

**UNABLE OR**  

---

**UNWILLING?**

**CASE STUDIES ON DOMESTIC IMPLEMENTATION OF  
THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES**

**EDITED BY MAX DU PLESSIS  
AND JOLYON FORD**

ISS MONOGRAPH SERIES • No 141, MARCH 2008



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## ACKNOWLEDGEMENTS

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The Institute for Security Studies acknowledges with thanks the support of the Open Society Foundation (South Africa) ([www.osf.org.za](http://www.osf.org.za)) for making this study and monograph possible.

The editors would like to record their thanks to the contributing authors and to those officials, academics, judges, legal professionals, members of civil society and others who kindly advised and assisted them in their effort to draw an accurate map of the current status of domestic implementation in the countries selected. The International Committee of the Red Cross (ICRC) Regional Office (Pretoria) and the Criminal Law Section, Legal and Constitutional Affairs Division of the Commonwealth Secretariat (London) also shared some insights with the authors.

In accordance with ISS policy, this monograph was peer reviewed (by Anton du Plessis and Antoinette Louw) prior to publication.

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## ACRONYMS

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AFRC	Armed Forces Revolutionary Council
AG	Attorney General
APIC	Agreement on Privileges and Immunities
APRM	African Peer Review Mechanism
BIA	Bilateral Immunity Agreement
CAT	UN Convention Against Torture 1984
CDD	Ghana Centre for Democracy
CICC	Coalition for an International Criminal Court
DPP	Director of Public Prosecutions
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
ICAP	International Crime in Africa Programme (at the ISS)
ICC	International Criminal Court
ICCPR	The International Covenant on Civil and Political Rights 1966
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IGAD	Intergovernmental Authority on Development



IHL	International Humanitarian Law
ISS	Institute for Security Studies
KLRC	Kenya Law Reform Commission
MLA	Mutual legal assistance
MP	Member of parliament
NEPAD	New Partnership for African Development
NRC	National Reconciliation Commission, Ghana
OAU	Organisation for African Unity
OTP	Office of the Prosecutor (at the ICC)
PNDC	Provisional National Defence Council
SADC	Southern African Development Community
SARPCCO	Southern African Regional Police Chiefs Cooperation Organisation
UCICC	Uganda Coalition on the International Criminal Court

## EXECUTIVE SUMMARY

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By adopting the Rome Statute and creating a permanent International Criminal Court (ICC), the ideal of ending impunity – so that the most serious crimes of concern to the international community should not go unpunished – has taken institutional form. The ideals underlying the ICC require practical instrumentalities and processes not just on the part of the Court, but by all States in their own jurisdictions. The inability or unwillingness to bring future perpetrators of international crimes to justice would represent a failing of both the international system and of respective national legal systems. This monograph is concerned with the significance of national level measures and country–ICC co-operation to the effectiveness of the scheme of international criminal justice: it is not enough for states to show by ratification they are *willing* to co-operate or implement measures, if they do not take the steps to ensure that they are *able* to prosecute.

At the heart of the international criminal justice system are the measures that must be taken by individual states in their own legal systems to prosecute international criminals in their national courts (on behalf of the international community as a whole), or to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute and who happen to be in the state's jurisdiction. These national procedures and mechanisms need to be clear, prescribed, comply with international human rights law, and be of sufficient quality that in dealing with the worst criminals, international justice is not brought into disrepute.

This monograph is intended to contribute to enhanced understanding of the reasons why some African states have been slow in meeting their domestication obligations under the Rome Statute. In the international arena, African countries were generally very supportive of the creation of the ICC, and promptly ratified the Rome Statute. More than half of all African states have ratified. This study reveals, however, that none of the five countries selected for study (Botswana, Ghana, Kenya, Tanzania and Uganda) has implemented measures: all five are at this time unable to respond fully and on a clear, prescribed lawful basis to an ICC investigation or request for arrest and surrender, nor able to themselves prosecute the most serious international crimes.

The country studies are in-depth analyses of the status of implementation. Drawing on the country studies, some common barriers to implementation, misgivings or concerns are described. These include a lack of awareness among key groups of officials, civil society, the legal profession and judiciary; a capacity shortfall for these over-stretched and thinly-staffed justice systems; the lack of any domestic pressure to implement ICC laws; the existence or perception of other priorities for government; the distraction of significant elections or reform processes; added to these are some political misgivings, including on immunity issues – the view that the local political risk of implementation outweighs the risk of any international criticism for lack of implementation.

While real capacity constraints do hamper the justice systems of these countries, the primary barrier to implementation in the countries studied appears to be that co-operation on impunity for international crimes is not seen as having sufficient importance, relevance and priority. However, a failure by all five countries sampled to put in place national level measures to implement Rome Statute obligations means that in the near future a ratified African state (perhaps bordering a conflict area) may be incapable of dealing satisfactorily with the foreseeable possibility of an internationally-wanted person being in its jurisdiction.

The study draws on the comparative overview to make six recommendations, mainly identifying and encouraging those institutions and organisations best placed to raise awareness of the need for national level implementation. A state's ability to maintain the rule of law and to respond to international crimes within the parameters of international law and human rights is likely to reflect an otherwise strong national criminal justice system. Moreover, action to increase ICC responsiveness is likely to have the added benefit of strengthening generic national capacity on crime and justice issues.

The study notes that many of the problems with implementation can be understood as generic problems with treaty implementation (on any subject) in many developing countries. Moreover, some countries appear able to engage in international legal co-operation without having specific laws in place. The study uses these two points to detail, in a more positive voice, what it identifies as entry points for progress on implementation: features of these countries or dimensions of this issue that suggest that implementation may be achievable in the near future.

Reinforcing an overall concern of the ISS project, the most forceful of these forward looking points is the persuasiveness of the argument revealing the

link between impunity and insecurity, how lack of action breeds further violence and resentment. The argument that whatever any one state's view of 'international justice', having in place the technical legal ability to deal lawfully with international criminals or respond to the ICC represents a vital component of any state's primary priorities: a sense of its own security, and a confidence that it will not fail its peers in the international community when intolerable crimes have been committed and the stakes and expectations are high.

# CHAPTER 1

## INTRODUCTION

Max du Plessis and Jolyon Ford

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It is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.

– Preamble, Rome Statute of the International Criminal Court

The most serious international crimes – genocide, war crimes, and crimes against humanity – are shocking cruelties attracting universal condemnation. While the acts themselves are intolerable to our sense of humanity, impunity for these acts, the fact that perpetrators of such crimes escape being brought to account, offends our notions of justice. If the crimes themselves were not egregious enough, impunity adds insult to the injury already suffered by victims. Continued impunity of *genocidaires* or war criminals from formal processes of justice mocks our notions of a coherent, civilised and competent 21<sup>st</sup> Century world system based on universal values. There may exist special circumstances where even victims accept that the price of persuading some persons to agree to peace is that one agrees not to prosecute their past conduct. But in all other cases, the inability or unwillingness to bring perpetrators of international crimes to justice represents a failing of the international system.

The creation, through widespread adoption of the Rome Statute, of a permanent International Criminal Court (ICC) has been of enormous practical and symbolic significance. Through the concerted efforts of states, the vision of a practical means to end impunity has taken institutional form. In establishing the ICC, the international community has built on the experience of the post-Second World War prosecutions, the *ad hoc* international criminal tribunals set up after the conflicts in the Balkans and Rwanda, national level prosecutions such as the famous Eichmann trial, and the legacy of many years of international legal consensus on prosecuting those who, like pirates on the high seas, can be considered by the atrocity and destructiveness of their conduct to be *hostes humanis generis*: the enemies of all mankind. Among other things, states determined in the Preamble to the Rome Statute that ‘the most serious crimes of concern to the international community must not go unpunished’.

The ideals underlying the ICC require practical instrumentalities and processes. This monograph is concerned with the significance of national

level measures to ensure the effectiveness of international criminal justice. As the Preamble to the Rome Statute emphasises, 'effective prosecution must be ensured by taking measures at the national level and by international co-operation'. At the heart of the international criminal justice system are the measures that must be taken by individual states in their own legal systems to ensure no safe harbour exists for the worst international criminals, to ensure that there are no barriers to smooth co-operation and assistance between states and with the ICC, and to ensure that national procedures and mechanisms are of sufficient quality from a rule of law perspective and adequately accommodate human rights safeguards, so that principles are upheld and prosecutions are not jeopardised by deficient investigations.

It is not satisfactory that co-operation take place informally or on an ad-hoc basis. As with shortcuts on human rights guarantees, this undermines the reputation of national and international courts. It is not enough for states to show by ratification they are *willing* to co-operate or implement measures, if they do not take the steps to ensure that they are *able* to prosecute. One may thus say that the inability or unwillingness to bring perpetrators of international crimes to justice also represents a failing of national systems. Correspondingly, and viewed more positively, a state's ability to maintain the rule of law and to respond to international crimes within the parameters of international law and human rights is likely to reflect a national criminal justice system that serves its own people efficiently, justly and with respect for their basic procedural rights. Generic national capacity on crime and justice issues thus bears a strong relationship with a state's ability to respond to the particular requirements of the ICC scheme.<sup>1</sup>

This monograph consists of a compilation of reports by independent experts on the extent of legislative and other measures taken by five selected African states (all party to the Rome Statute), to implement the Statute's obligations into their national laws and procedures. It concludes with a comparative overview of the themes emerging from the various country reports. As such, it is an assessment of the degree of capacity of these states (and similarly situated states), to respond to international crimes by workable, acceptable and lawful processes and within the parameters set by international law, in particular international human rights law.

It is right and proper that an institution such as the Institute for Security Studies, whose overall concern is with security in Africa, should consider whether African states are ready to co-operate with the ICC and deal with international crimes. The regional and international community's interest in effective prosecution of international criminal conduct is not only a principled

interest based on shared revulsion at the criminality inherent in acts of genocide, war crimes and crimes against humanity. There is in addition a clear recognition of the link between deterring or satisfactorily dealing with such conduct, and the prospects for peace and stability.

So, the creation of the ICC reflects not just an attempt to maintain high principles in the face of the commission of the most serious of crimes, but also a belief in the practical deterrent and other effects of such a regime, 'the conviction of States that more consistent and effective enforcement of criminal justice is an essential component in ... building stability' (Friman & Robinson 2005). In this monograph we suggest that the decision of the world community to create the ICC means that one may assert the link between a properly functioning international system of justice and better prospects for stability, human development and international peace and security.<sup>2</sup>

How relevant to Africa is the priority of implementing measures consistent with the ICC Statute which enable the effective prosecution of international crimes? How does it sit relative to the other priorities of government and government departments, human rights defenders, civil society?

As is evident from the country reports in this monograph, one perception is that having in place national ICC response measures is not particularly relevant or urgent from an African perspective. However, as the country reports reveal quite clearly, a failure by all five countries sampled to put in place national level measures to implement Rome Statute obligations means that it is not inconceivable that in the near future a ratified African State (for example, one bordering on a conflict area such as the Democratic Republic of Congo) may be unable to respond satisfactorily to the foreseeable possibility of an internationally-wanted person being present in its jurisdiction. Aside from the diplomatic implications that might arise for the State as a ratified party to the Statute of the International Criminal Court, it is not difficult to see how the impunity and victims' sense of injustice resulting from an inability to prosecute or surrender such a person might both decrease the deterrence effect that the ICC may have brought to conflict situations, and be a factor feeding further resentment and violence.

If that might be the result of inaction, it is also not difficult to see how an attempted informal or shortcut handling of such a situation without proper, prescribed procedures and human rights safeguards might endanger otherwise safe convictions or discredit and undermine the international effort against those enemies of all mankind whose conduct the ICC is empowered to deal with. These brief scenarios illustrate the significance of

comprehensive, principled national ICC response mechanism to the African continent's conception of its own 'security'.

## Notes

- 1 The International Coalition for the ICC ('ICC Now'), which engages in advocacy surrounding ratification and implementation, puts this issue well in the following terms ([www.iccnw.org](http://www.iccnw.org)): 'As the Court initiates investigations, the existence of solid co-operation legislation takes on new urgency. Beyond situation States and their neighbours, the implementation of the Rome Statute provides an opportunity to reinvigorate reforms of the criminal and procedure codes, which in the long term, will strengthen rule of law, peace and security'.
- 2 The provision for Security Council referrals for prosecution (Art. 13(b)) and requests for deferrals (Art. 16) is an explicit recognition of the fact that the conduct involved in the commission of these crimes will very often relate to a situation of widespread instability or conflict. The ICC regime in both its deterrent and corrective capacities is a vital component of a considered conception of what constitutes 'security'.

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## CHAPTER 2

# BACKGROUND TO THE ISS INTERNATIONAL CRIME IN AFRICA PROGRAMME

Max du Plessis and Jolyon Ford

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The Institute for Security Studies, Pretoria (ISS) is a leading African human security research institute. It was founded in 1991 as the Institute for Defence Policy, and has offices in Pretoria, Cape Town, Addis Ababa and Nairobi and operates as a non-profit organisation. While the ISS has a broad programme, it has retained its emphasis on strategic and security issues, seeing these as critical to wider aspirations for development, peace and prosperity in Africa. The ISS is nevertheless guided by a broad approach to security, reflecting the changing nature and origin of threats to human development. This approach is reflected by the term 'human security' which has come to be understood to transcend a narrow focus on traditional state-centric national security concerns, and brings additional areas of focus such as human rights, good governance (political and economic), personal and community security (crime), justice, refugee movements and internal displacement, food security, sustainable livelihoods, etc. If human development is conceptualised as freedom from want (a process widening the range of people's choices), a concern with 'human security' can be understood as an attempt to assess what determines the ability to pursue those choices in a safe and equitable environment. The ISS research process is partly shaped by the conviction that African development requires a democratic context and a vibrant civil society.

The ability of the ISS to engage in and shape the international debate on African human security issues from its base on the continent (and its regional recruitment of expert staff) is an important component of the ISS work. The overarching goal of the ISS is to entrench its reputation as an established African strategic studies institute able to inform debates and policy on African security from an African perspective.

Over the past few years the ISS has developed substantial work with and through sub-regional organisations including the African Union (AU), Southern African Police Chiefs Cooperating Organisation (SARPCCO), the Southern African Development Community (SADC), the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), the Economic Community of Central African States (ECCAS) and the Intergovernmental

Authority on Development (IGAD). The ISS has continued to enhance its engagement with civil society groups and networks, most prominently as part of its work on arms management issues, defence sector engagement and anti-corruption initiatives.

The ISS has moved towards capacity building at a senior level as an increasing component of its engagement on security issues. This assessment of responses to ratification of the Rome Statute by some African States comprises one element of the recently established International Crime in Africa Programme (ICAP) at the ISS. Over the past several years, the ISS has tracked international criminal justice developments relevant to its work, most notably in relation to terrorism and counter-terrorism (both domestic and international), the establishment of *ad hoc* criminal tribunals and the creation of the ICC, and the implications of these developments for peace building and peace keeping in Africa.

In February 2008, the ISS launched a new programme dedicated to informing the African debate on international crime and terrorism and enhancing the capacity of African countries to respond effectively to these complex crimes. The International Crime in Africa Programme (ICAP) is motivated by the goals of durable peace building and strengthening the rule of law, both of which are threatened in Africa by the pervasive culture of impunity and the general lack of criminal justice capacity to respond effectively to these crimes, including war crimes, crimes against humanity, genocide and terrorism.

ICAP runs various projects, each focusing on different aspects of international crime in Africa. All projects are designed to support and complement each other through a combination of awareness raising, research, training and implementation support activities. Current projects aim to:

- Enhance the African debate and voice on terrorism and counter-terrorism from the region and therefore from an African perspective
- Strengthen the criminal justice capacity of requesting African countries to detect, investigate, prosecute and adjudicate terrorist cases in line with rule of law and human rights principles and international/regional legal obligations
- Strengthen the capacity of selected African countries to end impunity by effectively investigating and prosecuting core international crimes within the context of human rights and international law

An underlying premise of the programme is that a key element of long term post-conflict peacebuilding is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government. In Africa, post-conflict peacebuilding is threatened by the widespread lack of accountability among those responsible for the continent's many violent conflicts that are characterised by torture, rape, murder, and other atrocities. The pervasive culture of impunity threatens newly established peace processes – not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge which can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance.

However, for most African countries, the national judicial systems are often too weak to cope with the burden of rendering justice for these crimes. 'International crimes' including war crimes, crimes against humanity and genocide are characterised by large numbers of victims and perpetrators, and are often committed with the complicity if not the active participation of state structures or political leaders. This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further limited by resource and skills shortages, together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.

In circumstances such as these, when the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist with these processes. This the international community did in the early 1990s with the establishment of two *ad hoc* international criminal tribunals – the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. These culminated in the formation of the permanent International Criminal Court in The Hague, which has jurisdiction over international crimes.

Of immense importance for Africa is that the ICC's first five 'situations' are all on the continent (Democratic Republic of the Congo, Uganda, Sudan, the Central African Republic and Côte d'Ivoire), and the UN Security Council recently referred the genocide in Darfur to the Court. Africa is thus currently a high priority for the ICC, and will remain so for the foreseeable future. It is the most represented region in the ICC's Assembly of States Parties with 29 countries having ratified the Rome Statute (which gives effect to the ICC), and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peacebuilding efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. Apart from many African states' well-known resistance to interventions perceived as emanating from or being imposed by the 'West' (a theme which is highlighted in some of the reports in this monograph), the ICC faces several challenges, not least of which is the scale of the impunity problem.

In reality, the Court will be able to tackle a selection of only the most serious cases. And even if it did have the capacity to handle higher volumes of cases, this would be limited in Africa by the fact that the ICC is, by design, a 'court of last resort' – with the main responsibility for dealing with alleged offenders resting with domestic justice systems. Governed by the principle of complementarity, this means that the ICC can only act in support of domestic criminal justice systems. National courts should be the first to act, and only when they are 'unwilling or unable' to do so, can the ICC take up the matter. This implies a certain level of technical competency among domestic criminal justice officials.

But technical competency is only part of the problem. A related (and oftentimes prior) issue is political support for the idea of international criminal justice and for the International Criminal Court's complementarity scheme. In that regard, it is vital that African states ratify the Rome Statute. The ICC cannot, of its own accord, initiate investigations into crimes committed in a state, or by a national of a state that has not ratified or acceded to the statute establishing the ICC. Considering that 29 of Africa's 53 states have ratified, a large portion of the continent still falls outside the ICC's mandate.

The five States considered in this monograph (Botswana, Ghana, Kenya, Tanzania and Uganda) have ratified the Statute. It is, however, after ratification that states must adopt complementary national legislation to allow for domestic prosecutions of international crimes, and enable full co-operation with the ICC. Generally, progress in this regard in Africa has been slow. According to the ISS's recent research, 15 countries have signed and ratified but have no implementing legislation, and seven are in the process of developing legislation, while nine have draft or completed versions of implementing legislation. In terms of co-operation with the ICC, only seven countries in Africa have ratified the Agreement on Privileges and Immunities, which is required to protect the Court and its personnel (by allowing safe access of ICC staff to their countries and the transfer of evidence, witnesses and other information to and from the Court). The ICC's impact in Africa

will thus be limited by the extent to which countries have ratified the Rome Statute and developed complementary national legislation – processes that rely equally on domestic capacity as well as political support among States for ending impunity and for the ICC as an institution.

This monograph is an attempt to consider the extent to which the five countries visited have reacted to their obligations under the Rome Statute. Put differently, the intention behind this monograph, then, is to provide a snapshot of the manner and extent of responses to ratification by these countries to date, and in particular the reasons for delays in implementation.

