THE IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SOUTH AFRICA; A CRITICAL ANALYSIS

A thesis submitted for the degree of Doctor of Philosophy

By

Saidat Nakitto

Brunel Law School, Brunel University London

September 2017

Abstract

The thesis examines the extent to which the Rome Statute of the International Criminal Court (Rome Statute) has been implemented by Uganda and South Africa. State parties to the Rome Statute are expected to perform their obligations under the Statute in good faith. This entails conducting investigations and prosecutions for ICC crimes by virtue of the principle of complementarity, as well as fully cooperating with the ICC in its investigations and prosecutions where the state is unwilling or unable to do so. However, the Rome Statute does not provide clear guidance on what measures need to be undertaken by states to implement its provisions. This leaves states with the discretion to determine how best to give effect to the provisions of the Rome Statute.

Drawing from the practices of various states, the thesis gives an overview of the ways through which the Rome Statute has been implemented and makes a detailed analysis of the case studies of Uganda and South Africa. The focus is on the national implementing legislation, institutions that enforce the legislation and resultant court decisions. The emerging challenges faced by institutions in implementing the Rome Statute are discussed and using examples of other states, solutions are suggested to eliminate these problems. The thesis argues that effective implementation of the Rome Statute at the national level requires not only enacting legislation to domesticate the Rome Statute but also actual enforcement of the legislation to ensure adherence with the law.

Declaration

No portion of the work referred to in the thesis has been submitted in any form for another degree or qualification at any university or other institute or tertiary education. Information derived from published or unpublished work of others has been acknowledged in the text and a list of references is given.

Acknowledgement

This PhD has been completed with the assistance of many colleagues, friends and family. I wish to thank my two supervisors, Professor Manisuli Ssenyonjo and Dr. Mohamed Elewa Badar. Most of all, I am grateful to Professor Manisuli for his guidance and support throughout my studies. I feel privileged to have been supervised by Professor Manisuli who introduced me to academic writing and publishing in reputable international law journals.

My gratitude extends to the Commonwealth Scholarship Commission in the United Kingdom which funded me throughout the three years. Many thanks for the generous financial support without which, I would not have undertaken PhD studies. I am truly indebted to the Commonwealth Scholarship Commission and happy to be a beneficiary of the prestigious Commonwealth Scholarship.

I would also like to thank my employers at the Islamic University in Uganda particularly, Dr. Ahmad Sengendo and Dr. Mouhammad Mpezamihigo for their support and encouragement. Many thanks for nominating me for the Commonwealth Scholarship and for having faith in me. Special thanks to Professor Tindifa Samuel and Dr. Serwanga Jamil for their moral support and encouragement right from the early stages of my studies. Thank you to all my colleagues at Brunel Law School for your guidance and support throughout the PhD journey.

I owe greatest thanks to my father, mother and sisters who took on the parenting role of my four children. I appreciate your love and support in ensuring that I concentrate on my studies without worrying about my children. Last but not least, my heartfelt thanks to my husband, Dr. Kasozi Ediriisa Sinaani, for his unwavering love and support and to my children, Munirah, Muniir, Hannah and Lateefah for your patience.

Many thanks to the Almighty God for enabling my successful completion of PhD studies.

Table of Contents

Chapter Three

Measures Undertaken by Uganda to Implement the Rome Statute of the International Criminal Court

Chapter Four

Measures Undertaken by South Africa to Implement the Rome Statute of the International Criminal Court

Chapter Five

Non-Legislative Obstacles to the Implementation of the Rome Statute in Uganda and South Africa

Chapter Six

Measures to Eliminate Obstacles to the Implementation of the Rome Statute in Uganda and South Africa

Conclusions and Recommendations

Chapter Seven

List of Abbreviations

ADF - Allied Democratic Forces

ARLPI - Acholi Religious Leaders Peace Initiative

ASP - Assembly of States Parties

AU - African Union

BiH - Bosnia and Herzegovina

CALDH - Center for Human Rights Legal Action

CATS - Crimes Against the State

CID - Criminal Investigation Department

CSOs - Civil Society Organisations

DNDPP - Deputy National Director of Public Prosecutions

DPCI - Directorate of Priority Crime Investigations

DPP - Directorate of Public Prosecutions

DRC - Democratic Republic of Congo

EU - European Union

GCM - General Court Martial

GoU - Government of Uganda

HRW - Human Rights Watch

HURINET-U - Human Rights Network-Uganda

ICC - International Criminal Court

ICC Acts - International Criminal Court Act (2010), Uganda and The Implementation of the Rome Statute of the International Criminal Court Act (2002), South Africa

ICC crimes - genocide, crimes against humanity and war crimes

ICD- International Crimes Division (of the High Court of Uganda)

ICJ - International Court of Justice

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

ISS - Institute for Security Studies

JLOS - Justice Law and Order Sector

LRA - Lord's Resistance Army

NDPP - National Director of Public Prosecutions (South Africa)

NGOs - Non-Governmental Organisations

NPA - National Prosecuting Authority (South Africa)

PCICC - Philippines Coalition for the International Criminal Court

PCLU - Priority Crimes Litigation Unit

SADC - Southern African Development Community

SALC - Southern Africa Litigation Centre

SAPS - South African Police Service

SDOC - Special Department for Organized Crime, Economic Crime and Corruption

SICO - Special International Crimes Office

TRC - Truth and Reconciliation Commission

UCICC - Uganda Coalition on the International Criminal Court

UNSC - United Nations Security Council

UPDF - Uganda People's Defence Forces

UPF - Uganda Police Force

USAID - United States Agency for International Development

WCIU - War Crimes Investigation Unit

WCPU - War Crimes Prosecution Unit

WJP - World Justice Project

Chapter One

Introduction

1. Background and Context

The Rome Statute of the International Criminal Court (Rome Statute)[1] has been described by some scholars as: 'the most significant development in international law of the twentieth century'[2]and 'an accurate reflection of the present state of development of international criminal law'.[3] Such statements indicate the importance of the Rome Statute worthy of the current study. The Rome Statute established the International Criminal Court (ICC) as a permanent court with limited jurisdiction over 'the most serious crimes of concern to the international community as a whole'[4] but 'complementary to national criminal jurisdictions.'[5]

The primary role of the ICC is 'to put an end to impunity for the perpetrators of these [the most serious] crimes' and to 'contribute to the prevention of such crimes.'[6] Over the years activities of the ICC have been assessed and some scholars have described this Court as 'a poor performer' compared to other international courts.[7] The reason for such performance is attributed to several factors including the few trials completed by the ICC such as the trials of Thomas Lubanga Dyilo, Germain Katanga and Ahmad Al Mahdi.[8] Moreover, the proceedings of the ICC are lengthy which involve conducting preliminary examination, investigations, pre-trial, trial, appeal, interlocutory appeals, as well as victim participation.[9] Except for the Al Mahdi trial that was completed in less than 1 year because he pleaded guilty, the trials against Lubanga and Katanga lasted over 5 years between the confirmation

[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (hereinafter, Rome Statute).
[2] Dinah Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) ix.
[3] Juan Méndez, 'International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships' in Dinah Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) 65-74, 73.
[4] Rome Statute (1998), art 5(1). These crimes are genocide, crimes against humanity, war crimes and the crime of aggression, subject to fulfilment of certain conditions under art 15*bis* (2)-(3).
[5] Ibid, art 1.
[6] Ibid, Preamble, para 5.
[7] See for example, William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43(3) *The John Marshall Law Review* 535-552, 551, 542-543.
[8] *The Prosecutor v Thomas Lubanga Dyilo*, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/06) Trial Chamber I (14 March 2012); *The Prosecutor v Germain Katanga*, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/07) Trial Chamber II (7 March 2014) and *The Prosecutor v Ahmad Al Faqi Al Mahdi*, 'Judgment and Sentence', (ICC-01/12-01/15) Trial Chamber VIII (27 September 2016).
[9] Carsten Stahn, 'Introduction: More than a Court, Less than a Court, Several Courts in One? The International Criminal Court in Perspective', in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) xxxiii-c, xxxvi-xxxvii and Judge Phillipe Kirsch, 'The International Criminal Court: From Rome to Kampala' (2010) 43 *The John Marshall Law Review* 515-533, 524.

of charges and the verdicts.[10] Such lengthy proceedings are costly for the ICC which appears to have less funding[11]compared to its workload.

In effect, the ICC may only conduct proceedings in a few cases and its jurisdiction is limited to the most serious crimes namely, genocide, crimes against humanity, war crimes (ICC crimes) and the crime of aggression, subject to fulfilment of certain conditions.[12] Moreover, these crimes must have been committed after the Rome Statute entered into force, on the territory of a state party or by a person who is a national of a state party; or where a non-party state has lodged a declaration with the Registrar accepting exercise of jurisdiction by the ICC in respect of that crime.[13] More so, such jurisdiction is only exercised over natural persons who should be above 18 years of age and after a situation has been referred to the ICC by a state party, or the Security Council, or the Prosecutor of the ICC.[14]

With the above-mentioned limitations, it appears that many crimes will have to be handled by states and this exhibits the vital role of states in fighting impunity for ICC crimes. This is because national criminal systems are in the best position to prosecute ICC crimes since such crimes are committed in the territories of states where evidence and witnesses can easily be accessed and accused persons apprehended.[15] Moreover, the ICC continues to rely on state cooperation in all its proceedings to collect evidence, secure attendance of witnesses, as well as enforce arrest warrants.[16] This limits the work of the ICC as evidenced in the case of Kenya whereby the government of Kenya failed to produce records to facilitate the trial against President Uhuru Muigai Kenyatta[17] hence leading to the Prosecutor's withdrawal of the case against him.[18]

---

[10] See above n 8.

[11] Stuart Ford, 'How Much Money Does the ICC Need?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 84-104, 103.

[12] Rome Statute (1998), arts 5(1), 6-8*bis* and 15*bis* (2)-(3). This study only focuses on genocide, crimes against humanity and war crimes currently under jurisdiction of the International Criminal Court (ICC).

[13] Ibid, arts 11(1), 12(2)(a)-(b) and 12(3) respectively.

[14] Ibid, arts 25(1), 26 and 13(a)-(c) respectively.

[15] Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10(1) *European Journal of International Law* 144-171, 158 and Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2(2) *Goettingen Journal of International Law* 791-811, 801.

[16] Rome Statute, Part 9.

[17] *The Prosecutor v Uhuru Muigai Kenyatta*, 'Judgment on the Prosecutor's Appeal Against Trial Chamber V(B)'s "Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute"', (ICC-01/09-02/11 O A 5) Appeals Chamber (19 August 2015) para 3.

[18] *The Prosecutor v Uhuru Muigai Kenyatta*, 'Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta', (ICC-01/09-02/11) Office of the Prosecutor (4 December 2014).

Similarly, the charges against Mr. William Samoei Ruto and Joshua Arap Sang were 'vacated and the accused discharged without prejudice' to their future prosecution.[19] This was due to lack of sufficient evidence majorly attributed to interference with witnesses[20] leading to the majority of the witnesses to recant their testimony. Further still, non-cooperation of states is evident in the failure to execute the arrest warrant issued by the ICC against President Omar Hassan Ahmad Al Bashir (President Al Bashir) of Sudan by states including South Africa and Uganda.[21]

No effective action has been taken against non-cooperating states due to the weak enforcement mechanism created by the Rome Statute.[22] Seemingly, the Appeals Chamber of the ICC took the same position when it decided that the referral of the 'matter of non-cooperation to the ASP [Assembly of States Parties] or the UNSC [United Nations Security Council] … may not be an effective means to address the lack of cooperation in the specific context of the case.'[23] Thus, other mechanisms may be utilised to secure state cooperation including obtaining the assistance of regional or international organisations,[24] as well as the active engagement of civil society organisations to generate political will of states.[25]

While lack of state cooperation limits the effectiveness of the ICC, it should be noted that the Court was meant to prosecute only the most serious crimes of concern to the international community and only when states are unwilling or unable to prosecute such crimes by virtue of the principle of complementarity.[26] This confers primacy on national

[19] *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, 'Decision on Defence Applications for Judgments of Acquittal', (ICC-01/09-01/11) Trial Chamber V(A) (5 April 2016) 1.
[20] Ibid, see 'Reasons of Judge Eboe-Osuji', paras 141-142.
[21] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (4 September 2015) and *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Requesting the Republic of Uganda to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/15-01/09) Pre-Trial Chamber II (17 May 2016).
[22] Rome Statute (1998), art 87(7) whereby the ICC is required to make a finding of non-cooperation by a State Party and refer the matter either to the Assembly of States Parties or the Security Council depending on the nature of the referral.
[23] *The Prosecutor v Uhuru Muigai Kenyatta*, above n 17, para 52.
[24] *The Prosecutor v Uhuru Muigai Kenyatta*, 'Second Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute', (ICC-01/09-02/11) Trial Chamber V(B) (19 September 2016) para 8.
[25] Matthew Cannock, 'Strengthening International Criminal Court Cooperation – The Role of Civil Society' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 318-365.
[26] Rome Statute (1998), Preamble, para 10 and art 1; see also Mohamed M. Al Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 4 and Judge Philippe Kirsch, 'ICC Marks Five Years Since Entry into Force of Rome Statute' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 11-12, 12.

courts over such crimes[27] and the ICC only 'steps in'[28] or acts as a 'back-up or a reserve arrangement'[29] where national judicial systems fail to investigate and prosecute persons bearing the greatest responsibility for ICC crimes. This relegates the ICC to a court of last resort hence emphasising the primary responsibility of states to investigate and prosecute ICC crimes. In effect, this ensures protection of the sovereign right of states over such crimes.[30]

Therefore, the import of the principle of complementarity is that states have the primary responsibility to ensure that ICC crimes are investigated and prosecuted. This is the case despite the lack of an explicit obligation of states to implement the substantive criminal law provisions of the Rome Statute.[31] Moreover, state parties to the Rome Statute have an obligation to give effect to the provisions of the Statute, having consented to be bound by the Statute on ratification.[32] It is submitted that performing the Rome Statute in good faith as required under the Vienna Convention on the Law of Treaties[33]possibly entails ensuring that ICC crimes are effectively investigated and prosecuted at the national level as well as facilitating state cooperation with the ICC.

This study aims at examining the measures which states have undertaken to implement the Rome Statute focussing on Uganda and South Africa as case studies. Uganda and South Africa are located in the Sub-Saharan Africa, with Uganda in the Eastern region and South Africa in the Southern region of Africa. Uganda has a population of about 40 million people with a low income[34] and South Africa has a population of about 55 million people with an upper middle income.[35]Both Uganda and South Africa are parties to the Rome

[27] Al Zeidy, above n 26, 139.; see also Kirsch, above n 9, 516 and Cassese, above n 15, 158.
[28] Roberto Bellelli, 'The Establishment of the System of International Criminal Justice' in Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 5-63, 50 and Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 164.
[29] Daniel Nsereko, 'The ICC and Complementarity in Practice' (2013) 26(2) *Leiden Journal of International Law* 427-447, 429.
[30] William A. Schabas, *An Introduction to the International Criminal Court* (4th edn Cambridge University Press 2011) 194; Al Zeidy, above n 26, 63; Bellelli, above n 28, 48; Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2013) 243-244 and Judge Hans-Peter Kaul, 'The International Criminal Court – Its Relationship to Domestic Jurisdictions' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 31-38, 34.
[31] Note should be taken that states are only explicitly required to enact legislation penalising crimes against the administration of justice and incorporate procedures to enable cooperation with the ICC. See Rome Statute (1998), arts 70(4)(a) and 88, respectively.
[32] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 2(1)(b), 14(1)(a) and art 16(b).
[33] Ibid, art 26.
[34] The World Bank, 'Uganda', available at <http://data.worldbank.org/country/uganda> last visited, 30 August 2017.
[35] The World Bank, 'South Africa', available at <http://data.worldbank.org/country/south-africa> last visited, 30 August 2017.

Statute, which Uganda ratified on 14 June 2002[36] and South Africa ratified it on 27 November 2000.[37] In August 2017, the two states formed part of the 34 African states that had ratified the Rome Statute out of 124 states parties to the Statute[38] which makes the African region with the largest membership to the Rome Statute.

To show commitment to fulfilling the obligations under the Rome Statute, Uganda and South Africa domesticated the Rome Statute, whereby Uganda enacted the International Criminal Court Act (Uganda's ICC Act) on 25 June 2010.[39]South Africa also enacted the Implementation of the Rome Statute of the International Criminal Court Act (South Africa's ICC Act) on 18 July 2002[40] which entered into force on 16 August 2002. Notably, both states are amongst the few African states that have enacted legislation domesticating the Rome Statute[41] that is, Uganda's ICC Act and South Africa's ICC Act (ICC Acts). To facilitate effective enforcement of the legislation, the two states further created special institutions to investigate and prosecute serious crimes.

However, enforcement of the ICC Acts in both states is faced by several obstacles which have limited domestic implementation of the Rome Statute. For instance, South Africa not only submitted to the Secretary General of the United Nations (UN) a notification of

---

[36] ICC, Assembly of States Parties, 'Uganda' available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx> last visited, 30 August 2017 and United Nations, 'Common Core Document Forming Part of the Reports of States Parties, Uganda', (HRI/CORE/UGA/2015) (11 May 2015) 24.

[37] ICC, Assembly of States Parties, 'South Africa' available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx> last visited, 30 August 2017 and United Nations, 'Common Core Document Forming Part of the Reports of States Parties, South Africa', (HRI/CORE/ZAF/2014) (2 February 2016) 31.

[38]ICC, Assembly of States Parties, available at <https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> last visited, 30 August 2017. Note should be taken that three African states submitted to the United Nations Secretary General withdrawal notifications from the Rome Statute that is, South Africa (19 October 2016, see C.N.786.2016.TREATIES-XVIII.10), Burundi (27 October 2016, see C.N.805.2016.TREATIES-XVIII.10) and Gambia (10 November 2016, see C.N.862.2016.TREATIES-XVIII.10). Withdrawal notifications are permitted under the Rome Statute, art 127(1). However, before the withdrawals could take effect 1 year after the date of receipt of the notification by the Secretary-General of the United Nations, South Africa (7 March 2017) and Gambia (10 November 2016) withdrew their notifications of withdrawal from the Rome Statute (see C.N.121.2017.TREATIES-XVIII.10 and C.N.862.2016.TREATIES-XVIII.10 respectively). Available at United Nations, Depository Notifications, <https://treaties.un.org/pages/CNs.aspx?cnTab=tab1&clang=_en> last visited, 30 August 2017.

[39] International Criminal Court Act (2010), Act 11 of 2010 (hereinafter, Uganda's ICC Act).

[40] The Implementation of the Rome Statute of the International Criminal Court Act (2002), Act 27 of 2002 (hereinafter, South Africa's ICC Act).

[41] Others states include Burkina Faso, Central Africa Republic, Comoros, Kenya, Mauritius, Senegal and the Democratic Republic of Congo (DRC). See ICC Legal Tools Database, available at <https://www.legal-tools.org/en/browse/ltfolder/0_9047/#results> last visited, 30 August 2017. See also The Coalition for the International Criminal Court, '2013 Status of the Rome Statute Around the World' 12-27, available at <http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf> last visited, 30 August 2017.

withdrawal from the Rome Statute but introduced a Bill in Parliament to repeal its ICC Act.[42] With respect to Uganda, many perpetrators of such crimes have not been prosecuted, which has led to closure of some cases after 'the accused applied for amnesty'.[43]For instance, Caesar Acellam was granted amnesty in 2015[44] yet criminal proceedings had been commenced against him by the Director of Public Prosecutions.[45]This has created an impunity gap which the two states seem unwilling or unable to close. This brings into question the commitment of these states to ensure that persons alleged to have committed ICC crimes are investigated and prosecuted.

A considerable period of time has passed since Uganda (over 14 years) and South Africa (over 16 years) ratified the Rome Statute. Drawing from the practice of other states, the study examines the extent to which the measures undertaken by Uganda and South Africa facilitate domestic implementation of the Statute. This is aimed at determining the progress made by these states to fulfil their obligations under the Rome Statute. The weaknesses in these measures, as well as major obstacles faced in implementing the Statute are identified and solutions are suggested to remove these obstacles.

2. Statement of the Problem

The principle of complementarity under the Rome Statute confers primacy on national criminal jurisdictions to investigate and prosecute ICC crimes. However, there is no explicit obligation in the Rome Statute which requires state parties to the Rome Statute to implement the substantive criminal law provisions of the Statute in national legislation. Thus, state parties are confronted by the need to determine how best to implement the Rome Statute at the national level. This has led to various approaches taken by states to give effect to the

[42] This was on 19 October 2016, see United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10 and the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B 23-2016). However, South Africa withdrew these instruments, see chapter 4, section 4.2.

[43] Joan Kagezi, 'Practical Aspects of Prosecuting and Adjudication of International and Transnational Crimes-The East African Perspective', a paper presented at the 7th Annual Conference and Annual General Meeting of the African Prosecutors' Association (APA) under the theme; *Strengthening Institutional Capacity of Prosecution Authorities and Agencies in Africa – Uniting Africa's Prosecutors*, held at Windhoek, Namibia (7-10 October 2012) 5 (on file with the author).

[44] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', Samuel Okiror, 12 June 2015, available at<http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda> last visited, 30 August 2017.

[45] Joyce Freda Apio, 'Accountability Efforts in Uganda, the Democratic Republic of Congo, and Nigeria; Securing Accountability For LRA Crimes in Uganda' in Southern Africa Litigation Centre, 'Civil Society in Action: Pursuing Domestic Accountability for International Crimes' International Criminal Justice Regional Advocacy Conference Report, (10-11 June 2014) Johannesburg-South Africa, 9-13, 11, available at <http://www.southernafricalitigationcentre.org/2015/01/15/international-criminal-justice-regional-advocacy-report-civil-society-in-action-pursuing-domestic-accountability-for-international-crimes/> last visited, 30 August 2017. See also chapter 5 in this thesis.

Rome Statute including enacting legislation and establishing institutions to investigate and prosecute ICC crimes as well as facilitate cooperation with the ICC.

Despite such legislative and institutional mechanisms, enforcement of the legislation remains minimal due to several obstacles faced by states in implementing the Rome Statute. Drawing from the experience of other states, the study focuses on Uganda and South Africa with the aim of providing an in-depth analysis of the extent to which the Rome Statute has been implemented domestically and the obstacles faced by these states in the process. Solutions are suggested to improve the legislation as well as strengthen national institutions to ensure effective implementation of the Rome Statute at the national level.

3. Objectives of the Study

The general objective of this study is to provide an in-depth analysis of the extent to which the Rome Statute has been implemented by Uganda and South Africa and to analyse the obstacles faced by these states in doing so. The specific objectives of the study are the following;

i. To establish the measures which Uganda South Africa need to undertake to implement the Rome Statute;
ii. To examine the extent to which the national implementing legislation of Uganda and South Africa (ICC Acts) conforms to the provisions of the Rome Statute;
iii. To analyse whether national institutions in Uganda and South Africa have the capacity to conduct effective investigations and prosecutions of ICC crimes;
iv. To examine the obstacles faced by Uganda and South Africa in implementing the Rome Statute.
v. To identify solutions to these obstacles so as to enhance the implementation of the Rome Statute in Uganda and South Africa.

4. Research Questions

The overriding question which this study answers is: to what extent have Uganda and South Africa implemented the Rome Statute and what are the underlying obstacles? The specific questions of the study are the following:

i. What measures have Uganda and South Africa undertaken to implement the Rome Statute?
ii. To what extent does the implementing legislation of Uganda and South Africa (ICC Acts) conforms to the provisions of the Rome Statute?

iii. Do national institutions in Uganda and South Africa have the capacity to effectively investigate and prosecute ICC crimes?

iv. What obstacles are faced by Uganda and South Africa in implementing the Rome Statute?

v. What solutions should be adopted by Uganda and South Africa to eliminate these obstacles?

5. Methodology

The methodology of the study consists of doctrinal legal research which is library-based entailing a critical analysis of the primary sources (such as legislation and case law) as well as secondary sources (these include textbooks and journal articles), with the aim of describing how the legislation is applied.[46] In this case, the study entails an examination of major studies on the subject to identify gaps in existing literature. Analysis of such studies provides a deeper understanding of what measures states need to undertake to implement the Rome Statute. This provides foundation for critical analysis of the measures undertaken by Uganda and South Africa to give effect to the Rome Statute through comparing and contrasting these measures in order to identify best practices in that regard. The study analyses national implementing legislation to determine its consistency with the provisions of the Rome Statute. Suggestions are made to demonstrate how the law could be improved to enhance the implementation of the Rome Statute.

Thus, doctrinal legal research is suitable for the study since national implementing legislation of Uganda and South Africa as well as court decisions are examined to determine the extent to which these states have implemented the Rome Statute. Owing to the limited time within which to complete the study, this method is appropriate since library-based information could easily be obtained hence minimising the time and resources for conducting research.[47] This may be contrasted with other research methods such as empirical research which requires trained personnel to interpret statistical data,[48] as well as sufficient

[46] Ian Dobinson and Francis Johns, Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn Edinburgh University Press 2017) 18-47, 21. See also Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83-119, 84-85.

[47] See Hutchinson and Duncan, ibid, 87, with respect to 'increasing amounts of legal data' on the internet.

[48] Craig Allen Nard, 'Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession' (1995) 30 *Wake Forest Law Review* 347- 368, 366.

time,funding and approval to collect data (involving human participants)[49] yet these resources may not be obtainable.

Although doctrinal legal research is library-based, not every information is available in existing literature or in various sources (such as journals, internet, government reports). More so, some of these sources may be costly, inaccessible and sometimes the materials could be outdated or lack authenticity.[50]Moreover, such a method may be influenced by the bias and personal values of the researcher which is not the case with empirical research whereby the researcher may act objectively when reporting the findings of the study.[51] Thus, while a researcher may use empirical research to obtain accuracy for instance, by measuring the effect and efficiency of legal mechanisms,[52] it may not be the case with doctrinal legal research because as rightly stated, 'numbers can often tell us what words cannot.'[53] This is due to the fact that one may not determine accurately whether evidence obtained from doctrinal legal research is enough to support a specific legal positionand also the practical application of the law remains contetious.

Nonetheless, doctrinal legal research is appropriate for the present study because it is not very costly to access most of the materials and less time is utilised in analysing these materials, which in most cases does not require special skills to interpret the data. Thus, any shortcomings of this method are minimised for instance, to reduce bias the study utilises different sets of data relating to a particular research question and ensures that factual claims are substantiated by reference to current empirical studies on the matter.

6. Justifications for the Implementation Measures and Case Studies Selected

This part of the thesis provides justifications for selecting national implementing legislation, institutions and court decisions as measures for implementing the Rome Statutewhich is the focus of the study. Particularly, the case studies of Uganda and South Africa are selected for a

[49] Michael Heise, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' (2002) (2002) 4 *University of Illinois Law Review* 819-850, 829. See also Jack Goldsmith and Adrian Vermeule, 'Empirical Methodology and Legal Scholarship' (2002) 69(1) *The University of Chicago Law Review* 153-167, 154.

[50] Michelle M. Wu, 'Why Print and Electronic Resources are Essential to the Academic Law Library' (2005) 92(2) *Law Library Journal* 233-256, 236-238.

[51] Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville, *Research Methods for Law* (Edinburgh University Press 2007) 46-68, 48.

[52] In this case the legal and institutional frameworks for implementing the Rome Statute which may be done by speaking directly to persons who are directly involved in the legal mechanisms such as the Judges, legal practitioners, legislators and persons on whom these mechanisms apply. See also Nard C A, above n 48, 349-350.

[53] Heise, above n 49, 827.

detailed analysis of the extent to which these states have implemented the Rome Statute at the national level.

6.1.Selection of Measures for Implementing the Rome Statute

There are various ways through which the Rome Statute is implemented by states. However, this study focuses on the ICC Acts, institutions which enforce the Acts and the resultant court decisions where the Acts have been applied. These measures have been selected because of a number of reasons; firstly, ratification, domestication and enforcement of the obligations under the Rome Statute using courts are indicators of states' progress in fulfilling such obligations.[54] In essence, a state can only exercise jurisdiction over ICC crimes where these crimes are clearly defined with specific penalties imposed in national legislation. Moreover, effective enforcement of the legislation is possible if national institutions have sufficient capacity to investigate, prosecute and punish perpetrators of ICC crimes. Thus, national implementing legislation and its enforcement by institutions are necessary for the state to implement the Rome Statute.

Secondly, using the Rome statute's principle of complementarity inference can be drawn that legislative and institutional measures need to be taken by states in order to exercise jurisdiction over ICC crimes. As noted above, the principle of complementarity recognises that states have the primary responsibility over ICC crimes and thus, encourages states to exercise such responsibility by investigating, prosecuting and punishing such crimes.[55] Only when a state is unwilling or unable genuinely to investigate or prosecute ICC crimes does the ICC exercises its jurisdiction. The implication is that a state requires legislative and institutional capacity to effectively investigate and prosecute ICC crimes. Where such mechanisms are lacking and the state fails to take action, this may be a ground for declaring the case admissible before the ICC[56] subject to the gravity of the case.

---

[54] Report of the Expert Workshop entitled; 'Giving Effect to the Law on War, Crimes Against Humanity and Genocide in Southern Africa' organised by the Centre for Human Rights, International Criminal Law Services and the Konrad Adenauer Stiftung, (13-14 June, 2011) University of Pretoria, South Africa, 6, available at <http://www.chr.up.ac.za/index.php/publications/other-publications/925-expert-workshop-giving-effect-to-the-law-on-war-crimes-crimes-against-humanity-and-genocide-in-southern-africa.html> last visited, 30 August 2017.

[55] Rome Statute, Preamble, para 10, arts 1 and 17; see also Markus Benzig, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591-632, 596.

[56] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, 'Decision on the Admissibility of the Case under Article 19(1) of the Statute', (ICC-02/04-01/05) Pre-Trial Chamber II (10 March 2009) para 52 and Benzig, above n 54, 601.

Basically, to make the case inadmissible before the ICC, a state must have taken some measures by investigating or prosecuting the case or conducting trial.[57] Thus, a state must show that it has taken concrete steps to facilitate domestic proceedings for ICC crimes such as having enabling legislation which provides for ICC crimes and functional institutions to handle such crimes.[58] This implies that actual investigations, prosecutions and possibly trial are some of the factors which exhibit the commitment of the state to conduct criminal proceedings for ICC crimes domestically. However, this will require states to have adequate national implementing legislation penalising ICC crimes and sufficient institutional capacity without any obstacles to such proceedings.[59]

Lastly, the view that states should have legislative and institutional mechanisms to implement the Rome Statute domestically finds support from publicists of international criminal law who recognise domestication of the Rome Statute as enabling states to conduct proceedings for ICC crimes. For example, experts in international criminal law opine that states should create implementing legislation to enable investigation, prosecution and adjudication of ICC crimes.[60] In addition, different organisations which guide states in implementing the obligations of the Rome Statute support enactment and enforcement of legislation as measures states should undertake to implement the Statute.[61]

---

[57] OTP, 'Paper on Preliminary Examinations' (November 2013) para 47, available at <https://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf> last visited, 30 August 2017.

[58] In the case of *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, above n 56, paras 47-51, the ICC assessed information including preparations for establishing a special institution to try perpetrators of ICC crimes and the absence of a legislation penalising ICC crimes which depicted lack of preparedness of Uganda to conduct domestic proceedings for ICC crimes.

[59] OTP, 'Paper on Preliminary Examinations', above n 57, para 48 where inactivity of a state was said to result from factors such as the absence of adequate legislative framework, existence of legal obstacles to domestic proceedings like amnesties, immunities of statutes of limitations, deliberately focussing on low-level or marginal perpetrators than those more responsible and lack of political will or judicial capacity.

[60] See for example, Morten Bergsmo, 'Preface by the Series Editor' in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010) iii-iv, iii; Olympia Bekou, 'The ICC and Capacity Building at the National Level' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1245-1258, 1249; Carsten Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19(1) *Criminal Law Forum* 87-113, 92; Lisa J. Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 *The John Marshall Law Review* 635-680, 668 and Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10(5) *Journal of International Criminal Justice* 1081-1094, 1093.

[61] See for example, Amnesty International, 'The International Criminal Court: Checklist for Effective Implementation', AI Index: IOR 40/11/00 (July 2000) 2; Human Rights Watch, 'International Criminal Court: Making the International Criminal Court Work; A Handbook for Implementing the Rome Statute' (September 2001), Vol. 13 No.4(G)) 3 and International Centre for Criminal Law Reform and Criminal Justice Policy, 'International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute' (3rd edn Vancouver, March 2008) 11-12, all available at <http://www.iccnow.org/?mod=romeimplementation> last visited, 30 August 2017.

From the above discussion, it is contended that the measures which states need to undertake to implement the Rome Statute include creating legislative and institutional frameworks to facilitate investigations, prosecutions and adjudication of ICC crimes, as well as enabling state cooperation with the ICC. Actual enforcement of the legislation by national courts is a determining factor as to the adequacy of the measures undertaken to implement the Rome Statute. Thus, the study focuses on the ICC Acts and institutions which enforce the Acts to determine the extent to which the Rome Statute has been implemented. In addition, court decisions are examined to determine how the legislation has been applied in practice and the emerging challenges.

6.2. Selection of Case Studies

For purposes of this study, the case studies of Uganda and South Africa were selected. As mentioned in section 1, there are 34 African states which have ratified the Rome Statute out of which a few state parties including Uganda and South Africa have both complementarity and cooperation provisions incorporated in national legislation. There are different reasons for selecting Uganda and South Africa.

Firstly, Uganda and South Africa are among the few African states which have ratified and domesticated the Rome Statute, as well as engaged national courts in enforcing the obligations under the Statute. This is evident from the judicial decisions passed by national courts to compel relevant state authorities to investigate and prosecute ICC crimes committed either within the territory of these states or abroad.[62] As discussed above, creating national implementing legislation and institutions to handle ICC crimes are some of the measures reflecting state action in implementing the Rome Statute. Thus, in-depth analysis of these cases studies will provide understanding on how the Rome Statute has been implemented domestically by examining in detail, the extent to which the legislation has incorporated the relevant provisions of the Statute and the obstacles encountered by national institutions in enforcing such legislation. Analysing the resultant court decisions will provide insight into whether the implementation of the Rome Statute in Uganda and South Africa has been effective.

Secondly, Uganda is an important case study having been the first state to refer the situation to the ICC on 16 December 2003 with respect to ICC crimes allegedly committed in

[62] *Uganda v Thomas Kwoyelo* (Constitutional Appeal No. 01 of 2012) Supreme Court of Uganda (8 April 2015) (hereinafter, *Thomas Kwoyelo Case*) (on file with the author) and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Zimbabwe Exiles' Forum* (CCT 02/14) [2014] ZACC 30, Constitutional Court of South Africa (30 October 2014) (*Zimbabwe Torture Case*).

northern Uganda due to the inability to arrest perpetrators of such crimes.[63] At the time of writing (August 2017), the case against Dominic Ongwen which commenced on 6 December 2016[64] was ongoing before the ICC. This implies that the Government of Uganda (GoU) has to fulfil its legal obligations of cooperating fully with the ICC in its investigations and prosecutions with respect to cases before the Court as required under article 86 of the Rome Statute. Moreover, under article 88 of the Rome Statute, the GoU is required to provide procedures under national legislation to enable such cooperation. This study will highlight on whether the procedures for cooperation with the ICC set out in Uganda's ICC Act conform to the Rome Statute.

Aside cooperating with the ICC in its proceedings, it is important to examine whether the GoU is committed to conducting domestic investigations and prosecutions of ICC crimes. This is to ensure that Uganda not only refers situations to the ICC for prosecution but is also handling the bulk of the cases due to its primary responsibility to exercise jurisdiction over ICC crimes committed on its territory. Besides, it is important to examine key obstacles to domestic proceedings for ICC crimes such as the Amnesty Act of Uganda[65] which was recognised by national courts as a valid legislation.[66]

Although Uganda's ICC Act may not apply retroactively,[67] it is certainly operational where the alleged crimes were committed after the enactment of the Act in 2010. However, this may not be the case with the existence of the Amnesty Act since the Act totally shields perpetrators of ICC crimes from liability.[68] The study will provide insight into the extent to which the Amnesty Act curtails the application of Uganda's ICC Act thereby impeding domestic implementation of the Rome Statute in Uganda. This is intended to devise means of eliminating such obstacles to enhance the implementation of the Rome Statute.

Thirdly, while noting inconsistencies in the practice of South Africa in implementing the Rome Statute, South Africa is recognised as 'playing a prominent role in serving as a bridge between the ICC and the AU [African Union]'.[69] More so, South Africa actively

[63] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, above n 56, para 37.
[64] *The Prosecutor v Dominic Ongwen*, 'Decision Setting the Commencement Date of the Trial', (ICC-02/04-01/15) Trial Chamber IX (30 May 2016) para 12.
[65] Amnesty Act (2000) (Cap 294, Laws of Uganda (2000), Act 2 of 2000, (herein after, Amnesty Act), secs 2 and 3 which permit issuance of amnesty without determing the nature of crimes committed by applicants.
[66] *Thomas Kwoyelo Case*, above n 62, 65.
[67] See chapter 3, section 4.1 on non-retroactivity of Uganda's ICC Act.
[68] See chapter 3, section 4.2.1 concerning the Amnesty Act (2000).
[69] Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13(5) *Journal of International Criminal Justice* 1027-1047, 1030.

participated during the drafting of the Rome Statute[70] and at the Review Conference in 2010 where it contributed in advancing the policy of positive complementarity together with Denmark.[71] Moreover, national courts in South Africa have demonstrated commitment in ensuring that South Africa's ICC Act is enforced even with limited support from the government of South Africa.[72] The practice and experience of South Africa in implementing the Rome Statute is worthy of the current study.

Lastly, Uganda and South Africa provide good case studies as the governments of both states seem to lack the necessary political will to give effect to their obligations under the Rome Statute. This is evident from non-cooperation of both states in relation to the execution of ICC's warrant of arrest against President Al Bashir of Sudan[73] coupled with the subsequent notification of withdrawal of South Africa from the Rome Statute,[74] which was publicly supported by the President of Uganda.[75]Although South Africa subsequently withdrew the notification of withdrawal,[76]it was stated that the African National Congress (ANC), South Africa's ruling party, is 'sticking to its call for South Africa to withdraw from the International Criminal Court'.[77]This brings into question the commitment of the two states in ensuring effective implementation of the Rome Statute. A study of Uganda and South Africa is useful in examining lack of political will as a major obstacle curtailing domestic implementation of the Rome Statute despite the existing legislative and institutional frameworks in these states.

Therefore, the experience of Uganda and South Africa in implementing the Rome Statute will provide an understanding of the measures adopted by these states to implement the Statute and the obstacles encountered in the process. Drawing from the experience of other states, the study will provide suggestions to address the weaknesses identified in the measures adopted by Uganda and South Africa to implement the Rome Statute.

---

[70] Christopher Gevers, 'International Criminal Law in South Africa' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 403-441, 403, 409.

[71] Bergsmo, et al, above n 15, 799.

[72] See for example in the case of *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, (Case No. 27740/15) High Court of South Africa (24 June 2015) (hereinafter, *Al Bashir Case*).

[73] For ICC decisions on non-cooperation of Uganda and South Africa, see above n 21.

[74] United Nations, C.N.786.2016.TREATIES-XVIII.10 (Depository Notification).

[75] Elsa Buchanan, 'Ugandan President Museveni Praises African Nations for Withdrawing from "Useless" ICC' (26 October 2016), available at <http://www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328> last visited, 30 August 2017.

[76] This was on 7 March 2017, see United Nations, Depository Notification, C.N.121.2017.TREATIES-XVIII.10.

[77] Genevieve Quintal, 'ANC is Sticking to its guns on ICC Withdrawal' (4 July 2017), available at <https://www.businesslive.co.za/bd/politics/2017-07-04-anc-is-sticking-to-its-guns-on-icc-withdrawal/> last visited, 30 August 2017.

7. Significance of the Study

The study is important since there is no clear guidance in the Rome Statute on how the provisions of the Statute are to be implemented at the national level. By analysing the Rome Statute in light of subsequent ICC jurisprudence and the practice of different states, the study will provide clarity on what states need to do to give effect to the provisions of the Rome Statute.

Such information is useful in understanding the methods which Uganda and South Africa used to incorporate provisions of the Rome Statute in their ICC Acts and also provide ideas about what these states need to do to ensure that the Acts are enforced. More so, a detailed examination of the Acts will provides insight into the extent to which the legislation incorporates the provisions of the Rome Statute. Suggestions will be made to improve the ICC Acts of Uganda and South Africa where weaknesses are identified by drawing from the examples of national implementing legislation of other states.

The study will also provide an in-depth analysis of the major obstacles curtailing the implementation of the Rome Statute. Drawing from the experience of other states, suggestions will be made to guide Uganda and South Africa on how to eliminate these obstacles. The solutions suggested in the study will hopefully help authorities in Uganda and South Africa to address the obstacles that curtail domestic implementation of the Rome Statute in these states.

Analysis of court decision will provide insight into the ways through which national courts enforce the legislation to implement the Rome Statute for instance by pressuring respective states to give effect to the provisions of the Statute. This is notable with regard to courts in South Africa which demonstrated determination in enforcing South Africa's ICC Act and in pressuring the government of South Africa to fulfil its obligations under the Rome Statute.[78] More so, other courts may use the same approach to enforce the national implementing legislation.

The research findings will benefit national officials in Uganda and South Africa involved in making policies, reforming legislation and institutions, as well as promoting justice for ICC crimes. These officials will be guided by the findings of the study to devise ways of improving both legal systems in order to facilitate domestic proceedings for ICC

[78] See for example, *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, (Case No. 77150/09) High Court of South Africa [2012] ZAGPPC 61 (8 May 2012) (*Zimbabwe Torture Case*) and *Al Bashir Case*, above n 72.

crimes. More so, the information will be useful in enhancing the debate of scholars and practitioners on what measures should be adopted by both states to implement the Rome Statute effectively. Therefore, it is important that the findings of the study are disseminated and availed to relevant authorities in Uganda and South Africa, as well as other states engaged in implementing the Rome Statute.

8. Literature Review

There is existing scholarship on the principle of complementarity[79] which provides for the relationship between the ICC and national courts to the effect that the ICC only complements national courts hence treated as a court of last resort. These studies are valuable in elaborating the primary role of states in enforcing justice for ICC crimes. This provides basis for the argument that Uganda and South Africa, as state parties to the Rome Statute, have to perform the Statute in good faith by giving effect to its provisions which entails ensuring accountability for ICC crimes at the national level.

In order to conduct proceedings for ICC crimes, these states need an enabling legislation setting out the definitions of such crimes with the prescribed penalties. However, as noted in section 1, the Rome Statute does not expressly guide state parties on how to implement its substantive criminal law provisions. In this case principles of international law may be used to understand how states incorporate provisions of treaties in national legislation. Much has been written generally on the treatment of international law in national legal systems[80] with some studies focusing on South Africa and Uganda.[81] These studies are

[79] See for generally, Al Zeidy, above n 26; Schabas, above n 30; William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19(1) *Criminal Law Forum* 59-85; Bergsmo, et al, above n 15; Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013); Jurdi, above n 28; Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010); Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015); Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) and Bekou, above n 60.

[80] See for example, James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012) 48-50; Malcolm N. Shaw, *International Law* (6th edn Cambridge University Press 2008) 131-194 and Anthony Aust, *Modern Treaty Law and Practice* (2nd edn Cambridge University Press 2007) 145-157.

[81] See for example, Erika de Wet, 'The Reception of International Law in South African Legal Order: An Introduction' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 23-50; Erika de Wet, 'South Africa' in Dinah Shelton, International Laws and Domestic Legal Systems (Oxford University Press 2011) 567-593; Henry Onoria, 'Uganda' in Dinah Shelton, International Laws and Domestic Legal Systems (Oxford University Press 2011) 594-619 and Christopher Gevers, 'Immunity and the Implementation Legislations in South Africa, Kenya and Uganda' in Kai Ambos and Ottilia A. Maunganidze (eds), *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universtitätsverlag Göttingen 2012) 85-117.

useful in ascertaining the approach taken by Uganda and South Africa to incorporate provisions of the Rome Statute in domestic law for enforcement by national courts.

Having legislation without more is not enough to ensure effective implementation of the Rome Statute at the national level. To understand what states need to implement besides incorporating the provisions of the Rome Statute in national law, reference has been made to other studies on the matter. These include studies conducted by international organisations to guide states in implementing the Rome Statute,[82] though such studies are not and do not purport to be a comprehensive guide to domestic implementation of the Rome Statute. More so, studies on the practice of different states have provided insight into how these states have implemented the Statute,[83] with a few studies focusing on South Africa[84] and Uganda.[85]

---

[82] See above n 61.

[83] See for example, Claus Kreß and Flavia Lattanzi (eds), *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues*, Vol. I (Nomos Verlagsgesellschaft Baden-Baden 2000); Mwiza Nkhata, 'Implementation of the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 277-303; Joseph Rikhof, 'The Canadian Model' in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010) 13-18; Helmut Satzger, 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 *International Criminal Law Review* 261-282; Colin Warbrick, Dominic McGoldrick and Robert Cryer, 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51(3) *International and Comparative Law Quarterly* 733-743; Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quite Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507-534; Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court' (2004) 2(1) *Journal of International Criminal Justice* 179-190; Marco Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy' (2007) 5 *Journal of International Criminal Justice* 493-512; Juliet Hay, 'Implementing the ICC Statute in New Zealand' (2004) 2(1) *Journal of International Criminal Justice* 191-210; Simon M. Meisenberg, 'Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court' (2015) 5 *Asian Journal of International Law* 123-142 and Alejandro E. Avarez, 'The Implementation of the ICC Statute in Argentina' (2007) 5(2) *Journal of International Criminal Justice* 480-492.

[84] See for example, Max du Plessis, 'An African Example: South Africa's Implementation of the Rome Statute of the International Criminal Court' (2007) 5(2) *Journal of International Criminal Justice* 460-479; Max du Plessis, 'South Africa's International Criminal Court Act: Countering Genocide, War Crimes and Crimes Against Humanity' Institute for Security Studies (ISS) Paper No. 172 (November 2008); Max du Plessis, 'South Africa's Implementation of the Rome Statute' in Kai Ambos, Ottilia A. Maunganidze (eds), *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universtitätsverlag Göttingen 2012) 23-38; Lee Stone, 'Implementation of the Rome Statute in South Africa' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 305-330 and Anton Katz, 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12(4) *African Security Review* 25-30.

[85] See for example, Christopher Mbazira, 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in Chach Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 197-220; Caroline Nalule and Rachael Odoi- Musoke, 'The Complementarity Principle put to the Test: Uganda's Experience' in Vincent O. Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012) 243-265; Barney Afako, 'Country Study V; Uganda' in Max du Plessis and Jolyon Ford (eds), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African States*, Institute for Security Studies (ISS) Monograph Series No. 14 (March 2008) 93-114 and Open Society Foundations, 'Putting Complementarity into Practice; Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (Open Society Foundations 2011) available at <https://www.opensocietyfoundations.org/reports/putting-complementarity-practice> last visited, 30 August 2017.

Notably, the studies which examined the implementation of the Rome Statute in Uganda and South Africa singly[86] and jointly[87] provided insight into the weaknesses and strengths of the national implementing legislation. However, these studies barely examined the application of these laws in practice, which the current study seeks to examine. More so, the studies which discussed national institutions that enforce the legislation only mentioned a few obstacles faced by these institutions in that regard.[88]Although there is literature concerning the ways through which national institutions can be assisted to enhance domestic procedings for international crimes[89] these solutions are general yet the current study seeks to identify specific solutions to the problems faced by Uganda and South Africa.

Thus, the available literature indicates an existing gap in examining the application of the national implementing legislation in practice and the emerging challenges in implementing the Rome Statute in Uganda and South Africa. The literature also does not provide a detailed discussion of the solutions which can be applied to overcome these challenges. Nonetheless, the studies mentioned above have been instrumental in providing information which has enhanced ideas in this study.

Therefore, drawing from the experience of other states involved in domestic implementation of the Rome Statute, the current study provides a detailed analysis of the national implementing legislation of Uganda and South Africa (ICC Acts) and the institutions which enforce the legislation. This is aimed at assessing the effectiveness of the legislation and national institutions in enabling domestic implementation of the Rome Statute. This also entails examination of the decisions of national courts in Uganda and South Africa in which the ICC Acts were applied to enforce the obligations under the Rome Statute. Moreover, this study provides an in-depth analysis of the obstacles curtailing effective enforcement of these Acts. Drawing from the experience of other states, solutions are suggested to eliminate these obstacles to enhance the implementation of the Rome Statute in Uganda and South Africa.

[86] See for example, Katz, above n 84; du Plessis, above n 84; Stone, above n 84; Mbazira, above n 85 and Nalule and Odoi-Musoke, above n 85.

[87] See for example, Max du Plessis,Antoinette Louw and Ottilia Maunganidze, 'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions', Institute for Security Studies (ISS) Paper No. 241 (November 2012); Olympia Bekou and Sangeeta Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6(3) *Human Rights Law review* 499-544; Ottilia Anna Maunganidze and Anton du Plessis, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65-83 and Gevers, above n 81.

[88] See for example, Maunganidze and du Plessis, above n 87; Mbazira, above n 85; Nalule and Odoi-Musoke, above n 85 and Open Society Foundations, above n 85.

[89] See for example, Morten Bergsmo, Olympia Bekou and Annika Jones, 'New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project' (2010) 10(4) *Human Rights Law Review* 715-729; Bekou, above n 60 and Olympia Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in Triestino Mariniello (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015) 133-146.

9. Limitations of the Study

The study examines the implementation of the Rome Statute at the national level by analysing the national implementing legislation, the practical application of the legislation and emerging challenges. Although examples are drawn from the practice of different states, the detailed study focusses on Uganda and South Africa. Specifically, the consistency of the legislation with the Rome Statute is examined together with the capacity of national institutions in enforcing the legislation and the emerging obstacles, in order to formulate solutions for enhancing the implementation of the Statute in these states.

Thus, the study does not purport to provide an exhaustive or comprehensive analysis of the measures undertaken by Uganda and South Africa to implement the Rome Statute. Further research may have to be conducted to examine other measures adopted by these states to implement the Statute. More so, since the Rome Statute obligations arose after Uganda and South Africa ratified the Statute, this study does not address international crimes committed before ratification. Crimes committed in the past can be investigated and prosecuted basing on other relevant national legislation of Uganda and South Africa.[90] These crimes are beyond the scope of this study.

10. Structure of the Study

This study comprises of seven chapters. The first chapter serves as the general introduction. The second chapter which is divided into three parts. The first part highlights whether states have the duty to implement the Rome Statute and analyses the different methods used by states in doing so.The second part examines the legislative and non-legislative measures states need to undertake to implement the Statute. The third part analyses key obstacles faced by states in implementing the Statute. This chapter provides an important foundation for discussion in the proceeding chapters.

The third chapter specifically focusses on Uganda by examining the effectiveness of the measures undertaken by Uganda to implement the Rome Statute. The chapter examines the national implementing legislation (Uganda's ICC Act) and institutions which enforce the legislation to determine the extent to which these mechanisms have facilitated domestic implementation of the Rome Statute. The relevant court decisions are analysed to demonstrate the emerging challenges in applying the legislation. The chapter also

[90] See for example, Uganda's Geneva Conventions Act (1964) and South Africa's Implementation of the Geneva Conventions Act (2012).

examinesnon-retroactivity of the Act and amnesty as key obstacles curtailing the enforcement of the Act and suggests solutions to remove these obstacles.

Similarly, the fourth chapter analyses the effectiveness of the measures undertaken by South Africa to implement the Rome Statute. The chapter examines the national implementing legislation (South Africa's ICC Act) and institutions which enforce the legislation, as well as court decisions that interpret and apply the legislation. The two chapters on the case studies provide a detailed examination of the extent to which the measures undertaken by Uganda and South Africa have enabled domestic proceedings for ICC crimes and cooperation with the ICC. The weaknesses and strengths of these measures as well as the emerging challenges relating to the application of the ICC Acts are identified.To this effect, immunity is examined as an obstacle to the implementation of the Rome Statute in South Africa. The chapter also highlights the best practices which other states may emulate from South Africa.

The fifth chapter examines major obstacles which curtail effective implementation of the Rome Statute in Uganda and South Africa. Three key non-legislative obstacles are analysed in the chapter namely weak institutions, limited political support for domestic proceedings of ICC crimes and limited support from Civil Society Organisations (CSOs).

The sixth chapter builds on the fifth chapter by suggesting various measures which should be adopted by Uganda and South Africa to eliminate the obstacles discussed in the fifth chapter, drawing from the practices of other states.

Finally, the seventh chapter provides the conclusion and highlights the lessons learnt from the practices of Uganda and South Africa.

.

Chapter Two

The Domestic Implementation of the Rome Statute: A General Overview

1. Introduction

The Rome Statute does not clearly guide states on how it should be implemented[1] leaving states with the discretion to decide how best to give effect to the provisions of the Statute. The central argument advanced in the thesis is that notwithstanding the lack of an explicit obligation to incorporate substantive provisions of the Rome Statute into national law, it is important thatstate parties to the Rome Statute perform this treaty in good faith.[2] This entails acting 'honestly, fairly and reasonably' and to avoid evading treaty obligations.[3] For that matter, having legislative and institutional capacity to investigate and prosecute genocide, crimes against humanity, war crimes (ICC crimes), as well as facilitate state cooperation with the ICC are some of the ways of giving effect to the Rome Statute.[4]

This chapter is divided into 3 parts. Firstly, the chapter highlights whether state parties have the duty implement the Rome Statute. Since the Rome Statute is silent on how it should be implemented, the first part also examines the various methods adopted by states to give effect to the provisions of the Statute in order to establish whether there is a preferable method to that effect.

Secondly, an analysis of what needs to be implemented by states follows, particularly focussing on; 1) legislative measures by identifying the provisions of the Rome Statute which need to be incorporated in the national implementing legislation and; 2) on non-legislative measures such as the capacity of institutions for enforcing such legislation. It is contended that irrespective of the method used by states to implement the Rome Statute, the legislative and non-legislative measures undertaken by states should sufficiently enable domestic proceedings for ICC crimes.

---

[1] This is the case except for provisions on cooperation with the ICC and penalising crimes against the administration of justice, see Rome Statute, arts 88 and 70(4)(a) respectively.

[2] Under the Vienna Convention on the Law of Treaties, (adopted 23 May 1969, came into force 27 January 1980)1155 UNTS 331 , art 26 it is provided that every treaty binds state parties and must be performed in good faith.

[3] Mark E. Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties: Beyond the Vienna Convention* (Oxford University Press 2011) 105-122, 109.

[4] Lisa J. Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 *The John Marshall Law Review* 635-680, 668-669 and Olympia Bekou, 'The ICC and Capacity Building at the National Level' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1245-1258, 1249.

Thirdly, the chapter examines the obstacles that curtail domestic implementation of the Rome Statute such as immunity, statutes of limitations, non-retroactivity and amnesty clauses, as well as highlights the non-legislative obstacles. Lastly is the conclusion that state parties to the Rome Statute have the primary responsibility to ensure that the Statute is performed in good faith by taking legislative and non-legislative measures to facilitate proceedings for ICC crimes and eliminating obstacles to enable such proceedings.

Part One: The Duty to Implement and Methods of Implementing the Rome Statute

The Rome Statute is silent on whether state parties are under an obligation to conduct proceedings for ICC crimes and does not clearly guide states on how the Statute should be implemented. In view of the principle of complementarity set out in article 1 of the Rome Statute coupled with the jurisprudence of the ICC and the practice of state parties, this part clarifies on whether state parties have the duty to implement the Rome Statute and analysesthe methods used by states in that regard.

2. Do State Parties Have the Duty to Implement the Rome Statute?

The Rome Statute neither provides an explicit obligation for states to investigate and prosecute ICC crimes, nor requires explicitly, enactment of national legislation penalising these crimes. What is clearly stipulated are the requirements that states should enact legislation penalising crimes against administration of justice,[5] as well incorporate procedures in national legislation which facilitate cooperation between the ICC and states parties.[6] Moreover, it is mandatory for these states to cooperate fully with the ICC 'in its investigation and prosecution of crimes within the jurisdiction of the Court.'[7]

Aside these explicit obligations, the Preamble, paragraph 6 of the Rome Statute recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[8]This recognises an existing duty of states to investigate and prosecute crimes of serious concern to the international community as a whole including ICC crimes.To that effect, the Preamble in paragraph 4 provides that the 'most serious crimes of concernto

[5] Rome Statute, art 70(4)(a).
[6] Ibid, art 88.
[7] Ibid, art 86 and Part 9 of the Statute; States which failed to cooperate with the ICC have been referred to the United Nations Security Council or the Assembly of States Parties as evident in *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (9 April 2014).
[8] Rome Statute, Preamble, para 6.

the international community as a whole must not go unpunished and that their effective prosecution must be ensured by undertaking measures at the national level …'[9] This paragraph has been interpreted as imposing a positive obligation to ensure that effective prosecution takes place domestically.[10]

One criticism made against this view is that the Preamble neither clarifies 'the jurisdictional scope of this "duty" nor reinforce this duty 'by any operative provision in the Statute'.[11] In essence, an explicit provision should have been incorporated in the Rome Statute to create a positive duty of states to prosecute ICC crimes if that was the intention of the drafters of the Statute. No such duty was set out in the operative provisions of the Statute to create a binding obligation on state parties to investigate and prosecute ICC crimes which brings into question the assertion that there is a positive obligation to prosecute these crimes.

Moreover, it is still unclear whether there exists a general duty imposed on states to prosecute 'international crimes' as set out in paragraph 6 of the Preamble. What is clear though is that there are certain conventions providing for a duty to prosecute certain crimes. These include the Geneva Conventions (with respect to grave breaches) and the Torture Convention that set out the duty 'to extradite or prosecute' (*aut dedere, aut judicare*).[12] It is contended that save for treaties which expressly create the duty to prosecute specific international crimes, it may not be possible to prove the existence of such a duty under customary international law or using state practice with respect 'international crimes' in general.[13]

---

[9] Ibid, Preamble, para 4.

[10] Mohamed M. Al Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 218.

[11] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn Cambridge University Press 2014) 78; see also Payam Akhavan, 'Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes' (2010) 8(5) *Journal of International Criminal Justice* 1245-1266, 1248.

[12] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31, art 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85, art 50; Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135, art 129 and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, art 146 (hereinafter, Geneva Conventions). See also the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (hereinafter, Torture Convention) art 7(1) and the case of *Questions Relating to the Obligation to Prosecute or Extradite* (*Beligium v Senegal*) ICJ General List No. 144, ICJ Reports 2012, at 422 (Judgment, 20 July 2012) where this obligation is discussed in relation to the Torture Convention.

[13] See also Cryer, et al, above n 11, 570 and 77.

Other scholars argue that the prembular provisions 'recall pre-existing obligations under general international law rather than create new treaty-based obligations'.[14]As mentioned already, reference is made to other international treaties[15] and perhaps customary international law which provide for the duty to prosecute certain international crimes including ICC crimes. The view above has been criticised by Payam Akhavan as 'haphazard and disjointed'[16] though he agrees, like some scholars, that there is an emerging duty to prosecute crimes committed on the territory of a state.[17] This appears to be based on the recognition of the sovereign right of each state to prosecute crimes committed on its territory.

This study argues that in accordance with the Vienna Convention on the Law of Treaties, the Rome Statute is binding upon state parties and must be performed in good faith.[18] Besides, the Rome Statute must be interpreted as per the ordinary meaning within the context and in light of its object and purpose.[19]To this effect,the Preamble may be used to interpretprovisions of the Rome Statute[20]but as mentioned above preambular provisions do not create a positive duty on states to prosecute ICC crimes in the absence of an explicit provision in the operative part of the Statute.

Some scholarsclaimthat 'the Preamble clearly reflects a *mandatory role* of national criminal jurisdictions in the investigation and prosecution of international crimes'.[21]This is questionable because to grant the Preamble a legally binding force seems to place it on equal footing with the operative part of the Rome Statute.Arguably, while the Preamble forms 'an integral part of the treaty',[22] it may not create legally enforceable obligations on state parties. In essence, state parties to the Rome Statute are not obliged to investigate and prosecute ICC

[14] Beth Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10(1) *Journal of International Criminal Justice* 133-164, 154.
[15] See for example, the Geneva Conventions, above n 12, GC I, art 49; GC II, art 50; GC III, art 129 and GC IV, art 146. See also the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention) (1948) 78 UNTS 277, arts I, IV and V; and the Torture Convention, above n 12, art 7(1).
[16] Akhavan, above n 11, 1250.
[17] Ibid, 1262; see also Cryer, et al, above n 11, 78 and Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn Oxford University Press 2014) 79.
[18] Vienna Convention on the Law of Treaties, above n 2, art 26.
[19] Ibid, art 31(1). The object and purpose of the Rome Statute is 'to put an end to impunity' and to ensure that 'the most serious crimes of concern to the international community as a whole' do not go unpunished. See Rome Statute, Preamble, paras 5 and 4 respectively; see also *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Judgment on Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', (ICC-01/04-01/07 OA 8) The Appeals Chamber (25 September 2009) para 79.
[20] Vienna Convention on the Law of Treaties, above n 2, ibid, art 31(2) read together with art 31(1).
[21] Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 238. At 239 it is stated that the Preamble has a 'legally binding' force as the 'provision in the operative part'.
[22] Max H. Hulme, 'Preambles in Treaty Interpretation' (2016) 164(5)*University of PennsylvaniaLaw Review* 1281-1343, 1305.

crimes. As noted already, the duty to prosecute specific international crimes is explicitly set out in other conventions and notin the Rome Statute.

It is contended the Preambular provisions of the Rome Statute mentioned above merely reinforce an existing duty to prosecute international crimes.Such a duty may be exercised by a state on whose territory the crimes were committed or perhaps by a state whose nationals are alleged to have committed such crimes. Therefore, states are only obliged to implement the cooperation provisions of the Rome Statute[23] and not the substantive provisions. The section that follows discusses the methods adopted by state parties to incorporate provisions of the Rome Statute in national legislation.

3. Implementing the Rome Statute in the Practice of ICC State Parties

It is noteworthy that both monist and dualist states[24] require implementing legislation since some of the provisions of the Rome Statute like the cooperation provisions are not self-executing[25] that is, such provisions cannot be enforced directly by national courts without implementing legislation.[26] In fact, implementing legislation is contemplated in the Rome Statute, specifically, article 88 provides that '[s]tates parties shall ensure that there are procedures available under their national law for all of the forms of cooperation' set out under Part 9 of the Rome Statute. Perhaps that is why states such as the Netherlands, the Republic of Korea and the Democratic Republic of Congo, which permit direct application of international treaties in national legislation,[27] have enacted national implementing legislation notwithstanding their monist legal systems.[28]Arguably, irrespective of whether a state is a

[23]Rome Statute, art 88.

[24]Under the monist system, international law is applied directly in national law as a single body of law where international law is treated as supreme which is not the case in a dualist system where states treat international law and national law as separate systems of law. Thus, in a monist system international law is incorporated in national law and a state may not be required to pass legislation to enforce treaty obligations in national courts as the case in a dualist system. See generally, Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (6th edn Oxford University Press 2016) 103-135; Malcolm N. Shaw, *International Law* (6th edn Cambridge University Press 2008) 131-194; James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012) 48-50 and Anthony Aust, *Modern Treaty Law and Practice* (2nd edn Cambridge University Press 2007) 145-15.

[25] A treaty is self-executing if 'the nature and content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures for implementation…' See Erika de Wet, 'The Reception of International Law in South African Legal Order: An Introduction' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 23-50, 34.

[26] See also Olympia Bekou and Sangeeta Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6(3) *Human Rights Law Review* 499-544, 504.

[27] The Constitution of the Netherlands (2008), art 93, Constitution of the Republic of Korea (1948), art 6(1) and Constitution of the Democratic Republic of the Congo (2005), art 215.

[28] These states have adopted implementing legislation that is, the Netherland's International Crimes Act (2003); Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007) and for the DRC, the implementing legislation was adopted by Parliament in 2015, see 'DRC: Parliament Votes to

monist or dualist, every state party to the Rome Statute will have to enact or amend existing legislation setting out procedures which facilitate cooperation with the ICC.

In section 1above, it was noted that states have the discretion to determine how best to implement the Rome Statute. Taking into consideration of the differences in the legal systems and specific national requirements such as adherence with the principle of legality,[29] states have used different methods in implementing the Rome Statute to incorporate provisions of the Statute in national law. The chapter draws from examples of national legislation of both monist and dualist states[30] to examine the different ways through which states have given effect to the provisions of the Rome Statute. The selection of examples is not intended to provide a systematic approach to implementation but highlights the variations in the methods used by state parties to the Rome Statute to implement its provisions.

Different approaches have been used by states to give effect to the provisions of the Rome Statute in national legislation. Some states opted to enact new or amend existing legislation to enable national criminal jurisdictions to investigate, prosecute and punish ICC crimes, as well as provide procedures for cooperating with the ICC. With respect to enacting new legislation, the approach of states varies whereby some states have a single legislation containing both the cooperation provisions and provisions enabling domestic proceedings for ICC crimes (complementarity provisions).[31] Other states have separate legislation for complementarity and cooperation provisions.[32]

Adopt ICC Implementation Law', available <https://blog.casematrixnetwork.org/toolkits/eventsnews/news/drc-parliament-votes-to-adopt-icc-implementation-law/?doing_wp_cron=1434052380.3540649414062500000000>last visited, 30 August 2017.

[29] The principle of legality is to the effect that conduct which triggers criminal responsibility must constitute a criminal offence under national or international law at the time it was committed. See the International Covenant on Civil and Political Rights (hereinafter, ICCPR) (1966), 999 UNTS 171, art 15(1); Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, European Convention on Human Rights (ECHR) (1950), 213 UNTS 221, art 7(1); American Convention on Human Rights (hereinafter, ACHR) (1969), 1144 UNTS 123, art 9 and African Charter on Human and Peoples' Rights (hereinafter, Banjul Charter) (1982) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58, art 7(2).

[30] Examples were drawn from legislation of more than 35 state parties to the Rome Statute including Uganda, Kenya, South Africa, Democratic Republic of Congo, Mauritius, Japan, Philippines, Korea, Bangladeshi, Samoa, Cambodia, Poland, Croatia, Bosnia and Herzegovina, Costa Rica, Trinidad and Tobago, the Netherlands, Switzerland, Greece, Belgium, Liechtenstein, Portugal, Spain, Sweden, Australia, Canada, United Kingdom, Ireland, Denmark, Finland, Austria, Germany, Malta, New Zealand and Norway.

[31] See for example, Samoa's International Criminal Court Act (2007); Trinidad and Tobago's International Criminal Court Act (2006); New Zealand's International Crimes and International Criminal Court Act (2000); Mauritius's International Criminal Court Act (2011); United Kingdom's International Criminal Court Act (2001); Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, adopted by Law 3003/2002 (A '75) and Ireland's International Criminal Court Act (2006).

[32] See for example, Netherlands' International Crimes Act (2003) for complementarity provisions and the International Criminal Court Implementation Act (2003) for enabling cooperation with the ICC. Other states like Australia and Norway have enacted implementing legislation, as well as amended existing national legislation to incorporate ICC crimes. See Australia's Criminal Code Act (1995) as amended by the International Criminal Court (Consequential Amendments) Act (2002), Schedule 1, Division 268 and the International Criminal Court

Apparently, no single approach is taken by states to give effect to the provisions of the Rome Statute but it is vital that both the cooperation and complementarity provisions of the Statute are incorporated in national law. The methods adopted by states to incorporate these provisions include; 1) using existing ordinary legislation; 2) complete incorporation either by a) reference to relevant provisions of the Statute or, b) by copying the wording of the Statute; 3) through modified incorporation; and 4) using combinations of different methods.[33]

3.1. Using Existing Legislation

States parties to the Rome Statute may opt not to incorporate provisions of the Statute into national legislation but simply use existing legislation which provides for ordinary crimes to prosecute perpetrators of ICC crimes. This method has been referred to as the 'traditional and minimalist approach' used by some states to apply ordinary penal provisions which correspond to international crimes.[34] Penalising ICC crimes as ordinary crimes is not prohibited under the Rome Statute and as noted above, there is no explicit obligation to incorporate such crimes in national legislation. Besides, relying on ordinary legislation is advantageous in that a state need not draft new legislation to incorporate relevant provisions of the Rome Statute. Note should be taken that such legislation may not conform to the provisions of the Rome Statute since ICC crimes are different from ordinary crimes. This is due to the heinous nature of ICC crimes which require proving additional elements to determine the liability of a person for such crimes.[35]

However, where existing legislation is consistent with the provisions of the Rome Statute, then no problem arises in applying such legislation to criminalise and punish ICC crimes. In fact national legislation of some states already incorporated the crime of genocide as set out under the Genocide Convention[36] which is similar to the definition under the Rome Statute. In this case, there is no need to redraft the definition of genocide since the same

---

Act (2002) as amended. See also Norway's Penal Code (2005) Chapter 16, secs 103-109 and Act No. 65 of 15 June 2001 relating to the Implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law.

[33] See generally, Werle and Jessberger, above n 17, 146-150, Gerhard Kemp, 'The Implementation of the Rome Statute in Africa' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds), *Africa and the International Criminal Court* (T.M.C. Asser Press 2014) 61-77, 63-64; Roger O'keefe, *International Criminal Law* (Oxford University Press 2015) 361-370 and Stéphane J. Hankins, 'Overview of Ways to Import Core International Crimes into National Criminal Law' in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010) 5-12, 7-10.

[34] Hankins, ibid, 7.

[35] Refer to section 4.1.1 on substantive crimes under the Rome Statute.

[36] Genocide Convention, above n 15, art II. See also Antigua and Barbuda's Genocide Act (1975), sec 3(1); Belize's Genocide Act (1971), sec 2(1) and Grenada's Genocide Act (1972), sec 2(1).

conduct is penalised under national legislation. States with legislation which appear not to sufficiently cover the conduct penalised under the Rome Statute may need to make necessary amendments to ensure that ICC crimes are fully incorporated in national law[37] or else, they may not have jurisdiction over ICC crimes as set out under the Rome Statute.

States like Norway initially relied on the 1902 Penal Code of Norway which 'contained offences that could cover the international core crimes in substance'[38] but not the same conduct penalised internationally. As a result, Norway could not prosecute crimes like genocide due to inadequate legislation. This is evident in the case of *The Prosecutor v Michel Bagaragaza* where the International Criminal Tribunal for Rwanda (ICTR) denied a request for referral of the case to Norway since Norway did not have any provision against genocide in its domestic criminal law.[39] Likewise, Norway would not be able to prosecute the crime of genocide as set out in the Rome Statute because different conduct was penalised under the 1902 Penal Code. To enable Norway prosecute crimes such as genocide, it amended its Penal Code in 2005 by incorporating definitions of ICC crimes[40] thereby entrusting Norwegian criminal systems with jurisdiction over such crimes.

This demonstrates that reliance on existing criminal legislation for ordinary crimes is not suitable where such legislation narrowly covers the conduct penalised under the Rome Statute[41] or imposes insufficient penalties not reflecting the gravity of the ICC crimes. Consequently, a case may be declared admissible before the ICC owing to the inability of the state to prosecute the same conduct as prosecuted by the ICC. Thus, state parties to the Rome Statute are encouraged to incorporate the definitions of ICC crimes, either by amending existing legislation as evident in the case of Norway, or using other methods discussed below to enable national courts exercise jurisdiction over such crimes.

3.2. Complete Incorporation

This method involves incorporation of relevant provisions of the Rome Statute in national legislation in entirety. For example, where similar definitions of crimes and other provisions

[37] Such legislation includes Albania's Criminal Code (1995), arts 74-75 with respect to crimes against humanity and war crimes; Estonia's Penal Code (2001), § 89(1) with respect to crimes against humanity and Finland's Criminal Code (1889), sec 3 with respect to crimes against humanity.
[38] Julia Selman-Ayetey, 'Universal Jurisdiction: Conflict and Controversy in Norway' in Kevin Jon Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 267-285, 270.
[39] *The Prosecutor v Michel Bagaragaza*, 'Decision on the Prosecution Motion for Referral to the Kingdom of Norway', (ICTR-2005-86-*R11*bis) ICTR Trial Chamber III (19 May 2006) paras 13 and 16.
[40] Norway's Penal Code, above n 32, secs 103-109.
[41] Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1(1) *Journal of International Criminal Justice* 86-113, 96-97.

such as the general principles of criminal law are set out in national legislation as provided for under the Rome Statute. This in effect facilitates development of similar standards for prosecuting perpetrators of ICC crimes as applied by the ICC. Complete incorporation may be effected either by reference or copying as examined below.

3.2.1. Incorporation by Reference

The Rome Statute may be implemented by states simply referring to its provisions without rewriting the provisions in national legislation. In effect, the provisions apply directly as set out in the Rome Statute hence easing the work of legislators since it involves less expertise and resources.[42] Moreover, this prevents discrepancies with the Rome Statute and ensures that similar conduct is penalised by states as set out in the Statute. This method has been adopted by states such as New Zealand, Mauritius, United Kingdom, Kenya, Bosnia and Herzegovina as well as Ireland.[43] The implementing legislation of these states defines ICC crimes by reference to articles 6 to 8 of the Rome Statute.

The main problem with this method is that it may not be suitable in states where national constitutions require written law to clearly set out the criminal responsibility of an individual.[44] Besides, the requirement of specificity is not fulfilled by merely referring to the provisions of the Rome Statute. This is evident in the penalty provisions of the Rome Statute which lack specific penalties for each category of ICC crimes.[45] Consequently, such penalties cannot be enforced at the national level without reference to other legislation for determining the appropriate sentences for different categories of crimes.

Although the penalties set out under the Rome Statute do not prejudice national law penalties[46] it is important that the national implementing legislation sufficiently provides for the criminalised conduct and clearly sets out the penalties imposed for each crime. This eases enforcement of legislation by national courts and sufficiently notifies the person of the prohibited conduct and punishment in event of breach of the law.

---

[42] Bekou and Shah, above n 26, 509.

[43] New Zealand's International Crimes and International Criminal Court Act (2000) secs 9(2), 10(2) and 11(2); Mauritius's International Criminal Court Act (2011), sec 2; United Kingdom's International Criminal Court Act (2001), sec 50(1); Kenya's International Crimes Act (2008), sec 6(4) (with respect to genocide and war crimes); Bosnia and Herzegovina's Law on Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court (2009), art 2 and Ireland's International Criminal Court Act (2006), sec 6(1) which refers to arts 6 to 8(2) (except for subparagraph (b)(xx)).

[44] Werle and Jessberger, above n 17, 147.

[45] Rome Statute, art 77(1); see also Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10(1) *Criminal Law Forum* 1-32, 6.

[46] Rome Statute, art 80.

3.2.2. Incorporation by Copying

This method entails complete incorporation where provisions of the Rome Statute are incorporated in national law *verbatim* or using identical wording which is also referred to as 'static transcription'.[47] Unlike incorporation by reference, this method entails drafting the relevant provisions of the Rome Statute but in the same words. In effect, legislators merely incorporate provisions of the Rome Statute by copying these provisions. The advantage of this method is that similar standards for investigating and prosecuting ICC crimes are applied by states as the ICC. States which have taken this approach include the Netherlands, Lesotho and Malta[48] which enables national authorities to investigate and prosecute similar conduct as set out in the Rome Statute.

The main problem with this method is that it is too specific and this may prevent national courts from considering new developments in international law when adjudicating ICC crimes.[49] Besides, states are limited to the crimes set out in the Rome Statute hence omitting several crimes not covered by the Statute for example, certain categories of war crimes such as the use of biological weapons, anti-personnel land mines and blinding laser weapons.[50] Similar to incorporation by reference discussed above, copying the penalties set out in the Rome Statute may not satisfy the requirements of the principle of legality due to lack of specific penalties for each category of ICC crimes. Thus, a judge may need to refer to other penal legislation to determine suitable punishment which may take more time.

Therefore, using the method of complete incorporation enables states to create provisions which are consistent with the Rome Statute. However, this method limits states' legislative capacity to what the Rome Statute provides for and some provisions may not satisfy the principle of legality. Notwithstanding these shortcomings, this method may be appropriate for states which lack national capacity to draft comprehensive legislation since it simply requires reproducing provisions of the Rome Statute. In other words, the method simplifies the drafting process as national authorities incorporate provisions that have already been drafted, unlike modified incorporation considered below, which is somewhat difficult.

---

[47] Hankins, above n 33, 8.

[48] Netherlands' International Crimes Act (2003), sec 4(1)-(2); Lesotho's Penal Code Act (2010), sec 94(1)-(2) and Malta's Criminal Code (1854), art 54C, all concerning crimes against humanity which copy article 7 of the Rome Statute.

[49] Hankins, above n 33, 8.

[50] Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes' (2003) 7 *Max Planck Yearbook of United Nations Law* 341-407, 345-347.

3.3. Modified Incorporation

This method entails redefining, reformulating and redrafting conduct criminalised under the Rome Statute also known as 'dynamic transcription'[51] to reflect new developments in international law. In effect, national legislation may be amended to incorporate relevant provisions of the Rome Statute as well as other provisions of related treaties and norms of customary international law. A comprehensive piece of legislation could be developed which incorporates international criminal law and at the same time, takes into consideration of the requirements of the national legal system.[52]

The advantage of this method is that it enables states to legislate beyond what the Rome Statute provides for. This is not prohibited as the Rome Statute merely sets the minimum standards and states have the right to legislate whatever is deemed appropriate.[53] Basically, a state could retain its national legal norms distinctive to its legal system and incorporates relevant provisions of the Rome Statute to give effect to the Statute. Moreover, this method could possibly enhance accessibility and enforcement of legislation by national courts when reference is made to a single comprehensive legislation.

Some states have used this method for example Germany in its Code of Crimes Against International Law (2002). This legislation has been described as comprehensive since it adapts fully the substantive criminal law of Germany to the Rome Statute definitions of ICC crimes as well as incorporates crimes under international law not set out in the Statute.[54]This is evident in the definitions of some crimes such as persecution which is defined in broad terms under section 7(10) of the Germany's Code of Crimes Against International Law (2002). This is due to the fact that the legislation does not require connecting the act with any other crime against humanity or genocide or war crime as required under the Rome Statute.[55] More so, legislation of some states including Lithuania, Bangladeshi and Philippines define genocide to include other categories of protected groups beyond the four groups set out under article 6 of the Rome Statute.[56] However, this method is time-consuming for legislators since

[51] Hankins, above n 33, 8.
[52] Werle and Jessberger, above n 17, 148.
[53] Kleffner, above n 41, 100.
[54] Gerhard Werle and Florian Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law', (2002) 13(2) *Criminal Law Forum* 191-223, 200 and Claus Kreß, 'The German Model' in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010) 19-22, 19.
[55] See Rome Statute (1998), art 7(1)(h).
[56] See the Criminal Code of Lithuania (2000), art 99; Bangladesh's International Crimes (Tribunals) Act (1973), sec 3(2)(c) and Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 5(a).

a lot of research needs to be done to determine the current state of international law and accordingly review national legislation to reflect that position.[57]

3.4. Using Combinations of Methods

This method, also known as the 'mixed approach',[58] entails combining various methods discussed above depending on the specific needs and local circumstances of each state. A state may opt to incorporate the definitions of ICC crimes as set out in the Rome Statute by copying but then provide specific penalties for each crime. In the same legislation, a state may refer to relevant provisions of the Rome Statute to incorporate the general principles of criminal law. Such combinations of methods are not prohibited provided that the provisions are consistent with the Rome Statute.

States like New Zealand, United Kingdom and Kenya have used this method whereby they completely incorporated the definitions of ICC crimes by simply referring to relevant provisions of the Rome Statute.[59] For the case of New Zealand and Kenya, provisions like the general principles of criminal law set out in the Rome Statute are applicable together with national principles of criminal law.[60] In case of inconsistencies between the principles of criminal law under the Rome Statute with national law principles, priority is given to the provisions of the Rome Statute.[61] For the case of the United Kingdom, the general principles of criminal law provided under the Rome Statute are not incorporated in the implementing legislation. In effect, United Kingdom's national implementing legislation permits application of the general principles of the law of England and Wales to determine criminal liability.[62] However, it is questionable whether national law principles are sufficiently similar to those contained in the Rome Statute.[63]

Other states including Canada, Samoa and Kenya have set out specific definitions of ICC crimes in the implementing legislation and at the same time permitted determination of the constitutive elements of these crimes in accordance with international law including

[57] Hankins, above n 33, 8-9.
[58] Ibid, 9.
[59] New Zealand's International Crimes and International Criminal Court Act (2000), secs 9(2), 10(2) and 11(2); United Kingdom's International Criminal Court Act (2001), sec 50(1) and Kenya's International Crimes Act (2008), sec 6(4).
[60] New Zealand's ICC Act, ibid, sec 12(1)(a)-(c); Kenya's ICC Act, ibid, sec 7(1) and 7(2)(a)-(b).
[61] New Zealand's ICC Act, ibid, sec 12(3) and Kenya's ICC Act, ibid, sec 7(2)(b)(i).
[62] United Kingdom's International Criminal Court Act (2001), sec 56(1).
[63] Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales' (2007) 5(2) *Journal of International Criminal Justice* 441-459, 445-447.

customary and conventional international law.[64] By providing the definitions and penalties for ICC crimes[65] claims for breach of the principle of legality are avoided. At the same time, recognising international law definitions of ICC crimes enables penalisation of conduct not covered under the Rome Statute. It is argued that states have the discretion to define crimes more broadly in their domestic law subject to the principle of legality. This may strengthen national legislation since new developments in international law could be considered without the need to amend the legislation. Thus, where a state uses combinations of methods to define ICC crimes, it creates options for national authorities to define such crimes in keeping with the provisions of the Rome Statute and also take into consideration of new developments in the law.

Overall, part one of the section has discussed the different methods used by states to give effect to the provisions of the Rome Statute. While some states incorporated provisions as set out in the Statute *verbatim*, other states opted to modify the provisions of the Rome Statute by redrafting these provisions to include national and international law principles. More so, other states adopted combinations of methods depending on the subject matter and the interests of each state.

It is contended that using combinations of methods appears to be the most appropriate way for enabling states to give effect to their obligations under the Rome Statute. This is because states may use complete incorporation with respect to the definitions of ICC crimes to ensure that the same conduct is criminalised domestically as the ICC. With respect to other provisions such as the general principles of criminal law and jurisdiction, states may use modified incorporation to ensure that the minimum standards of the Rome Statute are incorporated as well as permit the application of national and international law principles. No particular method is ideal, it all depends on the subject matter in question and whether the state may be in position to implement the Rome Statute. Therefore, states should comprehensively implement the Rome Statute to enable domestic investigations and prosecutions of ICC crimes, as well as facilitate state cooperation with the ICC. The Part which follows examines what needs to be incorporated in the national implementing legislation and the need for adequate institutional framework to enforce the legislation.

[64] See for example, Canada's Crimes Against Humanity and War Crimes Act (2000), secs 4(3) and 6(3) and Samoa's International Criminal Court Act (2007), secs 5(2), 6(2) and 7(2) with respect to definitions for all ICC crimes, as well as Kenya's International Crimes Act (2008), sec 6(4) with respect to crimes against humanity. See also Costa Rica's Criminal Prosecution to Punish War Crimes and Crimes against Humanity, Decree No. 8272 of 2002, arts 378 and 379.

[65] Canada's ICC Act, ibid, secs 4(1) and 4(2); Samoa's ICC Act, ibid, secs 5(1), 5(3), 6(1), 6(3), 7(1) and 7(3) and Kenya's ICC Act, ibid, sec 6(3).

Part Two:

4. What Needs to be Implemented?

Adjudicating international crimes is complex as it involves broad legal regimes of both international and national laws and this may lead to disparity in interpreting and applying that law by national courts.[66] To minimise inconsistencies in adjudicating ICC crimes, it is important that relevant substantive criminal law provisions of the Rome Statute are incorporated in national legislation to ensure that similar conduct is punished at the national level. In event that states fail to act, procedures should be available in national legislation to enable state cooperation with the ICC to facilitate proceedings before this Court.

However, having enabling legislation is not enough without the necessary institutional frameworks to enforce the legislation. In essence, states should have the necessary legislative and institutional capacity[67] to ensure that domestic proceedings for ICC crimes are conducted, as well as facilitate state cooperation with the ICC.[68] This section argues that effective implementation of the Rome Statute by states requires adequate legislation and institutions such as courts, the police and prosecuting authorities, not only to enforce the legislation but also execute requests for assistance from the ICC

4.1. Legislative Measures

The section examines the legislative measures to be undertaken by states to implement the Rome Statute focussing on the provisions of the Statute which need to be included in national legislation. Such provisions include; i) substantive crimes within the jurisdiction of the ICC; ii) penalties for ICC crimes; iii) the principle of individual criminal responsibility and defences; iv) jurisdiction and v) cooperation. These provisions are important because as noted above, the Rome Statute requires states to incorporate procedures in national law to facilitate cooperation with the ICC. Besides, the creation of the ICC as a court of last resort implicitly confers primary jurisdiction on states to investigate and prosecute ICC crimes which requires enabling legislation and institutions to facilitate such proceedings.

---

[66] Antonio Cassese, Paola Gaeta and Others (rev edn), *Cassese's International Criminal Law* (3rdedn Oxford University Press 2013) 268.

[67] Morten Bergsmo, 'Preface by the Series Editor' in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010) iii-iv, iii and Olympia Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in Triestino Mariniello (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015) 133-146, 134.

[68] Rome Statute, art 86 which provides for the general obligation to cooperate with the ICC.

4.1.1. Substantive Crimes under the Rome Statute

The Rome Statute does not explicitly require states to incorporate the substantive crimes set out in articles 6 to 8 of the Statute but as explained above, it is necessary for a state to criminalise the same conduct as contained in the Rome Statute in order to exercise jurisdiction over ICC crimes. In essence, national implementing legislation of states should as much as possible reflect the definitions of ICC crimes provided under the Rome Statute. This is important because unlike ordinary crimes, ICC crimes have additional elements which must be proved including the context within which the crimes are committed, intent, scale and gravity of the crimes.[69] This section does not purport to give an exhaustive discussion of ICC crimes but only provides an overview of the elements of these crimes to distinguish between ICC crimes and ordinary crimes hence justifying the incorporation of ICC crimesin national legislation asset out under the Rome Statute.

A. Genocide

The Rome Statute under article 6 provides for the definition of genocide which is similar to article II of the Genocide Convention.[70] The crime of genocide is proved by adducing evidence that any of the acts of genocide[71] was committed against a person or persons belonging to any of the four protected groups[72] coupled with the specific intention to destroy members of such a group in whole or in part.[73] The Elements of Crimes introduces a contextual element of proving that the 'conduct took place in the context of a manifest pattern of similar conduct directed against a group…'[74] These elements distinguish the crime of genocide from ordinary crimes and as such, a state can only exercise jurisdiction over genocide where these elements are set out in national legislation.[75]

Note should be taken that the definition of genocide under article 6 of the Rome Statute is limited to four groups (national, ethnical, racial or religious group) which excludes other groups such as political and social groups. The same definition appears to be recognised

[69] William Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 22 and Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Journal* 85-133, 100.

[70] Genocide Convention, above n 15, art II. Genocide is defined to mean any of the acts enumerated in this article 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'

[71] Rome Statute, art 6(a)-(e) provides for the list of prohibited acts.

[72] These are categorised as national, ethnical, racial and religious groups, see Rome Statute, art 6 and Elements of Crimes, Element 2 of each alternative act.

[73] Rome Statute, art 6 and Elements of Crimes, Element 3 of each alternative act. See also *The Prosecutor v Ignace Bagilishema*, (ICTR-95-1A-T) ICTR Trial Chamber I (7 June 2001) para 55.

[74] Elements of Crimes, art 6, with respect to each alternative act.

[75] *The Prosecutor v Michel Bagaragaza*, above n 39, as discussed above.

under international law[76] though national implementing legislation of some states broadly defines genocide to encompass other groups which is broader than what the Rome Statute provides for.[77] As explained above, this is not prohibited since the Rome Statute merely sets the minimum standards and a state has the discretion to penalise any conduct it deems fit.However, it is problematic where a state incorporated the definition of genocide which is narrower than the definition set out under the Rome Statute for instance, where the definition does not require proving specific intent to destroy the group as such or where more acts are punishable as genocide.[78] Thus, state parties to the Rome Statute need to incorporate the minimum standards set out in the Statute.

B. Crimes Against Humanity

Crimes against humanity are defined under article 7 of the Rome Statute which sets out 11 acts categorised as such.[79] Crimes against humanity are committed when any of the acts enumerated in article 7(1) are committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' An attack has been defined under article 7(2)(a) of the Rome Statute to mean 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.'[80]

Thus, evidence must be adduced to the effect that; firstly, the attack was of a widespread or systematic nature. By widespread attack, it means a large-scale nature of the attack involving multiple victims and 'systematic' refers to the organised nature of the attack, following a regular pattern, its non-accidental and non-isolated nature. [81] Secondly, the attack must be directed against civilian population that is, persons who are not members of armed

[76] In *Vasiliauskas v Lithuania* (Application No. 35343/05) ECHR Grand Chamber (20 October 2015) para 175.
[77] See above n 56.
[78] See generally Olympia Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012)10 *Journal of International Criminal Justice* 677-691, 679-683.
[79] Rome Statute, art 7(1)(a)-(k).
[80] Ibid, art 7(2)(a). See also *The Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', (ICC-01/05-01/08) Trial Chamber III (21 March 2016) para 149 which defines an attack as a 'campaign or operation carried out against the civilian population' covering a series of events and may not necessarily be a military attack.
[81] *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, 'Decision on Defence Applications for Judgments of Acquittal', (ICC-01/09-01/11) Trial Chamber V(A) (5 April 2016), Dissenting Opinion of Judge Herrera Carbuccia, paras 40-41; see also *The Prosecutor v Germain Katanga*, 'Judgment Pursuant to Article 74 5of the Statute', (ICC-01/04-01/07) Trial Chamber II (7 March 2014) para 1123 and Darryl Robinson, '"Crimes Against Humanity" at the Rome Conference' (1999) 93(1) *The American Journal of International Law* 43-57, 47.

forces and other legitimate combatants.[82] In effect, proof must be adduced that the victims were not taking active part in hostilities,[83] which may be problematic due to lack of uniform meaning of the concept of taking direct part in hostilities and state practice remains inconsistent in this matter.[84]

Thirdly, evidence must be adduced to show that the accused person had knowledge of the attack and mere knowledge by the accused person that his act formed part of the attack suffices irrespective of whether the person had knowledge of the details of the attack.[85] Moreover, such knowledge may be inferred from circumstantial evidence including the accused's position in the military, his presence at the scene of crimes, as well as the general historical and political environment in which the crimes were committed.[86] Lastly, the attack must have involved multiple commission of acts against the civilian population in pursuance of a State or organisational policy.[87] These elements must be proved for crimes against humanity which distinguishes such crimes from ordinary crimes due to the multiplicity of crimes, victims and perpetrators, as well as the involvement of the state or an organisation.

