international core crimes committed.²⁵⁸ The war in Northern Uganda involved not only the LRA but also the Uganda Peoples Defence Forces, whom the communities in Uganda claim committed atrocities in Uganda.²⁵⁹ Subject to the principle of command responsibility under the Rome Statute,²⁶⁰ it would then be possible to attribute the atrocities committed to the commander in Chief of the Uganda armed forces who is the President.²⁶¹ Therefore, not including the provision of official capacity can be perceived as applying the law selectively. Since the research established that Parliament enacted the ICC Act

²⁵⁸ Indictment for Omar Hassan Al Bashir of Sudan, Laurant Gbagbo of Ivory Cost, Muammar Gadaffi of Libya (now deceased); available at <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> (accessed 23 October 2012).

²⁵⁹ See HURINET-U, NPWJ and UCICC, Pre Review Conference States Delegates Visit Report (2010); available at <<http://www.npwj.org/sites/default/files/documents/DelegatesVisitsReport%20FINAL%2017DEC10.pdf>> (accessed 23 October 2012).

²⁶⁰ See Rome Statute, Art. 28. Also see Chapter 4, Sec. 3.5.3.3.

²⁶¹ See Chapter 4, Sec.4.5.4.1.

with the provision on irrelevance of official capacity present, a move to amend the ICC Act can still be brought forth. Also, consideration to amend the Constitution should be thought to include this provision as an exception to Article 98(4). This should be done with the notion that leaders are not expected to get involved in such international core crimes and if they do, then they should be held accountable.

5.3.2 Possible constitutional challenges²⁶²

The main threats to implementing the ICC Act are the variances established between the Act and other provisions in domestic legislation. First, are concerns raised about certain provisions of the ICC Act being inconsistent with domestic laws. Among these are: no death penalty for acts of murder under the ICC Act, which is otherwise stipulated under the Penal Code Act for the same offence; and no prosecution for acts committed while one is below the age of 18, yet other domestic laws indicate that criminal liability is possible for children under 18 years. Secondly, are provisions that are directly inconsistent with the Constitution, for instance the *ne bis in idem* rule which impliedly places the ICC as the highest Court, contrary to the Constitutional provision on hierarchy of courts in Uganda. To streamline the application of these provisions to avoid future technicalities, the constitutional challenges can be brought before the Uganda Constitutional Court to let the court rule on the issues.

²⁶² See petition by *Jowaad Kazaala vs the Attorney General* 24 of 2010, where the petitioner challenges a number of provisions of the ICC Act as being inconsistent with the Constitution.

5.3.3 Non-retrospective application of the ICC Act

The fact that the ICC Act is subject to the Uganda Constitution provision on non-retroactivity of the Law means that the ICC Act is reserved for a future rather than current application with respect to accountability of the LRA conflict. This therefore, defeats the whole underlying purpose for which those who lobbied for a Rome Statute implementing law had thought. The non-retroactivity of the law principle defeats the whole purpose of the Act in light of the LRA committed atrocities vis-à-vis the principle of complementarity. It can however, be argued that in as much as the principle is appreciated in law, it can be exempted in certain instances. The International Convention on Civil and Political Rights, which, although recognises the non-retroactive principle, also allows for retroactive prosecution 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 the community of nations.²⁶³ Namuwase²⁶⁴ contends that wording of the Ugandan Constitution on the Principle of legality subscribes to the international version of the principle of legality that is affiliated to international crimes as opposed to the national version. The international version does not require that a written law be in place as opposed to the national version that requires a written law. This posits that since Uganda had ratified the Rome Statute and the ICCPR, the principles and crimes automatically fell within the jurisdiction of Ugandan Courts. Such an argument would therefore, suggest that the principle of non-retroactivity for the ICC Act can be waived. However, this reverts back to the realities established in Chapter 3 on the question of international law being part of the domestic legal order in Uganda and the attitude of judges who will need to be enlightened on this development.

²⁶³ ICCPR Art. 15.

²⁶⁴ See Namuwase generally (2011).

5.3.4 Engaging judges

Chapter three on sources of criminal law in Uganda points out the fact that precedents by the courts of record form part of sources of law. However, as revealed, the Courts in their first encounter with a case of international criminal nature,²⁶⁵ differed from the international criminal principles in favour of the domestic grant of amnesty.²⁶⁶ This was irrespective of the fact that the accused was facing charges of grave breaches under the Geneva Conventions Act.²⁶⁷ This can be attributed to the fact that the justices do not appreciate the foundations of international criminal law particularly international core crimes. It is important that trainings are held on a roll in basis for members of the entire judiciary and not limited to judges of the Special Division-The International Crimes Division, established to try international crimes. This should be considered, owing to the fact that first, judicial officers are often transferred, meaning it is possible to have a novel mind handling a case one finds. Secondly, is the possible that an appeal may lie from the International Crimes Division to the Court of Appeal and Supreme Court. Thirdly, constitutional petitions on international crimes may be lodged and as such, the justices need to appreciate the principles of international criminal law.

Word count is 17995 excluding bibliography

²⁶⁵ See *Uganda vs Thomas Kwoyelo* No. 30/2011.

²⁶⁶ See Chapter 4, Sec. 4.5.5.2.

²⁶⁷ *Uganda Vs Thomas Kwoyelo* No.36/2011.

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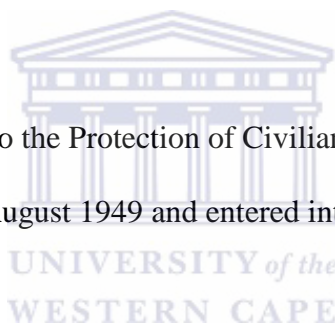
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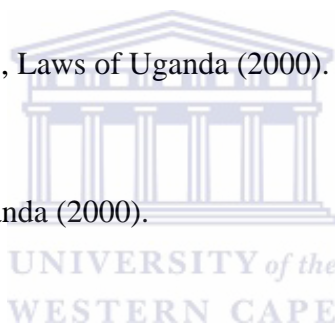
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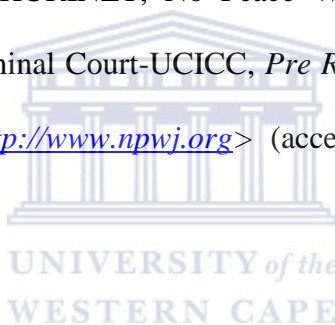
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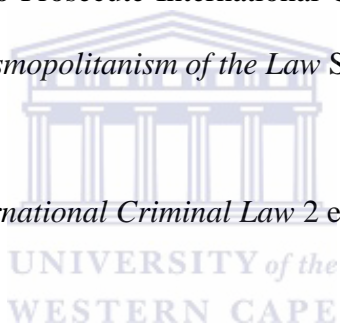
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