By doing so, it is hoped that the monograph will contribute to enhanced understanding of the reasons why the States considered have lagged in relation to their domestication obligations under the Rome Statute. Given the reasons for delay in implementation, and in particular the fact that many of the reasons are shared amongst the five states that have been studied, there remains an important role for the African Union and other international and regional organisations to enhance awareness of the International Criminal Court's work and to demonstrate support for the vision of international criminal justice through, amongst other things, the offer of technical assistance and support in the drafting of implementation legislation and the training of judges, lawyers and government officials in relation to international criminal justice principles. At the same time, there is an obvious need to garner support among political leaders, senior criminal justice and foreign affairs officials, and civil society stakeholders within African states for ending impunity and the practical steps required to achieve this.



**CHAPTER 3**  
**OVERVIEW OF THE GENERAL**  
**NATURE OF ROME STATUTE**  
**IMPLEMENTATION OBLIGATIONS**

Max du Plessis and Jolyon Ford

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As a backdrop to analysing the extent of measures taken by the sample of ratified African countries, it is useful to briefly outline the general nature of national implementation obligations assumed by States which elect to become party to the Rome Statute.<sup>1</sup> At the heart of these is the ability to prosecute international criminals in one's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute and who happen to be in one's jurisdiction. For this reason the Rome Statute notes that effective prosecution is that which is ensured by taking measures at the national level and by international co-operation.

### **General concepts**

#### ***Jurisdiction and complementarity***

Because of its special nature, States Party to the Rome Statute are expected to assume a level of responsibility and capability the realisation of which will entail taking a number of important legal and practical measures.

The principle of 'complementarity' built into the Rome Statute entails that the ICC is not intended to displace the responsibility of States to prosecute the most serious crimes of international concern: as article 1 states, the ICC as an institution is intended to be 'complementary to national criminal jurisdictions'. A case is inadmissible before the ICC (the Court cannot exercise jurisdiction) if a State's appropriate institutions have considered the matter and declined to prosecute, an acquittal or conviction has been obtained from an impartial and independent court in the State, or the State is at that time making a genuine effort to investigate and/or prosecute the matter (article 17 read with article 20(3)).

Moreover, once an investigation is begun, the State or States having territorial or nationality jurisdiction are to be afforded the opportunity to exert jurisdiction (article 18). Article 17 makes clear that the ICC may exercise its

jurisdiction over a Statute crime where a State, while having jurisdiction, is unwilling or unable to exercise it so as to prosecute. In this scenario, issues such as the efficiency, independence or intention of the State institutions responsible can determine whether the State is to be deemed to be unwilling or unable to prosecute, so as to pave the way for ICC jurisdiction.

The ICC does not exercise universal jurisdiction. The ICC's jurisdiction is only triggered when the crime occurred on the territory of a State accepting the Court's jurisdiction (territorial jurisdiction) or the accused is a national of such a State (active nationality principle), or the matter is referred to the Court by the UN Security Council exercising its Chapter VII powers. By article 12, a State accepts jurisdiction by becoming a State Party, or can do so by declaration where it is a non-party State. The consequence is that many States which become party to the Rome Statute might not have previously provided for criminal jurisdiction on the active national principle: such States will normally require special legislation as the domestic legal basis enabling them to bring a prosecution at home of a national accused of international crimes committed elsewhere.

It is sufficient for present purposes to note that the upshot of this is that the State Party assumes a significant role in the regime for the prosecution of international crimes, and certain particular features need to be present in the State's legal and justice system in order for this complementary system of justice to function effectively. What the assessments in the country reports in this monograph are concerned with is the extent to which certain African States have moved to manifest their international obligations by exerting formally their jurisdictional capacity to prosecute, or co-operate in the prosecution of, such crimes.

### ***The ICC crimes***

The ICC has jurisdiction over those crimes regarded with the highest degree of concern by the international community: genocide, crimes against humanity, and war crimes. These are thoroughly defined in articles 6, 7, and 8 of the Rome Statute, with further elaboration and definition given in the 'Elements of Crimes' guidelines agreed to by States Parties.

In addition to their duty to take steps to be able to surrender to the ICC persons for whom an arrest warrant is issued (see below), States Party to the Rome Statute may take steps to prohibit, as a matter of national or domestic law, the crimes or conduct described in the Statute. This is to enable them to



conduct a prosecution of such crimes domestically should they elect to do so (and to remove any question of the crimes for which surrender is sought not being found in national law). While some States may seek to create offences based on the ICC crimes and definitions, others may simply fully incorporate articles 6, 7 and 8 by reference (for example as a Schedule to the implementing legislation), giving them direct force of law in the country (as a matter of national or domestic criminal law). Article 70(4) meanwhile requires States to extend the operation and substance of their national criminal laws dealing with offences against the administration of justice, so as to criminalise in addition conduct that would constitute an offence against the ICC's administration of justice.

### ***Immunities and amnesties***

A significant issue that States encounter upon implementation is to reconcile their national laws with article 27 of the Statute, by which States have agreed that immunities from prosecution enjoyed as a result of holding public office are not bars to the Court exercising its jurisdiction. In other words, the Statute applies equally to all persons regardless of official capacity, and even to Heads of State.

Article 48 of the Statute also requires States to take steps to ensure that ICC officials at all levels, and certain others, will enjoy a certain level of domestic immunity within the State should their investigation or prosecution require them to operate physically within the State. This will normally require quite specific implementing legislation on the part of the State.

One issue that relates to implementation is the effect of assuming ICC obligations on other international obligations that a State Party may have assumed. While the Rome Statute provides, in article 90, a scheme for any situation of competing (ICC and third State) requests for surrender of the same accused person, its implementation will also need to take into account situations where its obligations to co-operate with the ICC imperil its other obligations to a third party State (in particular, in relation to diplomatic immunity). Article 98 sets out the procedure to be followed in such circumstances, with an emphasis on consultation and the seeking of waiver of immunities from the third State which holds these.

As the country reports here indicate, a significant issue that African States Party have had to deal with upon ratification is the pressure from the United States to conclude bilateral immunity agreements purportedly under article

98 ('Article 98 Agreements') whereby it is agreed that US citizens will not be surrendered to the ICC notwithstanding the State's compulsory surrender obligations under the Rome Statute.

### **ICC framework: co-operation, arrest and surrender, other assistance, investigations, seizures and forfeitures**

The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering, and inter-agency co-operation, often with high levels of confidentiality and information or witness protection required. Contact between the ICC (in particular the Office of the Prosecutor) and the national authorities will likely become extensive during the course of an investigation and any request for arrest and surrender or any prosecution. Indeed in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken.

The ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter: for ordinary policing and other functions, it will rely heavily on the assistance and co-operation of States' national mechanisms, procedures and agencies.

It is with the State's domestic implementation of its part in the cooperative scheme that we are here concerned. In order to be able to co-operate with the Office of the Prosecutor (OTP) during the investigation or prosecution period<sup>2</sup> (or otherwise with the Pre-Trial Chamber or the Court once a matter is properly before these, for example in relation to witnesses), a State Party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations.

The legal framework for requests for arrest and surrender (on the one hand) and all other forms of co-operation (on the other) is mostly set out in Part 9 of the Rome Statute. Article 86 describes the general duty on States to co-operate fully with the ICC in the investigation and prosecution of crimes. Article 87 sets out general provisions for requests for co-operation, giving the ICC authority (under article 87(1)(a)) to make requests of the State for co-operation. Failure to co-operate can, amongst other things, lead to a referral of the State to the Security Council (article 87(7)). Article 88 is a significant provision, obliging States to ensure that there are in place nationally the procedures and powers to enable all forms of co-operation contemplated in the Statute. Unlike inter-

State legal assistance and co-operation, the Rome Statute makes clear that by ratifying, States accept that there are no grounds for refusing ICC requests for arrest and surrender (see article 89 – although article 97 provides for consultation where there are certain practical difficulties). States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

In relation to other forms of co-operation, by article 93, States have obligated themselves to comply in almost all situations. There is a limited avenue for refusal. Thus while we have spoken in terms of ‘co-operation’, this overall obligatory character of the Rome Statute brings into relief the significance of implementation at the national level (with which this monograph is concerned), so that States will be able to respond effectively and efficiently to ICC requests for arrest and surrender or other forms of assistance.

In relation to requests for arrest, the Statute scheme leaves to States the detail of how national law might deal with the procedure for transforming a request into an arrest warrant or provisional arrest warrant with domestic effect, and what requirements need to be shown for a warrant to be issued. The Statute merely suggests that States keep to a minimum what is required for the successful issue of a warrant following a request, so that this should at very least not be more burdensome than what is normally required in an extradition request (article 91(2)(c)).

Article 59 gives direction on the form of procedure that a national implementing law will need to set out by directing that an arrested person be brought before a court to be properly identified and for determination of whether due process has been followed and rights observed – although in keeping with the Statute, national laws will not authorise a judicial officer to attempt to offer a remedy should such shortcomings be evident. National implementing law will need to deal with issues such as bail, dealt with in article 59.

In relation to surrender, this is also largely left to national laws and procedures, although the scheme of the Statute makes abundantly clear that it is intended that when implementing national measures to enable surrender, States keep the process simple and unencumbered, for example, by avoiding restrictions on surrender customarily found in national extradition laws (‘political offence exceptions’ and the like). Challenges to surrender based on the ‘double jeopardy’ principle are explicitly to be left to the ICC to determine at the time of determining admissibility, and national laws are not to deal with the issue (article 89(2)). Otherwise, most States will normally base the new provisions

for ICC surrender on a simplified version of their extradition surrender procedures, since the Statute leaves it to the State. Some national laws may allow for temporary surrender to the ICC (for example pending the return to the surrendering State of the person to complete a sentence for a separate offence). States are also obliged to accept transiting prisoners en route to the ICC pursuant to a request or a conviction, and to provide for this eventuality.

In relation to other forms of co-operation, States must ensure that their national laws are amended so as to allow them to fulfil domestically the obligation to be able to provide all the forms of co-operation listed in article 93 of the Statute. These relate to matters that arise with any criminal investigation and include assistance with locating persons or things, taking witness statements, protecting witnesses, providing documents, search and seizure of premises and property, tracing and freezing assets, temporary transfer of persons, etc. Article 93(1) includes a broad provision relating to any other form of assistance that is not unlawful in the State. It is left to the domestic law of the State as to the exact manner in which all these forms of assistance are made possible, whether court orders are required, etc – all of this may require specific legislation, or existing criminal procedural laws may cover many of the possibly required steps.

What the Statute does require (in article 99) is that requests for assistance be carried out in the manner specified in the request – this is necessary so as to minimise possible later challenges to admissibility before the Court. The effect is that while co-operation matters are left to national law, it is ideal if implementing legislation is directed as precisely as possible to ensuring an ICC-acceptable process is followed (for example in relation to informing an accused person of certain rights upon arrest). Very often these sorts of safeguards and procedures are already familiar to national criminal justice and law enforcement systems, or even constitutionally mandated.

The Statute provides for a number of other matters in relation to which national measures will need to exist, including providing for the eventuality of the ICC prosecutor exercising functions in the State's territory, the enforcement of ICC sentences in national systems, co-operation with ICC requests in relation to tracing and seizing and forfeiting of assets, etc.

## Notes

- 1 This monograph is not intended to provide more than a sketch as background to the country reports, and relates only to the measures required of States, not

the entire structure and regime of the ICC. For a more thorough treatment, see Schabas, W 2001. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. See also Brandon & du Plessis (eds) 2005. *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States*. London: Commonwealth Secretariat.

- 2 The extent of co-operation required of States Party is evident from the fact that the Office of the Prosecutor (OTP) has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth' (article 54(1)(a), Rome Statute).



# CHAPTER 4

## COUNTRY STUDY I:

### BOTSWANA

Lee Stone

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#### Introduction

The material for this country study was gathered during a visit to Botswana from 12 to 16 November 2007. The author interacted with officials from the Office of the President, the Ministry of Foreign Affairs, the Attorney General's Chambers (Legislative Drafting Division), Directorate of Public Prosecutions, as well as 'Ditshwanelo' (the Botswana Centre for Human Rights) and Professor Daniel Nsereko, an academic at the University of Botswana and who has recently been elected as a Judge of the International Criminal Court. The openness and frankness of government representatives in Botswana and their willingness to co-operate in the preparation of this study must be acknowledged.

In summary, the position in Botswana is the following:

- In 1999, SADC Member States, including Botswana, adopted the Pretoria Statement of Common Understanding on the ICC. This related to States supporting the ICC process and the adoption of implementing legislation, as well as the sharing of information on implementation.
- Botswana signed and ratified the Rome Statute on 8 September 2000.
- Botswana has not yet taken steps to draft any implementing legislation in respect of the Rome Statute. The primary explanation suggested for Botswana's failure to draft implementing legislation is a lack of expertise and capacity on the issue, a sense of proliferation of treaty obligations, together with the fact that ICC matters and the ability to respond or give assistance are not seen as a matter of priority for the government. It is revealing that Botswana has also failed to report to treaty monitoring bodies in respect of international treaties it has ratified. For example, to date, Botswana has never submitted a State Report in terms of article 62 of the African Charter on Human and Peoples' Rights to the African Commission on Human and Peoples' Rights.

- Botswana has not signed the Agreement on Privileges and Immunities, although it has generic domestic legislation (Diplomatic Immunities and Privileges Act, ch. 39). However, Botswana has signed a Bilateral Immunity ('article 98') Agreement with the United States.
- Should political consensus be obtained and the relevant directive be given, Botswana is sufficiently well governed and its officials sufficiently skilled that implementation could be completed fairly rapidly and efficiently. Professor Nsereko has recently been elected to the ICC, giving the Court and the issue of implementation somewhat more local profile. However, the matter is not considered as having priority for the government. Overall, therefore, the prospects of Botswana implementing a suitable national scheme in the next year or two may be said to be 'fair' (on a scale of 'unlikely – low – fair – good – highly likely').

### ***History of prosecution of serious international crimes***

According to the Attorney General's Chambers, no prosecutions of international crimes have taken place in Botswana.

In terms of the ratification of the Rome Statute, Botswana affirmed its full support for the adoption of the text of the Rome Statute during the United Nations Diplomatic Conference on the Establishment of an International Criminal Court on 17 July 1998. In 1999, SADC Member States, including Botswana, adopted the Pretoria Statement of Common Understanding on the ICC. This related to States supporting the ICC process and the adoption of implementing legislation, as well as sharing of information on implementation. Botswana signed and ratified the Rome Statute on 8 September 2000.

## **Legal regime**

### ***Constitutional system***

Botswana has a dual legal system, that is, the received foreign law (Roman Dutch Law combined with English common law principles) subsisting side by side with customary law. Tswana customary law, as represented by the laws and precedents of the eight recognised tribes, is also recognised in matters of property, inheritance and personal dispute arbitration. It remains subordinate to statutory law.



The development of the law can be traced back to the time of the protectorate in 1885. By section 2 of the 1909 proclamation the common law of the Cape of Good Hope became the law of Bechuanaland. This law was only intended for the Europeans. Customary law was applicable exclusively to Africans. It was only in 1943 that customary law was regulated. The civil legal code of Botswana dates back to 1890, when the Laws of the Cape Colony (Roman-Dutch as modified by English common law) were adopted for the Protectorate. The civil code has itself been modified by cases and precedents since 1890, as well as by legislation.

In terms of international law, Botswana is a dualist system – ratified treaties create no actionable rights or obligations unless implemented through national laws. In the internationally-cited case of *Unity Dow v Attorney General of Botswana* (Botswana High Court 1991), the Court of Appeal of Botswana said of an international human rights instrument signed but not ratified by Botswana that:

Botswana seeks to avoid violating international law where possible: if [an international instrument] has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaking given on behalf of the country by the executive.

The executive branch of government is headed by the President. The president is both the head of State and head of government, cabinet and appoints cabinet members. The President is elected from among elected members of parliament not by universal suffrage, for a renewable five-year term. The Vice President is appointed by the President.

The legislature is bicameral consisting of the National Assembly and the House of Chiefs. The National Assembly has 44 seats, 40 members are directly elected by popular vote and four are appointed by the majority party for a five-year term. National Assembly elections were last held on 30 October 2004 (next to be held in October 2009). Constitutional power is shared between the President and a popularly elected National Assembly. There is an independent Electoral Commission and the office of the Ombudsman. The House of Chiefs, representing the eight designated principal Batswana tribes and some smaller ones, has a consultative role especially on traditional matters.

The main functions of the judiciary are defined under Part VI of the Constitution as to hear and determine any civil and criminal cases under

any law. The Constitution creates the Judicial Service Commission to ensure the independence of the Judiciary. Judges of the High Court and the Court of Appeal, Registrars and Magistrates are appointed by the President on the advice of the Commission. The Judiciary is made up of the High Court; Court of Appeal (constituted on a part time basis, including some expatriate judges) and Magistrates' Courts in 17 Magisterial districts. The Customary Court operates at local level.

### ***Status of ratification of international human rights treaties***

The Republic of Botswana is party to the following international human rights instruments:

- The International Covenant on Civil and Political Rights 1966, and 1<sup>st</sup> Optional Protocol
- UN Convention Against Torture 1984
- The Convention on the Rights of the Child 1978
- Convention on the Elimination of all forms of Racial Discrimination
- Convention on Elimination of all forms of Discrimination Against Women
- The Genocide Convention
- The African Charter on Human and Peoples' Rights 1981
- African Peer Review Mechanism (APRM) of the New Partnership for African Development (NEPAD)
- The OAU Convention Governing the Specific Aspects of Refugee problems in Africa

### ***Sub-regional treaties***

Botswana is a member of the Southern African Development Community (SADC) and hosts its Secretariat. It has signed various SADC Protocols including on combating drug trafficking, and on immunities and privileges.

### **Implementing legislation**

Note that without implementing legislation, there is no prospect of prosecution of ICC crimes in Botswana as common law crimes (that is, on an argument that the common law of Botswana has evolved to include international crimes). That is because section 3 of the Penal Code explicitly

provides that 'no person shall be liable to punishment by the common law'. This is reinforced by section 10(8) of the Constitution which declares that 'no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law'. Until such time as the Rome Statute is implemented, ICC crimes will not be enforced by the courts.

### ***Status***

As far as it is possible to discern, Botswana has not yet undertaken the process of drafting any implementing legislation in respect of the Rome Statute. Thus, no draft legislation exists in any form. According to the international NGO Coalition for an International Criminal Court (CICC) (2007), Botswana has commenced the process of drafting implementing legislation. However, no concrete information concerning this draft legislation could be obtained including from informed officials, and Human Rights Watch reports that 'minimal/no progress' has been made by Botswana with regard to the implementation of the Rome Statute.

Currently, no process exists internally with a view towards implementation. However, various representatives of the Attorney General's Chambers have attended consultative workshops on the implementation of the Rome Statute over the past few years which may lend impetus to a more concerted effort towards implementation within the foreseeable future (that being over a period of approximately 24 months).

Furthermore, during the respective interviews held with government officials in order to obtain the information required for this report, the South African implementation legislation was often referred to by the officials as a point of reference. It is therefore likely that the Botswana government may be encouraged to advance the process of implementation since they have a precedent which could guide and assist them (see below).

### ***Government departments concerned and key participants***

Ratification of international treaties in Botswana is a purely executive act carried out by the President, on the advice of cabinet. The Office of the President is ultimately responsible for the implementation of the Rome Statute, including giving the issue shape and political momentum. Thereafter, the implementation of legislation takes the form of the drawing up of legislation

by the legal drafters within the Attorney General's Chambers. The Legislative Drafting Division of the Attorney General's Chambers is responsible for implementing the legislation because the Attorney General's Chambers falls under the Office of the President. In light of the fact that the Office of the President has not undertaken the process as yet, the onus will invariably fall on the Attorney General's Chambers to initiate the process. Legislation is subsequently submitted to Parliament for debate and adoption.