One of the problems likely to arise in enforcing the legislation is proving the element of state or organisational policy which still lacks clear interpretation.[88] Neither the Rome Statute nor the Elements of Crimes define the term 'state or organisational policy'. The interpretation of the term has been left to the ICC which still does not have a clear definition as exhibited in Kenyan cases before this Court. For example, Judge Hans-Peter Kaul argued that the attack against the civilian population must be attributed to 'a state-like "organisation"' which is 'the intellectual author' or which 'endorsed a policy to commit the attack'.[89] In his view, the

[82] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (hereinafter, Additional Protocol I), art 50.
[83] See also *Jean-Pierre Bemba Case*, above n 80, para 94.
[84] Ptrycja Grzebyk, 'Crimes against Civilians during Armed Conflicts' in Bartłomej Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill Nijhoff, 2016) 99-114, 106-109.
[85] *Germain Katanga Case*, above n 81, para 1125 and *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (IT-96-23 & IT-96-23/1-A) ICTY, Appeals Chamber (12 June 2002) paras 102-103.
[86] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Confirmation of Charges', (ICC-01/04-01/07) Pre-Trial Chamber I (30 September 2008) para 402.
[87] Rome Statute, art 7(2)(a).
[88] Charles Chernor Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (2013) 28(2) *American University International Law Review* 381-441, 284-285 and M. Cherif Bassiouni, Crimes Against Humanity: The Case for a Specialized Convention' (2010) 9(4) *Washington Global Studies Law Review* 575-593, 585.
[89] *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 'Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', (ICC-01/09-01/11) Pre-Trial Chamber II (15 March 2011) para 49.

ethnically-based gathering of perpetrators did not meet the interpretation of such an organisation.[90]

On the contrary, Judge Herrera Carbuccia argued that 'organisation' should be understood as 'a group of persons or an organised body of people with a particular purpose, and enough resources, means and capacity to bring about the commission of crimes.'[91] Thus, she not only disregarded limitation of the term to state-like organisations but also reliance on the form of the structure or the level of organisation.[92] States are likely to encounter similar challenges in interpreting the elements of crimes against humanity due to lack of clear definitions of some concepts set out in the Rome Statute. Nonetheless, this should not stop states from incorporating these definitions in the national implementing legislation.

C. War Crimes

War crimes are provided for under article 8 of the Rome Statute in four categories, firstly, grave breaches of the Geneva Conventions[93] which are violations committed during an international armed conflict against persons or property protected under the Geneva Conventions.[94] Secondly, other serious violations of laws and customs applicable in international armed conflict;[95] thirdly, violations of article 3 common to the Geneva Conventions which apply to non-international armed conflicts;[96] and lastly, other serious violations of laws and customs applicable in non-international armed conflict.[97] Notably, article 8(b) and (e) do not provide an exhaustive list of serious violations of international humanitarian law.[98] Consequently, implementing legislation which incorporates war crimes in the Rome Statute *verbatim* or by reference will similarly omit war crimes not penalised under the Statute. States with such legislation may have to amend the law to exercise jurisdiction over war crimes not contained in the Rome Statute.

To prove the criminal responsibility of a person for committing war crimes, evidence must be adduced to show the existence of an armed conflict whether international or non-international. An armed conflict is deemed to exist 'whenever there is a resort to armed force

[90] Ibid.
[91] *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, above n 81, para 43.
[92] Ibid. She added that the test should be 'whether a group has the capability to perform acts which infringe on basic human values' (ibid).
[93] Rome Statute, art 8(2)(a) with reference to Geneva Conventions, above n 12, GCI, art 50, GC II, art 51, GC III, art 130 and GC IV, art 147.
[94] Dörmann, above n 50, 343-344.
[95] Rome Statute, art 8(2)(b).
[96] Ibid, art 8(2)(c).
[97] Ibid, art 8(2)(e).
[98] Dörmann, above n 50, 348.

between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[99] Whereas in an international armed conflict occurrence of actual hostilities between two states suffices,[100] for the case of a non-international armed conflict[101] there is need to prove that the armed group had some level of organisation to carry out protracted violence.[102] In essence, the violence must have been widespread thereby occasioning grave injuries to the civilian population. The other element which must be proved for the case of grave breaches is that the violations must have been committed against protected persons or property[103] and lastly, that the accused person was aware of the factual circumstances that established the existence of an armed conflict and that his/her acts were associated with the armed conflict.[104] These elements give the context within which war crimes are committed to distinguish such crimes from ordinary crimes.

Different approaches have been taken by states when incorporating the definition for war crimes in national legislation. While some states made reference to the Rome Statute when defining war crimes,[105] other states included more punishable acts not set out in the Rome Statute.[106] As noted above, including more crimes than what is provided for under the Rome Statute is not prohibited since the Statute merely contains the minimum requirements. More so, some states did not distinguish between international and non-international armed conflicts.[107] Other states did not incorporate the jurisdictional threshold of proving that the

[99] *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) (hereinafter, *Tadić Jurisdiction Decision*) para 70 and *The Prosecutor v Thomas Lubanga Dyilo*, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/06) Trial Chamber I (14 March 2012) (hereinafter, *Thomas Lubanga Case*) para 533.

[100] As regards to what amounts to an international armed conflicts, see Geneva Conventions (1949), above n 12, common art 2 and Additional Protocol I, above n 82, art 1(4).

[101] With respect to non-international armed conflicts, see Geneva Conventions (1949), above n 12, common art 3 which provides for internal armed conflicts and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (hereinafter, Additional Protocol II), art 1(1).

[102] *Thomas Lubanga Case*, above n 99, paras 536-538 and Sandesh Sivakumaran 'Identifying an Armed Conflict not of an International Character' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 363-380, 366 and 368-370.

[103] *The Prosecutor v Tihomir Blaškić* (IT-95-14-T) ICTY Trial Chamber (3 March 2000) para 74. Protected persons include the wounded, sick and shipwrecked (see Geneva Conventions (1949), above n 12, GC I and GC II, art 13); prisoners of war (see GC III, Part II); and civilians in the hands of the party to a conflict or occupying powers of which they are not nationals (see GC IV, art 4).

[104] The Elements of Crimes, art 8, Introduction; see also Dörmann, above n 50, 356.

[105] New Zealand's International Crimes and International Criminal Court Act (2000), sec 11(2); Mauritius's International Criminal Court Act (2011), sec 2; United Kingdom's International Criminal Court Act (2001), sec 50(1); Kenya's International Crimes Act (2008), sec 6(4); Samoa's International Criminal Court Act (2007), sec 7(2) as well as Trinidad and Tobago's International Criminal Court Act (2006), sec 11(2).

[106] Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 4(a)(9) concerning unjustifiable delay in the repatriation of prisoners of war or other protected persons.

[107] German's Code of Crimes Against International Law (2002), sec 8.

crimes were 'committed as part of a plan or policy or as part of a large-scale commission of such crimes' as set out under article 8(1) of the Rome Statute.[108] It is believed that this is not a prerequisite for proving war crimes but such factors may be considered by the Prosecutor in determining whether to commence investigations for war crimes.[109] Since the jurisdictional threshold was meant to 'safeguard' the ICC against exercising jurisdiction 'over isolated cases',[110] similarly, states which include such a requirement may not prosecute these cases thereby limiting the domestic implementation of the Rome Statute. Arguably, to ensure that crimes within the jurisdiction of the ICC are investigated and prosecuted domestically, states need to incorporate the definitions of ICC crimes by reference to the Rome Statute which sets the minimum standards.

In sum, some states have completely incorporated definitions of ICC crimes by reference to articles 6 to 8 of the Rome Statute,[111] by copying the provisions of Statute[112] and by direct application of the definitions set out under international law.[113] This implies that states are cautious of the need to incorporate similar crimes as provided for in the Rome Statute which ensures consistency of national legislation with the Statute though, as explained previously, such states are limited to what the Rome Statute sets out. This is not the case with respect to other states[114] which redefined ICC crimes to take into consideration the norms of customary international law (and other treaty obligations) not covered by the Rome Statute even though as was noted already, redrafting these provisions may be time-consuming. It is argued that irrespective of the method used to incorporate the definitions of ICC crimes, states should be able to investigate and prosecute the same conduct as set out

[108] Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 4 and Timor Leste Penal Code (2009), art 125.
[109] Dörmann, above n 50, 349; see also *Jean-Pierre Bemba Case*, above n 80, para 126.
[110] Dörmann, ibid.
[111] New Zealand's International Crimes and International Criminal Court Act (2000), secs 9(2), 10(2) and 11(2); Mauritius's International Criminal Court Act (2011), sec 2; United Kingdom's International Criminal Court Act (2001), sec 50(1); Kenya's International Crimes Act (2008), sec 6(4) with respect to genocide and war crimes and Ireland's International Criminal Court Act (2006), sec 6(1) which refers to arts 6 to 8(2) (except for subparagraph (b)(xx)).
[112] Netherlands' International Crimes Act (2003), sec 4(1); Lesotho's Penal Code Act (2010), sec 94(1)-(2) and Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 6, all concerning crimes against humanity which copies art 7 of the Rome Statute.
[113] Canada's Crimes Against Humanity and War Crimes Act (2000), secs 4(3) and 6(3); Samoa's International Criminal Court Act (2007), secs 5(2), 6(2) and 7(2) and Kenya's International Crimes Act (2008), sec 6(4) with respect to crimes against humanity.
[114] Germany's Code of Crimes Against International Law (2002), sec 7(10) relating to persecution; see also the Criminal Code of Lithuania (2000), art 99; Bangladesh's International Crimes (Tribunals) Act (1973), Act No. XIX of 1973, sec 3(2)(c) and Lesotho's Penal Code Act (2010), sec 93, with respect to the definition of genocide.

under the Rome Statute. The section which follows concerns penalties for ICC crimes which need to be specified by states as discussed in detail below.

4.1.2. Penalties for ICC Crimes

The Rome Statute in its article 77 provides for penalties for ICC crimes[115] which some scholars have described as 'brief and vague',[116] as well as 'very general'[117] perhaps due to lack of specificity and certainty as regards to the penalties imposed for the different categories of crimes. However, according to Kai Ambos, the provision 'complies with the *nulla poena* requirements as it is understood in international criminal law' even though it does not fulfil the strict requirements of certainty for penalties under national criminal law.[118]This means that under international law the requirement of specificity of penalties may not be as strict as under national law. Moreover, the ICC is guided by its Rules of Procedure and Evidence to determine the appropriate sentences.[119]Arguably, states which incorporate penalties set out under the Rome Statute should likewise refer to respective national laws on sentencing for determination of specific sentencesfor each category of ICC crimes in order to adhere with the principle of legality.

While some states may choose to incorporate the same penalties as set out in the Rome Statute, they are not under an obligation to apply the penalties prescribed in the Statute.[120]In effect, states have the discretion to impose a range of penalties taking into consideration of the respective national criminal law systems. Due to such flexibility, there are notable variations in the penalties set out in national legislation. In states such as Ireland and the Netherlands, the penalties for ICC crimes are almost similar to the penalties set out in the Rome Statute.[121]

Still, in keeping with the provisions of the Rome Statute, some states imposed life imprisonment as the maximum penalty in their legislation.[122] However, in states like Trinidad

[115] Rome Statute, art 77 provides for a maximum penalty of 30 years imprisonment or 'life imprisonment when justified by extreme gravity of the crime and individual circumstances of the convicted person.' In addition, the Court may impose a fine or forfeiture of proceeds.
[116] Bekou and Shah, above n 26,518.
[117] Kevin Jon Heller, 'The Rome Statute of the International Criminal Court' in Kevin Jon Heller and Markus D. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 593-634, 597.
[118] Ambos, above n 45, 6.
[119] Rome Statute, art 78 and Rulesof of Procedure and Evidence, R. 145.
[120] Ibid, art 80 to the effect that penalties under the Rome Statute do not prejudice penalties under national law.
[121] Ireland's International Criminal Court Act (2006), sec 10(1) for all ICC crimes and the Netherlands' International Crimes Act (2003), secs 3(1) and 4(1) with respect to genocide and crimes against humanity.
[122] Samoa's International Criminal Court Act (2007), secs 5(3), 6(3) and 7(3); Canada's Crimes Against Humanity and War Crimes Act (2000), sec 4(2) (but for intentional killing, life imprisonment is mandatory); Albania's Criminal Code (1995), arts 73-75; the Criminal Law of Latvia (1998), secs 71 and 74; Slovenia's

and Tobago, New Zealand, as well as Kenya, the penalty of life imprisonment is imposed for crimes other than wilful killing, which is penalised as murder in national legislation.[123] Except for the case of New Zealand where the penalty for murder is life imprisonment,[124] national law of Trinidad and Tobago, as well as Kenya penalise murder with the death sentence.[125] This creates a possibility that the death penalty may be imposed where wilful murder is committed in states applying the death penalty.

Although there is a growing trend towards the abolition of the death penalty,[126]some state parties to the Rome Statute have not abolished the death penalty.[127] Besides, there is no rule of international law which abolishes the death penalty for the most serious crimes.[128] Moreover, during the Rome Conference there was no consensus on whether or not the death penalty should be included or excluded in the Rome Statute due to differences in national penal laws.[129] This creates injustice whereby a person convicted of ICC crimes may be penalised with a death penalty by the national court which is not the case for a person who appears before the ICC.

Other than life imprisonment, some states imposed the maximum penalty of imprisonment for a specified number of years[130] and other states including Germany, Australia, Greece, Fiji, Korea and Belgium imposed specific penalties for ICC crimes.[131]Such

---

Criminal Code (2008), art 46(2); Finland's Criminal Code (1889), secs 1(1), 3 and 5(1); Belgium's Act of 5 August 2003 on Serious Violations of International Humanitarian Law, art 9 which inserted art 136 quinquies in the Criminal Code with respect to genocide (art 136 bis) and crimes against humanity (art 136 ter).

[123] Trinidad and Tobago's International Criminal Court Act (2006), secs 9(3), 10(3) and 11(4); New Zealand's International Crimes and International Criminal Court Act (2000), secs 9(3), 10(3) and 11(3), as well as Kenya's International Crimes Act (2008), sec 6(3).

[124] New Zealand's Crimes Act (1961), sec 172(1).

[125] The Constitution of the Republic of Trinidad and Tobago (1976), Act 4 of 1976, sec 89(1) and Kenya's Penal Code, Chapter 63, Laws of Kenya (revised 2010), sec 24(a).

[126] William A. Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn Cambridge University Press 2002) 364 and Daniel David Ntanda Nsereko, *Criminal Law in Uganda* (Wolters Kluwer 2015) 287.

[127] See for example, Bangladesh's International Crimes (Tribunals) Act (1973), sec 20(2); Japan's Penal Code (1907), art 11(1); 1964 Constitution of Malta, art 33(1); Ghana's Criminal Code Act (1960), sec 49A (1); Mongolia's Criminal Code (2002), art 302; Tajikistan's Criminal Code (1998), art 398 and Belize's Genocide Act (1971), sec 2(3).

[128] See for example, ICCPR, above n 29, art 6(2) permits the death sentence.

[129] Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93(1) *The American Journal of International Law* 22-43, 39.

[130] Norway's Penal Code, above n 32, secs 101-109 (30 years imprisonment); Mauritius's International Criminal Court Act (2011), sec 4(1) (45 years); Montenegro's Criminal Code (2003), arts 426, 427 and 428(3) (40 years). For the case of the United Kingdom's International Criminal Court Act (2001), it is sec 53(6) (30 years) but for murder, the convicted person is 'dealt with as for an offence of murder…' (see sec 53(5)), which is mandatory life imprisonment. See John Child and David Ormerod, *Smith and Hogan's Essentials of Criminal Law* (Oxford University Press 2015) 155.

[131] Germany's Code of Crimes Against International Law (2002), sec 6-8; Australia's Criminal Code Act (1995), above n 32, Division 268; Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, arts 7-13; Fiji's Crimes Decree (2009), Divisions 2, 3 and 4 aswell as Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), arts 10-14.

penalties are distinguished from the penalties set out under the Rome Statute[132]due to adherence with the principle of legality as the maximum and minimum sentences for each crime are specified.

All in all, the variation exhibited by states in incorporating the penalty provisions of the Rome Statute seems acceptable and this creates an opportunity for some states to impose the death penalty for certain crimes which leads to inconsistency in the domestic application of penalties for ICC crimes. However, this does not dispel the argument that states should specify penalties for different categories of ICC crimes to ensure effective enforcement of the implementing legislation. The section which follows relates to the incorporation of key principles of criminal liability set out under the Rome Statute into national law.

4.1.3. Individual Criminal Responsibility and Defences

Criminal liability of a person is determined by assessing the specific elements of the crime in question taking into consideration of the relevant principles of criminal law.[133] The Rome Statute provides for several modes of attributing liability to an individual where ICC crimes are committed. It also sets out several defences which exclude liability under certain circumstances as discussed below. This section examines the principles of individual criminal responsibility, responsibility of commanders and other superiors as well as defences to a crime. This is due to the need to establish similar standards for determining criminal liability of a person for ICC crimes and ensure that the defences under national law are not so broad as to shield the person from liability.

A. Individual Criminal Responsibility

Basically, individual criminal responsibility is provided for under article 25 of the Rome Statute as established in the following instances; firstly, where a person commits a crime as an individual, or jointly with another or through another person.[134]This involves three forms of perpetration that is, direct perpetration, co-perpetration and perpetration by means.[135] Secondly, where a person participates in committing ICC crimes through ordering, soliciting or inducing the commission of ICC crimes.[136] Lastly, where the person facilitates commission

[132] Rome Statute, art 77.
[133] Cathleen Powell and Adele Erasmus, 'General Principles of International Criminal Law' in Max du Plessis (ed), *African Guide to International Criminal Justice* (Institute for Security Studies 2008) 143-180, 143.
[134] Rome Statute, art 25(3)(a).
[135] For the distinction between the three forms, see Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5(4) *Journal of International Criminal Justice* 953-975, 958-964.
[136] Rome Statute, art 25(3)(b).

of ICC crimes through aiding, abetting or by assistance.[137] The aider and abettor provide assistance in the commission of a specific crime and must have the intention to facilitate the commission of such crime.[138]

Other forms of responsibility under article 25 of the Rome Statute include contribution to commission of ICC crimes by a group acting with a common purpose and it must be proved that the individual contributed intentionally in any way, either with the aim of furthering the criminal activity of the group, or with knowledge of the intention of the group to commit the crime.[139] This has been referred to as a residual form of liability with respect to persons who contribute to commission of the crime 'in any other way' not amounting to aiding and abetting under article 25(3)(c).[140]

The *ad hoc* tribunals referred to such kind of liability as collective criminality whereby crimes are committed by plurality of persons in pursuance of common plan and any criminal act committed by any of the persons in the group may lead to criminal responsibility of all participants in the common plan.[141] In this case, they are all equally responsible for theensuing crime notwithstanding their level of contribution.[142] However, the notion of joint criminal enterprise as espoused by the *ad hoc* tribunals has been departed from by the ICC by distinguishing between commission and accessory liability in the context of article 25(3) of the Rome Statute.[143] This implies that the person is only to incur liability for crimes to which he or she contributed not that they formed part of the common purpose,[144] though the debate

[137] Ibid, art 25(3)(c). According to Schabas, '"[a]iding" generally refers to some form of physical assistance in the commission of the crime, while "abetting" suggests encouragement or another manifestation of moral suasion.' See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn Oxford University Press 2016) 576.

[138] *The Prosecutor v Dominic Ongwen*, 'Decision on the Confirmation of Charges Against Dominic Ongwen', (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016) (hereinafter *Dominic Ongwen Case*) para 43.

[139] Ibid, 44 and *The Prosecutor v Callixte Mbarushimana*, 'Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana', (ICC-01/04-01/10) Pre-Trial Chamber I (28 September 2010) para 39. See also Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 8(3).

[140] *Germain Katanga Case*, above n 81, para1618 and Schabas, above n 137, 579.

[141] *Prosecutor v Duško Tadic* (IT-94-1-A) (Judgment) ICTY Appeals Chamber (15 July 1999) (hereinafter, *Tadic Case*) paras 191 and 195 and Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 109-133, 111.

[142] Giulia Bigi, 'Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnik Case' (2010) 14 *Max Planck Yearbook of United Nations Law* 51-83, 54 and Werle, above n 135, 959.

[143] *The Prosecutor v Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction', (ICC-01/04-01/06 A 5) The Appeals Chamber (1 December 2014) (hereinafter *Thomas Lubanga Case on Appeal*) para 472; see also George P. Fletcher and Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3(3) *Journal of International Criminal Justice* 539-561, 549, to the effect that the Rome Statute displaced the 'formulation of joint criminal purpose' in art 25(3)(d) to 'imposes liability on members of groups that act with a common criminal purpose'.

[144] *Germain Katanga Case*, above n 81, para 1619.

as regards to how much contribution should have been made by a person in commission of a crime is far from settled.[145]

In essence, two principal forms of liability are created under article 25(3)(a)-(d) that is liability as a perpetrator[146] and an accessory.[147] The test is whether the person actually committed the crime than merely contributing to the crime committed by another person. This is determined by evaluating 'whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission.'[148]In effect, the person's contribution to commission of a crime is used to determine criminal liability because as held by some judges of the ICC, a perpetrator of the crime bears more blameworthiness since commission of the crime greatly depends on the perpetrator's actions.[149] However, this view has been criticised to the effect that the significance of the role of accomplices is not depicted when they are differentiated from the perpetrators who physically commit the crime.[150]

That notwithstanding, distinguishing between the different forms of liability not only ensures that perpetrators of ICC crimes or those who participate or contribute to the commission of such crimes are brought to justice but also labels criminal responsibility according to the degree of contribution to the crime. One major problem is that in practice, it is difficult to separate conduct characterised as aiding and abetting from contribution to commission of crimes with a common purpose.[151] Nonetheless, inclusion of these modes of liability in the national implementing legislation ensures that persons who commit ICC crimes or participate in any way are brought to justice. Other modes of liability under article 25 include incitement to genocide and attempted commission of a crime by taking substantial steps towards commission of the crime though persons who abandon the plan or prevent commission of such a crime are absolved from criminal responsibility.[152]

Notably, most of the above mentioned principles of criminal law exist in national legislation of states in various forms. For example, with respect to parties to an offence, legislation of some states equally penalises perpetrators, aiders, abettors as well as those who

[145] See for example, Randle C. DeFalco, 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute Thresholds of Contribution' (2013) 11(4) *Journal of International Criminal Justice* 715-735.
[146] Rome Statute, art 25(a) with respect to those who have committed the crime either personally or through others, the determining factor being 'control over the crime'. See *Thomas Lubanga Case on Appeal*, above n 143, para 469.
[147] Rome Statute, art 25(b)-(d) with respect to those who contribute to crimes committed by others.
[148] *The Prosecutor v Callixte Mbarushimana*, above n 139, para 30.
[149] *Thomas Lubanga Case on Appeal*, above n 143, para 467-468.
[150] Schabas, above 137, 567.
[151] Ambos, above n 45, 10-11, 13; on the contrary, see Cassese, above n 141, 116.
[152] Rome Statute, art 25(3)(d)(e) and (f) respectively; see further discussion in Ambos, above n 45, 2-16.

counsel or procure the commission of any crime.[153] No distinction is made between principal and accessory liability as the jurisprudence of the ICC discussed above seems to suggest.[154] On the contrary, some states such as Japan, Switzerland, Denmark and Bulgaria, distinguish between principal offenders and accessories when sentencing either by reducing the punishment for accessories or taking into account the nature and degree of participation.[155]As the case with the ICC,[156] the accomplice is penalised depending on his or her contribution towards commission of the crime and not the same way as the principal offender hence depicting divergence in the state practice in this regard.

More so, national legislation of some states makes it an offence for any person who through his or her overt acts, attempts to commit the crime even if the crime is not completed and it is irrelevant that the person was prevented or desisted from committing the crime.[157]On the contrary, other states exonerate any person who attempts to commit the crime but then voluntarily desists from implementing his intention or prevents the completion of the crime.[158] The second approach is similar to article 25(3)(f) of the Rome Statute which provides an opportunity for the person to escape liability if it is shown that he or she voluntarily abandoned commission of the crime. This shows variation of some national laws with provisions of the Rome Statute relating to the modes of criminal responsibility.It is argued that although there is no requirement for states to incorporate the principles of criminal law set out under the Rome Statute, states need to ensure that the national principles of criminal law do not shield perpetrators of ICC crimes from liability.

Some states including Kenya, New Zealand, Trinidad and Tobago as well as Philippines[159] have incorporated the principles of criminal law either by reference to article 25 of the Rome Statute or redrafted this provision. These states are able to apply the principles of individual criminal responsibility as set out in the Rome Statute. Besides, the national implementing legislation of these states permits reference to national law to

[153] See for example, Tanzania's Code of Criminal Law (1945), sec 22(1); Ghana's Criminal Code (1960), sec 20(1); Cyprus's Criminal Code (1959), sec 20; Guyana's Criminal Law (Offences) Act (1893), sec 31; Belize's Criminal Code (2000), sec 20(1)-(2) and Australia's Criminal Code Act (1995), sec 11.2(1).
[154] *Thomas Lubanga Case on Appeal*, above n 143, paras 467-468.
[155] Japan's Penal Code (1907), arts 60, 62 and 63; Swiss Criminal Code (1937), art 25; Denmark's Criminal Code (1930), § 23(1) and Bulgaria's Criminal Code (1968), arts 20 and 21(1).
[156] *Germain Katanga Case*, above n 81, para 1619.
[157] See for example, Malawi's Penal Code (1930), sec 400; Nigeria's Criminal Code Act (1916), sec 4 as well as Australia's Criminal Code Act (1995), sec 11.1(1)-(2) and (4).
[158] See for example, Japan's Penal Code (1907), art 43; Denmark's Criminal Code (1930), § 22 and Bulgaria's Criminal Code (1968), art 18(3).
[159] Kenya's International Crimes Act (2008), sec 7(1)(d); New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(a)(iv); Trinidad and Tobago's International Criminal Court Act (2006), sec 12(1)(a) and Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 8.

determine criminal responsibility.[160] This is not prohibited since the legislation contains the minimum standards set out in the Rome Statute and the Statute is accorded primacy over national law in case of contradictions between these laws.[161] The implication of this is that the provisions of national legislation should be applied consistently with the provisions of the Rome Statute.

B. Responsibility of Commanders and Other Superiors

The other mode of individual criminal responsibility worth mentioning is set out in article 28 of the Rome Statute that is, responsibility of commanders or persons acting effectively as military commanders[162] and the responsibility of other superiors.[163] Notably, it must be proved that the superiors had knowledge that their subordinates were committing or about to commit crimes, though different tests of knowledge are set out for both forms of responsibility,[164] proof of which remains debatable.[165]

Unlike article 25 which creates liability for crimes committed personally, article 28 establishes liability of the superiors for crimes committed by their subordinates particularly, for failing to prevent or repress commission of crimes or to ensure that their subordinates are punished for the ensuing crimes.[166] An example is of Clément Kayishema (a civilian superior)[167] and Jean-Pierre Bemba (a person acting effectively as a military commander)[168] were convicted of crimes committed by their subordinates having failed to exercise effective control over these subordinates.

[160] Kenya's ICC Act, ibid, sec 7(2)(a); New Zealand's ICC Act, ibid, sec 12(1)(b); Tobago's ICC Act, ibid, sec 12(1)(b) and Philippines' Act, ibid, sec 8(a).
[161] Kenya's ICC Act, ibid, sec 7(2)(b)(i); New Zealand's ICC Act, ibid, sec 12(3) and Tobago's ICC Act, ibid, sec 12(3).
[162] Rome Statute, art 28(a).
[163] Ibid art 28(b).
[164] Ibid, art 28(a) (i) and art 28(b)(i), while the military commander 'should have known that his subordinates were committing or about to commit crimes' which amounts to wilful blindness, the civilian superior is required to have known or 'consciously disregarded information which clearly indicated that the subordinates were committing or about to commit crimes'.
[165] Ambos, above n 45, 18-20 and Powell and Erasmus, above n 133, 154-155.
[166] Rome Statute, arts 28(a)(ii) and 28(b)(iii) and *Dominic Ongwen Case*, above n 138, para 45.
[167] *The Prosecutor v Clément Kayishema and Obed Ruzindana*, (ICTR-95-1-A) ICTR Appeals Chamber (1 June 2001) para 299 where the Appeals Chamber agreed with the Trial Chamber to the effect that Kayishema (*Préfet* of Kibuye) had effective control over communal police and the *gendarmerie*, the assailants including soldiers, prison warders, armed civilians and Interahamwe.
[168] See also *The Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', (ICC-01/05-01/08) Trial Chamber III (21 March 2016) para 737; as regards to exercising effective control over subordinates, see paras 180-188.

This is based on the superior-subordinate relationship[169] by virtue of the nature of control exercised by superiors over their subordinates.[170] Superiors are expected to use their powers to ensure that the fundamental principles of international humanitarian law are effectively enforced.[171]The idea is that failure to exercise proper control over subordinates leads to the commission of ICC crimes[172] and it is through punishing the superiors that such crimes may be deterred. It is contended that superior responsibility as a mode of liability should be created in national legislation to penalise superiors for crimes committed by their subordinates.

States that have directly incorporated the principle of responsibility of commanders and other superiors by reference to article 28 of the Rome Statute include Kenya and New Zealand.[173] States such as Mauritius, the United Kingdom and Malta have also incorporated provisions creating responsibility of commanders and other superiors which are similar to article 28 of the Rome Statute.[174] This is in keeping with the Rome Statute hence enabling penalisation of similar conduct. For the case of Germany, three provisions set out the offence of responsibility of military commanders and other superiors with respect to crimes committed by their subordinates.[175] Still, the three provisions are consistent with the Rome Statute since prosecution of all conduct covered by the Statute is enabled.[176] It is argued that states need to incorporate article 28 of the Rome Statute in the national implementing legislation to enable investigation, prosecution and punishment of superiors for crimes committed by their subordinates.

---

[169] *The Prosecutor v Jean-Paul Akayesu*, (ICTR-96-4-T) ICTR Trial Chamber I (2 September 1998) (hereinafter *Jean-Paul Akayesu Case*) para 691 where the Tribunal held that command responsibility required proof of the existence of superior-subordinate relationship between the accused person and the Interahamwe which had not been shown in the indictment.

[170] Powell and Erasmus, above n 133, 151.

[171] *Jean-Pierre Bemba Case*, above n 168, para 172. The basic principles of International Humanitarian Law entail that when conducting hostilities, warring parties should distinguish between civilians and combatants, attacks against those who are wounded or no longer taking part in hostilities (*hors de combat*) are prohibited as well as the infliction of unnecessary suffering and superfluous injury. Also the principles of proportionality, military necessity and humanity must be adhered with. See discussion in Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109-138.

[172] *Jean-Pierre Bemba Case*, ibid, paras 175-213 for a detailed discussion of the elements required to prove the responsibility of commanders for crimes committed by their subordinates.

[173] Kenya's International Crimes Act (2008), sec 7(1)(f) and New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(vi).

[174] Mauritius's International Criminal Court Act (2011), sec 5; United Kingdom's International Criminal Court Act (2001), sec 65(2) and Malta's Criminal Code (1854), art 54E(2)-(3).

[175] See Germany's Code of Crimes Against International Law (2002), secs 4, 13(1)-(2) and 14.

[176] Helmut Satzger, 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes Against International Law' (2002) 2 *International Criminal Law Review* 261-282, 273.

C. Defences

The Rome Statute sets out several defences to exclude criminal liability of a person for ICC crimes under certain circumstances. These defences may also be found in national legislation of some states as highlighted in this section.These include the defence of insanity that is, incapacity caused by mental disease which affects the person's mind such that the person does not know what he or she is doing or that it is wrong, or which affects the capacity to control his or her actions.[177]This obviates the person's blameworthness for the resultant crime because the mental disease affects the mind of the person beyond his or her control.

This may not be the case for voluntary intoxication whereby the person freely consumes the intoxicant which destroys his or her capacity to appreciate the wrongfulness of what he or she is doing.[178] Under the Rome Statute, it must be proved that the person knew or disregarded the risk of the likelihood of committing a crime while intoxicated.[179]This is akin to the intoxicated person acting recklessly whether or not a crime ensues while in that state though in practice, it may not be possible to prove that the intoxication was voluntary.[180]

Concerning self-defence, this requires acting reasonably in defending oneself or other persons, or in case of war crimes, defending property essential for survival or for military necessity.[181] In this case, the person must have acted reasonably in the face of 'an imminent and unlawful use of force' against himself or herself and the degree of force used should be proportionate to the degree of danger to the accused person.[182] Notably, the defence of property is applicable to war crimes and not for other ICC crimes[183] which means that the defence of property is limited under the Rome Statute which may not be the case under national law. This may create the possibility of national authorities applying the defence of property broadly to cover other ICC crimes thereby shielding perpetrators of these crimes from liability. Thus, as much as possible, the defences under national law should not be broader than the defences under the Rome Statute.

With respect to the defence of duress, it requires acting necessarily and reasonably to avoid a threat of imminent death or imminent serious grievous bodily harm against the person

[177] Rome Statute, art 31(1)(a).
[178] Ambos, above n 45, 25. See also Hungary's Criminal Code (1978), sec 25 to the effect that voluntary intoxication which affects the mind is not a defence to the ensuing crime.
[179] Rome Statute, art 31(1)(b).
[180] Ambos, above n 45, 25.
[181] Ibid, art 31(1)(c).
[182] *Prosecutor v Dario Kordić and Mario Ćerkez* (IT-95-14/2-T) ICTY Trial Chamber (26 February 2001) para 451.
[183] Schabas, above n 137, 644.

or other persons provided no greater harm is caused than one sought to be avoided.[184] Notably, there are other defences not provided under the Rome Statute yet available under national law includingdiminished responsibility and provocation.[185]Such defences should not be applied to shield perpetrators of ICC crimes from liability.

The defences set out in the Rome Statute have been incorporated by states such as Kenya, New Zealand and Trinidad and Tobago[186]by simply referring to articles 31 to 33 of the Statute. Moreover, there is provision for reliance on other defences available under national law or international law.[187] This is advantageous to the accused person because more defences are created beyond the defences set out under the Rome Statute. However, in case of any discrepancies, the defences set out in the Rome Statute have primacy over defences in other laws.[188] In essence, the defences set out under the Rome Statute are prioritised over national law defences which could possibly limit the state concerned from applying broad defences under national law and ensure consistency with the Rome Statute.

D. A Summary of State Practice on Individual Criminal Responsibility and Defences

Whereas some states have set out the principles of criminal responsibility and defences as provided for under the Rome Statute, other states have not done so and continue to rely on national law principles in some respects as noted above.[189] Although this is not prohibited,the interpretation and application of national criminal lawprinciples must be consistent with the provisions of the Rome Statutein in order to give effect to Statute. For example, in states such as Germany and the United Kingdom, the national implementing legislation permits application of the principles of national criminal law[190]but does not provide for most of the general principles of criminal law specified in Part III of the Rome Statute. It has been reported that some of the principles of criminal law and defences set out in the Rome Statute

[184] Rome Statute, art 31(1)(d).
[185] Dragana Radosavljevic, 'Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute', (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 37-55.
[186] Kenya's International Crimes Act (2008), sec 7(1)(i-k); New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(a)(ix)-(xi) and Trinidad and Tobago's International Criminal Court Act (2006), sec 12(1)(ix)-(xi).
[187] Kenya's ICC Act, ibid, sec 7(2)(b); New Zealand's ICC Act, ibid, sec 12(1)(c) and Trinidad and Tobago's ICC Act, ibid, sec 12(1)(c).
[188] New Zealand's ICC Act, ibid, sec 12(1)(c) and Trinidad and Tobago's ICC Act, ibid, sec 12(3).
[189] See section 4.1.3. A, B and C.
[190] Germany's Code of Crimes Against International Law (2002), sec 2 and United Kingdom's International Criminal Court Act (2001), sec 56(1).

are not available under national law of England and Wales.[191] A notable example is the defence of duress which is not available to crimes such as murder and attempted murder in England and Wales.[192] For the case of Germany, it is believed that the mental element under Germany criminal law is narrower than the mental element under article 30 of the Rome Statute.[193]

Thus, reliance on the principles of national criminal law is problematic due to the possibility that the legislation may not meet the minimum standards set by the Rome Statute with respect to certain principles of criminal law. Moreover, divergent results may be obtained before national courts and the ICC with respect to accused persons facing similar charges because of variation in the principles applied for determining criminal liability before these courts. This may bring into question the fairness of national criminal systems in comparison with proceedings of the ICC.

Therefore, variance is exhibited in the methods used by states to incorporate the principles of individual criminal responsibility and defences in national legislation. While some states noted above have endeavoured to incorporate such principles completely by reference to the relevant provisions of the Rome Statute,[194] other states have barely referred to these principles. Such states are encouraged to amend national legislation to incorporate these provisions to ensure that national criminal law applicable to individual criminal responsibility, command and superior responsibility as well as defences, is consistent with the Rome Statute. What follows is a discussion of the various bases of jurisdiction which need to be created in legislation to enable states to exercise jurisdiction over ICC crimes.

4.1.4. Jurisdiction

The concept of jurisdiction refers to the rights and powers of the state to regulate affairs in accordance with its laws.[195] States can exercise jurisdiction over ICC crimes using any of the traditional bases of jurisdiction recognised under international law that is, territoriality, nationality (active personality), passive personality, the protective principle and universal

[191] Cryer and Bekou, above n 63, 446-447 and Colin Warbrick, Dominic McGoldrick and Robert Cryer, 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51(3) *International and Comparative Law Quarterly* 733-743, 740.
[192] Child and Ormerod, above n 130, 572.
[193] Satzger, above n 176, 269.
[194] For example, Kenya, New Zealand and Trinidad and Tobago.
[195] Cryer, et al, above n 11, 49 and Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735-760, 736.

jurisdiction.[196] This may be done by criminalising a specific conduct (legislative or prescriptive jurisdiction) or by using national institutions like courts and the police to enforce the legislation (enforcement jurisdiction).[197] While a state in not prohibited to legislate on any matter taking place in the world, actual enforcement of legislation is problematic due to the principle of non-intervention in the affairs of other states.[198]

In essence, a state may not enforce its laws over matters which occur in the territory of another state without its consent or in the absence of any permissive rule under international law to that effect.[199] More so, the view that customary international law permits states to assert universal jurisdiction over genocide, crimes against humanity and war crimes to protect the interests of the international community as a whole[200] remains controversial. This is possibly due to lack of clarity as regards to the conditions under which universal jurisdiction is asserted. What is agreeable though is that, except for treaty obligations, states are not under a duty to exercise universal jurisdiction but are merely permitted to do so.[201]

The argument advanced here is that at the minimum, states should create jurisdiction basing on territoriality and nationality jurisdictions which are less disputable and are recognised under the Rome Statute.[202] Other bases of jurisdiction may be prescribed in national legislation but must be enforced in accordance with the recognised principles of international law. This section discusses the various bases of jurisdiction created in the national implementing legislation to enable states conduct proceedings of ICC crimes.

In keeping with the Rome Statute, the national implementing legislation of some states created jurisdiction based on either territoriality or nationality, or both, with respect to ICC crimes.[203] The advantage is that conflict over jurisdiction is minimised due to the recognition

---

[196] Territoriality jurisdiction is jurisdiction asserted with respect to crimes committed on the territory of the state; nationality or active personality jurisdiction is jurisdiction exercise over crimes committed abroad by a citizen of the state; passive personality principle is jurisdiction asserted over crimes committed against a citizen of the state while abroad; the protective principle jurisdiction is jurisdiction exercised by the state over extraterritorial activities which threaten national security and universal jurisdiction is jurisdiction asserted over crimes committed abroad in the absence of any acceptable jurisdictional link to the state asserting jurisdiction. See generally, O'keefe, above n 33, 5-25 and Cryer, et al, above n 11, 52-58.

[197] O'keefe, above n 33, 5.

[198] Cryer, et al, above n 11, 49.

[199] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) *The British Yearbook of International Law* 187-239, 195.

[200] Ibid, 196 and Cryer, et al, above n 11, 57.

[201] Cryer, et al, above n 11, 57 and Werle and Jessberger, above n 17, 81.

[202] The Rome Statute, art 12(2), art 12(3) and art 13(b) providing for the jurisdiction of the ICC.

[203] See for example, Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(a)(i); the Netherlands' International Crimes Act (2003), sec 2(1)(c); United Kingdom's International Criminal Court Act (2001), secs 51(2)(a) and 51(2)(b); Kenya's International Crimes Act (2008), secs 8(a) and 8(b)(i); Mauritius's International Criminal Court Act (2011), sec 4(3)(a); Samoa's International Criminal Court Act (2007), secs 13(1)(a) and 13(1)(b); Finland's Criminal Code (1889), secs 1(1) and 6(2); Greece's Law No. 3948/2011 on the

of the authority of the state over its territory and citizens.[204] A serious weakness with these bases of jurisdiction is that states may be reluctant to commence proceedings against their citizens or even in situations where the perpetrators are state agents.[205] Notwithstanding such shortfalls, criminal prosecutions have been conducted in several states basing on such jurisdictional bases for example, in the Democratic Republic of Congo *(*DRC),[206] Bangladeshi,[207] Bosnia and Herzegovina,[208] Lithuania,[209]Germany[210] and the Netherlands.[211]

Aside territoriality and nationality jurisdictions, some states have incorporated jurisdiction basing on passive personality[212] and universal jurisdiction.[213] Universal jurisdiction has been created in its absolute form that is, without any link between the crime and the state seeking to assert jurisdiction (forum state)[214] in states such as Germany under section 1 of the Germany's national implementing legislation.[215]

However, the application of this provision is limited by section 153f of the Code of Criminal Procedure[216] to the effect that the prosecutor has discretion to decline commencing

---

adaptation of internal law to the provisions of the ICC Statute, art 2(a)-(b) and Malta's Criminal Code (1854), art 5(1)(a) and (d).

[204] Mills, above n 199, 198.

[205] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *European Journal of International Law* 815-852, 816 and Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9(1) *European Journal of International Law* 2-17, 5.

[206] James Ellis and Dan Kuwali, 'Democratic Republic of the Congo', (2011) 14 *Yearbook of International Humanitarian Law*, Correspondents' Reports, 1, available at <http://www.asser.nl/media/1435/drc-yihl-14-2011.pdf> last visited, 30 August 2017.

[207] Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27(3) *Criminal Law Forum* 257-290.

[208] Morten Bergsmo, et al, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edn Torkel Opsahl Academic EPublisher 2010).

[209] Justinas Žilinskas, 'Prosecuting International Crimes in Lithuania: When Wounds Shape the Law' in Bartłomej Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill Nijhoff, 2016) 299-309.

[210] See the case of *Ignace Murwanashyaka and Straton Musoni* discussed in Werle and Jessberger, above n 17, 161.

[211] *The Prosecutor v Yvonne Basebya*, (Case No. 09/748004-09 (LJN: BZ4292), District Court of The Hague, The Netherlands (1 March 2013), available at <http://www.internationalcrimesdatabase.org/Case/971/Basebya/> last visited, 30 August 2017.

[212] See for example, Mauritius's International Criminal Court Act (2011), sec 4(3)(d); Samoa's International Criminal Court Act (2007), sec 13(1)(c); Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(a)(iii); the Netherlands' International Crimes Act (2003), sec 2(1)(b); Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 17(c); Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), art 3 and Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, art 2(c).

[213] For the definition of universal jurisdiction, see above n 196.

[214] Kateryna Gaidei, 'The Presence of an Alleged Offender in a Forum State: A Prerequisite for the Exercise of Universal Jurisdiction' (2014) 1(1) *European Political and Law Discourse* 9-18, 11.

[215] Germany's Code of Crimes Against International Law (2002), sec 1.

[216] Ibid, Annex, art 3(5) which amended the Code of Criminal Procedure by inserting sec 153f which stipulates circumstances under which prosecuting authorities of Germany may decline to prosecute.

criminal proceedings where there is no link to Germany.[217] Using this provision, the assertion of jurisdiction over ICC crimes committed abroad has been interpreted by the Federal Prosecutor General as subsidiary to the jurisdiction of 'other states, especially those which are closer to the site of the crime or to the alleged perpetrators…'[218] It appears that authorities in Germany are reluctant to assert universal jurisdiction where there is no link with Germany but such discretion may be exercised selectively or even abused.

Even in states like Spain and Belgium where universal jurisdiction was exercised in the absence of the perpetrator[219] the legislation was later amended to limit such jurisdiction after opposition from several states including the United States of America.[220] The inference to draw from this is that assertion of absolute universal jurisdiction by a state remains problematic due to the principle of non-intervention in the affairs of another state and other practical problems which arise in exercising such jurisdiction.[221] Thus, states like Trinidad and Tobago, New Zealand and Lithuania[222] which seem to permit absolute universal jurisdiction in their national implementing legislation may not ably enforce the legislation.

To avoid such problems, the legislation of some states requires the presence of the perpetrator in the territory of the forum state (conditional universal jurisdiction).[223] It is only after the accused person enters the territory of such a state that jurisdiction of national courts

[217] For example, the Federal Prosecutor dismissed the complaint of war crimes committed against prisoners in Abu Ghraib, Iraq on grounds that the 'accusations made against the defendants were being prosecuted … in the United States of America', the nationality state of the defendants. The Higher Regional Court of Stuttgart upheld the prosecutor's decision stating that there was no domestic connection of the crimes to Germany and that exercise of prosecutorial discretion was not subject to court review. See Higher Regional Court (Oberlandesgericht) Stuttgart, 5th Senate for Criminal Matters, 'Decision (Beschluss) from September 13th, 2005' (14 September 2005) (on file with the author).

[218] Werle and Jessberger, above n 17, 163.

[219] See for example, *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No.3) [2000] 1 A.C 147 [House of Lords] (hereinafter, *Pinochet Case*) and *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Rep 2002, 3 (14 February 2002) (hereinafter, *Arrest Warrant Case*).

[220] Craig Peters, 'The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide' (2015) 39 *Seattle University Law Review* 165-194 and Luc Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1(3) *Journal of International Criminal Justice* 679-689, 682. For example, Belgium's Act of 5 August 2003 on Serious Violations of International Humanitarian Law, art 16 inserted art 10(1) bis in the Code of Criminal Procedure.

[221] See Cassese, et al, above n 66, 280-281 on problems relating to exercising absolute universal jurisdiction like inducing victims to file complaints against alleged perpetrators; investigation of complaints over which a judge can do nothing and the difficulty in obtaining evidence where the territorial state declines to cooperate.

[222] Trinidad and Tobago's International Criminal Court Act (2006), sec 8(1)(c); New Zealand's International Crimes and International Criminal Court Act (2000), sec 8(1)(c) and Lithuania's Criminal Code (2000), art 7(1).

[223] See for example, Samoa's International Criminal Court Act (2007), sec 13(1)(d); Mauritius's International Criminal Court Act (2011), sec 4(3)(c); Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(b); Kenya's International Crimes Act (2008), sec 8(c); Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 17(b); Albania's Criminal Code (1995), art 7/a; Montenegro's Criminal Code (2003), art 137(2); Portugal's Adaptation of Criminal Legislation to ICC Statute (2004), Annex, art 5(1) and Serbia's Criminal Code (2005), art 9(2).

is triggered. However, the meaning attached to the presence requirement remains debatable due to lack of coherent state practice on the matter.[224] Moreover, such a condition is regarded merely as a formal requirement than a matter of law.[225] Nevertheless, expanding jurisdiction over ICC crimes enables states to investigate and prosecute crimes beyond the reach of the ICC especially where states with territorial or nationality jurisdiction fail to take action.

Aside the traditional bases of jurisdiction, national implementing legislation of some states provide other conditions for exercising jurisdiction over ICC crimes committed abroad. Such conditions include where the accused person is an employee of the forum state[226] and where the accused person or the victim of ICC crimes is an ordinary or permanent resident of forum state.[227] In this case, residents seem to be treated the same way as nationals of the forum state especially where the accused person is a permanent resident.[228] For instance, in the United Kingdom some of the conditions for asserting jurisdiction over ICC crimes committed abroad include a situation where the accused person becomes a resident of the United Kingdom after committing such crimes.[229]

Arguably, residence of the accused person in the forum state enables such a state to commence criminal proceedings against the person who is already in the custody of this state. More so, prosecuting perpetrators of ICC crimes who relocate to other states to escape justice enhances the fight against impunity and avoids creating safe havens for criminals in these states. Nonetheless, to avoid breaching the principle of legality, it is necessary that the conduct for which the person is prosecuted was also a crime at the place where the conduct was performed or under international law.[230] The assumption is that the accused person could have foreseen or had sufficient notice of the criminalisation of such conduct in the territorial state and thus, subsequent prosecution in the state of residence for the same crime does not violate the principle of legality.

---

[224] *Arrest Warrant Case*, above n 219, para 54, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. See detailed discussion in chapter 4, section 3.1.1.B.II of this thesis.

[225] Cryer, et al, above n 11, 58. See also Hervé Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals' (2003) 1(3) *Journal of International Criminal Justice* 690-702, 700.

[226] See for example, Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(a)(i) and Kenya's International Crimes Act (2008), sec 8(b)(i).

[227] See for example, Samoa's International Criminal Court Act (2007), sec 13(1)(b) and (c); Mauritius's International Criminal Court Act (2011), sec 4(3)(b) and (d) and Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), art 3.

[228] See for example, Finland's Criminal Code (1889), sec 6(3)(1) and Malta's Criminal Code (1854), art 5(1)(d). See also the case of *The Queen v Munyaneza* (2009 QCCS 2201) No. 500-73-002500-052, Superior Court Criminal Division (22 May 2009) para 65.

[229] United Kingdom's International Criminal Court Act (2001), sec 68(1).

[230] Cryer, et al, above n 11, 55. This is in situations where the accused person acquires the nationality or becomes a resident of the forum state after committing crimes abroad.

Overall, there is notable variation in the provisions creating jurisdiction over ICC crimes in national implementing legislation. While some states created jurisdiction basing on the traditional bases, other states created conditions for exercising jurisdiction beyond these bases. These approaches are not prohibited as long as states are able to exercise jurisdiction over ICC crimes in accordance with the principles of international law. Even where universal jurisdiction is prescribed, for practicability and prudence, such jurisdiction may be asserted in situations where a state with close connection to the case (the territorial state or state of nationality of the accused person) is unwilling or unable to investigate or prosecute the accused person. This would possibly avoid conflict over jurisdiction and enhance cordial relations between states. The next section examines the cooperation provisions of the Rome Statute which states need to incorporate in national legislation to execute requests for assistance from the ICC.

4.1.5. Cooperation

It not disputable that the ICC is mainly dependent on states to conduct its activities such as collecting evidence, carrying out investigations, executing arrest warrants and enforcing sentences.[231]State cooperation is vital since the ICC lacks an enforcement body like the police or the military and has to work with national authorities to perform its activities. This is the very reason why states should ensure that procedures are available under national law to facilitate full cooperation with the ICC. Moreover, upon request by a state party, the ICC may render assistance to facilitate domestic investigations and prosecutions for ICC crimes.[232] It is contended that states should set out cooperation provisions in national legislation to enable these states and the ICC conduct proceedings for ICC crimes. The section does not seek to give a detailed discussion of the cooperation provisions of the Rome Statute[233] but merely

[231] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016) para 16. See also the Netherlands' International Criminal Court Implementation Act (2003), at 4 explaining the need for states to set out legislation to enable cooperation with the ICC.

[232] Rome Statute, art 93(10).

[233] See discussion in Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation of States with the International Criminal Court' (2001) 25(3) *Fordham International Law Journal* 767-839; Jackson Nyamuya Maogoto, 'A Giant Without Limb: The International Criminal Court's State-Centric Cooperation Regime' (2004) 23(1) *The University of Queensland Law Journal* 102-133, 102 and Rita Mutyaba, 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects its Ongoing Investigations and Prosecutions' (2012) 12(5) *International Criminal Law Review* 937-962.

highlights the various forms of cooperation which states should facilitate by providing procedures in national legislation.

States parties to the Rome Statute are under a legal obligation to 'cooperate fully with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court.'[234] However, states have the discretion to determine specific procedures for executing the requests from the ICC and the importance of this is to recognise state sovereignty and divergent procedures in national legislation.[235] In essence, the Rome Statute only requires states to ensure that procedures are available in national legislation to enable all forms of cooperation specified under Part 9 of the Statute.[236] It is contended that in the absence of the cooperation legislation, a state may not effectively execute the requests for assistance from the ICC and will be in breach of its legal obligations under the Rome Statute.[237]

Various forms of cooperation are set out under the Rome Statute including arresting and surrendering of an accused person who is on the territory of the requested state.[238] Notably, the term 'surrender' is used and not 'extradition' because the procedure for arresting and surrendering a person applies between the ICC and states, rather than amongst states.[239] More so, it was to ensure that extradition laws are not applied with respect to requests for arrest and surrender from the ICC due to obstacles set out in these laws.[240] To this effect, the Rome Statute requires that procedures for surrendering a person should be less burdensome than those applied in extradition.[241] This means that states have to set out procedures at the national level to ease the process of arresting and surrendering the accused person to the ICC. Even then, cooperation procedures remain complicated because states not only have diverse

[234] Rome Statute, art 86.
[235] Oosterveld, et al, above n 233, 770.
[236] Rome Statute, art 88.
[237] Schabas, above n 137, 1281. See also Rome Statute, art 86.
[238] Rome Statute, art 89(1); see also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber II (13June 2015) para 1. For examples of some laws which set out detailed procedures for arrest and surrender, see Kenya's International Crimes Act (2008), secs 28-75; Samoa's International Criminal Court Act (2007), secs 35-52; Trinidad and Tobago's International Criminal Court Act (2006), secs 32-80; Australia's International Criminal Court Act (2002), secs 17-48; New Zealand's International Crimes and International Criminal Court Act (2000), secs 32-80 and Ireland's International Criminal Court Act (2006), secs 15-35.
[239] Rome Statute, art 102 of the Statute which distinguishes between 'surrender' and 'extradition'.
[240] Goran Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605-652, 607-608 and Sunil Kumar Gupta, 'Extradition Law and the International Criminal Court' (2000) 3(1) *Berkeley Journal of Criminal Law* 1-35. See also Netherlands' International Criminal Court Implementation Act (2003), at 3 where it is explained that 'surrender' is 'distinct from the horizontal extradition between states' in that the relation between the ICC and state parties is of vertical character, with article 89(1) of the Rome Statute framed in a strict manner which forecloses any grounds for refusal as found in interstate extradition cases.
[241] Rome Statute, art 91(2) (c).

legal regimes and procedural requirements but also have different political interests and sometimes are faced with other constraints such as limited resources.[242]

Notwithstanding these obstacles, cooperation legislation is needed to clearly stipulate the procedures for enabling arrest and surrender of the accused person to the ICC. Besides, national mechanisms should be available to enable transportation of the person through the territory of the state to the ICC, which also requires detaining the person in the custody of such a state.[243] Still, national legislation is needed to stipulate the procedures for executing requests for assistance from the ICC in that regard.[244] Moreover, such requests together with the accompanying documentation are transmitted through the diplomatic channel or any other designated authority of the state[245] and shall have priority over other competing requests depending on the circumstances of each case.[246]

In addition, procedures for other forms of cooperation such as taking evidence, serving documents, carrying out searches and seizures, questioning of persons, as well as protection of victims and witnesses need to be set out in national legislation.[247] However, this is not an absolute obligation since the request for assistance can be denied where the evidence to be disclosed relates to the security of the state.[248] Besides, where a state encounters obstacles which prevent execution of any request for assistance, the state has to consult the ICC so that the matter is resolved.[249] Further still, the ICC is required not to proceed with a request for

---

[242] Pascal Turlani, 'The International Criminal Court Cooperation Regime – A Practical Perspective from the Office Of the Prosecutor' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Bril Nijhoff 2016) 58- 79, 66-67.

[243] Rome Statute, art 89(3)(a) (c).

[244] See for example, Kenya's International Crimes Act (2008), secs 131-132; Belgium's Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, art 20 and Malta's International Criminal Court Act (2003), art 11.

[245] Ibid, art 87(1)(a). For the case of Mauritius it is the Attorney General, for Japan it is the Minister of Foreign Affairs and in Finland it is the Minister of Justice who receive requests for assistance from the ICC. See Mauritius's International Criminal Court Act (2011), sec 11(1); Japan's Act on Cooperation with the International Criminal Court (2007), art 3 and Finland's Act on the Implementation of Provisions of a Legislative Nature of the Rome Statute of the International Criminal Court and on the Application of the Statute (2000), sec 2(1).

[246] Ibid, arts 90(2) and 90(4)), these provisions set out different conditions under which the ICC is given priority. For exceptions, see art 90(6). See also national legislation that set out provisions to guide national authorities in case of competing requests for assistance including Kenya's International Crimes Act (2008), secs 57-60; Trinidad and Tobago's International Criminal Court Act (2006), secs 61-64 and Australia's International Criminal Court Act (2002), secs 38-40.

[247] Rome Statute, art 93(1). See for example, Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, adopted by Law 3003/2002 (A '75), arts 28-30; Ireland's International Criminal Court Act (2006), secs 50-54 and New Zealand's International Crimes and International Criminal Court Act (2000), secs 81-85.

[248] Ibid, art 93(4). For example, Samoa's International Criminal Court Act (2007), sec 76 and United Kingdom's International Criminal Court Act (2001), sec 39.

[249] Ibid, art 97. For example, Mauritius's International Criminal Court Act (2011), sec 31(1) and New Zealand's International Crimes and International Criminal Court Act (2000), sec 28(1)(e).

surrender which would require the requested state to breach its obligations under international law with respect to a non-state party.[250] Although this provision may limit enforcement of the cooperation obligations, it is argued that compliance with the obligation to cooperate with the ICC should not lead to violation of a state's international law obligations towards another state which is not a party to the Rome Statute.

With respect to cooperation from the ICC to states, this is availed upon request from the state and it is within the discretion of the ICC whether to comply with such a request.[251] This has been referred to as the 'reverse aspect of complementarity'[252] whereby the Rome Statute creates a possibility of the ICC cooperating with state parties in conducting proceedings for ICC crimes. The assistance provided includes transmission of statements, documents and other types of evidence obtained by the ICC in the course of its investigations or during trial, as well as questioning of a person under ICC detention order.[253] Such assistance may also involve technical advice provided by the ICC to share expertise with national authorities in investigating and prosecuting ICC crimes.[254]Both the ICC and state parties are intended to benefit from cooperation in handling ICC crimes.

All these provisions indicate that state parties to the Rome Statute will have to amend existing laws or enact new legislation to facilitate state cooperation with the ICC. This has been done by some states which have set out procedures in national legislation to provide for cooperation with the ICC.[255]These states have taken different approaches either by enacting legislation with or without complementarity provisions,[256] or by amending existing legislation.[257] Whereas some states have enacted detailed cooperation legislation in addition

[250] Ibid, art 98(1). See discussion in section 5.1.1 of this chapter.
[251] Ibid, art 93(10)(a). See also *Situation in the Republic of Kenya*, 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence', (ICC-01/09) Pre-Trial Chamber II (29 June 2011) para 29.
[252] Turlani, above n 242, 61.
[253] Rome Statute, art 93(10)(b)(i). An example is New Zealand's International Crimes and International Criminal Court Act (2000), secs 173-175; Kenya's International Crimes Act (2008), secs 168-170 and Belgium's Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, art 7.
[254] Informal Expert Paper, 'The Principle of Complementarity in Practice', para 11, available at <https://www.legal-tools.org/en/doc/ff5cf5/> last visited, 30 August 2017.
[255] As of September 2015, there were 53 states parties which had implementing legislation on part 9 of the Rome Statute. See Assembly of States Parties, 'Report of the Court on Cooperation', ICC-ASP/14/27, (22 September 2015) para 40(a).
[256] See for example, Samoa's International Criminal Court Act (2007); Australia's International Criminal Court Act (2002); Germany's Law on Cooperation with the International Criminal Court (2002); Swiss Federal Law of 22 June 2001 on Co-operation with the International Criminal Court and Japan's Act on Cooperation with the International Criminal Court.
[257] See for example, Canada's Extradition Act (1999) and Canada's Mutual Legal Assistance in Criminal Matters Act (1985).

to amending national laws,[258] other states have supplemented the brief cooperation legislation with direct reference to relevant national law on the same matter.[259] A possible explanation for such variation in legislation is to ensure that cooperation with the ICC is eased without any obstacles at the national level. States that have incorporated provisions relating to request for assistance from the ICC include Kenya, New Zealand, Trinidad and Tobago, as well as Australia, which even listed the nature of assistance required.[260]Other states merely set out a general clause permitting request for assistance from the ICC without specifying the nature of assistance.[261]This is not fatal since article 93(10)(b)(i) of the Statute is not exhaustive and as explained above, the ICC has discretion in the matter.[262]

Therefore, irrespective of the method used by states to enable cooperation with the ICC, the procedures set out in national legislation should effectively facilitate the activities of the ICC as well as enable states to seek assistance from the Court where necessary. The following part of the section discusses the non-legislative measures which states need to undertake to enable domestic implementation of the Rome Statute. It is argued that the Rome Statue can only be implemented effectively if the national implementing legislation is enforced by states and this may require availability of adequate resources for that purpose.

4.2. Non-Legislative Measures

Implementing the Rome Statute requires not only incorporating provisions of the Statute in national legislation but also giving effect to the law by conducting proceedings for ICC crimes as well as enabling state cooperation with the ICC. In effect, national institutions need to have the capacity to investigate and prosecute ICC crimes given that states 'have the best access to evidence and witnesses' than the ICC.[263] Where states fail to take action, national

[258] See for example, New Zealand's International Crimes and International Criminal Court Act (2000), Parts III – X which sets out the different forms of cooperation with the ICC and also provides that 'Part 2 of Mutual Assistance in Criminal Matters Act 1992' and 'Part 6 of the Extradition Act 1999' apply 'with necessary modifications' in relation to request for assistance and surrender of the persons to the ICC subject to any contrary provision in the Statute or the Rules. See secs 176 and 177 of the Act.

[259] See for example, Bosnia and Herzegovina's Law on Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court (2009), art 6(1) and Norway's Act No. 65 of 15 June 2001 relating to the Implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law, sec 2.

[260] Kenya's International Crimes Act (2008), secs 168-170; New Zealand's International Crimes and International Criminal Court Act (2000), secs 173-175; Trinidad and Tobago's International Criminal Court Act (2006), secs 173-175, as well as Australia's International Criminal Court Act (2002), secs 180(1)- 180(2).

[261] Samoa's International Criminal Court Act (2007), sec 82; Netherlands' International Criminal Court Implementation Act (2002), sec 5(1); Germany's Law on Cooperation with the International Criminal Court (2002) para 64; Swiss Federal Law of 22 June 2001 on Co-operation with the International Criminal Court, art 11(1) and Ireland's International Criminal Court Act (2006), sec 62(2).

[262]*Situation in the Republic of Kenya*, above n 251.

[263] Informal Expert Paper, 'The Principle of Complementarity in Practice', above n 254, para 1.

mechanisms should be available to ensure that requests for assistance from the ICC are executed by states to facilitate proceedings before this Court. This section highlights some of the non-legislative measures which states need to undertake to give effect to the provisions of the Rome Statute. Particularly, it focuses on institutional capacity of states due to the vital role of national institutions in investigating, prosecuting and adjudicating ICC crimes as well as executing requests for assistance from the ICC.

It is worth noting that states such as Senegal,[264] Bosnia and Herzegovina,[265] Croatia,[266]Denmark,[267] United Kingdom, the Netherlands,Germany, Belgium, Sweden and Norway[268] have established special institutions for conducting domestic proceedings for serious crimes as well as handling requests of cooperation from the ICC.[269] The advantage of such institutions is that proceedings for ICC crimes are carried out by competent personnel authorised to deal with these crimes. In addition, such personnel are able to share knowledge and experience in handling ICC crimes[270] which eases national processes in the implementation of the Rome Statute. Moreover, it enhances consistent practice and builds expertise in managing serious crimes.[271] It is argued that irrespective of the nature of institutions used by states, such institutions should have the capacity to facilitate proceedings for ICC crimes both at the national level and before the ICC.

Having domestic capacity to handle ICC crimes is important because proceedings for ICC crimes and for ordinary crimes differ in a number of ways; for example the nature of the legal regime regulating international crimes encompasses multiple sources of law such as

[264] Extraordinary African Chambers in the Senegalese Courts as established by virtue of the Statute of the Extraordinary African Chambers within the Courts of Senegal created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990', available at <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> last visited, 30 August 2017.

[265] Bosnia and Herzegovina's Law on Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court (2009), art 9. See also O'keefe, above n 33, 389 and Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edn Torkel Opsahl Academic EPublisher 2010) 11.

[266] Croatia's Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law (2003), art 12(1) provides for the establishment of special courts at the County Courts of Osijek, Rijeka, Split and Zagreb.

[267] Andreas Laursen, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law' (2012) 10(4) *Journal of International Criminal Justice* 997-1016, 1014-1015.

[268] Cryer, et al, above n 11, 88 and REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units' (December 2010) 31, 9-11 (on file with the author).

[269] See for example, Belgium's Central Authority for Cooperation in Gérald Dive and Julie de Hults, 'A State's Experience of Cooperation with the International Criminal Court: The Case of Belgium' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 269-296.

[270] Ibid, 290.

[271] REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units', above n 268, 21.

national legislation, treaties and case law of different states and international criminal tribunals.[272] Thus, it requires ascertainment of the applicable law to a given set of facts which may need someone who is conversant with the law to do so. In addition, multiple victims and perpetrators are involved as well as evidence, which normally covers large numbers of facts coupled with crimes committed in different locations.[273] In essence, conducting investigations, collecting evidence as well as examining the documentation involved will require personnel who are conversant with the law and possess the necessary skills to investigate, prosecute and adjudicate ICC crimes.[274]

A state which lacks skilled personnel may fail to exercise jurisdiction over these crimes and consequently, national authorities may opt to charge the accused persons with ordinary crimes with which they are familiar.[275] This is undesirable due to the serious nature of ICC crimes which affect the international community as a whole. It is vital for national institutions to have competent personnel knowledgeable in criminal law and procedure, as well as other relevant disciplines such as international law, human rights law and humanitarian law. More so, states need to ensure that specialised training in various skills is available to personnel who are entrusted with handling ICC crimes including investigation, prosecution of ICC crimes as well as victim support and witness protection.[276]

Therefore, to enhance national capacity in handling ICC crimes, states need to engage international expertise to work with national personnel for knowledge and skills transfer. This was done in the War Crimes Chamber of Bosnia and Herzegovina whereby Bosnian authorities worked with international personnel until the end of the transition period in 2012[277]which is believed to have contributed to the completion of many cases involving war crimes.[278]However, this might require teamwork and sharing of information between national

[272] Stuart Ford, 'Complexity and Efficiency at International Criminal Courts' (2014) 29(1) *Emory International Law Review* 1-69, 17; see also Cassese, et al, above n 66, 268.
[273] Stuart Ford, ibid, 13 and 18.
[274] See also Heller, above n 69, 100-103 and Bekou, above n 4, 1250.
[275] Schabas, above n 69, 43.
[276] See for example trainings conducted in the DRC, Uganda and South Africa, see Open Society Foundations, 'Putting Complementarity into Practice; Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (Open Society Foundations 2011) (on file with the author) and Max du Plessis, Antoinette Louw and Ottilia Maunganidze, 'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions', Institute for Security Studies (ISS) Paper No. 241 (November 2012).
[277] Avril McDonald, 'Bosnia's War Crimes Chamber and the Challenges of an Opening and Closure' in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, (Martinus Nijhoff Publishers 2009) 297-328, 326, 327 and O'keefe, above n 33, 390.
[278] Human Rights Watch, 'Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina' (March 2012) 1, available at <https://www.hrw.org/europe/central-asia/bosnia-and-herzegovina> last visited, 30 August 2017.

and international personnel which need to be encouraged to ensure self-reliance of national personnel.

In addition to skilled personnel, states would require sufficient resources including finance, tools and equipment such as forensic labs and computers, as well as adequate infrastructure in terms of well-furnished buildings, adequate office space and up to-date libraries. The lack of resources and adequate infrastructure may be one reason for the inability of states to conduct proceedings for serious crimes after a conflict as evident in Kosovo and East Timor where physical infrastructure was destroyed during conflicts experienced in these states.[279]Where national capacity is lacking, states cannot exercise jurisdiction over ICC crimes and may be declared unable to do so[280]hence failing to give effect to the Rome Statute. It is contended that national implementing legislation can only be enforced where the concerned state possesses adequate resources to handle ICC crimes. Thus, measures should be undertaken to avail enough resources to institutions handling ICC crimes.

Further still, national institutions should be readily available to facilitate execution of requests for assistance from the ICC in order to implement the Rome Statute. As noted above, article 88 of the Rome Statute obliges state parties to provide procedures under national law to enable state cooperation with the ICC. Such procedures are carried out by designated national authorities who should be competent in ensuring prompt and efficient responses to requests for assistance from the ICC. Besides, the ICC will have to engage with several national authorities to obtain information and other forms of assistance to execute its activities.[281] Therefore, to ensure domestic implementation of the Rome Statute a state should have sufficient capacity in terms of skilled personnel, adequate infrastructure, sufficient funding, tools and equipment as well as the necessary political will. Without the necessary facilities to enable national institutions handle ICC crimes, less may be realised in implementing the Rome Statute domestically.What follows is a discussion of some of the obstacles to domestic implementation of the Rome Statute.

[279] Corinne Parver and Rebecca Wolf, 'Civil Society's Involvement in Post-Conflict Peacebuilding' (2008) 36(1) *International Journal of Legal Information* 51-79, 61.

[280] Lack of judicial capacity was identified as one of the factors indicating inactivity of the state which makes the case admissible before the ICC. See OTP, 'Paper on Preliminary Examinations' (November 2013) para 48, at <https://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf> last visited, 30 August 2017.

[281] For a list of some of the government institutions which the Office of the Prosecutor will interact with, see the Informal Expert Paper, 'The Principle of Complementarity in Practice', above n 254, para 38.

Part Three: Obstacles to Domestic Implementation of the Rome Statute

The discussion above demonstrated that some states have enabled national criminal systems to handle ICC crimes by creating legislative and institutional frameworks for such purposes. Nevertheless, the practical application of the legislation seems minimal[282] due to several legislative and non-legislative obstacles which possibly have a negative impact on the implementation of the Rome Statute at the national level. This section firstly examines the legislative obstacles and lastly, the non-legislative obstacles are highlighted.[283]

5.1. Legislative Obstacles

The need to have adequate legislation which enables a state to implement the Rome Statute has been elaborated in section 3 above. This is vital because a state cannot justify its failure to give effect to the Rome Statute by invoking provisions of its national law.[284] It is argued that to ensure effective implementation of the Rome Statute, states should take measures by excluding provisions in national legislation that curtail domestic proceedings for ICC crimes. This section examines immunity, statutes of limitations, non-retroactivity of legislation and amnesty as obstacles curtailing the application of national implementing legislation. This is aimed at highlighting the effect of these obstacles on domestic implementation of the Rome Statute.

5.1.1. Immunity

Immunity laws shield perpetrators of ICC crimes from national criminal processes especially senior state officials such as Heads of state who are normally protected under respective national laws[285] and under international law.[286] In effect, no criminal process can be instituted against such officials thereby making the national implementing legislation redundant. Notably, the issue of immunity remains complex and controversial especially concerning immunity of senior state officials.[287] It is therefore necessary to clarify the two categories of

[282] See for example, prosecutions in the *Democratic Republic of Congo (*DRC), Bangladeshi, Bosnia and Herzegovina, Lithuania, Germany, the Netherlands and Canada, see above n 206-211.
[283] For a detailed examination of non-legislative obstacles, see chapter 5 focusing on Uganda and South Africa.
[284] Vienna Convention on the Law of Treaties, above n 2, art 27.
[285] See for example, Head of state immunity granted under the 1977 Constitution of Tanzania, art 46(1); 1972 Constitution of Bangladesh, art 51(2) and 1958 Constitution of France, art 67(2).
[286] Cassese, et al, above n 66, 318 as well as Akande and Shah, above n 205, 818.
[287] See for example, Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407-433 and Paola Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest? (2009) 7(2) *Journal of International Criminal Justice* 315-332.

immunity that is, personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*).

Personal immunity is enjoyed before foreign national courts by selected categories of state officials (including Heads of state, foreign ministers and diplomats) during their term of office.[288] Head of state immunity has been recognised in states such as France with respect to the former President of Libya, Mouammar Gaddafi,[289] as well as the United States with respect to President Robert Mugabe of Zimbabwe and the former President of China, Jiang Zemin.[290] Save for situations where the immunity is waived by respective states or the person relinquishes his or her position, these officials cannot be prosecuted before foreign national courts for ICC crimes due to the absolute nature of personal immunity.[291]

Of concern is the need to safeguard foreign state officials representing their states abroad from possible abuse of the authority of territorial states, which in effect, may interfere with the exercise of their official duties.[292]Criminal proceedings can only be instituted against these officials when they relinquish their official positions except for acts performed in their official capacity.[293] Notable examples of former Heads of state who have been prosecuted for committing ICC crimes include Saddam Hussein,[294] Charles Taylor,[295] Slobodan Milošević[296] and Alberto Fujimori.[297]

With respect to functional immunity, this is immunity enjoyed by serving and former state officials for acts performed in their official capacity.[298] Such immunity does not extinguish with the official position of the person since any act performed in official capacity is attributed to the state though commission of international crimes is not an official function

[288] *Arrest Warrant Case*, above n 219, para 51; see also para 59.
[289] Salvatore Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case Before the French Cour de Cassation' (2001) 12(3) *European Journal International Law* 595-612.
[290] David P. Stewart, 'Immunity and Accountability: More Continuity than Change?' (2005) 99 *American Society of International Law* 227-230, 229.
[291] *Pinochet Case*, above n 219, Lord Browne-Wilkinson, 202-203; see also Gaeta, above n 287, 326.
[292] Gaeta, above n 287, 320 and Stewart, above n 290, 228-229.
[293] Andrew D. Mitchell, 'Leave Your Hat On? Head of State Immunity and Pinochet' (1999) 25(2) *Monash University Law Review* 225-256, 231.
[294] *DujailCase* (Case No. 1/C 1/2005), Judgment of the Dujail Trial at the Iraqi High Tribunal English Translation, 126 and 271 (on file with the author).
[295] *The Prosecutor v Charles Ghankay Taylor*, (SCSL-03-01-A) Special Court for Sierra Leone, Appeals Chamber (26 September 2013).
[296] *Prosecutor v Slobodan Milošević*, Case No. IT-02-54 (24 October 2015), available at <http://www.icty.org/case/slobodan_milosevic/4> last visited, 30 August 2017.
[297] Kai Ambos, 'The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' (2011) 9(1) *Journal of International Criminal Justice* 137-158.
[298] O'keefe, above n 33, 431.

of a state.[299] Basically, functional immunity is disregarded where a state official is alleged to have committed international crimes. This is demonstrated by courts in the United Kingdom and Switzerland which have held that acts of torture are not official functions of the state since such actions are contrary to international law.[300] Similarly, functional immunity cannot be raised where ICC crimes are committed because these are 'the most serious crimes of concern to the international community as a whole'.[301]

However, criminal proceedings against a serving state official can be commenced before international courts like the ICC which have jurisdiction over the matter as was the case with respect to President Uhuru Kenyatta of Kenya.[302] Particularly, the Rome Statute disregards the official capacity of any person as a bar to criminal responsibility under the Statute and cannot act as a ground for reduction of the sentence.[303] In addition, the ICC is not barred from exercising its jurisdiction over any person by 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law…'[304]

Notably, this provision is believed to have removed immunities under national and international law with respect to state parties to the Rome Statute.[305]This is because the Rome Statute cannot impose obligations on a non-party state without its consent.[306]In effect, immunities granted under international law like Head of state immunity before foreign national courts subsist[307] and must be respected where the official concerned is a national of a non-party state.

This view finds support in article 98(1) of the Rome Statute which requires the ICC to first obtain waiver of the immunity from a third state[308] before requesting for surrender of a

[299] Werle and Jessberger, above n 17, 273.
[300] *Pinochet Case*, above n 219, 204 and 206, as well as *A versus Office of the Attorney General of Switzerland*, 'Decision of the Swiss Federal Criminal Court dated 25 July 2012', para 5.4.3, Unofficial translation provided by the Swiss non-governmental association TRIAL (Track Impunity Always), available at <http://www.internationalcrimesdatabase.org/Case/831/A-(Khaled-Nezzar)/> last visited, 30 August 2017.
[301] Rome Statute, Preamble, para 4 and art 1.
[302] *The Prosecutor v Uhuru Muigai Kenyatta*, 'Decision on the Withdrawal of Charges Against Mr. Kenyatta', (ICC-01/09-02/11) Trial Chamber V(B) (13 March 2015).
[303] Rome Statute, art 27(1). According to Schabas, official capacity is 'more likely to be an aggravating than a mitigating factor', see Schabas, above n 137, 597.
[304] Rome Statute, art 27(2).
[305] See also Schabas, above n 137, 600; Akande, above n 287, 420 and Gaeta, above n 287, 323.
[306] Vienna Convention on the Law of Treaties, above n 2, art 34. See also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (9 April 2014) para 26 where the ICC acknowledged this fact.
[307] Kleffner, above n 41, 106.
[308] According to Akande, the term 'third state' does not refer to non-parties only but 'to a state other than one with custody of the suspect.', see Dapo Akande, 'International Law Immunities and the International Criminal

person if this 'would require the requested State to act inconsistently with its obligations under international law' with respect to such immunity.[309] Such obligations would include respecting the immunity of Heads of state before foreign national courts which seems to be widely recognised.

This means that the ICC should first obtain waiver of immunity before requesting for the arrest and surrender to the ICC of an official who enjoys immunity under international law.[310] However, some scholars hold the view that where the referral is made by the United Nations Security Council (UNSC) resolution under Chapter VII powers of the United Nations Charter, the requirement for cooperation may be imposed on non-party states.[311] Still, the question whether or not the UNSC resolution can remove personal immunity of senior state officials without explicit provision to that effect remains contentious among scholars.[312]Nonetheless, it is argued that states are not legally obliged to exercise jurisdiction over foreign state officials who enjoy personal immunity under international law and to avoid political disputes, it is prudent to recognise such immunities.

In a bid to give effect to the provisions of the Rome Statute, some states have excluded immunity in the national implementing legislation using different approaches. States such as South Africa and Bosnia and Herzegovina prohibited any form of immunity for ICC crimes which is granted under any law.[313] Although such provisions are consistent with the Rome Statute, practical enforcement of these provisions may be problematic with respect to state officials who enjoy personal immunities. A notable example relates toPresident Omar Hassan Ahmad Al Bashir (President Al Bashir) whom South Africa declined to arrest and surrender to the ICC notwithstanding exclusion of any form of immunity as noted above.[314]

Court' American Journal of International Law (2004) 98(3) *The American Journal of International Law* 407-433, 423.

[309] Rome Statute, art 98(1).

[310] Gaeta, above n 287, 328.

[311] See for example, Dapo Akande, 'The Effects of Security Council Resolution and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10(2) *Journal of International Criminal Justice* 299-324, 305-306.

[312] Cryer, et al, above n 11, 560; Dov Jacobs, 'The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation', in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 281-302, 295; Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13(5) *Journal of International Criminal Justice* 1027-1047 and Schabas, above n 137, 604.

[313] The Implementation of the Rome Statute of the International Criminal Court Act (2002), Act 27 of 2002 (hereinafter, South Africa's ICC Act), sec 4(2) and Bosnia and Herzegovina's Law on Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court (2009), art 7.

[314] South Africa's ICC Act, ibid, sec 4(2) and *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others* (Case No. 27740/15) High Court of South Africa (24 June 2015) (hereinafter, *Al Bashir Case*) para 3.

Other states expressly took into consideration of the immunity granted under international law but empowered the ICC to make final determination on the existence of such immunities. States like Samoa, Trinidad and Tobago, Kenya and New Zealand[315] specifically removed immunity as a bar to ICC proceedings in their national implementing legislation but remained silent with respect to domestic proceedings. Moreover, a clause was incorporated which permits consultations with the ICC for determination of whether article 98(1) of the Rome Statute applies.[316] Although this enables state cooperation with the ICC without any obstacle on grounds of immunity, enforcement of these provisions remains problematic with respect to personal immunity of Heads of state.[317]

In states such as the United Kingdom, the national implementing legislation distinguishes between state parties and non-party states that is, it excludes immunity of a national of a state party to the Rome Statute.[318] For the case of a national of a non-party state, jurisdiction over such a person is conferred on British courts after the ICC has obtained a waiver of immunity in relation to a request for surrender of that person.[319] In other states including Philippines and Belgium, immunity granted under international law is explicitly recognised in national legislation.[320] This is a clear manifestation of states' recognition of personal immunity of selected categories of state officials which may prevent domestic criminal proceedings for ICC crimes against such persons.

In a nutshell, the above analysis has exhibited variedpractice of states concerning immunity of senior state officials. While some states totally disregarded all immunities, others either expressly recognised international law immunities of selected state officials or inserted clauses for consultation with the ICC to determine the existence of such immunities. However, it appears that even states which have expressly disregarded immunities in their national implementing legislation, personal immunities granted under international law remain an obstacle to domestic proceedings for ICC crimes.

---

[315] Samoa's International Criminal Court Act (2007), secs 32(1) and 41; Trinidad and Tobago's International Criminal Court Act (2006), sec 31(1); Kenya's International Crimes Act (2008), sec 27(1) and New Zealand's International Crimes and International Criminal Court Act (2000), sec 31(1).

[316] Samoa's ICC Act, ibid, sec 32(2); Trinidad and Tobago's ICC Act, ibid, sec 66(1); Kenya's ICC Act, ibid, sec 62(1); New Zealand's ICC Act, ibid, sec 66(1) and Mauritius's International Criminal Court Act (2011), sec 14(1).

[317] See for example, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya', (ICC-02/05-01/09) Pre-Trial Chamber I (27 August 2010).

[318] United Kingdom's International Criminal Court Act (2001), sec 23(1) and see also Ireland's International Criminal Court Act (2006), sec 61(1).

[319] United Kingdom's ICC Act, ibid, sec 23(2). This is consistent with the Rome Statute as reflected in art 98(1).

[320] Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 9 and Belgium's Act of 5 August 2003 on Serious Violations of International Humanitarian Law, art 13 which inserted 'Article 1 bis' in the Code of Criminal Procedure.

5.1.2. Applicability of Statutes of Limitations

Criminal proceedings against the accused persons are sometimes barred when the time within which such proceedings should be commenced lapses. The advantage of limiting time for prosecuting certain crimes is to administer justice expeditiously and avoid problems related to prosecuting past crimes such as loss of evidence.[321] Notably, statutory limitation of prosecution of ICC crimes is not expressly prohibited by treaty or custom[322] and some states still limit prosecution of international crimes at the national level. States such as the Netherlands apply statutes of limitations with respect to less serious war crimes,[323] as well as Italy with respect to ICC crimes which do not entail a sentence of life imprisonment.[324] For the case of France, courts declared that statutory limitation does not apply to crimes against humanity but barred prosecution of war crimes to which a 10-year statutory limitation applied.[325]Arguably, such clauses limit enforcement of national lawto penalise ICC crimes notwithstanding the emerging norm of customary international law of non-applicability of statutes of limitations for genocide, crimes against humanity and war crimes.[326]

Moreover, the Rome Statute specifically provides that 'crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'[327]which means that ICC crimes are not statute barred. In keeping with the Rome Statute, some states excluded statutes of limitations from their national implementing legislation by direct reference to article 29 of the Statute,[328]while others incorporated provisions excluding the application of statutory limitation for ICC crimes.[329]In effect, prosecution of ICC crimes was enabled irrespective of the number of years which may have elapsed since commission of such crimes.

---

[321] Nsereko, above n 126, 64.
[322] O'keefe, above n 33, 462, 463.
[323] Cryer, et al, above n 11, 84.
[324] Cassese, et al, above n 66, 313.
[325] *The Prosecutor v Klaus Barbie*, (Case No. 83-93194) Supreme Court (Criminal Law Chamber), France (6 October 1983), available at<http://www.internationalcrimesdatabase.org/Case/183/Barbie/> last visited, 30 August 2017.
[326] Cryer, et al, above n 11, 84.
[327] Rome Statute, art 29.
[328] New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(a)(vii) and Kenya's International Crimes Act (2008), sec 7(1)(g).
[329] Germany's Code of Crimes Against International Law (2002), sec 5; Samoa's International Criminal Court Act (2007), sec 15; Croatia's Criminal Code (1998), arts 18(2) and 24; The Criminal Law of Latvia (1998), sec 57; Macedonia's Criminal Code (1996), art 112; Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, art 3; Portugal's Adaptation of Criminal Legislation to ICC Statute (2004), Annex, art 7; Swiss Criminal Code (1937), art 101(1)(a)-(c); Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), art 6; Albania's Criminal Code (1995), art 67; Lithuania's Criminal Code (2000), art 95(5) and Hungary's Criminal Code (1978), sec 33(2)(a)-(b).

This exhibits variation in state practice whereby some states still rely on statutory limitations under national law even for ICC crimes unless where expressly excluded by legislation. Thus, in accordance with article 29 of the Rome Statute, state parties to the Rome Statute need to ensure that statutes of limitations do not apply to ICC crimes so as to enable domestic proceedings for such crimes.

5.1.3. Non-Retroactive Application of Legislation

This is one notion of the principle of legality[330] requiring that a person is only to be punished for conduct that was a crime at the time it was performed, either under national or international law.[331]In essence, an applicable law which criminalises and penalises a specific conduct must be in existence so that the addressee is notified of the prohibited conduct and the penalty for breaching the law. However, this does not apply to conduct which was already penalised under international law,[332]which is applicable to the person at the time the crime was committed.[333]

This implies that international law can be used as a basis for punishing conduct where such law is directly applicable before national courts. This is permissible in states such as the Democratic Republic of Congo (DRC) where military courts have applied provisions of the Rome Statute to fill the gaps in national penal legislation when adjudicating ICC crimes.[334]However, inconsistencies have been noted in the court practice in this regard whereby it is stated that some acts may be punishable in one court and not another court due to disparity in the definitions of the elements of crimes[335]

Basically, a person can only be prosecuted for crime which was clearly set out in national legislation. Similarly, under article 24(1) of the Rome Statute no person is criminally responsible under the Statute for conduct performed before its entry into force.[336] Although the principle of non-retroactivity may not be enshrined in the implementing legislation of

[330] See Cassese, et al, above n 66, 23-24 concernig the other 3 notions of legality.
[331] ICCPR, above n 29, art 15(1); ECHR, above n 29, art 7(1); ACHR, above n 29, art 9 and Banjul Charter, above n 29, art 7(2).
[332] ICCPR, ibid, art 15(2) and ECHR, ibid, art 7(2). Legislation of states that recognise criminalising conduct which is already penalised under international law include the 1998 Constitution of Albania, art 29(1) and 1990 Constitution of Croatia, art 31.
[333] Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 379.
[334] Constitution of the Democratic Republic of the Congo (2005), art 215 provides that '[l]awfully concluded treaties and agreements have, when published, an authority superior to that of the law…'
[335] Antonietta Trapani, 'Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Courts of the Democratic Republic of Congo' (2013) 46(2) *Israel Law Review* 233-248, 239, 248.
[336] See also Rome Statute, art 11(1); see also South Africa's ICC Act, above n 313, sec 5(2).

some states, the majority of states incorporated this principle either in their constitutions[337] or in other national laws.[338]

However, the principle of non-retroactivity curtails domestic application of the implementing legislation. This can be seen in states such as the Netherlands whereby the Netherlands' national implementing legislation could not be applied in the case of *Public Prosecutor v Joseph Mpambara*[339] due to its non-retroactivity. Mpambara was not prosecuted for genocide committed in 1994 in Rwanda since the Dutch courts had no jurisdiction over genocide.[340] Instead, Mpambara was prosecuted for war crimes, as well as torture using alternative legislation and his conviction for these crimes and sentence to life imprisonment were upheld by the Supreme Court on 26 November 2013.[341]

Similarly, in the case of *The Prosecutor v Yvonne Basebya*,[342] the Netherlands' national implementing legislation was not applied to punish genocide committed in 1994 in Rwanda. Instead the Netherlands' Criminal Code, section 131 was used as law applicable at the time the crimes were committed.[343] Basebya was convicted of incitement to genocide and sentenced to 6 years and 8 months in prison.[344] In both cases, the Netherlands ICC Act was inapplicable but this did not stop national authorities from using alternative legislation to ensure that perpetrators of ICC crimes residing in the Netherlands do not go unpunished.

Norway experienced the same obstacle in the case of *The Public Prosecuting Authority v Mirsad Repak*.[345]In this case the Supreme Court of Norway decided that the 2005 Penal Code which incorporated definitions of ICC crimes was inapplicable to war crimes and crimes against humanity committed before the entry into force of the Act (March 2008).[346]This is because the crimes were committed in 1992 and using the 2005 Penal Code would violate article 97 of the Norwegian Constitution which prohibited retroactive

[337] Gallant, above n 333, 244 who stated that '[m]ore than four-fifths of UN members (162 of 192, or about 84%) recognize non-retroactivity of criminal definitions (nullum crimen) in their constitutions.'
[338] See for example, the Penal Code of France (1994), art 111-3 and Criminal Code of Germany (1871), sec 1.
[339] *Public Prosecutor v Joseph Mpambara* (Case No. 12/04592) Supreme Court of The Netherlands (26 November 2013).
[340] Larissa van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts' (2009) 7(5) *Journal of International Criminal Justice* 1117-1132, 1119.
[341] *Public Prosecutor v Joseph Mpambara* , above n 339.
[342] *The Prosecutor v Yvonne Basebya*, above n 211.
[343] See unofficial translation of the summary of the verdict (27 March 2013) para 6, available at <http://www.internationalcrimesdatabase.org/Case/971/Basebya/> last visited, 30 August 2017.
[344] Ibid, para 7 and 12.
[345] *The Public Prosecuting Authority v Mirsad Repak* (Case No. 08-018985MED-OTIR/08), Oslo District Court, Norway (2 December 2008).
[346] Ibid.

legislation.[347]The Court acquitted Repak of war crimes and instead sentenced him to eight years in prison for illegal deprivation of liberty and detention of civilians under the 1902 Penal Code.[348] Like the Netherlands, Norway applied relevant national legislation which was applicable at the time the crimes were committed by the accused person other than setting him free.

The three cases discussed above exhibit that non-retroactivity of the national implementing legislation has not prevented the Netherlands and Norway from prosecuting perpetrators of ICC crimes using alternative legislation to penalise a person for an equivalent conduct. However, such legislation does not sufficiently cover the conduct penalised under the Rome Statute since the contextual elements of ICC crimes are not considered when prosecuting ordinary crimes. As noted previously, using ordinary penal laws is not prohibited though it does not reflect the heinous nature of ICC crimes.[349]Nonetheless, it is better than setting the perpetrator free thereby enhancing the fight against impunity.

It is noteworthy that retroactive legislation is permitted in states such as Australia, Latvia and Lithuania.[350] More so, the implementing legislation of Trinidad and Tobago, as well as New Zealand expressly authorise penalisation of ICC crimes committed before commencement of the legislation. Explicitly, Trinidad and Tobago's national implementing legislation, section 8(1)(a)(ii) provides for jurisdiction over genocide and crimes against humanity committed before the commencement of the Act but after the applicable date where the act performed was 'an offence under the law of Trinidad and Tobago…'[351] Under section 8(4), the applicable date with respect to genocide is 31st January, 1977 and for crimes against humanity, 1st January 1991.

Similarly, New Zealand permits retroactive application of the implementing legislation to genocide and crimes against humanity[352]except that the applicable date differs from Trinidad and Tobago with respect to genocide. Under section 8(4) of New Zealand's ICC Act, the applicable date for genocide is 28 March 1979 and for crimes against humanity, 1

[347] The Supreme Court decision overruled the decision of the Oslo District Court which had categorised crimes against personal liberty (penalised under section 223 of the 1902 Penal Code applicable at the time the crimes were committed) as war crimes under section 103 of the 2005 Penal Code. See paras 8, 76 and 78.
[348]*The Public Prosecuting Authority v Mirsad Repak*, ibid.
[349] See section 3.1 of this chapter concerning states using existing legislation to penalise ICC crimes.
[350] Australia's War Crimes Act (1945), sec 9(1), the High Court of Australia upheld the validity of this law in the case of *Polyukhovich v The Commonwealth of Australia and Another* (F.C. 91/026) High Court of Australia (14 August 1991), available at <http://www.internationalcrimesdatabase.org/Case/1172> last visited, 30 August 2017. See also the Criminal Law of Latvia (1998), sec 5(4) with respect to all ICC crimes and Lithuania's Criminal Code (2000), art 3(3) with respect to genocide and certain categories of war crimes.
[351] Trinidad and Tobago's International Criminal Court Act (2006), sec 8(1)(a)(ii).
[352] New Zealand's International Crimes and International Criminal Court Act (2000), sec 8(1)(a)(ii).

January 1991. Clearly, genocide and crimes against humanity committed before the commencement of both Acts can be penalised in the two states if it is proved that such crimes were punishable under the respective national laws at the time the crimes were committed.

It is generally agreed that the crime of genocide was prohibited before 1953[353] but with respect to crimes against humanity, there is some evidence to suggest that prohibition of such crimes even during peace time 'gradually begun to evolve' in the late 1960s.[354] Seemingly, the periods set out in the implementing legislation of Trinidad and Tobago, as well as New Zealand reflect the time during which genocide and crimes against humanity were already established as punishable under international law. However, it is necessary to prove that similar conduct was criminalised under national law of the respective states at the time of commission and moreover, the same definition of the crime in question must be adopted.[355]

It is contended that creating jurisdiction over ICC crimes committed before commencement of the national implementing legislation enables domestic proceedings for ICC crimes. Once it is proved that similar conduct was penalised under both national and international law at the time when the crime was committed, then no breach of the principle of non-retroactivity occurs. However, whether or not the principle of non-retroactivity applies depends on specific authorisation under national law of the concerned state. Without any legal basis for retroactive legislation, national criminal systems cannot commence criminal proceedings for ICC crimes committed before the enactment of the legislation in question.

5.1.4. Amnesty

National amnesty laws shield perpetrators of ICC crimes from prosecution which curtails national authorities from applying the implementing legislation to investigate, prosecute and punish such crimes. There is no accepted definition of amnesty under international law but amnesty has been referred to as 'an act of sovereign power immunizing persons from criminal prosecution for past offenses.'[356]There is evidence that amnesty is permitted under

[353] *Vasiliauskas v Lithuania* (Application No. 35343/05) ECHR Grand Chamber (20 October 2015) para 168. See also Schabas, above n 69, 72 and Valentina Spiga, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga' (2011) 9(1) *Journal of International Criminal Justice* 5-23, 17.

[354] Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR' (2006) 4(2) *Journal of International Criminal Justice* 410-418, 413.

[355] Kai Ambos, 'The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights' (2016) *Human Rights Law Review* 1-12, 10.

[356] Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32(3) *Cornell International Law Journal* 507-527, 508.

international law in certain circumstances[357]and moreover, no treaty expressly prohibits states from granting amnesty for international crimes.[358] The Rome Statute too, is silent about amnesty which is attributed to lack of consensus of states during negotiations for the Statute.[359] Even customary international law does not expressly provide any rule prohibiting amnesty for ICC crimes and the practice of states is inconsistent in this regard.[360]

Thus, issuance of amnesty remains controversial[361] due to lack of a clear position as regards to the legality of amnesty under international law. Nevertheless, this does not dispel an emerging norm prohibiting amnesty for serious international crimes and the 'scope of lawful amnesties has narrowed.'[362]Moreover, there is evidence to suggest that amnesty legislation is increasinglyconforming to international law by excluding ICC crimes and that in many states amnesty legislation coexists with domestic prosecutions of international crimes.[363]

This can be seen in Cambodia[364] and Sierra Leone,[365] with respect to the most responsible perpetrators, as well as the DRC,[366] where trials have been conducted notwithstanding the existence of amnesty laws, though still at the minimum level.[367] It is contended that the existence of amnesty *per se* does not violate the norms of international law but not in situations where it prevents investigations and prosecutions of perpetrators of

[357] See for example, ACHR, above n 29, art 4(6) and the ICCPR, above n 29, art 6(4) with respect to issuance of amnesty to prevent the death penalty.
[358] O'keefe, above n 33, 468.
[359] Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) 42-65, 61.
[360] Ronald C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? (2002) 43 *Virginia Journal of International Law* 173-247, 176.
[361] This is the case irrespective of whether such amnesties have an element of accountability or merely blanket amnesties which prevent prosecution of all persons without distinction. See Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press 2014) 16.
[362] Cryer, et al, above n 11, 572.
[363] Kathryn Sikkink, 'The Future of International Criminal Justice: Recent Empirical Studies on the Impact of Justice Mechanisms on Human Rights and Conflict' in M. Cherif Bassiouni (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015) 135-145, 138.
[364] Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 'Decision on Leng Sary's Rule 89 Preliminary Objections (Ne Bis in Idem and Amnesty Pardon)' Case No. 002/19-09-2007/ECCC/TC (3 November 2011) paras 54-55.
[365] *Morris Kallon and Brima Bazzy Kamara*, 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty' (SCSL-2004-15-AR72(E)) and (SCSL-2004-16-AR72(E) SCSL, Appeals Chamber (13 March 2004) paras 86 and 88.
[366] Patricia Pinto Soares, 'Transitional Justice in the Democratic Republic of Congo: The 2014 Amnesty Law and the Principle of Complementarity' in Triestino Mariniello (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015) 174-189, 181.
[367] Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65(3) *International Criminal Law Quarterly* 645-680, 672-673.

serious crimes. Thus, national proceedings for ICC crimes can be conducted notwithstanding the existence of amnesty laws by excluding perpetrators of ICC crimes from amnesty.

Some scholars argue that where states lack the capacity to prosecute all perpetrators due to inadequate facilities, such states should prosecute persons most responsible like political or military leaders in combination with conditional amnesties for less serious offenders.[368] It appears that legislation which enables prosecution of high-level perpetrators and permits conditional amnesties for less serious offenders is not contrary to international law.[369] More so, the ICC has jurisdiction over the most serious crimes and it is likely to intervene where high-level perpetrators are shielded from prosecution through national amnesty legislation. Thus, states should ensure that perpetrators of ICC crimes especially the civilian leaders and military commanders who instigate others to commit crimes, do not benefit from amnesty.

However, amnesty legislation which permits blanket amnesties without considering the nature of crimes committed by amnesty applicants[370] prevents states from exercising jurisdiction over ICC crimes. In South American states such as Argentina, Chile, Uruguay and Peru, legal strategies were applied to limit the application of amnesties which provided an opportunity for conducting criminal proceedings for past crimes.[371] For example, in Argentina amnesty laws which shielded military personnel from prosecution were outlawed in 2005 in the judgment of the Supreme Court in *Julio Simón et al. v Public Prosecutor*.[372]This enabled prosecution and punishment of several Argentinian military and police personnel for crimes against humanity including torture, abductions and murder.[373]

On the contrary, other states in the region like Brazil, the Supreme Court declined to annul the amnesty laws which remain operational.[374] It is argued that effective enforcement of the implementing legislation can only be realised in the absence of amnesty laws which prevent investigations and prosecutions of ICC crimes. Where such laws exist, the concerned state may not be able to exercise jurisdiction over ICC crimes which exhibits failure to give effect to the Rome Statute. The section which follows highlights some of the non-legislative

[368] Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10(5) *Journal of International Criminal Justice* 1081-1094, 1088.
[369] See also Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) 9.
[370] See for example Uganda's Amnesty Act (2000), secs 2 and 3. Refer to chapter 3 of this thesis.
[371] For example, ensuring that amnesty laws were narrowly interpreted, challenging the constitutionality of the amnesty laws and legislative annulment. See Mallinder, above n 367, 651-657.
[372] *Julio Simón et al. v Public Prosecutor* (Case No. 17.768) Supreme Court of Argentina (14 June 2005), available at <http://www.internationalcrimesdatabase.org/Case/49> last visited, 30 August 2017.
[373] Elena Maculan, 'Prosecuting International Crimes at National Level: Lessons from the Argentine "Truth-Finding Trials" (2012) 8(1) *Utrecht Law Review* 106-121,115-116.
[374] See Mallinder, above n 367, 657 and 673.

obstacles which curtail domestic implementation of the Rome Statute. It argues that effective implementation of the Rome Statute not only requires excluding legislative barriers but also non-legislative obstacles must be addressed by states.

5.2. Non-Legislative Obstacles

State parties to the Rome Statute have endeavoured to put in place national implementing legislation to give effect to their obligations under the Rome Statute using various forms as discussed in section 3. However, it appears that states have taken less effort to implement the legislation and this perhaps is due to several obstacles faced by states in implementing the Rome Statute. Some of the obstacles which curtail the implementation of the Rome Statute noted by the Assembly of States Parties include lack of human and financial resources as well as other political challenges.[375]

Shortage of funds is one of the challenges faced by states in conducting domestic proceedings for ICC crimes. This is evident in the DRC whereby financial support was mainly provided by international organisations to facilitate proceedings for ICC crimes since support from the DRC government was minimal.[376] However, as will be discussed in chapter 5 using the case studies of Uganda and South Africa, dependence on donor funding may not be sustainable due to change in priorities of the donors.

National criminal systems also have broad mandateswhereby they handle several serious crimes including ICC crimes in addition to ordinary crimes which may lead to inefficiency due to huge caseload. For example, in Croatia, the special courts designated to handle ICC crimes handle several crimes and ICC crimes are merely 'one part of a normal criminal caseload' of these courts.[377] This was also experienced in Bosnia and Herzegovina, particularly in the Republika Srpsk where prosecutors handled a huge caseload involving war crimes and other types of cases.[378]With such a huge caseload, it is questionable whethernational personnel could focus on ICC crimes which are considered complex to

[375] ASP, 'Report of the Bureau on the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court', ICC-ASP/9/21 (28 October 2010) para 20.
[376] International Centre for Transitional Justice (ICTJ), 'The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)' (July 2015) 25, available at <https://www.ictj.org/publication/briefing-accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-response> last visited, 30 August 2017.
[377] O'keefe, above n 33, 378.
[378] Human Rights Watch, 'A Chance for Justice? War Crimes Prosecutions in Bosnia's Serb Republic' (March 2006) Volume 18, No. 3(D) 21, available at <https://www.hrw.org/report/2006/03/15/chance-justice/war-crime-prosecutions-bosnias-serb-republic> last visited, 30 August 2017.

handle.[379]Consequently, fewer proceedings for ICC crimes may be instituted due to lack of prioritisation.

The other obstacle is lack of sufficient evidence to prove commission of crimes a notable example being Germany whereby investigations for war crimes against Colonel Klein and First Sergeant Awilhelm in Afghanistan in 2009 were terminated for failure to meet the requirements set out in the definition of war crimes under the Germany's Code of Crimes Against International Law (2002).[380] Lack of evidence is sometimes attributed to limited state cooperation in obtaining evidence for crimes committed abroad yet physical and documentary evidence may not be obtained easily.[381] Moreover, obtaining evidence for past crimes may be difficult due to passage of long period of time between commission of crimes and prosecution leading to loss of memory of the witnesses. Without sufficient evidence to prove commission of past crimes, no successful prosecutions may be conducted hence defeating the fight against impunity.

Aside lack of evidence, national criminal systems in some states are faced with the obstacle of lack of independence in conducting their activities due to interference from their respective governments. For example, it is alleged that the appointment of judges and prosecutors in Bosnia and Herzegovina was not on merit and lacked transparency to the extent that the majority of the appointments were made on the basis of ethnic and political considerations.[382] More so, some of the judges and prosecutors were living in fear and as such, they could not conduct their work independently.[383]Where national institutions handling ICC crimes are interfered with by the government either in the nature of their appointments or in the way they carry out their activities, justice may not be served due to lack of independence of these institutions.

In some states selective prosecutions are conducted due to unwillingness to prosecute state officials engaged in committing such crimes.[384] This has been experienced in Croatia whereby prosecutions of war crimes between 2005 and 2009 seemed to focus on perpetrators from one ethnic group, the Croatian Serbs, 'who were the accused in nearly 76 per cent of all cases.'[385] Moreover, many high-ranking military and political officials were not investigated

[379] See generally Ford, above n 272.
[380] Werle and Jessberger, above n 17, 161-162.
[381] Cryer, et al, above n 11, 88.
[382] Organization for Security and Co-operation in Europe (OSCE), 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles' (March 2005) 33 (on file with the author).
[383] Ibid, 35.
[384] Akande and Shah, above n 205, 816 and Cassese, above n 205, 5.
[385] Amnesty International, 'Behind a Wall of Silence Prosecution of War Crimes in Croatia' (2010) 6, available at <https://www.amnesty.org/en/documents/eur64/003/2010/en/> last visited, 30 August 2017.

and prosecuted for war crimes.[386] Similarly in the Central African Republic (CAR) although military personnel including members of the presidential guard are alleged to have committed several crimes during the armed conflicts in CAR, national courts have not handled these cases.[387] This means that many perpetrators of ICC crimes including state actors still enjoy impunity in the CAR yet the ICC is only handling a few cases.[388]

This section has demonstrated that although states have put in place legislation to enable domestic proceedings for ICC crimes, it appears that only a few states have successfully enforced the legislation due to several legislative and non-legislative obstacles encountered in the process. This has inhibited investigations and prosecutions of ICC crimes at the national level as well as hampered state cooperation with the ICC thereby leaving the majority of perpetrators to enjoy impunity. In some states where alternative legislation has been applied due to non-retroactivity of national implementing legislation, conduct which does not amount to ICC crimes has been penalised instead. It is contended that without addressing the obstacles discussed above, effective implementation of the Rome Statute may not be realised at the national level.

6. Conclusion

The implementation of the Rome Statute at the national level is vital since states have the primary responsibility to investigate and prosecute ICC crimes. This chapter has argued that state parties to the Rome Statute are required to give effect to the provisions of the Statute which must be done in good faith and in accordance with the object and purpose of the Statute. By virtue of the principle of complementarity (which relegates the ICC to a court of last resort), states are expected to take the lead in ensuring that investigations and prosecutions for ICC crimes are conducted domestically by taking necessary legislative and non-legislative measures to enable such proceedings.

To give effect to the Rome Statute, states have taken different approaches to incorporate provisions of the Statute in national law. Many states have created procedures for enabling cooperation with the ICC either by enacting cooperation legislation or amending existing legislation to that effect.[389] More so, states have largely incorporated the definitions of ICC crimes in keeping with the provisions of the Statute by completely incorporating the

[386] Ibid.
[387] Marlies Glasius, 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33(4) *Alternatives* 413-433, 417.
[388] See for example, *The Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', (ICC-01/05-01/08) Trial Chamber III (21 March 2016).
[389] See section 4.1.5 on cooperation.

definitions of ICC crimes, either by reference to the Rome Statute, or by copying the definitions of the Statute. Other states drafted the definitions in almost similar words as the Rome Statute or in broad terms to include crimes not covered by the Statute and for some states, these methods have been used in combination.For that matter, aside the cooperation provisions which are mandatory,[390]it was contended that incorporating the definitions of ICC crimes in national legislation is one of the important measures states need to undertake to implement the Rome Statute by criminalising the same conduct as set out in the Statute.

This may not be the case with respect to the penalties for ICC crimes as observed by states' imposition of various penalties including the death sentence.[391] This could be attributed to the flexibility under the Rome Statute whereby national penalties are not affected by the penalty provisions of the Statute.[392] With respect to the general principles of criminal law,since many of the principles set out in part III of the Rome Statute arealready available in national legislation, a state may rely on its existing law without the need to incorporate these principles.Where there are inconsistencies between the Rome Statute and national law, a state may have to ammend its law to ensure that thenational principles of criminal law are in keeping with the provisions of the Rome Statute.

Concerning jurisdiction over ICC crimes, many states if not all, created jurisdiction based on territoriality and nationality groundswhich is similar to the Rome Statute as mentioned above. Extending such jurisdiction to cover passive personality jurisdiction and universal jurisdiction as evident with some states[393]is not contrary to the Rome Statute but merely enhances the fight against impunity where the ICC may have no jurisdiction.Although there is notable disparity of the approach taken by states in incorporating provisions of the Rome Statute in national legislation, it is argued that irrespective of the approach adopted, states should be able to give effect to their obligations under the Rome Statute by enabling criminal proceedings at the national level and before the ICC.

In order to enforce national implementing legislation, non-legislative measures should also be undertaken by states such as building national capacity to effectively handle ICC crimes and execute the requests for assistance from the ICC. This will require availability of skilled personnel, adequate resources and the necessary political will to ensure that the Rome Statute is implemented at the national level. Thus, both legislative and non-legislative

[390] Rome Statute, art 86.
[391] See section 4.1.2 on penalties for ICC crimes.
[392] Rome Statute, art 80 to the effect that the penalties set out under the Rome Statute do not affect penalties under national law.
[393] See section 4.1.4 on jurisdiction.

measures are needed to be undertaken to facilitate effective implementation of the Rome Statute.

Moreover, states have to ensure that obstacles which curtail domestic implementation of the Rome Statute are addressed. Obstacles such as the principle of non-retroactivity, statutes of limitations, immunity and amnesty laws[394] should be excluded from national legislation to enable states exercise jurisdiction over ICC crimes. Similarly, non-legislative obstacles such as shortage of funds, broad mandate, lack of sufficient evidence, lack of independence as well as selective prosecutions[395] should be addressed by states to enable proceedings for ICC crimes. It is only when actual investigations and prosecutions of ICC crimes, as well as cooperation with the ICC are carried out by states, can it be stated with certainty that the Rome Statute has been implemented effectively.

The chapter which follows examines in detail the measures undertaken by Uganda to implement the Rome Statute and the emerging challenges. It is contended that despite the enactment of the national implementing legislation which appears to set out relevant provisions of the Rome Statute, coupled with establishment of institutions for handling ICC crimes and other serious crimes, less has been done to enforce the legislation due to various obstacles as will be examined in the next chapter.

[394] See section 4.1 on legislative obstacles.
[395] See section 4.2 on non-legislative obstacles.

Chapter Three

Measures Undertaken by Uganda to Implement the Rome Statute of the International Criminal Court

1. Introduction

Uganda has experienced a series of armed conflicts in the past between the Government of Uganda (GoU) and various armed groups such as the Lord's Resistance Army (LRA) in northern Uganda led by Joseph Kony, which has been described as the longest and sustained since mid-1980s.[1] As a result, serious human rights abuses were committed including deaths of thousands of the civilian population, massive displacement of over 90% of the population in northern Uganda, abduction of civilians including children, as well as rape and sexual abuses.[2] Both parties to the conflict that is, the Uganda Peoples Defence Forces (UPDF) and the LRA are believed to have committed atrocities[3] which amount to international crimes.

However, less has been done by the GoU to bring to justice perpetrators of such crimes[4] and instead, thousands of LRA armed personnel and commanders have benefitted from amnesty.[5] For example, by 2015 it was estimated that more than 27,000 former opposition armed forces 'have received amnesty over the past 15 years' including senior commanders of the LRA such as Kenneth Banya and Sam Kolo Otto.[6] This is brings into question the commitment of the GoU to prosecute perpetrators of international crimes. Notably, some of these crimes are within the jurisdiction of the International Criminal Court (ICC)[7] and accordingly, the GoU made the first referral of the situation in northern Uganda to the ICC on 16 December 2003.[8] At the time of writing, the ICC was prosecuting Dominic Ongwen one

[1] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance* Army (Zed Books 2006) 1 and Apuuli K P, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15(4) *Criminal Law Forum* 391-409, 393-394.

[2] See generally, Office of the United Nations High Commissioner for Human Rights (OHCHR), '"The Dust Has Not Settled Yet" Victims' Views on the Right to Remedy and Reparation, A Report from the Greater North of Uganda' (on file with the author).

[3] Human Rights Watch (HRW), 'Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda' (September 2005, Vol 17, No. 12(A), 14-37, available at <https://www.justice.gov/eoir/country/uganda-contents> last visited, 30 August 2017.

[4] See also Barney Afako, 'Country Study V; Uganda' in Max du Plessis and Jolyon Ford (eds), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African States*, Institute for Security Studies (ISS) Monograph Series No. 14 (March 2008) 93-114, 95.

[5] Human Rights Watch, above n 3, 3.

[6] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', Samuel Okiror, 12 June 2015, available at <http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda> last visited, 30 August 2017.

[7] Rome Statute, art 5 entrusts the ICC with jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression (subject to fulfilment of certain conditions).

[8] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, 'Decision on the Admissibility of the Case under Article 19(1) of the Statute', (ICC-02/04-01/05) Pre-Trial Chamber II (10 March 2009) para 37.

of the former commanders of the LRA for crimes against humanity and war crimes committed in Uganda.[9] As a state party to the Rome Statute,[10] Uganda has the obligation to fully cooperate with the ICC in such proceedings and this entails executing requests for assistance from the ICC in this regard.[11]

Besides, the ICC has got only supplementary jurisdiction by virtue of the principle of complementarity[12] and Uganda has the primary role to investigate and prosecute most of the crimes within the jurisdiction of the ICC that is, genocide, crimes against humanity and war crimes (ICC crimes).[13] However, national investigations and prosecutions for such crimes seem minimal and at the time of writing, only one case was before the International Crimes Division (ICD) of Uganda[14] after the Supreme Court decided that Thomas Kwoyelo was not eligible for amnesty.[15]

This chapter examines the extent to which Uganda has implemented the Rome Statute to enable proceedings for ICC crimes and facilitate cooperation with the ICC. Firstly, the chapter assesses institutions in Uganda created to handle serious crimes including ICC crimes. This is aimed at establishing whether these institutions have the capacity to investigate, prosecute and adjudicate ICC crimes. Secondly, it examines relevant provisions of the International Criminal Court Act (2010) (Uganda's ICC Act)[16] to determine the extent to which these provisions are consistent with the Rome Statute. Particularly, the jurisdiction of courts over ICC crimes, definitions of crimes and penalties, as well as the principles of criminal law used by national criminal jurisdictions are examined.

Thirdly, the chapter analyses key legislative obstacles curtailing enforcement of the Act specifically non-retroactivity of the Act and amnesty, to demonstrate how these obstacles limit the implementation of the Rome Statute in Uganda. It is submitted that although Uganda enacted legislation that incorporated several provisions in keeping with the Rome Statute as well as established institutions to handle ICC crimes, there are key obstacles that curtail domestic prosecution of these crimes. Without removing these obstacles, less proceedings for

[9] *The Prosecutor v Dominic Ongwen*, 'Decision Setting the Commencement Date of the Trial', (ICC-02/04-01/15) Trial Chamber IX (30 May 2016) para 2.
[10] Uganda ratified the Rome Statute on 14 June 2002, see United Nations, 'Common Core Document Forming Part of the Reports of States Parties, Uganda', (HRI/CORE/UGA/2015) (11 May 2015) 24.
[11] Rome Statute, arts 86 and 88; see also chapter 2, section 4.1.5 relating to cooperation with the ICC.
[12] Ibid, art 1 and Preamble, para 10.
[13] See chapter 1, section 1.
[14] The International Criminal Division (ICD) is entrusted with the mandate of adjudicating serious crimes including ICC crimes, see The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, sec 6(on file of the author).
[15] *Uganda v Thomas Kwoyelo* (Constitutional Appeal No. 01 of 2012) Supreme Court of Uganda (8 April 2015) (hereinafter, *Thomas Kwoyelo Case*) (on file with the author) 65.
[16] International Criminal Court Act (2010), Act 11 of 2010 (hereinafter, Uganda's ICC Act).

ICC crimes maybe conducted in Uganda. To that affect the section suggests solutions to remove these obstacles.

Fourthly, provisions relating to cooperation with the ICC as set out in the Act are analysed to determine whether these provisions are consistent with the Rome Statute so as to facilitate Uganda's full cooperation with the ICC.[17] Arguably, despite the extensive cooperation provisions set out under the Act, there appears to be limited political will to implement the Rome Statute as will be demonstrated in this chapter. Lastly, the chapter concludes that notwithstanding the existence of enabling legislation and institutions to facilitate domestic proceedings for ICC crimes, the extent to which Uganda has implemented the Rome Statute seems to be small. Key obstacles such as amnesty which curtail investigations and prosecutions for ICC crimes ought to be eliminated by undertaking measures including legislative reforms to deny amnesty to perpetrators of these crimes.

2. Institutions Dealing with ICC Crimes in Uganda

Uganda undertook several measures to implement the Rome Statute at the national level including establishing institutions to investigate, prosecute and punish serious crimes such as ICC crimes. Ordinarily, key institutions which handle crimes in Uganda are the Uganda Police Force (UPF), the office of the Director of Public Prosecutions (DPP) and courts. The UPF executes various functions such as preventing and detecting crime as well as enforcing the laws of Uganda.[18] This entails investigating crimes, securing criminals and attendance of witnesses for trial, as well as producing evidence to prove commission of such crimes.[19] It is the DPP with the mandate of directing the UPF to conduct investigations and thereafter, the DPP institutes criminal proceedings against any person in a court with competent jurisdiction other than the court martial.[20] The court then determines whether the accused person is guilty of the crime basing on the evidence adduced by the parties and on satisfaction that the accused person is guilty, a sentence is passed by the court putting into consideration the gravity of the offence.[21]

[17] This is an obligation set out under the Rome Statute, art 88.
[18] Police Act (1994), Chapter 303, sec 4(1).
[19] Daniel David Ntanda Nsereko, *Criminal Law in Uganda* (Wolters Kluwer 2015) 29.
[20] 1995 Constitution of Uganda, art 120(3)(a)-(b).
[21] Nsereko, above n 19, 30, see also the 1995 Constitution of Uganda, arts 129(1)-(2), 132, 134(2) and 139 with respect to the jurisdiction of the courts of judicature (Supreme Court, Court of Appeal and the High Court).

While states like Belgium created special units for handling requests for cooperation from the ICC,[22] Uganda established special units for investigating, prosecuting and adjudicating ICC crimes.[23] The advantage of creating special units for implementing the Rome Statute is to ensure proper coordination of various authorities engaged in handling matters relating to ICC crimes which enhances sharing of information and experience among these personnel.[24] More so, such cooperation and coordination may expedite the implementation of the Rome Statute since specific authorities are easily contacted to execute their respective duties. Moreover, it is thought that having the special units enables concentration of expertise and experience within these units in investigating and prosecuting serious international crimes thereby enhancing efficiency of the criminal justice system.[25] This section examines firstly, institutions engaged in investigating and prosecuting ICC crimes in Uganda and lastly, the operations of the International Crimes Division (ICD) of Uganda, the court which adjudicates ICC crimes.[26] This is aimed at assessing whether these institutions have the capacity to conduct proceedings for ICC crimes in Uganda.

2.1. Special Units for Investigating and Prosecuting ICC Crimes

National investigations and prosecutions of ICC crimes are conducted by the UPF and the DPP which operate special units to handle such crimes.[27] The War Crimes Investigation Unit (WCIU), a unit within the Criminal Investigation Department (CID) of the UPF, is responsible for investigating serious crimes including ICC crimes.[28] Once investigations are completed, the DPP, using the War Crimes Prosecution Unit (WCPU)[29] takes over the matter

[22] Gérard Dive and Julie de Hults, 'A State's Experience of Cooperation with the International Criminal Court: The Case of Belgium' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 269-296.

[23] Other states that have created special units to facilitate national proceedings for ICC crimes include Bosnia and Herzegovina as well as Croatia; see Morten Bergsmo, et al, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edn Torkel Opsahl Academic EPublisher 2010) and Croatia's Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law (2003), art 12(1) provide for the establishment of special courts at the County Courts of Osijek, Rijeka, Split and Zagreb.

[24] Dive and de Hults, above n 22, 274-275.

[25] REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units' (December 2010) 9 (on file with the author).

[26] The High Court (International Crimes Division) Practice Directions, above n 14, sec 6.

[27] Open Society Foundations, 'Putting Complementarity into Practice; Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (Open Society Foundations 2011) 59, available at <https://www.opensocietyfoundations.org/reports/putting-complementarity-practice> last visited, 30 August 2017.

[28] Ibid, 63; see also Human Rights Watch, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (January 2012) 7, available at <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division> last visited, 30 August 2017.

[29] Open Society Foundations, above n 27, 65 and Human Rights Watch, above n 28, 7.

for prosecution. It is worth noting that investigators closely work with and under the guidance of the prosecutors to ensure that relevant evidence is collected for trial.[30] This is important since coordination between investigators and prosecutors is believed to be one way of closing the impunity gap as their capability of handling ICC crimes is strengthened by sharing knowledge and experience in that regard.[31] Perhaps that is why a team of 6 prosecutors and 5 police investigators is attached to the ICD[32] to facilitate such coordination.

Relatively similar institutions were created in Bosnia and Herzegovina (BiH) for investigators and prosecutors to facilitate the work of the War Crimes Chamber (WCC) of BiH.[33] Unlike institutions in Uganda, institutions in BiH were composed of local and international personnel (such as prosecutors) who handled war crimes.[34] This was partly due to allegations of unfair trials conducted by the district and cantonal courts, as well as the need to transfer cases from the International Criminal Tribunal for the former Yugoslavia (ICTY) in order to facilitate its completion strategy.[35] For that matter, the ICTY and BiH officials cooperated in sharing information and evidence to ensure effective prosecution of war crimes.[36] This exhibited a significant international presence in BiH which is not the case in institutions handling ICC crimes in Uganda.

That notwithstanding, the special institutions in the BiH like institutions in Uganda, seem to be faced with the problem of insufficient personnel entrusted with war crimes. Particularly, in the BiH the War Crimes Investigation Centre (WCIC) which was created as a

[30] Kasande Sarah Kihika and Meritxell Regué, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' ICTJ (January 2015) 2, available at <http://www.ictj.org/publication/pursuing-accountability-serious-crimes-uganda> last visited, 30 August 2017. See also Joan Kagezi, 'Practical Aspects of Prosecuting and Adjudication of International and Transnational Crimes- The East African Perspective', a paper presented at the 7th Annual Conference and Annual General Meeting of the African Prosecutors' Association (APA) under the theme; *Strengthening Institutional Capacity of Prosecution Authorities and Agencies in Africa – Uniting Africa's Prosecutors*, held at Windhoek, Namibia (7-10 October 2012) 1 (on file with the author).

[31] Mrs Fatou Bensouda, 'The Investigation and Prosecution of Sexual and Gender-Based Crimes: Reflections from the Office of the Prosecutor', opening Keynote speech made during the inauguration of *The Hague Academy of International Law Advanced Course on International Criminal Law – Special Focus: Gender Justice*, held at the Hague Academy of International Law, the Netherlands (24 August 2015) 11 (on file with the author).

[32] Kagezi, above n 30, 1 and Ottilia Anna Maunganidze and Anton du Plessis, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65-83, 78.

[33] Avril McDonald, 'Bosnia's War Crimes Chamber and the Challenges of an Opening and Closure' in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009) 297-328, 307.

[34] For example, 'as early as 2006' there were 6 international prosecutors and 8 local prosecutors, Ibid, 307.

[35] Claire Garbett, 'Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina' (2010) 10(3) *Human Rights Law Review* 558-568, 559-560.

[36] Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina', (February 2006) Volume 18, No. 1(D) 18, available at <https://www.hrw.org/reports/2006/ij0206/> last visited, 30 August 2017.

unit within the State Investigation and Protection Agency (SIPA)[37] to investigate war crimes nationally, had a total of about 7 investigators (assigned to different regions) to conduct investigations for war crimes in BiH by 2006.[38] For the case of prosecutors, they operated under a Special Department for War Crimes (SDWC) established within the Office of the Prosecutor of BiH and as of 2006, a total of about 14 prosecutors worked with this Department.[39] These investigators (SIPA) and prosecutors (SDWC) in BiH handled a huge caseload[40] which included cases referred by the ICTY and allegations of new crimes initiated at the local level.[41] This demonstrates that specialised units in BiH lack sufficient personnel to effectively conduct proceedings for war crimes yet they have huge case load.

Other special units with huge case load include the Netherlands specialised war crimes unit whose caseload remained huge even after increasing the number of investigators from 18 to 30.[42] It appears that shortage of personnel working in these units may not be the sole reason for the failure of the special units to conduct proceedings for ICC crimes even in Uganda.[43] This is because the number of personnel working in the special units in Uganda is comparable to similar units in other states. For example in the Netherlands, the Special International Crimes Office (SICO) was established in 2002 as part of the Public Prosecution Service for investigating and prosecuting serious crimes including ICC crimes committed abroad by persons residing in Denmark.[44] By 2012 SICO consisted of 3 prosecutors and 10 investigators[45] and was criticised for low convictions that is, 1 in its 10 years of existence.[46] Moreover, it was reported that SICO 'in a handful of cases declined to initiate investigations'[47] which means that the fewer convictions were perhaps not caused by insufficient personnel but other factors such as desisting from initiating investigations. Arguably, the lack of domestic proceedings for ICC crimes may be due to several factors of which insufficient personnel handling such crimes is one possible cause.

[37] This was created to deal with police and security issues at the court, see Bergsmo, et al, above n 23, 21.
[38] Ibid.
[39] Ibid, 15.
[40] McDonald, above n 33, 307 and Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina', above n 36, 14.
[41] Ibid.
[42] REDRESS and FIDH, above n 25, 28.
[43] As will be discussed in chapter 5, several obstacles have curtailed domestic proceedings for ICC crimes such as limited political support for such proceedings.
[44] Andreas Laursen, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law' (2012) 10(4) *Journal of International Criminal Justice* 997-1016, 1014.
[45] Ibid, 1015. See also Germany's 'Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes Against International Law' which in 2009 had 7 permanent police investigators. See REDRESS and FIDH, above n 25, 10.
[46] Laursen, above n 44, 1015.
[47] Ibid, 1010.

Notably, personnel working in the special units of Uganda are continuously trained by several organisations to obtain specialised expertise in handling serious crimes including ICC crimes.[48] Such training is aimed at enhancing the skills of staff and keep them abreast with new techniques of investigating and prosecuting ICC crimes. However, the training may not be adequate because it mainly concerns with other serious crimes yet the focus on ICC crimes is limited. This is evident in the financial year 2014/2015 where it was reported that the Uganda Police Force (UPF) 'trained 200 detectives' in crimes such as fraud, cyber and homicide investigation techniques and others in investigation of violent crime and terrorism.[49] No mention was made about specialised training in investigating ICC crimes.

In addition, long-term capacity building of these units may be affected since investigators and prosecutors have multiple responsibilities over other serious crimes such as human trafficking and terrorism[50] and are sometimes transferred to other regions or departments.[51] Arguably, lack of continuity could affect the teamwork of staff thereby preventing them from focusing on ICC crimes, which require special knowledge and skills as well as long-term commitment to effectively investigate and prosecute.

Moreover, it has been reported that some personnel are reluctant to investigate and prosecute 'politically sensitive cases'[52] to avoid dismissal from work.[53] Consequently, other crimes may be prioritised over ICC crimes and this perhaps explains why the ICD is currently adjudicating only one case involving ICC crimes compared to other serious cases before this court.[54] Notably, by 2015 only 35 cases of war crimes had been registered with investigations in some cases concluded.[55] Still, this is not satisfactory because many ICC crimes were

[48] Training programmes have been conducted by organisations such as the Institute for Security Studies (ISS), see Maunganidze and du Plessis, above n 32, 78.

[49] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', 17 (on file with the author); see also the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 78-79 (on file with the author). Relevant training of the UPF in investigating sexual and gender-based violence was on *ad hoc* basis and thus, not continuous. See Kim Thuy Seelinger, 'Domestic Accountability for Sexual Violence: The Potential of Specialized Units in Kenya, Liberia, Sierra Leone and Uganda' (2014) 96(894) *International Review of the Red Cross* 539-564, 555.

[50] Human Rights Watch, above n 28, 7 and Uganda Police, 'Annual Crime and Traffic/Road Safety Report 2013', 8, 30, available at <http://www.upf.go.ug/publications/> last visited, 30 August 2017.

[51] Open Society Foundations, above n 27, 63; Human Rights Watch, above n 28, 19-20 and Seelinger, above n 49, 555. For example a list of police officers transferred to other regions of Uganda including '104 CID and crime intelligence officers' (dated 11 February 2015), see Uganda Police Force, 'New Transfers and Appointments' (12 February 2015), available at <http://www.upf.go.ug/new-transfers-appointments/> last visited, 30 August2017.

[52] Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 177.

[53] Ibid, 186 and 231.

[54] See discussion below about the operations of the ICD.

[55] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 49, 68. In 2016, only 33 cases were under investigation though with slow progress due to factors such as issuance of amnesty to

committed by several persons during the armed conflict in northern Uganda.[56] It is contended that lack of interest, continuity and commitment in investigating and prosecuting ICC crimes could possibly have curtailed the implementation of the Rome Statute in Uganda.

Therefore, effective investigations and prosecutions of ICC crimes nationally require not only an adequate national implementing legislation but also institutions with sufficient capacity to handle such crimes. Where investigators and prosecutors of ICC crimes are insufficient, adjudication of ICC crimes by the ICD is affected since only a few cases may be commenced for trial.

2.2. The International Crimes Division (ICD)

Adjudication of ICC crimes in Uganda is a new practice for national courts and as mentioned above, special institutions were created to handle such crimes including the ICD. The ICD was established in July 2008 as a special division of the High Court[57] in pursuance of the two peace accords that is, the Agreement on Accountability and Reconciliation and its Annexure, signed during the Juba peace negotiations between the GoU and the LRA.[58] Specifically, clause 7 of the Annexure provided for the establishment of a 'special division of the High Court of Uganda … to try individuals who are alleged to have committed serious crimes during the conflict.'[59] Such crimes include ICC crimes committed in northern Uganda. This section examines the operations of the ICD to determine whether the court has sufficient capacity to adjudicate ICC crimes in Uganda. Notably, the trial of the first case before the court commenced in 2011 and had not been completed at the time of writing (August 2017)[60] which brings into question the effectiveness of the ICD in handling ICC crimes.

---

some suspects, difficulty in tracing witnesses as well as lack of facilitation for the witnesses in transportation, feeding and general welfare. See the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 49, 91.

[56] See *The Prosecutor v Dominic Ongwen*, 'Decision on the Confirmation of Charges Against Dominic Ongwen', (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016) (hereinafter *Dominic Ongwen Case*) paras 73-74 which provides insight into some of the ICC crimes committed during the armed conflict in northern Uganda under the orders of Domic Ongwen.

[57] Hon. Justice Moses Mukiibi, 'International Crimes Division Annual Report 2014', a paper presented at the 16th Annual Judges' Conference under the theme; *Enhancing Public Confidence in the Judiciary*, held at Imperial Resort Beach Hotel, Entebbe, Uganda (26-30 January 2014) 2 (on file with the author).

[58] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 29 June, 2007, available at <http://www.beyondjuba.org/BJP1/peace_agreements.php> last visited, 30 August 2017 and the Annexure to the Agreement on Accountability and Reconciliation, 19 February, 2008 (on file with the author).

[59] Annexure to the Agreement on Accountability and Reconciliation, ibid, clause 7.

[60] *Thomas Kwoyelo Case*, above n 15, 65, where the Supreme Court decided that the trial against Kwoyelo 'by the International Crimes Division of the High Court is proper and should proceed.'

The ICD is one of the 8 Divisions of the High Court of Uganda[61] which is entrusted with jurisdiction over ICC crimes and other serious crimes such as terrorism, human trafficking and piracy.[62] It is composed of five judges of the High Court and a Registrar[63] with three judges for the bench, one judge as the Head of the ICD and His Deputy. As noted above, 6 prosecutors and 5 investigators work with the ICD[64] in handling ICC crimes. This facilitates coordination amongst staff as well as enhances competence and specialism in investigating and prosecuting such crimes.[65] Moreover, judges are supported by legal assistants and support staff in conducting their duties.[66]

The ICD may be contrasted with the War Crimes Chamber of Bosnia and Herzegovina (WCC) which forms part of the 3 Sections of the Criminal Division of the Court of Bosnia and Herzegovina.[67] Unlike the ICD with no units and only composed of local judges, the WCC has 5 panels and an appellate division whereby each panel was initially composed of both local and international judges.[68] This was partly aimed at enabling national personnel benefit from their international counterparts through sharing knowledge and experience in handling war crimes.[69] However, when the transition period ended in 2012, international judges were phased out.[70] Nonetheless, the international presence is believed to have contributed to the transfer of knowledge between local and international staff as well as facilitated completion of many cases,[71] which perhaps may not have been possible with only

[61] The other Divisions are Civil Division, Commercial Division, Family Division, Land Division, Criminal Division, Anti-Corruption Division and Execution and Bailiff Division. See The Judiciary of the Republic of Uganda, 'High Court', available at <http://www.judiciary.go.ug/data/smenu/9/High%20Court.html> last visited, 30 August 2017.

[62] The High Court (International Crimes Division) Practice Directions, above n 14, sec 6. The ICD has had different designations since its inception; initially, as the 'Special Division of the High Court', later as the 'War Crimes Court', then the 'War Crimes Division' and currently, the 'International Crimes Division' as referred to in this study. See Nouwen, above n 52, 179.

[63] Kagezi, above n 30, 1 and Maunganidze and du Plessis, above n 32, 78.

[64] Kagezi, ibid, 1 and Maunganidze and du Plessis, ibid, 78.

[65] Max du Plessis, Antoinette Louw and Ottilia Maunganidze, 'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions', Institute for Security Studies (ISS) Paper No. 241 (November 2012) 17.

[66] Open Society Foundations, above n 27, 67 and Human Rights Watch, above n 28, 6.

[67] The Court of Bosnia and Herzegovina has 3 Divisions (Criminal, Administrative and Appellate Divisions) with the Criminal Division having three sections (Section I handles war crimes, Section II handles organised crime, economic crimes and corruption and Section III handles other crimes within the jurisdiction of the Court. See the Law on the Court of Bosnia and Herzegovina 2000 (Official Gazette of Bosnia and Herzegovina, 49/09, arts 10(1)-(3), 14(1).

[68] Bergsmo, above n 23, 11.

[69] McDonald, above n 33, 326.

[70] Roger O'keefe, *International Criminal Law* (Oxford University Press 2015) 390.

[71] Human Rights Watch, 'Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina' (March 2012) 1, available at <https://www.hrw.org/europe/central-asia/bosnia-and-herzegovina> last visited, 30 August 2017. Many perpetrators of ICC crimes committed during the war in Bosnia and Herzegovina have been prosecuted before the WCC. See O'keefe, above n 70, 390.

local staff handling such crimes as the case with the ICD of Uganda. This shows the importance of international experts working with local staff to enhance the capacity of local staff in handling ICC crimes through knowledge transfer.

For the case of the ICD, to enhance the knowledge and skills of these judges in adjudicating ICC crimes, various training programmes in international criminal justice and other related disciplines are conducted by international organisations such as the Institute for Security Studies.[72] However, the knowledge and skills acquired by the judges of the ICD may not be maintainable because they are entrusted with broad jurisdiction over ICC crimes and other serious crimes noted above.[73] Moreover, ICD judges like all High Court judges, are required to adjudicate other cases in various regions of Uganda to curb the case backlog[74] and are attached to other Divisions of the High Court where they handle multiple assignments from these Divisions.[75] For example, in 2015 Justice Moses Mukiibi was appointed as the Head of the ICD but was also attached to the Family Division.[76] It is questionable whether these judges can effectively handle ICC crimes with such multiple assignments, bearing in mind that adjudicating such crimes involves complex matters.[77]

On the contrary, it is has been stated that in practice, the WCC of Bosnia and Herzegovina 'is assigned only cases of war crimes, crimes against humanity and genocide'[78] though legally it has jurisdiction over other criminal offences.[79] Thus, unlike the WCC which seems to be focused on ICC crimes, the ICD has broader jurisdiction since it adjudicates other cases not relating to ICC crimes in other regions of Uganda to curb the case backlog as mentioned above. This is problematic due to the possibility of limiting the judges'

[72] Du Plessis, Louw and Maunganidze, above n 65, 17; Maunganidze and du Plessis, above n 32, 78, Mukiibi, above n 57, 5-6 and Open Society Foundations, above n 27, 67. Similar organisations including the Institute for International Criminal Investigation (IICI) offered training to staff working in the special units handling international crimes in Germany and the Netherlands, see REDRESS and FIDH, above n 25, 10.
[73] See above n 62, including genocide, crimes against humanity, war crimes, terrorism and human trafficking.
[74] Human Rights Watch, above n 28, 6; see also Open Society Foundations, above n 27, 67.
[75] Mukiibi, above n 57, 5.
[76] He replaced Justice Ezekiel Muhanguzi who was posted as the Head, Execution & Bailiffs Division but at the same time indicated as attached to the ICD. See 'Full List of High Court Judge's Transfer' (8 October 2015), available at <https://ugandaradionetwork.com/story/full-list-of-high-court-judges-transfer> last visited, 30 August 2017.
[77] Antonio Cassese, Paola Gaeta and Others (rev edn), *Cassese's International Criminal Law* (3rdedn Oxford University Press 2013) 268, justifying why international judges are more suitable to adjudicate international crimes since they have expertise in handling 'complex legal issues arising both from national legislations involved and the relevant rules of international law.'
[78] O'keefe, above n 70, 390.
[79] These include crimes in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina as well as certain crimes in the laws of the Federal entities. See the Law on the Court of Bosnia and Herzegovina 2000, above n 67, art 7(1)-(2).

concentration on ICC crimes which ultimately impedes development of special knowledge and skills in adjudicating such crimes in Uganda.

More so, it appears that other serious crimes of less complexity are prioritised over ICC crimes. This is exhibited by the rate at which other cases are completed before the ICD which is not the case with ICC crimes. For example, the case of *Uganda v Thomas Kwoyelo*[80] which commenced in 2011 was ongoing at the time of writing. However, other serious crimes were commenced in the ICD around the same time including cases of terrorism[81] and human trafficking, of which some have been successfully completed.[82] This defeats the very reason for creating the ICD and brings into question its ability to enforce justice for ICC crimes.

One can argue that due to the complexity of ICC crimes, the ICD may not be expected to handle these crimes expeditiously as other crimes (such as human trafficking) which may involve fewer perpetrators. A similar argument was made for the fewer cases completed by the WCC in contrast with the Special Department for Organised Crimes (SDOC) handling cases of organised crime in BiH which were considered 'less complex or politically sensitive than war crimes cases.'[83] Even so, the ICD's adjudication of only the *Thomas Kwoyelo Case* since its establishment in 2008 leaves a lot to be desired. When contrasted with the WCC established in 2005, by 2010 about 60 verdicts had been made of which 43 cases where completed with a final decision.[84] The fact that the WCC was composed of international and local judges as mentioned above[85] which is not the case with the ICD does not dispel the argument that the ICD has made limited progress in handling ICC crimes.

Therefore, the establishment of the ICD as a special court for handling ICC crimes exhibited commitment by the GoU to give effect to its obligations under the Rome Statute by enabling domestic proceedings for ICC crimes. However, the broad mandate of the ICD and multiple tasks of the judges seem to affect proper adjudication of ICC crimes in Uganda due to lack of consistency and less focus on these crimes. This exhibits that institutions handling ICC crimes in Uganda do not have sufficient capacity to facilitate effective domestic proceedings for these crimes. Thus, it is contended that the creation of special institutions to handle ICC crimes has so far resulted into fewer proceedings for ICC crimes in Uganda. Nonetheless, having these institutions in place is a step forward in the fight against impunity

[80] *Thomas Kwoyelo Case*, above n 15, Judgment of Hon. Dr. Esther Kisaakye, 2.
[81] Mukiibi, above n 57, 4.
[82] Ibid, 3-4. See for example, *Uganda v Umutoni Annet* (HCT-00-ICD-CR-SC-No. 003 of 2014) High Court of Uganda (International Crimes Division) (16 October 2014).
[83] Bergsmo, above n 23, 39.
[84] Garbett, above n 35, 565-566.
[85] See above n 68.

in Uganda. The section which follows examines the legal framework which entrusts national institutions with jurisdiction over ICC crimes to determine the extent to which the legislation is in conformity with the Rome Statute.

3. The Law Implementing the Rome Statute in Uganda

Uganda's legal system is based on English common law and thus, it adopted the dualist system whereby treaty provisions can only be enforced by national courts after incorporation in national legislation by an Act of Parliament.[86] Although national courts also refer to international law instruments when adjudicating cases even without domesticating such instruments,[87] treaties executed by Uganda are not self-executing and require domestication to enable enforcement in national courts.[88] In fact, adoption of national implementing legislation was noted as vital in determining whether Uganda had taken steps to investigate and prosecute ICC crimes to make the case inadmissible before the ICC.[89]

Consequently, Uganda enacted its ICC Act to implement the Rome Statute which came into force on 25 May 2010.[90] To this effect, the Act provides procedures to facilitate cooperation with the ICC and also enables domestic proceedings for ICC crimes in its substantive provisions.[91] The approach adopted by Uganda in implementing the Rome Statute was to set out the cooperation provisions with the complementarity provisions (provisions which enable domestic proceedings for ICC crimes) in a single Act. The advantage is that all the relevant provisions of the Act are contained in one document which is not the case for states such as the Netherlands which has separate national implementing legislation.[92] Since there is no specific method prescribed for incorporating provisions of the Rome Statute,[93] what is important is whether the Act sufficiently gives effect to the provisions of the Statute, which is the subject of analysis in this section.

---

[86] Henry Onoria, 'Uganda' in Dinah Shelton, *International Laws and Domestic Legal Systems* (Oxford University Press 2011) 594-619, 597.
[87] Busingye Kabumba, 'The Application of International Law in the Ugandan Judicial System: A Critical Enquiry' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 83-107, 90-104.
[88] Nsereko, above n 19, 45.
[89] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, above n 8, paras 50-52.
[90] Uganda's ICC Act, above n 16.
[91] Ibid, sec 2.
[92] Netherlands' International Crimes Act (2003), for complementarity provisions and the International Criminal Court Implementation Act (2003) for enabling cooperation with the ICC.
[93] See chapter 2, section 3 on methods of implementing the Rome Statute in the practice of state parties.

The Act is divided into 10 parts of which 6 parts are dedicated to cooperation of Uganda with the ICC and 2 parts contain the complementarity provisions.[94] Clearly, the Act extensively sets out the procedures for cooperation with the ICC which is not the case with the complementarity provisions. This may be attributed to the explicit obligation under article 88 of the Rome Statute to the effect that states 'shall ensure that there are procedures available under their national law for all of the forms of cooperation' specified under part 9 of the Statute. For that matter, the section examines the complementarity provisions of the Act particularly, i) jurisdiction, ii) definitions of ICC crimes, iii) penalties for ICC crimes, and lastly, iv) individual criminal responsibility and defences. This is due to the utmost importance of incorporating such provisions to enable domestic proceedings for ICC crimes. An analysis of the cooperation provisions of the Act is made elsewhere in this chapter.[95]

3.1. Jurisdiction over ICC Crimes

The crimes created under Uganda's ICC Act can only be investigated, prosecuted and punished in Uganda if national criminal systems are entrusted with jurisdiction over such crimes. This is the authority of the state to regulate its affairs in accordance with national law.[96] Generally, a state may exercise jurisdiction over international crimes using territoriality, nationality (active personality), passive personality, the protective principle and universality bases of jurisdiction which are recognised under international law.[97] As noted in chapter 2, it is important for the state to create at the minimum, jurisdiction based on territoriality and nationality jurisdictions which are generally accepted[98] and are in keeping with the Rome Statute.

Notably, under the PCA of Uganda the jurisdiction of courts in Uganda 'extends to every place in Uganda'[99] which is basically territorial, the idea being that each state has the authority over events which occur on its territory.[100] It follows that authorities in Uganda cannot exercise jurisdiction over crimes committed abroad except with the consent of the

[94] Uganda's ICC Act, above n 16, Part III to VIII provide for cooperation with the ICC and Parts II and IX provide for complementarity provisions.
[95] See section 5.
[96] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn Cambridge University Press 2014) 49. See chapter 2, section 4.1.4.
[97] Olympia Bekou and Sangeeta Shah, 'Realising the Potential of the International Criminal Court: The African Experience' *Human Rights Law Review* (2006) 6(3) 499-544, 511.See chapter 2, section 4.1.4 for the definitions of the territoriality, nationality, passive personality, protective principle and universal jurisdictions.
[98] Cryer, et al, above n 96, 52-53.
[99] Penal Code Act (1950) (Cap 120, Laws of Uganda (2000) (hereinafter, PCA of Uganda) sec 4(1).
[100] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) *The British Yearbook of International Law* 187-239, 196. See also Nsereko D, above n 19, 65.

other state.[101] Nonetheless, jurisdiction is extended to prosecute and punish Ugandans or ordinary residents in Uganda who commit crimes abroad, such as treason and offences against the state, concealment of treason,[102] terrorism[103] and grave breaches of the Geneva Conventions.[104] This is based on nationality jurisdiction which is thought to be widely accepted but in relation to international crimes and not domestic crimes.[105]

Clearly, courts in Uganda had no jurisdiction over ICC crimes other than grave breaches of the Geneva Conventions before the entry into force of Uganda's ICC Act. When the Act became operational, national courts were entrusted with jurisdiction over ICC crimes committed within Uganda and abroad.[106] This created jurisdiction based on territoriality and other bases with respect to ICC crimes committed abroad, on fulfilment of conditions under section 18 of the Act which provides;

> For the purpose of jurisdiction where an alleged offence against sections 7 to 16 was committed outside the territory of Uganda, proceedings may be brought against a person, if- (a) the person is a citizen or permanent resident of Uganda; (b) the person is employed by Uganda in a civilian or military capacity; (c) the person has committed the offence against a citizen or permanent resident of Uganda; or (d) the person is, after the commission of the offence, present in Uganda.

This provision established several jurisdictional bases that is, nationality jurisdiction whereby proceedings can be commenced against any Ugandan who committed ICC crimes abroad.[107] This is based on the idea that the authority of the state extends to its nationals abroad[108] because people owe allegiance to their states and are obliged to abide by national laws, especially where national security and economic interests of the state are concerned.[109] It has been argued that nationality jurisdiction extends to permanent residents of the state who are deemed as nationals of such a state.[110] This means that permanent residents of Uganda may be treated as Ugandans for purposes of exercising jurisdiction over ICC crimes committed abroad. However, it is not clear whether permanent residents of Uganda who are victims of ICC crimes while abroad may be treated as Ugandans. Nonetheless, the Act provides for

[101] See also Julia Selman-Ayetey, 'Universal Jurisdiction: Conflict and Controversy in Norway' in Kevin Jon Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 267-285, 269.
[102] PCA of Uganda, above n 99, sec 4(2).
[103] The Anti-Terrorism Act (2002), sec 4(1)(b)(iii); see also sec 4(1)(b)(iv)-(v) and sec 4(1)(b)(viii).
[104] Geneva Conventions Act (1964) (Cap 363, Laws of Uganda, 2002) (hereinafter, GCA of Uganda) sec 2(2).
[105] Cryer, et al, above n 96, 54 and Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9(4) *Utrecht Law Review* 68-89, 76.
[106] Uganda's ICC Act, above n 16, secs 7(1), 8(1) and 9(1).
[107] Ibid, sec 18(a); see also Samoa's International Criminal Court Act (2007), sec 13(1)(b).
[108] Mills, above n 100, 198.
[109] Nsereko, above n 19, 69.
[110] Cryer, et al, above n 96, 55.

jurisdiction over ICC crimes committed against such persons while abroad.[111] In addition, Ugandans who are victims of ICC crimes are covered under the Act basing on passive personality jurisdiction.[112] This is based on the right of the state to protect its citizens abroad though it is pertinent that the territorial state is given an opportunity to exercise jurisdiction first[113] to avoid breaching its sovereignty.

With respect to jurisdiction which is based on a person being an employee of Uganda in a civilian or military capacity,[114] this is beyond the traditionally recognised bases of jurisdiction. Presumably, this applies to a person employed by Uganda who is neither a citizen nor a permanent resident of Uganda. It appears that mere employment suffices to trigger jurisdiction of national systems irrespective of whether there is a link between employment and the crime committed.[115] However, exercising jurisdiction basing on employment in the absence of any recognised bases of jurisdiction may be contested by a state with close connection to the crime such as the territorial state or state of which the accused person is a national.

Arguably, such jurisdiction should be exercised when the perpetrator is present in Uganda after committing the crime. This is permitted under section 18(d) which is also known as conditional universal jurisdiction,[116] a limited form of universal jurisdiction exercised when the perpetrator is in the territory of the forum (prosecuting) state after committing crimes abroad without any link to that state.[117] An example is Belgium whereby in 2001 four Rwandese nationals all present in Belgium, were prosecuted and convicted for crimes committed in Rwanda.[118] Notably, state practice on the presence requirement seems unclear though legislation of some states provides guidance for example, where it states that jurisdiction is asserted if the accused person is found or arrested in the territory of the forum

[111] Uganda's ICC Act, above n 16, sec 18(c).
[112] Ibid, sec 18(c).
[113] Nsereko, above n 19, 70.
[114] Uganda's ICC Act, above n 16, sec 18(b), see also Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(a)(i) and Kenya's International Crimes Act (2008), sec 8(b)(i).
[115] Bekou and Shah, above n 97, 511.
[116] See also Samoa's International Criminal Court Act (2007), sec 13(1)(d); Mauritius's International Criminal Court Act (2011), sec 4(3)(c); Canada's Crimes Against Humanity and War Crimes Act (2000) sec 8(b); Kenya's International Crimes Act (2008), sec 8(c) and Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 17(b).
[117] Cassese, et al., above n 77, 278. See chapter 2, section 4.1.4.
[118] M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) *Virginia Journal of International Law* 81-162, 146.

state.[119] This implies that such a person has to be in the custody of the forum state to trigger jurisdiction over extraterritorial crimes.

Therefore, providing national courts with jurisdiction over ICC crimes committed abroad is commendable but this requires clear provisions stipulated in national legislation. To this effect, Uganda's ICC Act may need to be amended to clearly state when the presence requirement is satisfied to exercise jurisdiction over ICC crimes committed abroad. This is important with regard to exercising universal jurisdiction to avoid breaching international law norms. Nonetheless, setting out jurisdiction basing on territoriality, nationality, passive personality and universal jurisdiction (conditional) enables national criminal systems to exercise broad jurisdiction over ICC crimes. It remains to be seen whether Uganda will exercise jurisdiction over ICC crimes committed abroad since less has been done to investigate and prosecute ICC crimes allegedly committed within its territory.[120] The section which follows examines provisions concerning definition of ICC crimes under the Uganda's ICC Act to establish consistency of these provisions with the Rome Statute.

3.2. Definitions of ICC Crimes

The 1995 Constitution of Uganda requires that a person should be convicted for a criminal offence where 'the offence is defined and the penalty for it prescribed by law.'[121] Clearly, there must be a law setting out the prohibited conduct and the penalty for breaching the law. Thus, Uganda's Penal Code Act (1950) (PCA of Uganda)[122] which is the primary source of criminal law provides for ordinary crimes such as murder, rape, defilement and robbery and imposes penalties for each crime.[123] These crimes cannot be equalled to ICC crimes which are normally committed on a high scale, involving multiple victims and perpetrators hence requiring proof of additional elements to show the context within which the crimes were

[119] See for example, Albania's Criminal Code (1995), art 7/a; Montenegro's Criminal Code (2003), art 137(2); Portugal's Adaptation of Criminal Legislation to ICC Statute (2004), Annex, art 5(1); Serbia's Criminal Code (2005), art 9(2) and Macedonia's Criminal Code (1996), art 119(2). See also chapter 4 on South Africa.
[120] See section 2 of this chapter concerning institutions for investigating and prosecuting ICC crimes.
[121] 1995 Constitution of Uganda, art 28(12).
[122] PCA of Uganda, above n 99.
[123] Under the PCA of Uganda, ibid, for murder its death sentence (secs 188-189) same applies to rape (secs 124) but for attempted rape, its life imprisonment (sec 125) and the same applies to defilement (sec 129(1)). For aggravated defilement, the penalty is death (sec 129(3)) and attempted defilement is penalised with imprisonment not exceeding 18 years (sec 129(2)). For robbery, the punishment is 10 years where the case is heard by the Magistrates' Court and life imprisonment where the case is heard by the High Court (sec 286(1)). Where a deadly weapon is used during the robbery or death of a person or grievous bodily harm results thereby, the punishment is death sentence (sec 286(2)).

committed, as well as the gravity of these crimes.[124] This called for a specific legislation to address these crimes than relying on the PCA of Uganda.

In essence, before enacting Uganda's ICC Act ICC crimes were not criminalised under Ugandan law except for grave breaches of the Geneva Conventions.[125] This meant that other than grave breaches of the Geneva Conventions, national criminal jurisdictions in Uganda could not investigate and prosecute other categories of war crimes, genocide and crimes against humanity due to lack of national legislation outlawing such crimes.

The importance of Uganda's ICC Act lies in creating ICC crimes as punishable under Ugandan law. The Act makes it a crime for any person who commits genocide, crimes against humanity and war crimes in Uganda or elsewhere[126] and the definitions of ICC crimes were incorporated by reference to articles 6, 7 and 8(2)(a)(b)(c) and (e) of the Rome Statute.[127] The approach taken by Uganda is similar to the approach adopted by states such as Mauritius and United Kingdom.[128]National institutions may ably investigate and prosecute the same conduct as the ICC since similar definitions were incorporated which entrusted national criminal systems in Uganda with jurisdiction over ICC crimes.

Moreover, replicating definitions of ICC crimes in the Rome Statute ensures consistency of the Act with the Statute and is also thought to be less costly in terms of expertise and resources[129] since it obviates the need for redrafting the definitions of ICC crimes. The problem with this approach is that it limits Uganda's legislative capacity to crimes set out under the Rome Statute hence omitting crimes such as certain categories of war crimes not penalised under the Statute.[130] Nonetheless, the definitions are in keeping with the Rome Statute which enables domestic proceedings for ICC crimes.

---

[124] William Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 22; see also chapter 2, section 4.1.1 regarding the elements of ICC crimes.

[125] GCA of Uganda, above n 104, sec 2. Grave breaches are defined in Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31, art 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85, art 51; Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135, art 130 and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, art 147 (hereinafter, Geneva Conventions).

[126] Uganda's ICC Act, above n 16, secs 7(1), 8(1) and 9(1).

[127] Ibid, secs 7(2), 8(2) and 9(2).

[128] Mauritius's International Criminal Court Act (2011), sec 2 and United Kingdom's International Criminal Court Act (2001), sec 50(1).

[129] Bekou and Shah, above n 97, 509.

[130] These include the use of biological weapons, anti-personnel land mines and blinding laser weapons. See Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes' (2003) 7 *Max Planck Yearbook of United Nations Law* 341-407, 345-347.

In order to interpret and apply articles 6 to 8 of the Rome Statute for purposes of sections 7 to 9 of Uganda's ICC Act, section 19(4)(a) of the Act provides that national courts in Uganda '*may have regard* to any elements of crimes adopted or amended in accordance with article 9 of the Statute… '[131] Seemingly, it is not mandatory for courts in Uganda to refer to the Elements of Crimes as the case with the United Kingdom[132] but are permitted to do so at their discretion. These Elements of Crimes are useful in interpreting ICC crimes and provide greater certainty as well as clarity with regard to the content of each crime.[133] In effect, judges in Uganda have the discretion to apply the Elements of Crimes to ensure that the ingredients of ICC crimes are properly interpreted.

Overall, setting out the definitions of ICC crimes by reference to the Rome Statute and permitting judges to refer to the Elements of Crimes in interpreting these provisions enables Uganda to give effect to the provisions of the Statute. This is because the standards used by the ICC may be adopted by national courts in Uganda when defining ICC crimes to ensure consistency in interpreting the definitions of these crimes. The section which follows discusses the penalties for ICC crimes and argues that although there is no obligation to incorporate penalties in the Rome Statute, judges should be in position to determine appropriate penalties for ICC crimes being guided by relevant legislation on the matter.

3.3. Penalties for ICC Crimes

Uganda's ICC Act sets out penalties for ICC crimes in broad terms as life imprisonment or a lesser term without specifying the penalty for each crime.[134] Such penalties not only fail to satisfy the principle of legality[135] but also contradict with the 1995 Constitution of Uganda which requires a person to be convicted of a crime with a clearly specified penalty.[136] This implies that legislation in Uganda can only be enforced where judges are able to determine specific penalties for each crime committed. For example the PCA of Uganda clearly sets out the crime and the penalty imposed.[137]

---

[131] Uganda's ICC Act, above n 16, sec 19(4)(a) emphasis added; see also a similar provision in the New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(4)(a).
[132] The United Kingdom's International Criminal Court Act (2001), sec 50(2)(a) requires the judge to 'take into account' of 'relevant Elements of Crimes adopted in accordance with article 9…'
[133] Dörmann, above n 130, 403 and 350 respectively.
[134] Uganda's ICC Act, above n 16, secs 7(3), 8(3) and 9(3); see also New Zealand's International Crimes and International Criminal Court Act (2000), secs 9(3), 10(3) and 11(3).
[135] Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99(4) *Journal of Criminal Law and Criminology* 857-927, 865.
[136] The 1995 Constitution of Uganda, art 28(12).
[137] See above n 123.

Such specificity of penalties is lacking under Uganda's ICC Act which is the same case for penalties under the Rome Statute[138] except that the Statute provides for life imprisonment as 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person.'[139] In essence, the penalty of life imprisonment is imposed by the ICC in exceptional circumstances and in any case, a fixed term of imprisonment is provided for in the Rome Statute as 30 years[140] which is not the case for Uganda's ICC Act.

Seemingly, variation in penalties is anticipated because article 80 of the Rome Statute is to the effect that penalties under the Statute do not affect penalties provided under national law. Indeed, there is flexibility in this regard as demonstrated from state parties to the Rome Statute which impose various penalties for ICC crimes including the death penalty.[141] It is contended that the penalties set out under Uganda's ICC Act are not contrary to the Rome Statute since there is no obligation to incorporate penalties under the Statute. However, to enforce penalties set out under the Act the judges in Uganda will have to refer to relevant national law to ascertain specific penalties for different types of ICC crimes.

It is therefore pertinent to examine how judges in Uganda determine sentences for ordinary crimes such as murder, rape, defilement and robbery which are penalised with life imprisonment or death sentence under the PCA of Uganda.[142]It appears that these penalties are regarded as maximum sentences since judges have the discretion to impose lessor sentences depending on the gravity of the crimes committed.[143] For example, in the case of *Attorney General v Susan Kigula & 417 Others*, the Supreme Court declared the mandatory death sentence unconstitutional and upheld the discretion of the judges in confirming the death sentence, not the Parliament.[144] However, such discretion can only be exercised effectively using the principles and guidelines which courts in Uganda apply in sentencing that is, the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (Sentencing Guidelines).[145]

---

[138] Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10(1) *Criminal Law Forum* 1-32, 6. See chapter 2, section 4.1.2.
[139] Rome Statute, art 77(1)(b).
[140] Ibid, art 77(1)(a).
[141] See for example, Ghana's Criminal Code Act (1960), sec 49A (1); Mongolia's Criminal Code (2002), art 302 and Belize's Genocide Act (1971), sec 2(3). See also chapter 2, section 4.1.2.
[142] PCA of Uganda, above n 99.
[143] *Attorney General v Susan Kigula & 417 Others*, (Constitutional Appeal No. 03 of 2006) Supreme Court of Uganda (21 January 2009) 45. The same may be said concerning the mandatory life imprisonment for grave breaches of the Geneva Conventions under the GCA of Uganda, above n 104, sec 2(1)(i).
[144] *Attorney General v Susan Kigula & 417 Others*, ibid, 45.
[145] The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No. 8 of 2013 (hereinafter, Sentencing Guidelines), sec 3(b), available at <http://www.loc.gov/law/help/sentencing-guidelines/uganda.php> last visited, 30 August 2017.

Uganda adopted Sentencing Guidelines to promote 'uniformity, consistency and transparency in sentencing'[146] and to ensure that offenders who commit similar crimes in similar circumstances are sentenced in the same way.[147] The same approach was taken by states such as England and Wales, Australia, Scotland and Northern Ireland which introduced sentencing guidelines to minimise disparities in sentencing.[148]The Sentencing Guidelines contain the general sentencing principles set out in section 6 which courts have to take into account in determining the appropriate sentence to impose against the offender.[149]

Various sentencing options (penalties) are set out in section 10 including the death penalty.[150] Indeed, the death penalty is still recognised as a valid punishment in Uganda[151] and is imposed against perpetrators of serious crimes.[152] Since Uganda's ICC Act sets life imprisonment as the maximum sentence,[153] this may not create difficulties in implementing the Rome Statute. This is perceived from the PCA of Uganda to the effect that the Act does not affect trial and punishment of a person for a crime set out in any other written law in Uganda.[154] In a sense, Uganda's ICC Act is recognised as a law which creates ICC crimes and sets penalties for such crimes. It is arguable that there is no possibility of imposing the death sentence for ICC crimes as life imprisonment is the maximum penalty in the Act.

Nevertheless, judges in Uganda need to refer to the Sentencing Guidelines to ascertain specific sentences for ICC crimes depending on the gravity of the crimes committed. In this case, an appropriate sentence is determined by considering the aggravating or mitigating factors.[155] The aggravating factors taken into account include the degree of injury, the body part of the victim injured, repetitions of injury to the victim, the nature of weapon used and

[146] Ibid, sec 3(e).
[147] Ibid, sec 6(c).
[148] Northern Ireland Assembly, 'Sentencing Guidelines Mechanisms in Other Jurisdictions', Research and Information Service Research Paper 79/16, (30 September 2016), available at <http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/research-publications-2016/>last visited, 30 August 2017.
[149] These include taking into consideration of the gravity and nature of the crime, the need for consistency in sentencing of offenders who commit similar crimes in similar circumstances and the previous convictions of the offender, as well as restorative justice processes. See Sentencing Guidelines, above n 145, sec 6.
[150] Other penalties include life imprisonment, imprisonment for a specified term, a fine, community service, probation and caution. See Sentencing Guidelines, above n 145, sec 10.
[151] 1995 Constitution of Uganda, art 22(1) in execution of a lawful sentence confirmed by the highest appellate court; see also *Attorney General v Susan Kigula & 417 Others*, above n 143.
[152] Serious crimes such as rape, aggravated defilement, murder and robbery (with a deadly weapon) are punishable with death sentence under the PCA of Uganda, above n 99. See also above n 123.
[153] Uganda's ICC Act, above n 16, secs 7(3), 8(3) and 9(3).
[154] PCA of Uganda, above n 99, sec 3(a).
[155] Sentencing Guidelines, above n 145, sec 27(2).

the degree of intention to cause death by the accused person or culpable negligence.[156] However, such a sentence can be mitigated by factors such as lack of intention to cause death, mental disorder or disability of the accused person, the role of the accused person and self-defence.[157] The specific sentences for the crimes committed are determined by reference to the sentencing range set out in part II of the Third Schedule of the Sentencing Guidelines.[158] Using the Sentencing Guidelines, the ICD may ably determine specific sentences for each ICC crime.

Despite the usefulness of the Sentencing Guidelines in ensuring consistency and uniformity in sentencing offenders noted above,[159] divergence in sentencing still occurs. It is believed that in exercising their discretion, sometimes judges consider other factors like age, sex and race of the accused person.[160] Moreover, unfairness in sentencing may be occasioned due to the characteristics of the judges including age, education or training.[161] Nonetheless, Sentencing Guidelines need to be utilised in Uganda especially with regard to enforcing Uganda's ICC Act which lacks specific penalties for different categories of ICC crimes.

In sum, the penalties set out in Uganda's ICC Act are in keeping with provisions of the Rome Statute and the lack of specificity can be cured by reference to the Sentencing Guidelines explained above in order to determine appropriate sentences. The section which follows examines the general principles of criminal law focussing on individual criminal responsibility and defences, to determine whether these principles as set out under Uganda's ICC Act are consistent with the Rome Statute.

3.4. Individual Criminal Responsibility and Defences

When prosecuting international crimes, the general principles of criminal law must be applied as well as the specific elements of the crime proved in order to determine the criminal liability of any person.[162] In addition, there are certain defences available to an accused person justifying or excusing the criminal charge against such a person. Several principles of

[156] Ibid, sec 28, in the case of *Uganda v Vincent Kamau and Another* (HCT-00-CR-SC-0077 of 2012) High Court of Uganda (30 April 2013) the court took into consideration aggravating factors including the harm inflicted on the victim.
[157] Sentencing Guidelines, ibid, sec 29.
[158] Ibid, sec 27(1) and part II of the Third Schedule that is, 3 years up to life imprisonment.
[159] Ibid, sec 3(e).
[160] Mandeep K. Dhami, 'Sentencing Guidelines in England and Wales: Missed Opportunities?' (2013) 76(1) *Law and Contemporary Problems* 289-307, 290.
[161] Ibid.
[162] Cathleen Powell and Adele Erasmus, 'General Principles of International Criminal Law' in Max du Plessis (ed), *African Guide to International Criminal Justice* (2008 Institute for Security Studies) 143-180, 143.

criminal law are incorporated in Uganda's ICC Act under section 19(1)(a) by reference to the relevant provisions of Part III of the Rome Statute.[163]

This section only focusses on the principle of individual criminal responsibility and defences as set out under Uganda's ICC Act.[164] This is because of the importance of establishing the liability of the person for the crime committed as well as any circumstances which may discharge or limit the person's culpability for such a crime. Thus as suggested previously, the standards set out under national law should be in keeping with the provisions of the Rome Statute to ensure that perpetrators of ICC crimes are not shielded from liability due to broad defences that may be available under national law.[165]

Notably, section 19(1)(b) of the Act is to the effect that 'provisions of Ugandan law and the principles of criminal law applicable to the offence under Ugandan law apply'. In effect, the provisions referred to in the Rome Statute are supplemented with national criminal law principles thereby broadening the law applicable to ICC crimes in Uganda. However, where there is discrepancy between the principles of criminal law and defences provided under the Rome Statute with those contained under Ugandan law, the Statute prevails.[166]This means that the principles set out under the Rome Statute have precedence over national law principles in case of any inconsistency as demonstrated below using the principle of individual criminal responsibility and defences.

3.4.1. Individual Criminal Responsibility

The principle of individual criminal responsibility is provided for under section 19(1)(a)(iv) of Uganda's ICC Act by reference to article 25 of the Rome Statute.[167] To determine responsibility of a person for the crime committed, section 19 of the PCA of Uganda provides for participants in commission of a crime. These include the person who actually commits the crime,[168] one who aids and abets others to commit the crime[169] and one who procures others

[163] These include the prohibition of trial of a person who has already been convicted or acquitted of the same conduct; the requirement of strict interpretation of the definition of a crime without extending the interpretation by analogy; the principles of individual criminal responsibility; exclusion of jurisdiction over persons under 18 years; responsibility of commanders and other superiors; exclusion of statutes of limitations; mental element of crimes; grounds for excluding criminal responsibility; mistake of law and the defence of superior orders. See Rome Statute, arts 20, 22(2), 25, 26, 28, 29, 30, 31, 32 and 33.

[164] Uganda's ICC Act, above n 16, secs 19(1)(a)(iv) and 19(1)(a)(ix) respectively.

[165] See chapter 2, section 4.1.3 on individual criminal responsibility and defences.

[166] Uganda's ICC Act, above n 16, sec 19(3).

[167] See also New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(a)(iv) and Kenya's International Crimes Act (2008), sec 7(1)(d).

[168] PCA of Uganda, above n 99, sec 19(1)(a).

[169] Ibid, sec 19(1)(c). In the case of *Uganda v Sserunkuuma Edrisa and Others* (Session Case No. HCT-00-CR.SC 15/2013) High Court of Uganda (28 April 2015) 20, the court stated that 'for one to be guilty of aiding

to commit the crime.[170] All of them are treated as principal offenders for having intentionally participated in commission of the crime and are equally punished for the ensuing crime.[171] This blurs the distinction between different categories of participation yet in interpreting article 25(3)(a)-(d) of the Rome Statute, some judges of the ICC support the view that perpetrators are more blameworthy than those who merely contribute to the commission of the crime.[172] They espouse the view that a person should be punished according to the level of contribution in commission of the crime, the view criticised by some scholars for failing to show the significant role of accomplices if they are differentiated from the perpetrators.[173]

Thus, the practice of states varies on the matter in that while the PCA of Uganda and national legislation of some states[174] equally penalise persons who participate in commission of a crime without distinguishing between the different modes of liability, in other states principal offenders are treated differently from accessories by imposing reduced sentences for accessories.[175] Nonetheless, the approach adopted by Uganda may not affect the implementation of the Rome Statute because as noted above, the principles set out under the Statute prevail over national law principles.[176] In any case, punishing all persons without distinguishing between the levels of contribution enhances the fight against impunity.

With respect to joint offenders, section 20 of the PCA of Uganda is to the effect that where two or more persons 'form a common intention to prosecute an unlawful purpose in conjunction with one another', and an offence is committed in the process which 'was a probable consequence' of prosecuting an unlawful purpose, 'each of them is deemed to have committed the offence.'[177] In essence, the accused persons must have shared a common intention to perform an unlawful act with the probability that in the process of doing so it

---

and abetting one must be proved to have been consciously participating in what was being done and should have facts that constitute the offence.'

[170] Ibid, sec 19(2); in *Teddy Sseezi Cheeye v Uganda* (Criminal Appeal No. 105 of 2009) Court of Appeal of Uganda (20 October 2010) the court stated that '[a] procurer uses the hands and eyes of the person procured to commit a crime as his own. The actions of the person procured become the action of the procurer.'

[171] Ibid, sec 19(1)-(2).

[172] *The Prosecutor v Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction', (ICC-01/04-01/06 A 5) The Appeals Chamber (1 December 2014) (*Thomas Lubanga Case on Appeal*) para 467-468. Refer to discussion in chapter 2, section 4.1.3.A.

[173] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn Oxford University Press 2016) 567.

[174] Nigeria's Criminal Code Act (1916), sec 7 and Australia's Criminal Code Act (1995), sec 11.2(1).

[175] See for example, Japan's Penal Code (1907), art 63 and Swiss Criminal Code (1937), art 25.

[176] Uganda's ICC Act, above n 16, sec 19(3).

[177] PCA of Uganda, above n 99, sec 20; see also Malawi's Penal Code (1930), sec 22.

would lead to commission of a crime and in this case, each of the participants will be guilty of the resultant crime.[178]

This is distinguished from article 25(3)(d) of the Rome Statute which requires contribution in the criminal purpose involving the commission of the crime to be intentional[179] rather than foreseeable that the crime would be committed as the case in Uganda.[180] In essence, a person accepts the risk of the crime being committed without necessarily having the full *mens rea* to commit such a crime.[181] Thus, under section 20 of the PCA of Uganda mere probability that the crime would be committed in executing the unlawful act suffices. But as noted above, the principles under the Rome Statute shall prevail over national law principles in case of discrepancies between these laws.[182]

For the case of incomplete crimes such as attempt to commit a crime[183]or where the person incites others to commit a crime,[184] in both cases, the person is penalised irrespective of whether or not the crime is committed.[185] However, regarding attempt to commit a crime, while under the Rome Statute a person who abandons his or her efforts to commit the crime is not liable for punishment[186] under the PCA of Uganda it is immaterial that the accused person desisted from further fulfilment of his or her intention to commit the crime in question.[187] This exhibits variance in the two laws though as mentioned already, the provisions of the Rome Statute shall prevail over national criminal law principles.[188]

It should be noted that section 19(1)(a)(vi) of Uganda's ICC Act provides for the principle of responsibility of commanders and other superiors by reference to article 28 of the Rome Statute whereby superiors are penalised for crimes committed by their subordinates due to the failure to exercise powers of control over these subordinates.[189] Seemingly, such liability was not provided for in Ugandan law because section 128 of the Uganda Peoples'

---

[178] *Uganda v Natseba Lawrence & Others* (Criminal Session Case 283/1997) cited in Lilliam Tibatemwa-Ekirikubinza, *Offences Against the Person, Homicides and Non-fatal Assaults in Uganda* (Fountain Series in Law and Business Studies 2005) 62.
[179] *The Prosecutor v Dominic Ongwen*, above n 56, 44. See chapter 2, section 4.1.3.A.
[180] Nsereko, above n 19, 159 on the interpretation of section 20 of the PCA of Uganda.
[181] Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5(4) *Journal of International Criminal Justice* 953-975, 960.
[182] Uganda's ICC Act, above n 16, sec 19(3).
[183] PCA of Uganda, above n 99, sec 386(1).
[184] Ibid, sec 21(1)-(2).
[185] Ibid, sec 386(2) and sec 21(1)-(2) respectively.
[186] Rome Statute, art 25(3)(f). See also Japan's Penal Code (1907), art 43 and Denmark's Criminal Code (1930) § 22 and Bulgaria's Criminal Code (1968), art 18(3).
[187] PCA of Uganda, above n 99, sec 386(2)(a); see also Malawi's Penal Code (1930), sec 400.
[188] Uganda's ICC Act, above n 16, sec 19(3).
[189] *The Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', (ICC-01/05-01/08) Trial Chamber III (21 March 2016) paras 171-172. See chapter 2, section 4.1.3.B.

Defence Forces Act (2005) penalises the commander for failing to ensure that his subordinates carry out successful military operations[190] but not for crimes committed by his subordinates.

Moreover, section 19(1)(a)(vi) of the Act extends liability to superiors who act effectively as military commanders[191] which includes persons appointed as such in non-governmental forces even though not performing exclusively military functions.[192] More so, the provision applies to non-state actors (civilian superiors) who fail to prevent subordinates under their effective authority and control from committing crimes or punishing them for the crimes committed.[193] In effect, the absence of a similar provision under Ugandan law means that section 19(1)(a)(vi) of the Act shall apply to penalise superiors for crimes committed by their subordinates as mentioned above.

It is submitted that incorporating the principles of criminal responsibility in the Act and recognising the primacy of the Rome Statute in case of inconsistency with national law is to ensure that national authorities apply similar standards as the ICC to determine the responsibility of a person for ICC crimes. Moreover, the liability of commanders and other superiors for crimes committed by their subordinates was created under the Act which strengthens national law of Uganda concerning ICC crimes.

3.4.2. Defences

The grounds for excluding criminal responsibility or defences are incorporated in the Uganda's ICC Act by reference to article 31 of the Rome Statute.[194] While the defence of insanity[195] exonerates a person from criminal responsibility for the crime committed in such a state,[196] this may not be the case with respect to intoxication[197] except where such intoxication was involuntary.[198] Perhaps this is because insanity is caused by a disease of the mind independent of the person's will[199]yet intoxication may be voluntary where a person

[190] Uganda Peoples' Defence Forces Act (2005), sec 128.
[191] This is by reference to the Rome Statute, art 28(a).
[192] *The Prosecutor v Jean-Pierre Bemba Gombo*, above n 189, paras 176-177.
[193] Rome Statute, art 28(b), see for example, *The Prosecutor v Clément Kayishema and Obed Ruzindana*, (ICTR-95-1-A) ICTR Appeals Chamber (1 June 2001) para 303.
[194] Uganda's ICC Act, above n 16, sec 19(1)(ix).
[195] PCA of Uganda, above n 99, sec 11 which is almost similar to the Rome Statute, art 31(1)(a). See chapter 2, section 4.1.3.C.
[196] Schabas, above n 173, 641 and Nsereko, above n 19, 101 and 107. See also *Kawooya Ronny v Uganda* (Criminal Appeal No. 23 of 2013) High Court of Uganda (1 August 2013).
[197] PCA of Uganda, above n 99, sec 12(1).
[198] Ibid, sec 12(2)(a)-(b); see chapter 2, section 4.1.3.C.
[199] Ibid, sec 11.

consumes narcotics or drugs[200] in which case the person is not blameless. Indeed, the Rome Statute considers the person who voluntarily got intoxicated as having disregarded the risk of the ensuing crime[201] and this may encompass a person who acts recklessly in that regard.[202] However, for the case of Uganda voluntary intoxication may be considered for mitigating the sentence[203] which may not be the case for the ICC. Such variance is not fatal since the accused person is not shielded from responsibility but punished with a reduced sentence.

With respect to self-defence, under Ugandan law self-defence is permissible where a person uses force in defence of oneself from the attack of his assailant with a belief on reasonable grounds that he or she was in imminent danger of death or serious bodily harm and that use of force was necessary to repel the attack.[204] Notably, the accused person must have used reasonable force to defend oneself or others or his or her property.[205] This is almost the same standard required under article 31(1)(c) of the Rome Statute though the defence of property is only available for war crimes under the Statute[206] which implies that acting in defence of one's property under the Rome Statute is narrower than the defence of property under Ugandan law. Nevertheless, as noted already the Uganda's ICC Actconfers primacy to the principles of criminal law set out under the Rome Statute[207] which means that an accused person may not raise the defence of property with respect to crimes against humanity and genocide.

Aside the grounds for excluding criminal responsibility incorporated by reference to the Rome Statute under section 19(1)(a) of the Act, the Act permits reference to defences available under national law or international law.[208] This creates more defences for the accused person beyond the defences provided under the Rome Statute. For example, diminished responsibility and provocation[209] are partial defences to the charge of murder

[200] Ibid, sec 12(5).
[201] Rome Statute, art 31(b).
[202] Schabas, above n 173, 643.
[203] *Uganda v Sempija Samuel*, High Court Criminal Case No. 243/98, cited in Lilliam Tibatemwa-Ekirikubinza, *Offences Against the Person, Homicides and Non-fatal Assaults in Uganda* (Fountain Series in Law and Business Studies 2005) 48.
[204] *Uganda v Ojok* [1992-1993] HCB 54, see also PCA of Uganda, above n 99, sec 15(a).
[205] *Uganda v Ojok*, ibid and *Marwa s/o Robi v R* [1959] EA 660.
[206] Rome Statute, art 31(c) and Schabas, above n 173, 644.
[207] Uganda's ICC Act, above n 16, sec 19(3).
[208] Ibid, sec 19(1)(c).
[209] PCA of Uganda, above n 99, sec 194(1); see also Schabas, above n 173, 640 on the defence of diminished responsibility not incorporated explicitly in the Statute. With respect to provocation, see PCA of Uganda, secs 192-193.

which may reduce murder to manslaughter.[210]The problem which may arise is where these defences are broad to the extent of shielding the perpetrator of ICC crimes from liability. As noted above, any discrepancy between the defences provided under the Rome Statute with defences under Ugandan law, the Rome Statute prevails.[211]

It is contended that Uganda's ICC Act incorporated most of the principles of criminal law set out in the Rome Statute and recognised the primacy of the Statute where national criminal law principles contradicted with the provisions of the Statute. This enhances domestic implementation of the Rome Statute since it creates the possibility of national personnel applying similar standards as the ICC when enforcing Uganda's ICC Act.

Largely, the Act incorporated most of the relevant provisions of the Rome Statute which enable domestic prosecution of ICC crimes that is; provides for various jurisdictional bases including territoriality and nationality; it incorporated the definitions of ICC crimes by reference to the Rome Statute, as well as prioritised the Statute over national law with respect to conflicting principles of criminal law. Despite the enactment of enabling law and creation of special units for conducting domestic proceedings for ICC crimes, less has been done to address these crimes in Uganda partly due to key legislative obstacles[212] discussed in the section which follows.

4. Legislative Obstacles to the Implementation of the Rome Statute

Domestic proceedings for ICC crimes in Uganda remain minimal due to several obstacles. While immunity of the serving Head of state in Uganda may bar criminal proceedings against such a person before national courts in Uganda,[213] this section focusses on non-retroactivity and amnesty. These are key obstacles to proceedings for ICC crimes in Uganda. Firstly, non-retroactivity of Uganda's ICC Act is assessed to determine how it affects proceedings for ICC crimes. Lastly, the amnesties granted under the Amnesty Act of Uganda[214] are examined to determine whether such amnesties conform to international law norms. It argues that without addressing these obstacles, proceedings for ICC crimes in Uganda will remain minimal.

---

[210] *Rukarekoha Felex v Uganda*, Criminal Appeal No. 2/1998 (Supreme Court) cited in Lilliam Tibatemwa-Ekirikubinza, *Offences Against the Person, Homicides and Non-fatal Assaults in Uganda* (Fountain Series in Law and Business Studies 2005) 78-80 and *Uganda v Yowana Baptist Kabandize* [1982] HCB 93.
[211] Uganda's ICC Act, above n 16, sec 19(3).
[212] The non-legislative obstacles are handled in chapter 5 of this thesis.
[213] 1995 Constitution of Uganda, art 98(4).
[214] Amnesty Act, 2000 (Cap 294, Laws of Uganda, 2000), (herein after, Amnesty Act).

4.1. Non-Retroactivity of Uganda's ICC Act

Laws which criminalise conduct that occurred before the passing or entry into force of these laws are retroactive and are deemed to be repugnant to the rule of law.[215] Thus, a person can only be tried, convicted and punished for the crime basing on law which existed at the time the crime was committed.[216] The idea is that before performing the illegal act, the person should at least be notified of the existence of the law as well as the consequences in case of breach of the law which in effect, guides people in their conduct. Thus, Uganda's ICC Act was enacted to proscribe ICC crimes but it appears that many of these crimes may not be penalised under the Act due to its non-retroactive application as discussed in this section

As noted previously, some states such as Australia, Latvia, Lithuania, and New Zealand[217] provide for situations where national legislation applies retroactively even for ICC crimes. On the contrary, Uganda, like the majority of the states, prohibits retroactive legislation.[218]To this effect the 1995 Constitution of Uganda clearly prohibits charging or convicting any person for 'an act or omission that did not at the time it took place constitute a criminal offence.'[219] Moreover, the Constitution also requires that a person should only be convicted of a crime which is 'defined and the penalty for it prescribed by law.'[220]This means that there must be an existing law criminalising and penalising a specific conduct before a person is deemed to have breached such a law.