The Botswana Defence Force and the Ministry of Foreign Affairs are also likely to be considered stakeholders in any process towards implementation. The departments who would be engaged under any legislation adopted are:

- Office of the President
- Ministry of Foreign Affairs
- Attorney General's Chambers
- Directorate of Public Prosecutions
- Botswana Police

### ***Status of any amendments to existing domestic laws***

There are no relevant amendments to note, other than the effect in Botswana law of the Bilateral Immunity Agreement with the United States, in respect of ICC requests.

### ***Obstacles to implementation***

The main reason provided by officials and local experts for the delay in implementation is that Botswana is party to numerous instruments, and is facing enormous capacity challenges with respect to implementation of all of these instruments. Furthermore, resources and expertise in the Attorney General's Chambers are insufficient. However, the Attorney General's Chambers did contend that if and when the implementation of the Rome Statute is prioritised, outsourcing of the technical aspects will be possible, so as to ensure implementation.

A parallel reason appears to be that there is no sense of priority in the government for the implementation of the Statute (or indeed of other international instruments). At present, the government's priorities do not point to the ICC.

## **Co-operation with the ICC**

In the absence of any implementing legislation, the following discussion reflects the existing legal framework (both at the domestic level and the sub-regional level) concerning aspects of arrest, surrender, available defences, rights of the accused, etc. These are referred to since these will be relevant to any implementing legislation which Botswana may adopt.

### ***Arrest and surrender***

Sub-regional mechanisms exist which are relevant to the obligations under the Rome Statute of the International Criminal Court. Botswana is a party to the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002) as well as the SADC Protocol on Extradition (2002), both signed in October 2002. These deal with transnational organised crime, corruption, taxation, custom duties and foreign exchange control.

According to the SADC Protocol on Mutual Legal Assistance in Criminal Matters, Members States have committed themselves to extending to each other the widest possible mutual assistance within the limit of the laws of their respective jurisdictions. The Protocol provides for the following forms of assistance:

- Locating and identifying persons, property, objects and items
- Serving documents, including documents seeking the attendance of persons and providing returns of such service
- Providing information, documents and records
- Providing objects and temporary transfer of exhibits
- Search and seizure
- Taking evidence or obtaining statements or both
- Authorising the presence of persons from the Requesting State at the execution of requests
- Ensuring the availability of detained persons to give evidence or to assist in possible investigations
- Facilitating the appearance of witnesses or the assistance of persons in investigations

The Protocol on Extradition operates in the context of several obstacles to the effective administration of the extradition processes in the sub-region, including lack of expertise in extradition matters, lack of a common definition of extraditable offences, undue delays in surrendering fugitives,

the perception of expenses associated with extradition, and conflict or uncertainty of extradition laws and practices including matters relating to the extradition of own nationals and the death penalty.<sup>1</sup>

The SADC Protocol defines extraditable offences as offences punishable by imprisonment for 'a period of at least one year, or by a more severe penalty'. In an attempt to harmonise the definition sub-regionally, article 19 of the SADC Protocol provides that the provisions of any treaty or bilateral agreement governing extradition between any two State Parties shall be complementary to the provisions of the Protocol and shall be construed and applied in harmony with the Protocol. In the event of any inconsistency, the provisions of the Protocol shall prevail. Additionally, in determining what constitutes an extraditable offence it shall not matter whether:

- The laws of the State Parties place the conduct constituting the offence within the same category of offence or describe the offence by the same terminology, and
- The totality of the conduct alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the State Party, the constituent elements of the offence differ

The Protocol also provides that an offence is extraditable whether or not the conduct on which the requesting state bases its request occurred in the territory over which it has jurisdiction.

Article 4 of the Protocol provides the following mandatory grounds for refusal to extradite:

- If the offence for which extradition is requested is of a political nature. An offence of a political nature under the Protocol does not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition.
- If the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons.

- If the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law.
- If there has been a final judgement rendered against the person in the requested state or a third state in respect of the offence for which the person's extradition is requested.
- If the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty.
- If the person whose extradition is requested has been, or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in article 7 of the African Charter on Human and Peoples' Rights.
- If the judgement of the requesting state has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence.

Article 5 of the Protocol provides the following optional grounds for refusal to extradite:

- If the person whose extradition is requested is a national of the requested state. When extradition is refused on this ground, the requested state is obliged, if the other state so requests, to submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested.
- If a prosecution in respect of the offence for which extradition is requested is pending in the requested state against the person whose extradition is requested.
- If the offence for which extradition is requested carries a death penalty under the law of the requesting state, unless that state gives such assurance, as the requested state considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. When extradition is refused on this ground, the requested state is obliged, if the

other state so requests, to submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested.

- If the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the requested state does not provide for jurisdiction over such an offence committed outside its territory on comparable circumstances.
- If the offence for which extradition is requested is regarded under the laws of the requested state as having been committed in whole or in part within that state. Where extradition is refused on this ground, the requested state is obliged, if the other State Party so requests, to submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested.
- If the requested state, while also taking into account the nature of the offence and of the interest of the requesting state, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

The Protocol addresses the death penalty, under article 5(c), as a discretionary ground of refusal to extradite with the possibility of assurances.

### *The procedure involved in the arrest process*

As a result of the relatively recent amendment to the Constitution and in terms of the Mutual Assistance in Criminal Matters Act, the Director of Public Prosecutions (in consultation with the Attorney General) is the designated authority in order to decide on any international or foreign request for the arrest of a suspect. The request itself is usually done through the Department of Foreign Affairs.

In relation to obtaining an arrest warrant, s. 20 of the Penal Code makes clear that the consent of the Director of Public Prosecutions is required in order to effect an arrest of a suspect and commence a prosecution. However, section 20 states:

Notwithstanding that in respect of any offence it is provided that no prosecution shall be instituted without the consent of the Director



of Public Prosecutions, a person may be arrested and charged for such offence and any such person may be remanded in custody or bail notwithstanding that the consent of the Director of Public Prosecutions to the institution of prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

### *The procedure involved in the surrender process*

The Directorate of Public Prosecutions is also responsible for the surrender of accused persons. In Botswana, s. 8 (Restrictions on Surrender of Criminals) of the Extradition Act states that a person may only be extradited if a reciprocal arrangement exists with another country.

Requests for extradition within the SADC are usually communicated through the diplomatic channel. The Protocol however, makes provision for communication of requests through 'other channels'. Article 6(1) of the Protocol provides that a request for extradition, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties. The disadvantage of the diplomatic channel is that it involves a certain degree of delay. The law enforcement agency investigating a case requiring the extradition of a suspect refers a request for extradition to its foreign ministry. The request is then sent to the embassy or high commission of the requesting State. The embassy, in turn, sends the request to the foreign ministry of the requested State that dispatches it to the ministry of justice. The Ministry then sends it to the competent law enforcement agency for execution. The results of the request are sent back to the requesting authority by the same procedure.

The procedural steps of executing an extradition request also involve a lengthy process. Most SADC States require that facts of the alleged crime be made available to the requested State, to determine if there is sufficient evidence for extradition to proceed. The standard for sufficiency applied is that of the *prima facie* case. Under this test, the requested State will require the submission of evidence, which a court will have to determine whether or not it satisfies the required standard to justify committal of the person for trial under domestic law, if the case had arisen there. The requested person has a right to appeal against an adverse court ruling.

In an attempt to simplify the extradition procedure, article 9 of the Protocol provides that the requested State, if not precluded by its laws, may grant

extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents, before a competent authority, to be extradited. Additionally, under article 13 of the Protocol, Member States are mandated to arrange for the surrender of a requested person without undue delay. If circumstances beyond its control prevent the requested State from surrendering or removing the person to be extradited, the Protocol requires the requested State to notify the other State and the two State Parties must mutually decide upon a new date of surrender.

One of the central issues concerning the execution of extradition requests in the region is the cost of proceedings arising out of such requests. In most of the countries in the region, government institutions including the courts and law enforcement agencies operate in an environment of extreme resource constraints including critical shortage of fuel and transport. Account must also be taken of the enormous surface area that is involved in the conduct of law enforcement operations. Due to the financial implications involved, government institutions may naturally be reluctant to get involved in lengthy and complex extradition proceedings. Under article 18 of the Protocol matters relating to costs associated with extradition are dealt with as follows:

- The Requested State is obliged to make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition
- The Requested State must bear the expenses incurred in its territory or jurisdiction in the arrest and detention of the person whose extradition is sought, and the maintenance in custody of the person until that person is surrendered to the Requesting State
- If during the execution of a request, it becomes apparent that fulfilment of the request will entail expenses of an extraordinary nature, the Requested State and the Requesting State must consult to determine the terms and conditions under which execution may continue
- The requesting State must bear the expenses incurred in translation of extradition documents and conveying the person extradited from the territory of the Requested State
- Consultations may be held between the Requesting State and the Requested State for the payment by the Requesting State of extraordinary expenses

### *Constitutional/human rights concerns in surrender of suspects*

There is no Constitutional prohibition on the extradition of nationals. In other respects, the normal procedural protections of Botswana law apply.

### ***Other forms of assistance to the ICC***

The present official attitude appears to be that staffing and financial constraints may be obstacles to Botswana offering assistance to the Court. However, government officials appear conscious of the duty to co-operate in view of the obligations assumed by the Rome Statute.

The present position of the Botswana government appears to be that there is no reason why the government would not incur obligations outside the Mutual Assistance Context, including facilitating the Court sitting and exercising its functions outside of The Hague.

The obligations would fall under the responsibility of the Ministry of Foreign Affairs and would entail the extension of Privileges and Immunities (as are presently extended to diplomats and some others).

In terms of the enforcement of sentences, the SADC Protocols may be relevant practice from which, as with the other matters above, the approach to these issues will remain to be addressed in any implementation legislation.

### **Incorporating the crimes**

No steps have been taken to incorporate the ICC crimes, which are therefore unknown to Botswana law.

In the absence of any draft incorporating provisions, it might be noted that in relation to genocide, the crime of sedition, as articulated under s. 50 of the Penal Code, may conceivably cover similar conduct if the acts are manifested in such a manner that a certain level of lethality results. The applicable provisions of section 50 are the following:

- (1) A seditious intention is an intention-
  - (e) to promote feelings of ill-will and hostility between different classes of the population of Botswana.

(2) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances which he so conducted himself.

However, this would appear to relate only to acts within Botswana. In relation to war crimes, s. 38 of the Penal Code contains a provision entitled 'Promoting war or warlike undertaking'. This section states that:

Any person who, without lawful authority, carries on, or makes preparation for carrying on, or aids in or advises the carrying on of, or preparation for, any war or warlike undertaking with, for, by, or against any person or group of persons within Botswana, is guilty of an offence and is liable to imprisonment for not less than 15 years nor more than 25 years.

The above matters aside (neither appears to have extra-territorial effect), it remains doubtful that domestic courts would have jurisdiction over charges of genocide, war crimes and crimes against humanity in the absence of specific incorporation of the ICC crimes in implementing legislation.

### **Domestic courts: Jurisdiction and principles of liability**

- Bases of jurisdiction: There is no indication of the basis on which Botswana would purport to extend any jurisdiction to prosecute domestically in relation to conduct not necessarily occurring in Botswana, nor how challenges to admissibility or jurisdiction would be managed.
- Temporal jurisdiction: In terms of temporal jurisdiction, laws in Botswana only have retrospective effect when conferring a benefit, there being a general conventional and Constitutional prohibition on retrospective criminal laws.
- Principles of liability: See section on 'available defences' below.
- Challenges to admissibility or jurisdiction: There is no indication of how a future Bill would deal with this issue.

## **Rights of the accused**

An accused person's rights upon arrest are protected by s. 15 of the Constitution of Botswana. The applicable provisions of s. 15 provide the following:

Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he or she understands, of the reasons for his or her arrest or detention.

Any person who is arrested or detained:

(a) for the purpose of bringing him or her before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the law in force in Botswana,

and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial.

The Constitution provides for a number of other familiar civil and political rights protections, in terms generally consistent with international standards.

## **Available defences**

### ***Duress***

Section 15 of the Penal Code contains the defence of compulsion, such that 'a person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse the causing of, or the attempt to cause, death'.

## ***Age***

Section 13 provides that a person under the age of eight years is not criminally responsible for any act or omission, and a person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

## ***Intoxication***

Section 12 provides that intoxication shall not constitute a defence to any criminal charge (s. 12(1)), except if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing, and the state of intoxication was caused without his consent by the malicious or negligent act of another person; or the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission (s. 12(2)). Intoxication is taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence (s. 12(4)).

## ***Self defence***

This is governed by s. 16 of the Penal Code, such that 'a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property or the person or property of anyone whom it is his moral or legal duty to protect if the means he uses and the degree of force he employs in so doing are no more than is reasonably necessary in the circumstances'.

## ***Diminished responsibility and insanity***

Section 10 provides a presumption of sanity. Section 11 provides that 'a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease,

if such disease does not in fact produce upon his mind one or other of the effects mentioned above in reference to that act or omission’.

### ***Mistakes of fact and law***

Section 9 of the Penal Code regulates mistakes of fact and provides that a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

Section 6 of the Penal Code provides that ignorance of law does not constitute a defence.

### ***Other***

Section 14 of the Penal Code states that ‘Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in good faith in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.’

### **Immunity**

The Constitution of Botswana protects the President from prosecution. Moreover, the Diplomatic Immunities and Privileges Act (chapter 39:01) echoes the provisions of the 1961 Vienna Convention on Diplomatic Relations in that it provides that a sitting President would not be liable to be prosecuted.

### **Article 98 agreements**

Botswana signed the Bilateral Immunity Agreement in Gaborone on 30 June 2003. The agreement entered into force on 28 September 2003.

The President entered into the agreement for the executive, on account of political reasons. The signing of the agreement apparently caused some controversy in Botswana, because the Attorney General’s Chambers had

expressly declared that this would not be in Botswana's best interests. However, the President committed Botswana to the Agreement while on a mission to the United States of America.

## Notes

- 1 These obstacles were articulated during a regional Governmental Legal Experts Workshop on Extradition and Mutual Legal Assistance, hosted by the Institute for Security Studies, Pretoria, 2004.

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## CHAPTER 5

# COUNTRY STUDY II: GHANA

Godfrey Musila

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### Introduction

This country report aims to outline and evaluate the steps taken by Ghana to fulfil its duty of domestic implementation as a State Party to the Rome Statute of the International Criminal Court. The report is based on primary and secondary source material as well as on interviews conducted by the author with government officials and local civil society representatives in Ghana in September 2007.

In summary, the position in Ghana is the following:

- Ghana's relative proximity to former and current conflict areas means that it is not inconceivable that fugitive internationally-sought persons may be found in the jurisdiction in future. High profile serious criminal prosecution issues are also leant an additional local tone by Ghana's vivid history of military regime trials, torture and executions, self-amnesties, and reconciliation mechanisms.
- Ghana ratified the Rome Statute on 20 December 2000.
- Ghana has not yet brought into force domestic legislation to implement its ICC obligations.
- A draft Bill is in existence (not yet public) and Cabinet continues to consider certain policy and legal issues arising from implementation. It is not clear when the law could be in place, and initial impetus following ratification and the drafting of the Bill seems to have slowed.
- Ghana signed the Agreement on Privileges and Immunities (APIC) on 12 September 2003. Ghana is believed to have signed a conditional Bilateral Immunity Agreement (BIA or 'article 98 agreement') with the United States. Immunity (both of foreigners and the non-immunity of officials under article 27 of the Rome Statute) is one of the issues which it is believed is delaying the progress of the Bill.

- The 'Charles Taylor experience' seems to inform the belated concerns to subject the draft to greater scrutiny as it relates to immunity enjoyed by the head of state (and former head of state) under the Constitution. This is partly the reason for delay in implementation.
- Ghana's position as a leading West African country, its openness evinced by its amenability to NEPAD peer review (APRM), its proud legal profession and judiciary, and its current President's position as a relative 'elder statesman' in the region, mean in the context of the fact that a comprehensive Bill is already before Cabinet, that it is conceivable that Ghana might be amenable to encouragement to take a lead on ensuring ICC response mechanisms are in place. However, with elections due in 2008, the lack of any priority accorded this issue by NGOs or government, and internal concerns about certain aspects of the Bill, it is just as possible that the Bill will remain before Cabinet for an extended period.
- Overall, the prospects of implementing a suitable national scheme in the next two years can be described, at best, as 'fair' (on a scale of 'unlikely – low – fair – good – highly likely').

### ***History of prosecution of serious international crimes***

Despite its history of gross human rights violations, there have been no prosecutions of such crimes *per* international crimes. Ghana is a party to the Geneva Conventions and 1977 Protocols, but there is no municipal legislation in this regard.

On the transition from military rule in 1992, the Rawlings administration provided for a self-amnesty in the 1992 Constitution. Section 34 (1) and (2) of the Transitional Provisions annexed to that Constitution expressly bars any judicial action pertaining to the criminal actions of persons who acted in the name of, or as operatives of, the two Rawlings governments (the Provisional National Defence Council (PNDC) and the Armed Forces Revolutionary Council (AFRC)). Section 34(2) provided that:

It is not lawful for any court or tribunal to entertain any action or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of Ghana or any person acting under the authority of the Government of Ghana.

To buttress this, a further constitutional clause entrenched the self-amnesty by barring Parliament from amending the Transitional Provisions. This effectively ensured that no legal action could ever be taken against any member of the two military administrations headed by Rawlings.

In view of the absolute and permanent blanket self-amnesty, the National Reconciliation Commission (NRC) established in 2002 by the National Reconciliation Act 2002 could not legally take any measures that could be considered offensive to the constitutional amnesty. This view seems to be reflected in the solitary objective with which the NRC was tasked:

[To] seek and promote *national reconciliation* among the people of this country by recommending appropriate redress for persons who have suffered any injury, hurt, damage or grievance or who have in any other manner been adversely affected by abuses and violations of their human rights arising from activities or inactivities of public institutions and persons holding public office during periods of unconstitutional government ... [emphasis added].

The NRC was thus reduced to compiling a historical record of past human-rights violations by providing a forum for victims to tell their stories. Unlike the South African Truth and Reconciliation Commission, the mandate of the NRC did not seek to revisit the indemnity in the 1992 Constitution. However, after being inundated with petitions from victims of past violations, the NRC recommended that the indemnity clauses be put to a referendum. This recommendation is yet to be taken up, and is unlikely to be implemented given a number of local factors.

The tribunals ('People's Tribunals' NDC Establishment Proclamation 1984) created at the start of Rawlings' second reign, and which operated outside the mainstream judicial system, can only with great perversity be considered as examples of 'prosecution of international crimes'. They were convened to look into what were regarded as 'anti-government crimes' and a broader rubric of crimes including economic crimes committed in the 15 years after Nkrumah's rule.<sup>1</sup> Described by Rawlings as part of a 'Holy War', the tribunals turned out as instruments to target and eliminate previous leaders and opponents considered a threat to the military regime.<sup>2</sup>

With respect to other crimes of international concern, there is a history of mutual co-operation between Ghana and the United States relating to drug trafficking. Persons involved in trafficking have been extradited both ways to face trial.

With regard to the ratification of the Rome Statute, Ghana ratified on 20 December 2000.