Uganda's ICC Act explicitly authorises execution of requests for assistance from the ICC for ICC crimes committed before commencement of the Act. It appears that this was intended to enable Uganda to cooperate fully with the ICC[221] without any legal obstacles. However, there is no similar provision for retroactive application of the Act to domestic proceedings for ICC crimes committed before 25 June 2010 when the Act

[215] Nsereko, above n 19, 49.
[216] Theodor Meron, *The Making of International Criminal Justice: A View from the Bench, Selected Speeches* (Oxford University Press 2011) 32 and *Prosecutor v Zlatko Alesovski*, IT-95-14/1-A, (Judgment) ICTY Appeals Chamber (24 March 2000) para 126.
[217] Australia's War Crimes Act (1945) sec 9(1); the Criminal Law of Latvia (1998) sec 5(4); Lithuania's Criminal Code (2000), art 3(3) as well as New Zealand's International Crimes and International Criminal Court Act (2000) sec 8(1)(a)(ii) and 8(4). See chapter 2, section 5.1.3 on non-retroactive application of legislation.
[218] 1995 Constitution of Uganda, arts 28(7) and 28(12); see also Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 244 and chapter 2, section 5.1.3 regarding examples of states that prohibit retroactive legislation.
[219] 1995 Constitution of Uganda, art 28(7).
[220] Ibid, art 28(12).
[221] This is required under the Rome Statute, art 86.

commenced.[222]This seems to be based on the Constitution of Uganda mentioned above which bars retroactive legislation.[223]

Consequently, the application of the Act to penalise ICC crimes committed in Uganda before 2010 has been impeded. This is evident from the case of *Uganda v Thomas Kwoyelo*[224] concerning international crimes committed during the armed conflict between the GoU and the LRA. In this case, the Uganda's ICC Act was not applied since some of the crimes were allegedly committed by Kwoyelo as early as 1993.[225] Clearly, it would be in breach of the principle of non-retroactivity if such crimes were charged using the Act that commenced in 2010. Instead, the case was brought under the GCA of Uganda regarding grave breaches of the Geneva Conventions[226] and the PCA of Uganda in the alternative, concerning ordinary crimes.[227]A similar approach was used by the Netherlands and Norway[228] whereby the non-applicability of national implementing legislation due to the principle of non-retroactivity did not prevent these states from prosecuting perpetrators of ICC crimes for alternative crimes under existing national law.

However, reliance on alternative legislation is problematic because both the GCA of Uganda and the PCA of Uganda have limited application and may not sufficiently cover ICC crimes committed by Kwoyelo. For the case of the GCA of Uganda, the Act only penalises grave breaches of the Geneva Conventions (1949)[229] which are committed in international armed conflicts.[230] This means that other possible charges for war crimes not amounting to grave breaches and crimes against humanity cannot be prosecuted under the Act.

---

[222] Uganda's ICC Act, above n 16, 1.
[223] 1995 Constitution of Uganda, arts 28(7) and 28(12).
[224] *Thomas Kwoyelo Case*, above n 15.
[225] For example, the particulars of the offence in the charge sheet indicated that some of the crimes were committed in 1993, see *Thomas Kwoyelo Case*, ibid, Judgment of Hon. Dr. Esther Kisaakye, 6. See also Stephen Oola, 'In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 147-170, 162.
[226] GCA of Uganda, above n 104, sec 2. These crimes included willful killing, inhumane treatment and extensive destruction of property, see *Thomas Kwoyelo Case*, above n 15, Judgment of Hon. Dr. Esther Kisaakye, 5.
[227] PCA of Uganda, above n 99, whereby he was charged with crimes such as murder, kidnap with intent to murder and robbery with aggravation, see *Thomas Kwoyelo Case*, ibid, 6.
[228] *Public Prosecutor v Joseph Mpambara* (Case No. 12/04592) Supreme Court of The Netherlands (26 November 2013); *The Prosecutor v Yvonne Basebya*, (Case No. 09/748004-09 (LJN: BZ4292), District Court of The Hague, The Netherlands (1 March 2013) and *The Public Prosecuting Authority v Mirsad Repak* (Case No. 08-018985MED-OTIR/08), Oslo District Court, Norway (2 December 2008). See Chapter 2, section 5.1.3.
[229]GCA of Uganda, above n 104, sec 2(1) and Geneva Conventions, above n 125.
[230] *Prosecutor v Duško Tadic* (IT-94-1-A) (Judgment) ICTY Appeals Chamber (15 July 1999) (hereinafter, *Tadic Case*) para 83.

Moreover, to prove commission of grave breaches there is need to adduce evidence of the existence of an armed conflict between two states.[231] Notably, the armed conflict between the GoU and the LRA was internal but may be deemed to have become international if it is proved that Sudan intervened using its troops or if some LRA personnel acted on behalf of Sudan.[232] It is believed that Sudan provided support to the LRA such as finance and military training[233] and seemingly, the charges were brought under the GCA of Uganda on this basis.

The possible difficulties which might arise in proving the international character of the armed conflict is adducing evidence that the LRA were acting on behalf of Sudan which wielded authority or some degree of control over the LRA. In this case the 'overall control test' as enunciated in the case of *Prosecutor v Duško Tadic*[234] is applied to prove that Sudan had a role in organising, coordinating or planning the military actions of the LRA, as well as financed, trained and equipped or provided support for the operations of the LRA.[235] However, it may not be easy to prove the overall control of Sudan over the LRA as per the *Tadic* test for purposes of qualifying the armed conflict as international. This because the test does not clearly state the level of intervention required from the other state(in this case Sudan) to make the conflict international.[236]

Failure to prove the existence of an international armed conflict, the alternative charges for ordinary crimes under the PCA of Uganda mentioned above will have to be proved against Kwoyelo. Nevertheless, resorting to this Act is insufficient since ICC crimes are prosecuted as ordinary crimes. Although this is not prohibited under the Rome Statute,[237] it lessens the gravity of ICC crimes which are categorised as the 'most serious crimes of concern to the international community as a whole'.[238] Arguably, prosecuting perpetrators of ICC crimes requires Uganda's ICC Act which defines such crimes as per the Rome Statute.

---

[231] Geneva Conventions (1949), above n 125, common art 2. An armed conflict was deemed to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' See *Prosecutor v Duško Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) (hereinafter, *Tadic Jurisdiction Decision*) para 70 and *The Prosecutor v Thomas Lubanga Dyilo*, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/06) Trial Chamber I (14 March 2012) (hereinafter, *Thomas Lubanga Case*) para 533.

[232] *Tadic Case*, above n 230, para 84 and *Thomas Lubanga Case*, ibid, para 541 for the definition of internationalised armed conflict.

[233] Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Intervention on Ending Wars and Building Peace* (Oxford University Press 2016) 80.

[234] *Tadic Case*, above n 230, para 137; see also *Thomas Lubanga Case*, above n 231, para 541 and *Prosecutor v Zlatko Alesovski*, IT-95-14/1-A, (Judgment) ICTY Appeals Chamber (24 March 2000) para 134.

[235] *Tadic Case*, above n 230, para 137.

[236] Jed Odermatt, 'Between Law and Reality: "New Wars" and Internationalised Armed Conflict' (2013) 5(3) *Amsterdam Law Forum* 19-32, 22.

[237] See chapter 2, section 3.1 which concerns using existing legislation to prosecute ICC crimes.

[238] Rome Statute, art 1.

In sum, it is contended that the inapplicability of Uganda's ICC Act to crimes committed between 2002 when Uganda ratified the Rome Statute and 2010 when the Act was enacted prevents Uganda from investigating and prosecuting crimes within the jurisdiction of the ICC. The alternative legislation such as the GCA of Uganda and the PCA of Uganda are inadequate to address such crimes. Thus, Uganda cannot justify its failure to give effect to the Rome Statute basing on its ICC Act which does not permit retroactive application.[239] Without an enabling legislation, effective proceedings for ICC crimes in Uganda may not be realised.

4.2. Amnesty

The Amnesty Act (2000) of Uganda[240] defines amnesty as 'a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.[241] In essence, once the person is granted amnesty, he or she is discharged from criminal responsibility for any crime. The Amnesty Act entered into force in January 2000 after it was passed by the Parliament of Uganda on 7 December 1999.[242]On 23 May 2012, the Minister of Internal Affairs declared Part II of the Amnesty Act as lapsed then extended it to 24 May 2013[243] and further extension was made to 25 May 2015[244] and later, to 2017.[245]

Issuance of amnesty in Uganda is a major obstacle which curtails domestic investigations and prosecutions for ICC crimes since no proceedings can be commenced under any law in Uganda. This is evident from the number of former opposition military personnel including senior commanders who have benefitted from amnesty as previously mentioned.[246] Consequently, national institutions in Uganda have not been able to investigate and prosecute such persons owing to the operation of the Amnesty Act. Moreover, such inability may be a ground for admissibility of the case before the ICC due to inaction by

[239] Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980), art 27.
[240] Amnesty Act, above n 214.
[241] Ibid, sec 1.
[242] Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation (Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009) 22.
[243] Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000' (August 2013) para 13.8, available at <http://www.parliament.go.ug/new/index.php/documents-and-reports/committee-reports/category/31-committee-on-defence-and-internal-affairs> last visited, 30 August 2017.
[244] *Thomas Kwoyelo Case*, above 15, 17.
[245] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', above n 6.
[246] Ibid, to the effect that an estimated number of over 27,000 former combatants had benefitted from amnesty by 2015. See section 1 of this chapter.

Uganda.[247]This calls for firstly, examination of the provisions of the Amnesty Act and secondly, the legality of amnesties issued under the Act in light of international law norms to assess the extent to which the Act curtails proceedings for ICC crimes in Uganda which in effect makes Uganda's ICC Act redundant. Lastly, the *Thomas Kwoyelo Case*[248]is analysed to show how courts in Uganda have interpreted the Act to the extent of declaring it valid.

4.2.1. The Amnesty Act (2000)

According to section 2(1) of the Amnesty Act, amnesty is provided to any Ugandan who has engaged in war or armed rebellion with the GoU by 'actual participation', 'collaborating with perpetrators', assisted or aided such conduct or committed 'any other crime *in the furtherance of war or armed rebellion*'.[249] Such crimes must have been committed on or after 26th January, 1986[250] but no end date is mentioned. This implies that future crimes are included until such a time when the Minister responsible for internal affairs declares the lapsing of Part II of the Amnesty Act.[251]

The effect of such amnesty is to completely exonerate the amnesty applicant (reporter)[252] issued with amnesty from 'punishment for the participation in the war or rebellion for any crime committed *in the cause of the war or armed rebellion*.'[253] In essence, any participant who commits crimes 'in the cause of war or armed rebellion' is eligible for amnesty. However, the Act does not define this term which seems to be the determining factor for granting amnesty as perceived from the Supreme Court decision in *Thomas Kwoyelo Case*[254] but no clarification was given for this term.[255] Arguably, section 2 of the Act remains ambiguous and literally, it permits amnesty if the alleged crimes were committed in the cause of war or armed rebellion without distinguishing between such crimes.

Moreover, section 3(1) of the Act which sets out conditions for granting amnesties does not exclude any crimes from amnesty. The section provides thus;

---

[247] OTP, 'Paper on Preliminary Examinations' (November 2013) para 48, available at <https://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf> last visited, 30 August 2017.
[248] *Thomas Kwoyelo Case*, above n 15.
[249] Amnesty Act, above n 214, sec 2(1), emphasis added.
[250] Ibid, sec 2(1).
[251] Amnesty (Amendment) Act (2006), sec 16(3).
[252] Amnesty Act, above n 214, sec 1(e) defines a 'reporter' as 'a person seeking to be granted amnesty under this Act.'
[253] Ibid, sec 2(2), emphasis added.
[254] *Thomas Kwoyelo Case*, above n 15, 31.
[255] Ibid, 31 where the Court merely stated that the relevant 'authority would need to look at all the relevant laws of Uganda including Uganda's International Treaty Obligations to determine which acts are deemed to be in the cause of, or furtherance of, war or rebellion.

> A reporter shall be taken to be granted the amnesty declared under section 2 if the reporter – (a) reports to the nearest Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader within the locality; (b) renounces and abandons involvement in the war or armed rebellion; (c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and (d) is issued with a Certificate of Amnesty as shall be prescribed in regulations to be made by the Minister.

In essence, the amnesty applicant is only required to report to an authorised person, renounce the armed rebellion, surrender any weapon he or she may possess and is later issued with a certificate. The section neither mentions any steps required to be taken by these authorities to certify eligibility for amnesty nor provides situations where the person may be denied amnesty. In addition, the provision does not require assessment of the nature of crimes committed by amnesty applicants before amnesty is granted. More so, the applicant is not required to make any form of accountability, disclose information regarding commission of crimes during the armed rebellion or make acknowledgment of responsibility for such crimes. Seemingly, any person is eligible for amnesty irrespective of the nature of crimes committed once the above conditions are fulfilled.

It is contended that section 3(1) of the Amnesty Act was meant to apply with respect to amnesties granted by other authorities in Uganda, possibly whom the amnesty applicants contact as soon as they surrender.[256] Moreover, the DPP is not required to certify eligibility of the applicants for amnesty as the case for amnesties issued under section 3(3) and 3(4) of the Amnesty Act. Under these provisions, the DPP is required to certify that he or she is satisfied that the amnesty applicant falls within the provisions of section 3 and that the person is not charged with any other offence not covered under section 3.[257] In addition, the DPP is required to investigate all the offences the person is charged with and take steps to ensure the release of this person if he or she qualifies for amnesty and after renouncing the rebellion.[258] Still, this applies to limited persons who are in custody but not the majority who voluntarily surrender as anticipated under section 3(1) of the Amnesty Act.

Since no provision is made for determining eligibility of amnesty applicants, it appears that many applicants were granted amnesty including perpetrators of ICC crimes. More so, the role of the Minister of Internal Affairs of excluding certain persons from amnesty has

[256] These are, the '*nearest* Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader *within the locality*.' See Amnesty Act, above n 214, sec 3(1)(a), emphasis added.
[257] Amnesty Act, above n 214, sec 3(3). This is subject to sec 3(2) which requires the person who is in lawful custody to declare to a prison officer or judge or magistrate the renunciation of the rebellion and that he or she intends to apply for amnesty.
[258] Ibid, sec 3(4).

never been exercised. This is provided for under section 2A of the Amnesty (Amendment) Act (2006)[259] which empowers the Minister of Internal Affairs to declare, by statutory instrument approved by Parliament, persons who are not eligible for amnesty. In essence, the Minister is required to formulate a list of persons not suitable for amnesty clearly showing the criteria used for selecting such persons.[260] To date, this has not been done partly due to lack of coordination between the Minister and Parliament in this regard.[261] This puts into question the commitment of the GoU to ensure that perpetrators of ICC crimes do not go unpunished and raises the issue of the legality of amnesties issued under the Amnesty Act.

4.2.2. The Legality of the Amnesty Act (2000)

As noted above, sections 2 and 3(1) of the Amnesty Act neither exclude ICC crimes from amnesty nor set out conditions to examine the nature of crimes committed by the applicants. Without the DPP's role of certifying eligibility of the applicants for amnesty and non-availability of a list excluding certain categories of persons from amnesty as discussed above, it is submitted that the Amnesty Act in its form facilitates issuance of blanket amnesties.[262] This is due to the fact that the Act permits amnesty for broad categories of persons irrespective of the nature of crimes committed by the applicants and without making any form of accountability for such crimes. Examples of states that have granted blanket amnesties for international crimes include Sierra Leone,[263] Chile and Argentina.[264] Nonetheless, these amnesties were challenged later to enable prosecution of perpetrators of international crimes.[265] This may not be possible for the case of Uganda since the Amnesty

[259] Amnesty (Amendment) Act (2006), above n 251.
[260] Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000', above n 243, para 10.2.
[261] Ibid.
[262] Blanket amnesties are amnesties which 'exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis.' OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (UN, 2009), 8, available at <http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials3.aspx> last visited, 30 August 2017. See also Luke Mofett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 220, he argued that the Amnesty Act 2000 offers blanket amnesty since it 'makes no distinction between the gravity of the atrocities, the number of crimes committed, or the seniority of the reporter.'
[263] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (1999), art IX.
[264] Ronald C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? (2002) 43 *Virginia Journal of International Law* 173-247, 199.
[265] Simon M. Meisenberg, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' (2004) 86(856) *International Review of the Red Cross* 837-851; Cath Collins, 'Human Rights Trials in Chile During and After the "Pinochet Years' (2009) 4(1) *The international Journal of Transitional Justice* 67-86 and Margarita K. O'Donnell, 'New Dirty War Judgments in

Act was upheld as valid by courts in Uganda and even noted that there are no uniform international standards prohibiting amnesty.[266]

Even so, the lack of clarity regarding prohibition of amnesty under international law[267] does not imply that issuance of amnesty is unlimited. Particularly, amnesties for certain categories of crimes are not permissible where treaties require prosecution and punishment of perpetrators of such crimes as evident in the Geneva Conventions (1949) and Genocide Convention which provide for an absolute obligation to prosecute grave breaches of the Geneva Conventions and genocide respectively.[268] A state would be in breach of these treaties where amnesty is granted for such crimes.[269] More so, blanket amnesties for genocide, crimes against humanity and war crimes are 'deemed impermissible under international law'.[270] In effect, ICC crimes need to be investigated and prosecuted in Uganda to give effect to the Rome Statute notwithstanding the lack of a legal duty to do so in the Statute.[271] This is by virtue of the principle of complementarity whereby state parties to the Rome Statute have the primary role to conduct proceedings for ICC crimes.[272]

Since the Amnesty Act does not explicitly exclude perpetrators of ICC crimes from amnesty, many persons including senior commanders have been granted amnesty.[273]Consequently, this has discouraged officials in Uganda from investigating ICC crimes[274] as well as caused the closure of '[m]any cases' already 'investigated and registered in the courts' after the accused persons applied for amnesty.[275] A notable example is the case against Caesar Acellam who was granted amnesty in 2015[276] notwithstanding an arrest

---

Argentina: National Courts and Domestic Prosecutions of Human Rights Violations' (2009) 84(1) *New York University Law Review* 333-374.

[266] *Thomas Kwoyero Case*, above n 15, 63 and *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Petition No. 036/11) Constitutional Court of Uganda (21 September 2011) 24. See section 4.2.3 of this chapter.

[267] See Chapter 2, section 5.1.4 on amnesty.

[268] Geneva Conventions, above n 125, GC I, art 49, GC II, art 50, GC III, art 129 and GC IV, art 146, as well as the Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277, art I. See also Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Court' (1999) 32 *Cornell International Law Journal* 507-527, 516 and Charles P. Trumbull IV, 'Giving Amnesties a Second Chance' (2007) 25(2) *Berkeley Journal of International Law* 283-345, 288.

[269] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695-720, 703.

[270] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives' (UN 2006) 23, available at <http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials3.aspx> last visited, 30 August 2017.

[271] See chapter 2, section 2 on whether there is a duty imposed on state parties to implement the Rome Statute.

[272] Rome Statute, arts 1 and 17; see also chapter 1, section 1.

[273] An example noted above is Kenneth Banya and Sam Kolo Otto of the LRA, see IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', above n 6.

[274] Nouwen, above n 52, 232.

[275] Joan Kagezi, above n 30.

[276] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', above n 6.

warrant issued against him by the Buganda Road Magistrates Court in 2014.[277] Justice Moses Mukiibi (Head of the ICD) explained the effect of the Amnesty Act as 'a frustration of the ICD in all its efforts to exercise its criminal jurisdiction over those responsible for international crimes.'[278]

Therefore, amnesty has curtailed investigations and prosecutions for ICC crimes in Uganda especially regarding amnesties issued under sections 2 and 3(1) of the Amnesty Act which do not require the DPP's certification. Without checks on eligibility for amnesty, the amnesty process may be abused by wrongful issuance of amnesty to persons alleged to have committed ICC crimes. This may prevent Uganda from giving effect to the Rome Statute by ensuring that proceedings for ICC crimes are conducted at the national level. In the absence of a list excluding certain persons from amnesty (as formulated by the Minister), the Amnesty Act in its current form greatly curtails investigations and prosecutions of crimes in Uganda yet national courts upheld the legality of the Act as discussed in the section below.

4.2.3. Analysing the Thomas Kwoyelo Case

The effect of the Amnesty Act on domestic proceedings for ICC crimes in Uganda can be assessed using the *Thomas Kwoyelo Case*[279] where both the Supreme Court and Constitutional Court in Uganda declared the Amnesty Act constitutional.[280] Kwoyelo a former commander of the LRA was captured by the Uganda People's Defence Forces (UPDF) in the Democratic Republic of Congo (DRC) in 2008.[281] On 6September 2010, the DPP brought charges against him before the Chief Magistrates Court at Buganda Road for various crimes under the GCA of Uganda.[282] On 11 July 2011,[283] criminal proceedings were commenced against him before the ICD and the charge sheet was amended by adding other charges in the alternative under the PCA of Uganda.[284] The ICD made a reference to the

[277] Kasande Sarah Kihika and Meritxell Regué, above n 30, 4.
[278] Hon. Justice Moses Mukiibi, 'Complementarity in Practice in Uganda', a Key-Note Address delivered at the Parliamentary Conference under the theme; *To Give Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo*, held at Parliament Conference Hall, Parliament of Uganda (17 July 2014) 18, available at <http://www.pgaction.org/pdf/activity/2014-07-17-Keynote-Address-Justice-Mukiibi.pdf> last visited, 30 August 2017.
[279] *Thomas Kwoyelo Case*, above n 15.
[280] Ibid, 63 and *Thomas Kwoyelo Case*, above n 266, 20.
[281] *Thomas Kwoyelo Case*, above n 15, Judgment of Hon. Dr. Esther Kisaakye, 2.
[282] Ibid and at 5. These include wilful killing, kidnap with intent to murder and inhumane treatment.
[283] Ibid.
[284] Ibid, 6. These included murder, robbery with aggravation and attempted murder.

Constitutional Court of Uganda since Kwoyelo was challenging the failure of the DPP to grant him amnesty.[285]

On 22 September 2011 the Constitutional Court upheld the constitutionality of the Amnesty Act[286] and directed the ICD to 'cease the trial' against Kwoyelo.[287] The Attorney General lodged an appeal to the Supreme Court on 11 April 2012[288] which on 8 April 2015 not only upheld the constitutionality of the Amnesty Act but also the DPP's prosecutorial powers and ordered that the trial against Thomas Kwoyelo should continue.[289]The decisions of these courts are of interest in as far as domestic proceedings for ICC crimes are concerned because the two courts reached the same conclusion of upholding the legality of amnesty but with different reasons as discussed in this section.

With respect to the Constitutional Court, the Court emphasised the role of the DPP under sections 3(3) and 3(4) of the Amnesty Act of certifying eligibility of the applicants for amnesty.[290] Basing on these provisions, the Court concluded that the Amnesty Act did not infringe the DPP's prosecutorial powers and thus, was valid.[291] Moreover, the DPP could prosecute persons declared ineligible for amnesty or those who refused to renounce the rebellion or government agents who committed grave breaches of the Geneva Conventions.[292] In essence, the DPP was empowered to certify amnesties under the Amnesty Act and to prosecute those who did not qualify for amnesty. This decision appears contradictory because the very prosecutorial powers which the DPP sought to exercise after declining to grant Kwoyelo amnesty were denied by the Constitutional Court.This fettered the discretion of the DPP to exercise his prosecutorial powers without any direction or control of any person.[293]

Concerning the Supreme Court of Uganda, the Court cited article 120(3) of the 1995 Constitution of Uganda providing for the functions and powers of the DPP,[294] as well as section 3(3)-(4) of the Amnesty Act which provide for the role of the DPP.[295] Taking slightly a different approach from the Constitutional Court, the Supreme Court stated that the DPP

[285] *Thomas Kwoyelo Case*, above n 266, 4-5.
[286] Ibid, 20.
[287] Ibid, 25.
[288] Kihika and Regué, above n 30, 6.
[289] *Thomas Kwoyero Case*, above n 15, 65-66.
[290] *Thomas Kwoyelo Case*, above n 266, 22; regarding the role of the DPP, see Amnesty Act, above n 214, secs 3(3)-(4).
[291] Ibid, 23.
[292] Ibid, 23.
[293] This is recognised under the 1995 Constitution of Uganda, art 120(6).
[294] *Thomas Kwoyero Case*, above n 15, 24. The functions of the DPP under art 120(3)(a)(b) of the 1995 Constitution of Uganda include directing 'the police to investigate any information of a criminal nature' as well as 'institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial'.
[295] Ibid, 26.

was required to satisfy himself that the applicant fulfils conditions set out not only under the Amnesty Act but also under other laws of Uganda.[296] This extended the powers of the DPP beyond the Amnesty Act to the effect that the DPP had to satisfy himself or herself that the applicant had not committed crimes under other laws of Uganda to be eligible for amnesty.

The Supreme Court exhibited creativity when it expanded the interpretation of the Amnesty Act to cover treaty crimes. Particularly, the Court referred to the GCA of Uganda (which criminalised grave breaches of the Geneva Conventions) as well as article 8(2)(e) of the Rome Statute (which criminalised violations of laws of war in non-international armed conflicts);and decided that the crimes penalised under these laws do not fall in the category of crimes which are amnestied under section 2 of the Amnesty Act.[297] The decision is important in that it upheld the international legal obligations of Uganda under the Geneva Conventions which requires a state party to prosecute persons who commit grave breaches.[298] More so, the Court decided that crimes set out under the Rome Statute are not covered under the Amnesty Act which in effect, upheld Uganda's obligations to give effect to the Rome Statute[299] by investigating and prosecuting ICC crimes. Moreover, the DPP's powers to prosecute perpetrators of such crimes[300]without giving reasons for declining to certify amnesty[301] were upheld by the Court thereby enhancing the fight against impunity.

Nonetheless, the Supreme Court reached the same conclusion as the Constitutional Court by finding that the prosecutorial powers of the DPP are not impinged by the Amnesty Act[302] and accordingly, declared the Act not inconsistent with the Constitution of Uganda and Uganda's International law obligations.[303] In essence, the DPP still has powers to prosecute persons not eligible for amnesty despite the existence of the Amnesty Act. The decision ended further challenges to the Act using court process. It is contended that both decisions are unsatisfactory because they apply to limited situations where amnesty applicants are in custody.[304] Even so, the Act does not explicitly exclude ICC crimes from amnesty notwithstanding that the DPP has powers to certify whether such persons are eligible for amnesty. Without a court order for amending the Amnesty Act to expressly exclude ICC

[296] Ibid, 27.
[297] Ibid, 38-43.
[298] Geneva Conventions, above n 125, GC I, art 49; GC II, art 50; GC III, art 129 and GC IV art 146. Uganda ratified the Geneva Conventions on 18 May 1964, see United Nations, 'Common Core Document Forming Part of the Reports of States Parties, Uganda', above n 10, 24-25.
[299] Vienna Convention on the Law of Treaties, above n 239, art 26. See also chapter 2, section 2.
[300] *Thomas Kwoyero Case*, above n 15, 43, 31 and 50.
[301] Ibid, 34 and 56.
[302] Ibid, 65, see also 35.
[303] Ibid, 43.
[304] Amnesty Act, above n 214, secs 3(3) and 3(4).

crimes, the DPP may not exercise his powers beyond what the Act provides for and will only certify eligibility for amnesty as per the conditions explicitly set out in the Amnesty Act.

More so, both courts did not address amnesties issued by other authorities in Uganda under section 3(1) of the Amnesty Act[305] where no certification by the DPP is required yet no clear criterion for issuing such amnesties is set out under the Act. As discussed above, amnesties issued under section 3(1) are blanket amnesties which are deemed contrary to the norms of international law for lack of distinction between persons eligible for amnesty leading to perpetrators of ICC crimes to benefit from amnesty.

Therefore, the fact that there are no uniform international standards prohibiting amnesty[306] does not discharge Uganda from giving effect to the Rome Statute by ensuring that ICC crimes are effectively investigated and prosecuted domestically without any legal bars. The recognition of the constitutionality of the Amnesty Act by courts in Uganda[307] without taking into consideration of amnesties not certified by the DPP seriously curtailed investigations and prosecutions of ICC crimes in Uganda. As a result, Uganda's ICC Act cannot be applied where the Amnesty Act continues to be in force in its current form. Without amending the Act to exclude perpetrators of ICC crimes, Uganda may fail to give effect to the Rome Statue by leaving perpetrators of ICC crimes to enjoy impunity. The section which follows examines provisions on cooperation with the ICC to establish whether these provisions enable Uganda to give effect to its cooperation obligations under the Rome Statute.

5. Cooperation

State parties to the Rome Statute are required to cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction by setting out procedures in national legislation to facilitate all forms of cooperation under Part 9 of the Statute.[308] To give effect to the cooperation obligations, Uganda did not choose to amend existing legislation such as the Extradition Act (1964). Instead, Uganda's ICC Act was enacted which extensively incorporated provisions on cooperation set out under the Rome Statute.[309] This

[305] Ibid, sec 3(1)(a), these are the 'Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader'.
[306] *Thomas Kwoyero Case*, above n 15, 63 and *Thomas Kwoyelo Case*, above n 266, 24.
[307] Ibid, 65 and *Thomas Kwoyelo Case*, above n 266, 20.
[308] Rome Statute, arts 86 and 88, see chapter 2, section 4.1.5 on cooperation.
[309] Uganda's ICC Act, above n 16. Other states with detailed cooperation provisions include Germany's Law on Cooperation with the International Criminal Court (2002); Australia's International Criminal Court Act (2002) and New Zealand's International Crimes and International Criminal Court Act (2000).

enabled Uganda to incorporate procedures for executing requests for assistance from the ICC. Moreover, restrictions in the Extradition Act such as non-extradition for crimes of political nature[310] were avoided possibly to ensure that requests from the ICC are not impeded other than as set out in the Rome Statute.[311] Thus, provisions relating to requests for various forms of assistance such as arrest and surrender of the person to the ICC, other forms of cooperation and enforcement of sentences and orders of the ICC were incorporated in the Act.[312]

5.1. Provisions Concerning Arrest and Surrender

Part III of the Act provides for general provisions relating to requests for assistance and particularly, such a request is addressed to the Minister of Justice in writing[313] who is required to respond without delay and in case of any obstacles, to consult with the ICC urgently.[314] A notable example of consultation with the ICC is where the Minister is of the opinion that article 98 of the Rome Statute applies.[315] This is the case with regard to requests for surrender or assistance involving a state official even though the Act clearly excludes official capacity of any person as a bar to such requests for assistance.[316]

However, the recent practice of Uganda indicates non-compliance with these provisions. A notable example is Uganda's failure to consult with the ICC when President Omar Hassan Ahmad Al Bashir of Sudan (President Al Bashir) visited Uganda on 12 May 2016 to attend the inaugural ceremony of President Yoweri Museveni.[317]One of the arguments made by Uganda for failure to arrest and surrender President Al Bashir to the ICC was partly because 'it abided by decisions of the African Union'.[318] This argument was rejected by the ICC reasoning that the United Nations Security Council (UNSC) Resolution

[310] Extradition Act (1964), sec 3(a).
[311] See for example, Rome Statute, art 93(4) on disclosure of evidence which prejudices national security and art 98 on cooperation with respect to waiver of immunity and consent to surrender. See chapter 2, section 4.1.5.
[312] Uganda's ICC Act, above n 16, Parts III to IX.
[313] Ibid, sec 21(1) this is in accordance with the Rome Statute, arts 89(1) and 91.
[314] Uganda's ICC Act, above n 16, sec 22 as required under the Rome Statute, art 97. See also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016) paras 4 and 9.
[315] Uganda's ICC Act, above n 16, sec 25(2) which makes reference to sec 24(6); see also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Requesting the Republic of Uganda to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (17 May 2016) para 3.
[316] Uganda's ICC Act, ibid, sec 25(1).
[317] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Requesting the Republic of Uganda to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', above n 315, paras 4-5.
[318] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', above n 314, para 13.

1593 of 2005 (which referred the situation in Darfur, Sudan to the ICC) 'effectively lifted the immunities enjoyed by Omar Al Bashir'.[319] This means that President Al Bashir no longer enjoyed immunity after the UNSC referred the situation in Darfur to the ICC.

Consequently, the ICC made a finding of non-compliance by Uganda with the request for cooperation and the matter was referred to the Assembly of State Parties (ASP) and the UNSC.[320] In essence, Uganda breached its obligations under the Rome Statute which triggered the application of article 87(7) of the Rome Statute. Arguably, the fact that detailed cooperation procedures were set out in the Act does not necessarily mean that Uganda is committed to enforce the Act by cooperating with the ICC. This however, should not reduce the importance of Uganda's ICC Act in facilitating cooperation with the ICC and in fact, assistance has been provided to the ICC in some respects.[321]

To this effect, the Act provides detailed procedures for executing requests for arrest and surrender of the person to the ICC under Part IV of the Act. Thus, once the Minister receives such a request, he or she shall transmit the request together with the accompanying documents required by article 91 of the Rome Statute to the Registrar of the High Court, to endorse the ICC arrest warrant or issue a domestic warrant as appropriate and then notify the Director of Public Prosecutions (DPP) to that effect.[322] This is done upon satisfaction on reasonable grounds that the person named in the warrant is on his or her way to Uganda.[323]

With respect to provisional arrest of the person set out under article 92 of the Rome Statute, the procedure is different perhaps due to the urgency of the matter in that authorities in Uganda are required to arrest the person before receiving formal request for arrest and surrender from the ICC.[324] Specifically, the Minister transmits the request for arrest and surrender with supporting documents to the Inspector General of Police (IGP), not the Registrar, and a copy is also transmitted to the DPP.[325] The IGP instructs the Police to execute the request and thereafter notifies the Minister and the DPP to that effect.[326] The rationale for provisional arrest is to prevent the person from fleeing jurisdiction[327] and

[319] Ibid, para 12.
[320] Ibid, para 15.
[321] See for example, in the case of *The Prosecutor v Dominic Ongwen* whereby Uganda availed the Prosecutor with materials such as radio communications and logbooks to be used in evidence to prove whether Ongwen committed the alleged crimes. See *Dominic Ongwen Case*, above 56, para 50.
[322] Uganda's ICC Act, above n 16, sec 26(1). See also sec 26(2)(a)-(b) which guides the Registrar.
[323] Ibid, sec 26(2).
[324] The same is provided for under the Rome Statute, art 92(1).
[325] Uganda's ICC Act, above n 16, sec 29(1)-(2).
[326] Ibid, sec 29(3)-(4).
[327] Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation of States with the International Criminal Court' (2001) 25(3) *Fordham International Law Journal* 767-839, 772.

perhaps ensure his or her safe custody pending issuance of the formal request for arrest and surrender by the ICC. However, without the formal request for arrest and surrender from the ICC, no further proceedings can be taken by the Registrar to transmit the request for assistance.[328] In fact, after expiration of 60 days from the date when the person was provisionally arrested, the Registrar shall release the person from custody[329] though this does not prejudice subsequent proceedings for arrest and surrender of the person.[330]

Notably, the Act provides for protection of the rights of the arrested person such as being produced before the Registrar within 48 hours[331] as well as the right to apply for bail.[332] During such proceedings, the Registrar may inquire into the lawfulness of the arrest or whether the rights of the person were respected.[333] This is not for purposes of providing relief in case where the person's rights were violated but for making a declaration which is then transmitted to the Minister and later to the ICC.[334] Clearly, allegations of violation of the rights ot the accused person do not impede cooperation with the ICC. Rather, it is the ICC to determine whether the person's rights were violated to the extent of abusing the judicial process and may award compensation.[335]

Thus, the Registrar's role is to ensure that proceedings for arresting and surrendering the person to the ICC are executed lawfully. Indeed, with respect to surrender hearings, the Registrar is not required to delve into evidence as to whether the trial against the person before the ICC is justified or any issue relating to a claim that a person has previously been tried or convicted for conduct which the ICC seeks surrender of the person.[336] Moreover, the Registrar is not required to inquire into the validity of the warrant issued by the ICC.[337] Any claim raised by the person relating to these matters is to be transmitted to the ICC[338] to handle not authorities in Uganda.

In essence, during surrender hearings the Registrar is only required to satisfy himself or herself as to the existence of the warrant of arrest from the ICC and that it relates to the person before him or her and thereafter, issues a delivery order as per article 59(7) of the

[328] Uganda's ICC Act, above n 16, secs 29(5) and 32(1).
[329] Ibid, sec 32(3); see also Rome Statute, art 92(3).
[330] Ibid, sec 32(4); see also Rome Statute, art 92(4).
[331] Ibid, sec 30(1).
[332] Ibid, sec 31(1). This is subject to recommendation from the ICC as per the Rome Statute, art 59(5) though the Registrar can proceed to hear the application if no recommendation is made by the ICC within 7 days, sec 31(3) and 31(5).
[333] Uganda's ICC Act, ibid, sec 30(2).
[334] Ibid, sec 30(4)-(5) similar requirements are set out under Rome Statute, art 59(2).
[335] Rome Statute, art 85(1); see also Bekou and Shah, above n 97, 499-544, 529.
[336] Uganda's ICC Act, above n 16, secs 33(6).
[337] Ibid, sec 34.
[338] Ibid, sec 33(7).

Rome Statute.[339] The effect of the delivery order is to give authority for holding the person in custody until he or she is delivered to the ICC.[340] The Registrar then transmits the delivery order to the IGP for execution and meanwhile commits the person to custody pending execution of the order.[341] It is the IGP to make arrangements with the ICC to for execution of the delivery order.[342] However, if the person is not delivered to the ICC within 60 days after issuing the delivery order, he or she may be discharged except where reasonable cause is shown for the delay.[343]

5.2. Restrictions and Competing Requests for Arrest and Surrender

The Act provides restrictions on executing requests for arrest and surrender of the person to the ICC. For example, the Minister may postpone a request for arrest and surrender in situations such as existence of pending admissibility proceedings before the ICC.[344] In addition, the Minister is required to refuse such requests where the ICC decides that the case is inadmissible or if the ICC advises that it is not interested in proceeding with the matter.[345] The possible explanation for the mandatory refusal is because execution of the request for assistance is no longer relevant after the ICC's inadmissibility decision or lack of interest in the matter. More so, it is within the discretion of the Minister to refuse requests for assistance for example, where there are competing requests for arrest and surrender with respect to a non-party state to the Rome Statute.[346] This shows that any restrictions to such requests are in keeping with the provisions of the Rome Statute as reflected in Uganda's ICC Act, possibly to eliminate obstacles to cooperation with the ICC not anticipated under the Statute.

Regarding competing requests for arrest and surrender of the person, the Act clearly elaborated the procedures of handling such requests. Particularly, where the matter relates to the same conduct which forms basis of the crime giving rise to ICC's request for surrender and the ICC has determined that the case is admissible, priority is given to the ICC where the request for assistance is from a state party.[347] The same applies to a non-party state if Uganda

[339] Ibid, sec 33(1).
[340] Ibid, sec 33(5) and 36(1) and such a person shall be deemed to be in legal custody pending delivery to the ICC, sec 36(2).
[341] Ibid, sec 33(2).
[342] Ibid, sec 33(4).
[343] Ibid, sec 38; the Rome Statute, art 59(7) requires that the 'person shall be delivered to the ICC as soon as possible'.
[344] Ibid, sec 28(1).
[345] Ibid, sec 27(1)(a)-(b).
[346] Ibid, sec 27(2). In this case, the Minister's decision should be made in consideration of article 90 of the Rome Statute and section 41 of the Act, see sec 27(2).
[347] Ibid, sec 41(2); see also Rome Statute, art 90(2).

is not under an international obligation to extradite the person to such a state.[348] With respect to conduct different from that which is the basis for ICC's request for surrender, still the ICC has priority where Uganda is not under an international obligation to extradite the person to any requesting state.[349]

However, where Uganda is under an international obligation to extradite to the non-party state, the Minister has the discretion to determine whether to surrender the person to the ICC or extradite to the non-party state but in consideration of factors set out in article 90(6) of the Rome Statute.[350] The same applies to competing requests from the ICC and other states with respect to the same person but for different conduct from that which is the basis for the ICC's request for surrender, if Uganda is under an international obligation to extradite to any such states.[351] This exhibits that requests from the ICC are prioritised where the competing request for extradition is from a state party to the Rome Statute and in situations where Uganda is not under an international obligation to extradite to any other state.

5.3. Provisions Concerning Other Forms of Assistance

With respect to other types of cooperation set out under article 93(1) of the Rome Statute, Part V of the Act provides detailed procedures for executing requests for such assistance. These include identifying persons or things, taking evidence, production of documents and articles, protection of witnesses, assistance in questioning persons, assistance in arranging service of documents, request for voluntary appearance of witnesses, request for temporary transfer of prisoners, examining places and sites as well as conducting searches and seizures.[352] A notable example where Uganda assists the ICC concerns criminal proceedings in the case of *The Prosecutor v Dominic Ongwen*.[353]

Ongwen was charged with crimes against humanity and war crimes committed in Uganda between 1 July 2002 (when the Rome Statute entered into force but before the enactment of Uganda's ICC Act) and 31 December 2005.[354] Thus, Uganda is expected to assist the ICC in ensuring that the case is successfully completed and such assistance may be in terms of collecting evidence to prove the crimes allegedly committed by Ongwen. Indeed

[348] Ibid, sec 41(3); see also Rome Statute, art 90(4).
[349] Ibid, above n 17, sec 41(5); see also Rome Statute, art 90(7)(a).
[350] Ibid, sec 41(4).
[351] Ibid, sec 41(6); see also Rome Statute, art 90(7)(b).
[352] Ibid, secs 43-59.
[353] *Dominic Ongwen Case*, above n 56.
[354] Ibid, para 1.

evidence was collected and availed to the ICC including radio communications and logbooks intercepted by the UPDF[355] and the case was ongoing at the time of writing.

However, the Minister may refuse such requests for assistance where there are competing requests for assistance from the ICC[356] or postpone such requests which decisions are taken in accordance with article 90 of the Rome Statute.[357] More so, the Act makes it mandatory for the Minister to refuse such requests for assistance where the case is inadmissible before the ICC or where the ICC does not intend to proceed with the matter or where it is prohibited under Ugandan law.[358] Even where the request for assistance relates to production of evidence involving national security,[359] in which case procedures under sections 85 to 86 the Act[360] apply, the Minister is required to consult with the ICC.[361] In event of failure to get a resolution on how such request may be executed without prejudicing national security, the Minister has to inform the ICC with specific reasons.[362] This shows that the Act clearly sets out detailed procedures to facilitate state cooperation with the ICC.

Notwithstanding the failure of consultations between Uganda and the ICC, the Minister is required to comply with the request for assistance where the ICC makes orders including disclosure of information through 'hearings in camera and *ex parte*'.[363] Perhaps this is because alternatives such as hearings in camera minimise the risk of prejudicing national security. Any decision taken by the Minister in this regard must be made fully aware of the powers of the ICC to refer the matter to the UNSC or the ASP as per article 87(7) of the Rome Statute in event of non-cooperation.[364] Such a provision recognises the enforcement measures of the ICC to secure compliance by Uganda. It remins to be seen whether the UNSC and the ASP will obtain the cooperation of Uganda with the ICC in the future.

Other forms of assistance dealt with under Part VI of the Act relate to enforcement of penalties which are provided for under Part X of the Rome Statute. The Act provide detailed provisions for enforcing penalties such as orders for victim reparation, fines, forfeiture orders

[355] Ibid, para 50, other evidence includes testimonies of witnesses, victims, LRA insiders, members of the Uganda military and police, see para 47.
[356] Uganda's ICC Act, above n 16, sec 60(2), this is done in accordance with the principles set out in article 90 of the Rome Statute or where it relates to protection of national security.
[357] Ibid, sec 61(1).
[358] Ibid, sec 60(1); see also Rome Statute, art 93(3) with respect to prohibition of the requested assistance in the requested state basing on 'an existing legal principle of general application'.
[359] Rome Statute, art 93(4)
[360] Uganda's ICC Act, above n 16, sec 82(1).
[361] Ibid, sec 85 which is at per with the Rome Statute, art 72(5).
[362] Ibid, sec 86(1) which is at per with the Rome Statute, art 72(6).
[363] Ibid, sec 86(3); see also Rome Statute, art 72(7)(a).
[364] Ibid, sec 87.

and sentences[365] to facilitate enforcement of orders and sentences issued by the ICC. This is commendable because the Rome Statute only obliges state parties to 'give effect to fines or forfeiture orders by the Court'[366] but not sentences. The enforcement of sentences imposed by the ICC is based on the willingness of states[367] and indeed, the Act provides detailed procedures for such purposes[368] which shows the commitment of Uganda to give effect to the provisions of the Rome Statute notwithstanding the lack of an obligation in that regard.

5.4. Provisions Concerning Assistance to Uganda

Uganda's ICC Act in Part IX, incorporated requests for assistance to the ICC to the effect that the Minister may request the ICC for assistance in conducting investigations or trial.[369] Such requests relate to transmission of statements, documents or other type of evidence or questioning of any person detained by the order of the ICC.[370]Indeed, the ICC availed similar assistance to Uganda in relation to investigation and prosecution of the case before the High Court of Uganda (*Thomas Kwoyelo Case*) as well as assistance in 'witness-related issues.'[371]This enhances domestic proceedings for ICC crimes in Uganda since it provides opportunity for sharing knowledge and expertise in handling ICC crimes and enables national authorities to obtain access to evidence in possession of the ICC. Largely, the Act sets out detailed procedures enabling cooperation with the ICC in many respects as discussed above and it remains to be seen whether these provisions will be enforced as already signs of failure to cooperate with the ICC have been noted above with respect to the case of President Al Bashir.[372]

For the most part, Uganda's ICC Act incorporated most of the provisions of the Rome Statute which facilitate domestic proceedings for ICC crimes mainly by reference to the Statute as evident in the definitions of ICC crimes and the principles of criminal law. Even the jurisdiction entrusted in national criminal systems over ICC crimes is beyond territoriality and nationality bases of jurisdiction to enable national criminal systems handle ICC crimes

[365] Ibid, secs 64-72.
[366] Rome Statute, art 109(1); see also Kimberly Prost, 'State Cooperation and Transfers' in William A. Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 305-322, 320.
[367] Rome Statute, ibid, art 103(1)(a).
[368] Uganda's ICC Act, above n 16, secs 67-80.
[369] Ibid, sec 97.
[370] Ibid, sec 99.
[371] Assembly of States Parties, 'Report of the Court on Complementarity', ICC-ASP/10/23 (11 November 2011) para 36.
[372] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', above n 314, paras 13-15.

committed abroad. This is accompanied with detailed procedures for facilitating cooperation with the ICC all of which exhibit that to a large extent the Act incorporated relevant provisions of the Rome Statute which enable domestic proceedings of ICC crimes and facilitate cooperation with the ICC. However, less seems to have been done to enforce the Act due to key legislative obstacles discussed above (non-retroactivity of Uganda's ICC Act and the Amnesty Act) which has limited the implementation of the Rome Statute inUganda.For that matter, Uganda should removethese obstacles by amending the legislation to enable domestic proceedings for ICC crimes as discussed in the proceeding section.

6. Eliminating Legislative Obstacles

The measures discussed in this section need to be undertaken by Uganda to enhance the implementation of the Rome Statute. These are a)amend Uganda's ICC Act to allow retroactive application to ICC crimes committed before 2010; and b) amend the Amnesty Act to exclude persons who committed ICC crimes and less serious offenders should be granted conditional amnesty.

6.1. Amending Uganda's ICC Act to Permit Retroactive Application

Uganda's ICC Act should be amended to permit retroactive application so that crimes committed before 2010 are investigated and prosecuted. This is due to the fact that; 1) ICC crimes are deemed as 'the most serious crimes of international concern'[373]; 2) these crimes were already established under international law when the Rome Statute[374] entered into force in 2002; and 3) the crimes were committed on the territory of Uganda and as discussed elsewhere, there is an emerging duty imposed on the state to prosecute crimes committed on its territory.[375]This implies that Uganda has the primary responsibility to ensure that ICC crimes committed on its territory are investigated and prosecuted. This is vital because Uganda has to prosecute crimes committed on its territory even though the Rome Statute does not expressly provide for this duty. The Rome Statute merely provides for the principle of

[373]Rome Statute, art 1.

[374] The Rome Statute is believed to reflect existing customary international law; see *Prosecutor v Anto Furundzija* (IT-95-17/1-T) ICTY, Trial Chamber (10 December 1998) para 227.

[375] Ibid, 1262; see also Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn Cambridge University Press 2014)78 and Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn Oxford University Press 2014) 79.

complementarityby which the ICC is meant to complement national criminal jurisdictions[376] only when states are unable or unwilling to act.

To ensure that Uganda investigates and prosecutes crimes within the jurisdiction of the ICC, retroactive application of the ICC Act should at least be effected from the entry into force of the Rome Statute. This is because ratification of the Rome Statute by Uganda and subsequent ICC intervention in the situation in northern Uganda in 2004[377] may be deemed to have put the government and opposition armed forces in Uganda on notice of the prohibited conduct under the Statute. In essence, the requirement of foreseeability of such conduct as penalised under international law was fulfilled. For that matter, it is arguable that there is no breach of the principle of legality where perpetrators of ICC crimes are prosecuted and punished for crimes committed before the enactment of Uganda's ICC Act in 2010. This is due to the fact that ICC crimes were already penalised under the Rome Statute to which Uganda is a party.[378] Taking the example of states which permit retroactive application of legislation to criminalise specific ICC crimes,[379] Uganda should amend its ICC Act to the same effect.

In event of failure to take immediate measures to amend the Act, Uganda should utilise the GCA of Uganda[380] which penalised grave breaches of the Geneva Conventions under section 2(1), long before the ICC crimes complained of were committed.[381] With respect to other categories of war crimes as well as crimes against humanity, the PCA of Uganda for ordinary crimes may be utilised. Notwithstanding the non-suitability of prosecuting ICC crimes as ordinary crimes, the Rome Statute does not prohibit states from doing so.[382] What is required though, is proof that the crimes prosecuted at the national level 'cover "substantially the same conduct" as those charged by the Court [ICC]' irrespective of the legal characterisation of these crimes.[383] Arguably, in the absence of an applicable legislation,

[376] Rome Statute, arts 1 and 17, see also chapter 2, section 2.
[377] ICC, 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda', ICC-OTP-20040729-65. See also Nouwen, above n 52, 114.
[378] Uganda ratified the Rome Statute on 14 June 2002, see ICC, Assembly of States Parties, 'Uganda' available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx> last visited, 30 August 2017.
[379] See above n 217.
[380] Geneva Conventions Act (1964), above n 104.
[381] See further discussion under section 4.1 of this chapter concerning non-retroactivity of Uganda's ICC Act.
[382] See chapter 2, section 3.1 concerning using existing legislation to penalise ICC crimes.
[383] *The Prosecutor v Saif Al-Islam and Abdullah Al-Senussi*, 'Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi', (ICC-01/11-01/11 OA 6) The Appeals Chamber (24 July 2014) para 119.

then ordinary penal legislation may be utilised to prosecute perpetrators of ICC crimes.[384] This however, should be used as the last resort to ensure accountability for these crimes pending the amendment of Uganda's ICC Act.

6.2. Amending the Amnesty Act (2000)

Notably, prosecutions alone may not adequately ensure accountability for all crimes in case of mass human rights violations.[385] This is due to the fact that a single approach may not be comprehensive to handle such crimes owing to the 'complexity and scale of wartime criminality'.[386] Moreover, conducting such proceedings requires sufficient resources which the government may not be able to provide.[387] Indeed, it was stated that the Director of Public Prosecutions (DPP) cannot prosecute all ICC crimes committed in Uganda due to insufficient capacity of national institutions to address mass criminality.[388] Since issuance of amnesty under international law is not completely prohibited,[389] limited amnesties may be granted to persons who committed less serious crimes.

This requires an amendment to the Amnesty Act to allow issuance of amnesty on condition that the applicants disclose the full truth of their crimes and impose some form of accountability such as community service and public apology. Notably, the Amnesty Amendment Bill 2015 was before the relevant Ministries for consideration[390] at the time of writing (2017) and it provides for conditional amnesty to persons 'involved in acts associated with war or armed rebellion' against the GoU but excludes persons alleged to have committed ICC crimes.[391] It is submitted that the amendment to the Amnesty Act is long overdue as several persons alleged to have committed ICC crimes continue to be shielded from prosecution yet the ICC can only prosecute a few individuals.[392] Thus, Uganda has to

[384] The same was done in the Netherlands and Norway, see chapter 2, section 5.1.3.
[385] Corinne Parver and Rebecca Wolf, 'Civil Society's Involvement in Post-Conflict Peacebuilding' (2008) 36(1) *International Journal of Legal Information* 51-79, 62.
[386] McDonald, above n 33, 328.
[387] Camila Uribe, 'Do Amnesties Preclude Justice?' (2012) 21 *International Law, Revista Colombiana de Derecho Internacional* 297-359, 317.
[388] Justice Mike J. Chibita, (Director of Public Prosecutions), 'Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo', a paper presented at the Parliament Conference under the theme; *To Give Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo*, held at Parliament Conference Hall, Parliament of Uganda (17 July 2014) 6, available at <http://www.pgaction.org/pdf/activity/2014-07-17-Presentation-Justice-Mike-Chibita.pdf> last visited, 30 August 2017.
[389] Cryer, above n 96, 572.
[390] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 49, 36-37.
[391] Ibid, 20 and 37.
[392] The ICC issued four warrants of arrest in July 2005 against Joseph Kony, Vicent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongen but has so far commenced trial against Dominic Ongwen in December 2016

ensure that the legal framework enables prosecution of persons alleged to have committed ICC crimes.

Amnesty should be granted only to perpetrators of crimes not amounting to ICC crimes after disclosing the truth of their role in committing atrocities. This is intended to establish the applicants' eligibility for amnesty and the information may be verified using evidence collected by bodies such as the police and security forces in Uganda[393] as well as various organisations such as Human Rights Watch with respect to human rights violations committed during the armed conflict in Uganda.[394] Verification of the applicants' statements was carried out in South Africa whereby the Committee for Amnesty was required to investigate the person's application for amnesty and make further inquiries deemed necessary.[395] Similar measures were taken in Honduras and Guatemala whereby courts interpreted the amnesty process to require investigations before being granted.[396] Such investigative steps may unearth further information relating to the crimes allegedly committed by the applicant and as noted above, it is useful in assessing his or her eligibility for amnesty.

Since the Amnesty Amendment Bill 2015 is still pending before the relevant Ministries, further proposals may be submitted for incorporation like providing some form of accountability including community service and public apology. Such sanctions might benefit the community as well as facilitate rehabilitation of the offenders with these communities and perhaps utilised for seeking forgiveness from the victims and affected communities. In East Timor similar measures were undertaken whereby amnesty for serious crimes was excluded and only perpetrators of less serious crimes such as assault, theft and property damage were granted amnesty after disclosing the full truth about their crimes and performing either community service or paid reparations or made public apology or any other act.[397]This served as an avenue for creating alternative mechanisms of accountability and facilitated national

---

The Prosecutor v Dominic Ongwen, 'Decision on the Confirmation of Charges Against Dominic Ongwen', (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016) (hereinafter *Dominic Ongwen Case*) para 4 and *The Prosecutor v Dominic Ongwen*, 'Decision Setting the Commencement Date of the Trial', (ICC-02/04-01/15) Trial Chamber IX (30 May 2016) 7.

[393] The Prosecutor of the ICC is also relying on such information in part, to prove commission of ICC crimes by Ongwen as illustrated in the case of *The Prosecutor v Dominic Ongwen*, above n 56, para 50.

[394] Human Rights Watch (HRW), 'Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda', above n 3, 14-37.

[395] Promotion of National Unity and Reconciliation Act (1995), Act 34 of 1995 (hereinafter, Truth and Reconciliation Act), sec 19(2).

[396] Slye, above n 264, 194.

[397] Camila Uribe, above n 387, 324, see also 345. See also OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties', above n 262, 34 and OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives', above n 270, 9.

reconciliation between these persons and the community.[398] In essence, alternative punishments such as community service and apology may act as some form of justice to the victims of ICC crimes in northern Uganda which could enhance reconciliation. Thus, persons alleged to have committed less serious crimes should be granted conditional amnesty.

Provisions that clearly exclude perpetrators of ICC crimes from amnesty should be set out in the Amnesty Amendment Act (2015) though such exclusion may not result into domestic prosecution of these crimes possibly due to several factors including lack of political support for these proceedings. This is evident from Guatemala whereby despite the exclusion of amnesty for international crimes, less has been done to enforce justice in cases involving leaders of paramilitary militias instituted by the army.[399] Thus, persons excluded from amnesty continue to enjoy impunity in Guatemala.[400] This should not be the case in Uganda in that legislative amendments should be accompanied with the necessary political support for domestic proceedings of ICC crimes.

Moreover, being a state party to the Geneva Conventions and the Genocide Convention,[401] Uganda has the duty to prosecute grave breaches of the Geneva Conventions and genocide.[402] This implies that persons alleged to have committed these crimes are not eligible for amnesty. However, there is need to determine whom to prosecute by establishing the criteria for prioritisation since prosecutors have limited resources and would need to make hard choices concerning what crimes to focus on and which defendants to prosecute.[403] Thus, in determining whom to prosecute, persons most responsible for committing such crimes should be selected first for it has been argued that the duty to prosecute international crimes relates to persons most responsible for these crimes.[404] These may include persons at the hierarchical position such as military and civilian leaders due to the fact that it is the leaders

[398] Camila Uribe, ibid, see also 345 and 346.
[399] Naomi Roht-Arriaza, 'Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala' (2008) 9(1) *Chicago Journal of International Law* 79-106, 84.
[400] Megan K. Donovan, 'The International Commission Against Impunity in Guatemala: Will Accountability Prevail?' (2008) 25(3) *Arizona Journal of International & Comparative Law* 779-824, 792.
[401] Uganda acceded to the Genocide Convention on 14 November 1995 and ratified the Geneva Conventions on 18 May 1964, see United Nations, 'Common Core Document Forming Part of the Reports of States Parties, Uganda', above n 10, 24-25.
[402] Geneva Conventions, above n 125, GC I, art 49; GC II, art 50; GC III, art 129 and GC IV, art 146. See also the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention) (1948) 78 UNTS 277, arts I, IV and V.
[403] Slye, above n 264, 184.
[404] Patricia Pinto Soares, 'Transitional Justice in the Democratic Republic of Congo: The 2014 Amnesty Law and the Principle of Complementarity' in Triestino Mariniello (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015) 174-189, 179.

'who plan, participate in, or acquiesce in large-scale human rights abuses'[405] hence they should be held liable for the ensuing crimes.

More so, persons to be selected for prosecution may include those who allegedly committed crimes of such gravity which involved numerous victims and affected vast geographical area.[406] This implies that the overall effect of the crimes committed by a person against victims and the community at large may be used to determine which person to prosecute before the ICD. It is argued that prosecutions should be conducted with respect to perpetrators who are most responsible in terms of their leadership positions and those who committed crimes of such gravity which affected the victims and communities as mentioned above. This may be determined on a case by case basis by assessing the nature of crimes allegedly committed by the person so as to determine whether the crimes are of such magnitude to warrant prosecution.

Overall, Uganda's ICC Act should be amended to permit retroactive application from the time Uganda ratified the Rome Statute in 2002. In addition, the Amnesty Act should be amended to state clearly the category of persons eligible for amnesty so that those excluded from amnesty (perpetrators of ICC crimes) are investigated and prosecuted. Only perpetrators of less serious crimes should be eligible for amnesty on disclosure of full truth but they should also provide some form of accountability such as community service.

7. Conclusion

Uganda ratified the Rome Statute in 2002 and like any other state party to the Rome Statute, it is expected to give effect to the provisions of the Statute by setting out procedures under national law to facilitate cooperation with the ICC.[407] Since the ICC is a court of last resort as explained already, Uganda has the responsibility of exercising its primary role of investigating and prosecuting ICC crimes especially crimes committed on its territory. To that effect, Uganda established special institutions such as the ICD in 2008 to adjudicate these crimes as well as enacted Uganda's ICC Act which came into force in 2010. Putting in place legal and institutional frameworks for handling ICC crimes is commendable

[405]Greg R. Veter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25(1) *Yale Journal of International Law* 89-143, 92. Such leaders also exercise control over their subordinates like issuing orders to engage in hostilities and controlling the means of warfare. See *The Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', above n 189, 188.

[406] See OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) paras 37- 41, available at <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> last visited, 30 August 2017.

[407]Rome Statute, art 88.

considering that there was no law penalising ICC crimes in Uganda except for grave breaches of the Geneva Conventions with limited application to international armed conflicts.[408]

Such measures exhibit Uganda's commitment to implement the Rome Statute and other state parties may emulate these practices to ensure availability of legal and institutional frameworks for addressing ICC crimes at the national level. This is because as noted already, Uganda's ICC Act largely incorporated the relevant provisions of the Rome Statute to enable investigations and prosecutions of ICC crimes domestically and also facilitate cooperation with the ICC. More so, it was noted that concentrating resources and expertise in special institutions enhances coordination and transfer of knowledge among personnel to improve their competence in handling ICC crimes.[409]

Notwithstanding these measures, less seems to have been done to conduct proceedings for ICC crimes in Uganda.Only one case of *Thomas Kwoyelo* has been commenced in court and many persons have benefitted from amnesty including persons alleged to have committed ICC crimes as already noted.[410] The Act has largely remained on paper without enforcement due to legislative obstacles such as non-retroactivity of the Act and amnesty. More so, even the cooperation provisions which are not affected by non-retroactivity[411] and amnesty, are not enforced by Uganda as demonstrated in the *Al Bashir Case* discussed above.[412]

Arguably, the failure to enforce national implementing legislation in Uganda seems to be largely as a result of lack of political support from the GoU in that the GoU has the authority to remove legislative barriers to enable domestic procedings for ICC crimes which has not happened yet. Thus, the extent to which Uganda has implemented the Rome Statute appears limited.For that matter, Uganda should take the initiative to enforce the legislation in order to fully implement the Rome Statute at the national level. This would entail removing legislative obstacles by amending existing legislation to enable domestic proceedings for ICC crimes.

[408] Section 4.1 on non-retroactivity of Uganda's ICC Act. See for example in the *Thomas Kwoyelo Case*, above n 15.
[409]See section 2 of this chapter on institutions dealing with ICC crimes in Uganda.
[410] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', above n 6.
[411]Uganda's ICC Act, above n 16, sec 1(1).
[412] See section 5.1.

Chapter Four

Measures Undertaken by South Africa to Implement the Rome Statute of the International Criminal Court

1. Introduction

South Africa was considered to be a supporter of the International Criminal Court (ICC)[1] as exhibited from its active participation during the drafting of the Rome Statute and the establishment of the ICC.[2] Such support is further evident from the early ratification of the Rome Statute by South Africa on 27 November 2000[3] and enactment of a national implementing legislation to domesticate the Statute on 18 July 2002[4] a few weeks after the Rome Statute entered into force on 1 July 2002.[5] In addition, during the Review Conference in 2010, South Africa actively contributed in advancing the policy of positive complementarity together with Denmark[6] to devise means of enhancing national capacity in investigating and prosecuting serious crimes of international concern[7] that is, genocide, crimes against humanity, war crimes (ICC crimes) and aggression.

Despite such strong support for the ICC, South Africa submitted a notification of withdrawal from the Rome Statute to the Secretary General of the United Nations (UN) on 19 October 2016[8] and even introduced a Bill in Parliament to repeal its ICC Act.[9] Thus, it is pertinent to examine the extent to which South Africa has implemented the Rome Statute to enable proceedings for ICC crimes as well as facilitate cooperation with the ICC. Firstly, the

---

[1] Max du Plessis, 'South Africa's Implementation of the Rome Statute' in Kai Ambos, Ottilia A. Maunganidze (eds), *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universtitätsverlag Göttingen 2012) 23-38, 38.

[2] Christopher Gevers, 'International Criminal Law in South Africa' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 403-441, 403, 409.

[3] United Nations, 'Common Core Document Forming Part of the Reports of States Parties, South Africa', (HRI/CORE/ZAF/2014) (2 February 2016) 31.

[4] Implementation of the Rome Statute of the International Criminal Court Act (2002), Act 27 of 2002 (hereinafter, South Africa's ICC Act).

[5] The Rome Statute of the International Criminal Court (adopted 17 July 1998 and entered into force 1 July 2002) 2187 UNTS 90.

[6] Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2(2) *Goettingen Journal of International Law* 791-811,799.

[7] See also ASP, 'Report of the Bureau on Complementarity', ICC-ASP/9/26 (17 November 2010) para 8 and ASP, Resolutions and Declarations Adopted by the Review Conference, 'Resolution RC/Res.1', (adopted at the 9th plenary meeting on 8 June 2010) para 8, available at <https://asp.icc-cpi.int/en_menus/asp/complementarity/Pages/Resources.aspx> last visited, 30 August 2017.

[8] United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10. Similar measures were taken by Burundi (27 October 2016) and The Gambia (10 November 2016), see United Nations, Depository Notifications, C.N.805.2016.TREATIES-XVIII.10 and C.N.862.2016.TREATIES-XVIII.10. See further discussion in section 4.2 on South Africa's Notification of Withdrawal from the Rome Statute.

[9] Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B 23-2016), available at <http://www.justice.gov.za/legislation/bills/bills.htm> last visited, 30 August 2017.

chapter analyses whether institutions created to investigate and prosecute ICC crimes in South Africa have the capacity to handle such crimes.

Secondly, the chapter examines relevant provisions of the South Africa's ICC Act to establish the extent to which the Act incorporated provisions of the Rome Statute. It is submitted that despite the creation of special institutions to handle serious crimes including ICC crimes, as well as the enactment of implementing legislation which incorporated most of the relevant provisions of the Rome Statute, South African authorities seem not fully committed to enforce the legislation. As will be demonstrated in this chapter, the law appears to be applied selectively which could limit the implementation of the Rome Statute in South Africa.

Thirdly, the chapter analyses immunity as an obstacle to the implementation of the Rome Statute in South Africa. It highlights the conflicting obligations under the Rome Statute and customary international law, as well as the position of the African Union (AU) on immunity upon which South Africa partly based to justify its failure to implement the Statute and its subsequent submission of the notification of withdrawal from the Statute. Fourthly, it highlights the cooperation provisions set out in the Act to establish consistency of these obligations with the Rome Statute. It argues that without clarifying the scope of article 98(1) of the Rome Statute by the ICC in its jurisprudence, other states may decline to cooperate with the ICC basing on immunity.

Lastly, the chapter concludes that that although South Africa has an enabling legislation with institutions for handling ICC crimes, enforcement of the legislation by these institutions is still minimal partly due to lack of political will. That notwithstanding, it appears that the extent to which the Rome Statute has been implemented in South Africa is to a greater extent than in Uganda due to the relentless role played by national courts in passing decisions that confirmed South Africa's obligations under the Rome Statute.

2. Institutions Dealing with ICC Crimes in South Africa

In South Africa, the South African Police Service (SAPS) has the responsibility of conducting investigations for all crimes[10] and the institution of criminal proceedings on behalf of the state is the mandate of the National Prosecuting Authority (NPA) led by the National Director of Public Prosecutions (NDPP).[11] Notably, South Africa's ICC Act requires

[10] 1996 Constitution of South Africa, sec 205(3).
[11] Ibid, sec 179(2).

the NDPP when making a decision whether to commence prosecutions for ICC crimes, to 'give recognition to the obligation' that South Africa, 'in the first instance … has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.'[12] Seemingly, the provision requires the NDPP when making prosecutorial decisions, to be mindful of the primary obligation of South Africa to prosecute ICC crimes. This provisions earmarks the key role of the NDPP of ensuring that ICC crimes are prosecuted as a matter of priority. With respect to conducting trials, the 1996 Constitution of South Africa vests judicial authority in the courts.[13]

Unlike Uganda which created a special court for handling ICC crimes and other serious crimes,[14] South Africa utilises existing courts to adjudicate ICC crimes.[15] As noted already, establishing special institutions to handle international crimes is advantageous in that it leads to concentration of specialised skills in these units and also enables staff to share knowledge and experience in handling such crimes.[16] It is submitted that irrespective of the nature of institutions created to enforce justice for ICC crimes, states should ensure that these institutions have the capacity to conduct proceedings for ICC crimes effectively in terms of personnel and other facilities. Particularly, South Africa's ICC Act empowers the Minister responsible for justice in consultation with the Chief Justice and the NDPP to designate an 'appropriate High Court' in which to conduct proceedings for ICC crimes.[17] Thus, any High Court in South Africa deemed suitable for handling ICC crimes may be designated for such purposes.

Compared to Uganda,[18] South Africa created special units for handling serious crimes including ICC crimes due to the need for special skills and knowledge in handling such crimes.[19] Concerning investigations, the Crimes Against the State (CATS) a specialised unit of 26 members within the Directorate of Priority Crime Investigations (DPCI),[20] is

[12] South Africa's ICC Act, above n 4, sec 5(3). Under sec 1(vii), a crime means 'the crime of genocide, crimes against humanity and war crimes.'

[13] Ibid, sec 165. These are the Constitutional Court, Supreme Court of Appeal, High Courts, Magistrates Courts and other recognised courts (sec 166). The High Court has original jurisdiction over all crimes, see Jonathan Burchell, 'South Africa' in Kevin Jon Heller and Markus D. Dubber (eds) *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 455-487, 457.

[14] See chapter 3, section 2.2 on the International Crimes Division.

[15] See section 3.1.1 of this chapter which analyses court decisions on jurisdiction.

[16] See chapter 2, section 4.2 on non-legislative measures.

[17] South Africa's ICC Act, above n 4, sec 5(4).

[18] See chapter 3, section 2 on institutions for investigating and prosecuting ICC Crimes in Uganda.

[19] See also Justice Fabricius in the *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, (Case No. 77150/09) High Court of South Africa [2012] ZAGPPC 61 (8 May 2012) (hereinafter, *Zimbabwe Torture Case*) para 25 (on file with the author).

[20] This is a Division of the SAPS and has the mandate of investigating national priority offences, see South African Police Service Act (1995), Act No. 68 of 1995 (hereinafter, SAPS Act), secs 17C (1) and 17D(1)(a)

responsible for investigating several crimes including ICC crimes, acts of terror, crimes against the state and organised crime.[21] In view of the broad mandate handled by the CATS it is questionable whether a 26 member unit could effectively investigate these crimes.

The fact that the CATS work in collaboration with prosecutors in the Priority Crimes Litigation Unit (PCLU)[22] in handling ICC crimes may not alleviate the problem of shortage of staff in this unit. This is because the PCLU directs investigations and prosecutions for ICC crimes and several serious crimes[23] hence handles a broad mandate similar to the CATS. With only 5 advocates to execute such broad mandate,[24] it is questionable whether the PCLU has the capacity to effectively prosecute the various crimes mentioned above.

Similarly in Croatia, the special courts designated to handle ICC crimes handle several crimes and ICC crimes are thought to be 'one part of a normal criminal caseload' of these courts.[25] Consequently, 'as few as 18 war crimes cases are concluded a year' yet about 700 cases were pending prosecution.[26] In contrast, the special institutions created in Bosnia and Herzegovina (BiH) only handle war crimes[27] and serious violations of international humanitarian law. Other serious crimes such as organised crimes are handled by the Special Department for Organized Crime, Economic Crime and Corruption (SDOC)[28] which reduces the workload of the various special units working on a range of serious crimes in BiH.

Arguably, despite investigators and prosecutors in the special units working in collaboration and mutually assisting each other in handling ICC crimes,[29] this may have less impact in ensuring that ICC crimes are investigated and prosecuted. This is because both the CATS and the PCLU have responsibility over other serious crimes yet the available

---

respectively. See also sec 17A and sec 16(2) (iA) as well as Item 4 of the Schedule to the Act regarding national priority ofences as encompassing ICC crimes.

[21] Max du Plessis**,** Antoinette Louw and Ottilia Maunganidze,'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions' Institute for Security Studies (ISS) Paper No. 241 (November 2012) 16; see also Ottilia Anna Maunganidze and Anton du Plessis, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65-83, 74-75.

[22] Teamwork is enjoined and legally provided for under the South African Police Service Act (1995), sec 17F (4).

[23] These include national and international terrorism, complex financial crime, weapons of mass destruction, matters arising from the Truth and Reconciliation Commission. Maunganidze and du Plessis, above n 21, 74.

[24] Ibid, 74.

[25] Roger O'keefe, *International Criminal Law* (Oxford University Press 2015) 378.

[26] Amnesty International, 'Behind a Wall of Silence Prosecution of War Crimes in Croatia' (2010) EUR 64/003/2010, 6, available at <https://www.amnesty.org/en/documents/eur64/003/2010/en/> last visited, 30 August 2017.

[27] These include the War Crimes Investigation Centre (WCIC) and the Special Department for War Crimes (SDWC) for prosecutors, see Morten Bergsmo, et al, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edn Torkel Opsahl Academic EPublisher 2010) 21, 15 respectively.

[28] Law on the Court of Bosnia and Herzegovina 2000 (Official Gazette of Bosnia and Herzegovina, 49/09, art 14(1)(b).

[29] Du Plessis, above n 1, 35.

personnel noted above seem insufficient to effectively handle these crimes, a similar situation faced by the special units in Uganda.[30] Continuous specialised training availed to staff to enhance their skills in investigating and prosecuting ICC crimes[31] is laudable but may not be utilised fully in handling such crimes due to the broad mandate executed by staff in the units.

Perhaps this explains the less focus on ICC crimes and it is believed that some cases involving international crimes including ICC crimes brought to the attention of these special units have been declined.[32] This is evident in the *Zimbabwe Torture Case*[33] discussed above whereby the NDPP and the Head of the PCLU denied having legal mandate to initiate investigations into allegations of crimes against humanity committed in Zimbabwe. Instead, they claimed that the SAPS had the legal mandate to act.[34] The High Court of South Africa decided that both the NDPP and PCLU abdicated their 'lawfully prescribed functions' when they deferred the work to SAPS which did not have 'specialised guidance of the PCLU' due to the NPA's failure 'to manage and direct' such investigations 'in a multi-disciplinary manner as required by law'.[35]

It is submitted that since the NPA, PCLU and SAPS are legally mandated to act in collaboration when handling ICC crimes, declining to take action by the NDPP and the PCLU defeats the purpose of creating these special units. Seemingly, ICC crimes are accorded less priority by staff in these special units compared to other serious crimes like terrorism which are successfully investigated and prosecuted.[36] This exhibits reluctance of staff in these special units to handle ICC crimes which curtail the implementation of the Rome Statute in South Africa.

Therefore, enjoining staff to work in collaboration to execute such broad mandate is commendable though without reducing the broad mandate of these special units, investigations and prosecution of ICC crimes in South Africa may remain minimal. This exhibits that institutions handling ICC crimes in South Africa do not have sufficient capacity to investigate and prosecute ICC crimes in South Africa. It is contended that without sufficient resources availed to institutions handling ICC crimes, domestic implementation of the Rome Statute may not be realised in South Africa. The section which follows examines

[30] See chapter 3, section 2.1 on special units for investigating and prosecuting ICC crimes.
[31] Du Plessis**,** Louw and Maunganidze, above n 21, 17.
[32] Maunganidze and du Plessis, above n 21, 75.
[33] *Zimbabwe Torture Case*, above n 19. See further discussion in section 3.1.1.B of this chapter.
[34] Ibid, paras 22-23.
[35] Ibid, para 25.
[36] See for example, *The State v Okah* (SS94/11) [2013] ZAGP JHC 75, High Court of South Africa (26 March 2013).

national implementing legislation to determine the extent to which this law is consistent with the Rome Statute so as to enable domestic proceedings for ICC crimes.

3. The Law Implementing the Rome Statute in South Africa

The legal system of South Africa comparable to Uganda[37] is based on the English common law though with a mixture of Anglo-American and Roman-Dutch Law.[38] South Africa adopted a dualist system which requires incorporating provisions of a treaty into national law by an Act of Parliament except for a self-executing provision in an agreement which has been approved by Parliament.[39] This means that unlike Uganda, the Constitution of South Africa recognises self-executing provisions of treaties where such provisions are very clear and precise.[40] In this case judicial enforcement is enabled without the need for enacting legislation to incorporate such provisions in national law. Nonetheless, as discussed in chapter 2 some provisions of the Rome Statute such as the cooperation provisions are not self-executing.[41] In fact, the Rome Statute requires state parties to ensure that there are procedures available in national legislation to facilitate cooperation with the ICC.[42]

Thus, the provisions of the Rome Statute were incorporated in South African law by enacting the ICC Act[43] which came into force on 16 August 2002.[44] Some of the objectives of the Act included, creating a legal framework for implementing the Rome Statute by criminalising ICC crimes[45] so as to enable authorities in South Africa to prosecute and adjudicate such crimes.[46] In the event of failing to do so, the Act was to facilitate South Africa to cooperate with the ICC in investigating and prosecuting persons alleged to have committed ICC crimes.[47] In effect, both the complementarity provisions (provisions which

[37] See chapter 3, section 3 concerning the law implementing the Rome Statute in Uganda.
[38] Erika de Wet, 'The Reception of International Law in South African Legal Order: An Introduction' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 23-50, 23, 24 and Burchell, above n 13, 456.
[39] De Wet, ibid; the 1996 Constitution of South Africa, sec 231(4) and *The Azanian Peoples Organization and Others v The President of the Republic of South Africa and Others*, Case No CCT 17/96, Constitutional Court of South Africa (25 July 1996) paras 26-27.
[40] De Wet, ibid, 34-35.
[41] See chapter 2, section 2 concerning whether state parties have the duty to implement the Rome Statute.
[42] Rome Statute, art 88.
[43] South Africa's ICC Act, above n 4.
[44] Max du Plessis, 'South Africa's International Criminal Court Act: Countering Genocide, War Crimes and Crimes Against Humanity' Institute for Security Studies (ISS) Paper No. 172 (November 2008) 1.
[45] South Africa's ICC Act, above n 4, sec 3(c).
[46] Ibid, sec 3 (d).
[47] Ibid, sec 3 (e).

enable domestic proceedings for ICC crimes) and cooperation provisions are set out in South Africa's ICC Act, a similar approach adopted by Uganda of enacting a single legislation.[48]

The Act is divided into 5 chapters of which 2 chapters provide for cooperation of South Africa with the ICC and 1 chapter provides for domestic proceedings for ICC crimes in South Africa.[49] It is notable that compared to Uganda's ICC Act[50] South Africa's ICC Act provides more provisions for cooperation with the ICC than the complementarity provisions possibly because of the explicit obligation of incorporating procedures for cooperation in national law.[51] This section examines; i) jurisdiction over ICC crimes, ii) definitions of ICC crimes, iii) penalties for ICC crimes, and iv) individual criminal responsibility and defences.

3.1. Jurisdiction over ICC Crimes

The jurisdiction of courts in South Africa over ICC crimes is provided for under South Africa's ICC Act.[52] This provision creates extensive jurisdiction based on territoriality and other jurisdictional bases which apply to extraterritorial crimes as discussed below.[53] With respect to territoriality, this is traditionally recognised by virtue of the competency of the state to exercise jurisdiction over acts that occur within its territory.[54] Generally, the territoriality principle forms basis for exercising criminal jurisdiction in South Africa[55] though extraterritorial jurisdiction is also permitted for crimes such as corruption[56] and terrorism.[57]Regarding ICC crimes, aside the territoriality jurisdiction other bases of jurisdiction exercised over such crimes committed abroad are set out under section 4(3) of South Africa's ICC Act which provides thus;

> In order to secure jurisdiction of a South African court … any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- (a)that person is a South African citizen; or (b) that person is not a South African citizen but is ordinarily resident in the Republic; (c) that person, after the commission of the crime, is present in the territory of the Republic; or (d) that person has committed the said crimes against a South African citizen or against a person who is ordinarily resident in the Republic.

[48] See chapter 3, section 3 on the law implementing the Rome Statute in Uganda.
[49] South Africa's ICC Act, above n 4.
[50] International Criminal Court Act (2010) (hereinafter, Uganda's ICC Act), Part III to Part VIII provide for cooperation with the ICC. See chapter 3, section 3.
[51] Rome Statute, art 88.
[52] South Africa's ICC Act, above n 4, sec 3(d).
[53] The generally accepted bases of jurisdiction are territoriality, nationality (active personality), passive personality, protective principle and universal jurisdiction. See chapter 2, section 4.1.4.
[54] Du Plessis, above n 1, 27.
[55] Burchell, above n 13, 457.
[56] Prevention and Combating of Corruption Activities Act (2004), sec 35(1)-(3).
[57] Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004), sec 15(2).

This clause provides for several bases of jurisdiction that is, nationality jurisdiction whereby courts in South Africa have jurisdiction over ICC crimes committed by a citizen of South Africa. This is based on the state's competency over nationals who commit crimes abroad since it is believed that nationals owe allegiance to their state which creates a link for exercising such jurisdiction.[58]

More so, jurisdiction over ICC crimes committed abroad against nationals of South Africa is set out under the Act[59] basing on passive personality jurisdiction due to the need for protection of its nationals abroad.[60] A notable example where such jurisdiction was asserted is Spain whereby in 1996 Spanish prosecutors commenced proceedings against General Pinochet and other military leaders of Chile on behalf of Spanish victims who had been killed or disappeared in Chile.[61] This culminated into a request submitted to the British police for Pinochet's extradition to Spain[62] only to be released by the British authorities considering his ill-health and returned to Chile.[63] However, the assertion of passive personality jurisdiction remains contested save for war crimes,[64] it is important that the territorial state be given an opportunity to exercise jurisdiction[65] unless where it is unwilling or unable to do so.

Aside nationals of South Africa, national courts have jurisdiction over ICC crimes committed abroad by or against ordinary residents of South Africa[66] which is similar to Mauritius's national implementing legislation[67] but different from Uganda's ICC Act which provides for permanent residents.[68] As noted in chapter 2, persons who are residents in a state are treated as nationals of the state seeking to assert jurisdiction (forum state) especially where they are permanent residents.[69] However, it is not clear whether ordinary residents are recognised as nationals of the forum state. Nonetheless, the creation of jurisdiction over

[58] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press, 2014) 54.
[59] South Africa's ICC Act, above n 4, sec 4(3)(d).
[60] Regula Echle, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem' (2013) 9(4) *Utrecht Law Review* 56-67, 60.
[61] Diane F. Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92(6*) Georgetown Law Journal* 1057-1134, 1072 and Craig Peters, 'The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide' (2015) 39 *Seattle University Law Review* 165-194, 176.
[62] Diane F. Orentlicher, ibid, 1072.
[63] Peters, above n 61, 177.
[64] Cryer, et al, above n 58, 55.
[65] Daniel David Ntanda Nsereko, *Criminal Law in Uganda* (Wolters Kluwer 2015) 70.
[66] South Africa's ICC Act, above n 4, sec 4(3)(b) and (d). See section 3.1.1.A of this chapter analysing the case of *Joseph Alfred Rakoto and Others v The Head Directorate for Priority Crimes Investigation and Others*, (Case No. 52268/12) High Court of South Africa (19 November 2012) (hereinafter, *Madagascar Case*) (on file with the author).
[67] Mauritius's International Criminal Court Act (2011), sec 4(3)(b) and (d).
[68] Uganda's ICC Act, above n 50, sec 18(a) and (c); see chapter 3, section 3.1.
[69] Cryer, et al, above n 58, 54-55.

ordinary residents avoids South Africa being used as a safe haven by persons who relocate to South Africa after committing ICC crimes abroad. In addition, victims of ICC crimes abroad who are ordinary residents have recourse to courts in South Africa for redress.[70]

Furthermore, universal jurisdiction which is exercised in the absence of any jurisdictional link to the forum state[71] is created under South Africa's ICC Act on condition that the accused person after committing the crime is present in South Africa.[72] As noted in chapter 2, assertion of universal jurisdiction is still controversial due to lack of clarity as regards to the conditions under which such jurisdiction is exercised.[73] Particularly, South Africa provides an example where assertion of conditional universal jurisdiction was problematic in that authorities have not applied it consistently. For example, they declined to initiate investigations into crimes against humanity allegedly committed in Zimbabwe[74] but acted with respect to similar crimes allegedly committed in Madagascar.[75] The section below examines the decisions of courts in these cases to highlight the possible reasons why authorities acted differently with regard to these cases in light of the practice of other states.

3.1.1. Analysing Court Decisions on Jurisdiction

Compared to Uganda and other states,[76] South Africa created jurisdiction over ICC crimes committed abroad on condition that the person is present in South Africa after committing the crime.[77] This presupposes a person who is neither a citizen nor an ordinary resident of South Africa who happens to enter the territory of South Africa after committing ICC crimes. This is also known as conditional universal jurisdiction as distinguished from absolute or pure universal jurisdiction, which is normally exercised in the absence of the person without any link between the crime and the forum state.[78] The court decisions examined below demonstrate inconsistent application of South Africa's ICC Act with regard to assertion of conditional universal jurisdiction.

---

[70] South Africa's ICC Act, above n 4, sec 4(3)(d).
[71] Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735-760, 745.
[72] South Africa's ICC Act, above n 4, sec 4(3)(c).
[73] See chapter 2, section 4.1.4 on jurisdiction.
[74] *Zimbabwe Torture Case*, above n 19.
[75] *Madagascar Case*, above n 66.
[76] Uganda's ICC Act, above n 50, sec 18(d); see also Samoa's International Criminal Court Act (2007), sec 13(1)(d); Mauritius's International Criminal Court Act (2011), sec 4(3)(c) and Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(b); Kenya's International Crimes Act (2008), sec 8(c).
[77] South Africa's ICC Act, above n 4, sec 4(3)(c).
[78] Charles C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', Legal Studies Paper Series, Working Paper No. 2009-38 (March 2010) 7-8, available at <http://ssrn.com/abstract=1526622> last visited, 30 August 2017. See also chapter 2, section 4.1.4 on jurisdiction.

A. Analysing the Madagascar Case

Marc Ravalomanana a former President of Madagascar sought asylum in South Africa after being deposed from power in 2009 and was granted a permanent residency status in South Africa.[79] During this time, the Head of the Priority Crimes Litigation Investigation Unit (PCLU) of South Africa[80] commenced investigations against him for crimes against humanity allegedly committed in Madagascar in 2008/2009.[81] Although residence in South Africa is one of the conditions for exercising jurisdiction over ICC crimes committed abroad,[82] the PCLU exercised their powers basing on section 4(3)(c) of South Africa's ICC Act.[83] This was done after deciding that there was reasonable basis for initiating investigations into the alleged crimes.[84] Thus, conditional universal jurisdiction was utilised and not jurisdiction based on residence though both are acceptable since Ravalomanana was resident in South Africa.

Ravalomanana wanted to travel abroad and there was a possibility of him fleeing South Africa to escape justice.[85] This prompted victims of these crimes to seek a court order to prevent Ravalomanana from leaving South Africa until investigations against him were completed.[86] The Court referred to South Africa's ICC Act which permits assertion of jurisdiction over ICC crimes committed abroad when the perpetrator is present in South Africa after committing such crimes.[87]

Since investigations were ongoing, the Court allowed him to travel within or outside South Africa upon fulfilling the following conditions;[88] i) to travel within South Africa unrestricted after depositing his passport with the investigating authorities;[89] ii) to travel abroad either for purposes of attending the Southern African Development Community (SADC) meetings after producing written invitation from SADC;[90] or iii) to travel to Madagascar with the recommendation from SADC[91] and on returning to South Africa, to deposit his passport with the investigating officers within 72 hours.[92] In essence, his presence

[79] Ibid, para 2.
[80] Ibid, paras 4(a) and 6.
[81] Ibid, para 3.
[82] South Africa's ICC Act, above n 4, sec 4(3)(b).
[83] *Madagascar Case*, above n 66, para 47; see also paras 50 and 53.
[84] Ibid, para 40.
[85] Ibid, paras 8-9.
[86] Ibid, para 3.
[87] Ibid, para 31.11.
[88] Ibid, para 65.1-4.
[89] Ibid, para 65.1.
[90] Ibid, para 65.2.
[91] Ibid, para 65.3.
[92] Ibid, para 65.4.

in South Africa was guaranteed for purposes of jurisdiction and the fact that he was a permanent resident of South Africa as stated above, made it possible to exercise jurisdiction over crimes against humanity allegedly committed by him in Madagascar. Although he was never prosecuted for these crimes,[93] mere commencement of investigations sent a strong message that South Africa is not to be used as a safe haven by perpetrators of ICC crimes which enhances the fight against impunity by ensuring that such persons are brought to justice wherever they may be.

This case exhibits that authorities in South Africa found ease in asserting conditional universal jurisdiction perhaps due to the fact that Ravalomanana was a permanent resident in South Africa. In any case, there seemed to be no possibility of breaching the sovereignty of Madagascar since evidence was readily available from victims of these crimes.[94] Such jurisdiction was asserted by states like Canada in the case of *The Queen v Munyaneza*.[95] In this case Munyaneza fled Rwanda after committing ICC crimes in Rwanda and obtained residence in Canada.[96] The Court convicted him of genocide, crimes against humanity and war crimes[97] and sentenced him to 25 years in prison.[98] Note should be taken that authorities in Canada exercised universal jurisdiction over ICC crimes committed in Rwanda by a resident of Canada[99] which satisfied the condition of presence in Canada after committing the crime.[100]

However, in cases where the perpetrator is not a resident in South Africa, national authorities seem reluctant to exercise jurisdiction over ICC crimes committed abroad even where the presence requirement is met by some perpetrators. This is evident in the case of *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others (Zimbabwe Torture Case)*[101]which is discussed below. Perhaps this is due to lack of clarity in South Africa's ICC Act as regards to the presence requirement. This warrants analysis of the *Zimbabwe Torture Case* to highlight the interpretation adopted by courts in

[93] Marc Ravalomanana returned to Madagascar in October 2014; see Encyclopædia Britannica, 'Marc Ravalomanana', available at <http://www.britannica.com/biography/Marc-Ravalomanana> last visited, 30 August 2017.
[94] *Madagascar Case*, above n 66, para 10.
[95] *The Queen v Munyaneza* (2009 QCCS 2201) No. 500-73-002500-052, Superior Court Criminal Division (22 May 2009).
[96] Ibid, paras 5-7.
[97] Ibid, paras 2083, 2086 and 2088, respectively.
[98] Fannie Lafontaine, 'Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case' (2010) 8(1) *Journal of International Criminal Justice* 269-288, 269-270.
[99] *The Queen v Munyaneza* , above n 95, para 65 where the Court held that prosecution of a person who allegedly committed ICC crimes abroad is permitted under Canada's ICC Act, if he or she resides in Canada.
[100] Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(b).
[101] *Zimbabwe Torture Case*, above n 19.

South Africa for the presence requirement. In addition, the views of some scholars and the practice of other states on the matter are examined to obtain a clear understanding of how the presence requirement has been interpreted.

B. Analysing the Zimbabwe Torture Case

This case arises out of a complaint submitted on 14 March 2008 by the Southern Africa Litigation Centre (SALC), a Civil Society Organisation, to the Priority Crime Litigation Unit (PCLU), a special unit in the National Prosecuting Authority (NPA), which handles crimes under South Africa's ICC Act.[102] It was alleged that acts of torture were committed by Zimbabwean officials against Zimbabwean nationals in Zimbabwe on 27 March 2007.[103] Named in the Docket were senior state officials a number of whom frequently visited South Africa which prompted SALC to request for investigation into the matter for possible prosecution.[104] In essence, the complainants requested the PCLU to investigate ICC crimes committed in Zimbabwe as empowered under South Africa's ICC Act where the accused persons are present in South Africa after commission of the crimes.[105]

The PCLU declined to investigate and as a result, SALC commenced proceedings in the High Court of South Africa challenging inaction by relevant officials of South Africa (that is, the National Director of Public Prosecutions (NDPP)), Head of PCLU and National Commissioner of the South African Police Service (SAPS)).[106] The decision not to commence investigations was set aside by the High Court for illegality since it contravened South African law and an order to initiate investigations was made by this Court.[107] In effect, authorities in South Africa acted contrary to South Africa's ICC Act[108]by declining to initiate investigations into the matter. This decision was upheld by the Supreme Court of Appeal and the Constitutional Court.[109]

---

[102] Ibid, para 1.10. See also National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', 16, available at <https://www.npa.gov.za/node/32> last visited, 30 August 2017.
[103] Ibid, para 1.8.
[104] Ibid, para 1.13.
[105] South Africa's ICC Act, above n 4, sec 4(3)(c).
[106] *Zimbabwe Torture Case*, above n 19, para 1.1.
[107] Ibid, para 33.1-5.
[108] South Africa's ICC Act, above n 4, sec 4(3)(c)
[109]*National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Others* (485/2012) [2013] ZASCA 168, Supreme Court of Appeal (27 November 2013) (hereinafter, judgment of the Supreme Court of Appeal) para 70.3.1-2 and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Zimbabwe Exiles' Forum* (CCT 02/14) [2014] ZACC 30, Constitutional Court of South Africa (30 October 2014) (judgment of the Constitutional Court) para 81.

I. Decisions of Courts in South Africa Concerning the Presence Requirement

Courts in South Africa interpreted section 4(3)(c) of South Africa's ICC Act (which requires presence of the perpetrator in South Africa before exercising jurisdiction over ICC crimes committed abroad) as relating to trial proceedings. Particularly, the High Court stated that the provision 'was concerned with a trial' and had 'nothing to do with the power to conduct investigations.'[110] This was based on the view that investigations would have to be conducted first before a decision to prosecute is made and in any case, not all investigations led to prosecution.[111] This interpretation is reasonable considering the fact that the presence of the person alleged to have committed any crime within South Africa or abroad is a requirement for trial purposes.[112]

The decision of the High Court was upheld by the Supreme Court of Appeal basing on the fact that section 4(3) neither expressly authorises nor prohibits 'an investigation prior to the presence of an alleged perpetrator within South African territory.'[113] In essence, the provision should have clearly indicated whether presence was a requirement for initiating investigations against an accused person if that was the intention of the legislators. In fact the Supreme Court of Appeal noted the lack of any rule prohibiting initiation of investigations in the absence of the perpetrator[114] and that where presence of the perpetrator in South Africa was anticipated there was no reason 'why an investigation should not be initiated.'[115] This implies that in the absence of any law prohibiting initiation of an investigation before the person's presence in South Africa after committing the crime, investigations should be commenced especially where such presence was anticipated.[116]

The decisions of both courts were confirmed by the Constitutional Court which noted lack of clarity under international law on the presence requirement[117] and referred to the 1996 Constitution of South Africa which requires presence of the accused person for trial but silent on the issue of investigation.[118] This means that initiating investigations in the absence of the accused person is not contrary to the Constitution and international law which seem silent on

[110] Ibid, judgment of the High Court, para 32.
[111] Ibid.
[112] 1996 Constitution of South Africa, art 35(3)(e); see also Switzerland in the case of *A versus Office of the Attorney General of Switzerland*, 'Decision of the Swiss Federal Criminal Court dated 25 July 2012.
[113] *Zimbabwe Torture Case*, above n 109, judgment of the Supreme Court of Appeal, para 55.
[114] Ibid, para 66.
[115] Ibid; see also judgment of the Constitutional Court, above n 109, para 48.
[116] See for example, Germany's Code of Crimes Against International Law (2002), sec 1 read together with Annex, art 3(5) which amended the Code of Criminal Procedure by inserting sec 153f which stipulates circumstances under which prosecuting authorities of Germany may decline to prosecute.
[117] *Zimbabwe Torture Case*, above n 109, judgment of the Constitutional Court, para 47.
[118] Ibid; see also the 1996 Constitution of South Africa, art 35(3)(e).

that matter. More so, the Court decided that 'anticipated presence of a suspect in South Africa' is only one of the factors to consider when determining 'practicability and reasonableness of an investigation' but is 'not a prerequisite to trigger an investigation.'[119]

In essence, anticipated presence of the perpetrator in South Africa is not enough to call for investigations by authorities in South Africa. Other factors may be considered to determine the possibility of exercising universal jurisdiction over ICC crimes such as the likelihood of investigations leading to a prosecution or the prospect of the presence of the accused person in South Africa and perhaps his or her arrest for prosecution, as well as the availability of resources to conduct the investigations.[120]

This interpretation requires taking into consideration of other factors beyond the presence requirement set out in South Africa's ICC Act.[121] From the above court decisions, it is submitted that there is lack of clarity as regards to when jurisdiction is exercised in South Africa over ICC crimes committed abroad. This calls for analysis of the views of some scholars and the practice of states to highlight on how the presence requirement has been interpreted and determine whether the decisions of courts in South Africa are justifiable.

II. The Views of Scholars and State Practice Concerning the Presence Requirement

The requirement for the presence of the perpetrator in the territory of the forum state has basis in treaty law.[122] However, neither treaty law nor customary law is clear as regards to the meaning of the presence requirement[123] partly due to divergent state practice on the matter.[124] Notably, national legislation of some states such as South Africa, Uganda, Mauritius, and Samoa[125] provide for the presence of the accused person in the territory after commission of the alleged crimes without elaborating whether presence is required for trial or for all proceedings including investigations.

On the contrary, other states such as Canada and Kenya indicate that the person may be 'prosecuted', 'tried and punished' for the crime allegedly committed if he or she is present in

[119] Ibid, para 81.
[120] Ibid, para 64.
[121] South Africa's ICC Act, above n 4, sec 4(3)(c).
[122] For instance, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 5(2).
[123] Antonio Cassese, Paola Gaeta and Others (rev edn), *Cassese's International Criminal Law* (3rd edn Oxford University Press 2013) 271-272.
[124] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 2002, 3 (14 February 2002) (hereinafter, *Arrest Warrant Case*), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 54.
[125] South Africa's ICC Act, above n 4, sec 4(3)(c); Uganda's ICC Act, above n 50, sec 18(d); Mauritius's International Criminal Court Act (2011), sec 4(3)(c) and Samoa's International Criminal Court Act (2007), sec 13(1)(d).

either state after commission of the crime.[126] More so, states such as Albania, Montenegro, Macedonia, Serbia, Portugal and Switzerland[127] provide for the assertion of jurisdiction over crimes committed abroad when the accused person is in the territory of these states but not extradited to a foreign state. It appears that these provisions relate to an accused person who is in the custody of these states possibly after completion of investigations and they are not extradited for trial to other states.

This view is supported by some scholars such as Antonio Cassese who argued that the presence requirement is only fulfilled when the accused person is in custody of the state seeking to exercise universal jurisdiction (forum state) over this person.[128] This implies that by the time the person is apprehended, preliminary investigations may have already been conducted showing the possibility that the person in custody has committed the alleged crimes. Furthermore, Cherif Bassiouni seems to advance a similar view when he observed that '… the application of national legislation [providing for universal jurisdiction] has always been with respect to situations in which the accused was in the custody of the enforcing state.'[129] Still, he is alluding to assertion of jurisdiction by national authorities when the person is apprehended.

Similarly, Dapo Akande argued that a state party to the ICC has territorial criminal jurisdiction over a national of a non-party state where the 'alleged crime is subject to universal jurisdiction under international law' and that state party has custody over the perpetrator.[130] This means that applying national legislation of the forum state to exercise universal jurisdiction has been with respect to an accused person already in custody of the forum state possibly for purposes of prosecution. Moreover, it is argued that the 'presence of the accused in court is a matter of fairness' and that 'there are no compelling reasons' for the presence of the accused person in the territory at the investigation stage.[131] In essence, investigations can be commenced in the absence of the accused person which is not the case for prosecutions.

---

[126] Canada's Crimes Against Humanity and War Crimes Act (2000), sec 8(b) and Kenya's International Crimes Act (2008), sec 8(c)

[127] Albania's Criminal Code (1995) art 7/a; Montenegro's Criminal Code (2003), art 137(2); Macedonia's Criminal Code (1996), art 119(2); Serbia's Criminal Code (2005), art 9(2); Portugal's Adaptation of Criminal Legislation to ICC Statute (2004), Annex, art 5(1) and Swiss Criminal Code (1937), art 7(2).

[128] Cassese, et al, above n 123, 278.

[129] M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) *Virginia Journal of International Law* 81-162, 139.

[130] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) *Journal of International Criminal Justice* 618-650, 620.

[131] Gerhard Werle and Paul Christoph Bornkamm, 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC V. National Director of Public Prosecutions' (2013) *Journal of International Criminal Justice* 659-675, 666.

It is submitted that there is lack of clarity as regards to whether the presence of the accused person is required at the initiation of investigations or for prosecutions due to variation in state practice as exhibited above. Nonetheless, as will be demonstrated using case law below, states seem not to object to initiation of investigations in the absence of the accused person which indicates that the presence of the accused person is possibly for purposes of conducting trial against the person.

In fact, in states such as Switzerland in the case of *A versus Office of the Attorney General of Switzerland*, the Swiss Federal Criminal Court stated that the condition for the presence of the accused person on Swiss territory 'is met at the time of the opening of the criminal procedure' irrespective of whether such a person is present throughout the trial.[132] Still this relates to commencing prosecution when the person is present in Switzerland even though the person leaves the territory before trial, the presence requirement is satisfied. This is comparable to the decision in the *Zimbabwe Torture Case* discussed above[133] to the effect that the presence of the perpetrator in South Africa was not required for purposes of investigations but for trial proceedings.[134]

Another example is Germany whereby assertion of universal jurisdiction over ICC crimes is permitted[135] but may not be exercised where the accused person is not present in Germany and such presence is not anticipated.[136] Indeed basing on section 153f(1) of the Code of Criminal Procedure, the Higher Regional Court of Stuttgart upheld the Federal Prosecutor's decision (dismissing the complaint of war crimes committed against prisoners in Abu Ghraib, Iraq) on grounds including the fact that some of the persons named in the complaint were not staying in Germany and such a stay was 'not to be expected.[137] This indicates that universal jurisdiction should be exercised in accordance with national law. In the case of Germany, there is a requirement for either the presence of the person in Germany or the anticipated presence of such a person. It appears that courts in South Africa[138] adopted

[132] *A versus Office of the Attorney General of Switzerland*, above n 112, para 3.1.
[133] See section 3.1.1.B of this chapter.
[134] *Zimbabwe Torture Case*, above n 19, judgment of the High Court, para 32 and judgment of the Constitutional Court, above n 109, para 43.
[135] Germany's Code of Crimes Against International Law (2002), sec 1.
[136] Ibid, Annex, art 3(5) which amended the Code of Criminal Procedure by inserting sec 153f which stipulates circumstances under which prosecuting authorities of Germany may decline to prosecute.
[137] Higher Regional Court (Oberlandesgericht) Stuttgart, 5th Senate for Criminal Matters, 'Decision (Beschluss) from September 13th, 2005' (14 September 2005), available at <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Germany/Rumsfeld_Decision_Stuttgard_13-9-2005.pdf> last visited, 30 August 2017.
[138] *Zimbabwe Torture Case*, above n 109, judgment of the Supreme Court of Appeal, para 66 and judgment of the Constitutional Court, para 48.

the same position as Germany though no such requirement of anticipated presence is set out under South Africa's ICC Act.

In fact when the 2004 complaint against Donald Rumsfeld and others was supplemented in 2006, the new Federal Prosecutor General dismissed the complaint in April 2007 citing the same grounds as the Higher Regional Court of Stuttgart mentioned above.[139] Other factors considered were the limits to the investigatory powers of the Prosecutor such as available resources and the 'likelihood of a lack of success in a Germany investigations of the American activity'.[140] This exhibits that other factors are taken into consideration when making a decision whether or not to initiate investigations into crimes committed abroad.

This should not necessarily be limited to the presence or anticipated presence of the accused person in the forum state but also practical considerations as noted above by the Constitutional Court in South Africa.[141] It appears that actual presence of the person is a requirement for prosecution not at the investigation stage where other factors such as practicability and reasonableness of conducting investigations are considered before a state like Germany initiates investigations into crimes committed abroad.

Further still, in Spain universal jurisdiction was exercised against Adolfo Scilingo, an Argentine navy officer in 1995 (who had travelled to Spain to appear on a television show) for genocide, terrorism and torture.[142] He was tried and convicted of crimes against humanity and sentenced to 30 years in prison.[143] Although the court based on the fact that some of the victims were nationals of Spain which created a link based on passive personality,[144] it is submitted that the presence of Scilingo in Spain made it possible for Spain to prosecute him.This was recognised by the Court as an alternative base for exercising jurisdiction.[145]

Seemingly, the presence of an accused person in Spain is for purposes of trial proceedings and this finds support in the decision of the Spanish Constitutional Tribunal whereby the presence of the accused person in Spain was held to be a condition for trial since Spanish law does not permit trials *in absentia*'.[146] Thus, while investigations can be

[139] Tom Gede, 'Universal Jurisdiction: The German Case Against Donald Rumsfeld' 8(3) *Engage* 41-46, 44.
[140] Ibid.
[141] *Zimbabwe Torture Case*, above n 109, judgment of the Constitutional Court, paras 81 and 64.
[142] Peters, above n 61, 178.
[143] Ibid, 179.
[144] Ibid, 178 and Mugambi Jouet, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond' (2007) 35 *Georgia Journal of International and Comparative Law* 495-537, 505.
[145] Mugambi Jouet, ibid, 506.
[146] Hervé Ascensio, 'The Spanish Constitutional Tribunal's Decision in Guatemalan Generals Unconditional Universality is Back' (2006) 4(3) *Journal of International Criminal Justice* 586-594, 593. See also Hervé

conducted in the absence of the accused person, trials *in absentia* are not permitted in Spain.[147] Such practice reflects the position of courts in South Africa in that the presence requirement was interpreted as applicable to trials and not investigations because the Constitution of South Africa prohibits trials*in absentia*.[148]

Indeed, commencement of proceedings by Spain in the absence of the accused person was opposed by China in the case concerning acts of genocide and torture committed in Tibet in 1950.[149] This case related to a complaint made against the former Chinese President Jiang Zemin, the former Prime Minister Li-Ping and five others, which was declared admissible by the Spanish court.[150] This was based on the fact that the ICC had no jurisdiction over these crimes because the crimes were committed before the entry into force of the Rome Statute[151] and it is believed that there was no judicial remedy before Chinese courts.[152] Consequently, China and other states such as the United States of America and Israel opposed Spain's exercise of universal jurisdiction leading to the amendment of Spanish law in 2009[153] to the effect that jurisdiction was to be exercised where the alleged perpetrators were in Spain as one of the conditions.[154] The opposition to exercise of jurisdiction *in absentia* further supports the view that the presence of the accused person is a requirement for trial purposes and not for investigations.

More so, Belgium's assertion of universal jurisdiction in the absence of the accused person in its territory seems to show that exercising jurisdiction may not be objectionable where investigations are commenced without taking further actions. This is illustrated in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*)[155]where an international warrant of arrest was issued by Belgium for apprehending Mr. Abdoulaye Ndombasi Yerodia, then acting Minister of Foreign Affairs of the Democratic Republic of Congo (DRC).[156] The action was challenged by the DRC before the International Court of Justice (ICJ) on grounds that Yerodia was not in Belgium and had immunity.[157]

Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals' (2003) 1(3) *Journal of International Criminal Justice* 690-702, 698.
[147] Jouet, above n 144, 512.
[148] 1996 Constitution of South Africa, art 35(3)(e).
[149] Christine A. E. Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?' (2006) 4(3) *Journal of International Criminal Justice* 595-601, 596.
[150] Ibid, 595.
[151] Rome Statute, art 11(1).
[152] Bakker, above n 149, 599 and Peters, above n 61, 184.
[153] Peters, above n 61, 187.
[154] Ibid, 187
[155] *Arrest Warrant Case*, above n 124.
[156] Bassiouni, above n 129, 146.
[157] *Arrest Warrant Case*, above n 124, para 7.

The ICJ upheld the immunity of Yerodia to the effect that Belgium had violated his immunity to which he was entitled as a 'Minister of Foreign Affairs of the Congo'.[158] However, in addressing the issue of exercising jurisdiction in the absence of Yerodia, the ICJ conceded that there was confusion over this issue due to lack of specific guidance regarding when the presence requirement is satisfied and noted divergent national legislation, case law and writings on the matter.[159] Thus, the ICJ emphasised that '[t]he only prohibitive rule (repeated by the Permanent Court in the *"Lotus"* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State.'[160] The ICJ added that by initiating investigations which may later lead to issuance of an arrest warrant 'does not of itself violate those principles.'[161]

This means that where a state seeks to exercise jurisdiction, such a state should not infringe the sovereignty of another state without its consent.[162] However, if the state consents to execute the warrant of arrest issued by Belgium, then no breach of state sovereignty occurs in that case[163] because it would not be Belgium executing the arrest warrant in the territory of the other state. Seemingly, the position taken by the ICJ is that in the absence of a clear position on the presence requirement, what is material is exercising jurisdiction without infringing the sovereignty of the other state.

It is submitted that the issue of when the presence requirement is satisfied to trigger jurisdiction of the forum state is not yet settled under international law. The view of the ICJ in the *Arrest Warrant Case* to the effect that initiating investigation alone does not infringe the sovereignty of another state is reasonable since the presence of the accused person is normally required during trial proceedings.[164] A similar view was adopted by judges in South Africa in the *Zimbabwe Torture Case* where the courts clearly stated that investigations were not to be conducted beyond the territory of South Africa[165] and where possible, the assistance of Zimbabwe was to be sought.[166] This was to avoid infringing the sovereignty of Zimbabwe by enforcing South African laws on Zimbabwe's territory.

[158] Ibid, para 84.
[159] Ibid, para 54.
[160] Ibid.
[161] Ibid, para 59.
[162] O'Keefe, above n 71, 737.
[163] *Arrest Warrant Case*, above n 124, para 54.
[164] Refer to the above discussion on the views of scholars and state practice on the presence requirement.
[165] *Zimbabwe Torture Case*, above n 109, judgment of the Constitutional Court, para 78.
[166] Ibid, judgment of the Supreme Court of Appeal, para 68 and judgment of the High Court, above n 19, para 31.

Overall, the views of the scholars, national legislation and case law discussed above seem to suggest that presence of the accused person in the forum state is a requirement for purposes of trial and in any case, conducting investigations in the absence of the accused person is not contrary to international law due to lack of a clear position on the matter.[167] This shows differences in interpreting the presence of the person in the forum state for purposes of exercising jurisdiction over crimes committed abroad. What is important is to ensure that in exercising jurisdiction over such crimes, authorities in South Africa should not breach the sovereignty of other states which the ICJ warned against.[168]

Therefore, the creation of broad jurisdiction over ICC crimes in South Africa's ICC Act beyond what the Rome statute provides for,[169] empowered national courts to exercise jurisdiction over these crimes, which is useful in closing the impunity gap. However, creating such jurisdiction in domestic law is not an end in itself, for actual enforcement of the Act is important if the implementation of the Rome Statute is to be realised in South Africa. The lack of clarity of certain provisions in the Act, as demonstrated in the *Zimbabwe Torture Case*,[170] reflected the problems national authorities face in applying the Act. This might be exploited by some authorities by declining to enforce the Act. In addition, the principles of international law should be adhered to such as non-interference in the affairs of another state as well as recognition of the immunity of certain categories of state officials.[171] In the next section, the definitions of ICC crimes are examined as set out under South Africa's ICC Act to establish whether these provisions are in keeping with the Rome Statute.

3.2. Definitions of ICC Crimes

Prior to the enactment of South Africa's ICC Act, South African law did not criminalise ICC crimes[172] which is distinguishable from Uganda where at least grave breaches of the Geneva Conventions were criminalised.[173] Moreover, under the 1996 Constitution of South Africa a person cannot be convicted for an act or omission which was not a crime either under national or international law when the crime was committed.[174] This means that there must be

[167] *Arrest Warrant Case*, above n 124, para, 54.
[168] Ibid, para, 54.
[169] Rome Statute, art 12(2) the jurisdiction of the ICC is limited to territoriality and nationality jurisdictions except where the UN Security Council refers a situation to the ICC (art 13(b)) or where a non-party state accepts the jurisdiction of the ICC (art 12(3)).
[170] Section 3.1.1.B of this chapter.
[171] *Arrest Warrant Case*, above n 124, para 59.
[172] Du Plesis, above n 44, 1.
[173] Geneva Conventions Act, 1964 (Cap 363, Laws of Uganda, 2000), sec 2.
[174] 1996 Constitution of South Africa, sec 35(3)(l); see also 1990 Constitution of Croatia, art 31.

a law criminalising a specific conduct or omission before a person is penalised for such a conduct or omission. To that effect, the conduct proscribed under South African law is clearly set out in legislation with penalty imposed for breaching the law.[175]

With respect to ICC crimes, South Africa's ICC Act was enacted to enable authorities in South Africa to investigate, prosecute and punish such crimes. The Act incorporated ICC crimes in the legal system of South Africa.[176] Compared to Uganda,[177] the definitions of these crimes are incorporated by reference to articles 6 to 8 of the Rome Statute[178] and these are adopted *verbatim* in Schedule I of the Act.[179] This will enable authorities in South Africa to prosecute and punish similar conduct as the ICC though they will be limited to ICC crimes set out in the Rome Statute.[180]

Unlike Uganda's ICC Act which permits reference to the Elements of Crimes,[181] South Africa's ICC Act is silent on this matter. Although the Elements of Crimes are intended to assist the ICC in interpreting and applying articles 6 to 8 of the Rome Statute,[182] it is prudent for national judges to refer to these provisions to ensure certainty and clarity of the content of each crime.[183]As rightly observed by some scholars, South Africa should consider incorporating the Elements of Crimes by regulation for purposes of 'clarity and completeness'[184] thereby ease the enforcement of the Act. Thus, incorporating similar crimes as set out in the Rome Statute is important in ensuring that the Statute is implemented in South Africa. However, it is also important that national judges are expressly permitted to utilise the Elements of Crimes to ensure that the interpretation of ICC crimes under domestic law is consistent with the Rome Statute. The section which follows examines the penalties created for ICC crimes.

---

[175] See for example, the Criminal Law Amendment Act (1997), Part I of Schedule 2, at 17-18, which provides for murder and rape and Part II of Schedule 2 of the Act, at 19, aggravated robbery which leads to death of a person is set out in the Act. Sec 51(1)-(2) of the Act provides for the penalty of life imprisonment with respect to murder and rape, as well as different sentences of imprisonment for the case of aggravated robbery depending on whether the person is a first, second or subsequent offender.

[176] South Africa's ICC Act, above n 4, sec 3(c).

[177] Uganda's ICC Act, above n 50, secs 7(2), 8(2) and 9(2).

[178] South Africa's ICC Act, above n 4, secs 1(i), 1(ii) and 1(vii).

[179] Ibid, Schedule 1, Parts 1-3.

[180] See discussion in chapter 2, section 3.2.1 on incorporation by reference.

[181] Uganda's ICC Act, above n 50, sec 19(4)(a).

[182] Rome Statute (1998), art 9(1); see also Robert Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 390-405, 401.

[183] Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes' (2003) 7 *Max Planck Yearbook of United Nations Law* 341-407, 350.

[184] See for example, Du Plessis, above n 1, 2. Such incorporation is permitted under South Africa's ICC Act, above n 4, sec 38(2).

3.3. Penalties for ICC Crimes

The imposition of any sentence for a crime committed should be based on law which clearly sets out the penalty for the crime and in the absence of such a law judges are powerless to impose any sentence.[185] This justifies why national legislation should set out penalties for each crime to enable enforcement of the legislation. Notably, ICC crimes are penalised under South Africa's ICC Act by a fine or imprisonment, including life imprisonment or both penalties.[186] These penalties are almost similar to the penalties set out under the Rome Statute[187] but slightly different from the penalties provided under Uganda's ICC Act which sets out life imprisonment or a lesser term without an option of a fine.[188]

However, the penalties are broad and may not satisfy the requirement of specificity under the principle of legality.[189] More so, a judge may not be guided by such a provision with regard to when to impose a high or low sentence for different categories of ICC crimes. On the contrary, national legislation of some states provides specific penalties for ICC crimes[190] and in such cases, it may not be necessary to refer to other national legislation to determine the sentences for each category of ICC crimes. As noted previously, applying penalties under national law is not contrary to the Rome Statute[191] and indeed, state parties to the Statute have set out various penalties for ICC crimes including the death penalty.[192] Unlike Uganda where the death penalty is still valid,[193] South African law prohibits the death penalty[194] and this is consistent with the Rome Statute which does not provide for the death sentence.[195]

Nevertheless, the penalty of imprisonment set out in South Africa's ICC Act is still broad and judges in South Africa may need to refer to relevant national law to determine specific sentences for ICC crimes. While Uganda adopted sentencing guidelines to enable

---

[185] *The Director of Public Prosecutions v Arnold Prins*, Case No. 369/12 [2012] 106 ZASCA (15 June 2012) para 8.
[186] South Africa's ICC Act, above n 4, sec 4(1). See also the Criminal Law Amendment Act (1997), sec 51(1).
[187] Rome Statute, art 77 that is, life imprisonment as the maximum penalty in addition to a fine and forfeiture.
[188] Uganda's ICC Act, above n 50, secs 7(3), 8(3) and 9(3) that is, life imprisonment, see chapter 3, section 3.3 on penalties.
[189] Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99(4) *Journal of Criminal Law and Criminology* 857-927, 865.
[190] See for example, Greece's Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute, adopted by Law 3003/2002 (A '75), arts 7-13 and Korea's Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), arts 10-14. See chapter 2, section 4.1.2.
[191] Rome Statute, art 80; see also chapter 3, section 3.3 on penalties under Uganda's ICC Act.
[192] See chapter 2, section 4.1.2 on penalties for ICC crimes.
[193] 1995 Constitution of Uganda, art 22(1).
[194] Criminal Law Amendment Act (1997) sec 1 and *The State v T Makwanyane and M Mchunu*, Case No. CCT/3/94, Constitutional Court of South Africa (6 June 1995) para 392. See also the 1990 Constitution of Croatia, art 21; 1991 Constitution of Romania, art 22 and 1917 Constitution of Mexico, art 22.
[195] Rome Statute, art 77.

imposition of uniform, consistent and clear sentences,[196] South Africa has not adopted such guidelines. However, the Criminal Law Amendment Act[197] may be utilised to guide judges in South Africa for it provides for a term of imprisonment not exceeding 30 years where the court is 'satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence...'[198]

As regards to what amounts to 'substantial and compelling circumstances', different interpretations have been made by courts in South Africa[199] though the case of *Henna Malgas v The State*[200] provides some guidance on the matter. The factors taken into consideration by courts include where injustice will be occasioned by imposing a sentence which is 'disproportionate to the crime, the criminal and the needs of society'.[201] Other factors include the gravity of the crime and the 'need for effective sanctions against it'.[202] This test was endorsed in the case of *S v Dodo*[203] as 'an overarching guideline'.[204]

Thus, lack of specificity of the penalties set out under South Africa's ICC Act may be remedied by taking into consideration of all relevant factors such as the proportionality of the sentence to the crime committed, the seriousness of the crime and the responsibility of the offender.[205] Moreover, South Africa is not required to have similar penalties as set out under the Rome Statute and in any case, there is variation in penalties for ICC crimes among different states as mentioned already.[206]That notwithstanding, there is need to setout clear guidelines for judges to follow when determining appropriate sentences for each crimes.The following section examines the principle of individual criminal responsibility and defences under South African law to assess whether these principles are consistent with the provisions of the Rome Statute.

[196] The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No. 8 of 2013, sec 3(e); see also chapter 3, section 3.3 on penalties for ICC crimes.
[197] Criminal Law Amendment Act (1997).
[198] Ibid, sec 51(3)(a). Regarding the implication of this provision, see *Henna Malgas v The State*, Case No. 117/2000, Supreme Court of Appeal of South Africa (19 March 2001) para 25.
[199] *S v Dodo* (CCT 1/01) [2001] ZACC 16, para 10; Dirk Van Zyl Smit, 'Mandatory Sentences: A Conundrum for the New South Africa?' (2000) 2(2) *Punishment and Society* 197-212, 206-207 and Sandra M. Roth, 'South African Mandatory Minimum Sentencing: Reform Required' (2008) 7(1) *Minnesota Journal of International Law* 155-182, 167-170.
[200] *Henna Malgas v The State*, above n 198.
[201]Ibid, para 25(I), see also paras 22-23.
[202]Ibid, para 25E.
[203] *S v Dodo*, above n 199.
[204] Ibid, para 11.
[205] Ibid, para 37.
[206] Chapter 2, section 4.1.2 on penalties for ICC crime.

3.4. Individual Criminal Responsibility and Defences

While some states including Uganda have incorporated the general principles of criminal law set out under Part III of the Rome Statute,[207] South Africa did not incorporate these principles in its ICC Act.[208] Some scholars have argued that such an omission will be remedied by resorting to South African law which provides for the modes of liability and ordinary defences.[209] Such an argument is reasonable if the general principles of liability and defences set out in the Rome Statute are available in national legislation. Particularly, command responsibility has been noted as one of the modes of liability which does not have a 'domestic counterpart'[210] under South African law. This means that such a crime may not be investigated and prosecuted in South Africa due to lack of explicit criminalisation.

It has also been argued that such an omission can be remedied by reference to conventional international law particularly the Rome Statute as well as the 1996 Constitution of South Africa.[211] This is permitted under section 2 of South Africa's ICC Act providing for the applicable law before courts in South Africa. However, this seems to be based on the assumption that judges will refer to this provision to fill the gaps in the Act which may not be the case. It is submitted that explicit inclusion of the general principles of liability and defences set out in Part III of the Rome Statute is necessary especially where some of the principles are not provided for under national law of the concerned state. This section highlights some of the principles of criminal law contained in South African law focusing on individual criminal responsibility and defences to determine whether such principles reflect the principles contained in the Rome Statute.

3.4.1. Individual Criminal Responsibility

As noted in chapter 2, the liability of a person for commission of a crime is determined by assessing the specific elements of the crime in view of the relevant principles of criminal law.[212] In addition, different persons may participate in commission of the crime either as perpetrators or accomplices and these modes of liability are set out under article 25(3) of the

[207] Uganda's ICC Act, above n 50, sec 19(1)(a); see also Kenya's International Crimes Act (2008), sec 7(1) and New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(1)(a).
[208] See also Samoa's International Criminal Court Act (2007); Mauritius's International Criminal Court Act (2011); the Netherlands' International Crimes Act (2003) and Canada's Crimes Against Humanity and War Crimes Act (2000).
[209] See for example, Gevers, above n 2, 416 and Max du Plessis, 'An African Example: South Africa's Implementation of the Rome Statute of the International Criminal Court' (2007) 5 *Journal of International Criminal Justice* 460-479, 464.
[210] Christopher Gevers, ibid, 416.
[211] Du Plessis, above n 1, 28.
[212] See chapter 2, section 4.1.3.A on individual criminal responsibility.

Rome Statute.[213] Whilst Ugandan law equally treats and punishes persons who actually commit the crime and those who merely contribute in the commission of the crime,[214] South African law distinguishes between different parties to the crime that is, participation before the crime is committed (perpetrators and accomplices) and after the commission of the crime (accessories after the fact).[215] Whether or not the person is a perpetrator or an accomplice is determined by the degree of participation before the crime is completed.[216] This is similar to the Rome Statute where by perpetrators and accomplices are distinguished by providing for different modes of liability.[217]

In effect, accomplices are punished differently from perpetrators by taking into consideration of the role of each individual participant in the commission of the crime.[218] But as noted in chapter 2, such differentiation has been criticised as diminishing the significant role of the accomplice in the commission of the crime.[219] Nonetheless, South African law is in keeping with the provisions of the Rome Statute by differentiating between the different modes of liability. This is important because of the need to establish individual culpability of the person which is useful in guiding judges when imposing sentences.[220]

With respect to common purpose doctrine, criminal liability may be attributed to any person who jointly with another person undertakes to commit a crime.[221] In this case the state does not have to prove the contribution of each person in causing the unlawful consequence but the 'conduct of each participant is attributed to the others who share in the common purpose.'[222] This is the position under Ugandan law whereby each participant in the common design is deemed to have committed the ensuing crime.[223] It is thought that it is difficult to identify the person who actually committed the crime[224] though this may not be the case in situations where a few people are involved in executing a common purpose.

---

[213] Ibid.
[214] Uganda's Penal Code Act (1950), sec 19(1)-(2).
[215] Gerhard Kemp, 'South Africa', in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Routledge 2013) 415-531, 415. See also the Criminal Procedure Act (1977), sec 155(1) which provides for the procedure concerning participants to the crime.
[216] Ibid, 420.
[217] Rome Statute, art 25(3)(a)-(d). See chapter 2, section 4.1.3.A.
[218] *Elton Everts v The State*, Case No. A497/10, High Court of South Africa (31 May 2011) para 16.
[219] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn Oxford University Press 2016) 567.
[220] Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5(4) *Journal of International Criminal Justice* 953-975, 957.
[221] Moseneke J, in the case of *Thebus and Another v The State* (2003) AHRLR 230 (SACC 2003) para 18.
[222] Kemp, above n 215, 421.
[223] Uganda's Penal Code Act (1950), sec 20.
[224] *Zingeleza Mzwempi v The State*, Case No. 284/04, High Court of South Africa (28 April 2011) para 45.

To that effect, the liability of the person is determined either by a prior agreement (express or implied) to commit a crime or by active association in the furtherance of the common criminal design.[225] This means that where there is no agreement to prove the common purpose, it must be proved that the person actively associated himself or herself with the conduct of the others to commit the crime. In this case, the acts of the person leading to commission of the crime must be separately scrutinised before imputation of liability of the other persons for the resultant crime.[226] Thus, there is need to prove individual culpability of the person in commission of the crime which must be accompanied with the intention to bring about the unlawful consequence.[227] Notably, South African law appears to be similar to the position under the Rome Statute which requires the contribution to the common purpose to be intentional.[228]

At the same time, South African law is distinguished from Ugandan law which requires that the commission of the crime must have been foreseeable as a probable consequence of execution of the common purpose.[229] Under South African law, it appears that foreseeability that the crime might be committed must be accompanied with the person's active association with the conduct which leads to the ensuing crime.[230] In other words, there must be proof of the physical actions of the person coupled with the intention to execute a common purpose[231] rather than mere probability of the crime being committed as the case under Ugandan law.[232]

Still, the person will be punished for the crime committed irrespective of whether the person's actions were minor.[233] This shows variance in the application of the principles of criminal law at the national level and it is submitted that in order to give effect to the provisions of the Rome Statute, South Africa should ensure that the principles applied with

[225] *S V Safatsa and Others*, 1988 (1) SA 868 (A), para 899 and *Zingeleza Mzwempi v The State*, ibid, para 52. See also James Grant, 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2014) 30 *South African Journal of Human Rights (SAJHR)*, 1-23, 3, available at <http://ssrn.com/abstract=2412595> last visited, 30 August 2017.
[226] *Zingeleza Mzwempi v The State*, above n 224, para 63.
[227] *Thebus and Another v The State*, above n 221, paras 19 and 34.
[228] Rome Statute, art 25(3)(d); see chapter 2, section 4.1.3.A.
[229] Uganda's Penal Code Act (1950), sec 20 and Daniel David Ntanda Nsereko, *Criminal Law in Uganda* (Wolters Kluwer 2015) 159 on the interpretation of sec 20.
[230] *Thebus and Another v The State*, above n 221, para 49 Moseneke J stated: 'If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself, reckless as to whether the result was to ensue.'
[231] *Zingeleza Mzwempi v The State*, , above n 224, 121-122.
[232] See chapter 3, section 3.4.1 on individual criminal responsibility.
[233] Grant, above n 225,11.

respect to ICC crimes as much as possible reflect principles set out under the Statute. This will be consistent with the principle of complementarity.[234]

3.4.2. Defences

South African law provides for several defences such as insanity, intoxication, self-defence and defence of property, diminished responsibility and provocation. In comparison with Uganda,[235] the defence of insanity under South African law completely exonerates the person from criminal liability.[236] This is not the case with respect to intoxication where it is voluntary[237] though the law on intoxication in South Africa is believed to be unclear in this regard.[238] Particularly, section 1 of the Criminal Law Amendment Act[239] has been interpreted as requiring the prosecution to prove beyond reasonable doubt that the accused person is guilty of the crime despite lacking the criminal capacity due to voluntary intoxication.[240] It is submitted that adducing evidence to that effect may be difficult for the prosecution thereby leading to the acquittal of the person for the crime committed.[241]

What is clear though is that intoxication which impairs the person's faculties leading to commission of the crime may be regarded as an aggravating circumstance leading to increase in sentence.[242] This is distinguished from Ugandan law whereby voluntary intoxication may be a ground for mitigating the sentence[243] and from Philippines' law where intoxication may be a mitigating or an aggravating factor depending on the circumstances of each case.[244] Notwithstanding that intoxication may be regarded as an aggravating factor in South Africa,

---

[234] Rome Statute, arts 1 and 17. See chapter 1, section 1.
[235] Uganda's Penal Code Act (1950), sec 11 and the Rome Statute, art 31(1)(a); see chapter 3, section 3.4.2.
[236] Criminal Procedure Act (1977), secs 78(1) and 78(6)(a); see also *Sarah Snyders and Mornay Calitz N O v Minister of Justice and Constitutional Development and Others*, Case No. 5825/14, High Court of South Africa (5 September 2014) 7.
[237] For the case of Uganda, see Uganda's Penal Code Act (1950), sec 12(1).
[238] See for example, Justice Ploos Van Amstel in the case of *The State v Donovan Mark Ramdass*, Case No. CC43/2015, High Court of South Africa (16 September 2016) para 33.
[239] The Criminal Law Amendment Act (1988), sec 1(1).
[240] Gerhard Kemp, 'South Africa' in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds), General Defences in Criminal Law: Domestic and Comparative Perspectives (Ashgate 2014) 289-300, 297.
[241] *The State v Donovan Mark Ramdass*, above n 238, para 35 where the accused person was acquitted when the prosecution failed to prove beyond reasonable doubt that he had the required criminal capacity to cause the death of his girlfriend.
[242] Criminal Law Amendment Act (1988), sec 2.
[243] *Uganda v Sempija Samuel*, High Court Criminal Case No. 243/98, cited in Lilliam Tibatemwa-Ekirikubinza, *Offences Against the Person, Homicides and Non-fatal Assaults in Uganda* (Fountain Series in Law and Business Studies 2005) 48.
[244] The Revised Penal Code of the Philippines, Act 3815 of 1930, art 15 provides that intoxication is a mitigating circumstance where a person commits a crime while intoxicated where it is not habitual or 'subsequent to a plan' to commit the crime. However, intoxication is an aggravating circumstance where it is 'habitual or intentional.'

it is argued that the defence of intoxication in South Africa creates the possibility of shielding the accused person from criminal liability where the prosecution fails to prove beyond reasonable doubt that the person had the required capacity to commit the crime.[245]

This is distinguished from the Rome Statute whereby voluntary intoxication is not a defence where a person who voluntarily got intoxicated is deemed as having disregarded the risk of committing the ensuing crime[246] and may not rely on such a defence to exclude liability for the crime. It is therefore important that the defences available under South African law are not interpreted broadly so as to shield the criminals from liability.

With respect to self-defence, South African law is comparable to Ugandan law in that self-defence is a valid defence where force is used by the accused person to defend oneself or in defence of property from an unlawful attack of his or her assailant, with the belief on reasonable grounds that there was imminent danger of death or serious injury.[247] In addition, it must be proved that the force used was not excessive in relation to the danger and that it was the only way to avoid the danger.[248] Although self-defence under South African law is almost similar to article 31(1)(c) of the Rome Statute, the defence of property is only available with respect to war crimes under the Statute.[249]

This means that an accused person appearing before the ICC may not raise the defence of property with respect to genocide and crimes against humanity but the same defence may be raised in national courts of South Africa and Uganda.[250] However, for the case of Uganda the defences under the Rome Statute take precedence over national law defences.[251] There is a possibility that authorities in South Africa may apply the defence of property broadly to cover other ICC crimes contrary to the Rome Statute. Although this is not prohibited, it is prudent that the defences available under South African law are not so broad as to shield perpetrators of ICC crimes from liability.

Concerning other defences such as diminished responsibility[252] and provocation also available under South African law yet seem unavailable under the Rome Statute,[253] it is contended that the application of these defences may not shield perpetrators of ICC crimes

[245] *The State v Donovan Mark Ramdass*, above n 238, para 35.
[246] Rome Statute, art 31(b); see chapter 2, section 4.1.3.C.
[247] *Ex Partie Die Minister Van Justisie: In Re S v Van Wyk*, 1967 (1) SA 488 (A) and *S v De Oliveira* 1993 (2) SACR 59 (A) at 63I-64A, cited in *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014) para 13.
[248] *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014) para 19 and *Ex Partie Die Minister Van Justisie: In Re S v Van Wyk*, 1967 (1) SA 488 (A); see also Kemp, above n 240, 292.
[249] Rome Statute, art 31(c) and Schabas, above n 219, 644.
[250] See chapter 3, section 3.4.2 on defences.
[251] Uganda's ICC Act, sec 19(3).
[252] Criminal Procedure Act (1977), sec 78(7).
[253] Schabas, above n 219, 640.

from liability. This is due to the fact that these are partial defences and only lead to mitigation of the sentences but not exclude the person from liability.[254] This is the same situation under Ugandan law whereby the defence of diminished responsibility and provocation only apply to the charge of murder with the effect of reducing murder to a lesser crime such as manslaughter.[255] It is contended that such defences may not prevent South Africa from giving effect to the Rome Statute since the perpetrator of ICC crimes is not shielded from liability.

In sum, it is contended that the general principles of criminal law relating to individual criminal liability and defences under South African law whose application may lead to the acquittal of individuals alleged to have committed ICC crimes need to be applied narrowly so as not to shield accused persons from criminal liability. More so, principles such as command and superior responsibility which are not set out in South Africa's ICC Act need to be incorporated by amending the Act. This will enable South Africa to give effect to the provisions of the Rome Statute by ensuring that perpetrators of ICC crimes do not escape liability.

The section has demonstrated that South Africa's ICC Act not only entrusted national institutions with jurisdiction over ICC crimes but also incorporated the definitions of ICC crimes by reference to the Rome Statute as discussed above.[256] Nonetheless, the Act has been applied selectively whereby in some cases investigations for ICC crimes were commenced[257] and declined in other cases as noted above.[258] In the extreme cases, South African authorities not only declined to act but also decided to withdraw from the Rome Statute citing immunity as a ground for failing to implement the Statute. The next section examines immunity as a key obstacle in implementing the Rome Statute in South Africa.

4. Immunity as an Obstacle to the Implementation of the Rome Statute

As noted in chapter 2, Heads of state enjoy personal immunity from foreign jurisdictions during their term of office[259] irrespective of the nature of crimes they may have committed.[260] In essence, national courts of foreign states are barred by customary international law from

[254] *Director of Public Prosecutions v Phillipus Jacobs Venter*, Case No. 430/07, The Supreme Court of Appeal of South Africa (30 May 2008) para 33.
[255] See chapter 3, section 3.4.2 on defences.
[256] See sections 3.1 and 3.2.
[257] *Madagascar Case*, above n 66, see section 3.1.1.A of this chapter.
[258] *Zimbabwe Torture Case*, above n 19, see section 3.1.1.B of this chapter.
[259] *Arrest Warrant Case*, above n 124, para 51 and *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (9 April 2014) para 25.
[260] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *The European Journal of International Law* 815-852, 819.

exercising jurisdiction over senior state officials such as Heads of state.[261] This is in view of the need to respect Heads of state by virtue of their status and being representatives of their states,[262] as well as to enable them to execute their duties without any interference.[263] The assumption is that remedies are available in the officials' countries of origin since immunities do not apply in their national courts.[264] However, this may not be true because in most cases national law protects Heads of state from prosecution.[265]

Indeed, states such as France[266] and the United States of America[267] recognised Head of state immunity before their courts perhaps to avoid destabilising relations with other states. For the case of South Africa, although the court recognised the existence of personal immunity of Heads of state under customary international law even where international crimes are committed,[268]it cited South Africa's ICC Act which incorporated provisions of the Rome Statute[269]and decided that the immunity of President Al Bashir as Head of state was 'excluded or waived in respect of crimes and obligations under the Rome Statute.'[270] In effect, the courts did not uphold the inviolability of the Head of state before national criminal systems in South Africa.

Note should be taken that although immunity of the Head of state curtailed the implementation of the Rome Statute in Uganda,[271] the case of South Africa is important to examine in detail. This is because as noted previously, not only did South Africa fail to arrest

[261] David P. Stewart, 'Immunity and Accountability: More Continuity than Change?' (2005) 99 *American Society of International Law* 227-230, 229 and Christopher Gevers, 'Immunity and the Implementation Legislations in South Africa, Kenya and Uganda' in Kai Ambos and Ottilia A. Maunganidze (eds), *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universtitätsverlag Göttingen 2012) 85-117, 93.
[262] Akande and Shah, above n 260, 824.
[263] Paola Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' (2009) 7(2) *Journal of International Criminal Justice* 315-332, 320 and Stewart, above n 261, 228-229.
[264] Stewart, above n 261, 229.
[265] See for example, 1958 Constitution of France, art 67(2).
[266] Salvatore Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case Before the French Cour de Cassation' (2001) 12(3) *European Journal International Law* 595-612 concerning Mouammar Gaddafi, former President of Libya.
[267] Stewart, above n 261, 229 with respect to President Robert Mugabe of Zimbabwe and Jiang Zemin, the former President of China.
[268] *The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) para 84.
[269] South Africa's ICC Act, above n 4, sec 4(2) which disregards immunity of any person irrespective of official status of the person.
[270] *Zimbabwe Torture Case*, above n 19, para 28.8.
[271] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016) para 15. See chapter 3, section 5.1.

and surrender President Al Bashir,[272]it also submitted notification of withdrawal from the Rome Statute to the Secretary General of the UN,[273] as well as submitted a Bill to Parliament to repeal its ICC Act.[274]Seemingly, South Africa intended to totally relieve itself of the obligations under the Rome Statute.

This section examines Head of state immunity as an obstacle to the implementation of the Rome Statute in South Africa. This is intended to show the emerging problems in enforcing South Africa's ICC Act despite the explicit disregard of any form of immunity under the Act.[275] In addition, the issue of withdrawing from the Rome Statute is worthy of examination focusing on Head of state immunity as one of the reasons South Africa gave for submitting the notification of withdrawal from the Rome Statute. Although South Africa withdrew the notification of withdrawal citing procedural irregularities, it is important to highlight the reasonableness and the implications for withdrawing from the Rome Statute. This is because it is not clear whether South Africa has totally abandoned its intention in that regard.

4.1. Immunity under South African Law and the Position of the African Union

National immunity laws tend to shield Heads of state during their term of office from prosecution and punishment for any crime allegedly committed by such officials. This is evident in states such as Tanzania, Ghana, Bangladesh, Fiji, France[276] and Uganda.[277] However, the immunity is lost after the person ceases to be the President in which case, criminal proceedings can be commenced against such a person for any crimes committed while in office.[278] With respect to South Africa, Head of state immunity granted under customary international law is recognised under section 4(1)(a) of the Diplomatic Immunities and Privileges Act (2001) (DIPA).[279] However, the 1996 Constitution of South Africa appears to be silent on the issue of immunity which implies that while immunity of foreign

[272] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Convening a Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with respect to the Republic of South Africa', (ICC-02/05-01/09) Pre-Trial Chamber II (8 December 2016) para 7. See section 5.1.A of this chapter.
[273] United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10. See above n 8.
[274] Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B 23-2016), see section 1 of this chapter.
[275] South Africa's ICC Act, above n 4, sec 4(2).
[276] See for example, Head of state immunity granted under the 1977 Constitution of Tanzania, art 46(1); 1992 Constitution of Ghana, art 57(5) and 1972 Constitution of Bangladesh, art 51(2).
[277] 1995 Constitution of Uganda, art 98(4).
[278] For the case of Uganda, see 1995 Constitution of Uganda, art 98(5).
[279] Diplomatic Immunities and Privileges Act (2001).

Heads of state is recognised under DIPA,[280] South Africa's Heads of state seem not to be granted any form of immunity before national courts.

In fact, under South Africa's ICC Act the immunity of any person including former and serving Heads of state is not a defence or a ground for reduction of a sentence for any ICC crime.[281]The immunity of a former Head of state was disregarded in the *MadagascarCase*[282]discussed above where authorities in South Africa commenced investigations into crimes against humanity allegedly committed by Ravalomanana, a former President of Madagascar during his reign.[283]In addition, no such immunity constitutes a ground for refusing issuance of an order for surrendering the person to the ICC.[284] In essence, irrespective of whether the person is a serving Head of state, the immunity accorded to such a person under any law is disregarded under South Africa's ICC Act to enable cooperation with the ICC.[285] This means that any serving Head of state is not immune from criminal process in South Africa as evident from the interim court order to prevent President Al Bashir's departure from South Africa.[286]

Clearly, section 4(1)(a) of DIPA noted above[287] contradicts with section 4(2) of South Africa's ICC Act yet both laws enjoy the same status under South African law.[288] This means that South Africa incorporated the immunity clause in its ICC Act without amending the DIPA. It is submitted that lack of harmonisation of these laws partly contributed to the failure to enforce the ICC Act. The same challenge is experienced in enforcing Uganda's ICC Act whereby the Amnesty Act continues to curtail domestic proceedings for ICC crimes.[289]

Nonetheless, South African law does not remove the personal immunity of foreign Heads of state enjoyed before courts in South Africa due to the fact that such immunity remains applicable with respect to senior state officials of states that are not parties to the Rome Statute.[290] In effect, proceedings against Heads of state including execution of requests for assistance from the ICC may be barred owing to immunity enjoyed by such persons

[280] Ibid, sec 4(1)(a).
[281] South Africa's ICC Act, above n 4, sec 4(2).
[282] *Madagascar Case*, above n 66.
[283] See section 3.1.1.A of this chapter.
[284] South Africa's ICC Act, above n 4, sec 10(9) read together with sec 10(5).
[285] This is in accordance with the Rome Statute, arts 86 and 89(1) read together with art 27.
[286] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, (Case No. 27740/15) Interim Order (14 June 2015) para 1.
[287] Diplomatic Immunities and Privileges Act (2001).
[288] Manuel J. Ventura, 'Escape from Johannesburg? Sudanese President Al-Bashir Visits South Africa and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of Al-Jedda' (2015) 13(5) *Journal of International Criminal Justice* 995-1025, 1011.
[289] See chapter 3, section 4.2 on Amnesty.
[290] Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1(1) *Journal of International Criminal Justice* 86-113, 106.

before foreign national courts.[291]This means that President Al Bashir being the Head of state of Sudan which is not a party to the Rome Statute may not be surrendered to the ICC until the ICC obtains a waiver of immunity from Sudan.[292]

Arguably, in event that authorities in South Africa had enforced the court order by arresting President Al Bashir, South Africa would have breached its obligations towards Sudan of not exercising jurisdiction over its Head of state.[293]Indeed, some states such as Malawi, Democratic Republic of Congo and Djibouti raised the argument of Head of state immunity for failing to arrest and surrender President Al Bashir who visited their territories.[294]

This argument was rejected by the ICC reasoning that the referral of the Sudan situation to the ICC was made by the United Nations Security Council (UNSC)exercising its powers under chapter VII of the United Nations Charter which 'implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593 (2005)'.[295] In essence, the Pre-Trial Chamber of the ICC has pronounced itself on the matter by adopting the position that the UNSC Resolution 1593 (2005) implicitly lifted the immunity of President Al Bashir[296] thus, no impediment exists to executing the request for his arrest and surrender to the ICC.

It is submitted that President Al Bashir's personal immunity does not absolve South Africa from its obligations under the Rome Statute of cooperating with the ICC by arresting and surrendering him to the Court.[297] These obligations remain even though the African

[291] The same view was stated by the ICC in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', above n 259, para 27.

[292] Rome Statute, art 98(1); see also *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, 'Decision on Defence Applications for Judgments of Acquittal', (ICC-01/09-01/11) Trial Chamber V(A) (5 April 2016), Reasons of Judge Eboe-Osuji, para 233 and chapter 2, section 5.1.1 discussing this provision.

[293] See also Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407-433, 421.

[294] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I (12 December 2011) para 13(i); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', above n 259, para 19 and *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Requesting the Republic of Djibouti to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/15-01/09) Pre-Trial Chamber II (17 May 2016) para 6.

[295] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', above n 259, para 31.

[296] See also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', above n 271, para 12.

[297] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (4 September 2015) paras 8 and 9.

Union (AU) urged its member states not to cooperate with the ICC in arresting and surrendering President Al Bashir.[298] In fact, the AU reaffirmed Chad, Kenya and Djibouti's failure to arrest and surrender President Al Bashir to the ICC when he visited these states, as acting in pursuance of their obligations under Article 23 of the Constitutive Act of the African Union and by virtue of article 98 of the Rome Statute, as well as 'in pursuit of peace and stability in their respective regions'.[299]

Seemingly, African states including South Africa are expected to comply with the decisions of the AU on non-cooperation with the ICC basing on their obligations under the Constitutive Act of the AU.[300] Moreover, it is believed that the AU decisions create binding obligations on member states such as South Africa.[301] The same obligations were reiterated by the AU in its January 2016 decision[302] where it commended South Africa for complying with the AU decisions of not cooperating with the ICC as mentioned above.[303] However, state parties to the Rome Statute are under an obligation to arrest and surrender President Al Bashir[304] and may not invoke AU decisions to justify non-compliance with the Rome Statute. This is because such obligations arose by virtue of the UNSC referral to the ICC[305] and article 103 of the UN Charter applies to the effect that the obligations arising out of the UN Charter take precedence over any other obligation.[306]

Notably, the AU passed a decision in January 2016 for the 'urgent development of a comprehensive strategy including collective withdrawal from the ICC'.[307] It is arguable that the decisions made by the AU could have emboldened African states such as South Africa to submit the notification of withdrawal from the Rome Statute. There is a possibility of more

[298] AU Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc.Assembly/AU/13(XIII), 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1, para 10.
[299] AU Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', Doc.EX.CL/670(XIX), 30 June - 1 July 2011, Assembly/AU/Dec.366(XVII) para 5; see also AU Assembly, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)', Doc.EX.CL/639(XVIII), 30 - 31 January 2011, Assembly/AU/Dec.334(XVI) para 5.
[300] The Constitutive Act of the African Union (2000), art 23(2) imposes sanctions on a member state which fails to comply with the decisions of the African Union.
[301] Ventura, above n 288, 1010. See also Max du Plessis and Christopher Gevers, 'Balancing Competing Obligations: The Rome Statute and AU Decisions', Institute for Security Studies (ISS) Paper No. 225 (October 2011) 1, 14
[302] AU Assembly, 'Decision on the International Criminal Court', Doc.EX.CL/952(XXVIII) 30-31 January 2016, Assembly/AU/Dec.590(XXVI) para 4.
[303] Ibid, para 3.
[304] Rome Statute, art 89(1).
[305] Ibid, 13(b).
[306] Du plessis and Gevers, above n 301, 15-18.
[307] AU Assembly, 'Decision on the International Criminal Court', Doc.EX.CL/952(XXVIII) 30-31 January 2016, Assembly/AU/Dec.590(XXVI) para 10(iv).

states withdrawing from the Statute if the issues raised by the AU are not addressed including the concern of ICC issuing indictments against African leaders.[308]

The AU reiterated that under customary international law serving Heads of state and other senior state officials are granted immunity during their tenure.[309] This is with respect to proceedings before foreign national courts and for the case of senior state officials, these personnel enjoy immunity for acts performed in their official capacity. The question of immunity for serving Heads of state is one of the reasons South Africa gave for submitting the notification of withdrawal from the Rome Statute discussed below.

4.2. South Africa's Notification of Withdrawal from the Rome Statute

The Rome Statute provides that a state party may withdraw from the Statute by submitting a written notification to the Secretary General of the UN which takes effect after 1 year except where a later date is specified in the notification.[310] In effect, the state is released from further obligations to perform the treaty[311] though existing obligations arising from the Rome Statute during the membership of the withdrawing state such as financial and cooperation obligations subsist.[312]It is noteworthy that South Africa became the first state to submit a written notification of withdrawal from the Rome Statute on 19 October 2016.[313]

However, this was successfully challenged in the High Court of South Africa in the case of *Democratic Alliance v Minister of International Relations and Cooperation and Others*.[314] This case was commenced by Democratic Alliance with support from CSOs including SALC and the Centre for Human Rights as well as academics. They challenged the notification of withdrawal from the Rome Statute as unconstitutional since no prior parliamentary approval was obtained.[315] The Court equated the notification of withdrawal to the instrument of ratification which requires prior parliamentary approval before depositing with the UN.[316] For that matter, the Court held that South Africa can withdraw from the

[308] AU Assembly, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec.1(Oct.2013) 12 October 2013, Ext/Assembly/AU/Dec.1-2(Oct.2013) para 4.
[309] Ibid, para 9.
[310] Rome Statute, art 127(1).
[311] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 70(1)(a) read together with art 70(2).
[312] Rome Statute, art 127(2) and Vienna Convention on the Law of Treaties, ibid, art 70(1)(b).
[313] See above n 8. This was followed by Burundi on 27 October 2016 and later by The Gambia on 10 November 2016. See United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10; C.N.805.2016.TREATIES-XVIII.10 and C.N.862.2016.TREATIES-XVIII.10, respectively.
[314] *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Case No. 83145/2016) High Court of South Africa (22 February 2017) (hereinafter, *Withdrawal Case*).
[315] Ibid, paras 1 and 2.
[316] Ibid, paras 47 and 51.

Rome Statute only on approval of Parliament and after repealing the Implementation Act.[317] Consequently, the government of South Africa revoked the notification of withdrawal from the Rome Statute.[318]

That notwithstanding, it is pertinent to discuss the reasons South Africa advanced in its notification of withdrawal[319] focusing on immunity of the Head of state. This is aimed at highlighting the reasonableness and likely implications for withdrawing from the Statute. Specifically, South Africa stated that it was faced with conflicting obligations to arrest President Al Bashir under the Rome Statute on the one hand[320] and on the other hand, the obligations to the AU to grant him immunity under the Host Agreement[321] and the General Convention on the Privileges and Immunities of the Organisation of African Unity (1965);[322] as well as under customary international law which recognises immunity of Heads of state.[323] In essence, South Africa was caught between two sets of conflicting obligations that is cooperation with the ICC by arresting and surrendering President Al Bashir[324] or recognition of his immunity under customary international law,[325] and South Africa chose to uphold the latter.[326]

To that effect, the issue of conflict of obligations as stated by South Africa in its notification of withdrawal from the Rome Statute may be justified basing on two reasons; firstly, as stated in section 4 above under customary international law serving Heads of state are granted immunity before foreign national courts notwithstanding the nature of crimes they may have committed.[327] Though, as noted in chapter 2, it is still debatable among some scholars whether the UNSC Resolution 1593 (2005) waived the immunity of President Al

[317] Ibid, para 53.
[318] United Nations, Depository Notifications, C.N.121.2017.TREATIES-XVIII.10 (7 March 2017). Similarly, The Gambia also revoked its notification of withdrawal from the Rome Statute, see C.N.62.2017.TREATIES-XVIII.10 (10 February 2017).
[319] These include the questionable credibility of the ICC due to the perceived focus of the ICC on Africa yet similar violations are committed by other states and the lack of clarity between the nature and scope of article 98(1) of the Rome Statute and its relationship with article 27. See South Africa's Notification of Withdrawal.
[320] South Africa's Notification of Withdrawal, above n 8, 2; this obligation is provided for under the Rome Statute, arts 86 and 89(1).
[321] *The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre*, above n 268, para 13 where 'the host agreement' refers to an agreement executed on 4 June 2015 between South Africa and the Commission of the African Union in relation to material and technical organisation of the AU Summit.
[322] General Convention on the Privileges and Immunities of the Organisation of African Unity (1965), CAB/LEG/24.2/13, adopted 25 October 1965, entered into force 25 October 1965, art V(1)(a).
[323] South Africa's Notification of Withdrawal, above n 8, 2.
[324] This arises under the Rome Statute, art 89(1) read together with art 86 requiring full cooperation.
[325] Such immunity is recognised under section 4(1)(a) of the Diplomatic Immunities and Privileges Act (2001).
[326] See section 5.1.A of this chapter analysing the Al Bashir Case.
[327] See also chapter 2, section 5.1.1 on immunity.

Bashir by implication.[328]Arguably, Head of state immunity granted under customary international law subsists and is still recognised by some states.[329]

Lastly, it appears that article 98(1) of the Rome Statute acknowledges that a conflict of obligation may arise which may curtail execution of the request for assistance from the ICC. This is because it provides that the ICC 'may not proceed with a request for surrender or assistance' which would require a requested state 'to act inconsistently with its obligations under international law' concerning the State or diplomatic immunity of a person of a third state unless after obtaining waiver of the immunity from such a state.[330] Moreover, it is believed that the obligation to cooperate with the ICC does not override conflicting obligations towards non-party states.[331] In fact, article 98(1) of the Rome Statute was also cited in South Africa's notification of withdrawal as lacking clarity in its nature and scope as reflected in the jurisprudence of the ICC.[332] More so, academic literature on the matter has also not been consistent especially concerning referrals by the UNSC.[333]

It is contended that the issue of conflicting obligations appears to be convincing but it does not justify South Africa's submission of the notification of withdrawal from the Rome Statute. This is because other mechanisms may have been utilised by South Africa such as addressing its concerns with the Assembly of States Parties (ASP) at a diplomatic and political level when called upon by the ASP to respond to non-cooperation after the ICC has referred the matter to the ASP as per article 87(7) of the Rome Statute.[334] Other options include referring the dispute relating to the interpretation and application of the Rome Statute

[328] See for example, Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333-352, 345 and 342.
[329] See for example, Philippines' Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009), sec 9 and Belgium's Act of 5 August 2003 on Serious Violations of International Humanitarian Law, art 13 which inserted 'Article 1 bis' in the Code of Criminal Procedure.
[330] Rome Statute, art 98(1).
[331] Annalis Ciampi, 'Legal Rules, Policy Choices and Political Realities in Functioning of the Cooperation Regime of the International Criminal Court' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 7-57, 11.
[332] South Africa's Notification of Withdrawal, above n 8, 2; see discussion of the jurisprudence of the ICC in Lorraine Smith-van Lin, 'Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 114-151, 126-129.
[333] See for example, Akande, above n 328; Gaeta, above n 263; Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13(5) *Journal of International Criminal Justice* 1027-1047 and Manisuli Ssenyonjo, 'The Rise of the African Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13(2) *International Criminal Law Review* 385-428.
[334] ASP, 'Assembly Procedures Relating to Non-coperation' (ICC-ASP/10/Res.5, Annex) para 14 which provides some of the procedures for engaging with the non-compliant state such as an open letter from the President of the ASP requesting for the views of the concerned state, as well as holding a meeting between the Bureau and the concerned state to obtain views from the state on how it will cooperate with the ICC in the future.

to the ASP for settlement.[335] In addition, a state party may request for the review of the Rome Statute to make the necessary amendments which can be effected with the approval of the majority of state parties.[336]

Below are some of the possible implications for South Africa's notification of withdrawal from the Rome Statute. Nationally, South Africa loses its membership to the Rome Statute once the notification of withdrawal becomes effective[337] hence it becomes no longer bound by the Statute. Moreover, South Africa's ICC Act has to be repealed, a process which South Africa had triggered by introducing a Bill to that effect in its Parliament[338] only to withdraw the Bill after revoking the notification of withdrawal. In essence, once South Africa ceases to be a member state of the Rome Statute, the South Africa's ICC Act will be repealed. This means that there will be no domestic mechanism providing legal basis for investigating and prosecuting ICC crimes in South Africa which could curtail the fight against impunity.

Regionally, it is thought that South Africa has played a leading role in Africa as a supporter of the ICC[339] and with respect to the implementation and enforcement of the Rome Statute.[340] More so, as discussed in section 3.1.1 above, South Africa has attempted to address ICC crimes committed abroad basing on its ICC Act which permits exercising jurisdiction over residents of South Africa who allegedly committed such crimes.[341] By repealing the ICC Act, South Africa may not exercise jurisdiction over persons who enter its territory after committing ICC crimes abroad. This will be a set-back for victims of such crimes who may not have any remedy in their state as evident in the *Zimbabwe Torture Case* analysed above.[342]It is also thought that repealing the Act will 'erase' the landmark judgments made in the cases decided by courts in South Africa.[343] This exhibits that South Africa's notification of withdrawal from the Rome Statute may have a negative impact on the implementation of the Rome Statute in Africa.

---

[335] Rome Statute, art 119(2).
[336] Ibid, art 123.
[337] Vienna Convention on the Law of Treaties, above n 311, art 70(1)(a) read together with art 70(2).
[338] Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B 23-2016).
[339] Du Plessis, above n 1, 38.
[340]Lee Stone, 'Implementation of the Rome Statute in South Africa' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 305-330, 323.
[341] *Joseph Alfred Rakoto and Others v The Head Directorate for Priority Crimes Investigation and Others*, above n 66; see section 3.1.1.A.
[342] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, above n 19; see section 3.1.1.B.
[343] Hannah Woolaver, 'International and Domestic Implications of South Africa's Withdrawal from the ICC' (24 October 2016), available at <http://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/>last visited, 30 August 2017. See section 3.1.1 of this chapter analysing the cases.

Internationally, other states may be influenced by South Africa's withdrawal from the Rome Statute since it sends the message that states may withdrawal at will without any repercussions. It is argued that states in which ICC crimes are committed may also withdraw from the Rome Statute to avoid the intervention of the ICC. Possibly, Burundi's notification of withdrawal from the Rome Statute noted above[344] may be interpreted as an attempt to avoid cooperation with the ICC since the Office of the Prosecutor commenced preliminary examination into ICC crimes which were ongoing in this state at the time of writing.[345] Other states such as Uganda, Namibia and Kenya are threatening to withdraw from the Rome Statute[346] and if such threats are put into effect, it will reduce the number of state parties to the Rome Statute thereby affecting its goal for universality.[347]

In sum, immunity of the Head of state has curtailed the implementation of the Rome Statute in South Africa. Although the Pre-Trial Chamber of the ICC has made its position clear on the application of article 98(1) of the Rome Statute,[348] it appears that South Africa does not agree with this position. To ensure that further withdrawals are prevented, the issues raised by South Africa should be addressed by relevant organs of the ICC to facilitate effective implementation of the Rome Statute. In the next section, the cooperation provisions set out in South Africa's ICC Act are analysed to examine the extent to which the Act incorporated provisions to facilitate cooperation with the ICC.

5. Cooperation

South Africa as a state party to the Rome Statute is under an obligation to cooperate fully with the ICC in its investigations and prosecutions by ensuring that there are procedures under national law to facilitate such cooperation.[349] Compared to Uganda,[350] South Africa did not choose to amend its Extradition Act (1962) but enacted a separate legislation to incorporate provisions relating to cooperation with the ICC in order to implement the Rome

[344] United Nations, Depository Notifications, C.N.805.2016.TREATIES-XVIII.10 .
[345] OTP, 'Report on Preliminary Examination Activities' (2016) (14 November 2016), para 22, available at < https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> last visited, 30 August 2017.
[346] Hanibal Goitom, 'The International Criminal Court and Africa' (23 November 2016), available at <https://blogs.loc.gov/law/2016/11/falqs-the-international-criminal-court-and-africa/> last visited, 30 August 2017.
[347] ASP, 'Report of the Bureau on the Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court', ICC-ASP/15/19 (10 November 2016) para 1.
[348] See section 4.1 on immunity under South African Law and the Position of the African Union.
[349] Rome Statute, arts 86 and 88; see chapter 2, section 4.1.5 on cooperation.
[350] Uganda's ICC Act, above n 50, see chapter 3, section 5 on cooperation.

Statute.[351] Although some of the procedures in the Extradition Act are thought to be similar to the procedures set out in South Africa's ICC Act,[352] it is contended that the Extradition Act may not have facilitated full cooperation with the ICC due to restrictions set out in the Act such as refusal of surrender of the person where the crime is of a political nature.[353] In effect, South Africa eased the process of executing requests for cooperation from the ICC without restrictions relating to extradition proceedings.[354]

Chapter 4 of South Africa's ICC Act provides for various forms of cooperation with the ICC, with Part 1 on arresting and surrendering accused persons and Part 2 on judicial assistance to the ICC including examination of witnesses, obtaining evidence, service of processes and documents, as well as enforcing sentences of imprisonment and execution of fines and orders from the ICC.[355]

5.1. Provisions Concerning Arrest and Surrender

The South Africa's ICC Act designated the Central Authority[356] through whom the request for arrest and surrender of the person to the ICC is transmitted with the accompanying documents.[357] Unlike Uganda where the Minister of Justice transmits the request to the Registrar of the High Court,[358] in South Africa the Central Authority forwards such request to the Magistrate to endorse the warrant of arrest from the ICC.[359] However, in matters of urgency whereby the ICC only issues a provisional warrant of arrest of the person, the procedure for executing such a warrant of arrest seems to be lengthy in South Africa than Uganda. This is because in Uganda the Minister is required to transmit the request for arrest and surrender to the Inspector General of Police (IGP) and direct him or her to arrest the person.[360]

On the contrary, the procedure under South Africa's ICC Act is that the Central Authority is required to forward the provisional request for arrest and surrender to the National Director of Public Prosecutions who then has to apply to the Magistrate for the

[351] South Africa's ICC Act, above n 4.
[352] Anton Katz, 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12(4) *African Security Review* 25-30, 28.
[353] Extradition Act (1962), sec 15, save for acts of terrorism (sec 22(1)).
[354] Katz, above n 352, 28.
[355] South Africa's ICC Act, above n 4, chapter 4, Parts 1 and 2.
[356] Ibid, sec 1(iii) the Central Authority is the Director General, Justice and Constitutional Development.
[357] Ibid, sec 8(1).
[358] Uganda's ICC Act, above n 50, sec 26(1).
[359] South Africa's ICC Act, above n 4, sec 8(2).
[360] Uganda's ICC Act,above n 50, sec 29(1).

warrant of arrest of the person.[361] This means that while in Uganda a person may be arrested pending a formal request from the ICC for the arrest and surrender of the person, in South Africa, the procedure seems lengthy due to the need for issuance of the arrest warrant by the magistrate on application by the National Director.[362] Although states have the discretion to determine specific procedures for facilitating all forms of cooperation with the ICC,[363] it is contended that the procedures adopted by states should be less burdensome to ensure quick response to requests from the ICC in that regard.[364]

The constitutional rights of the arrested person must be respected including the right to be produced within 48 hours before the Magistrate and to lawful arrest.[365] In fact, where these rights are not adhered with, the Act provides for the right of appeal to the High Court against the order for surrender within 7 days after the date of the order.[366] In event that the appeal succeeds, the surrender order must be cancelled immediately, the ICC is then notified by the Central Authority and the accused person released from custody.[367] This is contrasted with Uganda's ICC Act which does not provide any form of relief for unlawful arrest of the person or in the event of violation of the rights of the accused person but only requires the Registrar to make a declaration to that effect for transmission to the ICC by the Minister.[368]

Notably, the Magistrate may consult with relevant authorities in South Africa and the ICC in case of any problems experienced in executing 'any request of the Court for cooperation or judicial assistance.'[369] This provision is almost similar to article 97 of the Rome Statute and may be utilised by authorities in South Africa in case of any obstacles encountered in executing requests for arrest and surrender by consulting with the ICC to resolve such matters.

In fact with respect to President Omar Hassan Ahmad Al Bashir (President Al Bashir), unlike Uganda[370] South Africa endeavoured to consult with the ICC concerning his arrest and surrender to the Court.[371] However, South Africa did not take further action contrary to the

[361] South Africa's ICC Act, above n 4, sec 9(1).
[362] Ibid, sec 9(1)-(3).
[363] See chapter 2, section 4.1.5 on cooperation.
[364] This is supported under the Rome Statute, art 91(2)(c).
[365] South Africa's ICC Act, above n 4, sec 10(1); see also Uganda's ICC Act, sec 30(2) and 30(4).
[366] Ibid, sec 10(8)(b); see also sec 10(1)(a)-(c).
[367] Ibid, sec 10(8)(e)(i).
[368] Uganda's ICC Act, above n 50, sec 30(4)-(5).
[369] South Africa's ICC Act, above n 4, sec 10(2).
[370] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision Requesting the Republic of Uganda to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (17 May 2016) paras 4-5. See chapter 3, section 5.1 on provisions concerning arrest and surrender.
[371] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute', above n 297, paras 6-8.

Rome Statute[372] which culminated into legal proceedings against authorities in South Africa to prevent the departure of President Al Bashir from South Africa[373] as discussed below.

A. Analysing the Al Bashir Case

The case concerns failure of the government of South Africa to adhere with its obligations under the Rome Statute of arresting and surrendering President Al Bashir.[374] President Al Bashir is sought by the ICC to answer charges of war crimes, crimes against humanity and genocide allegedly committed in Darfur, Sudan.[375] However, when he visited South Africa to attend the African Union Summit scheduled from 7 to 15 June 2015,[376] South Africa did not execute its obligations under the Rome Statute of arresting and surrendering him to the ICC.[377]

Moreover, even after the High Court issued an interim court order on Sunday, 14 June 2015 directing relevant authorities to 'prevent President Omar Al-Bashir from leaving the country' until a final order was made by the Court,[378] the government of South Africa allowed him to leave the state before the court order was confirmed to the effect that the government of South Africa was under an obligation to arrest President Al Bashir.[379] The obligation arises from the Rome Statute which requires a state party on whose territory a person sought by the ICC is found to arrest and surrender him or her to the Court[380] as contemplated in South Africa's ICC Act.[381]

Although South Africa failed to comply with the court order[382]the decision of the Court confirming existence of an obligation to execute the arrest warrant against President Al Bashir recognised the binding nature of the Rome Statute on South Africa. Moreover,

---

[372] Rome Statute, art 89(1).
[373] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, (Case No. 27740/15) High Court of South Africa (24 June 2015) (hereinafter, *Al Bashir Case*).
[374] Rome Statute, art 89(1); see also *Al Bashir Case*, ibid, para 11.
[375] *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I (4 March 2009) and *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I (12 July 2010).
[376] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute', above n 297, para 5.
[377] Rome Statute, art 89.
[378] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Interim Order, above n 286, para 1.
[379] *Al Bashir Case*, above n 373, para 3.
[380] Rome Statute, art 89(1).
[381] South Africa's ICC Act, above n 4, sec 10(9) read together with sec 10(5) and 4(2).
[382] *Al Bashir Case*, above n 373, para 39.

engaging national courts to ensure compliance of South Africa with its obligations under the Rome Statute promoted the enforcement of South Africa's ICC Act domestically.[383]

Indeed, the Supreme Court of Appeal upheld the decision of the High Court to the effect that officials of South Africa had the obligation to arrest and surrender President Al Bashir basing on South Africa's ICC Act.[384] In essence, enforcement of the obligations under the Rome Statute was based on South Africa's ICC Act which domesticated the Statute and hence formed part of the laws of South Africa. The Court held that the Act was to be interpreted in a manner which permits South Africa to comply with its obligations under the Rome Statute[385] and decided thus;

> The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligation in terms of the Rome Statute and Section 10 of the Implementation of the Rome Statute of the ICC Act 27 of 2002, [South Africa's ICC Act] and unlawful.[386]

Both courts upheld South Africa's ICC Act as binding on authorities in South Africa who were required to enforce the Act to fulfil South Africa's obligations under the Rome Statute of arresting and surrendering persons sought by the ICC,[387]irrespective of the official capacity of such persons.[388] South Africa's failure to comply with the court order exhibits lack of good faith in fully cooperating with the ICC as required under the Rome Statute.[389] This is further supported by South Africa's attempt to initiate a process of withdrawal from the Rome Statute[390] and to repeal the ICC Act.

5.2. Provisions Concerning Other Forms of Assistance

Part 2 of the Act provides for judicial assistance to the Court by specifically making it a requirement to cooperate with the ICC in relation to its investigations and prosecutions with respect to several forms of assistance set out under section 4 which copies article 93(1) of the Rome Statute. This implies that relevant authorities in South Africa are under an obligation to assist the ICC in availing assistance in that regard. The Act provides procedures for executing

[383] See also *Al Bashir Case*, above n 373, para 37.1 where the Court decided that the officials of South Africa 'were bound to comply with domestic legislation' that is, South Africa's ICC Act.
[384] *The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre*, above n 268, para 61.
[385] Ibid, para 86; see also paras 95 and 103.
[386] Ibid, para 113.4.
[387] Rome Statute, art 89(1).
[388] South Africa's ICC Act, above n 4, sec 4(2) read together with sec 10(9). See section 5.1.A of this chapter.
[389] Rome Statute, art 86.
[390] United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10, 2-3.

forms of assistance such as obtaining evidence, examination of witnesses, attendance of witnesses in court proceedings before the ICC, as well as service of process and documents.[391] Moreover, the Act makes it a crime punishable by imprisonment for a term not exceeding 5 years where any witness who is summoned to appear before the Magistrate to sufficient cause, or fails to answer any question satisfactorily or fails to produce the document under his or her possession.[392]

The same applies to a witness who fails to appear before the ICC to give evidence after being served with summons and such a person is punished with imprisonment for a term not exceeding 12 months or a fine.[393] This shows the importance that South Africa's ICC Act attaches to provision of judicial assistance to the ICC to the extent of creating crimes where there is failure to provide the necessary evidence. It is contended that such provisions are intended to ensure that the ICC is fully supported at the local level. On the contrary, Uganda's ICC Act only permits compelling a person as per Ugandan law, to appear before a Registrar 'to give evidence or answer questions, or to produce documents or articles'[394] but does not make it a crime where the person fails to appear or declines to give the evidence required by the ICC.

In addition, South Africa's ICC Act provides procedures for executing an order for the payment of a fine to which the person has been sentenced or for execution of an order for payment of compensation arising from ICC proceedings.[395] This relates to orders of the ICC contemplated under articles 75 (on reparations to victims) and 77 (on penalties) of the Rome Statute. Particularly, with respect to fines it is an obligation for a state party to the Rome Statute to give effect to fines imposed by the ICC.[396] This enables authorities in South Africa to execute the order and ensure that the amount realised is paid to the ICC less the expenses incurred in the process.[397] Moreover, the Act provides almost similar procedures for executing a confiscation order made by the ICC[398] except that the request for assistance in executing the confiscation order must be supported with several documents such as a concise

[391] South Africa's ICC Act, above n 4, secs 15, 16, 19 and 21 respectively.
[392] Ibid, sec 18(1).
[393] Ibid, sec 19(4).
[394] Uganda's ICC Act, above n 50, sec 46(1)-(2).
[395] South Africa's ICC Act, above n 4, sec 25(1); see also secs 25(2)-26 of the Act for the procedure.
[396] Rome Statute, art 109(1); see also Kimberly Prost, 'State Cooperation and Transfers' in William A. Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 305-322, 320.
[397] South Africa's ICC Act, above n 4, sec 26(2), this is in accordance with articles 109(3) and 100 of the Rome Statute.
[398] Ibid, sec 27(1)-(3). Under sec 1(iv), a confiscation order is defined as any order issued by the ICC to recover the proceeds of any crime within the jurisdiction of the ICC.

statement of the purpose of the request, the grounds for the request as well as information about the location and identification of the property.[399]

Unlike for the case of execution of fines, the person against whom a confiscation order has been made may apply to the court which registered the order to set aside the registration of the order.[400] The registration of the order may be set aside by court on grounds such as the person was not given an opportunity to defend himself or herself at the proceedings before the ICC; or that the order is subject to review or appeal; or that the order has been satisfied already.[401] In essence, the person affected by registration of the order is given an opportunity to challenge such registration before national courts to prevent execution of the confiscation order in South Africa. On the contrary, under Uganda's ICC Act, the person against whom the forfeiture order has been made cannot apply to set aside the order except for the person 'who claims an interest in the property'.[402] Nonetheless, authorities in South Africa may not modify the order because states are only permitted to apply national laws to enforce the orders made by the ICC and not to adjust such orders.[403] It is submitted that providing procedures for executing fines and confiscation orders imposed by the ICC enables South Africa to fulfil its obligations under the Rome Statute.[404]

The other form of assistance noteworthy is providing procedures for enforcement of sentences of imprisonment imposed by the ICC. This is set out under section 32 of the Act and such sentences 'may only be modified by the relevant authorities in the Republic at the request of the Court…'[405] This is commendable in view of the fact that South Africa is not obliged to enforce sentences issued by the ICC as the case for fines mentioned above[406] and this exhibits its willingness to accept sentenced persons.[407] Providing procedures for executing sentences of the ICC shows the commitment of South Africa to give effect to the provisions of the Rome Statute irrespective of the lack of an explicit obligation in that regard.

By and large, the Act provides for procedures that enable South Africa to cooperate with the ICC in its investigations and prosecutions. However, implementation of the Act may be problematic with respect to some provisions[408] which disregard immunity of any person

[399] Ibid, sec 27(1)(f).
[400] Ibid, sec 27(4).
[401] Ibid sec 29(1).
[402] Uganda's ICC Act, above n 50, sec 66(6).
[403] ICC Rules of Procedure and Evidence, Rule 220, see also Schabas, above n 219, 1409.
[404] Rome Statute, art 109(1).
[405] South Africa's ICC Act, above n 4, sec 32(4)(b).
[406] Rome Statute, art 109(1).
[407] Ibid, art 103(1)(a); see also Uganda's ICC Act, above n 50, secs 67-80 of the ICC Act.
[408] South Africa's ICC Act, above n 4, sec 10(9) read together with sec 4(2).

including serving Heads of state who enjoy immunity under customary international law.[409] In fact, one of the reasons South Africa advanced for submitting a notification of withdrawal from the Rome Statute to the Secretary General of the UN is conflicting obligation under the Rome Statute and under international law. [410]

It has been demonstrated that South Africa's ICC Act incorporated the definitions of ICC crimes and the penalties for such crimes which are in keeping with the provisions of the Rome Statute. With respect to the general principles of criminal law, the Act is silent on the matter yet some principles[411] are not provided for under South African law. The broad jurisdiction created over ICC crimes is commendable but must be exercised in accordance with the principles of international law as noted in the section. More so, the Act incorporated provisions to enable cooperation with the ICC though the enforcement of these provisions is wanting as evident in the *Al Bashir Case* analysed above. Arguably, to a large extent the Act incorporated most of the relevant provisions of the Rome Statute. Nevertheless, the application of the Act to give effect to the Statute is still minimal especially regarding cooperation with the ICC with respect to senior state officials such as Heads of state subject to the ICC arrest warrant.

6. Conclusion

The ratification of the Rome Statute in South Africa in 2000 and its early domestication in 2002[412] was a step-forward in ensuring that South Africa gives effect to the provisions of the Statute. The aim was to enable South Africa fully cooperate with the ICC in its investigations and prosecutions[413] as well as exercise jurisdiction over ICC crimes at the national level which needed an enabling legislation and institutions to handle such crimes. As the case for Uganda, South Africa created special institutions to handle ICC crimes and legislation that incorporated relevant provisions of the Rome Statute which exhibits its willingness to give effect to the provisions of the Statute.

Unlike Uganda which appears to have made less effort to enforce the legislation, South Africa's ICC Act has been applied by national courts in a few cases[414] Worth noting were the

[409] See chapter 2, section 5.1.1 on immunity.
[410] United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10, 2-3. See further discussion in section 4.2 of this chapter.
[411] For example, the responsibility of commanders and other superiors as set out under the Rome Statute, art 28.
[412] See section 1 on introduction.
[413] Rome Statute, art 86.
[414]See for example, *Madagascar Case*, *Zimbabwe Torture Case* and *Al-Bashir Case*, see sections 3.1.1 and 5.1.A of this chapter.

efforts made by national courts to compel the government of South Africa to fulfil its legal obligations of cooperating with the ICC by arresting and surrendering persons sought for by the ICC as demonstrated in the *Al-Bashir Case*.[415] This was the case notwithstanding the existing international law immunities enjoyed by Al-Bashir as a sitting President of Sudan[416]and the fact that the government of South Africa seemed unwilling to enforce these obligations. The determination exhibited bycourts in enforcing South Africa's ICC Act is good practice which other courts ought to emulate to ensure that the national implementing legislation is enforced. However, this requires courts which enjoy independence in exercising their judicial function,as well as national implementing legislation that enables domestic proceedings for ICC crimes. Otherwise, the provisions set out in the legislation could largely remain on paper without enforcement.

That notwithstanding, the case study of South Africa has exhibited the difficulties states are likely to face in enforcing national implementing legislation to cooperate with the ICC. This concerns a situation where the person sought by the ICC is a sitting President of a non-party state who claims to enjoy international law immunity from arrest and prosecution. The debate as regards tohow to balance competing obligations that is, cooperating with the ICC by arresting and surrendering the President of a non-party state such as Sudan on the one hand, and respecting the customary international law immunities enjoyed by the President on the other hand, is far from over.[417] In the absence of a clear position on the matter, the practical implementation of the Rome Statute at the national level may not be realised.

[415]See section 5.1.A of this chapter analysing the case.
[416]See section 4 of this chapter examining immunity as an obstacle to the implementation of the Rome Statute.
[417]See also Minority Opinion of Judge Marc Perrin de Brichambaut in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*, 'Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir', (ICC-02/05-01/09) Pre-Trial Chamber II (6 July 2017).

Chapter Five

Non-Legislative Obstacles to the Implementation of the Rome Statute in Uganda and South Africa

1. Introduction

The implementation of the Rome Statute at the national level entails not only having an implementing legislation but also institutions with sufficient capacity to enforce the legislation.[1] Owing to the complexity of handling ICC crimes,[2] national institutions would require sufficient financial resources[3]and other facilities such as physical infrastructure and equipment as well as personnel with competence to investigate, prosecute and adjudicate such crimes effectively. This implies that states need to have effective criminal justice systems which enable domestic implementation of the Rome Statute.

While states such as Finland, Norway, Austria, Denmark and the Netherlands were reported among the top 10 states which had effective criminal justice systems,[4] South Africa was ranked 46/113 and Uganda was ranked 93/113.[5]There is a possibility that the criminal justice systems of the 5 states mentioned above may be faced with fewer obstacles than South Africa and Uganda though South Africa appears to be much better than Uganda as will be demonstrated in this chapter. In fact, the World Justice Project (WJP) Rule of Law indexes exhibited a drastic decrease of the criminal justice system of Uganda over the years[6] which is not the case for South Africa where the criminal justice system exhibited slight improvement.[7] The possible explanation is that South Africa being an upper middle

[1] See chapter 2 section 4 on what needs to be implemented.
[2] Stuart Ford, 'Complexity and Efficiency at International Criminal Courts' (2014) 29(1) *Emory International Law Review* 1-69.
[3] See also Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Journal* 85-133, 100.
[4] World Justice Project Rule of Law Index 2016 (hereinafter, WJP Rule of Law Index 2016) 43, available at <http://worldjusticeproject.org/publications> last visited, 30 August 2017.
[5] Ibid.
[6] For example, in 2012-2013, Uganda was ranked 69/97 states with a score of 0.43; in 2014, the rank was 72/99 states with a score of 0.37; in 2015, the rank was 80/102 states with a score of 0.34 and in 2016 the rank was 93/113 states with a score of 0.34. See 'The World Justice Project Rule of Law Index 2012-2013' (hereinafter, WJP Rule of Law Index 2012-2013) 147; 'The World Justice Project Rule of Law Index 2014' (hereinafter, WJP Rule of Law Index 2014) 29; 'World Justice Project Rule of Law Index 2015' (hereinafter, WJP Rule of Law Index 2015) 31 and WJP Rule of Law Index 2016, above n 4, 21, all available at <http://worldjusticeproject.org/publications> last visited, 30 August 2017. These scores are out of 1 which shows strongest adherence to the rule of law.
[7] For example, in 2012-2013, South Africa was ranked 48/97 states with a score of 0.49; in 2014, the rank was 47/99 states with a score of 0.45; in 2015, the rank was 38/102 states with a score of 0.50 and in 2016, the rank was 46/113 states with a score of 0.52. See WJP Rule of Law Index 2012-2013, ibid, 138; WJP Rule of Law Index 2014, ibid, 28; WJP Rule of Law Index 2015, ibid, 31 and WJP Rule of Law Index 2016, ibid, 21, respectively.

income[8]could have more resources at its disposal than Uganda which is a low income state.[9] However, shortage of finance may not be the full explanation for Uganda's deteriorating criminal justice system[10] but other factors such as lack of political will to enforce justice.

This chapter examines key non-legislative obstacles curtailing domestic implementation of the Rome Statute in Uganda and South Africa.[11] Firstly, the obstacle of weak institutions due to insufficient resources such as human resources, finance, physical infrastructure and equipment is examined. Secondly, the chapter analyses limited political will focusing on the failure of Uganda and South Africa to ensure that institutions which enforce justice are not interfered with by other organs and institutions of these states. In addition, it examines the failure to take action to ensure that domestic proceedings for ICC crimes are conducted with impartiality. It is contended that the apparent limited political support for domestic proceedings of ICC crimes largely explains why less resources are availed to institutions which handle ICC crimes in Uganda and South Africa thereby leading to less enforcement of national implementing legislation by these institutions.

Thirdly, CSOs which are recognised as stakeholders in strengthening the state's capacity to investigate and prosecute ICC crimes[12] as well as compelling state action to support these proceedings,[13] are examined as partly contributing to the fewer proceedings for ICC crimes mainly in Uganda. It argues that the circumstances within which CSOs operate may have a bearing on the activities of these organisations which couldlimits the ability of these CSOs to promote domestic implementation of the Rome Statute in these states.

Lastly, is the conclusion that limited political support for investigations and prosecutions of ICC crimes Uganda and South Africa appears to be the overriding factor which has curtailed the implementation of the Rome Statute in these states. This is partly because availability of sufficient resources and active support from CSOs, all of which enhance national proceedings for ICC crimes, depend on the political will of respective

[8] WJP Rule of Law Index 2016, above n 4, 25.
[9] Ibid, 24.
[10] WJP Rule of Law Index 2012-2013, above n 6, 147; WJP Rule of Law Index 2014, above n 6, 29; WJP Rule of Law Index 2015, above n 6, 31 and WJP Rule of Law Index 2016, above n 4, 21.
[11] The legislative obstacles have been dealt with elsewhere, see chapter 3, section 4 on non-retroactivity of Uganda's ICC Act and amnesty as well as chapter 4, section 4 on immunity.
[12] ICC-Resolutions and Declarations, 'Resolutions and Declarations adopted by the Review Conference', Resolution RC/Res.1, Adopted at the 9th plenary meeting (8 June 2010) para 8, available at <https://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.II-ENG.pdf> last visited, 30 August 2017.
[13] Charles C. Jalloh, 'The Role of Non-Governmental Organizations in Advancing International Criminal Justice' in M. Cherif Bassiouni (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015) 589-616, 590.

states. Without the necessary political support for such proceedings, domestic implementation of the Rome Statute in Uganda and South Africa might remain minimal.