## **Legal regime**

### ***Constitutional system***

Ghana has a multiparty parliamentary democracy based on the post-military 1992 Constitution which guarantees the separation of powers between the executive, legislature and the judiciary. The presidency has a four-year term and an incumbent can serve for a maximum of two terms. Although Ghana is a unitary state, a decentralised administration has been implemented through government structures. There are ten Regional Coordinating Councils as well as 110 Metropolitan, Municipal and District Assemblies which foster grassroots participation in the formulation and implementation of government policies and development programmes.

Ghana's electoral system is based on universal adult suffrage for citizens; political parties are not allowed to sponsor candidates for election to lower local government units; in the presidential election the winner requires more than 50 per cent of the votes cast; parliamentary and local elections are on the basis of the first-past-the post. A permanent Electoral Commission was established by the 1992 Constitution. It is charged with the responsibility of organising elections, and its seven Commissioners are appointed by the President of the Republic on the advice of the Council of State, a body of eminent citizens established by the Constitution. To support its work, a commission on civic education is also established by the Constitution.

Judicial power of Ghana vests in the Judiciary (s. 125(3) of the Constitution). The Judiciary consists of: the Superior Courts of Judicature comprising the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals. The Supreme Court is the final court of appeal and has jurisdiction over matters relating to the enforcement or the interpretation of the Constitution. There are also Lower Courts established by statute (ss. 125-152 of the Constitution).

The Attorney General is a Minister of State and the principal legal adviser to the government (s. 88 of the Constitution). The AG is responsible for the initiation and conduct of all prosecutions of criminal offences, but is mandated to delegate. In general, the Director of Public Prosecutions (DPP)

is in charge of the day-to-day conduct of prosecutions. However, the AG is responsible for co-operation with other states (and the ICC) in matters of criminal justice.

With respect to the application of international law, Ghana is a 'dualist' State – a specific piece of domestic legislation is required to incorporate international treaties into national law. The Constitution contains a 'supremacy clause' such that 'the Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void' (s. 1(2) Constitution).

### ***Status of ratification of international human rights treaties***

Ghana is a party (has ratified or acceded to) the following:

- The International Covenant on Civil and Political Rights 1966 and Optional Protocols
- The International Covenant on Economic, Social & Cultural Rights 1966
- UN Convention Against Torture 1984
- The Convention on the Rights of the Child 1978
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Status of Refugees 1951 and Protocol
- The Geneva Conventions (1949) and two Additional Protocols (1977)
- The Convention on the Prevention and Punishment of the Crime of Genocide
- The African Charter on Human and Peoples' Rights 1981
- African Peer Review Mechanism (APRM) of the New Partnership for African Development (NEPAD). Ghana was one of the first five African countries to submit itself for evaluation through NEPAD's African Peer Review Mechanism (APRM) process.
- The Convention Governing the Specific Aspects of Refugee Problems in Africa

Ghana has however not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

### ***Sub-regional treaties***

As a member of the Economic Community of West African States (ECOWAS), Ghana subscribes to a number of instruments relevant to human rights and security: the ECOWAS Treaty; the Protocol on Mutual Defence Assistance; participates in the multilateral armed force established by ECOWAS (ECOMOG); Declaration of a Moratorium on Importation, Exportation, and Manufacture of Light Weapons in West Africa; Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution and Peace-keeping and Security; Protocol on Democracy and Good Governance; Protocol on Mutual Assistance in Defence and Protocol on Non-Aggression.

### **Implementing legislation**

#### ***Status***

The ICC implementing legislation (the International Criminal Court Bill) has been drafted with the leadership of the office of the Attorney General and the Ministry of Foreign Affairs but is yet to be given Parliamentary sanction. Currently it is under discussion at the Cabinet level. The Cabinet still needs to deal with a number of policy issues. Two matters have been of particular concern – the immunity provision and the Ghana-US article 98 agreement – which, according to informed sources, have necessitated further consultation.

Experts have been requested to examine the Draft ICC Bill and to suggest the way forward. One such expert is a judge at the ICC, Akua Kwenyehia, who has been asked to study the Draft Bill and provide some guidance on the ‘contentious’ issues. It is estimated that the Bill will be made public soon to allow for discussion before being submitted to Parliament.

It is not clear when the law will be in place. Initial impetus seems to be waning.

#### ***Government departments concerned and key participants***

The departments and individuals so far, currently or (conceivably in future), involved in the process of erecting the legislation include the Office of the Attorney General, Ministry of Foreign Affairs (treaties section) and the Ghana Commission for Human Rights and Administrative Justice. These have been

the main participants in the draft ICC law process. Since the Bill is not yet public and is at Cabinet level, it is difficult to obtain clear information and details on the exact drafting process are unavailable. It appears that the drafting process was conducted as an internal affair within the Attorney General's office.

Two major NGOs have been involved at one level or other in the national activities related to the ICC – the Ghana Centre for Democracy (CDD) and Africa Legal Aid. The latter was involved with the drafting process of the draft ICC law and has in the past attended related events.<sup>3</sup> The Ghana Commission for Human Rights and Administrative Justice, a constitutional body, has also been involved in the process of drafting.

The departments who would be engaged under the legislation once in force (or in practice) are:

- The Ministry of Foreign Affairs
- The Office of the Attorney General
- The Directorate of Public Prosecutions
- The Ghana Police Service

### ***Status of any amendments to existing domestic laws***

No amendments have yet been effected to domestic legislation. Amendments to the Constitution and other laws may however be necessary for full conformity with the Rome Statute.

Sources at the Commission for Human Rights and Administrative Justice indicate that a review of many laws is to commence soon. The envisaged project on the review of all laws is in view of the relatively new Constitution which necessitates amendments to a number of laws to bring them in conformity therewith. Changes occasioned by the adoption of the ICC Statute would probably be done in this context, which could further delay the operationalisation of the ICC Bill.

Among others, the constitutional provision that bars prosecution of the President even after he/she has left office (see below) would have to be amended in view of article 27 of the Rome Statute which renders irrelevant the official capacity of anyone suspected of ICC crimes. Any amendment of the Constitution is a complicated process. This may have something to do with the delay in forwarding the Draft Bill to Parliament for discussion.

### ***Obstacles to implementation***

- While a Draft Bill has been written, it appears that the initial impetus has been lost. A lot of energy seems to have been directed into the recent NEPAD Peer Review Mechanism that engrossed all spheres of government. This seems to have been a more pressing matter for the country and the government. To explain the delay, sources indicated that the Draft Bill has been referred for advice on a number of 'contentious' issues. A source at the AG's office indicated that due to agitation by the opposition and the NGO community, the Bilateral Immunity Agreement signed with the United States raised political concerns for the government, hence the need to consult further. The need to consult outside sources also indicates capacity concerns.
- Elections are scheduled in Ghana for early 2008. This naturally distracts the political body from moving forward draft legislation.
- The review of laws discussed above would seek to include possible changes that an ICC law would necessitate, further delaying the operationalisation of the ICC Bill.
- The concern about immunities discussed above and the prospect of any constitutional amendment, is considered a possible reason for the extended period of time that the draft Bill has been before Cabinet and not yet publicised.

### **Co-operation with the ICC**

#### ***Arrest and surrender***

It appears that existing criminal procedure under the Criminal Procedure Code (Act 30, 1960) will apply to ICC-related processes.

It is also indicated that it is likely that existing procedure on extradition, or a shortened version of it, will apply to surrender proceedings. In terms of existing procedure, a *prima facie* case is required to grant an extradition order. Ghana has extradition agreements with a number of countries including USA, Nigeria, Togo and Benin. It has also signed the Convention on Extradition which is in force among the states within the Economic Community of West African States (ECOWAS). An elaborate extradition process applies, which is reproduced here in abridged form:



1. The requesting State, which must have a relevant agreement with Ghana, should make an authenticated deposition to the AG's office
2. A request is then made to the Minister of Interior who issues a warrant
3. After the arrest of a person takes place, a charge sheet is produced bearing the particulars from the requesting State
4. Presentation of the arrested person before a District Court
5. The court decides whether on the basis of the deposition, any offence has been committed by the accused (*prima facie* condition is therefore applicable)
6. If yes, the magistrate commits the person for extradition
7. The AG prepares Committal Warrant for the Magistrate or Judge to sign
8. An appeal to the High Court within 15 days is possible
9. Extradition has to be effected within two months of the surrender/extradition decision
10. The Minister of Interior signs a warrant of extradition before final extradition

There is no constitutional prohibition on the extradition of Ghanaian nationals to face a judicial process abroad. The ECOWAS Convention on Extradition signed by Ghana provides that extradition of a national is a matter of discretion for a requested State (article 10(1)).

Although no executions have been carried out in Ghana since 1997, the death penalty is applicable. It is therefore unlikely that the imposition of the death penalty in a requesting state – and life sentence as the severest sentence in the ICC – would pose problems or constitute a bar to the surrender or 'extradition' of a national to the ICC. In the same vein, the ECOWAS Convention on Extradition (art. 5) prohibits the extradition if the person whose extradition is requested has been, or would be subjected to, torture or cruel, inhuman or degrading treatment or punishment in the requesting State or if that person has not received, or would not receive the minimum guarantees in criminal proceedings.

### ***Other forms of assistance to the ICC***

The varied forms of assistance required to be offered to the Court in fulfilment of article 93 of the Rome Statute are said to be covered exhaustively by the Draft Bill.

In terms of obligations outside the Mutual Assistance Context, the Draft Bill is said to provide for the possibility of ICC investigations taking place in Ghana or the ICC relocating to hold any of its sessions or trials in Ghana.

In relation to obligations under article 48 of the Rome Statute, Ghana signed the Agreement on Privileges and Immunities (APIC) on 12 September 2003 by which it agrees to extend immunities and privileges to the Court, its property, assets and funds, its officials, and State representatives engaged with the Court in an official capacity.

It is said that the Draft Bill provides for offences against the administration of justice, which are in any case elaborately covered under the Criminal Code: perjury (sections 210, 211 and 212 of the Criminal Code Act 29 of 1960) and related offences such as fabrication of evidence with intent to defeat, obstruct or pervert the course of justice (Ss 213 and 214); contempt of court is a quasi-criminal offence characterised by disrespect or disobedience to a competent court of law which may arise from the interference of court proceedings;<sup>4</sup> deceit of court by personification or by false instrument, document, seal or signature (section 215.); resisting arrest and rescue of oneself or of another (section 226.), assaulting or obstructing a public officer; and compounding crime by forbearing from prosecuting or giving evidence in a criminal case at the advantage of himself or another. Of the offences against the administration of justice, perjury and fabrication of evidence are the most serious and are punishable as a second degree felony. All the rest are misdemeanors. No agreement exists relating to any offer by Ghana to host persons convicted by the ICC.

### **Incorporating the crimes**

Although the Rome Statute does not oblige States Parties to explicitly incorporate the ICC crimes into domestic law, the Draft Bill is said to reproduce in terms the crimes of genocide, war crimes and crimes against humanity as provided for in articles 6, 7 and 8 of the Statute.

### **Domestic courts: jurisdiction and principles of liability**

- Bases of jurisdiction: It is not clear what bases of jurisdiction Ghana intends to incorporate in its draft Bill.

- Temporal jurisdiction: Ghana has not provided for its courts to exercise retroactive jurisdiction over ICC crimes. The retroactive application of criminal law is expressly prohibited by the Constitution:

A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.<sup>5</sup>

- Principles of liability: See section on ‘available defences’ below. There is a lack of clarity on the exact position adopted in the Draft Bill on these issues.
- Challenges to admissibility or jurisdiction: It is not clear how these will be provided for in the Bill.

### **Rights of the accused**

In terms of existing Ghanaian criminal law, the rights of an accused are contained in the Bill of Rights in the 1992 Constitution (art. 19, chapter V), and are amplified in specific circumstances in the Criminal Procedure Code (Act 30 of 1960).

The following rights of accused are protected under the Criminal Procedure Code (Act 30 of 1960):

- To be presumed innocent until proven guilty or pleads guilty (s. 19(2)(c))
- To be informed immediately in a language that he understands, and in detail of the nature of the offence charged (s. 19(2)(d))
- To be tried without undue delay (s. 19(1))
- To be given adequate time and facilities for the preparation of this defence (s. 19(2)(e))
- To be permitted to defend himself before the court in person or by a lawyer of his choice (s. 19(2)(f))
- To be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court (s. 19(2)(g))
- To free assistance of an interpreter where he cannot understand the language used at the trial (s. 19(2)(h))
- To be tried in his presence unless his conduct renders it impossible (s. 19(3))
- To be protected against retroactive laws (s. 19(5))
- To remain silent at trial (s. 19(10))

The fair trial guarantees under Ghanaian law may be said to be in large part the same as those guaranteed by the Rome Statute. However, there are a few differences in the rights guaranteed. No right to legal assistance exists in Ghana, as is the case in the ICC (art. 67(1)(d) Rome Statute). Further, under the ICC, the Prosecutor has a disclosure obligation to the defence in cases where he comes upon evidence he believes is likely to show the innocence of the accused, or to mitigate the guilt of the accused (art. 67(2) Rome Statute). No comparable provision exists under Ghanaian law. Although no executions have been carried out in Ghana since 1997, the death penalty is still an available sentencing option for the most serious crimes.

### **Available defences**

In Ghana, certain defences are applicable as a matter of Statute (the Criminal Code), where they are referred to as 'general exemptions from liability' – while the rest arise in common law. Although some of the defences discussed may not be specifically provided for in the Rome Statute, they remain relevant and applicable in terms of article 21 of the Rome Statute, which details the sources of law.<sup>6</sup>

### ***Duress***

The defence is not expressly provided for. Despite this, it is an established principle that a criminal court is obliged to consider whatever explanation may be advanced by an accused person (*R v Barimah* (1945) 11 W.A.C.A 49; *Twumasi* 1985:193). That being said, it appears to be restricted to misdemeanors, and a person accused of murder, treason and other felonies is not entitled to invoke duress (*Twumasi* 1985:193).

### ***Age***

Under Ghanaian criminal law, minority is relevant in two respects: it may exclude criminal responsibility altogether, or it may exempt a person from certain forms of punishment. A child under 12 years of age cannot legally commit a crime and cannot therefore be held criminally liable for anything he does (s. 26 Criminal Procedure Code). Such a child is an 'involuntary agent' in terms of section 13 of the Criminal Code, whose criminal actions are attributable to whoever may cause them to so act. The presumption is

that such children have not attained sufficient maturity as to appreciate the consequences of their actions.

With respect to children between 12 and 15 years, they have legal capacity to commit a crime but a sentence of imprisonment may not be imposed on them. The same applies to those under the age of 17 years when tried before a District Court (s. 314 Criminal Procedure Code). Similarly, the death sentence is not applicable to juveniles – children under 17, on a finding of guilty, may be detained at the pleasure of the President (Ss 295(1) and (2) Criminal Procedure Code). This is one area of divergence of approaches with the Rome Statute, which elevates the age of criminal responsibility for international crimes.

### ***Intoxication***

As is the case under English law with which it converges substantially,<sup>7</sup> intoxication in Ghanaian law is a defence under tightly circumscribed circumstances which, when proven, operates to remove the element of intention of the accused person at the time the alleged criminal offence was committed (s. 28(4) Criminal Procedure Code). In terms of section 28(2) of the Criminal Code intoxication is a defence to a criminal offence ‘if by reason thereof the person charged at the time of the act complained of did not know that the act was wrong or did not know what he was doing.’ Further it is necessary to fulfil the requirement that ‘the state of intoxication was caused without his consent by the malicious or negligent act of another person’ (s. 28(2)(b) Criminal Procedure Code) or that ‘the person charged was, by reason of intoxication, insane, temporarily or otherwise at the time of the act.’(s. 28 (2)(c) Criminal Procedure Code).

Intoxication for this purpose includes a state produced by narcotics and drugs (s. 28(5) Criminal Procedure Code). In the first instance, where intoxication arose without his consent, or the malice of another, the accused person shall be discharged by law (s. 28(3) Criminal Procedure Code). In the second instance, where intoxication results in insanity, a special verdict provided for by law applies. This requires a mandatory medical examination to establish the alleged insanity (Special Procedure under ss 133-137 Criminal Procedure Code).

### ***Self defence***

With the object of preserving a certain state of affairs in society (law and order, safety and security of individuals, property) the Criminal Code expressly

provides for the defence of self defence. Section 30(1) of the Criminal Code provides: ‘for purposes of this Code, force or harm is justifiable which is used or caused in pursuance of such matter of justification, and within such [prescribed] limits...’ Therefore, the effect of a plea of justification is to exonerate any accused person of the criminal offence.<sup>8</sup>

Section 31 of the Criminal Procedure Code lists ten situations or circumstances in which acceptable/reasonable force may legally be used, one of which is self-defence (and defence of another person) (s.31(f) as amplified by s. 37.) In defence of self or another person against any crime, the law permits reasonable use of force, which may extend to killing (s.37 Criminal Procedure Code). Self defence is a plea of justification as opposed to provocation which is a plea in mitigation and therefore questions of intention or other state of mind do not arise at all. Accordingly, an accused that successfully puts up a plea of self defence is entitled to acquittal (Twumasi 1985:201). A notion of ‘collective self defence’ is recognised to cover persons who may assist a person legally entitled to use force. The law provides that ‘every person who aids another person in a justifiable use of force is justified to the same extent and under the same conditions as the other person’ (section 45 Criminal Procedure Code).

### ***Diminished responsibility and insanity***

There is a presumption that every person charged is responsible for their criminal actions until the contrary is proved. The defence of insanity in law holds that one cannot be considered guilty of a crime if at the time of its commission the accused’s mental faculty of reasoning was absent with the result that his conduct should be considered as involuntary (Twumasi 1985:152.)

In terms of section 27 of the Criminal Code, the defence of insanity is only applicable in two cases: where one is prevented, by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or the consequences of the act in respect of which one is accused (s. 27(a) Criminal Procedure Code); and if the accused did the act under the influence of an insane delusion of such a nature as to render him an unfit subject for punishment of any kind (s. 27(b) Criminal Procedure Code).

A prescribed procedure is set down, to be followed when the defence of insanity is invoked. Importantly, medical findings and expert testimony of

a qualified medical person to this effect is mandatory (ss.133-5 Criminal Procedure Code; *Agyeman v The Republic* (1969) CC 14; *Twumasi* 1985:153-154). Where insanity is invoked, the burden rests on the accused; the test is one of 'a balance of probabilities' therefore less stringent than that on the prosecution to prove guilt. If guilt of an accused is established in circumstances of insanity, the jury or the court returns a special verdict of 'guilty but insane'.

### ***Mistakes of fact and law***

Section 29 of the Criminal Code provides for the defence of mistake of fact and law, such that a person shall not be punished for any act which, by reason of ignorance or mistake of fact in good faith, he honestly and reasonably believes to be lawful. A person shall not, except as otherwise expressly provided, be exempt from liability to punishment for any act on the ground of ignorance that the act is prohibited by law. In Ghana, while mistake of fact is tenable generally as a defence, certain statutory offences exclude mistake or ignorance as defences.

In general, mistake of law cannot be raised as defence. It can only be a valid defence if the mistake relates only to matters of fact, and not to matters of law (*R v Foli VIII*, High Court (Ho) (1969) CC 2; *Twumasi* 1985:187). This position accords with the provisions of the Rome Statute (article 32).

### ***Superior orders***

The defence of obedience to superior orders is not to be found in Ghanaian statutory law and to the extent it has been recognised, it is based on common law. Generally, it holds that it is no defence for an accused to say that he did not know that the orders of his superior officer were prohibited by law. However, where the superior orders were made upon an honest, but mistaken belief in the existence of a state of affairs, the person who carries them out will be exempted from criminal responsibility (*Twumasi* 1985:189). For the defence of superior orders to stand, the person relying on it must demonstrate that his/her superior had legal authority or justification to do the acts in respect of which he is charged (*Twumasi* 1985:189; see *State v W.M.Q Halm and E. Ayeh-Kumi* (Crim. App No 118/67)). Further, the fact that a person charged is bound to obey his/her superior is irrelevant (*Republic v Hagan* [1968] G.L.R 607).

## **Other**

The defence of ‘accident’ or ‘inadvertence without culpability’ affords in effect a complete defence to any criminal offence on the basis of absence of *mens rea* (Twumasi 1985:197).

## **Immunity**

The question of immunity is one of the issues that have raised constitutional concerns in Ghana’s attempts towards implementation of the Rome Statute.

The President cannot be liable criminally or civilly while still in office: article 57(5) of the Constitution provides that ‘the President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.’ The provision does not specify which ‘court’ (i.e. whether this is limited to a municipal court, or purports to include an international court in keeping with Ghana’s obligations). Articles 57(4) and (6) provide as follows:

(4) Without prejudice to the provisions of Article 2 of this Constitution, and subject to the operation of the prerogative writs, the President shall not, while in office, be liable to proceedings in any court for the performance of his functions, or for any act done or omitted to be done, or purported to be done, or purported to have been done or purporting to be done in the performance of his functions, under this Constitution or any other law.

(6) Civil or criminal proceedings may be instituted against a person within three years after his ceasing to be President, in respect of anything done or omitted to be done by him in his personal capacity before or during his term of office notwithstanding any period of limitation except where the proceedings had been legally barred before he assumed the office of President.

If subsection (4) prevents liability while in office in respect of official acts, subsection (6) appears to provide for an exception to immunity only in respect of actions undertaken in a private capacity, and only if action is taken within three years of the end of the Presidency.

It is evident that Ghana would need to resolve how it intended in its implementing legislation to reconcile the provisions of article 57 of its Constitution with the clear terms of article 27 of the Rome Statute.



## Article 98 agreements

Ghana signed what is believed to be a conditional Bilateral Immunity Agreement (BIA) with the United States of America on 17 April 2003 (ratified 30 October 2003), agreeing not to hand over any US nationals (current or former government officials, employees including contractors, or military personnel) to the ICC for trial for one year, subject to renewal. Information is not available on the exact content of the agreement.

Many organisations and the opposition parties in Ghana criticised the government for agreeing to grant immunity to US nationals, fuelling speculation that the government would refrain from renewing the agreement when it became due. In 2002 Kwesi Quartey, Deputy Permanent Representative to the Permanent Mission of Ghana to the United Nations had stated that:

We are aware certain states entertain some fears of impartiality of the Court and have sought various ways to address these fears. We are distressed that some of these methods may tend to detract from the very integrity and universality that the likeminded states have worked hard to achieve. We believe that if the highest standards of integrity and judicial wisdom are balanced with geographical spread and gender sensitivity, these fears will be addressed sufficiently to render those special bilateral agreements redundant. We should avoid taking measures that would kill the ICC at birth or make it ineffectual.<sup>9</sup>

This statement was made 12 months before Ghana signed and ratified the BIA with the US.<sup>10</sup> In a statement after the ratification of the BIA by Parliament, opposition parties were united in condemnation:

[It would be] the hallmark of double standards for Ghana to ratify the Rome Statute that established the International Criminal Court, nominate its Vice-President and turn around to ratify an agreement that obviously undermines the integrity of the Court. We feel disappointed that Government is yielding to the US offer because of the financial inducement being offered (GNA 2003).

The Agreement has not been incorporated into domestic law. This renders difficult a constitutional challenge by those so minded. It is unclear whether the government will change its position on article 98 agreements once a law incorporating the Rome Statute into Ghanaian law is adopted.

## Notes

- 1 According to Rawlings' radio broadcast on 5<sup>th</sup> January 1982, the public tribunals parallel to the regular courts were to conduct investigations 'scrupulously' and that evidence would be 'properly assembled' but they would not be constrained by rules of procedure that 'perverted the course of justice'. See Gocking, R 1996. Ghana's Public Tribunals: An Experiment in Revolutionary Justice. *Oxford Journal of African Affairs*, 95(379):197-223; *Daily Graphic* 7 January 1982 and *Daily Graphic* 11 January 1982.
- 2 Among those tried and executed were three former Presidents: Lt. Gen. AA Afrifa, Gen. Ignatius Kutu Acheampong and Gen. Fred Akuffo.
- 3 The North-South aspects of International Justice and the International Criminal Court, 7-8 April 2005 Maastricht; Conference on Universal Jurisdiction over International Crimes, Arusha, organised by Africa Legal Aid 18-20 October 2002, available from [www.iccnw.org/documents/Arushalmpl\\_Summary20Oct02.pdf](http://www.iccnw.org/documents/Arushalmpl_Summary20Oct02.pdf).
- 4 Such offences include violence against judges in legal proceedings, disturbance of court, insulting court and exciting prejudice as to proceedings pending in court. Related offences include causing a witness to disobey summons, causing a person to refrain from giving evidence in a criminal case and disobedience of summons as witness. See ss 222, 223, 224, 225; Twumasi, P K 1985. *Criminal Law in Ghana*. Tema: Ghana Publishing Corporation, pp 384-492.
- 5 Art. 19(5) of the Ghana Constitution of 1992. Article 19(11) of the Constitution provides 'no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.'
- 6 Article 31(3) Rome Statute provides: at trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.
- 7 For a discussion of Ghanaian cases, see Twumasi, P K 1985. *Criminal Law in Ghana*. Tema: Ghana Publishing Corporation, pp 171-180.
- 8 Section 32 of the Criminal Code renders unjustifiable, and illegal use of force beyond prescribed limits.
- 9 Statement during the 6th Committee of the 57th session of the UN General Assembly available at [www.iccnw.org/documents/HighOfficialQuotes\\_Current.pdf](http://www.iccnw.org/documents/HighOfficialQuotes_Current.pdf). The government has previously expressed its 'unwavering commitment to the Court and its ideals: see Statement on behalf of Ghana by Minister Robert Tchie-Menson at the 5th Session of the Assembly of States Parties of the Rome Statute of the International Criminal Court, the Hague, 23rd November 2006.

- 10 Opposition parties criticised the President. Dan Lartey, leader of the Opposition party GCPP remarked: 'The president has only used the parliament as a rubber stamp for ratifying the agreement. Giving presidential assent to an agreement before sending it to parliament for approval means that you are only using parliament as a rubber stamp...Parliament should be able to have an opportunity to exhaust debate on the issue before endorsing it, this I say is unfortunate... I am surprised about the way things were done. It means that there is nothing that the government could do to back out of the agreement... The agreement needs public debate because there is enormous confusion in it. As it is now, the situation is more complex and that is why we needed time for debate and more clarifications before it was sent to parliament for approval'. See African News, *Ghanaian Chronicle*, 4 November 2003. See also Ghanaian opposition denounces ICC immunity deal with US' *Agence France Press*, 4 November 2003.

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## CHAPTER 6

# COUNTRY STUDY III: KENYA

Jolyon Ford

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### Introduction

This country study is based on research undertaken by the author in Kenya from 24 to 29 September 2007. The author interviewed and corresponded with officials of the Ministry of Justice and Constitutional Affairs, Attorney General's Department (Prosecutions, Legislative Drafting, Treaties), Law Reform Commission, Kenya Human Rights Commission, academics, the ICRC, and others.

In summary, the position in Kenya is the following:

- Kenya signed the Rome Statute in 1999 and ratified in 2005. It has not yet ratified the Agreement on Privileges and Immunities (APIC).
- Kenya has not yet implemented the Rome Statute into national law, neither as to substantive provisions (creation of offences in national criminal law) nor as to procedural matters enabling it to co-operate with ICC requests and proceedings. An Act of Parliament would be required.
- Kenya has since 2005 had in place a very comprehensive draft International Crimes Bill. Its prosecuting and legal authorities are aware of the issues generally, although they face certain capacity limitations. Kenyan authorities handle most MLA requests informally at present and are acquainted with such procedures.
- The primary reason for delay in implementation appears to be that other matters (legal and political, including a long-running constitutional reform process) have enjoyed priority or absorbed political energy. The draft Bill has not yet come before parliament, which as of November 2007 was effectively suspended for elections (which were held on 27 December 2007). The election result announcement, returning the incumbent Kibaki government, led to calls for an inquiry, widespread civil disorder and inter-ethnic killings. In this environment little attention has been given or will likely be given to an issue such as the ICC Bill. This is notwithstanding

calls by the defeated opposition for inquiries into alleged 'crimes against humanity' committed by government forces after the December election.

- There appears to be no particular official, local campaign or political grouping either advocating for or opposing implementation. It is not widely seen as a relevant or important issue by the legal profession, civil society or human rights defenders. At all levels there appears to be little appreciation of the relative priority for Kenya to be able to respond by proper domestic legal process to the foreseeable possibility of an internationally-sought person (for example from a nearby conflict area) being in the jurisdiction at some future date.
- Other related legislation is already in place or is in draft form. However, there have been political and community objections to proposed counter-terrorism laws.
- There is a fairly strong legal profession in Kenya. Human rights protections are constitutionally enshrined.
- Overall, the prospects of Kenya implementing a suitable national scheme in the next two years can only be described as 'fair' (on a scale of 'unlikely – low – fair – good – highly likely'). The Bill is very comprehensive and at an advanced stage of readiness, but this country report gives a number of reasons why it has not received priority to date, and may not be given any further priority in the near future, or may become the subject of some political misgivings.

### ***History of prosecution of serious international crimes***

There appear to have been no recorded prosecutions for international crimes in Kenya.

Kenya co-operated fully with the United States in pursuing persons responsible for the August 1998 bombing of the US Embassy in Nairobi. However, this does not appear to have involved any local prosecutions or legal processes.

### ***Ratification of the Rome Statute***

Kenya is listed as having ratified the Rome Statute on 15 March 2005. It had signed the Statute on 11 August 1999.

The lead on technical issues was taken by the Ministry of Foreign Affairs (treaty section) with some advice from the Attorney General's department. While there was a political issue surrounding the request by the US for an article 92 agreement (see below), there was no public or political debate or objection to the executive ratifying the Statute. Of course, this does not mean that there will be no objections and obstacles to forwarding the processes or to the attempt to secure parliamentary approval for the Bill.

## **Legal regime**

### ***Constitutional system***

Kenya is a Republic; a constitutional democracy under the 1991 Constitution. It has a unicameral parliament familiar in Commonwealth countries. The eight levels of courts are District Magistrates Courts (1st, 2nd, and 3rd classes), Resident Magistrates Courts, Senior Resident Magistrates Courts, Principal Magistrates Courts, Senior Principal Magistrates Courts, Chief Magistrates Courts, High Court, and the Court of Appeal. Islamic law is applied by *Kadhis'* Courts.

The Minister of Justice and the office of the Attorney General are distinct. The Attorney General is a member of parliament *ex officio* (non-voting) (Constitution section 36). The Attorney General is a constitutional office holder, under section 26 of the Constitution. This is relevant to an enquiry into ICC implementation and co-operation:

Section 26:

- (1) There shall be an Attorney General whose office shall be an office in the public service.
- (2) The Attorney General shall be the principal legal adviser to the Government of Kenya.
- (3) The Attorney General shall have power in any case in which he considers it desirable so to do- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney General may require the Commissioner of Police to investigate any matter which, in the Attorney General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney General upon the investigation.

Section 26(8) of the Constitution of Kenya provides that the Attorney General is not subject to the direction or control of any other person or authority in the exercise of his functions.

Kenya is a 'dualist' system for the purposes of international law. International instruments require enabling legislation in order to apply domestically (create rights and liabilities actionable in domestic law). Section 3 of the Constitution of Kenya provides as follows:

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

In this regard, of possible relevance to Kenya's obligations under the ICC is the case of *Okunda v Republic* [1970] EA 453, which is seen to emphasise the relevant significance of Kenyan law and courts as against other (in this case regional, but by analogy international) organs and structures. In addition to section 3 of the Constitution, section 26(8) of the Constitution provides that the Attorney General is not subject to the direction or control of any other person or authority. But an enactment relating to the East Africa Community (a regional body) provided that prosecution under that enactment (in a member country) should not be instituted except with the written consent of the Counsel to the Community. Article 95 of the Treaty establishing the East African Community obliged the partner states to pass legislation to give effect to the treaty and to confer on Acts of the Community the force of law in their territories.

The High Court stated:

The Constitution...must in the nature of things override all other laws...[n]o conflict between the Treaty for East African Co-operation and the Kenya Constitution or other Kenya law has arisen. If we did have to decide a question involving a conflict between Kenya law on the one hand and principles or usages of international law on



the other...and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed.

The Court of Appeal for Eastern Africa in its appeal judgment reinforced this:

The Constitution of the Republic of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country, which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict. The provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.

This is reinforced by the Judicature Act (Laws of Kenya, chapter 8) which provides the sources of law in Kenyan courts (including received laws of England as at August 1897) but states (section 3) that some sources of law (eg common law, doctrines of equity and statutes of general application, and by extension international law), 'shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.' The effect of the *Okunda* decision, sections 3 and 26(8) of the Constitution, and the Judicature Act, as all applied in Kenyan law and practice, make it very clear that courts would probably not give effect even to merely procedural rules (like that in *Okunda*) of an international body or tribunal to the extent that it conflicted with Kenyan law.

### ***Status of ratification of international human rights treaties***

Kenya is a party (has ratified or acceded to) the following (relevantly):

- The International Covenant on Civil and Political Rights 1966
- UN Convention Against Torture 1984
- The UN Convention on the Rights of the Child 1978
- The African Charter on Human and Peoples' Rights 1981
- The Geneva Conventions 1949
- Kenya acceded in March 2003 to the voluntary African Peer Review Mechanism (APRM) of the New Partnership for African Development (NEPAD)

### ***Sub-regional treaties***

Kenya is a member of the East African Community established by the Treaty on East African Co-operation. This has some relevant effects for example in relation to easing criminal co-operation (reciprocal honouring of warrants) and other forms of mutual legal assistance.

### **Implementing legislation**

The International Crimes Bill (first draft: 2005) (hereafter ‘the ICC Bill’) is at an advanced state of readiness, and appears to have been in that state for some time now (since 2005). It is very comprehensive (see further below). In its draft form, the Headnote (preamble) reads:

An Act to make provision for the punishment of certain international crimes, namely Genocide, Crimes Against Humanity, and War Crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions.

The Bill currently sits with the Attorney General’s office (legislative drafting section). It is difficult to estimate when the legislation will be in effect (see section on ‘obstacles to implementation’ below). According to one Ministry source it had one reading in parliament in 2006 to no objections, and has been published for the first time. This is unconfirmed.

Nor was it clear whether Kenya had received any international assistance with the production of the 2005 Bill. Kenyan officials did have access from 2004 onwards to the Commonwealth Model Implementing Legislation produced by the ‘Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court’ (London, 7-9 July 2004). It appears from a 2005 memorandum of the Attorney General that Kenya believed its position was that in order to ratify the Rome Statute (it had signed it in 1999), it needed to have at least draft legislation in place. It did have this in place as of 2005.

### ***Government departments concerned and key participants***

The departments so far, currently or (conceivably in future) involved in the process of erecting the legislation are:

- Attorney General's Department (mainly the legislative drafting section, but also inputs from public prosecutions, treaties section).
- Ministry of Justice and Constitutional Affairs.
- Office of Parliamentary Drafting (within the Parliamentary Service Commission; this official is formerly head of AG's drafting section; it is to this office, which appears to have a good deal of influence, that the Bill would go immediately before being put to Parliament).
- Kenya Law Reform Commission (it is possible that the KLRC might still have comments on the Bill, but the advanced stage of the drafting makes this unlikely).
- After a Bill such as this is drafted and ready, the AG's office normally has a 'validation' workshop with civil society and the Kenya Human Rights Commission.
- There is a national International Humanitarian Law (IHL) committee chaired by the AG's office which, with ICRC support, remains very active and continues to push for ratification and implementation of relevant treaties.

The departments who would be engaged under the legislation once in force (see section below on 'co-operation with the ICC') are:

- Ministry of Foreign Affairs (receipt of requests, unless sent directly to Ministry)
- Ministry of Justice and Constitutional Affairs (receipt and forwarding of requests to AG's department, advice to Minister)
- Attorney General's department (carriage of investigations/prosecutions/ complying with requests)
- The Kenya Police (assistance to the AG's department)

At present, extradition and mutual legal assistance (MLA) requests are generally received by the Ministry of Foreign Affairs and passed to the Attorney General's department, usually not through the Ministry first. Typically, the AG's department will then call a meeting of departments and AG's sections involved (e.g. the Ministry of Justice itself, police, immigration).

The Ministry usually deals with requests from other countries for location of witnesses (see sections 5 and 21 of the draft ICC Bill, discussed below). MLA is largely handled informally at present, pending any legislative basis.

### ***Status of any amendments to existing domestic laws***

Implementing legislation is still at the drafting stage. However, there are some relevant developments in relation to domestic legislation that, while not necessarily directly mentioning or engaging the ICC Bill, tend to complement the response regime envisaged by the Bill. These developments are covered below.

#### *Witness Protection Act*

The Witness Protection Act (Act 16 of 2006) has been passed and the AG's department (public prosecutors, 'DPP') is in the process of 'operationalising' a Witness Protection Programme.

The Act is related directly to the Prevention of Organised Crime Bill (see below) and intended to complement that Bill. A senior prosecutor commented that the single greatest issue with prosecution of international crimes will be fear on the part of witnesses – hence the priority given to the Act. The DPP is seeking study visits to South Africa, Australia and the United States to view witness protection measures. It has had country workshops on the new legislation. One source said that the ICC had assisted with one of these workshops. This was not confirmed.

#### *Prevention of Organised Crime Bill*

The Prevention of Organised Crime Bill (published 27 July 2007) is at an advanced state of preparation. Part V of the Bill deals with Mutual Legal Assistance and Extradition with respect to requests of the competent authorities of any foreign State, in response to which the Attorney General may cause to be disclosed any information, actions, movements (etc.) if this disclosure is not prohibited, prejudicial to the national interest, security, and safety (section 32).

The MLA aspects of the Act apply in respect of any act done or alleged to have been done outside Kenya which constitute an offence under the Act, or would constitute an offence if done in Kenya (section 33(4)). When the AG decides to comply with a request, he may apply to the High Court

for any order e.g. to search premises (sections 33(2) and (3)). The Act prescribes a format for requests (section 35(1)-(3)) although the request is not invalidated if the AG is of the opinion there has been sufficient compliance with the requirements (section 35(4)). Section 36 provides for extradition arrangements to be deemed to apply to other countries also party to any transnational crime convention.

### *Anti-Terrorism Bill*

An Anti-Terrorism Bill is being considered. This is intended mainly to provide for domestic investigations and prosecutions. It is the successor to the Suppression of Terrorism Bill, which was withdrawn due to objections from the Muslim community and human rights bodies and groups.

### *Extradition*

Consideration of this is relevant to assessing current practice and also gives insight into the way Kenya may handle such matters in the ICC Bill.

The present practice is based around the Extradition Act (Extradition (Contiguous & Foreign Countries) Act (ch. 76) 1966 (Rev 1987). Kenyan law does not give a general power to extradite – instead the Act applies only where a specific bilateral agreement has been made with any country (section 3) unless it is a Commonwealth country (the Extradition (Cwth Countries) Act (ch. 77) 1968 (which is in largely similar terms although with specific treatment of parallel requests – see section 11(4)(b)).