2. Weak Institutions

Institutions engaged in investigating, prosecuting and adjudicating ICC crimes in Uganda and South Africa seem to lack sufficient resources (staff, finance, physical infrastructure and equipment) to conduct their activities effectively. This is illustrated in the WJP Rule of Law Index 2015 where the problem of inadequate resources in the criminal justice system of Uganda was identified as very significant and significant for the case of South Africa.[14] This section focuses on human resource, physical infrastructure and equipment as well as finance to examine whether the non-availability of such resources has hampered effective implementation of the Rome Statute in Uganda and South Africa. Firstly, the obstacle of insufficient human resources is examined, followed by insufficient physical infrastructure and equipment and lastly, shortage of finance is examined. This is aimed at exhibiting how insufficient resources may affect enforcement of justice for ICC crimes at the national level.

2.1. Insufficient Human Resources

Uganda and South Africa have endavoured to recruit staff working in the criminal justice systems[15] though the problem of shortage of staff persists in these states with Uganda appearing to be more affected than South Africa. According to the Justice Law and Order Sector (JLOS),[16] the 'staff levels' in institutions such as the 'DPP [Directorate of Public Prosecutions], Police and Judiciary' required to handle criminal cases 'have remained a major concern'.[17] Possibly, this is due to the fact that the problem of shortage of staff still persists despite the recruitment of new staff in these institutions. This is exhibited in the Uganda Police Force (UPF) whereby in the financial year 2015/2016 Uganda had a police to population ratio of 1:764 which had improved from 1:816 due to recruitment of more staff

[14] WJP Rule of Law Index 2015, above n 6, 48.

[15] For example in the financial year 2015/2016, 136 judicial officers (including 19 judges) were recruited in Uganda. See The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 23 (on file with the author). For the case of South Africa, in financial year 2014/2015 of the 257 number of positions for judges, 240 were filled leaving only 17 positions pending recruitment. See The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', 247, available at <http://www.justice.gov.za/reportfiles/report_list.html> last visited, 30 August 2017.

[16] The Justice Law and Order Sector (JLOS) is a government institution coordinating the annual planning and budgeting for 17 institutions engaged in administration of justice, maintenance of law and order as well as promotion of human rights. Such institutions include, Uganda Police Force, DPP and Judiciary. See the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', 5 (on file with the author).

[17] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', ibid, 79.

but below the global standard of 1:500.[18] In fact, the Inspector General of Police, General Kale Kayihura is reported to have said that the UPF had 'only 44,600 officers out of the required 100,000' officers.[19]

In contrast, by the end of March 2016 South Africa's SAPS 'totalled to 194,730' work force with a police to population ratio of 1:362[20] which is within the global standard though some regions such as Cape Town were reported as having shortage of police officers compared to the population.[21] This indicates that both Uganda and South Africa experience a shortage of police officers due to increase in population yet the funds are not sufficient for recruiting more staff.[22] Perhaps this explains the fewer investigators allocated for handling ICC crimes as mentioned previously.[23] Indeed, in Uganda where commission of multiple ICC crimes involved several persons,[24] by 2016 only 33 cases were reportedly being investigated albeit with slow progress due to several obstacles such as difficulty in tracing witnesses.[25] This puts into question the ability of the police to investigate ICC crimes to ensure effective domestic proceedings for such crimes.

With respect to the judiciary, as of June 2016 Uganda's Supreme Court was composed of 9 judges, the Court of Appeal had 14 judges and the High Court had 49 judges.[26] However, the optimal number required in each court was not achieved that is, for the Supreme Court, the optimal number is 11, for the Court of Appeal, the optimal number is 15 and for the High Court, the optimal number is 82.[27] In essence, 36 judges are yet to be recruited to reach the optimal number of staff required in these courts. This means that the High Court had a shortfall of 33 judges at the time of writing yet the recruitment of new judges merely replaced

[18] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 76.
[19] Joseph Kato, 'Police Face 50,000 Personnel Shortage', (Tuesday, 24 January 2017), available at <http://www.monitor.co.ug/News/National/Police-face-50-000-personnel-shortage/688334-3784570-b7fadr/index.html> last visited, 30 August 2017.
[20] Annual Report 2015/16 South African Police Service, 60 and 34, respectively, available at <http://www.gov.za/documents/south-african-police-service-annual-report-20152016-10-oct-2016-0000> last visited, 30 August 2017.
[21] Buchule Raba, 'Cape Town's Police-to-Population Ratio Way Below National Norm' (27 July 2016), available at <http://www.timeslive.co.za/local/2016/07/27/Cape-Town%E2%80%99s-police-to-population-ratio-way-below-national-norm> last visited, 30 August 2017.
[22] Johnson Taremwa, 'Uganda: Police Suspends PCs, Cadet Recruitment, Promotions' (3 June 2016), available at <http://allafrica.com/stories/201606030705.html> last visited, 30 August 2017.
[23] Ottilia Anna Maunganidze and Anton du Plessis, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65-83, 74-75 and 78. See chapters 3 and 4, section 2 on institutions dealing with ICC crimes in Uganda and South Africa.
[24] For some of the ICC crimes committed during the armed conflict in northern Uganda, see for example, *The Prosecutor v Dominic Ongwen*, 'Decision on the Confirmation of Charges Against Dominic Ongwen', (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016).
[25] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 91.
[26] Ibid, 23. The new judges recruited in the financial year 2015/2016 equaled to 19 that is, 5 Justices in the Supreme Court, 7 Justices in the Court of Appeal and 7 Justices in the High Court.
[27] Ibid.

others who had been promoted to the higher bench or those who retired.[28] As a result, the case load per judge of the High Court increased 'from 1129 cases in 2014/2015 to 1391 cases in 2015/2016' with about 15 pending cases concerning international crimes[29] of which only 1 of Thomas Kwoyelo related to ICC crimes.[30] This indicates that courts in Uganda handle fewer cases relating to ICC crimes partly due to fewer personnel entrusted with a huge case load stated above. Notably, political reasons are believed to be the cause for fewer appointments of judges in the judiciary and in fact, the Government of Uganda (GoU) was sued in the East African Court of Justice (EACJ) for the President's failure to appoint more judges.[31] It is arguable that the limited number of personnel in the special units which handle ICC crimes in Uganda is partly due to reluctance by the GoU to appoint more officials in these institutions which ultimately affects the work of these institutions.

On the contrary, South Africa seems to have relatively high number of judges than Uganda. In 2016 South Africa's Constitutional Court had 11 judges, the Supreme Court of Appeal had 28 judges and the High Court had 240 judges.[32] Moreover, the High Courts in South Africa had a reduction in the backlog of cases from 34% to 26.4% in the financial year 2014/2015[33] which further reduced in financial year 2015/2016 to 21.3%.[34] This indicates that shortage of judges may not be a major problem in South Africa as in Uganda because it had 240 judges of the High Court which is quite a big number of judges when contrasted with the 49 judges of the High Court in Uganda.[35] This brings into question the ability of judges in Uganda to handle ICC crimes when faced with a huge backlog of cases not relating to such crimes.[36]

[28] Ibid, 48.
[29] Ibid, 54.
[30] *Uganda v Thomas Kwoyelo* (Constitutional Appeal No. 01 of 2012), Supreme Court of Uganda (8 April 2015) (hereinafter, *Thomas Kwoyelo Case*) (on file with the author).
[31] *Simon Peter Ochieng and John Tusiime v The Attorney General of the Republic of Uganda* (EACJ Ref. No. 11 of 2013) East African Court of Justice (First Instance Division) (7 August 2015). The decision of the Appellate Division of the EACJ was yet to be passed (at the time of writing in August 2017) , see EACJ, 'EACJ Appellate Division Hears an Appeal Challenging the President of Uganda on the Alleged Refusal to Appoint more Judges to the Judiciary' (26 August 2016), available at <http://eacj.org/?cat=11&paged=3> last visited, 30 August 2017.
[32] The South African Judiciary, available at <http://www.judiciary.org.za/index.html> last visited, 30 August 2017.
[33] The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', above n 15, 88.
[34] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', 97, available at <http://www.justice.gov.za/reportfiles/report_list.html> last visited, 30 August 2017.
[35] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 23.
[36] See chapter 3, section 2.2 on the International Crimes Division.

Concerning prosecuting authorities, the Director of Public Prosecutions (DPP)'s Office in Uganda had over 350 state attorneys and state prosecutors (as of May 2015)[37] in various regions of Uganda.[38] Moreover, in the financial year 2015/2016, 90 new state attorneys were recruited[39] which increased the number of staff working in the DPP's office. Although the case load per state attorney reduced from 396 in 2014/2015 to 323 in 2015/2016,[40] this is still high for the prosecutor to effectively handle in a year.[41]Moreover, it is thought that excessive prosecutorial caseloads lead to 'inadvertent prosecutorial error' because prosecutors are too busy to focus on their cases or for lack of guidance from senior lawyers who are similarly overburdened.[42] With huge caseloads handled by prosecutors for several crimes, it may not be possible to effectively prosecute ICC crimes which are deemed 'politically sensitive'.[43]

In contrast, the National Prosecuting Authority (NPA) of South Africa employed 3,147 prosecutors in permanent position as of 31 March 2016.[44] Still, it had a vacancy rate of 15.1% at the end of the financial year due to insufficient funding.[45] Perhaps that is partly why the NPA finalised '1,896 (0.4%) fewer cases … than the annual target of 478,686'.[46] This demonstrates that both Uganda and South Africa still experience shortage of prosecutors though it seems that Uganda has fewer prosecutors[47] than South Africa which in 2016 had a total of 3,147 as mentioned above.[48] This is a problem because these prosecutors handle huge

[37] For lists of staff see Office of the Director of Public Prosecutions, 'DPP Staff List', available at <http://www.dpp.go.ug/index.php/dpp-staff> last visited, 30 August 2017.
[38] There are 13 Regional Offices of the DPP each composed of 1 senior staff that is, the Assistant DPP or the Chief State Attorney with over 100 Stations composed of a specific number of state attorneys and state prosecutors depending on the location of the station. See Office of the Director of Public Prosecutions, 'DPP Staff List', ibid.
[39] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 57.
[40] Ibid, 34 and 55.
[41] The Deputy DPP Mr. Ngolobe reported to the Committee on Legal and Parliamentary Affairs of the Parliament of Uganda that 'each state prosecutor handles more than 230 case files which is a big work load.' See Yasiin Mugerwa, 'Prosecutors' Pay is Pathetic – DPP' (Wednesday, 30 July 2014), available at Daily Monitor, <http://www.monitor.co.ug/News/National/Prosecutors--pay-is-pathetic---DPP/688334-2402180-p49jluz/index.html> last visited, 30 August 2017.
[42] Adam M. Gershowitz and Laura R. Killinger, 'The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants' (2011) 105(1*) North Western University Law Review* 261-301, 263.
[43] Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 177.
[44] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', 69, available at <https://www.npa.gov.za/node/32> last visited, 30 August 2017.
[45] Ibid.
[46] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 92.
[47] As indicated above, the list of state attorneys and state prosecutors indicated about 350 staff in addition to 90 new recruits as per JLOS Report. See Office of the Director of Public Prosecutions, 'DPP Staff List' and The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 57.
[48] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', above n 44, 69.

caseloads which could affect prosecution of ICC crimes due to competition with other cases that may be prioritised over ICC crimes.[49]

Particularly, personnel working in institutions handling ICC crimes in Uganda and South Africa such as the police, prosecuting authorities and the judiciary are few.[50] For the case of Uganda, a team of 6 prosecutors and 5 police investigators is attached to the International Crimes Division (ICD) which conducts trials for ICC crimes with a composition of 5 judges of whom only 3 are for the bench.[51] Regarding South Africa, the Crimes Against the State (CATS) unit which investigates serious crimes including ICC crimes is composed of 26 members and the Priority Crimes Litigation Unit (PCLU) for prosecuting such crimes has 5 advocates and 1 administrator.[52] This exhibits that national institutions in Uganda and South Africa may not have sufficient capacity to effectively investigate, prosecute and adjudicate ICC crimes due to fewer numbers of staff.

It is contended that both Uganda and South Africa have shortage of human resources to handle ICC crimes yet the existing staff handle other crimes which increases their caseloads. As noted above, Uganda seems to be worse off than South Africa as illustrated by the police population ratio of 1:764 for Uganda and 1:362 for South Africa;[53] the number of judges in the High Courts (which handle ICC crimes) that is 49 for Uganda and 240 for South Africa;[54] and for prosecutors, South Africa had 3,147 prosecutors as of 2016[55] which seems to be more than half of the number of prosecutors in Uganda.[56]

The impact of shortage of staff in Uganda in relation to proceedings for ICC crimes is evident in the *Thomas Kwoyelo Case*[57] whereby Kwoyelo 'waited for over a year' in detention without a lawyer allocated for him by the GoU.[58] Eventually, criminal proceedings against Kwoyelo were commenced before the International Crimes Division (ICD) on 11 July

[49] Chapter 3, section 2 and chapter 4, section 2.
[50] Ibid.
[51] Maunganidze and du Plessis, above n 23, 78.
[52] Ibid, 74-75.
[53] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 76 and Annual Report 2015/16 South African Police Service, above n 20, 34.
[54] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', ibid, 23 and the South African Judiciary, above n 32.
[55] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', above n 44, 69.
[56] See Office of the Director of Public Prosecutions, 'DPP Staff List', above n 37 and The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 57.
[57] *Thomas Kwoyelo Case*, above n 30.
[58] Human Rights Watch, 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division' (16 January, 2012) 17, available at <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division> last visited, 30 August 2017.

2011.[59] Although the reference to the Constitutional Court of Uganda to determine whether Kwoyelo was eligible for amnesty was disposed of expeditiously on 22 September 2011,[60] further delays were experienced after an appeal was lodged in the Supreme Court on 11 April 2012 by the Attorney General.[61] This was due to the fact that the Supreme Court of Uganda lacked quorum and did not hear the appeal until 18 March 2014.[62]

There was a delay of almost 2 years before the appeal was heard by the Supreme Court and a decision was delivered almost a year later on 8 April 2015.[63] Explicitly, delay in the proceedings partly resulted from lack of defence counsel and judges, who had not been appointed by the GoU thereby violating Kwoyelo's right to legal representation at the expense of the state and the right to a fair and speedy trial as enshrined in the 1995 Constitution of Uganda[64]as well as several international treaties binding on Uganda.[65]Therefore, the problem of insufficient staff engaged in investigating, prosecuting and adjudicating ICC crimes curtails effective domestic proceedings for such crimes in Uganda and South Africa. Thus, without sufficient number of staff handling ICC crimes, investigation, prosecution and adjudication of such crimes may be problematic in both states hence curtailing the implementation of the Rome Statute at the national level.

2.2. Insufficient Physical Infrastructure and Equipment

Institutions, such as courts, require sufficient resources to function effectively. Such resources include office space for judges, court rooms, office materials and equipment. Where these are lacking, the quality of services delivered will be negatively affected.[66] This implies that states should ensure that adequate facilities with modern technology to facilitate effective domestic proceedings for ICC crimes are available and used effectively. This section examines insufficient physical infrastructure focusing on buildings, followed by

[59] *Thomas Kwoyelo Case*, above n 30, Judgment of Hon. Dr. Esther Kisaakye, 2.
[60] *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Petition No. 036/11) Constitutional Court of Uganda (21 September 2011) 25.
[61] Kasande Sarah Kihika and Meritxell Regué, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' ICTJ (January 2015) 6, available at <http://www.ictj.org/publication/pursuing-accountability-serious-crimes-uganda> last visited, 30 August 2017.
[62] Ibid, 1.
[63] *Thomas Kwoyelo Case*, above n 30, 66.
[64] 1995 Constitution of Uganda, arts 28(3)(e) and 28(1) respectively.
[65] See for example, the International Covenant on Civil and Political Rights (hereinafter, ICCPR) (1966), 999 UNTS 171, art 14(3)(c) and (d) as well as the African Charter on Human and Peoples' Rights (hereinafter, Banjul Charter) (1982) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58, art 7(1)(c) and (d).
[66] National Center for State Courts (NCSC), 'The International Framework for Court Excellence' (2dn edn 2013) 8, available at <http://www.courtexcellence.com/Resources/The-Framework.aspx> last visited, 30 August 2017.

insufficient equipment as obstacles to conducting effective investigations, prosecutions and adjudication of ICC crimes in Uganda and South Africa.

2.2.1. Insufficient Physical Infrastructure

Effective investigations, prosecutions and adjudication of ICC crimes may only be realised where national institutions have sufficient facilities and materials for such work. Notably, Uganda and South Africa have endeavoured to improve physical infrastructure by constructing new buildings and maintaining available facilities. For instance in Uganda, new facilities were constructed for various institutions including courts, police stations and offices of the DPP to reduce the cost of rent.[67] As a result, there was marked increase in infrastructure from '53%in 2014/15 to 59.8% in 2015/16' due to completion of several construction projects.[68] Such facilities are aimed at improving the living and working conditions of staff in these institutions[69] to ensure effective service delivery.

Similarly, the government South Africa under the Department of Justice and Constitutional Development (Department) improved infrastructure by constructing new court facilities through the capital works programme.[70] In this programme 43 courts were built in rural areas which made a total of 762 courts distributed throughout the country in financial year 2012/2013.[71] This enhanced access to justice owing to redistribution of courts and rehabilitation of branch courts into 'full-service courts'[72] and in the financial year 2014/2015, 32 of the 90 Branch Courts in traditionally black townships were designated to full service courts.[73] However, these courts are aimed at expanding services relating to civil and family law[74] thus may not be used for purposes of adjudicating ICC crimes which are criminal law matters. Nonetheless, the Limpopo High Court building was finalised in financial year 2015/2016 and by the end of the year, the Mpumalanga High Court will also be finalised in order to ease access to the courts.[75]

---

[67] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', above n 16, 11 and the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', 8 (on file with the author).
[68] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 10, see also 42.
[69] Ibid, 112.
[70] The Department of Justice and Constitutional Development, 'Annual Report 2012/2013', 8 and concerning examples of some of the projects under construction during the 2014/2015 financial year, see The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', above n 15, 110-111.
[71] The Department of Justice and Constitutional Development, 'Annual Report 2012/2013', ibid, 8.
[72] The Department of Justice & Constitutional Development, 'Annual Report 2013-2014', 13, available at <http://www.justice.gov.za/reportfiles/report_list.html> last visited, 30 August 2017.
[73] The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', above n 15, 34.
[74] Ibid.
[75] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 33.

Despite the improvement in infrastructure in both states, more needs to be done to ensure sustainability of the construction projects. Particularly, Uganda seems to rely on donor funding to finance these projects which is not sustainable as it was reported that reduced support from the development partners of JLOS over the years has affected infrastructural development.[76] This was evident in the financial year 2013/2014 whereby the Netherlands was meant to avail financial support worth UShs.23.4 billion (approximately $6.54 million).[77] However, the funding was suspended when the Anti Homosexuality Act was passed[78] which left JLOS with 'less than 50% of the expected funding' thereby leading to reduction of its work in relation to available funding.[79] In fact, in the financial year 2014/2015 the Netherlands did not release any money to JLOS[80] not until financial year 2015/2016 when it restored its support for JLOS projects.[81]

Furthermore, JLOS institutions are mainly 'urban based' thus, not available in '18% of the districts' in Uganda and many continue to operate from inadequate premises while others are faced with high cost of rent.[82] Moreover, it was reported that 'only 53% of Court houses' in Uganda are situated in buildings owned by the judiciary with the other court rooms located in 'either rented premises or buildings of local administration in the respective districts.'[83] This means that almost half of the buildings utilised as court houses in Uganda are rented by the judiciary and the rent arrears keep on accruing every year to the effect that the 'Judiciary carried forward' UShs.7,471,587,017 (approximately $2.1 million) 'which was 67.6% of its total debts' to the financial year 2015/2016.[84]

This demonstrates that in Uganda many institutions continue to utilise rented premises which deplete the meager resources as well as rely on donor funding to finance construction of new buildings which may not be sustainable. On the contrary, institutions in South Africa such as the South African Police Service (SAPS) adopted an approach to phase out leased premises and decided to purchase 9 facilities 'of which one has been completed' in order to curb high payments for leases.[85] In essence, the SAPS is aiming at utilising its own buildings to conduct its activities and do away with leased premises which are expensive to maintain.

[76] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 41.
[77] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', above n 16, 132.
[78] Ibid, 139.
[79] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 23.
[80] Ibid, 110.
[81] The Justice Law and Order (JLOS), 'Annual Performance Report 2015/16', above n 15, 141.
[82] Ibid, 12.
[83] Centre for Public Interests Law, 'In Dire Straits?' The State of the Judiciary Report 2016' (17 August 2016) 19 (on file with the author).
[84] Ibid.
[85] Annual Report 2015/16 South African Police Service, above n 20, 229 and 235.

Moreover, in the financial year 2015/2016, 8 new police stations were under construction in the rural areas scheduled for completion in financial year 2017/2018.[86] This shows that while JLOS institutions in Uganda mainly rely on donor funding, institutions in South Africa seem to utilise the available funding to construct own buildings.[87]

However, South Africa is still faced with the problem of insufficient physical infrastructure due to limited funds and seem not to prioritise infrastructural development. For instance, expenditure on buildings and other fixed structures 'was expected to decrease by R408.4 million [approximately $ 30.5 million]' because of reprioritisation to fund other matters such as courts in rural areas as well as 'capacitation of Human Rights and Legal Aid South Africa.'[88] This implies that infrastructural development competes with other demands of the justice sector in South Africa yet the funding may not be sufficient for conducting activities of the sector.[89]

With respect to inadequate facilities, the ICD of Uganda which is entrusted with adjudicating ICC crimes[90] is faced with the problem of inadequate infrastructure which affects operations of this court. For instance, it was reported that the premises accommodating this court were not spacious to house the judges' chambers, registry, library and there was only one 'improvised courtroom'[91] in these premises. In addition, offices at the ICD leaked when it rained, the lighting system was poor and sometimes work 'comes to a standstill' in event of shortage of electricity.[92] Explicitly, ICD facilities are inadequate for proper execution of judicial work which puts into question the ability of ICD staff to conduct effective domestic proceedings for ICC crimes.

A similar problem of inadequate court rooms and dilapidated court infrastructure was faced by South Africa.[93] Particularly, the Regional Courts in provinces such as Free State, Gauteng and Eastern Cape were reported as lacking separate rooms for witnesses in that the

[86] Ibid, 229.
[87] Funds received from donors by the Department of Justice and Constitutional Development of South Africa are for projects such as small claims courts from the government of Swiss Federation, increasing awareness for constitutional rights and access to justice from the European Union, as well as support for re-establishment of sexual offences courts from UNICEF. See The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', above n 15, 104-109 and 'Annual Report 2015/2016', above n 34, 119-122.
[88] The Department of Justice and Constitutional Development, 'Strategic Plan 2015/20', 46-47, available at <http://www.justice.gov.za/MTSF/mtsf.htm> last visited, 30 August 2017.
[89] See section 2.3 of this chapter on insufficient finance.
[90] The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, sec 6.
[91] Hon. Justice Moses Mukiibi, 'International Crimes Division Annual Report 2014', a paper presented at the 16th Annual Judges' Conference under the theme; *Enhancing Public Confidence in the Judiciary*, held at Imperial Resort Beach Hotel, Entebbe, Uganda (26-30 January 2014) 7 (on file with the author).
[92] Ibid.
[93] The Department of Justice and Constitutional Development, 'Strategic Plan for the Judiciary 2013-2018', (March 2013) 18 (on file with the author).

accused person and the complainant (including child victims) shared the same room which exposed the complainant to further trauma.[94] Further still, in provinces such as Gauteng, North West and KwaZulu-Natal, courts were located in dilapidated buildings and lacked office space whereby 3 to 4 prosecutors shared small offices designed for 1 person leading to loss of confidentiality between prosecutors and witnesses.[95] Moreover, Judges and Magistrates were also faced with shortage of court rooms and chambers[96] which indicates that effective operation of court business in South Africa could be hampered by insufficient infrastructure.

Therefore, both Uganda and South Africa are faced with the problem of insufficient physical infrastructure which affects effective operation of the work of institutions engaged in enforcing justice for ICC crimes. Facilities such as court houses, office space and judges' chambers may not be adequate for effective execution of judicial work and moreover, Uganda which seems to rely on donor funding for its infrastructural developments is inconvenienced due to suspension of such funds as evident with the Netherlands noted above.[97]Although South Africa seems to rely on its own finance for its capital works programme, the problem of insufficient physical infrastructure persists as the case in Uganda due to reprioritiasation of funds allocated for such activities.[98]

2.2.2. Insufficient Equipment

National institutions in Uganda and South Africa are increasingly investing in technology to facilitate the work of these institutions as well as improve service delivery. With respect to South Africa, the government has endeavoured to modernise the justice sector for example by computerising court records using the 'offsite storage of case records'.[99] This was aimed at eliminating problems relating to storage and loss of records as well as ease access to records.[100] This project was successfully deployed at 10 courts and since 2010 when the digitisation of records was incepted, a total of '5, 258, 335 cases' were 'scanned and removed

[94] Public Service Commission, 'Consolidated Report on Inspections of Regional Courts: Department of Justice and Constitutional Development' (October 2012) 15 (on file with the author).
[95] Ibid.
[96] Justice Mogoeng wa Mogoeng (Chief Justice of the Republic of South Africa), 'The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa', 2, a speech delivered during the 2013 Annual Human Rights Lecture of the Stellenbosch Law Faculty, University of Stellenbosch, Cape Town (Thursday, 25 April 2013) (on file with the author).
[97] The Justice Law and Order Sector (JLOS) (JLOS), 'Annual Performance Report 2014/2015', above n 67, 23.
[98] The Department of Justice and Constitutional Development, 'Strategic Plan 2015/20', above n 88, 46-47.
[99] The Department of Justice and Constitutional Development, 'Annual Report 2012/2013', above n 70, 18.
[100] The Department of Justice and Constitutional Development, 'Annual Report 2014/2015', above n 15, 47.

to an offsite location.'[101] The advantage is that it reduces loss of court records, creates more space for other court activities and it eases retrieving of documents in order to accelerate the rate of disposal of cases.[102]

Despite the heavy investment in technology as evident in the funds allocated for justice modernisation that is, R962,734,000 (approximately $72 million) in financial year 2014/2015 and R899,001,000 (approximately $67.2 million) in financial year 2015/2016,[103] the lack of financial resources still hampers investment in information technology because of the budget cuts.[104] It is reported that a total of R138 million (approximately $10.3 million) was 'reprioritised from the Justice Modernisation subprogramme, R60 million [approximately $4.4 million] to Financial Intelligence Centre for human resources capacity and R78 million [approximately $5.8 million] to capacitate the public entities ...'[105] It appears that funding allocated for improving technology is sometimes reallocated for other purposes thereby leading to high operational risks and slow networks which affect programmes of the Department supported by such technology.[106]

For the case of Uganda, the judiciary also improved its technology by establishing the Court Case Administration System in the Supreme Court, Court of Appeal and all Divisions of the Kampala High Court to facilitate the compilation, processing and analysis of statistics of cases.[107] In addition, Court Recording and Transcription Systems were installed in these courts and in all High Court Circuits.[108] This may have been intended to reduce manual taking of court records by judges. However, it appears that the equipment has not been fully utilised by court officials and the judiciary has been criticised for being slow in implementing the 'pilot electronic recording project' leading to slow rate of disposal of cases.[109] This means that court officials have not fully embraced the electronic recording system and perhaps still utilise manual recording of cases which is time-consuming and may delay court proceedings.

---

[101] Ibid, 47.
[102] The Department of Justice and Constitutional Development, 'Annual Report 2012/2013', above n 70, 18.
[103] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 116.
[104] The Department of Justice and Constitutional Development, 'Strategic Plan for the Judiciary 2013-2018', (March 2013), above n 93, 20.
[105] The Department of Justice and Constitutional Development, 'Strategic Plan 2015/20', above n 88, 60; see also Department of Justice and Constitutional Development, 'Annual Report 2012/2013', above n 70, 12, where funds for development of capital expenditure were diverted 'to alleviate a shortfall in security infrastructure and property rates and taxes.'
[106] The Department of Justice and Constitutional Development, 'Strategic Plan for the Judiciary 2013-2018', (March 2013) above n 93, 20 and 21.
[107] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 28.
[108] Ibid, see also 52.
[109] Centre for Public Interests Law, 'In Dire Straits?' The State of the Judiciary Report 2016', above n 83, 22.

A similar problem of limited utilisation of technology was encountered in South Africa whereby the audiovisual remand (AVR) system which linked 'magistrates' courts to correctional detention centres via closed-circuit television',[110] seemed not to have been utilised to the maximum in financial year 2015/2016. This is due to the fact that only 11, 329 criminal cases were conducted via the AVR system and the target of 12,000 cases was not achieved which is thought to have been 'influenced by limited utilisation of the AVR system.'[111] This demonstrates that although use of technology eases court processes, court officials may not actually utilise such technology thereby slowing down the court process.

Further still, in Uganda the UPF lacks modern equipment to identify fingerprints and forensic tools for investigation as well as experience poor record management which is 'still manual'.[112] By contrast, improvement in technology was reported in South Africa's SAPS for example the network infrastructure at all Forensic Science Laboratories (FSL) sites in Pretoria was upgraded to ensure quick response in analysing and reporting on exhibits.[113] Thus, it appears that South Africa may not have a problem of forensic tools as experienced by the UPF in Uganda. It is submitted that with inadequate physical infrastructure and equipment, national institutions in Uganda cannot effectively investigate, prosecute and adjudicate ICC crimes.

Therefore, lack of sufficient equipment in Uganda and South Africa may hamper the activities of institutions engaged in investigating, prosecuting and adjudicating ICC crimes. This is partly due to insufficient funds availed tothese institutions by respective governments.[114]An example noted above is South Africa which reprioritised funding allocated for justice modernisation to other activities of the Department thereby contributing to under investment in technology[115]which affected programmes relying on such technology. This exhibits a problem in the allocation of resources wherebythe government of South Africa prioritises some programmes over others and it is argued that with insufficient resources, ICC crimes may not be prioritised by these institutions due to the fact that

[110] This was to enable the accused person appear before court via the audiovisual link without being produced physically before court to reduce the cost of transporting these persons to the court. See the Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 115.
[111] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 116.
[112] Uganda Police, 'Annual Crime and Traffic/Road Safety Report 2013', above n 20, 32.
[113] Annual Report 2015/16 South African Police Service, above n 20, 84.
[114] See section 2.3 of this chapter.
[115] The Department of Justice and Constitutional Development, 'Strategic Plan for the Judiciary 2013-2018', above n 93, 20.

thesecrimes require more resources including finance[116] to effectively investigate, prosecute and adjudicate.

2.3. Insufficient Finance

National institutions in Uganda and South Africa are faced with challenges such as inadequate physical infrastructure as well as insufficient equipment mainly due to shortage of finance to facilitate various activities of these institutions. For the case of Uganda, it was reported that although the budget allocated to JLOS has grown from UShs.266.3 billion (approximately $74 million) in financial year 2008/2009 to UShs.1.244 trillion (approximately $347 million) in financial year 2015/2016,[117] the share of JLOS on the national budget has 'reduced from 5.6% in 2014/15 to 4.5% in 2015/16' and further to '4.4% in 2016/17.'[118]

Moreover, there seems to be inequitable resource allocation in institutions that enforce justice in Uganda since some institutions receive inordinate funding from the GoU than other institutions. This is notable in the financial year 2015/2016 whereby the UPF was allocated the largest share of the amount availed to JLOS institutions that is 53.2% (UShs.661.926 billion which is approximately $184.9 billion).[119] However, the judiciary was merely allocated 8.8% (UShs.109.730 billion which is approximately $30.7 million) and the DPP 2.3% (UShs.28.822 billion which is approximately $8 million)[120] far less than what was allocated to the UPF. This means that the GoU prioritises the work of some institutions over other institutional businesses, which perhaps contributes to shortage of funds in these institutions.

The impact of shortage of funds has been felt in the judiciary whereby it was reported that in the financial year 2014/2015, the performance of the High Court of Uganda was below expectation in that less than 50% of the sessions could be financed from the available funds.[121] More so, it is has been reported that the occasional postponement of the trial of Thomas Kwoyelo before the ICD is partly due to shortage of funds to conduct trial and other activities such as community outreach programmes.[122]

---

[116] Heller, above n 3, 100.
[117] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16',above n 15, 143.
[118] Ibid, 141.
[119] Ibid, 142.
[120] Ibid.
[121] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/15', above n 15, 31.
[122] Lino Owor Ogora, 'Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications' (22 July 2016), available at <https://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/> last visited, 30 August 2017.

Arguably, the failure to hold court sessions due to shortage of funds partly contributes to the case backlog and particularly, in the financial year 2015/2016 the High Court of Uganda was registered as having the highest case backlog of 37% of all courts in Uganda.[123] Indeed, case backlog affects all Divisions of the High Court including the ICD which handles ICC crimes. As mentioned already, judges of the ICD are assigned multiple cases in other Divisions of the High Court to curb the case backlog.[124] It appears that other cases are prioritised over cases relating to ICC crimes because at the time of writing, it was only the *Thomas Kwoyelo Case*[125]pending before the ICD with other 15 cases involving international crimes.[126]

In addition, some activities of the judiciary are under-funded such as staff training as evident in the financial year 2010/2011 whereby UShs.3,026,200,000 (approximately $845,308) was the estimated budget for training staff but only UShs.1,200,000,000[127] (approximately $335,196) was approved. Arguably, underfunding activities of the judiciary such as staff training may negatively affect enforcement of justice for ICC crimes. This is because it is believed that cases involving international crimes require 'better-trained personnel and significantly more financial resources'[128] to investigate, prosecute and adjudicate effectively. Consequently, specialised training for personnel handling ICC crimes seems to be mostly availed by CSOs than respective governments. In fact, it was reported that training of officials of the ICD was offered by foreign donor agencies such as the Institute for Security Studies (ISS) in several courses but was not part of the Judicial Studies Institute (JSI) training programmes.[129] This shows that the GoUs involvement in the training of ICD personnel is minimal.

Similarly, the problem of shortage of funding has affected institutions in South Africa such as the NPA leading to the significant reduction of the upskilling programme for prosecutors.[130] This means that continuous training of staff of the NPA is curtailed by shortage of funding availed to this institution. Compared to Uganda, continuous training in conducting proceedings for ICC crimes in South Africa seems to be offered mainly by CSOs

[123] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 65.
[124] See chapter 3, section 2.2 concerning the International Crimes Division (ICD).
[125] *Thomas Kwoyelo Case*, above n 30.
[126] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 54.
[127] The 13th Annual Judges' Conference Report 2010, 'Consolidating the Achievements of JLOS Quick Win Backlog Reduction Strategy', held from 16-20 January 2010 at Mbale Resort Hotel, Uganda, 10.
[128] Heller, above n 3, 100.
[129] Hon. Justice Moses Mukiibi, 'International Crimes Division Annual Report 2014', above n 91, 5-6 and 8.
[130] The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 247.

including the ISS.[131] This means that national institutions rely on CSOs for capacity building in handling ICC crimes since funding for such training may not be availed by the government.

Due to limited budgets, institutions in Uganda seem to depend on donor funding to obtain some resources such as physical infrastructure and equipment. However, this not sustainable and as noted above the suspension of financial support from the Netherlands in the financial year 2013/2014 of UShs.23.4 billion (approximately $6.54 million) led to reduction in the construction projects owing to insufficient funds.[132] Particularly, as noted already, the ICD of Uganda is housed in inadequate facilities[133]thereby hampering the operations of this institution. It is submitted that dependency on donor funds to develop national institutions is problematic due to changes in donor priorities which may adversely affect the activities of institutions that rely on such funds as the case in Uganda.[134]

Therefore, the challenge of insufficient resources is majorly caused by shortage of funding faced by various institutions in Uganda and South Africa. This has affected programmes such as staff training as well as infrastructural development and maintenance. With such state of affairs, conducting effective domestic proceedings for ICC crimes remains problematic for both Uganda and South Africa. However, Uganda appears to be faced with more challenges than South Africa due to limited finance compared to South Africa.[135]Moreover as mentioned above, political reasons are cited as one of the causes for limited resources in institutions which enforce justice in Uganda such as the judiciary with respect to budget allocation and appointment of judges. It is contended that with less political support for investigations and prosecutions for ICC crimes, effective implementation of the Rome Statute in Uganda may not be realised. The section which follows analyses the obstacle of limited political will to demonstrate the extent to which the obstacle has curtailed the implementation of the Rome Statute in Uganda and South Africa.

[131] Maunganidze and du Plessis, above n 23, 76.
[132] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', above n 16, 132 and the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 23.
[133] Hon. Justice Moses Mukiibi, above n 91, 7. See chapter 5, section 2.2.1 on insufficient physical infrastructure.
[134] Note should be taken that South Africa receives funds from donors such as the government of the Swiss Federation, European Union, GIZ (Germany), USAID and UNICEF apparently not for capital projects but for several programmes. See above n 87.
[135] See the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 142 and The Department of Justice and Constitutional Development, 'Annual Report 2015/2016', above n 34, 69.

3. Limited Political Will

Domestic implementation of the Rome Statute requires full support from the GoU and the government of South Africa to ensure that necessary measures are undertaken to give effect to the provisions of the Statute. While both states have undertaken legislative and non-legislative measures to enable cooperation with the ICC as well as facilitate national proceedings for ICC crimes,[136] actual proceedings involving ICC crimes remain minimal. This is evident in Uganda where many ICC crimes committed in Uganda remain unaccounted for by state actors that is, the Uganda Peoples Defence (UPDF) and non-state actors that is, the LRA with only one case so far before the ICD since its establishment in 2008.[137]

With respect to South Africa, relevant authorities declined to initiate investigations into crimes against humanity allegedly committed in Zimbabwe by Zimbabweans some of whom normally visited South Africa which would entail application of South Africa's ICC Act.[138] Moreover, both Uganda and South Africa declined to cooperate with the ICC in arresting and surrendering President Al Bashir.[139] This displays limited support from the GoU and the government of South African in ensuring that ICC crimes are effectively investigated and prosecuted at the national level as well as facilitating cooperation with the ICC.

This section examines limited political will of the GoU and the government of South Africa as an obstacle to the implementation of the Rome Statute in these states. Limited support for domestic proceedings for ICC crimes is examined firstly, with respect to the GoU focusing on failure to act by the GoU where institutions which enforce justice are interfered with in executing their work, as well as failing to conduct proceedings for ICC crimes with regard to military personnel of the UPDF alleged to have committed such crimes. Lastly, limited political will of the government of South Africa is also examined focusing on improper influence of the government in the work of prosecuting authorities, as well as the failure to prosecute by the NPA even where there is sufficient evidence to do so. This is aimed at highlighting actions of both governments which could prevent national institutions from conducting proceedings for ICC crimes.

---

[136] See chapters 3 and 4 on Uganda and South Africa respectively.

[137] *Thomas Kwoyelo Case*, above n 30. See chapter 3, section 2.2 on the International Crimes Division (ICD).

[138] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, (Case No. 77150/09) High Court of South Africa [2012] ZAGPPC 61 (8 May 2012) (hereinafter, *Zimbabwe Torture Case*), see chapter 4, section 3.1.1.B analysing the Case.

[139] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016) and *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (4 September 2015).

3.1. Limited Political Support by the Government of Uganda

Domestic institutions engaged in investigating, prosecuting and adjudicating ICC crimes in Uganda like the police, DPP as well as courts lack full support from the GoU. This is because the GoU seem not to be interested in the activities of national institutions that handle ICC crimes. A notable example is the government's failure to intervene when these institutions are prevented from executing their duties and the reluctance of these institutions to proceed against state actors alleged to have committed ICC crimes. Both situations are examined below in two ways; 1) failing to intervene when the UPDF declined to surrender Caesar Acellam for prosecution; and 2) failing to support criminal prosecutions of the UPDF military personnel alleged to have committed ICC crimes.

3.1.1. Inaction in Event of Interference with the Enforcement of Justice for ICC Crimes

The GoU did not intervene when the UPDF declined to surrender Acellam for prosecution despite allegations that he committed ICC crimes. Acellam is a former LRA field commander who was captured in Central African Republic (CAR) in May 2012 and detained by the UPDF in 'Gulu barracks with very restricted movements and access.'[140] Investigations against Acellam were completed in 2013 and his file was sanctioned for prosecution.[141] Although the DPP filed charges against Acellam, an arrest warrant issued by Buganda Road Magistrates Court in 2014 was not executed 'due to a lack of cooperation from the UPDF.'[142] Instead, the UPDF allegedly 'granted him immunity and integrated him into the national army'.[143] As noted already, issuance of amnesty is permitted under section 3(1)(a) of the Amnesty Act where the former combatant reports to relevant authorities in Uganda including the Army[144] and renounces the armed rebellion as well as surrenders any weapon he or she

[140] Joyce Freda Apio, 'Accountability Efforts in Uganda, the Democratic Republic of Congo, and Nigeria; Securing Accountability For LRA Crimes in Uganda' in Southern Africa Litigation Centre, 'Civil Society in Action: Pursuing Domestic Accountability for International Crimes' International Criminal Justice Regional Advocacy Conference Report, (10-11 June 2014) Johannesburg-South Africa, 9-13, 11, available at <http://www.southernafricalitigationcentre.org/2015/01/15/international-criminal-justice-regional-advocacy-report-civil-society-in-action-pursuing-domestic-accountability-for-international-crimes/> last visited, 30 August 2017. See also Kihika and Regué, above n 61, 4.

[141] Joyce Freda Apio, Ibid.

[142] Kihika and Regué, above n 61, 4.

[143] Apio, above n 140, 11.

[144] Other authorities indicated in the Act are the 'Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader within the locality'. See Amnesty Act, 2000 (Cap 294, Laws of Uganda, 2000), Act 2 of 2000 (hereinafter, Amnesty Act) sec 3(1)(a).

may have in possession.[145]Indeed, it was reported that Acellam was granted amnesty in 2015[146] thereby blocking further proceedings against him.

Explicitly, the actions of the UPDF interfered with the independence of the DPP contrary to article 120(3)(a) of the 1995 Constitution of Uganda which empowers the DPP to 'direct the police to investigate any information of a criminal nature…' In addition, the DPP has powers to '*institute criminal proceedings against any person* or authority in a *court with competent jurisdiction* other than a Court martial.'[147] Moreover, in exercising these powers, the DPP '*is not under direction or control of any person or authority* …'[148] The Supreme Court of Uganda confirmed the prosecutorial powers of the DPP to be exercised independent of any authority without the necessity of giving reasons for his decision to prosecute.[149]Clearly, it is the DPP to decide whether or not to prosecute a person without direction from any person or authority. By declining to surrender Acellam for prosecution, the UPDF interfered with the independence of the DPP as well as the judiciary contrary to articles 120(6) and 128(1) of the 1995 Constitution of Uganda respectively.[150]

It appears that the GoU did not take any action to compel relevant officials of the UPDF to surrender Acellam for prosecution before he was granted amnesty. Since the GoU has responsibility over the UPDF,[151] failure to intervene in the matter seems to have endorsed the actions of the UPDF and no further proceedings can be commenced against Acellam after being granted amnesty.[152] In essence, the Amnesty Act was utilised to validate the actions of the UPDF of shielding Acellam from prosecution for ICC crimes.

It is inconceivable whether the UPDF will cooperate with respect to UPDF military personnel who allegedly committed similar crimes. This exhibits limited support from the GoU for domestic proceedings for ICC crimes. As a party to the Rome Statute, Uganda is required to perform the Statute in good faith and may not invoke provisions of its Amnesty

[145] Ibid, sec 3(1)(b)-(c), see also chapter 3, section 4.2.1 concerning the Amnesty Act (2000).
[146] IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', Samuel Okiror, 12 June 2015, available at <http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda> last visited, 30 August 2017.
[147] 1995 Constitution of Uganda, art 120(3)(b), emphasis added.
[148] Ibid, art 120(6) emphasis added.
[149] *Thomas Kwoyelo* Case, above n 30, 34. See also Daniel D. Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124-144, 125.
[150] Under the 1995 Constitution of Uganda, art 128(1) provides that '[I]n the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.' See also WJP Rule of Law Index 2015, above n 6, 47 and 48 respectively, where problems of prosecutorial independence and judicial independence were identified as a significant in Uganda.
[151] Uganda Peoples Defence Forces (UPDF) Act (2005) (hereinafter, UPDF Act) sec 8(1) the President is the 'Commander-in-Chief of the Defence Forces.' See also 1995 Constitution of Uganda, art 98(1).
[152] Under the Amnesty Act, above n 144, sec 2(2) any person granted amnesty is completely exonerated from punishment for any crime committed in the cause of the war.

Act for failing to give effect to the Statute.[153] As such, inaction by the GoU may warrant the intervention of the ICC by virtue of the principle of complementarity[154] since failure to take action by Uganda renders the case admissible before the ICC.[155]

3.1.2. Failing to Conduct Proceedings for Military Personnel of the UPDF

The GoU seems protective of the UPDF since no action has been taken against the UPDF military personnel alleged to have committed ICC crimes. It is questionable whether any case will be commenced at all in future against these state actors. This is due to the fact that there are no known investigations and prosecutions conducted domestically concerning ICC crimes allegedly committed by these personnel.[156] Although, it was reported that 'a handful of soldiers' were 'prosecuted before military courts for certain murders and cases of torture',[157] still these are ordinary crimes which do not equate to ICC crimes in terms of gravity and scale.[158] In fact by 2015, the registered war crimes cases were 35 of which some investigations had been concluded but concerned military personnel of the LRA and the Allied democratic Forces (ADF),[159] not the UPDF. Apparently, ICC crimes allegedly committed by the UPDF have not yet been investigated by national authorities of Uganda.

Moreover, the referral of the situation in northern Uganda to the ICC in December 2003 by President Yoweri Kaguta Museveni of Uganda only emphasised crimes committed by the LRA.[160] This displays selective enforcement of justice by the GoU yet the crimes were allegedly committed by both the LRA and the UPDF[161] which means that both parties to the armed conflict should be investigated and prosecuted. Notably, theGoU and some military officials indicated that the UPDF will not be tried by the ICC[162]but if the ICC established that

---

[153] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 26 and 27.
[154] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Preamble, para 10 and arts 1 and 17.
[155] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Judgment on Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', (ICC-01/04-01/07 OA 8) The Appeals Chamber (25 September 2009) para 78.
[156] Nouwen, above n 43, 231.
[157] Luke Mofett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 205.
[158] William Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 22; see chapter 2, section 4.1.1 on substantive crimes under the Rome Statute.
[159] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 68.
[160] See ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (ICC-20040129-44).
[161] Stephen Oola, 'In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 147-170, 152.
[162] Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179-198, 188.

the UPDF were implicated in commission of ICC crimes, the GoU was to try such officials.[163]This implies that authorities in Uganda await the ICC to disclose that the UPDF committed ICC crimes before initiating necessary domestic proceedings to address such crimes.

In any case, there is lack of clarity as regards to which court is to try such personnel for ICC crimes. Under the Uganda Peoples Defence Forces (UPDF) Act (2005), the UPDF are subject to military law[164] and military officials are tried by the General Court Martial which has unlimited original and appellate jurisdiction.[165] This implies that any proceedings for crimes allegedly committed by military personnel of the UPDF are to be conducted before the General Court Martial (GCM). However, it is thought that where criminal jurisdiction of some offences is limited to specific courts, the GMC may not have jurisdiction over such crimes.[166] In the case of *Attorney General v Uganda Law Society*,[167] the Supreme Court of Uganda held that the GMC had jurisdiction over persons subject to military law at the time of commission of the crimes and that the offence of terrorism created under section 6 of the Anti-Terrorism Act (2002) was only triable by the High Court thus the GMC had no jurisdiction over such a crime.[168]

This means that the GMC can only exercise jurisdiction over crimes committed by military personnel of the UPDF as set out under the UPDF Act.[169] Since ICC crimes are not listed as crimes within the jurisdiction of military courts, it is contended that the GMC cannot try military personnel of the UPDF alleged to have committed these crimes because it is only the ICD with such jurisdiction.[170] This is distinguished from military courts in the Democratic Republic of Congo (DRC) which have jurisdiction over ICC crimes.[171] Though it is thought that since many ICC crimes in the DRC are committed by military personnel, prosecuting

[163] Nouwen, above n 43, 229.
[164] UPDF Act, above n 151, sec 119(1)(a)-(b).
[165] Ibid, sec 197(2) which establishes the General Court Martial.
[166] Ronald Naluwairo, 'The Trials and Tribulations of Rtd. Col. Dr. Kizza Besigye and 22 Others: A Critical Evaluation of the Role of the General Court Martial in the Administration of Justice in Uganda' (Human Rights & Peace Centre, 2006) 15.
[167] *Attorney General v Uganda Law Society* (Constitutional Appeal No. 1 of 2006) Supreme Court of Uganda (20 January 2009) 10.
[168] Ibid.
[169] See UPDF Act, above n 151, Part IV which provides for offences triable by military courts in Uganda.
[170] The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, sec 6.
[171] Dunia P. Zongwe, 'Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo' (2013) 46(2) *Israel Law Review* 249-269, 258-259.

such crimes by military courts is practical and that cooperation from the military may not be obtained by civilian judges since military courts are facing similar challenges.[172]

For the case of Uganda, it seems unlikely that proceedings for ICC crimes against the UPDF will be undertaken before the ICD because institutions which investigate and prosecute ICC crimes in Uganda seem reluctant to commence proceedings against the UPDF. According to Sarah Nouwen, '[n]either the army nor the police nor the DPP has an incentive to enter into this political arena, and risk their job, without external pressure or "cover".[173] It seems that national authorities handling ICC crimes lack independence in conducting their activities to the extent of avoiding commencing proceedings against military personnel of the UPDF who are alleged to have committed such crimes because these are deemed 'politically sensitive cases'[174]This means that these personnel fear the possibility of confronting the GoU with respect to ICC crimes allegedly committed by the UPDF. Perhaps that is why these institutions have mainly investigated ICC crimes committed by non-state actors like the LRA and the ADF[175] which shows selective justice for ICC crimes.[176]Thus, domestic proceedings for ICC crimes remain minimal in Uganda and seem focused on non-state actors as evident in the ongoing investigations noted above.[177]

In fact, the police seem to lack impartiality as illustrated by communication from the police spokesperson, Mr. Fred Enanga who is reported to have alerted members of the local and international media 'to desist from giving platform' to 'criminally-minded elements' who were planning to run stories in the media.[178] He was referring to individuals who were accusing the army for committing atrocities in northern Uganda against civilians during the armed conflict and intended to use the media to publicise such information.[179] The Police was reported to be working with 'sister security agencies' to hunt down 'these criminals', a statement which the army and security organs denied any knowledge of.[180]

---

[172] International Centre for Transitional Justice (ICTJ), 'The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)' (July 2015) 11, available at <https://www.ictj.org/publication/briefing-accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-response> last visited, 30 August 2017.
[173] Nouwen, above n 43, 231.
[174] Ibid, 177.
[175] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 68.
[176] For examples of other states where selective justice was conducted, see chapter 2, section 5.2 concerning non-legislative obstacles.
[177] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 68.
[178] Andrew Bagala and Risdel Kasasira, 'Army Disagrees with Police over on War Crimes' *Daily Monitor*, Tuesday 24 February, 2015, available at <http://www.monitor.co.ug/News/National/Army--disagrees---police--war-crimes/-/688334/2633218/-/7c1h9dz/-/index.html> last visited, 30 August 2017.
[179] Ibid.
[180] Ibid.

It is submitted that such a statement was intended to intimidate people who wanted to publicise information about crimes allegedly committed by the military personnel of the UPDF. Although the army disassociated itself from the statement made by the police spokesperson, it demonstrated that the police were not impartial in investigating ICC crimes committed by both parties to the armed conflict in northern Uganda. Instead, persons who may have witnessed crimes allegedly committed by military personnel of the UPDF during this conflict were intimidated by the police. Arguably, the police wanted to shield such personnel from accountability for ICC crimes yet continue to investigate the LRA for the same crimes as noted above.[181] This amounts to selective justice which endorses impunity of perpetrators of ICC crimes committed in northern Uganda.

This shows that there is limited cooperation in government institutions in ensuring that perpetrators of ICC crimes are investigated and prosecuted. This is majorly attributed to the failure of the GoU to actively support domestic proceedings against perpetrators of such crimes as the Acellam incident has exhibited. Additionally, the GoU has failed to ensure that military personnel of the UPDF alleged to have committed ICC crimes are investigated and prosecuted. This shows limited support from the GoU for such proceedings hence curtailing effective implementation of the Rome Statute in Uganda.

Therefore, intervention by the UPDF in the DPP's exercise of prosecutorial powers when they declined to surrender Acellam for prosecution prevented the DPP from commencing domestic proceedings for ICC crimes allegedly committed by Acellam. This was exacerbated by lack of response from the GoU to compel relevant UPDF officials to cooperate with the DPP's office. Such inaction from the GoU coupled with the failure to support investigations and prosecutions of military personnel of the UPDF alleged to have committed ICC crimes appear to have endorsed the actions of the UPDF. This exhibits limited support from the GoU for domestic proceedings of ICC crimes which curtails effective implementation of the Rome Statute in Uganda.

3.2. Limited Political Support by the Government of South Africa

Compared to Uganda, domestic implementation of the Rome Statute in South Africa by national institutions seems to be curtailed by limited political will of the government. Particularly such interference is prevalent in the prosecuting authorities whereby influence of the government is exhibited in the appointment of senior prosecuting officials such as the

[181] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 67, 68.

National Director of Public Prosecutions.[182] Additionally, in some cases the Priority Crime Litigation Unit (PCLU), a special unit in the National Prosecuting Authority (NPA) responsible for investigating and prosecuting crimes under South Africa's ICC Act[183] declined to exercise its powers[184] probably due to limited support from the government for such proceedings. This section analyses firstly, improper influence in the work of the NPA by the executive; and lastly, the NPA's exercise of discretion not to prosecute as possibly curtailing domestic proceedings for ICC crimes in South Africa.

3.2.1. Improper Influence in the Work of the National Prosecuting Authority (NPA)

The NPA of South Africa seems to lack independence in operating its activities due to the nature of appointment of senior staff like the National Director of Public Prosecutions (NDPP). Particularly section 179(1)(a) of the 1996 Constitution of South Africa established the office of the NPA headed by the NDPP who is appointed by the President[185] without consultation or recommendation from any authority. By contrast, in Uganda the DPP is 'appointed by the President on the recommendation of the Public Service Commission and with the approval of Parliament.'[186] In essence, the President of Uganda cannot appoint the DPP without the recommendations and approval of relevant authorities probably to check the presidential power of appointment.

After appointment by the President the NDPP is entrusted with the authority to commence criminal proceedings on behalf of the state and carry out any necessary functions incidental thereto[187] such as reviewing 'a decision to prosecute or not to prosecute,[188] as well as conducting any investigation deemed necessary for prosecution of a case.[189] With respect to ICC crimes, South Africa's ICC Act requires the NDPP when making a decision to prosecute to recognise 'in the first instance' that South Africa has the jurisdiction and

[182] See for example in the case of *Democratic Alliance v President of the Republic of South Africa and Others*, Case No. 263/11 [2011] ZACC 241, Supreme Court of Appeal of South Africa (1 December 2011).
[183] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', above n 44, 16.
[184] See for example the *Zimbabwe Torture Case*, above n 138 as discussed in chapter 4, section 3.1.1.B and declined to seek for an arrest warrant against the late Prime Minister of Ethiopia Meles Zenawi ahead of his visit to South Africa for crimes allegedly committed in Ethiopia. See Maunganidze and du Plessis, above n 23, 75.
[185] National Prosecuting Authority Act (1998), Act 32 of 1998, sec 10.
[186] 1995 Constitution of Uganda, art 120(1).
[187] 1996 Constitution of South Africa, sec 179(2) and National Prosecuting Authority Act (1998), above n 185, sec 20(1)(a).
[188] National Prosecuting Authority Act (1998), ibid, sec 22(2)(c).
[189] Ibid, sec 22(4)(a)(i).

responsibility to prosecute persons accused of committing such crimes.[190] In essence, in making prosecutorial decisions the NDPP has to consider South Africa's responsibility to prosecute ICC crimes with importance. In effect, South Africa's ICC Act clearly spells out the responsibility of South Africa to prosecute ICC crimes which the NDPP has to consider in making prosecutorial decisions which is not the case for Uganda's ICC Act. Moreover, in carrying out such functions, the NDPP as the head of the NPA is required to act 'without fear, favour or prejudice'.[191]These provisions are intended to strengthen the office of the NDPP.

However, such constitutional requirement may be compromised where the NDPP is appointed on the whims of the President without following proper procedures. A notable example is the case of *Democratic Alliance v President of the Republic of South Africa and Others*[192]where President Jacob Zuma appointed Mr. Menzi Simelane as the NDPP in 2009 to replace Mr. Vusumzi Patrick Pikoli. This was done after the Public Service Commission (PSC) had recommended that disciplinary action be taken against Simelane.[193] This was for making misleading statements during the Ginwala Commission established to inquire into Pikoli's fitness for the office of the NDPP in which Simelane participated leading the government team.[194] Specifically, Simelane's testimony was found 'contradictory and without basis or in law'[195] by the Commission but Simelane was later appointed as NDPP after the government reached a settlement with Pikoli.[196]

This implies that the appointment of Simelane by President Zuma was not on merit since no proper inquiries were made as regards to the suitability of Simelane for the position of the NDPP especially regarding questions of 'his intergrity and experience'.[197] It is debatable whether Simelane would have exercised independence as the NDPP considering his appointment being contested as unsuitable for the position.[198] This brings into question

[190] Implementation of the Rome Statute of the International Criminal Court Act (2002) (hereinafter, South Africa's ICC Act), sec 5(3).
[191] 1996 Constitution of South Africa, sec 179(4); National Prosecuting Authority Act (1998), above n 185, sec 32(1)(a). See also *Certification of the Constitution of the Republic of South Africa,1996*, (Case No. CCT 23/96) Constitutional Court of South Africa (6 September 1996) para 146.
[192] *Democratic Alliance v President of the Republic of South Africa and Others*, above n 182.
[193] Ibid, para 11.
[194] Ibid, para 18. The Ginwala Commission found the charges against Pikoli unsubstantiated and recommended his reinstatement as NDPP (see para 22).
[195] Ibid, para 23 and also para 24.
[196] Ibid, para 12.
[197] Ibid, para 121.
[198] A similar problem was experienced in Bosnia and Herzegovina whereby prosecutorial independence was lacking partly due to the appointment process of the prosecutor not based on merit but mainly on 'ethnic or political considerations'. See Organization for Security and Co-operation in Europe (OSCE), 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles' (March 2005) 33 (on file with the author).

the appointment process of prosecuting authorities and the likelihood of exercising their powers without improper influence from the government.

Notably the 1996 Constitution of South Africa envisages prosecuting authorities acting independently[199] but at the same time grants the Minister of Justice and Constitutional Development powers to 'exercise final responsibility over prosecuting authority'[200] which indicates lack of independence of the NPA. Still, this is contrasted with the DPP of Uganda mentioned above who is required to exercise his powers without any direction or control of any authority or person.[201] Moreover, other senior officers of the NPA like the Deputy National Directors of Public Prosecutions and Directors of Public Prosecutions (including Investigating Directors and Special Directors) are all appointed by the President in consultation with the Minister and the NDPP.[202]

It is contended that the appointments of senior prosecuting authorities in South Africa are political appointments since both the Minster and the NDPP who advise the President in the appointment process are appointed by the President single-handedly. It is uncertain whether prosecutorial discretion can be exercised by these personnel without interference from the executive. Although exercising prosecutorial powers is an executive function,[203] the office of the prosecutor must have independence in exercising prosecutorial discretion.

Jean Redpath analysed the NDPP's performance since establishment of the NPA noting frequent changes of personnel serving as NDPPs coupled with resignation and suspension of some NDPPs under suspicious circumstances.[204] Notable among such cases is one of Vusumzi Patrick Pikoli whose suspension by President Thabo Mbeki in 2007 was suspicious due to different reasons advanced by some officials as grounds for his suspension.[205] It transpired during the Ginwala Commission mentioned above[206] that there was political

[199] 1996 Constitution of South Africa, sec 179(4) provides that '[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'
[200] 1996 Constitution of South Africa, sec 179(6).
[201] 1995 Constitution of Uganda, art 120(6).
[202] National Prosecuting Authority Act (1998), sec 11(1) and 13(1)(a)-(c) respectively.
[203] Daniel D. Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124-144, 126.
[204] See full discussion in Jean Redpath, 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa', Institute for Security Studies (ISS) Monograph No. 186 (2012) 11-19. More about the NPA's involvement in political battles see for example, Anton du Plessis, Jean Redpath and Martin Schonteich, 'Report on the South African National Prosecuting Authority' in Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* (Open Society Institute 2008) 343-383, 370-372.
[205] Nico Horn, 'The Independence of the Prosecutorial Authority of South Africa and Namibia; A Comparative Study' in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia* (Konrad-Adenauer Stiftung 2008) 113-134, 131.
[206] *Democratic Alliance v President of the Republic of South Africa and Others*, above n 182, para 18.

interference with Pikoli's work as NDPP when he was instructed not to arrest Jackie Selebi, the Police Commissioner (who was facing charges of corruption).[207] This shows the level of interference of the government in the work of the NDPP to the extent of stopping him from exercising his prosecutorial role which is also exhibited with respect to the TRC cases as partly contributing to Pikoli's suspension.[208] Arguably, the removal of the NDPP from office without clear reasons depicts lack of independence of the NDPP hence threatening security of tenure of other personnel in the NPA.[209]

With respect to ICC crimes, lack of independence of the NPA was exhibited in the *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (*Zimbabwe Torture Case*)[210] where the NDPP declined to direct investigations into alleged crimes of torture committed in Zimbabwe. This was partly because such investigations would 'negatively impact on South Africa's international relations with Zimbabwe.'[211] This reasoning would be plausible if investigations were to be conducted in Zimbabwe without its consent, which would be in breach of Zimbabwe's sovereignty because states are prohibited from exercising criminal jurisdiction in the territory of another state without its consent.[212]

In fact the High Court pointed out that investigations would have been commenced in South Africa by interviewing witnesses and also attempts made to secure Zimbabwe's cooperation in that regard[213] which of course was not be contrary to international law. Thus the Court decided that the NDPP was required to act independently[214] in exercising his duties 'without fear or favour' and was not expected 'to blindly follow political views or

[207] Ibid, para 29; see also Horn, above n 205, 131.
[208] *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, Case No. 35554/2015, High Court of South Africa, Vusumzi Patrick Pikoli (former NDPP)'s Affidavit (6 May 2015) para 75 and 76; see also Anton Rossouw Ackermann (former Special Director of Public Prosecutions and the Head of the PCLU)'s Affidavit (7 May 2015) para 7, all available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-challenging-npa-inaction-for-trc-related-prosecutions/> last visited, 30 August 2017.
[209] *Pikoli, Vusimuzi Patrick v The President, the Speaker of the National Assembly and the Chair of the National Council of Provinces*, Case No. 8550/09, High Court of South Africa (13 November 2009) para 54, where prosecutorial independence was discussed as entailing among others; security of tenure of the NDPP who 'can only be removed from office on limited grounds' and taking decisions to prosecute without interference from the executive.
[210] *Zimbabwe Torture Case*, above n 138.
[211] Ibid, para 10.1.5.
[212] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 2002, 3 (14 February 2002) (hereinafter, *Arrest Warant Case*), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 54.
[213] *Zimbabwe Torture Case*, above n 138, para 31.
[214] Ibid, para 29.

policies'.[215] It remains to be seen whether the NPA will commence investigations into allegations of torture committed in Zimbabwe.

3.2.2. The NPA Exercise of Discretion not to Prosecute

The performance of the NPA is said to be unsatisfactory due to 'non-prosecution of a number of high profile cases', prosecution of 'too few cases' and 'losing a number of high-profile cases.'[216] Particularly, the NPA's selection of cases for prosecution has been criticised as 'inevitably political'[217] due to the failure to prosecute many TRC cases. Some of the cases which ended in acquittal such as the *Magnus Malan Case* the judgment was accepted by President Nelson Mandela who called upon South Africans to do the same.[218]

Moreover, the NPA seemed reluctant to prosecute crimes committed during the apartheid era to the extent of amending the prosecutorial policy in 2005.[219] The NPA Prosecution Policy (2005) contained clauses that permitted the NDPP not to prosecute but 'enter into agreements' with persons who 'committed crimes before 11 May 1994' and were 'prepared to unearthing the truth of the conflicts of the past'.[220] Indirectly, the Policy was extending amnesty to persons alleged to have committed serious crimes in the past in exchange for truth without any form of accountability for such crimes which condoned impunity.

However, this policy was struck down by court in the case of *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*.[221] Justice M.F Legodi held that the NDPP has a 'constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted' and that declining to prosecute 'where

---

[215] Ibid, para 31.

[216] See Martin Schönteich, 'Strengthening Prosecutorial Accountability in South Africa', Institute for Security Studies (ISS) Paper No. 255 (April 2014) 4 and Redpath, above n 204, 36 noting the increase in number of prosecutors without corresponding increase in number of trials finalised.

[217] Mia Swart, 'The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?' (2008) 68, *ZaöRV*, 209-226, 224. See also Redpath, above n 204 concerning the reluctance of the NDPP to prosecute politically-connected persons.

[218] Mia Swart, ibid, 224.

[219] See Prosecution Policy and Directives Relating to Prosecution of Criminal Matters Arising from Conflicts of the Past (hereinafter, the NPA Prosecution Policy) (December 2005), (on file with the author) para 1.3. This Policy was approved by the Cabinet and Parliament of South Africa and entered into force on 1 December 2005. See Louise Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa', Working Paper No.2 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (February 2009) 116.

[220] NPA Prosecution Policy, ibid, para A1(c)-(d). See also *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, Case No. 32709/07, High Court of South Africa (12 December 2008) para 8 which sets out relevant contents of the NPA Prosecution Policy (2005).

[221] *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, ibid, para 8.

there is a strong case and adequate evidence' is unconstitutional.[222] In other words, it was a constitutional duty for the NPA to prosecute where there was sufficient evidence to prove commission of the alleged crime. Thus, the Court declared *inter alia*, that the 'policy amendments to the National Prosecution Policy dated the 1 December 2005' was 'inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.'[223] Although this decision marked the end of the Policy which curtailed prosecution of past crimes, still the NPA has taken lukewarm response to order for investigations and prosecutions of these crimes.[224] This depicts lack of interest of the NPA in pursuing these cases and as noted above, there is government interference in the matter as stated by the former NDPP, Vusumzi Patrick Pikoli and the former Special Director of Public Prosecutions and Head of the PCLU, Anton Rossouw Ackermann.[225]

Notwithstanding the failure of the NPA to prosecute serious crimes, courts in South Africa have continued to affirm the NPA's duty to prosecute 'where there is a reasonable prospect of success' as illustrated in the case of *Freedom Under Law v National Director of Public Prosecutions & Others.*[226] In this case a Special Director of Public Prosecutions, Lawrence Mrwebi withdrew criminal charges of fraud, corruption and murder against the Head of Crime Intelligence, Richard Mdluli in spite of the evidence implicating Mdluli[227] and without consulting the DPP as required under section 24(3) of the National Prosecuting Authority Act (1998). The decision of the Special DPP not to prosecute without consulting the DPP was declared illegal and set aside by Court.[228] Since the NDPP is empowered to prosecute under the 1996 Constitution of South Africa,[229] declining to prosecute crimes without sufficient reason violates the Constitution and is contrary to the powers entrusted in the NDPP.

[222] Ibid, para 15.4.4.
[223] Ibid para 18.1.
[224] *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, Case No. 35554/2015, High Court of South Africa, 'Founding Affidavit' (18 May 2015) paras 18-21, available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-challenging-npa-inaction-for-trc-related-prosecutions/> last visited, 30 August 2017.
[225] Ibid, Vusumzi Patrick Pikoli's Affidavit (6 May 2015) paras 75-76 and Anton Rossouw Ackermann's Affidavit (7 May 2015) para 7 to the effect that he was 'stopped from pursuing the investigation and prosecution of the so-called political cases arising from South Africa's past ("the TRC cases").'
[226] *Freedom Under Law v National Director of Public Prosecutions & Others* 2014 (1) SA 254 (GNP) High Court of South Africa (23 September 2013) para 92.
[227] Ibid, para 10, paras 69-71 and paras 91-92.
[228] Ibid, paras 164 and 241(a)-(c).
[229] 1996 Constitution of South Africa, sec 179(2).

As noted above, reluctance by staff of the NPA to prosecute past crimes[230] and politically-connected persons as well as state authorities is thought to be as a result of political influence on the NPA by the executive.[231] Such past practices of the NPA may have affected proceedings for ICC crimes which the NPA seems unwilling to prosecute as exhibited in *Zimbabwe Torture Case*[232]discussed above coupled with the reluctance to commence proceedings against President Al Bashir.[233] In the case of *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others* (*Al Bashir Case*), the interim court order issued by the High Court to prevent President Al Bashir from leaving South Africa was not executed.[234] This also involved the NDPP as one of the 'government officials responsible for the arrest and/or detention of persons' suspected of having committed crimes.[235] The explicit disregard of a court order by relevant officials violated the rule of law and the government of South Africa breached its Rome Statute obligations of cooperating with the ICC in arresting and surrendering President Al Bashir.[236]

In view of such actions, the government of South Africa exhibited lack of political will in supporting criminal proceedings for ICC crimes and even disregarded court orders demanding for action.[237]Arguably, the government's influence on the work of the NPA curtails the operations of the NPA as exhibited in the failure to prosecute the TRC cases which involved government officials.[238] Perhaps this explains the reluctance to prosecute ICC crimes because it is thought that international crimes (including ICC crimes) by their very nature normally involve 'powerful political interests' with state agents implicated as

[230] For instance, the Truth and Reconciliation Commission of South Africa handed the NPA 'more than 450 cases' of which the 'prosecution service identified only sixteen cases' as feasible for prosecution. See Antje du Bois-Pedain, 'Accountability Through Conditional Amnesty: The Case of South Africa' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) 238-262, 255.
[231] Redpath, above n 204, 11-19; see also *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, Case No. 35554/2015, High Court of South Africa, Vusumzi Patrick Pikoli's Affidavit (6 May 2015) paras 75-76 and Anton Rossouw Ackermann's Affidavit (7 May 2015) para 7.
[232] *Zimbabwe Torture Case*, above n 138.
[233] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, (Case No. 27740/15) Interim Order (14 June 2015) and Judgment (24 June 2015).
[234] Ibid, Interim Order, 2 and Judgment, para 5.
[235] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Applicant's Founding Affidavit (14 June 2015) 13, available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/> last visited, 30 August 2017.
[236] See also *The Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17, Supreme Court of Appeal of South Africa (15 March 2016) para 113.4.
[237] See the *Zimbabwe Torture Case* and the *Al Bashir Case* discussed in chapter 4, sections 3.1.1.B and 5.1.A
[238] *Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others*, above n 231, para 60.

perpetrators of such crimes.[239] It is contended that lack of independence of the NPA and South Africa's limited support for domestic proceedings for ICC crimes has curtailed effective implementation of the Rome Statute in South Africa.

Therefore, less support for domestic proceedings of ICC crimes has been exhibited by the GoU and the government of South Africa as discussed above. This is partly because institutions engaged in investigating, prosecuting and adjudicating such crimes lack independence due to interference with activities of these institutions by other organs of the state and government bodies. However, the actions of these institutions are not questioned by respective governments leading to the perceived government support for such interference. Without full support from the GoU and the government South African for domestic proceedings of ICC crimes, less will be realised in implementing the Rome Statute in Uganda and South Africa.The next section examines the activities of Civil Society Organisations (CSOs) as partly curtailing domestic implementation of the Rome Statute in Uganda and South Africa.

4. Limited Support from Civil Society Organisations

As noted previously, CSOs are vital in enhancing the capacity of states to investigate and prosecute ICC crimes[240] as well as pressuring states into action in case of general reluctance by governments to support such proceedings.[241]The term civil society is broadly construed to mean 'many forms of social organizations formed voluntarily by citizens to advance shared goals or interests'.[242] Such organisations include independent public policy research organisations, advocacy organisations, professional, academic and recreational associations, trade unions, social movements, special interest groups and Non-Governmental Organisations (NGOs).[243]

---

[239] Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of- Law Policymakers, Donors, and Implementers* (Open Society Foundations 2011) 72, available at <https://www.opensocietyfoundations.org/reports/international-crimes-local-justice> last visited, 30 August 2017.

[240] ICC-Resolutions and Declarations, 'Resolutions and Declarations adopted by the Review Conference', Resolution RC/Res.1, above n 12, para 8.

[241] Charles C. Jalloh, 'The Role of Non-Governmental Organizations in Advancing International Criminal Justice' in M. Cherif Bassiouni (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015) 589-616, 590.

[242] Stephen Matias, 'Inter-Governmental Organisations and International Non-Governmental Organizations in the Era of Globalization, and How They Can Protect Human Rights and Support International Criminal Justice' in M. Cherif Bassiouni (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015) 575-587, 577. See also Corinne Parver and Rebecca Wolf, 'Civil Society's Involvement in Post-Conflict Peacebuilding' (2008) 36(1) *International Journal of Legal Information* 51-79, 53.

[243] Ibid; see also Simon Stacey and Sada Aksartova, 'The Foundations of Democracy: U.S. Foundation Support for Civil Society in South Africa 1988-96' (2001) 12(4) *International Journal of Voluntary and Nonprofit*

In essence, CSOs comprises of different types of organisations and actors performing different functions to advance interests of the members. It is such organisations at various levels which have contributed to the domestic implementation of the Rome Statute[244] for example, by availing information to states to facilitate the drafting of national implementing legislation,[245] as well as advocating for the domestication of the Rome Statute and cooperation with the ICC.[246]

While CSOs in South Africa have taken positive steps to ensure that the government fulfils its obligations under the Rome Statute,[247] CSOs in Uganda appear inactive in promoting domestic proceedings for ICC crimes.[248]Perhaps, the disparity in influencing the implementation of the Rome Statute is due to the fact that CSOs in South Africa and Uganda operate in different circumstances[249] such as the legal environment. In addition, some of the activities of the CSOs in both states seem to limit the promotion of domestic implementation of the Rome Statute in Uganda and South Africa.

The section firstly, provides insight into the circumstances within which CSOs in Uganda and South Africa operate to show how this has influenced the relationship between CSOs and the respective governments which ultimately affects the activities of these organisations. Secondly, the section examines the nature of activities conducted by CSOs to show how these activities may limit the participation of these organisations in influencing political will of the governments and lastly, prioritisation of activities by CSOs which attract funding from government and donors is also examined as a limitation of the capacity of CSOs to promote domestic proceedings for ICC crimes.

Organizations 373-397, 383 and D. J. Fourie and U. Kakumba, 'Assessing the Role and Capacity of Civil Society Organisations in Holding Local Government Accountable in Uganda' (2011) 4(2) *African Journal of Public Affairs* 54-66, 55.

[244] See chapter 6 for the role of CSOs in strengthening the implementation of the Rome Statute at various levels.

[245] See for example the Legal Tools Project as acknowledged in the ASP, 'Resolution on Cooperation', ICC-ASP/14/Res.3, para 8, see Assembly of States Parties, Fourteenth Session, The Hague, 18-26 November 2015, Volume I, (ICC-ASP/14/Res.3) 27-30.

[246] Matthew Cannock, 'Strengthening International Criminal Court Cooperation – The Role of Civil Society' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 318- 365.

[247] These include reminding relevant officials to cooperate with the ICC as well as commencing court proceedings to compel state action in that regard, see *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, (Case No. 27740/15) High Court of South Africa (24 June 2015) (hereinafter, *Al Bashir Case*).

[248] This is evident from the Acholi Religious Leaders Peace Initiative (ARLPI) which has continuously promoted peace and reconciliation in the northern region than domestic proceedings for ICC crimes. See Jackee Budesta Batanda, 'The Role of Civil Society in Advocating for Transitional Justice in Uganda' (Institute for Justice and Reconciliation 2009) 2, available at <https://www.africaportal.org/dspace/articles/role-civil-society-advocating-transitional-justice-uganda> last visited, 30 August 2017.

[249] Ibid, 1.

4.1. Circumstances within which Civil Society Organisations Operate

CSOs in Uganda and South Africa seem to operate differently partly due to divergent historical backgrounds and varying relationships with respective governments. With respect to South Africa, it is believed to have a 'well developed, vibrant, and organised civil society'[250] which since the apartheid era, has been engaged in influencing government policies to ensure that services are provided to the people such as 'literacy, health care, human rights and welfare'.[251] However, after transition to democracy there was a shift from the 'politics of resistance to a politics of reconstruction' whereby CSOs were perceived as partners in reconstruction of the society.[252] This meant that CSOs had to move from opposition to collaboration with the government though such a relationship may limit the autonomy of CSOs with the likelihood of minimising criticism of government policies.

This may be the case where such CSOs depend on the government for funding and in fact, after transition to democracy donor funding was channelled to the democratically elected government.[253] In effect, direct funding from donors for activities of CSOs in South Africa reduced and many CSOs receive funding from the government.[254] Moreover, the government majorly supports CSOs engaged in delivery of social services[255] such as education, health and community development. Thus, there is a possibility of CSOs engaged in advocacy work not receiving funding from the government and those which depend on such funding may lose their ability to criticise the government notwithstanding the fact that these CSOs enjoy freedom of expression.[256] In effect, lack of funds could affect the ability of these CSOs to influence the government in giving effect to the provisions of the Rome Statute.

Whereas CSOs in South Africa operate under an enabling legal framework with fewer restrictions on the operations of these organisations,[257] CSOs in Uganda, since the colonial

---

[250] Anton du Plessis and Antoinette Louw, 'Crime and Crime Prevention in South Africa: 10 Years After' (2005) Revue canadienne de criminologie et de justice pénale 427-446, 434.

[251] Coalition on Civil Society Resource Mobilisation, 'Critical Perspectives on Sustainability of the South African Civil Society Sector' (Jacana Media (Pty) Ltd 2012) 10 (on file with the author).

[252] Adam Habib and Rupert Taylor, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) 10(1) *International Journal of Voluntary and Nonprofit Organizations* 73- 82, 75.

[253] Ibid, 76.

[254] National Development Agency, 'Review of the State of the Civil Society Organisations in South Africa', (February 2008) 18 (on file with the author).

[255] Coalition on Civil Society Resource Mobilisation, above n 251, 16 and 21.

[256] WJP Rule of Law Index 2015, above n 6, 37.

[257] See for example, Nonprofit Organisations Act (1997), Act No. 71 of 1997 (hereinafter, NPO Act) secs 2(a), 3 and 5(b)(i) which aim at ensuring that relevant state authorities support NGOs and create an enabling environment for operations of these organisations.

period through the repressive regimes[258] and to date, have been operating amidst restrictions. The GoU is suspicious of the activities of CSOs leading to strict regulation of these organisations. As evident in the Non-Governmental Organisations Act (2016) every CSO is required to operate after being issued with a valid permit by the National Bureau for Non-Governmental Organisations (Bureau).[259]

Specifically, the application for the permit must indicate the areas where the organisation may conduct its activities and its 'geographical area of coverage'.[260] This implies that CSOs in Uganda cannot operate in areas where they are not registered thereby restricting the activities of these organisations. Indeed the Act prohibits any organisation from extending 'its operations to any new area beyond the area it is permitted to operate' except with the recommendation from the Bureau through the District Non-Governmental Monitoring Committee.[261] It is contended that such restrictions are meant to regulate activities of CSOs within specified geographical areas.

On the contrary, although CSOs in South Africa are more concentrated in areas such as Gauteng than in areas such as Kwa Zulu-Natal,[262] there is evidence to suggest that CSOs in South Africa are not limited in their area of operation and that over 54% of the CSOs 'indicated that they served both urban and rural communities…'[263] However, it is larger CSOs with more resources which have wider coverage than smaller CSOs that tend to limit their activities to the immediate community.[264] Thus, geographical operation of CSOs in South Africa seems to be limited by availability of resources than legislation as the case in Uganda noted above.[265] Moreover, it is the larger CSOs with access to funds which have the ability to carry out advocacy work[266] beyond the immediate community. Perhaps that is why CSOs with better resources such as the Southern Africa Litigation Centre (SALC) seem to be more active in promoting justice for ICC crimes than other CSOs.[267]

---

[258] Fourie and Kakumba, above n 243, 56.
[259] Non-Governmental Organisations Act (2016), sec 31(1). This is after registration of the CSO with the Bureau on fulfilment of certain conditions specified under the Act. See sec 29(1)-(2).
[260] Ibid, sec 31(5)(b) and (d).
[261] Ibid, sec 44(b); see also sec 44(a) which prohibits an organisation from conducting activities in any part of the country without the approval of the District Non-Governmental Monitoring Committee and Local Government of the area and must have signed a 'memorandum of understanding with the Local Government to that effect.'
[262] National Development Agency, above n 254, 23.
[263] Ibid, 24.
[264] Ibid, 25.
[265] Non-Governmental Organisations Act (2016), sec 31(5)(b) and (d).
[266] Coalition on Civil Society Resource Mobilisation, above n 251, 17.
[267] SALC was established as 'an initiative of the International Bar Association and the Open Society Initiative for Southern Africa' with the aim of providing technical and financial support to domestic lawyers in the

It is contended that whereas CSOs in South Africa work in collaboration with the government mainly to provide services to the people as noted above,[268] CSOs in Uganda operate under strict regulation and seem to be treated more as a threat to security than partners with the government.[269] Therefore, the historical background of CSOs and their relationships with the respective governments seem to have influenced the nature of activities carried out by CSOs some of which negatively affect the implementation of the Rome Statute in Uganda and South Africa as discussed in the section which follows.

4.2. The Nature of Activities Carried out by Civil Society Organisations

Many CSOs in Sub-Saharan African states such as Uganda and South Africa engage in providing a range of services including basic services (health, education, food), natural resource management, youth empowerment and advocacy.[270] According to the United States Agency for International Development (USAID) CSO Sustainability indexes, CSOs in South Africa had the best score in service provision with Uganda in the fifth position.[271] Probably this is due to the creation of partnerships between CSOs in South Africa and the government of South Africa.[272] However, there is less involvement in advocacy work[273] which may be partly due to the 'fear of jeopardizing' funding relationships of CSOs with the 'government donors'.[274] It is submitted that reliance on the government for funding may diminish the critical role of CSOs in monitoring the activities of the government especially CSOs that are in partnership with the government.[275]

Southern African region handling human rights and public interest matters. See *Zimbabwe Torture Case*, above n 138, para 12 (on file with the author).

[268] Coalition on Civil Society Resource Mobilisation, above n 251, 16 and 21.

[269] See for example, the Non-Governmental Organisations Act (2016), secs 44(d)) and 44(f)) respectively.

[270] United States Agency for International Development (USAID), '2012 CSO Sustainability Index for Sub-Saharan Africa', 8, available at <http://www.usaid.gov/africa-civil-society/2012> last visited, 30 August 2017 (hereinafter, 2012 USAID CSOs Sustainability Report).

[271] Ibid; see also USAID CSOs Sustainability Reports for 2014 and 2015 at xiii, available at <https://www.usaid.gov/africa-civil-society> last visited, 30 August 2017.

[272] This is evident in partnerships created for crime prevention in order to contribute to the improvement in community policing, diversion and victim empowerment. See du Plessis and Louw, above n 250, 434. See for example, the Centre for Justice and Crime Prevention formed partnership with the Department of Social Development in the Northern Cape to reduce 'youth offending in the Upington region.' See Centre for Justice and Crime Prevention (CJCP), 'Projects', available at <http://www.cjcp.org.za/projects.html> last visited, 30 August 2017.

[273] For example in 2012 only 2% of the CSOs in South Africa were reported as focusing on 'law, advocacy and politics' with many CSOs mainly engaging in providing other services including education, health, social welfare, development and housing. See 2012 USAID CSOs Sustainability Report, above n 270, 136.

[274] 2012 USAID CSOs Sustainability Report, above n 270, 139.

[275] National Development Agency, above n 254, 19 and 18.

That notwithstanding, CSOs in South Africa carry out their activities with less interference and harassment from government[276] but in Uganda the government is hostile to CSOs involved in issues of governance, transparency and accountability.[277] Such hostility has been noted for instance with respect to CSOs involved in advocacy in matters such as the fight against corruption and campaign for free and fair elections.[278] Thus, CSOs in Uganda cannot freely challenge government policies due to limited freedom of expression[279] More so, it is believed that the less involvement of CSOs in Uganda in advocacy on issues of politics, government and security was due to the repressive regimes which limited the ability of staff 'to develop into policy advocates or justice sector reformers.'[280] Arguably, occasional government interference in the activities of CSOs may dissuade these organisations from engaging in activities which the GoU seem not to fully support including bringing to justice all perpetrators of ICC crimes as discussed in the previous section.[281]

Perhaps that is why CSOs in Uganda have been influential in advocating for peace and reconciliation in northern Uganda[282] than domestic proceedings for ICC crimes. It has been reported that during the armed conflict in northern Uganda many CSOs persistently reminded the GoU of its legal obligation to protect human rights by ensuring that human rights violations ceased using peaceful means.[283] CSOs including the Refugee Law Project (RLP),[284] Council of Elders Peace Committee, the Council of Chiefs and the Acholi Religious Leaders Peace Initiative (ARLPI) 'forcefully' resisted the intervention of the ICC

[276] 2012 USAID CSOs Sustainability Report, above n 270, 136. See also WJP Rule of Law Index 2015, above n 6, 37 where it was indicated that 76% of CSOs in South Africa had freedom of expression.
[277] Ibid, 167.
[278] For example, the Black Monday Movement with respect to corruption (2012 USAID CSOs Sustainability Report, 164 and 2013 USAID CSOs Sustainability Report 154-155), as well as the Uganda National NGO Forum with respect to organising and holding a campaign for free and fair elections. (see 2014 USAID CSOs Sustainability Report, 179 and 2015 USAID CSOs Sustainability Report, 224-225, see above n 270- n 271).
[279] WJP Rule of Law Index 2015, above n 6, 37 where it was indicated that 36% of CSOs in Uganda had freedom of expression.
[280] Daniel Woods, 'The Role of Civil Society in Police Reform in Uganda', a paper presented at the IDASA Conference under the theme; *Policing in Post-Conflict Africa* (Commonwealth Human Rights Initiative, March 2006) 1 (on file with the author).
[281] See section 3.1 of this chapter concerning limited support from the government of Uganda.
[282] Batanda, above n 248, 2.
[283] Kasaija Phillip Apuuli, 'Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) VS The International Criminal Court (ICC) in Northern Uganda' (2011) 11(1) *Studies in Ethnicity and Nationalism* 116-129, 121 and Phil Clark, 'Creeks of Justice; Debating Post-Atrocity Accountability and Amnesty in Rwanda and Uganda' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) 210-237, 225.
[284] RLP, Position Paper on the ICC (Faculty of Law, Makerere University, July 2004), available at <http://www.refugeelawproject.org/files/archive/2004/RLP.ICC.investig.pdf> last visited, 30 August 2017.

and instead advocated for community-based approaches to resolving the armed conflict such as customary justice practices.[285]

In fact, the ARLPI's has continuously advocated for using peaceful mechanisms to resolve the armed conflict in northern Uganda than prosecution of perpetrators of ICC crimes. This is illustrated in the statement released by the ARLPI on the arrest of Domic Ongwen who is currently tried before the ICC.[286] The statement was to the effect that Ongwen was a victim of circumstances who 'should not be punished twice, and should have not been taken to The Hague' but 'brought back home in order, to go through the rituals of "Mato Oput" (Reconciliation)'.[287] It is contended that although activities of such CSOs are aimed at peace building, accountability for ICC crimes may be undermined because these CSOs seem to advocate for restorative justice in total disregard of prosecutions.

Furthermore, the ARLPI and other CSOs in Uganda advocated for 'blanket amnesty for all insurgents'[288] which as discussed in chapter 3, fails to take into consideration of the nature of crimes committed by the amnesty applicants thereby shielding them from liability.[289] In 2012 a team of 15 people representing traditional and religious leaders in northern Uganda as well as CSOs petitioned the Parliament of Uganda to restore Part II of the Amnesty Act (containing provisions which grant amnesty).[290] The Parliament recommended that Statutory Instrument 34 of 2012 which declared the expiry of Part II of the Act should be revoked and that the Act be extended for further two years 'upon its expiry on 24th May 2013'.[291] This exhibits that mechanisms such as amnesty which continue to curtail domestic proceedings for ICC crimes in Uganda[292] have been advocated for by some CSOs in Uganda than prosecutions for ICC crimes. Even CSOs such as the Uganda Coalition on the International Criminal Court (UCICC) seems to promote the ICC more than the ICD of Uganda (which has

---

[285] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance* Army (Zed Books 2006) 132.

[286] *The Prosecutor v Dominic Ongwen*, 'Decision Setting the Commencement Date of the Trial', (ICC-02/04-01/15) Trial Chamber IX (30 May 2016) para 12 which set the commencement date for the trial as 6 December 2016.

[287] See for example, Acholi Religious Leaders Peace Initiative (ARLPI), 'A Statement on the Position of ARLPI on Ongwen Dominic, Former LRA Commander, January 20, 2015', 2, available at <http://www.arlpi.org/Home> last visited, 30 August 2017.

[288] Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation (Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009) 19-20.

[289] See chapter 3, section 4.2.2 on the legality of the Amnesty Act (2000).

[290] Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000' (August 2013) para 5.1, available at <http://www.parliament.go.ug/new/index.php/documents-and-reports/committee-reports/category/31-committee-on-defence-and-internal-affairs> last visited, 30 August 2017.

[291] Ibid, paras 14.8 and 14.5 respectively and as noted in chapter 3, the Act was extended up to May 2017.

[292] See chapter 3, section 4.2 on amnesty.

jurisdiction over ICC crimes) as shown from its advocacy work aimed at strengthening support for the ICC and less work on the ICD.[293]

Thus, it is contended that a few CSOs are actively engaged with promoting the implementation of the Rome Statute due to less advocacy work as noted above though CSOs in South Africa seem to perform much better than CSOs in Uganda.[294] This is evident in the case of South Africa whereby CSOs such as the SALC, Open Society Institute (OSI) and Institute for Democracy in South Africa (Idasa) which in 2009, pressured the government to fulfill its obligations under the Rome Statute by issuing a press release reminding South Africa of its obligations to arrest President Omar Hassan Ahmad Al Bashir (President Al Bashir) should he enter South Africa.[295] Such attempts galvanise efforts of these organisations to ensure that the Rome Statute is implemented domestically. In fact, the few cases commenced in national courts to enforce South Africa's ICC Act[296] thereby implement the Rome Statute, were initiated by CSOs and not authorities in South Africa.[297] However, efforts of these CSOs are impeded by the apparent lack of political will of the government of South Africa.

It is further submitted that while CSOs in South Africa such as the SALC engaged in advocacy for the implementation of the Rome Statute and successfully challenged the government's refusal to arrest and surrender President Al Bashir to the ICC,[298] it appears that no similar challenge was made by CSOs in Uganda before national courts when President Al Bashir visited Uganda on 12 May 2016.[299] Arguably, CSOs in Uganda seem reluctant to promote matters which the government explicitly opposes such as the arrest and surrender of President Al Bashir on grounds of the alleged need to maintain peace and security in the region.[300]

Therefore, some of the activities carried out by CSOs in Uganda and South Africa appear to minimise the influence of these organisations on domestic implementation of the

[293] Human Rights Network-Uganda, 'Annual Report 2011', 29 and 33, available at <https://www.hurinet.or.ug/reports/> last visited, 30 August 2017.
[294] See 2012, 2013, 2014 and 2015 USAID CSOs Sustainability Reports, 7, xiii, xii and xii respectively on the level of advocacy of CSOs in both states.
[295] Max du Plessis, 'The Future of International Criminal Justice: Civil Society, Complementarity and the Case of South Africa' (2010) 19(4) *African Security Review* 17-30, 22-24. See further discussion in chapter 6.
[296] Implementation of the Rome Statute of the International Criminal Court Act (2002), Act 27 of 2002 (hereinafter, South Africa's ICC Act).
[297] Such cases include the *Zimbabwe Torture Case*, the *Madagascar Case* and the *Al-Bashir Case*, see chapter 4, sections 3.1.1.A-B and 5.1.A.
[298] *Al Bashir Case*, above n 247.
[299] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', above n 139, para 5.
[300] Ibid, para 7.

Rome Statute as demonstrated above partly due to the circumstances within which these CSOs operate. The legislation regulating CSOs in Uganda which restrict free operation of these organisations[301] coupled with less collaboration with the government seem to have demotivated CSOs from supporting domestic implementation of the Rome Statute. As shown above, CSOs in Uganda have focused on promoting peace and reconciliation[302] than advocating for domestic proceedings for ICC crimes.

By contrast, a few CSOs in South Africa such as the SALC have advocated for domestic implementation of the Rome Statute to the extent of commencing court proceedings to influence the government of South Africa into compliance with its obligations under the Statute,[303] which CSOs in Uganda did not do when President Al Bashir visited Uganda.[304] Still, the advocacy work of CSOs in South Africa seems to be minimal[305] to effectively galvanise the necessary political support for domestic implementation of the Rome Statute. Thus, it is argued that without active support from CSOs, less may be realised in implementing the Rome Statute in Uganda and South Africa.

4.3. Prioritising Activities which Attract Funding from Donors or Government

Many CSOs lack sufficient funds to conduct their activities and tend to depend on external sources for financial support especially for long-term projects.[306] However, donors have priorities, with donor funds reducing and increasingly becoming competitive for CSOs to secure. For instance, funds availed to CSOs in South Africa by international donors are reducing partly due to the 2008 global financial crisis and donors continue to direct funds to the government other than CSOs.[307] This implies that CSOs have to access funding through the government yet it is believed that the government avails funds to CSOs engaged in service delivery[308] as noted above. Indeed insufficient funding is thought to have caused some CSOs in South Africa to downsize their operations or completely close down such as the Institute for Democracy in South Africa (Idasa) which closed in March 2013.[309]

---

[301] Non-Governmental Organisations Act (2016), sec 31(5)(b) and (d).
[302] Batanda, above n 248, 2.
[303] See the *Zimbabwe Torture Case* and the *Al Bashir Case*, see chapter 4, sections 3.1.1.B and 5.1.A.
[304] See chapter 3, section 5.1 on provisions concerning arrest and surrender.
[305] 2012 USAID CSOs Sustainability Report, above n 270, 136 where it was reported that only 2% of the CSOs in South Africa focused on law, advocacy and politics.
[306] Ibid, 6.
[307] Ibid, 136.
[308] Dr. Marinda Weideman, 'The Changing Status of Civil Society Organisations in South Africa, 1994 to 2014', at 3, HSF Background Report South Africa (2015), Commissioned by Hanns Seidel Foundation (on file with the author) 3.
[309] 2012 USAID CSOs Sustainability Report, above n 270, 138.

For the case of Uganda, donors are shifting funding 'to basket funds and consortia' including the Independent Development Fund and European Union fund[310] which reduces direct access to funding for CSOs activities. This means that CSOs in Uganda have to compete with other sectors which access such funding such as JLOS's project for implementing the capacity building programme for local council courts.[311] It is submitted that reduction of direct funding to CSOs may affect the activities of these organisations because of the possibility of the respective governments declining to avail funding to CSOs which advocatefor promotion of domestic proceedings of ICC crimes. This is due the fact that in Uganda, the state military forces (UPDF) are believed to have committed ICC crimes[312] and the government may not be interested in prosecuting its military personnel. For the case of South Africa, the South Africa's ICC Act is applied selectively in that national authorities in some cases have declined to proceeded against high-ranking persons alleged to have committed ICC crimes.[313] In view of the apparent limited political support for ICC crimes, it may not be possible for respective governments to fund CSOs activities aimed at promoting domestic proceedings for ICC crimes.

This means that CSOs will have to rely on other sources of income which may not be sustainable and sometimes not availed for purposes of promoting the implementation of the Rome Statute. For instance, CSOs in South Africa obtain funding from local donations and substantial support from businesses aside donor funding[314] though for specific areas such as education, health care and housing depending on the interests of the local donors.[315] With respect to Uganda, CSOs continue to rely on donor funding by engaging in activities which attract such funding and have been described as 'donor driven'.[316] This could make the CSO sector in Uganda vulnerable to changes in priorities of donors thereby lacking sustainability which may not be the case for CSOs in South Africa which enjoy sustainability.[317]

Consequently, many projects or programmes designed by CSOs in Uganda do not reflect the interests of local communities in Uganda but of the donors.[318] Moreover it is believed that donors emphasise cooperation with the government than confrontation since

[310] Ibid, 165; the 2013 and 2015 USAID CSOs Sustainability Reports, above n 278, 156 and 226 respectively.
[311] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', above n 15, 37.
[312] See section 3.1.2 on Uganda's failure to conduct proceedings for military personnel of the UPDF.
[313] See *Zimbabwe Torture Case*, chapter 4, section 3.1.1.B.
[314] 2013 USAID CSOs Sustainability Report, above n 278, 127, 128.
[315] 2015 CSO USAID CSOs Sustainability Report, above n 271, 200.
[316] Batanda, above n 248, 5.
[317] See 2012, 2013, 2014 and 2015 CSO USAID CSOs Sustainability Reports, 1, vi, viii and vi respectively.
[318] Susan Dicklith and Doreen Lwanga, 'The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda' (2003) 25(2) *Human Rights Quarterly* 482-509, 507 and Fourie and Kakumba, above n 243, 61.

effective CSOs are those which 'aid "functioning" of government and its agencies' than promoting 'excessive criticisms of state policies and programmes.'[319] This implies that projects of CSOs relating to advocacy work which confront the government may not be funded by donors who seem to protect cordial relationships and other interests including commercial interests with the government.[320] It is submitted that supporting domestic proceedings for ICC crimes with the possibility of investigating and prosecuting state actors seems to be a project donors may decline to finance.

Therefore, due to less funding received from foreign donors by CSOs in Uganda and South Africa which is increasingly being channeled through governments and basket funds as mentioned above,[321] CSOs are relying more on the respective governments for funding. These sources of funding seem to influence activities of CSOs to suit the interests of the donors and of the respective governments. Thus, shortage of funding by CSOs in Uganda and South Africa may weaken advocacy work for domestic proceedings of ICC crimes and instead support non-legislative mechanisms such as community-based approaches as evident with regard to the ARLPI in Uganda noted above. [322]

5. Conclusion

Uganda and South Africa are facing numerous obstacles in implementing the Rome Statute despite measures undertaken by these states to enable domestic proceedings against perpetrators of ICC crimes.[323] This chapter has examined three major obstacles which seem to curtail the domestic implementation of the Rome Statute in both states. It was shown that institutions handling ICC crimes such as the police, prosecuting authorities and judiciary are weak due to lack of sufficient resources such as human resources, physical infrastructure and equipment which is largely because of shortage of finance.[324]This has affected the activities of these institutions including postponement of court sessions for the case of the High Court

[319] Uwem Essia and Afal Yearoo, 'Strengthening Civil Society Organizations/government Partnership in Nigeria' (2009) 4(9) *International NGO Journal* 368-374, 368.
[320] For example, according to Human Rights Watch, donors in Uganda are reluctant to strongly criticise corruption prevalent in the government partly because of the need to protect donor interests in trade and investment opportunities. See Human Rights Watch, "Letting the Big Fish Swim"; Failures to Prosecute High-Level Corruption in Uganda' (October 2013) 52, available at <https://www.hrw.org/report/2013/10/21/letting-big-fish-swim/failures-prosecute-high-level-corruption-uganda> last visited, 30 August 2017.
[321] Habib and Taylor, above n 252, 76 and 2015 USAID CSOs Sustainability Report, above n 271, 226.
[322] Section 4.2 of this chapter.
[323] See chapters 3 and 4 on Uganda and South Africa discussing the legislative and non-legislative measures undertaken by both states to implement the Rome Statute.
[324] See section 2 of the chapter concerning weak institutions.

of Uganda[325] which contributed to the backlog of cases; failure to recruit more prosecutors as the case of the NPA of South Africa with the vacancy rate of 15.1%;[326] as well as led to under-funding activities such as staff training[327] and investment in information technology.[328] However, it was noted that Uganda seems to be more affected than South Africa partly due to low income levels.[329]

That notwithstanding, the limited resources availed to national institutions, limited political will is largely the key obstacle curtailing the implementation of the Rome Statute in Uganda and South Africa. As demonstrated in the chapter, there is inequality in the allocation of fundingwhereby some institutions are allocated huge sums of money than other institutionsas the case in Uganda.[330]For the case of South Africa, resources are reprioritised which affects service delivery especiary for institutions using technology.[331]This exhibits that political interests of respective states influence the allocation resources in national institutionsthat enforce justice which in turn curtails domestic proceedings for ICC crimes.

It has been shown that even in situations where cases for ICC crimes were commenced in national courts, the respective governments sometimes failed to stop its bodies from interfering with the judicial processes as evident in Uganda,[332] or declined to enforce the law as the case for South Africa in the case of Al-Bashir.[333] Moreover, CSOs which normally support national criminal jurisdictions to condut domestic proceedings for ICC crimes through training national personnel or compelling state compliance with its obligations under the Rome Statute as exhibited by CSOs in South Africa,[334] are sometimes prevented from conducting such activities due to limited political support. It is argued that limited political will has largely curtailed the implementation of the Rome Statute in Uganda and South Africa. Without removing these obstacles, national institutions may fail to ensure that ICC crimes are investigated, prosecuted and punished domestically.

---

[325] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/15', above n 67, 31.
[326] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', above n 44, 69.
[327] The 13th Annual Judges' Conference Report 2010, 'Consolidating the Achievements of JLOS Quick Win Backlog Reduction Strategy', held from 16-20 January 2010 at Mbale Resort Hotel, Uganda, 10.
[328] The Department of Justice and Constitutional Development, 'Strategic Plan for the Judiciary 2013-2018', above n 93, 20.
[329] WJP Rule of Law Index 2016, above n 6, 24 and 25 whereby Uganda is referred to as a low income state and South Africa as an upper middle income state.
[330] In Uganda less resources were allocated to the judiciary and prosecution office and more to the police force.
[331] Section 2.2 on insufficient physical infrastructure and equipment and 2.3 on insufficient finance.
[332] See *Caesar Acellam Case* section 3.1.1.
[333] See Chapter 4, section 5.1.A.
[334] See *Zimbabwe Torture Case* and *Al-Bashir Case*, chapter 4, sections 3.1.1.B and 5.1.A.

Chapter Six

Measures to Eliminate Obstacles to the Implementation of the Rome Statute in Uganda and South Africa

1. Introduction

Uganda and South Africa are faced with various obstacles in implementing the Rome Statute of the International Criminal Court (Rome Statute).[1] This is the case despite undertaking several measures at the national level to facilitate investigations, prosecutions and adjudication of genocide, crimes against humanity and war crimes (ICC crimes).[2] Drawing from the experience of other states engaged in implementing the Rome Statute, this chapter suggests several measures which should be adopted by Uganda and South Africa to enhance the implementation of the Rome Statute at the national level and highlights the good practices of these states.

Firstly, to eliminate the obstacle of weak institutions particularly insufficient human resources, measures should be taken to provide satisfactory conditions of work to increase staff retention, as well as enjoin staff to work in collaborations and avail them continuous training to increase their competence in handling ICC crimes. With respect to the obstacle of insufficient finance, physical infrastructure and equipment, the respective governments should lobby for more funding from donors for long-term projects such as construction of buildings as well as encourage partnership with private sectors in provision of services. It is argued that proper allocation of resources would need the necessary political support to ensure that sufficient funding is availed in priority areas.

Secondly, the obstacle of limited political will may be eliminated by enhancing political support through; 1) guaranteeing the independence of prosecuting authorities by setting up a transparent appointment process but at the same time check wrongful exercise of discretion; 2) governments fully supporting domestic proceedings for ICC crimes and avoiding selective prosecutions; and 3) intervention by international organisations and other states using political pressure to secure compliance, as well as providing assistance to enable these states implement the Rome Statute.

[1] See for example legislative obstacles that is, non-retroactivity, amnesty and immunity as well as non-legislative obstacles such as weak institutions, limited support from Civil Society Organisations and limited political will as examined in chapters 3, 4 and 5 of this thesis.

[2] These measures include establishing legislation and institutions to enable domestic proceedings for ICC crimes as well as facilitate cooperation with the ICC. See chapters 3 and 4.

Thirdly, the obstacle of limited support from Civil Society Organisations (CSOs) should be addressed by strengthening CSOs through; 1) increasing coopeartion with the GoU in order to influence government support for the activities of CSOs; 2) ensuring proper utilisation of funds through a) strategic litigation, and b) working in collaboration to minimise costs aswell as share responsibilities and expertise.

Forthly, measures are suggested to enhance state cooperation with the ICC by increasingly engaging international organisations and CSOs to pressurise Uganda and South Africa to give effect to the Rome Statute. This may be done through political pressure and provision of other forms of assistance to increase national capacity for conducting proceedings of ICC crimes.

Lastly, is the conclusion that Uganda and South Africa should make the necessary legislative and institutional reforms,as well as avail sufficient facilities to instituions handling ICC crimes to facilitate domestic implementation of the Rome Statute. This may be realised with the assistance or through political pressure from other states and organisations to ensure that Uganda and South Africa give effect to the provisions of the Rome Statute.

2. Strengthening National Institutions

As demonstrated in chapter 5, national institutions in Uganda and South Africa still lack sufficient staff, physical infrastructure and equipment as well as experience shortage funding.[3] This calls for several measures to ensure that these institutions are availed sufficient resources to effectively investigate, prosecute and adjudicate ICC crimes. Firstly, measures for addressing insufficient human resources are examined and lastly, measures for addressing shortage of finance, inadequate physical infrastructure and equipment are also analysed.

2.1. Addressing Insufficient Human Resources

To curb the problem of insufficient human resources, the following measures should be undertaken by Uganda and South Africa; 1) providing satisfactory conditions of work to increase staff retention; 2) working in collaboration to enhance the competence of staff and 3) continuously training staff to enhance their skills in handling ICC crimes.

[3] See chapter 5, section 2 on weak institutions.

2.1.1. Providing Satisfactory Conditions of Work to Increase Staff Retention

States parties to the International Covenant on Economic, Social and Cultural Rights including Uganda and South Africa[4] have an obligation to ensure satisfaction of the right of everyone to the enjoyment of just and favourable conditions of work.[5] At a minimum, these states have to guarantee through legislation, the exercise of this right without discrimination, establish minimum wage in view of the cost of living as well as introduce and enforce minimum standards relating to rest, leisure, working hours, paid leaves and public holidays.[6] This implies that staff working in institutions handling ICC crimes should be availed favourable conditions of work to enable them conduct their duties efficiently. Possibly, this will enhance staff retention leading to consistency and continuity in service hence reducing loss of experienced staff.

In effect, South Africa and Uganda should provide staff with adequate remuneration,[7] improve staff welfare by availing them medical care, increasing access to education through grants or loans, as well as training them for career advancement. Improving the working conditions of staff in states like Guatemala whereby 'judges with the best track records could receive extra salary, training and security', was believed to have made the trial against Rios Montt (the former president of Guatemala) for genocide and war crimes 'more feasible' coupled with other resources.[8] Arguably, with good working conditions, effective enforcement of justice for ICC crimes may be enabled.

Legal Aid South Africa is a notable example with a staff retention capacity at the rate of 80% due to motivation through learning and career growth.[9] It was reported that salaries of staff were paid promptly as well as recieved 'performance bonuses and cost of living

[4] International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (hereinafter, ICESCR). The status of ratification of Uganda (21 January 1987) and South Africa (12 January 2015) is available at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> last visited, 30 August 2017.

[5] Ibid, art 7; see also Committee on Economic Social and Cultural Rights, 'General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC/23 (8 March 2016) para 65. See also paras 58-60, with regard to the obligations of state parties to ensure respect, protection and fulfilment of this right.

[6] Committee on Economic Social and Cultural Rights, ibid, para 65.

[7] Ibid, para 7 where it was stated that the 'term "remuneration" goes beyond the more restricted notion of "wage" or "salary" to include additional direct or indirect allowances in cash or in kind that should be of a fair and reasonable amount paid by the employer to the employee, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities.'

[8] Naomi Roht-Arriaza, 'Genocide and War Crimes in National Courts: the Conviction of Rios Montt in Guatemala and its Aftermath', (2013) 17(14) *American Society of International Law (ASIL)*.

[9] Legal Aid South Africa, 'Annual Report 2009/10', 86, available at <www.legal-aid.co.za> last visited, 30 August 2017.

increases'.[10]Moreover, they were availed bursaries for undertaking further studies.[11]Further still, the defence lawyers in this institution participated in various training programmes and discussion forums[12] coupled with continuous support and mentoring of junior staff by senior litigants in handling complex matters.[13]

Other institutions in South Africa that avail bursaries include the National Prosecuting Authorities (NPA) which provides employees with opportunities for further studies including full scholarships and interest-free loans[14] and the South African Police Service (SAPS).[15] It is argued that the incentives availed to staff coupled with career advancement opportunities and good working conditions could possibly motivate staff to provide long and productive service for these institutions thereby reducing the need for recruiting more staff.

Therefore, national institutions in Uganda should take the example of Legal Aid South Africa, the NPA and the SAPS noted above to increase staff retention and productivity. Recruiting more staff without improving their welfare may not alleviate the problem of insufficient staff because those recruited may not serve for long period due to poor conditions of work. Moreover, the cost of paying attractive salaries, performance bonuses and availing opportunities for career advancement to current staff may not be the same cost spent on recruiting new staff who perhaps would demand for similar incentives. It is argued that instead of recruiting more staff whose retention is uncertain, Uganda and South Africa should build competent work force, small in size but committed to work as a team.

2.1.2. Working in Collaborations to Increase Competence of Staff

Personnel working in institutions which investigate, prosecute and adjudicate ICC crimes need to have continuous working relationship to increase their skills and enable maximum utilisation of resources. As noted already, it is believed that 'concentrating expertise and experience within specialised units' permits the 'concentration of information, development

[10] Legal Aid Board, 'Annual Report 2005/6', 36. With regard to performance bonuses, see also Legal Aid South Africa, Annual Reports for 2014-2015, 2013-2014, 2012-2013 and 2011-2012 at 135-136, 109, 133-134 and 111-112, respectively.
[11] Legal Aid South Africa, 'Annual Report 2009/10',above n 9, 87.
[12] Ibid, 30, 31-32.
[13] Ibid, 34.
[14] Anton du Plessis, Jean Redpath and Martin Schonteich, 'Report on the South African National Prosecuting Authority', in Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* (Open Society Institute 2008) 343-383, 359.
[15] In the financial year 2015/2016 the SAPS awarded a total of 790 bursaries worth R8,964,117 of which 13 employees of the Directorate for Priority Crimes Investigation (DPCI) benefitted. See Annual Report 2015/16 South African Police Service, 69-70 (on file with the author).

of expertise and experience' which is vital for ensuring accountability consistently.[16] Thus, where a state establishes special units for handling ICC crimes it is important to have investigators and prosecutors working together to share knowledge and experience in that regard which may improve the quality of their work. Although the special units in Uganda and South Africa are thought to be working as a team,[17] such collaboration should be encouraged continuously to increase competence of staff working in these institutions.

Moreover, staff collaboration may hasten the decision-making process of relevant authorities because of close-working relationship between investigators and prosecutors. This is demonstrated by Denmark's Special International Crimes Office (SICO) for investigating and prosecuting serious crimes including ICC crimes which is composed of prosecutors and investigators working in close cooperation.[18] Once a decision to investigate a matter is made, investigators and prosecutors of the SICO work together so that when investigations are completed, the Danish Police and Prosecution Service can make quick decision on whether or not to prosecute.[19] It was reported that although SICO investigated 224 cases, only 1 led to prosecution and conviction, with the majority dismissed due to insufficient evidence, while in other cases, Denmark lacked jurisdiction to prosecute since the suspects had left the country.[20] This demonstrates that quick decision-making is vital especially where persons alleged to have committed ICC crimes abroad may possibly visit the enforcing state in which case, time is of essence to take action before they leave the state.

However, mechanisms should be put in place to ensure independence of personnel in these institutions in conducting their activities to avoid undue influence in the execution of their duties. Thus, government bodies like JLOS in Uganda and the Department of Justice and Constitutional Development of South Africa should be utilised to enhance coordination of staff in the institutions that handle ICC crimes. Furthermore, coordination between institutions should extend beyond national boundaries to encompass inter-state cooperation. This has been done for example by the SICO of Denmark which cooperated with similar units in states such as Canada to share background information relating to international

[16] REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units' (December 2010) 9 (on file with the author). For example, Bosnia and Herzegovina where investigators and prosecutors handling war crimes worked together to facilitate the War Crimes Chamber in adjudicating these crimes. see chapter 3, section 2.1 concerning special units for investigating and prosecuting ICC crimes.

[17] See chapters 3 and 4, section 2.

[18] Andreas Laursen, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law' (2012) 10(4) *Journal of International Criminal Justice* 997-1016, 1014.

[19] Birgitte Vestberg, 'Prosecuting and Investigating International Crimes in Denmark', Guest Lecture Series of the Office of the Prosecutor, 5 April 2006, The Hague (on file with the author) 9.

[20] REDRESS and FIDH, above n 16, 21.

crimes,[21] as well as received delegations from states such as China, Indonesia, Norway and Sweden to share experiences in handling these crimes.[22] Such coordination could enhance effective investigation and prosecution of ICC crimes through sharing of information on cases concerning crimes committed abroad in the same armed conflict. This would save time and resources if the background information concerning the conflict in question exists.

In addition, the prosecutor's office in Bosnia and Herzegovina signed a Protocol on cooperation in handling ICC crimes with the prosecutor's office in Serbia with the aim of enhancing cooperation between these offices in prosecuting perpetrators of ICC crimes including exchange of information and evidence in war crimes cases.[23] Such collaboration between states in handling ICC crimes would enable national institutions to collectively devise ways of combating impunity for these crimes.

Similar collaborations of institutions at the national level should also be encouraged by states including Uganda and South Africa to strengthen measures for effective handling of ICC crimes domestically. It is contended that where teamwork is enjoined, more work would be completed notwithstanding the challenge of shortage of staff experienced by institutions handling ICC crimes in Uganda and South Africa.[24] Therefore, collaboration among staff handling ICC crimes is vital considering the problem of limited resources faced by Uganda and South Africa as noted previously.[25] This would enhance teamwork of local staff, ease exchange of knowledge and skills, as well as create good working relations among institutions. Aside inter-departmental collaborations, personnel in Uganda and South Africa should cooperate at the national and regional level to strengthen national capacity for handling ICC crimes.

2.1.3. Continuous Training of Staff for Skills Enhancement

As noted previously, investigating and prosecuting ICC crimes requires sufficient resources such as skilled staff to handle these crimes effectively.[26] This means that a state may have to continuously train its personnel to handle these crimes. The periodic training of staff engaged

[21] Vestberg, above n 19, 9.
[22] Ibid, 10.
[23] Protocol of the Prosecutor's Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of the Republic of Serbia on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide', para 2, available at <http://tuzilastvobih.gov.ba/files/docs/Srbija_engProtokol-ENG.pdf> last visited, 30 August 2017.
[24] See chapter 5, section 2.1 on insufficient human resources.
[25] See chapter 5, section 2 on weak institutions.
[26] See chapter 2, section 4.2 on non-legislative measures.

in enforcing justice in Uganda and South Africa[27] though commendable, it needs to be streamlined so that personnel working in the special units are trained in sessions that focus on ICC crimes not just general training on several crimes.

Arguably, the GoU and the government of South Africa should take a leading role in ensuring that national personnel are continuously trained in handling ICC crimes to enhance their knowledge and skills in that regard. This means that the respective government should engage international experts to work with local staff in designing curriculum which incorporates specialised training courses relating to ICC crimes such as the theory and practice of international criminal law. The specialised training programmes should be prioritised and tailored to suit relevant professions and career needs of staff in respective institutions of these states.

Similar measures were taken in the former Yugoslavia whereby international experts worked with local trainers to select topics for training legal practitioners in the region and in view of the participants' needs.[28] More so, the International Criminal Law Series (ICLS) partnered with local training institutions as well as consulted with local and international experts to develop the training curriculum on international criminal law and practice for local justice actors.[29]Such curriculum and other resources were availed to local expert trainers which were utilised to train other local staff in the region.[30] In essence, investigators, prosecutors, defence lawyers and judges in Uganda and South Africa would have to be conversant with the general knowledge and procedures of international criminal law in relation to the local context so as to ably apply the knowledge and skills in their work. This would require the participation of international experts to train them in handling ICC crimes effectively.

Thus, it is important that Uganda and South Africa conduct a needs assessment before embarking on training staff[31] to establish the level of their knowledge and skills in handling ICC crimes. Similar measures were taken by the War Crimes Project, a '4-million Euro project, funded by the European Union' which conducted a needs assessment for 9 months by inquiring from the legal practitioners in the national jurisdictions of the Former

[27] See chapters 3 and 4, section 2 concerning institutions handling ICC crimes in Uganda and South Africa.
[28] OSCE, Office for Democratic Institutions and Human Rights, 'War Crimes Justice Project – Phase II', Final Report, (July 2012 – December 2015) 10, available at <http://www.osce.org/odihr/218231> last visited, 30 August 2017.
[29] Ibid.
[30] Ibid.
[31] See also Olympia Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in Triestino Mariniello (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015) 133-146, 141.

Yugoslavia,the challenges experienced in handling the caseload of war crimes and how their capacity can be enhanced in that regard.[32]

Basing on the recommendations made after the needs assessment, the War Crimes Project developed tools and conducted training with respect to the needs identified by legal practitioners.[33] As a result, the Project strengthened the capacity of legal practitioners in handling war crimes through training, as well as developing training curriculum on international criminal law and international humanitarian law.[34] Such capacity building projects availed by international organisations after conducting a needs assessment are aimed at strengthening national institutions in areas which are lacking thereby enabling these institutions to effectively conduct proceedings for ICC crimes.

With respect to Uganda and South Africa, in addition to conducting a needs assessment stated above, it is important that the training initially focusses on the basic legal knowledge before handling specialised areas of law.[35] This is to ensure that the trainees understand the legal fundamentals before proceeding to technical areas of specialisation relevant to the career needs of staff in different institutions. To facilitate these programmes, Uganda and South Africa need to avail the training institutes sufficient resources including materials and finance.

Initially, Uganda and South Africa should engage international experts and organisations to develop suitable curriculum for training local staff in handling ICC crimes. In this way, local expertise could be developed to reduce frequent need for skilled personnel[36] who may be recruited only in a few situations such as upgrading the skills of local staff. In effect, local expertise need to be availed necessary resources and support to assist in training other staff within the state which would reduce the cost of engaging international trainers

[32] Organization for Security and Cooperation in Europe (OSCE), 'War Crimes Justice Project', available at <http://www.osce.org/gsearch?qr=WAR%20CRIMES%20JUSTICE%20PROJECT> last visited, 30 August 2017.
[33] Ibid.
[34] OSCE, Office for Democratic Institutions and Human Rights, 'War Crimes Justice Project – Phase II', above n 28, 4-5. It was also reported that in Phase II, the War Crimes Justice Project conducted 16 activities including capacity building which 'were attended by 272 justice actors, including 125 defence attorneys, 67 prosecutors, 41 judges and 39 legal advisors, trainers and other individuals supporting war crimes cases.' (see p.9).
[35] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts' (UN 2008) 29.
[36] Under the National Prosecuting Authority Act (1998) (hereinafter, NPA Act), sec 38(1), the NDPP is permitted to engage on contract, 'persons having suitable qualifications and experience to perform services in specific areas.' Basing on this provision, the NPA of South Africa 'routinely and extensively' engages private lawyers to prosecute cases which require specialised skills. See *Sylla Moussa v The State Minister of Justice and Constitutional Development*, Case No. 181/2014, The Supreme Court of Appeal of South Africa (14 April 2015) paras 17 and 13. See also *The State v Amos Tshotshoza and Others*, Case No. 18/2009, High Court of South Africa (17 April 2009) para 19.

toenhance sustainability of the training programmes and perhaps reduce dependence on international assistance for capacity building.

2.2. Addressing Insufficient Finance, Physical Infrastructure and Equipment

As demonstrated in chapter 5, the problem of insufficient physical infrastructure and equipment is mainly caused by shortage of funding to enable investment in such activities.[37] To alleviate the obstacles of insufficient physical infrastructure and equipment, several measures need to be undertaken by Uganda and South Africa to increase funding allocated to institutions which handle ICC crimes as discussed below.

Institutions in Uganda and South Africa should minimise the problem of shortage of funding by engaging various stakeholders to lobby for more funding. Institutions such as the Justice Law and Order Sector (JLOS) in Uganda can be utilised by the GoU to seek for funding from the donors. JLOS is a government institution coordinating the annual planning and budgeting for 17 institutions that administer justice such as the Uganda Police Force, DPP and Judiciary.[38] In essence, JLOS facilitates the coordination and cooperation among these institutions to ensure joint working arrangement in addressing common problems facing these institutions[39] such as the case backlog.

The reports submitted regularly by these institutions through JLOS concerning the activities undertaken in a financial year, as well as the challenges and successes, are used by donors to determine the funding to be allocated to JLOS.[40] This means that allocation of funding to JLOS institutions by donors depends on the reports submitted by these institutions. The danger in this is that institutions may overstate their successes to obtain funding yet verifying such reports could be time-consuming for JLOS, considering its limited staffing.[41] Nonetheless, organisations such as JLOS may successfully lobby for more funding from the donors by justifying the need for such funds such as expediting the construction of the JLOS

[37] See chapter 5, section 2.3 on insufficient finance.
[38] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', 5 (on file with the author).
[39] Catherine Flew and Simon Rynn, 'Monitoring and Evaluation Arrangements for the Justice Law and Order Sector in Uganda: A Case Study', (Saferworld, January 2009) 7, available at <http://www.saferworld.org.uk/resources/view-resource/386-uganda-case-study> last visited, 30 August 2017.
[40] Ibid, 13.
[41] Ibid, 16-17 and 14.

house project and justice centres in different regions of Uganda to curb the high cost of renting premises.[42]

Similarly, in states such as the Democratic Republic Congo (DRC) military courts which conduct proceedings for ICC crimes received financial support from various donors such as the European Commission worth €5,000,000 for several projects like mobile court hearings.[43] Moreover, a Multi Donor Trust Fund to which states such as Belgium, the Netherlands, Norway and Sweden pledged a total of $22.8 million with respect to sexual violence was availed to the DRC until its closure in 2014.[44] This demonstrates that although states may benefit from donor funding, reliance on such funding is not sustainable especially for long-term projects such as ensuring accountability for past crimes which may take years to complete due to complexity of the proceedings involved.[45]

Notably, JLOS's construction project which relies on donor funding was also affected when donors such as the Netherlands suspended its funding.[46] This means that the GoU need to minimise reliance on donor funding by establishing measures for sustaining local income. This may be done by partnering with private sectors in provision of services such as joint ownership of construction projects for infrastructure in terms of financing the project, provision of technical services including human resources and technical resources.[47] In addition, misuse of funds should be minimising through training local staff in managerial skills to enhance their knowledge in financial management. Training may be conducted in areas such as proper budgeting, independent auditing of accounts and proper allocation of resources. Similar measures could be adopted by South Africa to ensure that the available

[42] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 12 (on file with the author). Donors who avail funds for JLOS activities include states such as Sweden, Austria, Denmark, the Netherlands and Irelad as well as organisations such as European Union, UNICEF and DANIDA (ibid, 141).

[43] Avocats Sans Frontières (ASF), 'ASF in the Democratic Republic of Congo', available at <http://www.asf.be/action/field-offices/asf-in-the-democratic-republic-of-congo/> last visited, 30 August 2017.

[44] Nynke Douma, Dorothea Hilhorst and Jocelyne Matabaro, 'Getting the Balance Right? Sexual Violence Response in the Democratic of Congo A Comparison Between 2011 and 2014' (January 2016) 21, Report 9, Secure Livelihoods Research Consortium (SLRC) and the Justice and Security Programme (JSRP), available at <http://www.securelivelihoods.org/publications_details.aspx?resourceid=392> last visited, 30 August 2017.

[45] Stuart Ford, 'Complexity and Efficiency at International Criminal Courts' (2014) 29(1) *Emory International Law Review* 1-69, 17.

[46] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/2015', above n 38, 23. See chapter 5, section 2.2.1 on insufficient physical infrastructure.

[47] OECD, 'Encouraging Public-Private Partnerships in the Utilities Sector: The Role of Development Assistance', a paper presented during the Roundtable organised by NEPAD and OECD under the theme, Investment for African Development: Making it Happen, held at Imperial Resort Beach Hotel, Uganda (25-27 May 2005) 4-6 (on file with the author).

funds are utilised properly and there is need to minimise reallocation of funds meant for the infrastructure of the judiciary for other activities as mentioned previously.[48]

Therefore, both Uganda and South Africa need to increase their sources of funding by lobbying for funds from donors with respect to projects such as development of infrastructure. However, alternative sources of funding should be created such as partnering with the private sector in provision of some services to avoid reliance on donor funding which is not sustainable. With the increase in funding there is a possibility that the respective governments could avail sufficient funds to institutions which handle ICC crimes thereby alleviating the obstacle of shortage of funds in these institutions. However, necessary political support is required to ensure proper allocation offunds and ICC crimes should be prioritised owing to the serious nature of these crimes. The next section discusses what measures may be adopted to address the obstacle of limited political support for domestic implementation of the Rome Statute.

3. Enhancing Political Support

Conducting effective investigations, prosecutions and adjudication for ICC crimes requires the GoU and the government of South Africa to be able and willing to support such proceedings. As noted in chapter 4, national authorities in these states seem reluctant to conduct domestic proceedings for ICC crimes which curtail enforcement of justice against perpetrators of these crimes. This calls for measures to obtain full political support for domestic proceedings of ICC crimes to enhance the rule of law in Uganda and South Africa.

Firstly, Uganda and South Africa should guarantee the independence of prosecuting authorities by ensuring democratic and transparent appointment of senior staff in these institutions. In addition, accountability mechanisms should be established to check wrongful exercise of prosecutorial discretion in situations where there is sufficient evidence to show that the crime was committed. Secondly, the GoU and the government of South Africa should fully support investigations and prosecutions of both state and non-state actors alleged to have committed ICC crimes to avoid selective prosecutions. Lastly, where Uganda and South Africa fail or are slow to investigate and prosecute ICC crimes, international organisations and other states should respond to compel these states to conduct such proceedings. This

[48] The Department of Justice and Constitutional Development, 'Strategic Plan 2015/20', 46-47, available at <http://www.justice.gov.za/MTSF/mtsf.htm> last visited, 30 August 2017. See chapter 5, section 2.2.1 on insufficient physical infrastructure.

should be done through political pressure and availing assistance to enhance national capacity to conduct proceedings for ICC crimes as discussed below.

3.1. Upholding the Independence of Prosecuting Authorities but Safeguard Against Wrongful Exercise of Independence

Institutions in Uganda and South Africa which handle ICC crimes do not freely exercise their powers and functions due to state interference in some instances as discussed previously.[49] However, authorities in Uganda and South Africa seem to interfere more with the independence of prosecuting authorities than courts.[50] This is exhibited by few cases of ICC crimes which prosecuting authorities refer to courts for prosecution and sometimes conducting selective prosecutions.[51] This section focuses on measures to address lack of independence of prosecuting authorities than other institutions. This is due to the key role played by prosecutors in selecting cases for prosecution and can even decline to prosecute where there is sufficient evidence to prove guilt of the accused person.[52]

In addition, while the appointment of judges is constitutionally protected with measures established to check presidential appointments,[53] no adequate legal safeguards are available to check political appointments of prosecuting authorities especially the head of prosecutions.[54] Furthermore, there seems to be no avenue to check the independence of these prosecuting authorities which may lead to abuse of prosecutorial discretion. The ability of an independent judiciary to check unjust prosecution though unable to check non-investigation

[49] See chapter 5, section 3 on limited political will.

[50] The 2015 WJP Rule of Law Index identified the problem of judicial independence as not significant in South Africa and significant in Uganda, see 'The World Justice Project Rule of Law Index 2015' (hereinafter, 2015 WJP Rule of Law Index) 48, available at <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2015-report> last visited, 30 August 2017.

[51] See chapter 5, section 3.2.2 on the NPA's exercise of discretion not to prosecute.

[52] For example, the National Prosecuting Authority (NPA) of South Africa is criticised for declining to prosecute many cases hence perceived as selective. See Martin Schönteich, 'Strengthening Prosecutorial Accountability in South Africa', (Institute for Security Studies Paper No. 255, April 2014) 17.

[53] 1995 Constitution of Uganda, art 142(1) and the 1996 Constitution of South Africa, secs 174(3), 174(4)(a)-(c) and 174(6). Such presidential powers of appointment have also been successfully challenged by courts in Uganda and South Africa in several cases. See for example the case of *Hon. Gerald Kafureeka Karuhanga v Attorney General*, (Constitutional Petition No. 0039 of 2013) Constitutional Court of Uganda (4 August 2014) 56-57 and *Justice Alliance of South Africa v President of the Republic of South Africa and Others* (Case CCT 53/11) [2011] ZACC 23, Constitutional Court of South Africa (29 July 2011) para 22-23.

[54] In South Africa, presidential powers of appointing the NDPP were only checked where Mr. Simelane's credibility, honesty and integrity was questioned in the report of the Ginwala Commission of Inquiry and of the Public Service Commission which could not be ignored when the matter was taken to court to determine the legality of such an appointment. See *Democratic Alliance v President of the Republic of South Africa and Others*, Case No. CCT 122/11 [2012] ZACC 24, Constitutional Court of South Africa (5 October 2012) para 86. See also chapter 5, section 3.2.1 concerning improper influence in the work of the National Prosecuting Authority.

or non-prosecution[55] shows that an accountable prosecuting authority is pivotal in ensuring that ICC crimes are investigated and prosecuted.

Thus, in devising measures to safeguard prosecutorial independence, measures for checking wrongful exercise of prosecutorial discretion need be adopted. This section discusses firstly, the appointment of the head of prosecutions through democratic and transparent process involving several officials including the President. Lastly, judicial review should be applied to check wrongful exercise of prosecutorial discretion.

3.1.1. Transparent Appointment of Prosecuting Authorities

Prosecuting authorities in Uganda and South Africa seem to lack independence when exercising their powers of prosecuting cases. Although prosecutorial independence in South Africa is not a significant problem as the case in Uganda,[56] the mode of appointment of the head of prosecuting authorities in South Africa compromises the independence of such personnel. It is submitted that checking political appointments of the head of prosecutions in Uganda and South Africa may minimise interference with prosecutorial independence.

In Uganda, the Director of Public Prosecutions (DPP) is appointed by the President who acts 'on the *recommendation of the Public Service Commission* and with the approval of Parliament'.[57] Despite the requirement that such a person must be 'qualified to be appointed a judge of the High Court',[58] the appointment of the DPP differs from the appointment of the judge of the High Court. It is the President to appoint judges but 'acting on the *advice of the Judicial Service Commission* and with the approval of Parliament.'[59]

This is a problem because while judicial appointments made against the advice of the Judicial Service Commission have been declared unconstitutional,[60] no similar challenges have been made in court with respect to the appointment of the DPP. Since the DPP performs an executive function of ordering commencement of investigations and prosecutions of

[55] Timothy Waters, 'Overview: Design and Reform of Public Prosecution Services' in Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* (Open Society Institute 2008) 21-79, 27.
[56] 2015 WJP Rule of Law Index, above n 50, 47.
[57] 1995 Constitution of Uganda, art 120 (1), emphasis added.
[58] Ibid, art 120(2).
[59] Ibid, art 142(1), emphasis added.
[60] *Hon. Gerald Kafureeka Karuhanga v Attorney General*, above n 53.

persons alleged to have committed crimes,[61] there is a possibility of interference from the executive with the exercise of prosecutorial powers.

It is contended that there is need for the appointment of the DPP with transparency to ensure that prosecuting authorities in Uganda are independent in exercising their prosecutorial discretion. The procedure may entail selection of the DPP by a body composed of members with the majority from the legal profession who may be familiar with the work of the proposed candidates to ensure suitability for appointment as the DPP. In effect, political appointments may be checked due to the reduced role of the executive in such appointments in order to limit political interference with the independence of the DPP in his work.

With respect to South Africa, as discussed in chapter 5 the National Director of Public Prosecutions (NDPP) is appointed by the President of South Africa[62] without seeking the advice or approval from any authority. As noted already, the appointment of senior officials in the NPA (like the Deputy National Directors of Public Prosecutions (DNDPP) and Directors of Public Prosecutions (DPP))is by the President in consultation with the Minister and the NDPP.[63] Still, such appointments may be deemed to be conducted at the whims of the President since the Minister and NDPP are presidential appointees and may not check the appointment powers of the President. This creates the possibility of the executive influencing the appointment of senior personnel in the NPA and it is submitted that senior personnel in the NPA are political appointees whose independence in exercising prosecutorial discretion may be influenced by political considerations.

To guarantee the independence of senior prosecuting authorities in South Africa, a transparent process of nominating eligible candidates and their selection criteria should be clearly formulated in legislation. Such nomination may be carried out by a Committee composed of people from different political affiliations and professions but the majority from the legal profession. In addition, the Committee should act independently in nominating the candidates and then make recommendations to the President for the suitable candidate to appoint after vetting the applicants. Any person selected and appointed by the President as the NDPP should be approved by Parliament.[64]

---

[61] Daniel D. Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals', (2005) 3 *Journal of International Criminal Justice* 124-144, 126, who stated that 'the enforcement of the criminal law and the initiation of criminal proceedings are executive functions.'

[62] 1996 Constitution of South Africa, sec 179(1)(a) and National Prosecuting Authority Act (1998), sec 10.

[63] National Prosecuting Authority Act (1998), ibid, secs 11(1) and 13(1)(a)-(c) respectively.

[64] As the case for the DPP in Uganda, see 1995 Constitution of Uganda, art 120(1).

Thus, it should not be a one man's decision as the case with the appointment of the NDPP by the President of South Africa.[65] The government of South Africa may have to amend its Constitution to provide for the role of other authorities in appointing the NDPP to strengthen the independence of the NPA. With democratic and transparent appointment of senior prosecuting authorities, the influence of the executive on prosecuting authorities may be minimised. The above-mentioned measures need to be undertaken to check political appointments of senior prosecuting authorities to eliminate interference of the executive with the work of prosecuting authorities.

3.1.2. Check Wrongful Exercise of Prosecutorial Discretion Through Judicial Review

National Constitutions of Uganda and South Africa safeguard the independence of prosecutors in performing their functions.[66] However, to avoid wrongful exercise of prosecutorial discretion, these authorities should be made accountable for improper exercise of powers with which they are entrusted.[67] Whereas bodies like the Judicial Service Commissions of Uganda and South Africa oversee and regulate the conduct of judicial officers,[68] there is no independent mechanism to monitor the performance of prosecuting authorities in these states.

With regard to South Africa, over-sight mechanisms which ensure that prosecutors perform their duties efficiently seem deficient. For instance, internal mechanisms of the NPA intended to control and direct prosecutions[69] are sometimes not complied with.[70] For the case of Uganda, the 1995 Constitution of Uganda is silent about over-sight mechanisms for prosecuting authorities which is not the case for South Africa.[71] Moreover, the activities of prosecuting authorities in Uganda may not possibly be scrutinised by the public due to the absence of annual reports on the matter accessible to the public. This depicts lack of openness and transparency in the performance of prosecutorial work of the DPP.

---

[65] 1996 Constitution of South Africa, sec 179(1)(a) and National Prosecuting Authority Act (1998), sec 10.
[66] 1995 Constitution of Uganda, art 120(6) and 1996 Constitution of South Africa, sec 179(4) respectively.
[67] See also Schönteich, above n 52 and Nsereko, above n 61, 124-144 for detailed discussion on prosecutorial accountability.
[68] 1995 Constitution of Uganda, art 147(1)(a) and 1996 Constitution of South Africa, sec 177(1)(a).
[69] Such mechanisms include the NDPP intervening in the 'prosecution process where policy directives are not complied with' or reviewing prosecutorial decisions made by NPA staff. See 1996 Constitution of South Africa, sec 179(5)(c)-(d) and National Prosecuting Authority Act (1998), sec 22(1)(b)-(c). See also *Sylla Moussa v The State Minister of Justice and Constitutional Development*, above 36, para 25.
[70] This is exhibited in the case of *Freedom Under Law v National Director of Public Prosecutions & Others* 2014 (1) SA 254 (GNP) High Court of South Africa (23 September 2013), see detailed discussion in the accompanying text.
[71] 1996 Constitution of South Africa, sec 179(5)(c)-(d).

It is argued that in the absence of readily accessible information about the activities of the DPP in Uganda and lack of adequate mechanisms to check wrongful exercise of prosecutorial discretion in South Africa, the performance of prosecuting authorities is questionable. Despite desirability of prosecutorial independence, such independence should be checked to ensure that prosecutors are neutral, non-political and apply the law equally.[72] The GoU and the government of South Africa should create mechanisms to check wrongful exercise of prosecutorial discretion.

This section focuses on judicial review of decisions of prosecuting authorities for wrongful exercise of prosecutorial discretion thereby causing a miscarriage of justice. Although there are other mechanisms for checking prosecutorial discretion such as internal over-sight mechanisms noted above,[73] it is submitted that judicial review of wrongful exercise of prosecutorial discretion may be appropriate. This is because where internal over-sight mechanisms are inadequate or where the work of prosecuting authorities is not disclosed to the public for scrutiny, there is a danger that decisions not to prosecute ICC crimes are likely to go unchallenged. Although this mechanism has been criticised as having retrospective effect, time-consuming, expensive and not 'a realistic option for most people',[74] resorting to court is the avenue which vulnerable members of the public can use to challenge wrongful prosecutorial decisions.[75]

Wrongful exercise of prosecutorial discretion was reviewed by courts in South Africa in the case of *Freedom Under Law v National Director of Public Prosecutions & Others*[76]with respect to the decision of the Special DPP to withdraw charges against the Head of Crime Intelligence within SAPS without consulting the DPP, Mdluli,[77] a decision which the NDPP failed to review. The High Court of South Africa held that the decision of the Special DPP was 'illegal for not complying with the duty to consult the DPP'.[78] In essence, the Special DPP had to act in accordance with the law by consulting with the DPP before

[72] Waters, above n 55, 29.
[73] See for example, the 1996 Constitution of South Africa, sec 179(5)(c)-(d).
[74]Schönteich, above n 52, 5.
[75] See also Carsten Stahn, 'Judicial Review of Prosecutorial Discretion Five Years on' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 247-279, 264, where it was stated that '[j]udicial review is the strongest form of prosecutorial accountability over individualised decision-making. It allows a judge to assess or reverse individual prosecutorial choices, either *proprio motu* or based on a challenge by a participant.'
[76] *Freedom Under Law v National Director of Public Prosecutions & Others*, above n 70; See chapter 5, section 3.2.2 on the NPA's exercise of discretion not to prosecute.
[77] Ibid, paras 151-154.
[78] Ibid, para 164. The court added that the 'constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.' (para 165).

withdrawing the charges against Mdluli.[79] Thus, the Court reviewed and set aside the decision of the Special DPP of withdrawing charges against the accused person.[80]

Arguably, courts should review decisions of prosecuting authorities who decline to prosecute a person alleged to have committed serious crimes including ICC crimes where there is sufficient evidence to prove the guilt of such a person.[81] This is in line with the Rome Statute which enjoins state parties to take measures at the national level to ensure that the 'most serious crimes of concern to the international community as a whole' are effectively prosecuted.[82] Thus, it is suggested that Uganda and South Africa need to empower national courts to review wrongful decisions of prosecuting authorities through a clear mandate provided under the law other than courts relying on grounds of 'legality, rationality and administrative reasonableness'[83] to assert powers of judicial review of wrongful prosecutorial decisions.

The grounds for judicial review need to be clearly stated to avoid unreasonable interference with prosecutorial independence.[84] However, a balance should be made between upholding the independence of national prosecutors in exercising prosecutorial discretion and ensuring accountability for wrongful exercise of such discretion. In essence, to avoid unreasonable interference with prosecutorial discretion, courts need to be cautious in adjudicating matters referred for judicial review. This could possibly be done by ensuring that the matter subjected to judicial review establishes a *prima facie* case with a reasonable prospect of success.[85] Thus, only cases which show miscarriage of justice and in breach of legal rules regulating prosecuting authorities should be subject to judicial review.

Therefore, Uganda and South Africa should not only guarantee prosecutorial independence but also ensure that wrongful exercise of such independence is checked to

---

[79] National Prosecuting Authority Act (1998), sec 24(3).

[80] *Freedom Under Law v National Director of Public Prosecutions & Others*, above n 70, para 241(a)(c). This was confirmed by the Supreme Court of Appeal though reversed the mandatory orders of the High Court to the NDPP to reinstate the criminal and disciplinary charges against the perpetrator. See *National Director of Public Prosecutions v Freedom Under Law* (67/14) [2014] ZASCA 58, Supreme Court of Appeal (17 April 2014) paras 53(c) and 54(1).

[81] In the case of *Freedom Under Law v National Director of Public Prosecutions & Others*, ibid, para 61, the Court established that 3 experienced commercial prosecutors and 2 senior police investigators 'were satisfied' that 'there was sufficient evidence to prosecute Mdluli'.

[82] Rome Statute, Preamble, para 4.

[83] *Freedom Under Law v National Director of Public Prosecutions & Others*, above n 70, para 117, see also paras 128, 140, 175, 190.

[84] Such grounds should include; 1) where there is a *prima facie* case with sufficient evidence which leads to successful conviction of the person; 2) where prosecutorial discretion is exercised illegally and in bad faith, and 3) where there is a compelling reason not to prosecute for instance, where it is not in the interest of the public to prosecute, among others.

[85] See for example, *Freedom Under Law v National Director of Public Prosecutions & Others*, above n 70, para 92.

enable prosecuting authorities make decisions which enhance domestic implementation of the Rome Statute. To ensure effective investigations and prosecutions of ICC crimes in these states, all measures suggested above must be accompanied by the necessary political will.

3.2. Governments Desisting from Supporting Selective Justice

Institutions in Uganda and South Africa need to be fully supported by respective governments to ensure accountability for ICC crimes for both state and non-state actors alleged to have committed such crimes. Selective investigations and prosecutions of ICC crimes are conducted in Uganda as evident from the sole focus on non-state actors (LRA).[86] The Uganda Peoples Defence Forces (UPDF) personnel who allegedly committed ICC crimes in the armed conflict in northern Uganda have not been prosecuted for such crimes.[87] This is exacerbated by confusion over which court has jurisdiction over UPDF personnel alleged to have committed ICC crimes. Although the ICD is entrusted with jurisdiction over ICC crimes,[88] UPDF personnel are subject to military law and the General Court Martial is entrusted with unlimited original and appellate jurisdiction over any crime.[89] The GoU should clarify the court entrusted with adjudication of ICC crimes allegedly committed by UPDF personnel. This will ease determination of the institution that has abdicated its duties of handling perpetrators of ICC crimes. If it is the General Court Martial, the UPDF Act should be amended to confer jurisdiction on this court over ICC crimes.

This will enable prosecution of perpetrators of ICC crimes both state and non-state actors before the designated court. The GoU should strengthen the rule of law by exhibiting that UPDF personnel are not above the law and this will entail supporting investigations and prosecutions of persons alleged to have committed ICC crimes. In addition, the GoU should ensure that the UPDF does not interfere with institutions involved in conducting such proceedings as the case in the Caesar Acellam case discussed previously.[90]Perhaps this will reduce intimidation of staff engaged in investigating and prosecuting ICC crimes.

---

[86] See chapter 5, sections 3.1.2 concerning failure to conduct proceedings for military personnel of the UPDF.
[87] Kasaija Phillip Apuuli, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 391-409, 398 and Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99-126, 112.
[88] The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, sec 6.
[89] Uganda Peoples Defence Forces (UPDF) Act (2005) (hereinafter, UPDF Act), secs 119(1)(a)-(b) and 197(2).
[90] See chapter 5, sections 3.1.1 regarding inaction of the government of Uganda in event of interference with the enforcement of justice for ICC crimes.

Similarly, South Africa seems selective in handling perpetrators of ICC crimes especially with regard to high-ranking personnel.[91] For example, authorities in South Africa declined to arrest and surrender President Omar Hassan Ahmad Al Bashir (President Al Bashir) to the ICC as required under South Africa's ICC Act and the Rome Statute.[92] This exhibits selective justice since high-ranking officials alleged to have committed ICC crimes appear to be tolerated in South Africa.[93] Although President Al Bashir enjoys immunity as the Head of state of Sudan under international law,[94] South Africa is not absolved from its obligations under the Rome Statute of cooperating with the ICC in arresting and surrendering persons sought by the ICC who enter its territory.[95] The government of South Africa should support proceedings against such persons in fulfilment of its Rome Statute obligations.[96]Thus, Uganda and South Africa should avail the necessary political support to institutions handling ICC crimes irrespective of the official position of the person to ensure that accountability for ICC crimes is equally enforced against all perpetrators of such crimes in order to combat impunity for these crimes.

3.3. States and International Organisations should Compel Governments

In states where ICC crimes have been committed, some state officials are reluctant to support domestic proceedings due to complicity in committing these crimes or where high-ranking state officials are involved. This has been noted in Uganda with respect to the UPDF personnel and in South Africa with respect to President Al Bashir.[97]Seemingly, such reluctance is due to the fear of implicating government supporters and key political allies. This warrants measures to induce Uganda and South Africa to support investigations and prosecutions of perpetrators of ICC crimes.

Moreover, it is recognised that regional and global mechanisms are needed to strengthen 'incentives and accountability systems at a national level' to ensure that states

[91] See chapter 5, sections 3.2.2 regarding the NPA's exercise of discretion not to prosecute.
[92] South Africa's ICC Act, above n 5, secs 4(2)(a)-(b), 10(5) and 10(9) and Rome Statute, arts 86 and 89(1).
[93] For example, the former Foreign Minister of Israel Tzipi Livni and the late Prime Minister of Ethiopia Meles Zenawi whom authorities in South Africa declined to investigate for crimes they allegedly committed abroad. See Ottilia Anna Maunganidze and Anton du Plessis, 'The ICC and the AU' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65-83, 75.
[94] See chapter 4, section 4 concerning immunity as an obstacle to the implementation of the Rome Statute.
[95] Rome Statute, arts 86 and 89(1).
[96] Ibid.
[97] See chapter 5, section 3 on limited political will.

'return to a constitutional path'.[98] Thus, states and other organisations need to take the following measures, firstly, applying political pressure to induce the GoU and the government of South Africa to support domestic proceedings of ICC crimes. Lastly, providing monetary and non-monetary assistance to both states to enhance the capacity of national institutions in handling ICC crimes as well as supporting state cooperation with the ICC.

3.3.1. Ensuring State Compliance

International organisations like the United Nations (UN) and the African Union (AU) are important in pressuring Uganda and South Africa to adhere with the rule of law as well as ensure that ICC crimes are effectively investigated and prosecuted domestically. This means that UN organisations such as the United Nations Security Council (UNSC) may be utilised to impose political pressure on Uganda and South Africa to investigate and prosecute perpetrators of ICC crimes.[99] More so, the UNSC has emphasised the need for accountability for ICC crimes in situations where such crimes are committed which has enhanced cooperation with the ICC.[100] Similarly, the UNSC should encourage Uganda and South Africa to conduct domestic proceedings for ICC crimes.

Regionally, impunity for ICC crimes is not supported in Africa[101] though the current stance of the Africa Union (AU) concerning investigation and prosecution of persons alleged to have committed ICC crimes such as high-ranking state officialsseems contrary to the fight

[98] The World Bank, 'World Development Report 2011: Conflict, Security and Development', 16 (on file with the author) which recognised the need for regional and global mechanisms to strengthen 'incentives and accountability systems at a national level' by pressuring states 'to return to a constitutional path'.

[99] OHCHR, Report 2014 (May 2013) 21, available at <http://www.ohchr.org/EN/PublicationsResources/Pages/AnnualReportAppeal.aspx> last visited, 30 August 2017. For example political pressure was applied by the UNSC in the DRC after being prompted by the UN Joint Human Rights Office in 2007 'to send to the President of DRC a list of five senior officers of the Congolese armed forces (FARDC)' who were suspected of committing serious crimes such as sexual violence, including Lieutenant-Colonel Bedi Mobuli Engangela. Criminal proceedings were commenced against Engangela, after he was issued with a warrant of arrest in 2011 (ibid).

[100] This has happened in Democratic Republic of Congo and Mali where the United Nations Mission in the DRC (MONUSCO) and the African-led Support Mission in Mali (AFISMA) were called upon by the UNSC to support the ICC to bring to justice persons alleged to have committed war crimes and crimes against humanity. See Deborah Ruiz Verduzco, 'The Relationship Between the ICC and the United Nations Security Council' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 30-64, 51-52.

[101] The AU, pursuant to a decision of the Assembly, has the right to intervene in a member state 'in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. See the Constitutive Act of the African Union, art 4(h), available at <http://www.au.int/en/about/constitutive_act> last visited, 30 August 2017.

against impunity in Africa.[102] That notwithstanding, the AU has assisted in ensuring that proceedings against the former president of Chad Hissène Habré are commenced in Senegal though the way in which the matter was handled was inadequate considering the fact that the AU took almost 7 years in attempting to bring him to trial.[103]

Nonetheless, the AU through various resolutions, requested Senegalese authorities to prosecute Hissène Habré or extradite him to another African state which was willing and able to prosecute him.[104] When Senegal failed to respond promptly, the AU invited other African states willing to prosecute Hissène Habré and Rwanda volunteered.[105] Such regional pressure on Senegal to prosecute perpetrators of ICC crimes indicates that impunity may not be tolerated in Africa. The stance of fighting impunity on the continent isarguably due to the need to obtain African solutions to African problems and may not necessarily be aimed at encouraging African states to implement the Rome Statute. This is because as noted previously, the AU has called upon African states not to cooperate with the ICC and even passed a decision for developing a strategy for collective withdrawal from the ICC.[106] This strategy has been described by some scholars as reading 'like a largely reasonable list of possible reforms to the Rome Statute and the Court'.[107] This means that the AU wants to see reforms in the Rome Statute and the ICC, which perhaps would improve the relationship between the ICC and the AU so to generate mass support of the ICC from AU member states.

In addition to constant reminders from the AU, international pressure was imposed on Senegal as noted from the decisions of the International Court of Justice and the United

[102] See for example, the resolution of non-cooperation of African states parties with the ICC in arresting and surrendering President Al Bashir, see the AU Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc.Assembly/AU/13(XIII), 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1, para 10. See also chapter 4, section 4.1 on immunity under South African law and the position of the African Union.

[103] Konstantinos D. Magliveras, 'Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union's Handling of the Hissène Habré Affair' (2014) 22(3) *African Journal of International and Comparative Law* 420-447, 421.

[104] See for example, Assembly of the African Union, 'Decision on the Hissen Habre Case' (Assembly/AU/Dec.371(XVII) adopted by the seventeenth Ordinary Session (30 June - 1 July 2011) in Malabo, Equatorial Guinea , paras 3, and 4, available at <http://www.au.int/en/decisions/assembly> last visited, 30 August 2017.

[105] Assembly of the African Union, 'Decision on the Hissen Habre Case' (Assembly/AU/Dec.401(XVIII) adopted by the Eighteenth Ordinary Session (29-30 January 2012) in Addis Ababa, Ethiopia, paras 2 and 5.

[106]See chapter 4, section 4.1 concerning immunity under South African law and the position of the African Union.

[107] Mark Kersten, 'Not All it's Cracked Up to Be –The African Union's "ICC Withdrawal Strategy"' (6 February 2017), available at <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/> last visited, 30 August 2017. See also chapter 4, section 4.1.

Nations Committee Against Torture[108] to the effect that Senegal must submit the case to its competent authorities for prosecution if it fails to extradite Hissène Habré. Consequently, Senegal was compelled to make legislative and institutional reforms to enable criminal proceedings of international crimes including ICC crimes.[109]Hissène Habré was found guilty for crimes against humanity, war crimes and torture and sentenced to life imprisonment by the Extraordinary African Chambers in Senegal.[110] It is contended that the AU has a role to play in the fight against impunity in member states including Uganda and South Africa by applying political pressure in collaborations with other African states.

3.3.2. Providing Assistance to States

As mentioned before, conducting domestic proceedings for ICC crimes requires more resources which may not be available to national institutions due to shortage of funds. It is argued that aside political pressure, states, international organisations and donors should influence Uganda and South Africa by availing financial assistance on condition that these states ensure accountability for ICC crimes. Uganda has previously benefitted from international support for purposes of implementing the Rome Statute[111] but less has been realised in ensuring that perpetrators of ICC crimes are investigated and prosecuted due to limited support from the GoU.[112] Arguably, international assistance alone without political support for domestic proceedings for ICC crimes may not be enough because it is the GoU which controls and allocates the resources. In the circumstances, political pressure on Uganda is vital to ensure that international assistance availed to Uganda in terms of finance and other assistance, is utilised for the specific needs for which it was granted.

In essence, the donor community needs to pressurise the GoU to fully support effective domestic proceedings for ICC crimes. This may entail availing future funding on condition that the GoU undertakes measures to remove legal and institutional barriers to domestic

[108]*Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) ICJ General List No. 144, ICJ Reports 2012, 422 (20 July 2012) para 121 and Committee Against Torture, 'Decision', Communication No. 181/2001, CAT/C/36/D/181/2001, adopted by the Thirty-Sixth Session (19 May 2006), Annex, paras 10-11.
[109] Committee Against Torture, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Third Periodic Report of States Parties due in 1996, Senegal', CAT/C/SEN/3 (5 October 2011) para 270-275, where legislative reforms made by Senegal were indicated.
[110] Trial International, 'Hissene Habre', available at <https://trialinternational.org/latest-post/hissene-habre/> last visited, 30 August 2017.
[111] For example the judiciary of Uganda was supported by donors to establish the International Crimes Division (ICD) for prosecuting ICC crimes, as well as training local personnel in handling such crimes. See Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 182-183.
[112]See chapter 5, section 3.1 on limited political support by the Government of Uganda.

proceedings for ICC crimes such as the Amnesty Act.[113] Where the GoU fails to respond, such aid should be withheld or suspended to ensure compliance.[114] Similar measures should be applied to the government of South Africa to ensure that ICC crimes are investigated and prosecuted domestically. International donors need to monitor activities undertaken by Uganda and South Africa for which funding was availed to ensure that the aims of such funding are realised. It is submitted that financial assistance availed by development partners can be used as an incentive for Uganda and South Africa to promote justice for ICC crimes and strengthen the rule of law in both states.

In addition, technical support in form of training of local staff in handling ICC crimes should be availed by international organisations.[115] These organisations are in the best position to connect states with international experts who offer specialised training in international criminal law and related disciplines. This could enable national institutions to investigate, prosecute and adjudicate ICC crimes effectively. For instance, the UN has provided assistance in capacity building to many states which handle domestic proceedings for ICC crimes.[116] Similarly, technical support was availed to Uganda and South Africa through training prosecutors, judges and defence lawyers by the International Crime in Africa Programme (ICAP) at the Institute for Security Studies (ISS).[117] Such continuous international assistance in specialised legal training and education should be availed to judges, prosecutors, defence lawyers and investigators in Uganda and South Africa to enable them attain adequate skills for handling ICC crimes.

To ensure sustainable local capacity, long-term projects like establishing institutions for training local staff should be initiated and supported by these international organisations. In addition, experts in international criminal law and related disciplines need to be recruited to train local staff who will manage such institutions in the future to serve the training needs of staff in Uganda and South Africa. This may create sustainable capacity at the national level leading to increase in skilled staff to handle ICC crimes and reduce reliance on CSOs for capacity building.

---

[113] See chapter 3, section 4.2.1 on the Amnesty Act (2000).

[114] Suspension of foreign aid in Uganda is not new for instance, Ireland suspended the general budget for JLOS activities 'due to scandals in the Office of the Prime Minister'. Similarly, the Netherlands government suspended support for JLOS leading to a shortfall of about '50% of the JLOS SWAP budget for the financial year'. This affected construction programmes, capacity building and legal aid provision. See the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2013/2014', above n 38, 137-138.

[115] See section 2.1.3 of this chapter on continuous training of staff for skills enhancement.

[116] States like Rwanda and Cambodia have benefitted in training the defence lawyers, prosecutors and judges. See OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector' (UN 2006) 11, 37.

[117] Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of- Law Policymakers, Donors, and Implementers* (Open Society Foundations 2011) 77, 87-88, 97 (on file with the author).

Academic staff exchange programmes should be established at these institutions to encourage sharing of knowledge and skills between foreign professionals and local academic staff. This will possibly keep local staff abreast with new developments in these disciplines thereby improving knowledge and skills of the local staff.[118]Thus, support should be extended to the academic staff in Uganda and South Africa where expertise in international criminal law is lacking to enable law graduates acquire knowledge and skills in handling ICC crimes.

In addition, support from international organisations should be availed to Uganda and South Africa in conducting domestic investigations for instance, in preserving evidence by initiating fact-finding missions, providing forensic services to collect such evidence, exhuming dead bodies and investigating mass crimes.[119] This should be complemented with capacity building of staff in investigating ICC crimes.[120] These training sessions and other forms of international assistance will strengthen national institutions by equipping staff with a range of skills in handling ICC crimes.

Furthermore, the AU as an umbrella organisation for African states should create an African network of contact points in member states to exchange information about mechanisms to be adopted to facilitate accountability for ICC crimes.[121] Such collaboration could enhance mutual legal assistance among African states in conducting investigations and prosecutions of these crimes. It is contended that collective measures at a regional level need to be undertaken and speared-headed by the AU to facilitate collection of evidence; creation of joint investigation teams and networks for African experts in international law; as well as build collaborations with other organisations such as the ICC and EU for technical assistance. Thus, the AU should assist Uganda and South Africa to access funding as well as obtain

[118] Similar programmes were undertaken by some International organisations that provided support in the academia in Kosovo including members of the rule-of-law team of the OSCE (Organization for Security and Co-operation in Europe) who worked with the Pristina University Law Faculty to modernise the curriculum and teaching methods of this faculty. See OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector' (UN 2006) 25.

[119] United Nations, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice' (March 2010) 7, available at <http://www.unrol.org/doc.aspx?d=2957> last visited, 30 August 2017.

[120] Several international organisations have conducted training of national investigators in states including the DRC and Sierra Leone to equip them with skills for investigating serious crimes. See Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of- Law Policymakers, Donors, and Implementers*, above n 117, 64.

[121] Similar measures were undertaken by the European Union (EU) whereby a European Network of contact points was created with respect to perpetrators of genocide, crimes against humanity and war crimes as well as the requirement for mutual assistance in investigation of such crimes. See United Nations Commission on Human Rights, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity', E/CN.4/2004/88 (27 February 2004) para 55, authored by Diane Orentlicher, available at <www.ohchr.org. http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10800> last visited, 30 August 2017.

adequate resources for conducting criminal proceedings for ICC crimes as exhibited in the Hissène Habré case mentioned above.[122]

Therefore, political pressure should be applied by international organisations to ensure that Uganda and South Africa conduct domestic proceedings for ICC crimes to facilitate accountability for these crimes where these states are unwilling to do so. In addition, international assistance should be availed to Uganda and South Africa to strengthen national institutions in investigating and prosecuting ICC crimes effectively. This should be in terms of finance, capacity building, investigative assistance as well as enhancing collaboration between various states and organisations. The section which follows discusses the ways through which CSOs could be strengthened to effectively promote domestic implementation of the Rome Statute.

4. Strengthening Civil Society Organisations (CSOs)

CSOs play an important role in ensuring successful prosecution of crimes as well as 'demanding justice and holding institutions and perpetrators to account'.[123] This section briefly highlights the influence of CSOs on the implementation of the Rome Statute at the international, regional and national levels to show how activities of these organisations shape the domestic implementation of the Rome Statute.[124] Lastly, the section suggests measures through which activities of CSOs in Uganda and South Africa may be enhanced to promote domestic implementation of the Rome Statute in these states. It argues that CSOs organisations are key in promoting domestic implementation of the Rome Statute as well as pressuring state to comply with their obligations under the Rome Statute.

4.1. Actions of Civil Society Relating to the Implementation of the Rome Statute

Internationally, it is acknowledged that CSOs actively participated during the Rome Conference particularly CSOs such as the Coalition for an International Criminal Court

[122] Assembly of the African Union, 'Decision on the Hissen Habre Case' (Assembly/AU/Dec.340(XVI) adopted by the sixteenth Ordinary Session (30-31 January 2011) in Addis Ababa, Ethiopia, para 8.

[123] Paul Seils, 'Putting Complementarity in its Place' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 305-327, 312. Such roles may include advocacy work for legislative and institutional reforms, participating in criminal proceedings as complainants using public interest litigation, submitting well-researched legal briefs on complex cases before court, documenting human rights violations as well as training local staff and providing free legal aid services.

[124] Note should be taken that the focus is on promoting domestic proceedings for ICC crimes since cooperation with the ICC has been discussed elsewhere, see Matthew Cannock, 'Strengthening International Criminal Court Cooperation – The Role of Civil Society' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 318- 365.

(CICC) supported the establishment of the ICC.[125] The CICC has continued to advocate for the ratification and domestication of the Rome Statute as well as promoted universality of the ICC.[126] For example, in 2011 the CICC together with the Philippines Coalition for the International Criminal Court (PCICC) organised a regional strategy meeting for CSOs to formulate strategies to pressurise their governments to ratify and implement the Rome Statute.[127] Such initiatives could mobilise CSOs in other regions to push for domestic implementation of the Rome Statute by respective states. CSOs that are members to the CICC include Amnesty international which issues press statements calling upon states to support the ICC,[128] ratify the Rome Statute,[129] and documents human rights violations committed in several states such as Sudan[130] which might be utilised as evidence in future trials.

Regionally, CSOs in several regions engage with regional organisations such as the European Union (EU), the Organization of American States (OAS) and the African Union (AU) to influence member states of these organisations to implement the Rome Statute.[131] Several CSOs have called upon member states of the AU to uphold their obligations under the Rome Statute by ratifying and domesticating the Statute[132] as well as ensuring that ICC crimes are prosecuted at the national level. A notable example is the African Network on International Criminal Justice which encouraged AU member states to 'strengthen national level judiciaries, law enforcement systems and institutions … to respond to international

[125] Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39(2) *Cornell International Law Journal* 243-284.

[126] ASP, 'Report of the Bureau on the Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court', ICC-ASP/15/19 (10 November 2016) para 35.

[127] Coalition for the International Criminal Court, 'CICC Asia Pacific Regional Strategy Meeting' Quezon City, The Philippines, 11-12 April 2011, available at <http://www.iccnow.org/?mod=region&idureg=7> last visited, 30 August 2017.

[128] Amnesty international, 'ICC: States must strengthen, not abandon, only route to justice for millions of victims' (15 November 2016) available at <https://www.amnesty.org/en/latest/news/2016/11/icc-states-must-not-abandon-only-route-to-justice-for-millions-of-victims/> last visited, 30 August 2017.

[129] Amnesty International, 'Morocco: Urge the government to ratify the Rome Statute of the International Criminal Court' (October 2004), available at <https://www.amnesty.org/download/Documents/100000/mde290072004en.pdf> last visited, 30 August 2017.

[130] Amnesty international, 'Sudan: Five Years and Counting: Intensified Aerial Bombardment, Ground Offensive and Humanitarian Crisis in South Kordofan State' (29 September 2016) Index No. AFR 54/4913/2016, available at <https://www.amnesty.org/en/documents/afr54/4913/2016/en/> last visited, 30 August 2017.

[131] See discussion in Cannock, above n 124, 337- 343 with respect to cooperation with the ICC.

[132] Conference Report, 'Advancing International Criminal Justice in Africa: State Responsibility, the African Union and the International Criminal Court; Towards an Effective Advocacy Response', 20, held between 14th to 16th November 2011, Nairobi-Kenya organised by Centre for Citizens Participation on the African Union (CCP-AU), Trust Africa and MacArtthur Foundation, available at <http://ccpau.org/?p=803> last visited, 30 August 2017.

crimes, in order to complement the work of the ICC'.[133] In essence, member states of the AU were encouraged to ensure accountability for ICC crimes at the national level since the ICC is complementary to national criminal jurisdictions.[134] This exhibits that CSOs are key in campaigning for domestic implementation of the Rome Statute.

Domestically, several CSOs have taken measures to promote domestic implementation of the Rome Statute including advocating for the ratification of the Rome Statute by respective states. This is evident from CSOs such as the Philippines Coalition for the International Criminal Court (PCICC) which was instrumental in encouraging the Philippines to ratify the Rome Statute.[135] Further support by CSOs is evident in ensuring that domestic trials for ICC crimes are conducted for example in documenting evidence of such crimes for use in future prosecutions as illustrated by Human Rights Watch (HRW) which investigated atrocities committed during Hissène Habré's rule.[136] The information was latter utilised by victims to commence proceedings against him.[137] By documenting atrocities committed, CSOs collect evidence for purposes of trial proceedings against perpetrators of such crimes.

More so, CSO have acted on behalf of victims of these crimes in criminal proceedings as well as provided protection to witnesses. This is evident in Serbia where CSO such as the Humanitarian Law Center assisted in the protection of Albanian witnesses and ensured their participation in trials.[138] In Guatemala, the Center for Human Rights Legal Action (CALDH) filed a complaint against Rios Montt and Rodriguez Sachez on behalf of the victims' association.[139] Such measures by CSOs are meant to ensure that victims of ICC crimes are

[133] African Network on International Criminal Justice, 'Reflections on the African Union ICC Relationship' (ICJ Kenya Section, January 2014) 2, available at <http://www.icj-kenya.org/jdownloads/Publications/reflections%20on%20the%20african%20union%20icc%20relationship.pdf> last visited, 30 August 2017.

[134] Rome Statute, arts 1 and 17; see also chapter 1, section 1.

[135] Emma Palmer and Christoph Sperfeldt, 'International Criminal Justice and Southeast Asia: Approaches to Ending Impunity for Mass Atrocities', *AsiaPacific Issues*, Analysis from the East-West Center, No. 126, September 2016, at 4, available at <http://www.eastwestcenter.org/publications/international-criminal-justice-and-southeast-asia-approaches-ending-impunity-mass> last visited, 30 August 2017.

[136] Magliveras, above n 103, 422.

[137] Ibid, 423. This was with the assistance of the Associaition des Victimes des Crimes et Répressions Politiques au Tchad (AVCRP). Similar measures were taken by CSOs in Chile such as the Vicaría as well as South Africa by SALC and the Zimbabwe Exiles Forum (ZEF) which documented human rights abuses and used the information to commence proceedings against perpetrators of these crimes. See Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (2010) 4(1) *The International Journal of Transitional Justice* 67-86, 70 and *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, (Case No. 77150/09) High Court of South Africa [2012] ZAGPPC 61 (8 May 2012), respectively.

[138] Iavor Rangelov, 'Contesting the Rule of Law: Civil Society and Legal Institutions' in Vesna Bojicic-Dzelilovic, James Ker-Lindsay, Denisa Kostovicova (eds), *Civil Society and Transitions in the Western Balkans* (Palgrave Macmillan 2013) 71-84, 79-80.

[139] Roht-Arriaza, above n 8.

represented to enable them obtain justice which perhaps would be impossible without external assistance from these organisations.

Other forms of participation by CSOs in domestic trials include submission of *amicus curiae* briefs on matters before court.[140] This is illustrated by CSOs in South Africa such as the Tides Centre and the Peace and Justice Initiative together with prominent scholars who submitted *amici curiae* concerning the enforcement of South Africa's ICC Act with respect to the presence of the accused person as a requirement for exercising jurisdiction.[141] The court acknowledged the usefulness of the submissions of the *amici curiae* in determining what the court termed as 'a complex legal question'.[142] This demonstrates the vital role of CSOs in assisting national courts to obtain proper interpretation of the provisions of national implementing legislation. Therefore, CSOs engage in various activities mentioned above which facilitate domestic proceedings for ICC crimes thereby enhancing the implementation of the Rome Statute at the national level.

4.2. Enhancing the Activities of Civil Society Organisations (CSOs)

As noted previously, CSOs in Uganda have influenced the implementation of the Rome Statute differently with CSOs in South Africa appearing to be more active than CSOs in Uganda in that regard.[143]Thus, existence of strong and vibrant CSOs is vital in enhancing support for domestic proceedings of ICC crimes. This calls for measures to be undertaken by these organisationsto strengthen their activities in support for the promotion of domestic implementation of the Role Statute in Uganda and South Africa.Firstly, CSOs in Uganda should increasingly cooperate with the GoU to facilitate dialogue on various matters including supporting domestic implementation of the Rome Statute. Lastly, CSOs in Uganda and South Africa should utilise available funds efficiently through strategic litigation and

[140] An *amicus curiae* or 'friend of the court' is described as 'a person or entity that intends to contribute to legal proceedings, but without becoming "a party" to those proceedings.' See Frans Viljoen and Adem Kassie Abebe, 'Amicus Curiae Participation Before Regional Human Rights Bodies in Africa' (2014) 58(1) *Journal of African Law* 22-44, 23-24.

[141] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Zimbabwe Exiles' Forum* and John Dugard, Kevin Heller, Gerhard Kemp, Hannah Woolaver, the Tides Centre and the Peace and Justice Initiative (amici curiae), Case No. CCT 02/14, 'Written Submissions of the First to Fourth Amici Curiae' (19 May 2014) paras 49-69.

[142] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Zimbabwe Exiles' Forum* (CCT 02/14)[2014] ZACC 30, Constitutional Court of South Africa (30 October 2014) para 8. See also *Mail and the Guardian Media Limited and Others v M. J. Chipu N.O. and Others* (CCT Case No. 136/12) Constitutional Court of South Africa (27 September 2013), 'Submissions of Southern Africa Litigation Centre', where SALC submitted *amicus curiae* concerning the contradiction between sections 4(1)(a) and 21(5) of the Refugees Act which may curtail the implementation of the Rome Statute in South Africa.

[143]See chapter 5, section 4 on limited support from civil society organisations.

working in collaboration to share roles, knowledge and expertise. This is aimed at minimising costs involved in promoting domestic implementation of the Rome Statute.

4.2.1. Increasing Cooperation with the Government of Uganda

Cooperation between the government and CSOs at all levels is required[144] which sometimes culminates into partnerships that empower people by enabling them to participate in development programmes.[145]It is believed that partnerships strengthen CSOs and enable these organisations to influence the implementation of policies and projects.[146] It is submitted that CSOs may influence government policies even without forming a partnership with the government because the nature of engagement of CSOs with the government varies.Some CSOs may be contracted and funded by the government to implement its policies; or may work in parallel with the government as autonomous entities to complement its work; or merely participate in policy formulation through dialogue with the government; or challenge government actions (confrontational relationship).[147]

While CSOs in South Africa are thought to be more in partnership with the government to increase service provision to the people,[148] CSOs in Uganda operate amidst restrictions as evident in the legal framework regulating these organisations.[149] This means that activities of CSOs in Uganda are restricted and may not have meaningful relationship with the GoU. There is need to create working relationship between CSOs in Uganda and the GoU not only for provision of services on behalf of the government but also participate in formulating policies through dialogue and recommend appropriate action. It is contended that CSOs in Uganda can effectively support domestic implementation of the Rome Statute through dialogue with relevant authorities to emphasise the need for domestic implementation of the

[144] Catherine Barnes, 'Governments & Civil Society Organisations: Issues in Working Together Towards Peace', Discussion Paper for GPPAC Strategy Meeting (European Centre for Conflict Prevention, October 2006) 12 (on file with the author).

[145] Mário Vasconcellos and Ana Maria de A. Vasconcellos, 'State-Civil Society Partnership: Issues for Debate and New Researches', (2011) 18(59) *Organ. Soc* 701-717, 711 available at <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1984-92302011000400008> last visited, 30 August 2017.

[146] James Manor, 'Partnerships Between Governments and Civil Society for Service Delivery in Less Developed Countries: Cause for Concern', Institute of Development Studies, University of Sussex (October 2002), a paper presented at the 'Making Services Work for Poor People' World Development Report (WDR) 2003/04 Workshop, held at Eynsham Hall, Oxford-United Kingdom (4-5 November 2002) (on file with the author) 1.

[147] See Barnes, above n 144, 15.

[148] Adam Habib and Rupert Taylor, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) 10(1) *International Journal of Voluntary and Nonprofit Organizations* 73- 82, 75.

[149] See for example, Non-Governmental Organisations Act (2016), secs 31(5)(b) and secs 31(5)(d) as well as sec 44(a)-(b) which limits the area of operation of CSOs to those registered by these organisations.

Rome Statute. This may be possible without losing their critical role and independence, especially if activities of these CSOs are not financed by the GoU.

As set out in the National NGO Policy that NGOs are 'potent and legitimate partners to governments in nation building'[150] the GoU need to be reminded to recognise CSOs as partners than acting as 'regulators and supervisors of CSOs'.[151] Thus, the intended goal for formulating the National NGO Policy of strengthening relationship between CSOs and the GoU should be implemented.[152] More so, under Non-Governmental Organisations Act (2016) one of the objectives of the Act is to 'promote a spirit of cooperation, mutual partnership and shared responsibility' between the CSOs and the government.[153] It remains to be seen whether the GoU will work with CSOs in mutual relationship if the GoU continues to control these organisations through legal restrictions for instance,limitation as regards to the area of operation.[154] Such restrictions exhibit lack of independence of CSOs in Uganda and government's mistrust of the activities of CSOs.

Basing on the National NGO Policy and the Non-Governmental Organisations Act (2016), CSOs should lobby with relevant officials of the government for the implementation of the Policy and the Act to secure cooperation from the GoU to support the activities of CSOs. This may encompass advocating for the removal of restrictions relating to the area of operation of CSOs.[155] It is contended that with free operations of CSOs and a harmonious working relationship with the GoU, it may be possible for CSOs to lobby the GoU to fully support domestic proceedings for ICC crimes. This may entail CSOs engaging relevant officials in government departments such as in the Ministry of Foreign Affairs and Ministry of Justice[156]to support legal and institutional reforms for enhancing effective domestic proceedings of ICC crimes.

---

[150] Ministry of Internal Affairs, Uganda, 'The National NGO Policy' (October 2010) 10 (on file with the author). The definition of Civil Society Organisations encompasses Non-Governmental Organisations (NGOs); see chapter 5, section 4.

[151] Uganda Program for Human and Holistic Development (UPHOLD), 'Study of Civil Society Oraginizations in Uganda', Phase II Final Report (September 2004) 51, available at <http://uphold.jsi.com/Resources_studies.htm> last visited, 30 August 2017.

[152] See 'The National NGO Policy', above n 150, para 4.1.

[153] Non-Governmental Organisations Act (2016), sec 4(c). See also the Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 17 (on file with the author).

[154]See above n 149.

[155] Some of the restrictions are set out under the Non-Governmental Organisations Act (2016), secs 31(5)(b) and secs 31(5)(d) as well as sec 44(a)-(b).

[156] Stephen A. Lamony, 'Closing the Impunity Gap in Africa – How to Mobilise and Encourage Domestication of ICC Legislation' in Southern Africa Litigation Centre, 'Civil Society in Action: Pursuing Domestic Accountability for International Crimes', International Criminal Justice Regional Advocacy Conference Report, (10-11 June 2014) Johannesburg-South Africa, 85-90, 88, available at <http://www.southernafricalitigationcentre.org/2015/01/15/international-criminal-justice-regional-advocacy-

4.2.2. Ensuring Proper Utilisation of Funds

CSOs in Uganda and South Africa should ensure that funds obtained for supporting domestic proceedings for ICC crimes are utilised properly. This can be done through strategic litigation whereby cases are taken to court to 'test a legal point that also applies to [other] cases' and is aimed at the impact of the case on the wider public than merely 'wining legal arguments'.[157] In essence, CSOs may support domestic proceedings against perpetrators of ICC crimes by availing litigation support for selected high profile cases. Adopting strategic litigation is appropriate for CSOs due to limited funds and should only focus on issues that advance accountability for ICC crimes by careful selection of cases which address a range of issues of importance to the wider community.[158] It is argued that using strategic litigation, the limited resources of CSOs will be utilised appropriately.

Strategic litigation has been applied by the SALC which partnered with the Zimbabwe Exiles Forum (ZEF) in the case of the *Zimbabwe Torture Case*[159] whereby these CSOs successfully obtained a court order to compel authorities in South Africa to commence investigations for ICC crimes committed in Zimbabwe.[160] Taking the example of CSOs in South Africa, CSOs in Uganda should adopt strategic litigation mechanism to focus on a few cases of high profile and pursue such cases till completion. Using strategic litigation CSOs should support cases which challenge the legality of the Amnesty Act to ensure that amnesties issued in Uganda exclude perpetrators of ICC crimes.

In addition, CSOs in Uganda and South Africa need to collaborate to minimise costs in conducting their activities for example by sharing roles, knowledge and expertise to achieve a common goal of ensuring effective domestic proceedings for ICC crimes. Such division of labour would minimise expenditure on activities carried out singlehandedly by a CSO due to low operational costs. Efforts for collaboration between CSOs have been undertaken by SALC which works with other CSOs in South Africa and abroad to support domestic implementation of the Rome Statute. For instance, in June 2014 SALC convened a meeting of 'civil society actors throughout Africa' to discuss mechanisms through which CSOs can

---

report-civil-society-in-action-pursuing-domestic-accountability-for-international-crimes/> last visited, 30 August 2017.

[157] See Public Law Project, 'Guide to Strategic Litigation', 5 (on file with the author).

[158] See also Southern Africa Litigation Centre, 'Positive Reinforcement: Advocating for International Criminal Justice in Africa' (May 2013) 77 (on file with the author).

[159] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, above n 137.

[160] See chapter 4, section 3.1.1.B analysing the Zimbabwe Torture Case.

advance domestic accountability for ICC crimes and advocacy for domestication of the Rome Statute.[161] This culminated into recommendations for CSOs to enhance domestic proceedings of ICC crimes in African states including Uganda and South Africa.[162] Perhaps it is through combined effort that CSOs in Uganda and South Africa can meaningfully influence these states to ensure that domestic proceedings for ICC crimes are conducted.

Similarly, CSOs in Uganda should build strong coalitions to increase advocacy for domestic proceedings of ICC crimes. Instead of advocating for national reconciliation and long-lasting peace in northern Uganda,[163] coalitions of CSOs in Uganda should also engage in advocacy work to increase political support for domestic investigation and prosecution of ICC crimes. Therefore, due to limited funding available to local CSOs, collaboration between CSOs need to be encouraged to enhance technical and financial capacities of CSOs. Coalitions of CSOs may be utilised to strengthen activities of CSOs aimed at promoting domestic proceedings for ICC crimes such as training local staff in handling these crimes.

5. Enhancing State Cooperation

Ensuring state cooperation with the ICC is important because it is one way states fulfil their obligations under the Rome Statute.[164] As discussed already, the ICC relies on state cooperation in many respects including collecting evidence, arresting persons alleged to have committed crimes and obtaining attendance of witnesses.[165] Where cooperation was refused,

[161] Southern Africa Litigation Centre, 'Civil Society in Action: Pursuing Domestic Accountability for International Crimes', International Criminal Justice Regional Advocacy Conference Report, (10-11 June 2014) Johannesburg-South Africa, 1, available at <http://www.southernafricalitigationcentre.org/2015/01/15/international-criminal-justice-regional-advocacy-report-civil-society-in-action-pursuing-domestic-accountability-for-international-crimes/> last visited, 30 August 2017.

[162] Ibid, 91-92.

[163] For example, the Civil Society Organisations for Peace in Northern Uganda (CSOPNU) is a coalition which was formed in 2001 and is composed of national and international CSOs. It has been influential in calling for increased dialogue and greater national reconciliation as well as supports a just and long lasting peace in northern Uganda. See Zachary Lomo and Lucy Hovil, 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' Refugee Law Project, Working Paper 11 (February 2004) 63 (on file with the author) and Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda' (2005) 5(2) *African Journal on Conflict Resolution,* 33-61, 56.

[164] Rome Statute, art 86

[165] Chapter 2, section 4.1.5 on cooperation

the ICC failed to secure the arrest of persons alleged to have committed ICC crimes[166] or obtain sufficient evidence to prove commission of these crimes.[167]

Various ways may be utilised to enhance state cooperation with the ICC. Article 87(7) of the Rome Statute provides for measures to be taken by the ICC where a state fails to cooperate with the Court which prevents it from exercising its functions. This is by making a finding of non-compliance and then refer the matter to the United Nations Security Council (UNSC) and the Assembly of States Parties (ASP). Notably, several findings of non-compliance have been made and even the UNSC and the ASP were informed of the matter.[168]However, no meaningful steps have been taken by the UNSC and the ASP against non-cooperating states after the ICC made a judicial finding of non-cooperation.[169] Arguably, there is need to obtain state cooperation by other means than the ASP and the UNSC such as regional and international organisations taking measures to compel states into cooperation[170]

While the AU has called upon member states not to cooperate with the ICC,[171] other regional organisations such as the EU have done otherwise. For instance, the EU signed an agreement on cooperation and assistance with the ICC on 10 April 2006 in which the EU undertook to provide information or documents relevant to the work of the ICC.[172] More so, CSOs should also be utilised in enhancing cooperation between states and the ICC.[173] Particularly in Africa, several CSOs have pressurised states to fulfil their cooperation

[166] See chapters 3 and 4, section 5.1 highlithing the failure by Uganda and South Africa to cooperate with the ICC in arresting and surrendering President Al Bashir to the Court.

[167] For example Kenya failed to provide the ICC with evidence to facilitate the proceedings against President Uhuru Muigai Kenyatta and his Deputy, Mr. William Samoei Ruto leading to the collapse of the cases against them. See chapter 1 section 1.

[168]*The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016).

[169] See Rome Statute, art 87(7) and Göran Sluiter and Stanislas Talontsi, 'Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court' in Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 80-113, 105 and 108.