Under the Act, requests for extradition are to be made to the Minister of Justice (section 5). Present practice is that the Attorney General's department (prosecutions) handles requests for arrests, usually communicated through Foreign Affairs or, in the case of contiguous countries (Uganda and Tanzania in particular), directly communicated from one AG's office to another. The Minister has discretion, when the offence alleged is of a political character, to refuse a request or order release of the extraditee (section 5(2)).

A magistrate may issue a warrant upon the order of the Minister and upon such evidence as would (in the magistrate's opinion) justify the issue of an arrest warrant had the offence been committed in Kenya (section 6(1)(a)) on such information and such evidence or after such proceedings as would satisfy him in a Kenyan case (section 6(1)(b)). The magistrate may also issue a warrant without an order from the Minister, but this must be put before the Minister who may cancel it (section 6(2)).

If a foreign warrant is duly authenticated before a magistrate and evidence is produced that would (in Kenyan law) justify committal for trial, a magistrate is bound to commit the person identified in the warrant to prison (section 8(1)), informing them that they will not be surrendered within 15 days (and have the right to apply for directions in the nature of *habeas corpus*) (section 9(1), after which (or after any decision on any application made), the Minister will warrant the person to be surrendered to whomsoever is duly authorised to receive them, and so surrender them (section 9(2)). If the person is not surrendered and conveyed within two months of committal (or any decision on an application), the High Court may discharge them out of custody unless the Minister shows sufficient cause to the contrary (section 10).

Part III of the Act deals with reciprocal backing of warrants, while Part IV details the restrictions on surrender for political offences (section 16(1)) and in respect of requests deemed to be trivial, not in good faith in the interests of justice, or where it would otherwise (in all the circumstances) be 'unjust or oppressive or too severe a punishment' to return the person at all or for a certain period (section 16(3)) – in such cases the magistrate may discharge or bail the person or delay for a period or make such other order as he sees fit).

Section 38 of the current draft Organised Crime Bill would amend the Schedule to the Extradition Act to include organised crime offences as extradition offences. It is not clear whether there is intended, as part of the ICC Bill, to be any amendment to the Extradition Act schedule so as to include the crimes covered by the Rome Statute: presumably it is seen as sufficient that the Bill provides for its own system of arrest and surrender (to the ICC or otherwise).

### *Mutual Legal Assistance Bill*

A Mutual Legal Assistance Bill is apparently being put together. At present, MLA requests are dealt with largely informally. However, the Law Reform Commission and the AG's office confirmed the existence of a draft MLA Bill. There are also MLA provisions within the Organised Crime Bill and in respect of ICC and other requests in the ICC Bill.

### *Geneva Convention Act*

There is in force a Geneva Convention Act giving effect to Kenya's obligations under international humanitarian law. Certain amendments to that Act have been advanced, although the nature of these is not clear.

### *Penal Code and the Criminal Procedure Act*

The Penal Code and the Criminal Procedure Act may need to be amended. However, it may be considered sufficient that the new offences and procedures are clearly set out in the ICC Bill.

### *Privileges and Immunities Act*

The Privileges and Immunities Act (ch. 179) exists to give effect to Kenya's obligations in respect of diplomatic privileges.

### ***Obstacles to implementation***

On this issue, the author has investigated the reasons for delay and obstacles to implementation, as closely as possible and attempted to verify this information. Some of what follows includes the author's own opinion based on the information received and opinions canvassed.

In general terms, the issue of implementation boils down to one of government priority and available capacity/resources. Although Kenya had been very vocal in its support for the establishment of the ICC and against attempts by the US to force it into signing an article 98 Agreement, and although draft legislation is ready, the matter has since 2002 been put behind matters of perceived greater priority (the 2002 elections and the settling in of that new government, and the national constitutional consultation, negotiation, referendum 2005 and drafting process).

The following are therefore advanced as the present or future or perceived obstacles to full implementation:

#### *Political considerations and consequences surrounding the 2007 elections*

This is the immediate factor delaying implementation as at February 2008. Since at least October 2007, there has been little to no movement on Bills, pending dissolution of Parliament and the December 2007 election. No movement on Bills (even higher priority ones) is likely until at very least April 2008 as post-violence reconciliation, political give and take and machinations, deal-making, appointments and general embedding of the new government or an alternative, unity government.

The Odinga opposition platform, narrowly defeated in the disputed election, is on record as calling for an international investigation into alleged 'crimes against humanity' by government security forces in the post-election phase. Should the incumbent government remain, it is unlikely in a climate of such accusations that it would risk advancing domestic legislation dealing with international crimes. Should the incumbent (Kibaki) government not survive the challenge to its legitimacy, it is an open question whether a replacement government (Odinga-led) would take the strong step of seeking to internationalise the election violence by dealing with perpetrators through the medium of legislation designed for ICC co-operation. It is more likely that either side would find a local solution to this issue than that an ICC Bill would be pushed through by either side.

#### *Political and legal considerations relating to constitutional reform*

This can be seen as a major reason for lack of movement on the Bill once it came into being. The long-running process of constitutional review and drafting, including the referendum in November, has dominated political debate and absorbed political and technical (legal) energies and expertise. The significant debate over the draft constitution took place in the same year (2005) as ratification and the production of the ICC Bill, which inevitably left the Bill to one side. That is, the most likely time for the Bill to receive rapid progression through to an Act, was soon after ratification itself, but the constitutional process took priority.

#### *Political and reform priorities*

While few new laws are receiving priority, the Attorney General's department is of the view that the Organised Crime Bill (dealing with drug smuggling, trafficking of persons and weapons, money-laundering etc) and laws to deal with terrorist offences (the successor to the Suppression of Terrorism Bill) are seen by officials as far more urgent and relevant to Kenya than the ICC Bill.

It should be noted that on matters relating to terrorism and organised crime, the Kenyan perception is that there is the added pressure, encouragement or assistance emanating from international and foreign partners (such as the US, UK, Commonwealth Secretariat). By contrast, the ICC issue is perceived to have fewer discernable international or local actors pushing it.

This reflects general opinion that of all the internationally related measures it is possible to undertake, the ICC Bill is not as relevant to Kenya. There is



no sense among most officials that Kenya might show a lead on this, nor that it is particularly in Kenya's own interests, nor that an ICC request might be likely given the regional conflicts (although the AG's prosecution staff agree it is highly relevant to have laws in place). Notwithstanding that, for example, Commonwealth Heads of Government have committed themselves to implement, there is some belief that the ICC (and international prosecution generally) is a priority of Western interests, and that an African approach to dealing with conflict has different priorities, for example would favour 'peace' over 'justice' to the extent that it is seen that there is a tension between the two.

In speaking with officials there was also perhaps an attitude that Kenya is distinguishable from countries which produce such persons and deeds as dealt with by the ICC: as in Tanzania, the view was expressed that 'this is a law that Uganda and others need, not us. This is Kenya'. It is difficult to tell if this is a genuinely held view, or the words of an official who feels compelled to explain implementation status.

Finally on 'priority' issues, the ICC Bill is not a matter of importance to the local human rights community, who see it (to the extent that they think of it at all) as foreign driven and not directly related to Kenya's human rights priorities (poverty and development, media freedom, terrorism legislation, etc). However, there is not expected to be any objection from civil society to the ICC Bill at any future 'validation' workshop (compare the Suppression of Terrorism Bill).

### *Lack of capacity*

Related to priority issues are the challenges regarding the capacity in the Ministry/AG's office. The lawyers (especially prosecutors) in the AG's office feel overworked, undervalued and reported a lack of motivation to push issues forward. On drafting issues, the Parliamentary Drafting Office lawyers are said to earn three to four times what their AG's colleagues earn: this was described as having the effect that draft legislation sent back from Parliament or the Parliamentary drafting office is not prioritised. It is not inconceivable that the ICC Bill has been one of these issues.

The Commonwealth Secretariat held a 'Workshop on Implementation of the Rome Statute for the ICC' for legal officials in 2002, including some from Kenya (which had not yet ratified). Since then one seminar, to which the ICC reportedly sent some representatives, has been held in Kenya on the topic for AG and Ministry officials. The Ministry and the AG's department both noted the need for training especially of prosecutors and investigators.

### *Attitudes of the senior judiciary*

One 'obstacle' noted (perhaps anticipating future requests or prosecutions, rather than barriers to implementation) was the attitude of the senior judiciary. The Ministry emphasised the difficulty of securing judicial co-operation or attendance at seminars: judicial officers do not believe that they require refresher courses or training (none responded to the invitation to the ICC seminar noted above, and all ignored the invitation to seminars on the new Witness Protection Act), or will only accept seminars delivered by other senior judges.

Prosecutors stated their general satisfaction with magistrates, who are said to understand the difficulties they face, but complained about the senior judiciary as the problem that they anticipate: 'senior judges are not aware of these international issues, they are defensive and arrogant because they are not confident on these applications'.

### *Cost*

Some mention was made of the tendency of MPs and other officials to assume that substantial costs would be involved in fully implementing any such international instrument (even if these assumptions are unfounded). This leads to reluctance to push the matter. In a Memorandum of Objects and Reasons associated with ratification by Kenya in March 2005 and dated 22 March 2005 by Amos Wako, Attorney General, it was stated that 'the enactment of this Bill will occasion additional expenditure of public funds to be provided for through the estimates'. It is not clear what estimate was made.

### *Lack of awareness and the issue of immunities*

Some mention was made about the degree of uncertainty among MPs and senior officials about the reach of the ICC and the issues dealt with by it. In particular, there may be a strong reluctance to implement a law removing immunities from state officials, and (to a lesser extent) to grant immunities to foreign persons from the operation of Kenyan law. Events such as the Mungiki massacres and the post-election violence in December 2007/January 2008 will perhaps serve to heighten the sensitivity of politicians and officials to issues which they perceive might be the subject of an international complaint of some sort (even if a person in the know would understand, for example that many possible complaints relating to alleged official misconduct in Kenya to be inadmissible to the ICC). The point is that in an atmosphere of allegations of misconduct, coupled with an incomplete knowledge about the

ICC and its work, it is possible that a Bill on a subject such as this might be seen as too threatening to local politicians.

## **Co-operation with the ICC**

(See also the section above on ‘government departments concerned and key participants’ and the section above on ‘extradition’).

### ***Arrest and surrender***

In terms of arrest and surrender, the procedure involved is dealt with in Part IV of the draft ICC Bill, considered in detail below. Sections 28–75 deal with the arrest and surrender of criminals or suspected criminals to the ICC.

Constitutional and human rights concerns are dealt with in the draft Bill, while procedural and substantive safeguards are set out in the Constitution and criminal codes. Confidentiality safeguards are dealt with in Part VIII of the Bill.

There is no constitutional prohibition on extradition by Kenya of its citizens/nationals. In practice, Kenyan courts tend however to be more stringent in such cases.

### ***Other forms of assistance to the ICC***

The draft ICC Bill includes provisions (Part III, sections 20–27, ‘General Provisions Relating to Requests for Assistance’) relating to requests received by Kenyan authorities from the ICC for assistance and enabling Kenya to fulfil its obligation to provide all forms of co-operation to the ICC, as required by article 93 of the Rome Statute.

The Bill provides for the channel for dealing with such requests and the manner of their dealing under the Bill. It provides for consultation with the ICC. Requests are treated confidentially and the draft provides that, in accordance with article 27 of the Rome Statute, requests are to be handled without regard to the diplomatic or other status of the person who is the subject of the request. These matters are outlined more fully below.

Obligations outside the Mutual Assistance Context are also dealt with in the ICC Bill, considered in more detail below. Part V deals with ‘Domestic

Procedures for other forms of Co-operation’ and Part IX with ‘Investigations or Sitzings of the ICC in Kenya’.

Enforcement of Sentences is dealt with in Part VI and Part VII of the ICC Bill, considered below.

### **Incorporating the crimes**

The draft ICC Bill has directly incorporated the ICC crimes (Rome Statute articles 6, 7, 8) and offences against the administration of justice (Rome Statute article 70), in Part II of the Bill. The effect will be to create these offences in Kenyan law.

Part II of the Bill (sections 6 to 19, see below) sets out the relevant offences. The offences concerned are of two types. The offences prescribed by section 6 are genocide, crimes against humanity and war crimes, and sections 7 and 8 prescribe the applicable principles for prosecution of these offences in Kenyan courts. The offences prescribed by sections 9–17 are offences against the administration of justice in the ICC, and these sections give effect to paragraph 4 of article 70 of the Rome Statute. Sections 18 and 19 prescribe the applicable principles for prosecution of these offences.

The Kenyan approach can be gleaned from a Memorandum of Objects and Reasons associated with ratification by Kenya in March 2005 and dated 22 March 2005 by Amos Wako, the then Attorney General:

Incorporation into Kenyan law of the crimes prescribed by s. 6 is not an obligation under the Rome Statute, but ensures that Kenyan authorities, rather than the ICC, will be in a position to prosecute these offences where they are alleged to have been committed by Kenyan nationals.

### **Domestic courts: Jurisdiction and principles of liability**

- Bases of jurisdiction: The grounds of jurisdiction that Kenya proposes to exercise are evinced in the draft ICC Bill. Jurisdictional issues are covered in section 8, described in detail below, and proceed on the traditional bases of territoriality, as well as the nationality of victim or perpetrator (including nationals of allies or enemies of Kenya in an armed conflict).

- Temporal jurisdiction: Kenya does not allow for retrospective jurisdiction in order to bring to justice those responsible for atrocities in the past. In relation to ICC crimes, it appears that jurisdiction to try a person under Kenyan law will only exist from the time the offences are established in Kenyan law.
- Principles of liability: See section below on ‘available defences’.
- Challenges to admissibility or jurisdiction – (as envisaged in the Rome Statute article 89(2)) are dealt with in the ICC Bill – see further below.

### **Rights of the accused**

Chapter V of the Constitution of Kenya (sections 70-86) provides for the ‘Protection of Fundamental Rights and Freedoms of the Individual.’

Note for ICC purposes that these rights would seem to apply to non-citizens subject to Kenyan legal proceedings. Section 70 provides that ‘every person *in Kenya* [emphasis added]’ is entitled to the rights and freedoms listed in chapter V.

Section 71 protects the right to life according to familiar constitutional and international formula. Kenya has a *de facto* moratorium on the death penalty and has not carried out any judicial sentence of death on any convicted person since 1987. The death penalty is provided for in the Penal Code ch. 63 for robbery or attempted robbery with violence (sections 296(2) and 297(2)), murder and attempted murder (sections 203 and 204) and treason (section 40(3)). The Armed Forces Act (ch. 199) includes capital offences relating to aiding the enemy.

Section 72(1) provides for the right to personal liberty, except (relevantly for present purposes) for the purpose of effecting the expulsion, extradition ‘or other lawful removal’ of a person from Kenya, or for the purpose of restricting that person while effecting that removal (s. 72(1)(i)).

Subsections 72(2) to (6) deal with rights on arrest – to be informed of the reason for arrest, etc, to be brought before a court within 24 hours (14 days for lethal offences), to thereafter not be held except pursuant to an order of the court, and to be released if not tried within a ‘reasonable time’. The section provides for bail except for capital offences (section 72(5)).

Section 77(1) describes the right to a fair trial, and the particular protections are set out in section 77(2). Other sections of chapter V describe the rights not to be held in slavery (section 73), not to be tortured (section 74), not to have one's person (or property) arbitrarily searched (or seized), and other freedoms such as free expression, assembly, non-discrimination, etc, (sections 78-82). Section 70 provides a general limitations clause, while section 83 deals with derogations and section 85 with the requirements of public security and safety.

Kenya is a party to the ICCPR and to the CAT (see section above on Status of ratification of International Human Rights Treaties). Neither has been implemented specifically into domestic law. There does not appear to be a specific prohibition on torture (as an international crime) in the Penal Code.

Extradition practice (and the relevant Act: see above) reveals that accused facing removal from Kenya under that Act have the right to apply for directions in the nature of *habeas corpus*, the possibility of the High Court ordering their discharge if not surrendered within two months of committal, as well as the restrictions on surrender in Part IV of the Act (see above – although the ICC Bill expressly provides that the restrictions in the Extradition Act do not apply to ICC surrenders).

In addition to these Constitutional protections, the rights of a person subject to an ICC request are adequately protected in the draft ICC Bill, in terms reflecting the Rome Statute. Determination of eligibility for surrender under Part IV of the Bill brings in the protections of article 59 of the Statute.

### Available defences

- Defences to criminal charges are set out in the Penal Code (ch. 63) 1930 (Rev. 1985), read with the Criminal Procedure Code (ch. 75).
- Duress: The defence of 'compulsion' is recognised in section 16 (where X is compelled by threats of immediate physical harm or death, but threats of future injury are not sufficient, and no threat is accepted as compelling X to kill or attempt to kill).
- Age: Persons under eight years are treated as incapable of forming a criminal intent (section 14); persons between eight and 12 may not be

prosecuted unless it is demonstrated that they have capacity to form the requisite intent.

- Intoxication: This is not a defence (section 13) unless caused by others or temporary insanity by reason of intoxication is shown (section 13(3)). The question is whether X formed (was capable of forming) the requisite intent (sections 13(4) and 12).
- Self defence: Recognised (section 17).
- Diminished responsibility and insanity: A recognised defence (section 12; see also ch. 75, sections 162-167) where through any disease affecting the mind, X was incapable of understanding his actions, or of knowing what he ought to do or not do. There is a presumption of sanity (section 11). See also section 9.
- Mistakes of fact and law: Ignorance of the law is no defence (section 7), but there may be a defence where an honest/reasonable but mistaken belief in the state of things will not lead to criminal responsibility to any greater extent than if the real state of things had been as so believed.
- Superior orders: There is no specific defence of 'superior orders' in the general criminal law.
- Other: Section 9 provides that while no criminal responsibility will fall for negligent acts or omissions occurring independent of X's exercise of will, or by accident, motive is irrelevant to determining criminal liability.

## Immunity

Kenya has not yet ratified the Agreement on Privileges and Immunities (APIC).

By article 27 of the Rome Statute, parties have agreed that immunities on account of official capacity will not bar the Court from exercising its jurisdiction. This is dealt with presently by Part IX of the Bill ('Investigations or Sittings of the ICC in Kenya'), while section 27 of the Bill is to the effect that it is no bar to proceedings that the person was acting in their official capacity at the relevant time. However, section 27 provides that this is subject to section 62 (Kenya's obligations to another State: Rome Statute Art. 98) and to section 115 (if the person is in the control of another State, the AG

shall inform the ICC and request it to direct its request to that other State, or to postpone the request).

Note however that section 14 of the Constitution creates a Presidential immunity:

(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.

Section 27 of the Constitution declares a Presidential prerogative of mercy for any crime of which a person may be alleged or convicted.

Section 174 of the Bill provides for an amendment to be made to the Privileges and Immunities Act (ch. 179) to accord quasi-diplomatic privileges such that judges and other staff of the ICC, and any counsel, experts or witnesses are to have the privileges and immunities set out in article 48 of the Rome Statute.

### **Article 98 agreements**

Kenya declined, with some public ferocity, the US Government's invitation to conclude an article 98 agreement. According to informed officials, the US reportedly suspended some forms of military assistance to Kenya, but this situation did not last for very long, no doubt because Kenya is considered a strategic country in terms of military co-operation in particular in relation to Somalia.

In terms of Rome Statute article 98(2), note that given the high degree of defence co-operation and the presence of sometimes substantial numbers of foreign troops in Kenya, it is almost certainly the case that there are Status of Force Agreements (SOFA) in place in Kenya in respect of at least the United Kingdom and probably the United States. The author was unable to confirm this.