[170] *The Prosecutor v Uhuru Muigai Kenyatta*, 'Second Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute', (ICC-01/09-02/11) Trial Chamber V(B) (19 September 2016) para 8.

[171] AU Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', above n 102, para 10.

[172]See 'Agreement between the International Criminal Court and the European Union on Cooperation and Assistance' (ICC-PRES/01-01-06) 10 April 2006, para 7(2)-(3). See detailed discussion of the role of the EU in enhancing cooperation with the ICC in Christian Behrmann, 'Strengthening the International Criminal Court Cooperation Regime from the European Union's Perspective' Olympia Bekou and Daley J. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff 2016) 297-317.

[173] See detailed discussion in Cannock, above n 124.

obligations a notable example being SALC in South Africa as discussed already[174] and the Kenyan Section of the International Commission of Jurists in Kenya.[175] In both cases, courts permitted CSOs to commence proceedings in court requesting for orders directing national authorities to arrest President Al Bashir (who visited both states but was never arrested and surrendered to the ICC). The court decisions shamed both states for failing to fulfil their obligations under the Rome Statute[176]and it remains to be seen whether President Al Bashir will set foot in these states in the future. It is arguable that CSOs as well as regional and inter-governmental organisations are vital in compelling state compliance with their cooperation obligations under the Rome Statute.

Thus, state cooperation with the ICC may not be enforced by Court referral of the matter to the ASP or UNSC as envisaged under article 87(7) but other measures should be undertaken. Such measures include engaging international organisations and civil society organisations to compel states to give effect to the Rome Statute using political pressure, as well as availing financial and technical assistance to these states. It is possible for Uganda and South Africa to implement the Rome Statute if they have sufficient facilities for conducting proceedings for ICC crimes and enable cooperation with the ICC, which should be accompanied with the necessary political will to that effect.

6. Conclusion

As parties to the Rome Statute, Uganda and South Africa have to perform the Statute in good faith[177]which entails giving effect to the Statute by removing obstacles curtailing its implementation. This chapter has suggested several measures which may be undertaken by Uganda and South Africa to eliminate these obstacles.[178] With respect to the obstacle of weak institutions it was suggested that these institutions should be strengthened by ensuring that human resources are provided with satisfactory conditions of work to increase staff retention, enjoin them to work in collaboration as well as avail them with continuous training to enhance their competence and skills in handling ICC crimes.[179]

---

[174] Chapter 4, section 5.1.A analysing the Al Bashir Case.

[175]*The Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security* (Misc. Criminal Application No. 685 of 2010) High Court of Kenya (28 November 2011).

[176]See *Al Bashir Case* (chapter 4, section 5.1) and *The Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security*, ibid.

[177] Vienna Convention on the Law of Treaties, above n 4, art 26.

[178]Measures to eliminate legislative obstacles to the implementation of the Rome Statute have been dealt with in the respective chapters.

[179] See section 2.1 of this chapter which addresses insufficient human resources.

However, as noted in chapter 5, the obstacles of insufficient human resources and equipment are partly caused by shortage of funds. Thus, to eliminate such an obstacle, it was suggested that national institutions should lobby for more funding form donors especially for long-term projects but at the same time, the governments should partner with private sectors to provide some of the resources in order to reduce reliance on donor funding.[180] With sufficient funding for the activities of national institutions, domestic proceedings for ICC crimes may be conducted effectively in Uganda and South Africa.

Regarding limited political will, it was proposed that the independence of prosecuting authorities should be upheld by ensuring transparent appointment of senior prosecuting authorities, as well as minimise political appointments which could lead the executive to interfere in the exercise of prosecutorial discretion.[181] It was also suggested that wrongful exercise of discretion should be checked by utilising judicial review of prosecutorial decisions where there is sufficient evidence to prove commission of ICC crimes. More so, it was suggested that governments should desist from supporting selective justice by ensuring that persons alleged to have committed ICC crimes are investigated and prosecuted impartially irrespective of their political connections or official position.[182]

Thus, in event that the governments of Uganda and South Africa fail to implement the Rome Statute, it was suggested that other states and international organisations should apply political pressure to secure compliance as well as provide assistance (such as finance and technical assistance) to these states to enhance the capacity of national institutions to handle ICC crimes domestically.[183]

Concerning the obstacle of limited support from CSOs, it was suggested that CSOs should increasely cooperateas well ascreate dialogue with the GoU and CSOs which could influence the GoU to support domestic implementation of the Rome Statute.[184]However, to avoid dependence of CSOs on the GoU, CSOs need to overcome the obstacle of limited funds by adopting strategic litigation to ensureproper utilisation of funds,as well as work in collaboration to reduce costs and increase efficiency in the activities of these organisations.[185] With sustainable finances and good working relations between CSOs and the respective governments, CSOs may be able to pressurise these government to support domestic implementation of the Rome Statute.

[180] See section 2.2 of this chapter which addresses insufficient finance, physical infrastructure and equipment.
[181] See section 3.1.1 of this chapter concerning transparent appointment of prosecuting authorities.
[182] See section 3.2 of this chapter relating to governments desisting from supporting selective justice.
[183] See section 3.3 of this chapter on states and international organisations compelling governments.
[184] See section 4.2.1 of this chapter concerning increasing cooperation with the government of Uganda.
[185] See section 4.2.2 of this chapter concerning ensuring proper utilisation of funds.

Therefore, the measures discussed above require full support from the GoU and the government of South Africa to ensure proper allocation of resources and enable national institutions to operate independently with impartiality. More so, these states should provide free space for operations of CSOs and an enabling environment to enable international actors facilitate domestic proceedings for ICC crimes. Thus, political support for such proceedings is vital in ensuring that the Rome Statute is implemented in Uganda and South Africaeffectively. For the case of enhancing cooperation with the ICC, it was suggested that international organisations and CSOs should be engaged increasingly to secure state cooperation with the ICC through political pressure and other forms off assistance.

Chapter Seven

Conclusions

1. Introduction

As noted already, the Rome Statute of the International Criminal Court established the International Criminal Court (ICC) to complement national criminal jurisdictions in investigating and prosecuting genocide, crimes against humanity, war crimes (ICC crimes) and the crime of aggression.[1] Implicitly, states are placed at the frontline of enforcing justice for ICC crimes because of their primary responsibility to address these crimes especially when committed on the territory of these states. This means that the implementation of the Rome Statute at the national level is vital in the fight against impunity by ensuring that perpetrators of ICC crimes do not escape justice.

Thus, the main question examined in this thesis concerns the extent to which Uganda and South Africa have implemented the Rome Statute and the underlying obstacles encountered in the process. The aim was to provide an in-depth analysis of the measures adopted by these states to give effect to the Rome Statute focusing on the ICC Acts to determine consistency of the Acts with the Rome Statute. More so, the capacity of national institutions which enforce the Acts as well as the resultant court decisions were analysed to establish the extent to which the Acts have been enforced by these institutions and the key obstacles faced by these institutions in doing so. Drawing from the practice of other states, solutions have been suggested on how to eliminate the obstacles.

Notwithstanding the fact that the issue of implementing the Rome Statute is of global nature, the focus on Uganda and South Africa was motivated by a concern of the extent to which the Statute has been implemented by both states, which initially supported the ICC but later acted negatively towards its activities.[2]The thesis sets out by providing the background and context of the study, followed by a general overview of domestic implementation of the Rome Statute by state parties to situate the study in a global context. The discussion on the case studies followed to examine in detail the measures adopted by Uganda and South Africa

[1] Rome Statute, art 5(1). The crime of aggression is subject to fulfilment of certain conditions under art 15*bis* (2)-(3).

[2] South Africa submitted a notification of withdrawal from the Rome Statute to the Secretary General of the United Nations (UN) on 19 October 2016 (see United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10) but withdrew the notification on 7 March 2017 (see United Nations, Depository Notification, C.N.121.2017.TREATIES-XVIII.10). Concerning Uganda, see Elsa Buchanan, 'Ugandan President Museveni Praises African Nations for Withdrawing from "useless" ICC' (26 October 2016), available at <http://www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328> last visited, 30 August 2017.

in implementing the Rome Statute. Key obstacles to implementation have been discussed and solutions suggested eliminating these obstacles.

2. Methods of Implementing the Rome Statute

It was noted that aside the explicit requirement for states to incorporate procedures in national law to facilitate cooperation with the ICC,[3] the Rome Statute does not clearly guide states on how it should be implemented. Thus, diverse approaches have been used by states in that regard. Drawing from the practice of various states, chapter 2 provided insight into the measures undertaken by these states to implement the Rome Statute and the methods adopted in doing so. This was aimed at informing our understanding of what measures have been adopted by Uganda and South Africa to implement the Rome Statute as well as assess the suitability of the measures adopted. It was argued that irrespective of the method used to implement the Rome Statute, a state should be able to give effect to the Statute by enforcing its provisions at the national level.

Notably, domesticating the Rome Statute to enable its enforcement in national courts was identified as one of the predominant ways states have implemented the Rome Statute.[4] However, the modes of incorporating the provisions of the Rome Statute in national law varied from state to state depending on the provision in question. It is noteworthy that states largely incorporated the definitions of ICC crimes as set out under the Rome Statute through complete incorporation, though a few states modified these definitions to set out norms of international law not covered by the Statute. It was argued that legislating beyond the Rome Statute though acceptable, it may be time-consuming as it involves conducting research on new developments in international law.

Nonetheless, incorporation of the definitions of ICC crimes in keeping with the Rome Statute shows the utmost importance of prosecuting the same conduct as set out in the Statute. As elaborated in the thesis, reliance on existing law to prosecute ICC crimes may be inadequate where such legislation does not cover the same conduct as provided for under the Rome Statute. Consequently, a state may not have jurisdiction over ICC crimes[5] or may prosecute ICC crimes as ordinary crimes which, though not prohibited, undervalues the heinous nature of ICC crimes. Thus, a state which intends to enact implementing legislation

[3] Rome Statute, art 88.

[4] See chapter 2, section 3 on implementing the Rome Statute in the practice of ICC state parties.

[5] *The Prosecutor v Michel Bagaragaza*, 'Decision on the Prosecution Motion for Referral to the Kingdom of Norway', (ICTR-2005-86-*R11*bis) ICTR Trial Chamber III (19 May 2006) where the ICTY declined to defer the case to Norway for lack of proper definition of genocide. See chapter 2, section 3.1.

must ensure that the definitions of ICC crimes are completely incorporated in national legislation so as to penalise similar conduct as the ICC.

With respect to the penalties for ICC crimes, variation was exhibited in several states of a range of penalties for these crimes which showed flexibility in that regard. Such variation may be due to the fact that states are not under an obligation to incorporate penalties under the Rome Statute.[6] Perhaps that is why some states continued to rely on penalties set out under national law including the death penalty.[7]Arguably, reliance on existing law to penalise ICC crimes would not be contrary to the Rome Statute and setting out lenient or harsh penalties is not a ground for retrial of the case before the ICC.[8] In essence, states have the discretion to incorporate any penalty for ICC crimes as per their legal systems.

Concerning the general principles of criminal law, still it is not mandatory for states to incorporate these principles in national law. As noted already, most of these principles are embedded in national law of many states and that is why national implementing legislation of some states omitted to incorporate the general principles of criminal law set out under the Rome Statute. It was argued that where national principles of criminal law are broader than what the Rome Statute provides for to the extent of shielding perpetrators of ICC crimes from liability, such principles may lead to the intervention of the ICC in the matter where it has jurisdiction. This implies that even without explicit requirement for incorporating the general principles of criminal law set out under the Rome Statute, states need to be cautious when applying national criminal law principles to ensure that the principles applied are in keeping with the provisions of the Rome Statute.

For the case of jurisdiction over ICC crimes, states largely permitted to exercise jurisdiction basing on territoriality and nationality grounds which are generally acceptable[9] and are in keeping with the Rome Statute.[10] In addition, some states created broad jurisdiction over ICC crimes committed extraterritorially with or without conditions. This was done possibly to enhance the fight against impunity since the ICC has limited jurisdiction.[11] In essence, states may exercise jurisdiction over ICC crimes beyond the reach of the ICC as

[6] Rome Statute, art 80.
[7] For example, Japan's Penal Code (1907), art 11(1); Ghana's Criminal Code Act (1960), sec 49A (1); Mongolia's Criminal Code (2002), art 302 and Belize's Genocide Act (1971), sec 2(3), see chapter 2, section 4.1.2.
[8] Rome Statute, art 20(3).
[9] See chapter 2, section 4.1.4 on jurisdiction.
[10] The Rome Statute, art 12(2) limits the jurisdiction of the ICC over crimes committed on the territory of a state party or by a national of a state party except where a non-party state accepts the jurisdiction of the ICC with respect to the crime in question, art 12(3) or where the a referral is made to the Prosecutor of the ICC by the United Nations Security Council acting under Chapter VII of the United Nations Charter, art 13(b).
[11]Ibid,

notable in South Africa with respect to crimes against humanity committed by Zimbabweans in Zimbabwe, which is not a state party to the Rome Statute.[12] However, setting out broad jurisdiction though not prohibited, states must ensure that they exercise jurisdiction in accordance with international law norms such as respect of immunity of selected categories of state officials.[13] As exhibited from the practice of state parties, immunity (of the head of state) remains an obstacle to the implementation of the Rome Statute at the national level.[14]

It was contended that in the absence of an explicit obligation for states to incorporate specific provisions of the Rome Statute in national law, using combinations of different methods may be the most appropriate way to effectively implement the Statute. With respect to the definitions for ICC crimes which need to be in keeping with the Rome Statute, complete incorporation is suitable to fulfil that purpose. For the case of penalties for ICC crimes, using existing legislation may be appropriate since the penalties under national law are not prohibited. Concerning the general principles of criminal law, modified incorporation may be suitable in that a state may incorporate the principles set out in the Rome Statute, in addition to national and international law principles. Therefore, by using combinations of methods, states may ably incorporate provisions that are consistent with the Rome Statute.

3. Measures Undertaken by Uganda and South Africa to Implement the Rome Statute

After analysing the various methods of implementing the Rome Statute and what needs to be implemented, the thesis provided a detailed analysis of the cases of Uganda and South Africa of the measures adopted by these states to implement the Rome Statute. This was aimed at examining the extent to which the measures adopted enable domestic implementation of the Act as well as establish what improvements can be made to ensure effective implementation of the Rome Statute in the two states.

3.1. ICC Acts

The ICC Acts of Uganda and South Africa largely set out relevant provisions of the Rome Statute to facilitate cooperation with the ICC and enable domestic proceedings for ICC crimes. As demonstrated in chapters 3 and 4, both states provide for the definitions of ICC

[12]See chapter 4, section 3.1.1.B which analyses the Zimbabwe Torture Case.
[13]*Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 2002, 3 (14 February 2002) (hereinafter, *Arrest Warrant Case*) paras 59 and 51.
[14]See chapter 2, section 5.1.1 concerning immunity.

crimes completely by reference to the Rome Statute.[15] Notably, Uganda's ICC Act also permits national courts to refer to the elements of crimes of the ICC[16] which are useful in interpreting the definitions of ICC crimes to provide certainty and clarity of the elements of each crime.[17] Other states that have permitted national courts to refer to the elements of crimes include New Zealand and the United Kingdom.[18] This is a good practice for it gives national courts a legal basis for applying the elements of crimes to guide judges in interpreting the content of each crime thereby easing enforcement of the ICC Act. More so, almost similar penalties were set out in the ICC Acts even though Uganda and South Africa are not under any obligation to mirror the penalties provided under the Rome Statute.

For the case of jurisdiction, the ICC Acts set out broad jurisdiction over ICC crimes beyond territoriality and nationality jurisdictions. This enhances the fight against impunity over these crimes since in most cases perpetrators thereof attempt to escape justice by relocating to other states as demonstrated in cases like the *Madagascar Case*.[19] However, exercising universal jurisdiction over ICC crimes has been problematic as the case study of South Africa exhibited in the *Zimbabwe Torture Case* with respect to the interpretation of the presence requirement for purposes of exercising universal jurisdiction.[20] The case demonstrated that where provisions set out in the ICC Act are vague, it may create avenues for national authorities to evade their responsibilities under the Act citing lack of clarity on the matter. Thus, it is important for states to incorporate clear provisions in national legislation to ease enforcement of these provisions by courts. To this effect, legislation of states like Canada and Kenya clearly set out that the prosecution and punishment of the person are to be conducted when the person is present in the territory after committing the alleged crime.[21] Such clarity in national implementing legislation would greatly enhance the implementation of the Rome Statute at the national level.

---

[15] International Criminal Court Act (2010), Act 11 of 2010 (hereinafter, Uganda's ICC Act), secs 7(2), 8(2) and 9(2) and the Implementation of the Rome Statute of the International Criminal Court Act (2002), Act 27 of 2002 (hereinafter, South Africa's ICC Act), secs 1(i), 1(ii) and 1(vii) as well as Schedule 1, Parts 1-3.

[16] Uganda's ICC Act, ibid, sec 19(4)(a).

[17] See chapter 3 section 2.1 on definition of ICC crimes.

[18] New Zealand's International Crimes and International Criminal Court Act (2000), sec 12(4)(a) and United Kingdom's International Criminal Court Act (2001), sec 50(2)(a).

[19] See chapter 4 section 3.1.1.A analysing the Madagascar Case; see also *the Queen v Munyaneza* (2009 QCCS 2201) No. 500-73-002500-052, Superior Court Criminal Division (22 May 2009); *The Prosecutor v Yvonne Basebya*, (Case No. 09/748004-09 (LJN: BZ4292), District Court of The Hague, The Netherlands (1 March 2013) and *Public Prosecutor v Joseph Mpambara* (Case No. 12/04592) Supreme Court of The Netherlands (26 November 2013), see chapter 2 section 5.1.3.

[20] See chapter 4 section 3.1.1.B which analyses the Zimbabwe Torture Case.

[21] Canada's Crimes Against Humanity and War Crimes Act (2000) sec 8(b) and Kenya's International Crimes Act (2008) sec 8(c)

With respect to the general principles of law, variance between the two Acts was noted whereby Uganda's ICC Act permits reference to the principles set out under the Rome Statute and Ugandan law but recognises the primacy of the Rome Statute in case of inconsistency between these laws.[22] On the contrary, South Africa's ICC Act does not incorporate the general principles of criminal law set out under the Rome Statute. Although there is no explicit requirement in the Rome Statute to incorporate such provisions in national law still, setting out the general principles of criminal law as part of national law is important. This is due to the fact that South African criminal law may not cover certain principles set out under the Rome Statute a notable example being command responsibility and responsibility of other superiors.[23]Arguably, a state like South Africa may fail to exercise jurisdiction over such crimes and this calls for the amendment of South Africa's ICC Act to incorporate the principle of responsibility of commanders and other superiors to enable national courts handle such crimes.

Other provisions in the ICC Acts which are noteworthy are provisions relating to retroactive application of these Acts. Specifically, South Africa's ICC Act is applicable from the entry into force of the Rome Statute in July 2002 notwithstanding its enactment on 16 August 2002.[24] For the case of Uganda, the ICC Act permits authorities in Uganda to execute requests for assistance from the ICC relating to ICC crimes committed before commencement of the Act.[25]As mentioned in already, retroactive application of Uganda's ICC Act concerns only matters relating to cooperation with the ICC but is silent on domestic investigations and prosecutions of ICC crimes which is not the case with South Africa's ICC Act. Arguably, permitting the application of South Africa's ICC Act from the entry into force of the Rome Statute (July 2002) is a good practice because crimes within the jurisdiction of the ICC may be investigated and prosecuted using the Act notwithstanding its commencement commenced at a later date (16 August 2002). Other states should emulate South Africa by ensuring that national implementing legislation is applicable from the entry into force of the Rome Statute. To that effect, it was suggested that Uganda should amend its ICC Act to

[22] Ibid, sec 19(3).
[23] Christopher Gevers, 'International Criminal Law in South Africa' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 403-441, 416.
[24] South Africa's ICC Act, above n 15, sec 5(2) which prohibits prosecution of any person for an act committed before the entry into force of the Rome Statute which by implication permits retroactive application to ICC crimes committed after 2002.
[25]Uganda's ICC Act, above n 15, sec 1.

permit retroactive application from 2002 to ensure that ICC crimes committed before 2010 are investigated and prosecuted using the Act.[26]

Further still, as noted above, South Africa's ICC Act enjoins the NDPP to recognise the primary obligation of South Africa to prosecute ICC crimes[27] and any decision not to prosecute must be explained to the Central Authority which is then forwarded to the Registrar of the ICC.[28] This could be interpreted as a supervisory mechanism on the prosecutorial decisions with respect to ICC crimes and may limit wrongful exercise of such discretion. Other state parties to the Rome Statute should emulate South Africa to ensure that provisions emphasising the obligation to prosecute ICC crimes are incorporated in national legislation even though no such provision is set out under the Rome Statute. It is contended that clearly spelling out South Africa's obligations to prosecute ICC crimes,coupled with the relative judicial independence enjoyed by courts in South Africa,[29] has enabled these courts to issue decisions directing relevant authorities in South Africa to enforce South Africa's ICC Act by conducting proceedings for ICC crimes.[30]

Therefore, it was established that the provisions set out in Uganda's ICC Act and South Africa's ICC Act greatly conform with the provisions of the Rome Statute, This relates to procedures that facilitate cooperation with the ICC,[31] the definition and penalties of ICC crimes as well as setting out broad jurisdiction over ICC crimes beyond the Rome Statute. It is arguable that Uganda and South Africa have the necessary legislation for implementing the Rome Statute. However, having legislative frame work enabling ICC crimes is not enough without sufficient institutional capacity to enforce the legislation by investigating, prosecuting and adjudicating ICC crimes. To this effect, chapters 3 and 4 examined whether institutions in Uganda and South Africa have sufficient capacity to handle ICC crimes.

3.2. Institutions for Investigating and Prosecuting ICC Crimes

Creating special institutions of handling ICC crimes as mentioned before, enables coordination of staff as well as concentrates knowledge and expertise in these institutions

[26] See chapter 3, section 6.1 on amending Uganda's ICC Act to permit retroactive application.
[27] South Africa's ICC Act, above n 4, sec 5(3).
[28] Ibid, sec 5(5). A similar provision is set out in Bosnia and Herzegovina's Law on Implementation of the Rome Statute of the International Criminal Court and Cooperation with the International Criminal Court (2009), art 10(2) ; see also art 11(3).
[29]As already noted, the 2015 WJP Rule of Law Index identified the problem of judicial independence as not significant in South Africa and significant in Uganda, see 'The World Justice Project Rule of Law Index 2015' (hereinafter, 2015 WJP Rule of Law Index) 48, available at <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2015-report> last visited, 30 August 2017.
[30] See chapter 4, section 3.1.1.B analysing the Zimbabwe Torture Case.
[31]See chapters 3 and 4, section 5 on cooperation.

which leads to efficiency.[32] Owing to limited resources, the establishment of specialised units to conduct proceedings for ICC crimes by Uganda and South Africa[33] is commendable as it is intended to ensure availability of specialised personnel to investigate, prosecute and adjudicate ICC crimes.

However, as demonstrated in chapters 3 and 4, these institutions seem not to have sufficient capacity in that regard which is evident in the fewer human resources not matched with existing case load over other crimes.[34] Consequently, other serious crimes seem prioritised over ICC crimes since cases relating to these crimes are disposed of fast which exhibits lack of commitment to address ICC crimes. Arguably, the establishment of special units for handling ICC crimes is a good practice which ought to be emulated by other states though the proper functioning of these institutions is vital to ensure that the national implementing legislation is enforced to punish perpetrators of ICC crimes.Thus, it was pertinent to establish the factors that prevent national institutions from operating efficiently.

In chapters 3 and 4, it was exhibited that key legislative obstacles that is, non-retroactivity of Uganda's ICC Act with respect to domestic proceedings for ICC crime; the Amnesty Act and immunity of senior state officials of non-party states continue to curtail domestic proceedings for ICC crimes. It was contended that without removing these obstacles, investigations and prosecutions of ICC crimes may not be conducted in Uganda and South Africa.

4. Obstacles to the Implementation of the Rome Statute

After analysing the measures undertaken by Uganda and South Africa to implement the Rome Statute and identifying key legislative obstacles,[35] the thesis proceeded to assess the non-legislative obstacles that curtail domestic implementation of the Rome Statute in Uganda and South Africa. It was demonstrated that institutions in Uganda and South Africa which enforce justice are weak partly due to lack of sufficient resources to conduct proceedings for ICC crimes. The lack of human resources, physical infrastructure, equipment and tools was largely caused by shortage of funding which affected the activities of these institutions

[32] See chapter 2, section 3 concerning institutions dealing with ICC crimes in Uganda.
[33] See the War Crimes Investigation Unit (WCIU) and the War Crimes Prosecution Units, as well as the Crimes Against the State (CATS) and the Priority Crimes Litigation Unit (PCLU); see chapters 3 and 4, section 2 on institutions dealing with ICC crimes in Uganda and South Africa, respectively.
[34] See chapter 5, section 2 concerning weak institutions.
[35] See for example, Uganda's ICC Act and the Amnesty Act examined in chapter 3, section 4 concerning legislative obstacles to the implementation of the Rome Statute.

including postponement of court sessions for the case of Uganda;[36] failure to recruit more prosecutors as the case of the National Prosecuting Authority (NPA) of South Africa,[37] as well as led to under-funding activities such as staff training.[38] With less funding availed to institutions engaged in enforcing justice, domestic proceedings for ICC crimes may be affected thereby causing delay in proceedings for ICC crimes before courts a notable example being the *Thomas Kwoyelo Case*.[39]

Thus, it was contended that the obstacle of shortage of resources in Uganda was largely due to limited political will of Uganda. Particularly, in the *Thomas Kwoyelo Case* there was failure to appoint judges of the Supreme Court to dispose of the constitutional reference pertaining to eligibility of Kwoyelo for amnesty.[40] In addition, the Uganda People's Defence Forces (UPDF) allegedly granted Caesar Acellam amnesty after the DPP commenced criminal proceedings against him in court which interfered with the DPP's and court's work.[41] Moreover, it was noted that the Government of Uganda (GoU) seemed reluctant to address ICC crimes allegedly committed by the UPDF. By implication, selective justice was enforced in Uganda with respect to ICC crimes allegedly committed in northern Uganda.

With respect to South Africa, limited political support for domestic proceedings of ICC Crimes was shown in the exercise of improper influence of the executive over the NPA especially through the appointment and dismissal of the senior prosecuting authorities.[42] The influence of the executive may have prevented investigations into ICC crimes allegedly committed in Zimbabwe in a bid to maintain international relations with Zimbabwe.[43] Moreover, such improper influence seems to affect the NPA in that the NPA sometimes declines to prosecute even when there is sufficient evidence to show commission of the alleged crimes.[44] Similarly, proceedings for ICC crimes have not been conducted against high-ranking personnel in South Africa with the aim of protecting the interests of the

[36] The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2014/15', 31.
[37] National Prosecution Authority, 'Annual Report National Director of Public Prosecutions 2015/16', 69.
[38] The 13th Annual Judges' Conference Report 2010, 'Consolidating the Achievements of JLOS Quick Win Backlog Reduction Strategy', held from 16-20 January 2010 at Mbale Resort Hotel, Uganda, 10.
[39] See chapter 5, section 2.1on insufficient human resources. See also section 2.3 on insufficient finance.
[40] Kasande Sarah Kihika and Meritxell Regué, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' ICTJ (January 2015) 1, available at <http://www.ictj.org/publication/pursuing-accountability-serious-crimes-uganda> last visited, 30 August 2017.
[41] See chapter 5, section 3.1.1 on inaction by the GoU in event of interference with the enforcement of justice for ICC crimes.
[42] See the case of Simelane and Pikoli in chapter 5, section 3.2.1 concerning improper influence in the work of the National Prosecuting Authority (NPA).
[43] See chapter 4, section 3.1.1.B analysing the case.
[44] *Freedom Under Law v National Director of Public Prosecutions & Others* 2014 (1) SA 254 (GNP) High Court of South Africa (23 September 2013).

government.[45] Thus, enacting legislation and establishing the special units for conducting domestic proceedings is not enough if the legislation is not enforced in national courts.

Thus, the experience of Uganda and South Africa exhibits that the existence of national implementing legislation and special institutions to facilitate ICC crimes is not enough to ensure effective implementation of the Rome Statute. Without the necessary political will to ensure proper functioning of the institutions (in terms of allocation of adequate resources and refraining from interfering with these institutions), no meaningful proceedings for ICC crimes may be conducted in these states. There is need to devise means to secure political will of states to support domestic proceedings for ICC crimes.

As noted already, Civil Society Organisations (CSOs) are vital in pressuring states to fulfil their obligations under the Rome Statute (through dialogue and court process), as well as facilitating domestic proceedings for ICC crimes (through capacity building and collecting evidence to prove commission of ICC crimes).[46] However, CSOs especially in Uganda seemed to have less impact on the implementation of the Rome Statute in Uganda due to the nature of activities conducted by CSOs whereby many CSOs engage in service provision such as health, education other than advocacy work. This is after partnering with respective governments which normally fund these activities. As discussed in chapter 5, collaborations with the government may have a negative impact on the operations of CSOs including reluctance to criticise the government.[47]

Thus, instead of enhancing domestic proceedings for ICC crimes as noted already,[48] the activities of CSOs as evident in Uganda, relate to advocacy for peaceful resolution of the armed conflict in northern Uganda than domestic proceedings for ICC crimes[49] thereby curtailing the domestic implementation of the Rome Statute. This means that limited political will continues to curtail the implementation of the Rome Statute in Uganda in that resource allocation to institutions that handle ICC crimes remains poor, yet the activities of CSOs are also restricted either by government interference as the case in Uganda or due to shortage of funding as the case in South Africa.

[45]See chapter 4, section 5.1.A analysing the Al Bashir Case.
[46] See chapter 5, section 4 on strengthening civil society (CSOs).
[47]See chapter 5, section 4.1 concerning circumstances within which CSOs operate.
[48] See chapter 6, section 4.1 on actions of civil society relating to the implementation of the Rome Statute.
[49] See chapter 5, section 4.2 the nature of activities carried out by CSOs.

5. Measures to Eliminate Obstacles to the implementation of the Rome Statute

To strengthen national institutions by addressing the problem of insufficient human resources it was suggested that the conditions of work for staff should be improved so as to increase staff retention and productivity. The personnel need to be encouraged to work in collaboration which could enhance teamwork and exchange of knowledge and skills among them thereby obviating the need for new staff. It was also suggested that the staff should continuously be trained to keep them abreast with new developments in the law. However, specialised training alone without reducing the case load of staff may not enhance their productivity due to lack of concentration on ICC crimes. Thus, it is pertinent that institutions handling ICC crimes should have less case load to enable them focus more on these crimes and broaden their understanding of the theory and practice of international criminal law and other relevant laws. This should be accompanied with sufficient funding from respective governments and donors, as well as partnering with the private sector to increase the resources availed to these institutions such as infrastructure, library and computer facilities.

To enhance political support for domestic proceedings of ICC crimes, it was suggested that prosecuting authorities should be able to act independently but also mechanisms should be in place to check wrongful exercise of discretion. Thus, the appointment process of senior prosecuting authorities should be transparent and involve various stakeholders in nominating and selecting suitable persons for such positions and not a one man decision as in South Africa. Governments should ensure that selective justice is not tolerated but support impartial justice for all persons alleged to have committed ICC crimes. This implies that institutions should not only be availed sufficient resources by respective governments but also be allowed to work without interference from the governments or their agents. Where these governments fail to act, active CSOs should be in place to pressurise states into compliance. In addition, states and international organisations should apply political pressure to compel governments to act and also provide assistance to national institutions handling ICC crimes.

Concerning state cooperation with the ICC, still the role of international organisations and CSOs is vital in ensuring state compliance with their cooperation obligations. However, this requires clarity as regards to the scope and application of some provisions of the Rome Statute. A notable example is article 98(1) of the Rome Statute which some state parties believe is ambiguous and have declinedto execute requests for assistance from the ICC.[50]It is worth noting that the ICC Pre-Trial Chamber has confirmed that state parties are obliged to

[50] For example, South Africa's Notification of Withdrawal from the Rome Statute, see United Nations, Depository Notifications, C.N.786.2016.TREATIES-XVIII.10 (19 October 2016) 2.

execute the arrest warrants from the ICC even when the person sought for is the Head of state of a non-party state such as President Al Bashir of Sudan.[51] However, within the ICC some judges believe that 'the current state of international law' does not give 'firm conclusions' as regards to whether article 98(1) of the Rome Statute is not applicable to President Al Bashiror whether the United Nations Security Council (UNSC) Resolution can waive the immunities enjoyed by him.[52]

In view of such ambiguity, state parties to the Rome Statute may continue to breach their cooperation obligations by declining to execute ICC arrest warrants against Heads of state of non-party states, who enjoy personal immunity under international law as previously noted.[53]This calls for the ICC Appeals Chamber to make a final clarification on the scope and application of article 98(1). This would help to answer the question whether state parties to the Rome Statute have an obligation to arrest and surrender to the ICC the Head of state (like President Al Bashir) of a non-party state (in this case Sudan).

6. Conclusion

Uganda and South Africa have undertaken various measures to implement the Rome Statute including domesticating the Statute as well as enforcing the ICC Acts to give effect to the Rome Statute. Using different methods to incorporate provisions of the Rome Statute in national law, the ICC Acts of both states largely conform to the Rome Statute by setting out provisions enabling domestic proceedings for ICC crimes and cooperation with the ICC. The ICC Acts of Uganda and South Africa exhibit thecommitment of these states to enforce justice for ICC crimes. However, this has not been realised due to several obstacles ranging from inadequate legal and institutional frameworks to limited political support.

Thus, the measures aimed at eliminating these obstacles were suggested including engagement of other states and organisations to assist Uganda and South Africa in implementing the Rome Statute. This should encompass provision of monetary and non-monetary assistance to institutions handling ICC crimes. More so, where Uganda and South Africa fail to provide the necessary political will, other states and organisations should compel the two states to implement the Rome Statute. By and large, effective implementation of the Rome Statute at the national level requires full political support from the two

[51]*The Prosecutor v Omar Hassan Ahmad Al-Bashir*, 'Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir', (ICC-02/05-01/09) Pre-Trial Chamber II (6 July 2017) para 93.
[52]Ibid, Minority Opinion of Judge Marc Perrin de Brichambaut, para 99.
[53] See chapter 2, section 5.1.1 on immunity.

governments, as well as the involvement of several actors to compel these governments into supporting investigations and prosecutions for ICC crimes.

Conclusively, the following lessons can be drawn from the practices of Uganda and South Africa in implementing the Rome Statute; first, enacting national implementing legislation which permit retroactive application from the entry into force of the Rome Statute in July 2002,an example being South Africa's ICC Act(section 5(2)), enhances domestic implementation of the Rome Statute. This enables national criminal jurisdictions to investigate and prosecute crimes within the jurisdiction of the ICC notwithstanding that the ICC Act commenced long after the entry into force of the Statute. Such proceedings may not be challenged for breaching the principle of legality because of the explicit penalisation of ICC crimes in the ICC Act and under international law as reflected in the Rome Statute.

Second, providing explicitly for the duty to prosecute ICC crimes in the national implementing legislation and identifying the concerned authority to carry out the duty may ease enforcement of the legislation by national courts. In effect, national courts will be in position to question the concerned authority whether the duty was carried out and if not, seek justification for failure to do so. This is evident in section 5(3) of South Africa's ICC Act which not only requires the NDPP to recognise the primary obligation of South Africa to prosecute persons alleged to have committed ICC crimes but also to give reasons for declining to exercise the duty.[54]Such a requirement may be utilised by courts to check wrongful exercise of prosecutorial discretion by prosecuting authoritiities for instance, declining to commece procedings where there is sufficient evidence to prove commission of ICC crimes.

Third, Incorporating the general principles of criminal law set out under Part III of the Rome Statute in the national implementing legislation is important in a way that similar standards are created for determining criminal liability of the person for ICC crimes. Moreover, this enables states to incorporate some modes of liability (for instance the responsibility of commanders and other superiors) which may not be available in national law. Uganda's ICC Act is a good example whereby several principles of criminal law set out under the Rome Statute were incorporated in section 19(1)(a) by reference to the Statute. Although the Act in its section 19(1)(b) permits application of the principles of criminal law under Ugandan law, it accords primacy to the principles of criminal law set out under the

[54]South Africa's ICC Act, above n 15, sec 5(5).

Rome Statute in case of inconsistencies between these laws.[55]Other states could emulate Uganda by granting primacy to the principles of criminal law set out under the Rome Statute. This is aimed at ensuring that perpetrators of ICC crimes are not shielded from liability where the principles of criminal law set out under national law are broader than the principles provided for under the Rome Statute.

Fourth, creating special units for handling ICC crimes encourages specialisation as well as enhances knowledge and skills of staff who work in coordination to ensure that proceedings for ICC crimes are conducted effectively. However, these institutions should be availed sufficient resources and supported to do their work without interference from other organs of the government. With limited political support and regular interference from respective governments, these institutions may fail to conduct proceedings for ICC crimes as evident in the case of Uganda discussed in the thesis[56]thereby curtailing the implementation of the Rome Statute at the national level.

Fifth, having independent courts which enforce the national implementing legislation enhances the implementation of the Rome Statute at the national level.This is evident in the practice of courts in South Africa whereby they endeavoured to interpret South Africa's ICC Act to facilitate domestic proceedings for ICC crimes. This included cases where the government was reluctant to act citing political reasons or declined to act citing immunity of the serving Head of state.[57]Notwithstanding the apparent lack of political will to enforce the court orders, courts in South Africa highlighted the obligations of South Africa under the Rome Statute and even directed relevant officials to facilitate domestic proceedings for ICC crimes or cooperate with the ICC in its investigations and prosecutions. Thus, to implement the Rome Statute effectively, states should be willing to enforce the national implementing legislation by ensuring that institutions handling ICC crimes are adequately facilitated and supported by respective governments.

Sixth, enhancing state compliance with their obligations under the Rome Statute requires intervention from international organisations and CSOs to pressurise the governments into compliance, as well as providenecessary assistance to national institutions where needed. For that matter, CSOs should be independent from the state and enjoy sustainability so as to influence government policies and programmes, as well as pressurise the governments to adhere with their Rome Statute obligations. A notable example is the

[55] Uganda's ICC Act, above n 16, sec 19(3).
[56] See chapter 5, section 3.1 on limited political support from the government of Uganda.
[57]*Zimbabwe Torture Case*, see analysis of the case in chapter 4, section 3.1.1.B and *Al Bashir Case*, see discussion in chapter 4, sections 4.1 and 5.1.A.

Southern Africa Litigation Centre (SALC) in South Africa which has persistently pressurised authorities in South Africa to conduct proceedings for ICC crimes and cooperate with the ICC.[58]This may not be possible where CSOs are dependent on the government for funding which could affect the critical role of these organisations. Thus, CSOs need to be independent and enjoy sustainability to effectively influence the polices and laws of respective states.

Lastly, harmonising existing national legislation with the Rome Statute before domesticating the Statute eliminates legal provisions which could bar the application of national implementing legislation. It is worth noting that South Africa through its inter-departmental committee, ensured that there were no legal impediments before South Africa's ICC Act was enacted.[59] On the contrary, Uganda's ICC Act was enacted in 2010 without eliminating legal impediments that is, the 1995 Constitution which bars retroactive legislation,[60] as well as the Amnesty Act (2000) which continues to permit issuance of amnesty without excluding ICC crimes. Prior measures taken to harmonise national legislation with the Rome Statute are intended to avoid contradictions between the ICC Act and existing legislation which may curtail enforcement of the ICC Act. Thus, it is important that harmonisation of existing legislation with the Rome Statute is conducted before enacting the national implementing legislation.Therefore, effective implementation of the Rome Statute at the national level requires availability of enabling legal and institutional frameworks coupled with political support for domestic proceedings of ICC crimes. Where political support is lacking, less may be realised in implementing the Rome Statute because the national implementing legislation will remain on paper without enforcement.

[58]See the *Zimbabwe Torture Case* and *Al Bashir Case* analysed in chapter 4, section 3.1.1.A-B.
[59] Lee Stone, 'Implementation of the Rome Statute in South Africa' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 305-330, 307-308.
[60]See chapter 3, section 4 concerning legislative obstacles to the implementation of the Rome Statute.

Bibliography

Books

Al Zeidy, M M, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008)

Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance* Army (Zed Books 2006)

Ambos K and Maunganidze O A (eds), *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universtitätsverlag Göttingen 2012)

Aust A, *Modern Treaty Law and Practice* (2nd edn Cambridge University Press 2007)

Bassiouni M C (ed), *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015)

Brandon B and du Plesis M (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat 2005)

Bellelli R, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010)

Bergsmo M, Harlem M and Hayashi N (eds), *Importing Core International Crimes Into National Law* (2nd edn Torkel Opsahl Academic EPublishers 2010)

Bergsmo M, Helvig K, Utmelidze I and Žagovec G, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edn Torkel Opsahl Academic EPublisher 2010)

Cannizzaro E (ed), *The Law of Treaties: Beyond the Vienna Convention* (Oxford University Press 2011)

Cassese A, Gaeta P and Others (rev edn), *Cassese's International Criminal Law* (3rdedn Oxford University Press 2013)

Child J and Ormerod D, *Smith and Hogan's Essentials of Criminal Law* (Oxford University Press 2015)

Crawford J, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012)

Cryer R, Friman H, Robinson D and Wilmshurst E, *An Introduction to International*

Criminal Law and Procedure (3rd edn Cambridge University Press 2014)

de Wet E, Holger Hestermeyer and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015)

Dixon M, McCorquodale R and Williams S, *Cases and Materials on International Law* (6th edn Oxford University Press 2016)

du Plessis M (ed), *African Guide to International Criminal Justice* (2008 Institute for Security Studies)

Gallant K S, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009)

Heller K J and Dubber M D (eds) *The Handbook of Comparative Criminal Law* (Stanford University Press 2011)

Jeffery R and Kim J H(eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press 2014)

Jurdi N N, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011)

Kersten M, *Justice in Conflict: The Effects of the International Criminal Court's Intervention on Ending Wars and Building Peace* (Oxford University Press 2016)

Killander M (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010)

Kleffner J K, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008)

Kreß C and Lattanzi F (eds), *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues*, Vol. I (Nomos Verlagsgesellschaft Baden-Baden 2000)

Lessa F and Payne L A (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012)

Mallinder L, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008)

Mariniello T (ed), *The International Criminal Court in Search for its Purpose and Identity* (Routledge 2015)

McConville M, *Research Methods for Law* (Edinburgh University Press 2007)

____ and Chui W H (eds), *Research Methods for Law* (2nd edn Edinburgh University Press 2017)

Meron T, *The Making of International Criminal Justice: A View from the Bench, Selected Speeches* (Oxford University Press 2011)

Mofett L, *Justice for Victims Before the International Criminal Court* (Routledge 2014)

Murungu C and Biegon J (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011)

Nmehielle V O (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012)

Nouwen S M H, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013)

Nsereko D D N, *Criminal Law in Uganda* (Wolters Kluwer 2015)

O'keefe R, *International Criminal Law* (Oxford University Press 2015)

Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (Open Society Foundations 2011)

Schabas W A, *The Abolition of the Death Penalty in International Law* (3rd edn Cambridge University Press 2002)

_____, *An Introduction to the International Criminal Court* (4th edn Cambridge University Press 2011)

_____, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press 2012)

_____, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn Oxford University Press 2016)

_____, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013)

Shany Y, *Assessing the Effectiveness of International Courts* (Oxford University Press 2013)

Shaw M N, *International Law* (6th edn Cambridge University Press 2008)

Shelton D (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000)

____, *International Laws and Domestic Legal Systems* (Oxford University Press 2011)

Stahn C (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015)

_____, and Sluiter G (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009)

Tibatemwa-Ekirikubinza L, *Offences Against the Person, Homicides and Non-fatal Assaults in Uganda* (Fountain Series in Law and Business Studies 2005)

Werle G and Jessberger F, *Principles of International Criminal Law* (3rd edn Oxford

University Press 2014)

Articles in Journals

Akande D, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) *Journal of International Criminal Justice* 618-650

_____, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407-433

_____, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333-352

_____, 'The Effects of Security Council Resolution and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10(2) *Journal of International Criminal Justice* 299-324

_____ and Shah S, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *European Journal of International Law* 815-852

Akhavan P, 'Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes' (2010) 8(5) *Journal of International Criminal Justice* 1245-1266

Alexander A, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109-138

Ambos K, 'General Principles of Criminal Law in the Rome Statute' (1999) 10(1) *Criminal Law Forum* 1-32

_____, The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus' (2011) 9(1) *Journal of International Criminal Justice* 137-158

_____, 'The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights' (2016) *Human Rights Law Review* 1-12

Apuuli K P, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15(4) *Criminal Law Forum* 391-409

_____, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda' (2005) 5(2) *African Journal on Conflict Resolution* 33-61

_____, 'Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) VS The International Criminal Court (ICC) in Northern Uganda' (2011) 11(1) *Studies in*

Ethnicity and Nationalism 116-129

Arsanjani M H, 'The Rome Statute of the International Criminal Court' (1999) 93(1) *The American Journal of International Law* 22-43

Ascensio H, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals' (2003) 1(3) *Journal of International Criminal Justice* 690-702

_____, 'The Spanish Constitutional Tribunal's Decision in Guatemalan Generals Unconditional Universality is Back' (2006) 4(3) *Journal of International Criminal Justice* 586-594

Avarez A E, 'The Implementation of the ICC Statute in Argentina' (2007) 5(2) *Journal of International Criminal Justice* 480-492

Bakker C A E, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?' (2006) 4(3) *Journal of International Criminal Justice* 595-601

Bassiouni M C, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59(4) *Law and Contemporary Problems* 9-28

_____, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) *Virginia Journal of International Law* 81-162

_____, Crimes Against Humanity: The Case for a Specialized Convention' (2010) 9(4) *Washington Global Studies Law Review* 575-593

Bekou O and Shah S, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6(3) *Human Rights Law review* 499-544

Benzig M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591-632

Bergsmo M, Bekou O and Jones A, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2(2) *Goettingen Journal of International Law* 791-811

_____, Bekou O and Jones A, 'New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project' (2010) 10(4) *Human Rights Law Review* 715-729

Bigi G, 'Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnik Case' (2010) 14 *Max Planck Yearbook of United Nations Law* 51-83

Boas G, 'An Overview of Implementation by Australia of the Statute of the International

Criminal Court' (2004) 2(1) *Journal of International Criminal Justice* 179-190

Branch A, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179-198

Burke-White W W, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19(1) *Criminal Law Forum* 59-85

Cassese A, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9(1) *European Journal of International Law* 2-17

_____, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10(1) *European Journal of International Law* 144-171

_____, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR' (2006) 4(2) *Journal of International Criminal Justice* 410-418

_____, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 109-133

Collins C, 'Human Rights Trials in Chile During and After the "Pinochet Years' (2009) 4(1) *The international Journal of Transitional Justice* 67-86

Cryer R, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 390-405

_____ and Bekou O, 'International Crimes and ICC Cooperation in England and Wales' (2007) 5(2) *Journal of International Criminal Justice* 441-459

Dana S, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99(4) *Journal of Criminal Law and Criminology* 857-927

DeFalco R C, 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute Thresholds of Contribution' (2013) 11(4) *Journal of International Criminal Justice* 715-735

Dicklith S and Lwanga D, 'The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda' (2003) 25(2) *Human Rights Quarterly* 482-509

Donovan M K, 'The International Commission Against Impunity in Guatemala: Will Accountability Prevail?' (2008) 25(3) *Arizona Journal of International & Comparative Law* 779-824

Dörmann K, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes' (2003) 7 *Max Planck Yearbook of United Nations Law*341-407

du Plessis M, 'An African Example: South Africa's Implementation of the Rome Statute of the International Criminal Court' (2007) 5(2) *Journal of International Criminal Justice* 460-479

_____, 'The Future of International Criminal Justice: Civil Society, Complementarity and the Case of South Africa' (2010) 19(4) *African Security Review* 17-30

_____ and Louw A, 'Crime and Crime Prevention in South Africa: 10 Years After' (2005) *Revue canadienne de criminologie et de justice pénale* 427-446

Echle R, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem' (2013) 9(4) *Utrecht Law Review* 56-67

Essia U and Yearoo A, 'Strengthening Civil Society Organizations/government Partnership in Nigeria' (2009) 4(9) *International NGO Journal* 368-374

Fletcher G P and Ohlin J D, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3(3) *Journal of International Criminal Justice* 539-561

Ford S, 'Complexity and Efficiency at International Criminal Courts' (2014) 29(1) *Emory International Law Review* 1-69

Fourie D J and Kakumba U, 'Assessing the Role and Capacity of Civil Society Organisations in Holding Local Government Accountable in Uganda' (2011) 4(2) *African Journal of Public Affairs* 54-66

Gaeta P, 'Does President Al-Bashir Enjoy Immunity from Arrest? (2009) 7(2) *Journal of International Criminal Justice* 315-332

Gaidei K, 'The Presence of an Alleged Offender in a Forum State: A Prerequisite for the Exercise of Universal Jurisdiction' (2014) 1(1) *European Political and Law Discourse* 9-18

Garbett C, 'Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina' (2010) 10(3) *Human Rights Law Review* 558-568

Gede T, 'Universal Jurisdiction: The German Case Against Donald Rumsfeld' 8(3) *Engage* 41-46

Gershowitz A M and Killinger L R, 'The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants' (2011) 105(1*) North Western University Law Review* 261-301

Goldsmith J and Vermeule A, 'Empirical Methodology and Legal Scholarship' (2002) 69(1) *The University of Chicago Law Review* 153-167

Grant J, 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2014) 30 *South African Journal of Human Rights (SAJHR)*, 1-23

Gupta S K, 'Extradition Law and the International Criminal Court' (2000) 3(1) *Berkeley Journal of Criminal Law* 1-35

Habib A and Taylor R, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) 10(1) *International Journal of Voluntary and Nonprofit Organizations* 73- 82

Hay J, 'Implementing the ICC Statute in New Zealand' (2004) 2(1) *Journal of International Criminal Justice* 191-210

Heise M, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism'(2002) 4 *University of Illinois Law Review* 819-850

Heller K J, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Journal* 85-133

Hulme M H, 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1281-1343

Ireland-Piper D, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9(4) *Utrecht Law Review* 68-89

Jalloh C C, 'What Makes a Crime Against Humanity a Crime Against Humanity' (2013) 28(2) *American University International Law Review* 381-441

Jessberger F and Geneuss J, 'The Many Faces of the International Criminal Court' (2012) 10(5) *Journal of International Criminal Justice* 1081-1094

Jouet M, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond' (2007) 35 *Georgia Journal of International and Comparative Law* 495-537

Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10(1) *Criminal Law Forum* 1-32

Katz A, 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12(4) *African Security Review* 25-30

Kirsch P, 'ICC Marks Five Years Since Entry into Force of Rome Statute' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 11-12

_____, 'The International Criminal Court: From Rome to Kampala' (2010) 43 *The John*

Marshall Law Review 515-533

Kleffner J K, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1(1) *Journal of International Criminal Justice* 86-113

Lafontaine F, 'Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case' (2010) 8(1) *Journal of International Criminal Justice* 269-288

Laplante L J, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 *The John Marshall Law Review* 635-680

Laursen A, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law' (2012) 10(4) *Journal of International Criminal Justice* 997-1016

Maculan E, 'Prosecuting International Crimes at National Level: Lessons from the Argentine "Truth-Finding Trials" (2012) 8(1) *Utrecht Law Review* 106-121

Magliveras K D, 'Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union's Handling of the Hissène Habré Affair' (2014) 22(3) *African Journal of International and Comparative Law* 420-447

Mallinder L, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65(3) *International Criminal Law Quarterly* 645-680

Mandeep K. Dhami M K, 'Sentencing Guidelines in England and Wales: Missed Opportunities? (2013) 76(1) *Law and Contemporary Problems* 289-307

Maogoto J N, 'A Giant Without Limb: The International Criminal Court's State-Centric Cooperation Regime' (2004) 23(1) *The University of Queensland Law Journal* 102-133

Meisenberg S M, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' (2004) 86(856) *International Review of the Red Cross* 837-851

____, 'Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court' (2015) 5 *Asian Journal of International Law* 123-142

Mills A, 'Rethinking Jurisdiction in International Law' (2014) 84(1) *The British Yearbook of International Law* 187-239

Mutyaba R, 'An Analysis of the Cooperation Regime of the International Criminal Court and

its Effectiveness in the Court's Objective in Securing Suspects its Ongoing Investigations and Prosecutions' (2012) 12(5) *International Criminal Law Review* 937-962

Naluwairo R, 'The Trials and Tribulations of Rtd. Col. Dr. Kizza Besigye and 22 Others: A Critical Evaluation of the Role of the General Court Martial in the Administration of Justice in Uganda' (Human Rights & Peace Centre, 2006)

Nard C A, 'Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession' (1995) 30 *Wake Forest Law Review* 347- 368

Nsereko D D N, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124-144

_____, 'The ICC and Complementarity in Practice' (2013) 26(2) *Leiden Journal of International Law* 427-447

O'Donnell M K, 'New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of Human Rights Violations' (2009) 84(1) *New York University Law Review* 333-374

O'Keefe R, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735-760

Odermatt J, 'Between Law and Reality: "New Wars" and Internationalised Armed Conflict' (2013) 5(3) *Amsterdam Law Forum* 19-32

Oosterveld V, Perry M and McManus J, 'The Cooperation of States with the International Criminal Court' (2001) 25(3) *Fordham International Law Journal* 767-839

Orentlicher D F, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92(6*) Georgetown Law Journal* 1057-1134

Palmer E and CSperfeldt C, 'International Criminal Justice and Southeast Asia: Approaches to Ending Impunity for Mass Atrocities', *AsiaPacific Issues*, Analysis from the East-West Center, No. 126, September 2016

Parver C and Wolf R, 'Civil Society's Involvement in Post-Conflict Peacebuilding' (2008) 36(1) *International Journal of Legal Information* 51-79

Pearson Z, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39(2) *Cornell International Law Journal* 243-284

Peters C, 'The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide' (2015) 39 *Seattle University Law Review* 165-194

Radosavljevic D, 'Some Observations on the Lack of a Specific Diminished Responsibility

Defence under the ICC Statute' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 37-55

Reydams L, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1(3) *Journal of International Criminal Justice* 679-689

Robinson D, '"Crimes Against Humanity" at the Rome Conference' (1999) 93(1) *The American Journal of International Law* 43-57

Rodman K A, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99-126

Roht-Arriaza N, 'Genocide and War Crimes in National Courts: the Conviction of Rios Montt in Guatemala and its Aftermath', (2013) 17(14) *American Society of International Law (ASIL)*

_____, 'Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala' (2008) 9(1) *Chicago Journal of International Law* 79-106

Roscini M, 'Great Expectations: The Implementation of the Rome Statute in Italy' (2007) 5 *Journal of International Criminal Justice* 493-512

Samad A, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27(3) *Criminal Law Forum* 257-290

Satzger H, 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 *International Criminal Law Review* 261-282

Schabas W A, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43(3) *The John Marshall Law Review* 535-552

Scharf M P, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32(3) *Cornell International Law Journal* 507-527

Seelinger K T, 'Domestic Accountability for Sexual Violence: The Potential of Specialized Units in Kenya, Liberia, Sierra Leone and Uganda' (2014) 96(894) *International Review of the Red Cross* 539-564

Sluiter G, 'The Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605-652

Slye R C, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? (2002) 43 *Virginia Journal*

of International Law 173-247

Spiga V, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga' (2011) 9(1) *Journal of International Criminal Justice* 5-23

Ssenyonjo M, 'The Rise of the African Opposition to the International Criminal Court's Investigations andProsecutions of African Leaders' (2013) 13(2) *International Criminal Law Review* 385-428

Stacey S and Aksartova S, 'The Foundations of Democracy: U.S. Foundation Support for Civil Society in South Africa 1988-96' (2001) 12(4) *International Journal of Voluntary and Nonprofit Organizations* 373- 397

Stahn C, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695-720

Stewart D P, 'Immunity and Accountability: More Continuity than Change?' (2005) 99 *American Society of International Law* 227-230

Swart M, 'The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?' (2008) 68*ZaöRV* 209-226

Tladi D, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13(5) *Journal of International Criminal Justice* 1027-1047

Trapani A, 'Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Courts of the Democratic Republic of Congo' (2013) 46(2) *Israel Law Review* 233-248

Triggs G, 'Implementation of the Rome Statute for the International Criminal Court: A Quite Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507-534

Trumbull IV C P, 'Giving Amnesties a Second Chance' (2007) 25(2) *Berkeley Journal of International Law*283-345

Uribe C, 'Do Amnesties Preclude Justice?' (2012) 21 *International Law, Revista Colombiana de Derecho Internacional* 297-359

van den Herik L, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts' (2009) 7(5) *Journal of International Criminal Justice* 1117-1132

van Schaack B, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10(1) *Journal of International Criminal Justice* 133-164

Vasconcellos M and de A. Vasconcellos A M, 'State-Civil Society Partnership: Issues for

Debate and New Researches' (2011) 18(59) *Organ. Soc* 701-717

Ventura M J, 'Escape from Johannesburg? Sudanese President Al-Bashir Visits South Africa and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of Al-Jedda' (2015) 13(5) *Journal of International Criminal Justice* 995-1025

Veter G R, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25(1) *Yale Journal of International Law* 89-143

Viljoen F and Abebe A K, 'Amicus Curiae Participation Before Regional Human Rights Bodies in Africa' (2014) 58(1) *Journal of African Law* 22-44

Warbrick C, McGoldrick D and Cryer R, 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51(3) *International and Comparative Law Quarterly* 733-743

Werle G, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5(4) *Journal of International Criminal Justice* 953-975

_____ and Jessberger F, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law' (2002) 13(2) *Criminal Law Forum* 191-223

_____ and Bornkamm P C, 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC V. National Director of Public Prosecutions' (2013) *Journal of International Criminal Justice* 659-675

Zappala S, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case Before the French Cour de Cassation' (2001) 12(3) *European Journal International Law* 595-612

Zongwe D P, 'Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo' (2013) 46(2) *Israel Law Review* 249-269

International Instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58

American Convention on Human Rights(adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

Constitutive Act of the African Union (adopted 1 July 2000) OAU Doc.CAB/LEG/23.15 (2001)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

General Convention on the Privileges and Immunities of the Organisation of African Unity (adopted 25 October 1965, entered into force 25 October 1965) CAB/LEG/24.2/13

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85

Geneva Convention (III) Relative to the Treatment of Prisoners of War (Adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 277

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Domestic Legislation and Instruments

Uganda

1995 Constitution of Uganda

Amnesty (Amendment) Act (2006)

Amnesty Act (2000)

Extradition Act (1964)

Geneva Conventions Act (1964)

International Criminal Court Act (2010)

Non-Governmental Organisations Act (2016)

Penal Code Act (1950)

Police Act (1994)

The Anti-Terrorism Act (2002)

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No. 8 of 2013

The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011

Uganda Peoples' Defence Forces Act (2005)

South Africa

1996 Constitution of South Africa

Criminal Law Amendment Act (1997)

Criminal Procedure Act (1977)

Diplomatic Immunities and Privileges Act (2001)

Extradition Act (1962)

Implementation of the Geneva Conventions Act (2012)

National Prosecuting Authority Act (1998)

Nonprofit Organisations Act (1997)

Promotion of National Unity and Reconciliation Act (1995)

Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004)

South African Police Service Act (1995)

The Implementation of the Rome Statute of the International Criminal Court Act (2002)

Cases

ICC

Situation in the Republic of Kenya, 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence', (ICC-01/09) Pre-Trial Chamber II (29 June 2011)

The Prosecutor v Ahmad Al Faqi Al Mahdi, 'Judgment and Sentence', (ICC-01/12-01/15) Trial Chamber VIII (27 September 2016)

The Prosecutor v Callixte Mbarushimana, 'Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana', (ICC-01/04-01/10) Pre-Trial Chamber I (28 September 2010)

The Prosecutor v Dominic Ongwen, 'Decision on the Confirmation of Charges Against Dominic Ongwen', (ICC-02/04-01/15) Pre-Trial Chamber II (23 March 2016)

The Prosecutor v Dominic Ongwen, 'Decision Setting the Commencement Date of the Trial', (ICC-02/04-01/15) Trial Chamber IX (30 May 2016).

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, 'Decision on the Confirmation of Charges', (ICC-01/04-01/07) Pre-Trial Chamber I (30 September 2008)

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, 'Judgment on Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', (ICC-01/04-01/07 OA 8) The Appeals Chamber (25 September 2009).

The Prosecutor v Germain Katanga, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/07) Trial Chamber II (7 March 2014).

The Prosecutor v Jean-Pierre Bemba Gombo, 'Judgment pursuant to Article 74 of the Statute', (ICC-01/05-01/08) Trial Chamber III (21 March 2016)

The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, 'Decision on the Admissibility of the Case under Article 19(1) of the Statute', (ICC-02/04-01/05) Pre-Trial Chamber II (10 March 2009).

The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I (4 March 2009)

The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I

(12 July 2010)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Convening a Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with respect to the Republic of South Africa', (ICC-02/05-01/09) Pre-Trial Chamber II (8 December 2016)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber II (13 June 2015)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya', (ICC-02/05-01/09) Pre-Trial Chamber I (27 August 2010)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', (ICC-02/05-01/09) Pre-Trial Chamber II (9 April 2014)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', (ICC-02/05-01/09) Pre-Trial Chamber I (12 December 2011)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Requesting the Republic of Uganda to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/15-01/09) Pre-Trial Chamber II (17 May 2016)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Decision Requesting the Republic of Djibouti to Provide Submissions on its Failure to Arrest and Surrender Omar Al-Bashir to the Court', (ICC-02/15-01/09) Pre-Trial Chamber II (17 May 2016)

The Prosecutor v Omar Hassan Ahmad Al Bashir, 'Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the

Rome Statute', (ICC-02/05-01/09) Pre-Trial Chamber II (4 September 2015)

The Prosecutor v Omar Hassan Ahmad Al-Bashir, 'Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir', (ICC-02/05-01/09) Pre-Trial Chamber II (6 July 2017)

The Prosecutor v Saif Al-Islam and Abdullah Al-Senussi, 'Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi', (ICC-01/11-01/11 OA 6) The Appeals Chamber (24 July 2014)

The Prosecutor v Thomas Lubanga Dyilo, 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction', (ICC-01/04-01/06 A 5) The Appeals Chamber (1 December 2014)

The Prosecutor v Thomas Lubanga Dyilo, 'Judgment Pursuant to Article 74 of the Statute', (ICC-01/04-01/06) Trial Chamber I (14 March 2012)

The Prosecutor v Uhuru Muigai Kenyatta, 'Decision on the Withdrawal of Charges Against Mr. Kenyatta', (ICC-01/09-02/11) Trial Chamber V(B) (13 March 2015)

The Prosecutor v Uhuru Muigai Kenyatta, 'Judgment on the Prosecutor's Appeal Against Trial Chamber V(B)'s "Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute", (ICC-01/09-02/11 O A 5) Appeals Chamber (19 August 2015)

The Prosecutor v Uhuru Muigai Kenyatta, 'Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta', (ICC-01/09-02/11) Office of the Prosecutor (4 December 2014)

The Prosecutor v Uhuru Muigai Kenyatta, 'Second Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute', (ICC-01/09-02/11) Trial Chamber V(B) (19 September 2016)

The Prosecutor v William Samoei Ruto and Joshua Arap Sang, 'Decision on Defence Applications for Judgments of Acquittal', (ICC-01/09-01/11) Trial Chamber V(A) (5 April 2016)

The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 'Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', (ICC-01/09-01/11) Pre-Trial Chamber II (15 March 2011)

ICJ

Questions Relating to the Obligation to Prosecute or Extradite (*Beligium v Senegal*) ICJ General List No. 144, ICJ Rep 2012, 422 (20 July 2012)

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) ICJ Rep 2002, 3 (14 February 2002)

ICTY

Prosecutor v Anto Furundzija, (IT-95-17/1-T) ICTY Trial Chamber (10 December 1998)

Prosecutor v Dario Kordić and Mario Ćerkez,(IT-95-14/2-T) ICTY Trial Chamber (26 February 2001)

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, (IT-96-23 & IT-96-23/1-A) ICTY Appeals Chamber (12 June 2002)

Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995)

Prosecutor v Drazen Erdemović, (IT-96-22-T) ICTY Trial Chamber (29 November 1996)

Prosecutor v Duško Tadic,(IT-94-1-A) ICTY Appeals Chamber (15 July 1999)

Prosecutor v Zlatko Alesovski, (IT-95-14/1-A) ICTY Appeals Chamber (24 March2000)

The Prosecutor v Tihomir Blaškić, (IT-95-14-T) ICTY Trial Chamber (3 March 2000)

ICTR

The Prosecutor v Clément Kayishema and Obed Ruzindana, (ICTR-95-1-A) ICTR Appeals Chamber (1 June 2001)

The Prosecutor v Ignace Bagilishema, (ICTR-95-1A-T) ICTR Trial Chamber I (7 June 2001)

The Prosecutor v Jean-Paul Akayesu, (ICTR-96-4-T) ICTR Trial Chamber I (2 September 1998)

The Prosecutor v Michel Bagaragaza, 'Decision on the Prosecution Motion for Referral to the Kingdom of Norway', (ICTR-2005-86-*R11*bis) ICTR Trial Chamber III (19 May 2006)

ECHR

Vasiliauskas v Lithuania,(Application No. 35343/05) ECHR Grand Chamber (20 October 2015)

SCSL

Morris Kallon and Brima Bazzy Kamara, 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', (SCSL-2004-15-AR72(E)) and (SCSL-2004-16-AR72(E) SCSL Appeals Chamber (13 March 2004)

EACJ

Simon Peter Ochieng and John Tusiime v The Attorney General of the Republic of Uganda, (EACJ Ref. No. 11 of 2013) East African Court of Justice (First Instance Division) (7 August 2015)

Uganda

Attorney General v Susan Kigula & 417 Others, (Constitutional Appeal No. 03 of 2006) Supreme Court of Uganda (21 January 2009)

Attorney General v Uganda Law Society, (Constitutional Appeal No. 1 of 2006) Supreme Court of Uganda (20 January 2009)

Hon. Gerald Kafureeka Karuhanga v Attorney General, (Constitutional Petition No. 0039 of 2013) Constitutional Court of Uganda (4 August 2014)

Kawooya Ronny v Uganda (Criminal Appeal No. 23 of 2013) High Court of Uganda (1 August 2013

Teddy Sseezi Cheeye v Uganda, (Criminal Appeal No. 105 of 2009) Court of Appeal of Uganda (20 October 2010)

Thomas Kwoyelo Alias Latoni v Uganda, (Constitutional Petition No. 036/11) Constitutional Court of Uganda (21 September 2011)

Uganda v Natseba Lawrence & Others, (Criminal Session Case 283/1997)

Uganda v Ojok [1992-1993] HCB 54

Uganda v Sempija Samuel, High Court Criminal Case No. 243/98

Uganda v Sserunkuuma Edrisa and Others, (Session Case No. HCT-00-CR.SC 15/2013) High Court of Uganda (28 April 2015)

Uganda v Thomas Kwoyelo, (Constitutional Appeal No. 01 of 2012) Supreme Court of Uganda (8 April 2015)

Uganda v Umutoni Annet, (HCT-00-ICD-CR-SC-No. 003 of 2014) High Court of Uganda (International Crimes Division) (16 October 2014)

Uganda v Vincent Kamau and Another, (HCT-00-CR-SC-0077 of 2012) High Court of Uganda (30 April 2013)

Uganda v Yowana Baptist Kabandize [1982] HCB 93

South Africa

Certification of the Constitution of the Republic of South Africa, 1996, (Case No. CCT 23/96) Constitutional Court of South Africa (6 September 1996)

Democratic Alliance v Minister of International Relations and Cooperation and Others, (Case No. 83145/2016) High Court of South Africa (22 February 2017)

Democratic Alliance v President of the Republic of South Africa and Others, Case No. 263/11 [2011] ZACC 241, Supreme Court of Appeal of South Africa (1 December 2011)

Democratic Alliance v President of the Republic of South Africa and Others, Case No. CCT 122/11 [2012] ZACC 24, Constitutional Court of South Africa (5 October 2012)

Director of Public Prosecutions v Phillipus Jacobs Venter, Case No. 430/07, The Supreme Court of Appeal of South Africa (30 May 2008)

Elton Everts v The State, Case No. A497/10, High Court of South Africa (31 May 2011)

Ex Partie Die Minister Van Justisie: In Re S v Van Wyk, 1967 (1) SA 488 (A)

Freedom Under Law v National Director of Public Prosecutions & Others,2014 (1) SA 254 (GNP) High Court of South Africa (23 September 2013)

Henna Malgas v The State, Case No. 117/2000, Supreme Court of Appeal of South Africa (19 March 2001)

Joseph Alfred Rakoto and Others v The Head Directorate for Priority Crimes Investigation and Others, (Case No. 52268/12) High Court of South Africa (19 November 2012)

Justice Alliance of South Africa v President of the Republic of South Africa and Others, (Case CCT 53/11) [2011] ZACC 23, Constitutional Court of South Africa (29 July 2011)

Mail and the Guardian Media Limited and Others v M. J. Chipu N.O. and Others, (CCT Case No. 136/12) Constitutional Court of South Africa (27 September 2013)

National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Others, (485/2012) [2013] ZASCA 168, Supreme Court of Appeal (27 November 2013)

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Zimbabwe Exiles' Forum, (CCT 02/14) [2014] ZACC 30, Constitutional Court of South Africa (30 October 2014)

National Director of Public Prosecutions v Freedom Under Law,(67/14) [2014] ZASCA 58, Supreme Court of Appeal (17 April 2014)

Pikoli, Vusimuzi Patrick v The President, the Speaker of the National Assembly and the Chair

of the National Council of Provinces, Case No. 8550/09, High Court of South Africa (13 November 2009)

Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others, (Case No. 77150/09) High Court of South Africa [2012] ZAGPPC 61 (8 May 2012)

S v De Oliveira 1993 (2) SACR 59 (A) at 63I-64A, cited in *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014)

S v Dodo (CCT 1/01) [2001] ZACC 16

S V Safatsa and Others, 1988 (1) SA 868 (A)

Sarah Snyders and Mornay Calitz N O v Minister of Justice and Constitutional Development and Others, Case No. 5825/14, High Court of South Africa (5 September 2014)

Sylla Moussa v The State Minister of Justice and Constitutional Development, Case No. 181/2014, Supreme Court of Appeal of South Africa (14 April 2015)

Thebus and Another v The State (2003) AHRLR 230 (SACC 2003)

Thembisile Phumelele Nkadimeng and Others v The National Director of Public Prosecutions and Others, Case No. 32709/07, High Court of South Africa (12 December 2008)

The Azanian Peoples Organization and Others v The President of the Republic of South Africa and Others, Case No CCT 17/96 Constitutional Court of South Africa (25 July 1996)

The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre, (867/15) [2016] ZASCA 17 (15 March 2016)

The State v Amos Tshotshoza and Others, Case No. 18/2009, High Court of South Africa (17 April 2009)

The State v Donovan Mark Ramdass, Case No. CC43/2015, High Court of South Africa (16 September 2016)

The State v Okah (SS94/11) [2013] ZAGP JHC 75, High Court of South Africa (26 March 2013)

The State v T Makwanyane and M Mchunu, Case No. CCT/3/94, Constitutional Court of South (6 June 1995)

The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others, (Case No. 27740/15) Interim Order (14 June 2015)

The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others, (Case No. 27740/15) High Court of South Africa (24 June

2015)

Zingeleza Mzwempi v The State, Case No. 284/04, High Court of South Africa (28 April 2011)

Cases from Other states

A versus Office of the Attorney General of Switzerland, 'Decision of the Swiss Federal Criminal Court dated 25 July 2012'

Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, '*Decision on Leng Sary's Rule 89 Preliminary Objections (Ne Bis in Idem and Amnesty Pardon)*',Case No. 002/19-09-2007/ECCC/TC (3 November 2011)

Julio Simón et al. v Public Prosecutor, (Case No. 17.768) Supreme Court of Argentina (14 June 2005)

Polyukhovich v The Commonwealth of Australia and Another, (F.C. 91/026) High Court of Australia (14 August 1991)

Public Prosecutor v Joseph Mpambara, (Case No. 12/04592) Supreme Court of The Netherlands (26 November 2013)

Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No.3) [2000] 1 A.C 147

The Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security, (Misc. Criminal Application No. 685 of 2010) High Court of Kenya (28 November 2011)

The Prosecutor v Klaus Barbie,(Case No. 83-93194) Supreme Court (Criminal Law Chamber) France (6 October 1983)

The Prosecutor v Yvonne Basebya, (Case No. 09/748004-09 (LJN: BZ4292)), District Court of The Hague, The Netherlands (1 March 2013)

The Public Prosecuting Authority v Mirsad Repak, (Case No. 08-018985MED-OTIR/08), Oslo District Court, Norway (2 December 2008).

The Queen v Munyaneza, (2009 QCCS 2201) No. 500-73-002500-052, Superior Court Criminal Division (22 May 2009)

Other Documents

United Nations

United Nations, 'Common Core Document Forming Part of the Reports of States Parties, Uganda', (HRI/CORE/UGA/2015) (11 May 2015).

_____, 'Common Core Document Forming Part of the Reports of States Parties, South Africa', (HRI/CORE/ZAF/2014) (2 February 2016).

_____, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010)' <http://www.unrol.org/doc.aspx?d=2957>

OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (UN, 2009)

_____, 'Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives' (UN 2006)

_____, 'Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts' (UN 2008).

_____, 'Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector' (UN 2006)

United Nations Commission on Human Rights, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity', E/CN.4/2004/88 (27 February 2004), authored by Diane Orentlicher

Committee on Economic Social and Cultural Rights, 'General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC/23 (8 March 2016)

Committee Against Torture, 'Decision of the Committee Against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Communication No. 181/2001: Senegal, CAT/C/36/D/181/2001, adopted by the Thirty-Sixth Session (19 May 2006)

_____, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Third Periodic Report of States Parties due in 1996, Senegal', CAT/C/SEN/3 (5 October 2011)

ICC

ASP, 'Assembly Procedures Relating to Non-operation' ICC-ASP/10/Res.5, Annex

_____, 'Report of the Bureau on Complementarity', ICC-ASP/9/26 (17 November 2010)

_____, 'Report of the Court on Complementarity', ICC-ASP/10/23 (11 November 2011)

_____, 'Report of the Court on Cooperation', ICC-ASP/14/27 (22 September 2015)

_____, 'Report of the Bureau on the Plan of Action for Achieving Universality and Full

Implementation of the Rome Statute of the International Criminal Court', ICC-ASP/9/21 (28 October 2010)

_____, 'Report of the Bureau on the Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court', ICC- ASP/15/19 (10 November 2016)

_____, 'Resolution on Cooperation', ICC-ASP/14/Res.3, in ASP, Fourteenth Session, The Hague, 18-26 November 2015, Volume I, (ICC-ASP/14/Res.3)

_____, Resolutions and Declarations Adopted by the Review Conference, 'Resolution RC/Res.1' (adopted at the 9th plenary meeting on 8 June 2010)

OTP, 'Paper on Preliminary Examinations' (November 2013)

_____, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016)

_____, 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda', ICC- OTP-20040729-65.

_____, 'Report on Preliminary Examination Activities' (2016) (14 November 2016)

_____, 'Situation in Colombia Interim Report - November 2012-'

ICC, 'Resolutions and Declarations adopted by the Review Conference', Resolution RC/Res.1, Adopted at the 9th plenary meeting (8 June 2010)

_____, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (ICC-20040129-44).

AU

AU Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc.Assembly/AU/13(XIII), 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1

_____, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', Doc.EX.CL/670(XIX), 30 June - 1 July 2011, Assembly/AU/Dec.366(XVII)

_____, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)', Doc.EX.CL/639(XVIII), 30 - 31 January 2011, Assembly/AU/Dec.334(XVI)

_____, 'Decision on the International Criminal Court', Doc.EX.CL/952(XXVIII) 30-31 January 2016, Assembly/AU/Dec.590(XXVI)

_____,'Decision on the Hissen Habre Case', Doc.Assembly/AU/8(XVII), 30 June - 1 July 2011, Assembly/AU/Dec.371(XVII)

_____,'Decision on the Hissen Habre Case', Doc.Assembly/AU/12(XVIII), 29-30 January 2012, Assembly/AU/Dec.401(XVIII)

_____'Decision on the Hissen Habre Case', Doc.Assembly/AU/9(XVI), 30-31 January 2011, Assembly/AU/Dec.340(XVI)

Reports

Uganda

The Justice Law and Order Sector (JLOS), Annual Performance Report 2013/2014

_____, Annual Performance Report 2014/2015

_____, Annual Performance Report 2015/16

South Africa

The Department of Justice and Constitutional Development, Annual Report 2012/2013

_____, Annual Report 2013-2014

_____, Annual Report 2014/2015

____ , Annual Report 2015/2016

_____, Strategic Plan for the Judiciary 2013-2018

_____, Strategic Plan 2015/20

National Prosecution Authority, Annual Report National Director of Public Prosecutions 2015/16

South African Police Service, Annual Report 2015/16 South African Police Service

Legal Aid Board, Annual Report 2005/6

Legal Aid South Africa, Annual Report 2009/10

_____, Annual Reports, 2011-2012

_____, Annual Reports, 2012-2013

_____, Annual Reports 2013-2014

_____, Annual Reports 2014-2015

Public Service Commission, 'Consolidated Report on Inspections of Regional Courts: Department of Justice and Constitutional Development' (October 2012)

Conference Papers

Birgitte Vestberg, 'Prosecuting and Investigating International Crimes in Denmark', Guest Lecture Series of the Office of the Prosecutor, 5 April 2006, The Hague, Netherlands

Conference Report, 'Advancing International Criminal Justice in Africa: State

Responsibility, the African Union and the International Criminal Court; Towards an Effective Advocacy Response', held from 14-16 November 2011, organised by Centre for Citizens Participation on the African Union (CCP-AU), Trust Africa and MacArtthur Foundation, Nairobi-Kenya

Daniel Woods, 'The Role of Civil Society in Police Reform in Uganda', a paper presented at the IDASA Conference under the theme; *Policing in Post-Conflict Africa* (Commonwealth Human Rights Initiative, March 2006)

Hon. Justice Moses Mukiibi, 'International Crimes Division Annual Report 2014', a paper presented at the 16th Annual Judges' Conference under the theme; *Enhancing Public Confidence in the Judiciary*, held from 26-30 January 2014 at the Imperial Resort Beach Hotel, Entebbe, Uganda

_____, 'Complementarity in Practice in Uganda', a Key-Note Address delivered at the Parliamentary Conference under the theme; *To Give Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo*, held from 17 July 2014 at the Parliament Conference Hall, Uganda

James Manor, 'Partnerships Between Governments and Civil Society for Service Delivery in Less Developed Countries: Cause for Concern', Institute of Development Studies, University of Sussex (October 2002), a paper presented at the 'Making Services Work for Poor People' World Development Report (WDR) 2003/04 Workshop, held from 4-5 November 2002 at Eynsham Hall, Oxford-United Kingdom

Joan Kagezi, 'Practical Aspects of Prosecuting and Adjudication of International and Transnational Crimes- The East African Perspective', a paper presented at the 7th Annual Conference and Annual General Meeting of the African Prosecutors' Association (APA) under the theme; *Strengthening Institutional Capacity of Prosecution Authorities and Agencies in Africa – Uniting Africa's Prosecutors*, held from 7-10 October 2012 at Windhoek, Namibia

Justice Mike J. Chibita (Director of Public Prosecutions), 'Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo', a paper presented at the Parliament Conference under the theme; *To Give Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo*, held from 17 July 2014 at Parliament Conference Hall, Uganda

Justice Mogoeng wa Mogoeng (Chief Justice of the Republic of South Africa), 'The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa', a speech delivered on Thursday, 25 April 2013, during the 2013 Annual

Human Rights Lecture of the Stellenbosch Law Faculty, University of Stellenbosch, Cape Town, South Africa

OECD, 'Encouraging Public-Private Partnerships in the Utilities Sector: The Role of Development Assistance', a paper presented during the Roundtable held from 25-27 May 2005, organised by NEPAD and OECD under the theme; *Investment for African Development: Making it Happen*, held at Imperial Resort Beach Hotel, Uganda

Report of the Expert Workshop entitled; 'Giving Effect to the Law on War, Crimes Against Humanity and Genocide in Southern Africa' organised by the Centre for Human Rights, International Criminal Law Services and the Konrad Adenauer Stiftung, held from 13-14 June 2011 at the University of Pretoria, South Africa

Southern Africa Litigation Centre, 'Civil Society in Action: Pursuing Domestic Accountability for International Crimes' International Criminal Justice Regional Advocacy', Conference Report (10-11 June 2014) Johannesburg, South Africa

The 13th Annual Judges' Conference Report 2010, 'Consolidating the Achievements of JLOS Quick Win Backlog Reduction Strategy', held from 16-20 January 2010 at Mbale Resort Hotel, Uganda.

Working Papers

Catherine Barnes, 'Governments & Civil Society Organisations: Issues in Working Together Towards Peace', Discussion Paper for GPPAC Strategy Meeting (European Centre for Conflict Prevention, October 2006)

Charles C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', Legal Studies Paper Series, Working Paper No. 2009-38 (March 2010)

Jean Redpath, 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa', Institute for Security Studies (ISS) Monograph No. 186 (2012)

Louise Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa', Working Paper No.2 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (February 2009)

_____, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast(March 2009)

Martin Schönteich, 'Strengthening Prosecutorial Accountability in South Africa', Institute for Security Studies (ISS) Paper No. 255 (April 2014)

Max du Plessis, 'South Africa's International Criminal Court Act: Countering Genocide, War Crimes and Crimes Against Humanity', Institute for Security Studies (ISS) Paper No. 172 (November 2008)

_____ and Jolyon Ford (eds), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African States*, Institute for Security Studies (ISS) Monograph Series No. 14 (March 2008)

_____ and Christopher Gevers, 'Balancing Competing Obligations: The Rome Statute and AU Decisions', Institute for Security Studies (ISS) Paper No. 225 (October 2011)

_____,Antoinette Louw and Ottilia Maunganidze, 'African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions', Institute for Security Studies (ISS) Paper No. 241 (November 2012)

Zachary Lomo and Lucy Hovil, 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda',Refugee Law Project, Working Paper 11 (February 2004)

Internet Sources

Acholi Religious Leaders Peace Initiative (ARLPI), 'A Statement on the Position of ARLPI on Ongwen Dominic, Former LRA Commander, January 20, 2015', <http://www.arlpi.org/Home>

African Network on International Criminal Justice, 'Reflections on the African Union ICC Relationship' (ICJ Kenya Section, January 2014), <http://www.icj-kenya.org/jdownloads/Publications/reflections%20on%20the%20african%20union%20icc%20relationship.pdf>

Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 29 June, 2007, <http://www.beyondjuba.org/BJP1/peace_agreements.php>

Amnesty International, 'Behind a Wall of Silence Prosecution of War Crimes in Croatia' (2010) EUR 64/003/2010, <https://www.amnesty.org/en/documents/eur64/003/2010/en/>

_____, 'ICC: States must strengthen, not abandon, only route to justice for millions of victims' (15 November 2016), <https://www.amnesty.org/en/latest/news/2016/11/icc-states-must-not-abandon-only-route-to-justice-for-millions-of-victims/>

_____, ‘Morocco: Urge the government to ratify the Rome Statute of the International Criminal Court’ (October 2004), <https://www.amnesty.org/download/Documents/100000/mde290072004en.pdf>

_____, ‘Sudan: Five Years and Counting: Intensified Aerial Bombardment, Ground Offensive and Humanitarian Crisis in South Kordofan State’ (29 September 2016) Index No. AFR 54/4913/2016, <https://www.amnesty.org/en/documents/afr54/4913/2016/en/>

Andrew Bagala and Risdel Kasasira, ‘Army Disagrees with Police over on War Crimes’ *Daily Monitor*, Tuesday 24 February, 2015, <http://www.monitor.co.ug/News/National/Army--disagrees---police--war-crimes/-/688334/2633218/-/7c1h9dz/-/index.html>

Avocats Sans Frontières (ASF), ‘ASF in the Democratic Republic of Congo’, <http://www.asf.be/action/field-offices/asf-in-the-democratic-republic-of-congo/>

Buchule Raba, ‘Cape Town’s Police-to-Population Ratio Way Below National Norm’ (27 July 2016), <http://www.timeslive.co.za/local/2016/07/27/Cape-Town%E2%80%99s-police-to-population-ratio-way-below-national-norm>

Catherine Flew and Simon Rynn, ‘Monitoring and Evaluation Arrangements for the Justice Law and Order Sector in Uganda: A Case Study’, (Saferworld, January 2009), <http://www.saferworld.org.uk/resources/view-resource/386-uganda-case-study>

Coalition for the International Criminal Court, ‘CICC Asia Pacific Regional Strategy Meeting’ Quezon City, The Philippines, 11-12 April 2011, <http://www.iccnow.org/?mod=region&idureg=7>

Elsa Buchanan, ‘Ugandan President Museveni Praises African Nations for Withdrawing from “Useless” ICC’ (26 October 2016), <http://www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328>

Genevieve Quintal, ‘ANC is Sticking to its guns on ICC Withdrawal’ (4 July 2017), <https://www.businesslive.co.za/bd/politics/2017-07-04-anc-is-sticking-to-its-guns-on-icc-withdrawal/>

Hanibal Goitom, ‘The International Criminal Court and Africa’ (23 November 2016), <https://blogs.loc.gov/law/2016/11/falqs-the-international-criminal-court-and-africa/>

Hannah Woolaver, ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC’ (24 October 2016), <http://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/>

Human Rights Network-Uganda, 'Annual Report 2011', <https://www.hurinet.or.ug/reports/>

Human Rights Watch, 'A Chance for Justice? War Crimes Prosecutions in Bosnia's Serb Republic' (March 2006) Volume 18, No. 3(D) 21, <https://www.hrw.org/report/2006/03/15/chance-justice/war-crime-prosecutions-bosnias-serb-republic>

_____, 'Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina' (March 2012), <https://www.hrw.org/europe/central-asia/bosnia-and-herzegovina>

____, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (January 2012), <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division>

_____, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina', (February 2006) Volume 18, No. 1(D), <https://www.hrw.org/reports/2006/ij0206/>

_____, 'Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda' (September 2005, Vol 17, No. 12(A), <https://www.justice.gov/eoir/country/uganda-contents>

ICC Legal Tools Database, <https://www.legal-ools.org/en/browse/ltfolder/0_9047/#results>

IRIN, 'Forgive and Forget? Amnesty Dilemma Haunts Uganda', Samuel Okiror, 12 June 2015, <http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda>

International Centre for Transitional Justice (ICTJ), 'The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)' (July 2015), <https://www.ictj.org/publication/briefing-accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-response>

Jackee Budesta Batanda, 'The Role of Civil Society in Advocating for Transitional Justice in Uganda' (Institute for Justice and Reconciliation 2009), <https://www.africaportal.org/dspace/articles/role-civil-society-advocating-transitional-justice-uganda>

James Ellis and Dan Kuwali, 'Democratic Republic of the Congo', (2011) 14 *Yearbook of International Humanitarian Law*, Correspondents' Reports, <http://www.asser.nl/media/1435/drc-yihl-14-2011.pdf>

Joseph Kato, 'Police Face 50,000 Personnel Shortage', (Tuesday, 24 January 2017),

<http://www.monitor.co.ug/News/National/Police-face-50-000-personnel-shortage/688334-3784570-b7fadr/index.html>

Johnson Taremwa, 'Uganda: Police Suspends PCs, Cadet Recruitment, Promotions' (3 June 2016), <http://allafrica.com/stories/201606030705.html>

Kasande Sarah Kihika and Meritxell Regué, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' ICTJ (January 2015) <http://www.ictj.org/publication/pursuing-accountability-serious-crimes-uganda>

Lino Owor Ogora, 'Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications' (22 July 2016), <https://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/>

National Center for State Courts (NCSC), 'The International Framework for Court Excellence' (2dn edn 2013), <http://www.courtexcellence.com/Resources/The-Framework.aspx>

Northern Ireland Assembly, 'Sentencing Guidelines Mechanisms in Other Jurisdictions', Research and Information Service Research Paper 79/16, (30 September 2016), <http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/research-publications-2016/>

Office of the Director of Public Prosecutions, 'DPP Staff List', <http://www.dpp.go.ug/index.php/dpp-staff>

Office of the United Nations High Commissioner for Human Rights (OHCHR), '"The Dust Has Not Settled Yet" Victims' Views on the Right to Remedy and Reparation, A Report from the Greater North of Uganda' (2011), <http://uganda.ohchr.org/Content/publications/The%20Dust%20Has%20Not%20Yet%20Settled.pdf>.

Open Society Foundations, 'Putting Complementarity into Practice; Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (Open Society Foundations 2011) <https://www.opensocietyfoundations.org/reports/putting-complementarity-practice>

Organization for Security and Co-operation in Europe (OSCE), 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles' (March 2005) <http://www.nuhanovicfoundation.org/en/reports-2/osce-report-war-crimes-trials-before-the-domestic-courts-of-bosnia-and-herzegovina-progress-and-obstacles/>

_____, 'War Crimes Justice Project', <http://www.osce.org/gsearch?qr=WAR%20CRIMES%20JUSTICE%20PROJECT>

_____, Office for Democratic Institutions and Human Rights, 'War Crimes Justice Project – Phase II', Final Report, (July 2012 – December 2015), <http://www.osce.org/odihr/218231>

Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000' (August 2013) <http://www.parliament.go.ug/new/index.php/documents-and-reports/committee-reports/category/31-committee-on-defence-and-internal-affairs>

REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units' (December 2010), <http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf>

The Coalition for the International Criminal Court, '2013 Status of the Rome Statute Around the World' <http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf>

The South African Judiciary, <http://www.judiciary.org.za/index.html>

The World Bank, 'Uganda', <http://data.worldbank.org/country/uganda>

_____, 'South Africa', <http://data.worldbank.org/country/south-africa>

The World Justice Project Rule of Law Indices for 2012-2013, 2014, 2015 and 2016, <http://worldjusticeproject.org/publications>

Uganda Police, 'Annual Crime and Traffic/Road Safety Report 2013', <http://www.upf.go.ug/publications/>

_____, 'New Transfers and Appointments' (12 February 2015), <http://www.upf.go.ug/new-transfers-appointments/>

Uganda Program for Human and Holistic Development (UPHOLD), 'Study of Civil Society Oraginizations in Uganda', Phase II Final Report (September 2004) <http://uphold.jsi.com/Resources_studies.htm>

United States Agency for International Development (USAID), CSO Sustainability Indices for Sub-Saharan Africa 2012, 2013, 2014 and 2015, <https://www.usaid.gov/africa-civil-society>

Yasiin Mugerwa, 'Prosecutors' Pay is Pathetic – DPP' (Wednesday, 30 July 2014), <http://www.monitor.co.ug/News/National/Prosecutors--pay-is-pathetic---DPP/688334-2402180-p49jluz/index.html>