## CHAPTER 7

# COUNTRY STUDY IV: TANZANIA

Jolyon Ford

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### Introduction

This country report is based on research undertaken by the author in Tanzania from 30 September to 5 October 2007. The author met, spoke and has corresponded with officials of the Ministry of Justice and Constitutional Affairs, Attorney General's Department (Director of Public Prosecutions), National Human Rights Commission, academics, the ICRC, NGO's, the Law Society, practitioners and others.

In summary, the position in Tanzania is the following:

- Tanzania was a leading advocate of the establishment of the ICC. It signed in 2000 and ratified in 2002. It has reportedly signed but not yet ratified the Agreement on Privileges and Immunities (APIC).
- Tanzania has not yet implemented the Rome Statute into national law, neither as to substantive provisions nor as to procedural matters enabling it to co-operate with ICC requests and proceedings. An Act of Parliament would be required.
- For the reasons advanced in this report, Tanzania has not yet commenced the process leading to a first draft of a Bill to implement the Statute. The matter would need to be put to Cabinet, then to an inter-ministerial committee, before legal officers would start the process leading to a first draft. Its prosecuting and legal authorities are relatively well aware of the general issues. They face certain capacity limitations. Tanzanian authorities handle most MLA requests informally at present and appear to be reasonably well acquainted with their existing procedures.
- The primary reason for delay in implementation is that the matter is not seen as a priority for Tanzania. There is no particular agency or constituency pushing the matter forward. There appears to be no particular official, local campaign or political grouping either advocating for or opposing implementation. It is not widely seen as a relevant or important

issue by the legal profession, civil society or human rights defenders – some of these see it as a ‘Western priority’. At all levels there appears to be little appreciation of the relative priority for Tanzania to be able to respond by proper domestic legal process to the foreseeable possibility of an internationally-sought person (for example from a nearby conflict area such as the DRC) being in the jurisdiction at some future date.

- Overall, the prospects of Tanzania implementing a suitable national scheme in the next two years can be described as ‘low’ (on a scale of ‘unlikely – low – fair – good – highly likely’). This report gives a number of reasons why it may not receive priority or why, if initiated, the process towards implementation may progress slowly. However, Tanzania is a relatively ‘positive’ regional and international citizen, its senior legal officials are responsive, and it is not inconceivable that, provided sufficient interest and energy from a senior official is forthcoming in the future, the matter might be attended to with relatively little obstruction.

### ***History of prosecution of serious international crimes***

Tanzania has not apparently prosecuted any serious international crimes domestically since independence.

Tanzania of course hosts the International Criminal Tribunal for Rwanda (ICTR). As noted below, however, the Arusha-based tribunal has conducted its business in a degree of isolation from Tanzanian political and legal life – apart from Tanzania’s lead in promoting the ICC in the 1990s, hosting the tribunal has somewhat surprisingly not given the issue of international criminal law any significant profile in Tanzania.

Tanzania has in the past faced competing extradition requests from Rwanda and Belgium for a Rwandan national whom the ICTR had decided not to prosecute, but who was held in a Tanzanian prison pending the decision on his status. The individual was alleged to have overseen the execution of Belgian peacekeepers in Rwanda. The person was reportedly extradited to Belgium by some form of process. No official or documented record of this was obtainable (the national human rights commission, CHRAGG, was of the opinion that matters are very informal and require mechanisms for proper due process to be set up).

Tanzania co-operated fully with the United States in pursuing persons responsible for the 1998 US Embassy bombing in Dar es Salaam. However,

this does not appear to have involved any local prosecutions or legal processes.

### ***Ratification of the Rome Statute***

Tanzania is listed as having ratified the Rome Statute on 20 August 2002. It had signed the Statute on 29 December 2000. It has reportedly signed but not yet ratified the Agreement on Privileges and Immunities (APIC).

The lead on political and technical issues concerning ratification was taken by the Ministry of Foreign Affairs (treaty section) with some advice from the Attorney General's department. While there was a political issue surrounding the request by the US for an article 98 agreement (see relevant section below), there was no public or political debate or objection to the executive ratifying the Statute. Of course, this does not mean that there will be no objections and obstacles to forwarding the processes or to the attempt to secure parliamentary approval for the Bill.

Tanzania was, among African countries, a leading proponent of the establishment of the ICC and its ratification was intended to coincide with the entry into force of the Statute in 2002. As this report shows, the enthusiasm has not translated into local implementation.

## **Legal regime**

### ***Constitutional system***

Tanzania is a 'dualist' system for the purposes of international law. International instruments require enabling legislation in order to apply domestically (create rights and liabilities actionable in domestic law). International treaty provisions do not take precedence over national laws.

The Minister of Justice and the Attorney General are distinct offices, with the second having more traditional constitutional functions, and directing public prosecutions through the Office of the Public Prosecutor.

The court system, on criminal cases, consists of Primary Courts, District Magistrates Courts, the High Court and the Court of Appeal of Tanzania. These courts apply statutory law, English common law and case laws in trying criminal cases. Zanzibar also has its own judicial system, which deals

with criminal cases internal to Zanzibar. However, the Court of Appeal of Tanzania is a Union matter whereby criminal appeals from the High Court of Zanzibar and those from the High Court of Tanzanian mainland, go to the Court of Appeal of Tanzania. The Attorney General of the Tanzanian mainland and the Attorney General of Zanzibar prosecute concurrently according to area.

The case of *Okunda v Republic* [1970] EA 453,<sup>1</sup> a decision in relation to Kenya but of the East African community of which Tanzania is a part, would carry weight in regard to the supremacy of local law over rules of international or regional entities.

### ***Status of ratification of international human rights treaties***

Tanzania is a party (has ratified or acceded to) the following (relevantly):

- International Covenant on Civil and Political Rights 1966
- Convention on the Rights of the Child 1978
- African Charter of Human and People's Rights 1981
- The Geneva Conventions 1949

### ***Sub-regional treaties***

Tanzania is a member of the East African Community established in 2001 by the Treaty on East African Co-operation, and hosts the Secretariat in Arusha. This membership has some relevant effects for example in relation to easing criminal co-operation (reciprocal honouring of warrants) and other forms of mutual legal assistance.

### **Implementing legislation**

The matter is dormant – there has been no action towards implementing measures for domestic application of Rome Statute obligations.

Informed sources confirm that a Bill to implement the Geneva Conventions is to be drafted soon, following approval of the concept by Cabinet and the relevant national committee, and with the support of the Ministry of Defence and the armed forces. There is no cabinet paper in existence that proposes the drafting of a Bill for ICC implementation – this would be required (produced

by the AG's department) before Cabinet could set in chain the process leading to a first draft (through a national inter-ministerial committee).

The Commonwealth Secretariat had proposed some training of prosecutors on ICC issues in Tanzania although this has yet to proceed. The training request (instead of assistance with drafting) might be understood to suggest that draft legislation was in existence already, but the Director of Public Prosecutions confirmed to the author that no draft legislation is in place in Tanzania.

### ***Government departments concerned and key participants***

The departments that could conceivably in future be involved in the process of erecting implementing legislation are:

- Attorney General's Department (public prosecutions)
- Ministry of Justice and Constitutional Affairs (parliamentary drafting section; human rights and constitutional affairs section)
- A relevant national committee established to overview the legislative drafting process
- Tanzania Law Reform Commission
- The Commission on Human Rights and Good Governance
- Tanganyika Law Society (consultative basis)
- Various NGOs (consultative basis)

The departments that would be engaged under any legislation were it to be erected and come into force are:

- Ministry of Foreign Affairs (receipt of requests, unless sent directly to Ministry)
- Ministry of Justice and Constitutional Affairs (receipt and forwarding of requests to AG's, advice to Minister)
- Attorney General's department (carriage of investigations/prosecutions/complying with requests)
- The Tanzania Police (assistance to the AG's department)

At present, extradition and mutual legal assistance (MLA) requests are generally received by the Ministry of Foreign Affairs, or the Attorney General's department. MLA is largely handled informally at present, in particular in relation to other EAC states.

The procedure for generating a Bill is that a cabinet paper is drafted and put before a national committee for comments before the matter is put with the relevant drafting ministry (it may come back before the committee), before being published and advanced to Parliament.

### ***Status of any amendments to existing domestic laws***

According to the ICRC country office, there is one piece of International Humanitarian Law (Geneva Conventions) implementing legislation which has been before the relevant national committee and now is in the 'final stages' (although not yet a draft Bill).

### *Mutual legal assistance*

Legislation does exist for mutual legal assistance (MLA): the Mutual Legal Assistance Act 1991 (Commonwealth and Foreign Countries).

Section 3 of the MLA Act provides that the Minister may by publication in the Gazette modify the application of the Act to allow for MLA with other foreign countries not presently scheduled: but it is not clear that MLA with the ICC (not being a 'country') would be capable of being achieved by gazette. Note however that section 5 of the MLA Act provides that it is not intended that it be the exclusive channel of legal assistance, and this may leave open the possibility of formal or informal co-operation with an ICC request notwithstanding the lack of implementing legislation at this time:

Nothing in this Act prevents provision or obtaining of assistance in criminal matters otherwise than as provided by the Act.

If it is a guide to how a future ICC Bill might look, section 6(1) of the MLA Act provides that requests for assistance shall be refused if, in the AG's opinion, the request is in relation to an offence of a political character, amounts to persecution on prohibited grounds, the request relates to conduct that would not have constituted an offence under the ordinary criminal law of Tanzania ('even if it would have constituted an offence under the military law of Tanzania'), there is a risk of 'double jeopardy', or the request relates to a country to which the Act does not apply (this must of course be read subject to section 5's broad exemption).

Section 6(2) provides discretionary grounds on which a request may be refused, including if there is a local investigation or proceedings in relation to the same

matter or suspect, if acting on the request would prejudice the safety of any person, or if it would impose an excessive burden on the resources of Tanzania.

Part II of the Act provides that the Attorney General may upon request authorise the taking of evidence and transmission etc, of documents, under certification by a magistrate. Part III provides for search and seizure in relation to serious offences where a magistrate has reasonable grounds to believe the warrant is justified and where he may impose conditions on the warrant. Part IV deals with certain immunities of a person brought to Tanzania on a request by Tanzania, with requests for giving evidence in other countries, requests for assistance with investigations and prosecutions in Tanzania or abroad, etc.

### *Extradition*

Extradition is managed by the Extradition Act 1965 (ch. 368, rev. 2002). Part II deals with surrender of fugitive (accused or convicted) criminals (section 2(1)). Extradition co-operation requires an extradition agreement to be in place with the requesting country, whereupon the Minister may publish an order in the Gazette to the effect that the Act applies in respect of that country. Commonwealth countries and EAC members are treated somewhat differently to other 'foreign countries' in this respect under the relevant regimes.

Section 4 provides for legal liability of a person to surrender, subject to section 16 and the other provisions of the Act being met. Where a request has been made by a designated person or diplomatic representative, the Minister may in writing signify to a magistrate that a request has been made, and require the magistrate to issue a warrant for arrest and detention: section 5(1). In cases relating to 'offences of a political character', the Minister may refuse to make this order: section 5(2).

Section 6 provides that a magistrate may issue a warrant where he is in receipt of a section 5 Ministerial order and upon any evidence which in his opinion would justify the issue of a warrant for arrest had the offence been committed in Tanzania: section 6(1)(a) and (b). The magistrate must report to the Minister who may have the warranted cancelled: section 6(2). The magistrate is to hear the warrant application in the same manner, and have only the same jurisdiction, as he would in an ordinary preliminary proceeding (section 7(1)), although he may receive evidence to show that section 16 applies, or that the offence alleged is not an extradition crime (section 7(2)).

When a magistrate receives a foreign warrant or proof of conviction, duly authenticated and where it is shown that the matter would have constituted

an offence in Tanzania justifying committal for trial, the magistrate must commit the person to prison to await surrender, or discharge the person if not relevantly satisfied, and await the order of the Minister for surrender: section 8. The person is to be informed that they will not be surrendered for 15 days and have the right to apply for directions in the nature of *habeas corpus*: section 9(1). After 15 days or the decision on any application, or ‘any further period allowed by the Minister’, the Minister may by warrant order the subject to be surrendered to any person duly authorised to receive the subject (section 9(2)), although if surrender is not effected within 60 days, or after a decision by the High Court, the High Court may (upon application to it and the production of proof of reasonable notice given to the Minister) order the discharge of the person unless the State can show sufficient cause to the contrary: section 10.

Part III of the Act deals with reciprocal backing of warrants with contiguous countries (EAC members): sections 11 to 15.

Part IV of the Act is in similar terms to section 6 of the MLA Act described above, in effect restricting the circumstances on which surrender is possible.

Part V deals with the taking of evidence in Tanzania for criminal trials in other countries: it is taken as it would be for a civil matter in Tanzania: section 25.

The Act is accompanied by a Schedule of extradition crimes. These do not include international criminal acts.

### ***Obstacles to implementation***

The author investigated the reasons for delay and obstacles to implementation as closely as possible and attempted to verify this information. Some of what follows includes the author’s own opinion based on the information received and opinions canvassed.

In general terms, the reason for lack of implementation of the Rome Statute, notwithstanding Tanzania’s role in promoting the ICC, is that the matter is not one about which officials are particularly aware (despite the ICTR – note below) or if they are, it is not seen as a priority for Tanzania. There may be good political will for implementation – as there often is in Tanzania in relation to regional or international issues – but there is also a serious lack of capacity within government.



One authoritative source observes that ‘Tanzania is good at ratifying international instruments, however, there is a persistent tendency of procrastination on the part of the government in enacting enabling legislation’. The view of an informed international organisation was that ‘whilst the political will seems to exist, matters remain fairly stuck for want of specialised personnel’.

It is noteworthy that international criminal law does not have the profile one might expect in a country that hosts an international criminal tribunal (ICTR). The fact that the ICTR is based in Tanzania has not led to cross-fertilisation of the sort one might expect: one would expect the judiciary and legal profession and academia in Tanzania to be fairly fluent in issues of international criminal law, or at least for a core of practical expertise to have built up for example among defence lawyers. This is not the case (there have been a few ICTR issues on continuing legal education courses, but these are minimal; ICTR case updates no longer appear in the High court library; the ‘10 years experience’ requirement for UN prosecuting jobs, for example, is said to have had the effect that most possible local applicants are either already successful in other fields, or too young to reach this threshold experience requirement).

The following are the perceived obstacles to implementation:

#### *Lack of priority in government*

Politically the issue lacks priority in government eyes as a local issue having relevance and urgency for Tanzania.

It is true to say that in some respects ICC implementation appears not only to not be a particular priority, but even to be thought not relevant. Despite the ICTR and proximity to conflict zones, the matter is not seen as being particularly ‘relevant to Tanzania’, which is discernibly the criterion driving the government agenda. As with Kenyan officials, there is a genuinely held view that international crimes such as genocide are what *those other* countries in the region produce, they are the ones who need to raise their standards, ‘We are the regional peacemakers here – the ICC is for DRC, Rwanda, and others’ [sic].

There is little sense among most officials that an ICC request might be likely given the regional conflicts, Tanzania’s many borders, and its history as a tolerant place of refuge. This again reveals little has been taken from hosting the ICTR, and there is little appreciation of the likelihood of an internationally-sought person coming into Tanzania’s jurisdiction from a neighbouring conflict zone, and the need for response mechanisms to be in place for this eventuality. The new DPP is perhaps an exception to this

general attitude among officials. This is not to say that the highest level political will is actually absent, but the matter is not one at the forefront.

The priority issue is relative even as to other international obligations and concerns: of the possible international issues of concern, laws to deal with terrorist offences are seen by officials as far more urgent and relevant to Tanzania than the ICC Bill.

It should be noted that on matters relating to terrorism, relative to ICC issues there is far greater pressure, encouragement or assistance emanating from international and foreign partners (such as the US, UK, Commonwealth Secretariat). This reflects general opinion that of all the internationally related measures it is possible to undertake, the ICC Bill is not as relevant to Tanzania.

#### *Lack of priority in civil society*

Civil society, the legal profession and NGO's confirm that the ICC is not seen as a priority by government. However, in addition it is not seen as a significant matter by NGOs and the human rights community, at this time. For example, some NGOs feel that poverty and developmental issues are a priority for their advocacy resources; some of them feel that the ICC represents Western interests, but that issues like HIV are neglected; others say that there is a need to educate officials and others about Tanzania's Constitution and human rights provisions already existing in law – the Rome Statute is relatively unimportant on any of these views.<sup>2</sup>

The consequence is that there is no pressure coming onto government on this issue. This has not always been the case. Tanzanian support for the establishment of the ICC, and ratification of the Rome Statute, was one of the major issues for sectors of the local human rights community. An NGO representative accompanied the official delegation to New York for ratification and the first assembly of the States Party.

At least one NGO (SAHRINGON) lobbied for entry into an Agreement on Privileges and Immunities, including in a meeting with the Parliamentary Committee on Foreign Affairs. At least one experienced human rights defender has written and spoken at regional conferences on the topic of implementation of the Statute in Tanzania. Sahrington has done some research on the issue of possible conflicts between local law and the Statute. However, the matter has not moved forward at a governmental level and the NGO community, energised by a campaign for ratification pre-2002, has largely left the topic

alone, or (if they have given it attention at all among the other issues) report feeling 'stranded' and unable to access government on this issue.

On a related issue, NGOs reported that the government often says that it considers its criminal laws as adequate and not in need of change.

### *Lack of ownership by one particular agency*

There is no particular agency or agent (official or non-governmental) pushing this issue forward – this is normally vital for parliament to give a matter attention. One reason advanced for the lack of action on implementation (especially considering Tanzania's active role in the drafting and entry into force of the Rome Statute) is that the Ministry of Foreign Affairs was involved in the external act of accession to the Statute – the Ministry of Justice (now carrying the matter) has little involvement and therefore do not have any interest or ownership of the issue generally.

When asked, the national human rights commission (CHRAGG) noted that it was not likely in the next 12 months or more to engage in any advocacy on the issue: it described itself as still bedding down or consolidating itself as an institution, in particular vis-a-vis government departments, and so was not selecting issues such as this for strategic reasons (although it did make submissions on draft counter-terrorism laws).

### *A 'Western agenda'*

Both in government and in civil society there was some expression of a perception that the ICC implementation is a Western agenda/priority, and that there are double standards in the application of international criminal justice – one NGO commentator said that this view may be contributing to apathy on the issue.

### *Immunities*

NGOs also reported that government is likely to be very reluctant to engage with some of the immunity issues inherent in implementation for two reasons:

- There is a general aversion among the highest level officials to removing legal immunities, international crimes are seen as having very political elements (NGOs think a culture of 'mutual protection of politicians' will decrease likelihood of implementation, at least of provisions such as article 27).

- It has experience of international organisations in Tanzania, brought to local courts on employment (dismissal cases), arguing that they enjoy immunity from the operation of laws. It is thought that this will mean it is a challenge to get government to amend the law to provide for some immunities.

### *Costs*

Government has reportedly in the past mentioned concerns about perceived costs involved in compliance. Particular mention was made of prisons standards: government appears to believe that since the ICTR has ruled that detention facilities (for its purposes) must meet certain international standards, the same would be true of compliance with the ICC if implemented. The belief is that government would be required to upgrade prisons or some prison cells, and it does not have the facilities or wish to incur the expense.

### *Lack of capacity*

Related to priority issues are the capacity challenges in the Ministry/AG's department. The lack of expertise in drafting is cited by an informed observer as the primary reason, alongside lack of perceived priority, why Tanzania has not yet drafted national implementation legislation.

### *Lack of awareness*

The NGO community advise that the Statute (and international criminal issues) are not well known, whether at the official level, in the legal profession and judiciary, in the NGOs, and in the population generally (the ICTR is seen as something unrelated to Tanzania). One NGO has made a funding proposal to a European donor to translate the Statute into Swahili. Having said that, there have been some roundtable discussions, including officials, to raise awareness about international human rights law and the ICC (the ICC-related ones were around the time of ratification).

The Commonwealth Secretariat held a 'Workshop on Implementation of the Rome Statute for the ICC' attended by some Tanzanian legal officials in 2002.

### *International Humanitarian Law implementation legislation*

The move to draft IHL implementation legislation is an issue affecting ICC implementation:

- Firstly, the fact that it has reached almost the stage of a draft Bill reveals something that the ICC issue by contrast lacks: the IHL implementation is the result of advocacy by ICRC in-country ('a lot of persuasive effort'), the acceptance and support of senior military officers, and the fact that IHL legislation is seen as 'relevant to Tanzania'. By contrast, the ICC issue has no agency pushing the matter at local level, no particular institutional supporters, and the matter is not seen as 'relevant to Tanzania'.
- Secondly, if the IHL Bill is passed, this may undermine the enthusiasm or energy for repeating the process with an ICC Bill, in the context of capacity limitations, perceived priorities, and perceived minimal relevance to Tanzania.

### **Co-operation with the ICC**

If current practice is a guide, any ICC or State Party request for legal assistance from Tanzania, pending any legislation implementing the Rome Statute, would possibly be dealt with informally, or under the 1991 Mutual Legal Assistance Act, or (which is less likely) under the Extradition Act. Most MLA matters at present are dealt with informally.

### **Domestic courts: Jurisdiction and principles of liability**

See the section above on 'legal regime', as to court structures. There is nothing to report in relation to the purported bases on which Tanzania will exercise jurisdiction or principles of liability in relation to ICC matters, as there is no implementing legislation in place or in draft form.

### **Rights of the accused**

Chapter III (sections 12 to 39) of the Constitution provides guarantees of protection for basic rights, including fair trial rights for accused persons. The Basic Rights and Duties Enforcement Act (Act 33 of 1994) provides the procedure for enforcement of constitutional rights, and applies (section 4) if chapter III constitutional rights are being or are likely to be contravened.

The last execution of a death sentence was in 1994, and although Tanzania is abolitionist in practice, as recently as 2003 the government expressly stated that it has no plans to abolish the death penalty as a matter of law.

## Available defences

The following defences are provided for in the Penal Code (ch. 16, 1945 rev. 2002), see also Criminal Procedure Act (ch. 20, 1985):

- Duress: Section 17 of the Code provides for the defence of ‘compulsion’.
- Age: Section 15(1) a child under 10 is not capable in law of committing a criminal offence, and a person under 12 years of age is incapable unless it is shown that they were able to form a criminal intent: section 15(2).
- Intoxication: This is not a defence to a criminal charge (section 14(1)) unless certain circumstances exist which render the intoxication involuntary or removed criminal capacity.
- Self defence: Defence of oneself, another or of property is a valid defence (section 18). Section 19 provides for reasonable use of force in effecting arrest. Sections 18A-C provide for the requirement of reasonable or proportional force in self defence, which may extend to causing death.
- Diminished responsibility and insanity: There is a presumption of sanity (section 12), but a defence exists where the person was incapable of understanding their actions or lacked any appreciation of what they ought to do or not do, or lack control of their actions; section 216 Criminal Procedure Act 1985. A person is not liable for something occurring independently of the exercise of their will or by accident: section 10(1).
- Mistakes of fact and law: Ignorance of the law is no excuse (section 8), although relevant mistakes of fact may constitute a defence in limited circumstances: section 11.
- Superior orders: There is no specific defence of superior orders.
- Other: Motive is not relevant to a criminal charge: section 10(3). Judicial officers carrying out their duties have a defence amounting to an immunity from charge: section 16.

## Immunity

According to civil society sources, Tanzania has signed but not ratified the Agreement on Immunities and Privileges (APIC). Existing national legislation

deals with immunity issues in relation to foreign diplomats and senior representatives of international organisations: thus the concept of immunity is one familiar to Tanzanian law. However, there has been some political objection to the immunity enjoyed by international organisations (described in the section on 'implementing legislation' above). Note also that the Constitution creates a Presidential immunity from prosecution.

### **Article 98 agreements**

Tanzania reportedly resisted US efforts to conclude an article 98 agreement. It is not clear what the consequences of this have been for Tanzania, but no bilateral article 98 agreement is in force. It is not clear whether any Status of Force Agreements are in place in respect of foreign military forces.

### **Notes**

- 1 See discussion above in Chapter 6 on Kenya of the decision in *Okunda v Republic*.
- 2 Civil society suggest that what is needed is a 'whole package' information advocacy strategy which incorporates the ICC into general human rights awareness, includes a Q & A section to anticipate objections, includes best practice examples, and involves civil society and CHRAGG. Among other local events in Tanzania leading up to ratification, Arusha hosted an NGO Conference on Universal Jurisdiction over International Crimes, organized by Africa Legal Aid 18-20 October 2002, available at [www.iccnw.org/documents/ArushaImpl\\_Summary20Oct02.pdf](http://www.iccnw.org/documents/ArushaImpl_Summary20Oct02.pdf).





## CHAPTER 8

# COUNTRY STUDY V: UGANDA

Barney Afako

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### Introduction

This country report is based on a five-day visit to Uganda (end October 2007), during which the author met and corresponded with several government officials, parliamentarians, and civil society representatives. In addition, the author was able to draw on his own expertise in relation to the situation in Uganda and some of the relevant issues under consideration.<sup>1</sup>

In summary, the position in Uganda is the following:

- Uganda ratified the Rome Statute on 14 June 2002. It has also ratified the Agreement on Privileges and Immunities (APIC).
- In December 2003, the President of Uganda made the first ever State Party referral to the new ICC, by referring the situation concerning the LRA in December 2003. The referral was publicly announced jointly, with the ICC Prosecutor, in January 2004.
- Uganda presently has no legislation in place to fulfil its domestic implementation obligations under the Rome Statute.
- Uganda has since 2004 had comprehensive draft implementing legislation. In this draft Bill it has provided for the main areas of co-operation and there are no provisions which would appear to actively impede the core work of the Court, although several areas have been described as requiring revisiting.
- The Bill was urgently drafted and tabled before Parliament in 2004, in order to provide a legal framework for the ICC intervention. Thereafter the matter lapsed somewhat, was put before Parliament again in late 2006, and is now at the Committee stage for fresh scrutiny.
- The circumstances in which the ICC intervention in Uganda arose have generated controversy and hesitation. One perception is that

the pursuit of international prosecutions would undermine locally driven peace efforts with the LRA, principally since the prospect of prosecution would deter high level actors from laying down arms. The counter argument has been that the ICC warrants have acted as catalysts for peace talks, and set down markers for accountability which would not otherwise have been contemplated. National and international actors have rallied around both sides of the argument, one in which the tension between 'justice' and 'peace' is stark and one which is bound to continue for as long as the conflict is not resolved and ICC warrants remain in force. Whatever the merits of either of these positions, the impeding effect on the passage of implementing legislation is undeniable.

- The government and the LRA have, since June 2006, been engaged in peace talks in Juba, mediated by the Government of South Sudan. As part of the long term solution to the conflict, the parties are negotiating the contents of accountability and reconciliation mechanisms to address the widespread human rights abuses and violations committed during the course of 20 years of the conflict which has affected Northern Uganda. The parties have already agreed on principles for accountability and reconciliation, by which they commit themselves to pursuing nationally based accountability mechanisms for crimes committed during the conflict, including through formal and other alternative justice mechanisms. If implemented, this suggests that any final peace agreement would commit the Government of Uganda to pursuing national rather than international prosecutions: the fate then of the original enthusiasm for implementing ICC mechanisms in Uganda can only be speculated about.
- The primary reason for delay in implementation is the LRA peace talks. Subsidiary reasons include the campaign for elections in 2006, and backlogs in Parliament. There are also some concerns held about the issue of immunities in national law – those accorded to the President under the Constitution, and any immunities that may be agreed as part of peace talks.

Overall, the prospects of Uganda implementing a suitable national scheme in the next two years can be described as 'low' (on a scale of 'unlikely – low – fair – good – highly likely'). While there is a comprehensive Bill in existence, this report illustrates a number of reasons, primarily relating to its own peace processes, why it is not obvious that Uganda will erect implementing legislation in the near future. However, it is not inconceivable that informal

co-operation (notwithstanding a lack of legislation) might proceed where it is seen as politically expedient.

### ***History of prosecution of serious international crimes***

There have been no recorded prosecutions of international crimes *per se* in Uganda's legal history. Although Uganda introduced legislation in the late 1950s to incorporate the Geneva Conventions of 1948, no prosecutions have been brought under the Geneva Conventions Act (ch. 363), which remains the only criminal legal regime by which grave breaches of the Geneva Conventions could be prosecuted. Uganda has ratified but not implemented the Addition Protocol relating to attacks on civilians, which would criminalise violations of Common Article 3.

As a political and legal response to the various insurgencies that the government has faced since it seized power in 1986, it has periodically offered formal and *ad hoc* amnesties as incentives to rebels to lay down arms. Amnesties have been a central part of all peace agreements reached between the government and various rebel groups. The current amnesty was declared in the Amnesty Act (ch. 256). First enacted in January 2000, it grants a complete amnesty to all nationals with respect to any crime committed in the course of war and armed rebellion. Where a previous amnesty, enacted in 1987, had made exceptions of certain serious crimes, including genocide, the current amnesty departed from that approach, apparently to address the concern that a limited amnesty would discourage insurgents from abandoning rebellion.

The interest of the international community and the International Criminal Court in Uganda was triggered by the conviction that serious crimes were being committed in Northern Uganda in the course of the conflict between the government and the LRA. With the encouragement of the Office of the Prosecutor, in 2004 the Government of Uganda decided to refer the Lord's Resistance Army to the ICC. The Prosecutor construed that referral consistently with the Rome Statute as requiring a consideration of the situation in Northern Uganda generally, and thus the conduct of any party to the conflict (including the Government). The referral led to an investigation and subsequently to the Court issuing its first-ever arrest warrants for five senior members of the LRA.

The issuing of warrants by the ICC gave rise to considerable debate in Uganda and abroad: for some, the warrants are seen as erecting a

disincentive for conflict resolution. For its part, the government maintained the Amnesty Act, encouraged by its effectiveness in reportedly convincing over 20 000 individuals to lay down their arms. However, the Act sought to exclude, in general terms, leaders of rebel groups (not only the LRA) from receiving the amnesty. The government sought to introduce amendments to the Act to exclude leaders of 'terrorist organisations' from receiving the amnesty. The measures in their original form were resisted by Parliament and in the end the government was able to secure only a more limited amendment which empowered the Minister of Internal Affairs to propose a list to Parliament for approval.<sup>2</sup> The final decision of whether or not a person is to be excluded from the amnesty therefore rests with the Parliament.

The existence of the amnesty did not prevent an apparently successful ICC investigation from taking place in Uganda, with the full co-operation of the government. The investigatory co-operation took place without any enabling legislation being in place: it proceeded on the basis of existing laws and bilateral, and confidential, agreements between organs of the Court and the Government of Uganda. The question of the potential conflict between the ICC processes and the Amnesty Act has not been resolved – one view is that the conflict is unlikely to have any practical consequences, given the narrow interest of the ICC in only a handful of individuals. Without the formal exclusion from the amnesty process of any Ugandans who may be sought by the ICC, they would, as a matter of national law, remain eligible for amnesty and the accompanying processes under that Act.

In recent talks between the Government of Uganda and the LRA, on 29 June 2007 the parties signed, in Juba, an Agreement on Accountability and Reconciliation by which they pledged to promote accountability using formal and non-formal mechanisms of justice at the national level. Although at the time of writing the specific mechanisms had not been identified, it is envisaged that any agreement would require individuals responsible for committing serious crimes to be subjected to trial. The agreement adopts a regime of alternative sanctions the details of which have not yet been elaborated and will be set out in an annex to the agreement. Implementing the agreement might necessarily entail an attempt by Uganda to re-assert jurisdiction over crimes committed by individuals with respect to whom arrest warrants have been issued by the ICC. This would raise questions about the ambit of the principle and provisions in the Rome Statute relating to complementarity and the nature of the obligations to arrest and surrender.

## ***Ratification of the Rome Statute***

Uganda ratified the Rome Statute of the International Criminal Court on 14 June 2002. It has also ratified the Agreement on Privileges and Immunities of the International Criminal Court (APIC). As noted above, in December 2003, the President of Uganda made the first ever referral of the situation affected by the LRA.

## **Legal regime**

### ***Constitutional system***

Like most Commonwealth countries, Uganda has inherited the Westminster model of government and the common law legal tradition. The Constitution of 1995, maintains a separation of the three arms of government. Uganda has a multi-party political system with a parliamentary democracy. Voting is by universal adult suffrage. The organisation of elections is entrusted to the Electoral Commission, a notionally independent, constitutional body. Elections are held at least once every five years. The President and ordinary Members of Parliament are elected by universal suffrage and a system of electoral colleges is used for special interest Members of Parliament, who including representatives of women (for each district), representatives of persons with disability, Trades Unions, Youth and the Army.

Uganda is a 'dualist' state for the purposes of the domestic effect of international legal obligations. Although one of the Foreign Policy Objectives of the Constitution is: 'respect for international law and treaty obligations',<sup>3</sup> international treaties are not directly applicable in Uganda unless they have been specifically incorporated by legislation. Neither can Ugandan courts use customary international law as a direct source of law. The principle of legality as enshrined in the Constitution (article 28) requires that a criminal offence must be defined by law which must also provide for a penalty. Customary international law is not automatically part of the law of Uganda.

### ***Status of ratification of international human rights treaties***

Uganda is a party (has ratified or acceded to) the following (relevantly):

- The International Covenant on Civil and Political Rights 1966 and 1<sup>st</sup> Optional Protocol thereto

- UN Convention Against Torture 1984
- Convention on the Elimination of All Forms of Discrimination against Women
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Prevention and Punishment of the Crime of Genocide
- The Convention on the Rights of the Child 1978
- The Geneva Conventions and 1977 Protocols
- The African Charter on Human and Peoples' Rights 1981
- African Peer Review Mechanism (APRM) of the New Partnership for African Development (NEPAD)

Of the above human rights treaties, only the Geneva Conventions have been formally incorporated into national law.

### ***Sub-regional treaties***

Uganda is a member of the East African Community established by the Treaty on East African Co-operation. This has some relevant effects for example in relation to easing criminal co-operation (reciprocal honouring of warrants) and other forms of mutual legal assistance.

### **Implementing legislation**

The delay in implementation of specific legislation has not affected the ability or, apparently, the domestic legal capacity of Uganda to co-operate with the ICC organs using administrative and bilateral agreements. Uganda was able to assist in the investigations relating to the situation in northern Uganda under bilateral arrangements with the ICC. During 2004, organs of the Court entered into formal agreements with the government which incorporate the key obligations under the Rome Statute with respect to co-operation with various ICC processes and the functioning of the ICC in Uganda. The ratification by Uganda of the APIC has also committed the country to additional obligations related to ICC functions.

On the basis of the bilateral arrangements, as well as the treaty commitments, the ICC has established offices and already enjoys a legal status in Uganda, along with privileges and immunities for its staff and property. In the continuing absence of legislation, the critical questions would arise where

individuals who are subjects of arrest warrants are sought to be surrendered to the Court. Without enabling legislation, judicial authorities would have no basis for authorising a transfer of an individual and attempts to remove a person would be vulnerable to challenge.

The draft Bill (the International Criminal Court Bill) is presently before the Legal and Parliamentary Affairs Committee of Parliament. The Bill had been urgently drafted and tabled before Parliament in 2004, in order to provide a legal framework for the ICC intervention in relation to the LRA situation. Though laid before the Seventh Parliament, the Bill was not enacted into law, despite considerable work on it by the Committee. The Bill thereafter lapsed, in particular with the 2006 election campaign. The 'International Criminal Court Bill 2006' was reintroduced in the Eighth Parliament in December 2006 following a first reading, and is now at the Committee stage for fresh scrutiny.

### ***Government departments concerned and key participants***

The departments so far involved in the process of erecting the legislation are as follows:

- The office of the First Parliamentary Counsel, in the Ministry of Justice is responsible for drafting all legislation in Uganda. The Office produced the first draft, in an effort to put in place legislation which would assist Uganda to co-operate with the ICC, during and after investigations. The government received assistance in the drafting exercise from the Commonwealth Secretariat, London.
- The Ministry of Justice, headed by the Attorney General, who is also the Minister of Justice, is sponsoring the ICC Bill in Parliament and remains the key ministry addressing all the issues of content.
- At this stage, the various entities which have been proposed to have roles under a future Act do not have a particular role in the promoting the Bill. The Uganda Law Reform Commission has taken the initiative to organise at least one public meeting on the Bill and to engage the Parliament and the Ministry of Justice on aspects of the Bill which require further consideration. The political sensitivities generated by the Bill are, however, significant, and affect the manner in which the legislation will continue to be scrutinised.
- A number of local organisations, including the Uganda Coalition on the International Criminal Court (UCICC) – an umbrella body of seven non-

government organisations – are actively promoting the Bill and the work of the ICC.

- The Uganda Law Society has also been active in promoting the Bill. It is cooperating with international organisations, especially the International Bar Association, in promoting the Bill.
- Several international human rights organisations also run programmes advocating for the introduction of implementing legislation and have maintained advocacy on this issue. At least two made formal representations to Parliament.

In terms of identifying the departments and individuals who would be engaged under the legislation once in force, the primary responsibility in the draft legislation is given to the Attorney General. However, it is still a matter of some debate how the functions of the AG and the Director of Public Prosecutions would be reconciled (see below).

### ***Status of any amendments to existing domestic laws***

The adoption of the Bill has not entailed any amendments or contemplated amendments to existing laws: the policy choice, up to this point, has been to establish a thorough, specific and free-standing system by which co-operation with the ICC is to be regulated by means of a single piece of legislation.

### ***Obstacles to implementation***

The following are advanced as the present or future or perceived obstacles to full implementation:

- Under the 7<sup>th</sup> Parliament (before 2006), the primary influence delaying progress was public and official concerns that an ICC law would undermine efforts at pursuing peace talks between the government and the LRA. Since the LRA conflict (and the question of the outstanding warrants) is unresolved, it is clear this remains a considerable barrier to progress on the ICC Bill. While there seems to be some determination by the Parliamentary Committee to push forward with the Bill, it is likely that the course of the Bill will await final clarity on how the government proposes to deal with the LRA issue.



- After the introduction of the Bill in 2004, political energy in Uganda has been absorbed by the lead up to the 2006 election (the first one under a multi-party system). At the same time the various reforms under the Museveni government, and then the 2007 Commonwealth Heads of Government Meeting, has monopolised the time of Parliamentarians.
- There is also growing concern that with ratification of the Rome Statute, Parliament had not been given the opportunity to reflect on the implications of article 27 of the Statute for the constitutional immunities currently enjoyed by the President of Uganda. Although this matter, which might yet go to litigation,<sup>4</sup> will have limited practical implications for the functioning of the Court, it can certainly be seen as a factor causing hesitation at various levels.
- In course of the legislative review process, members of the Parliamentary Committee have remained exercised by several controversial issues:
  - o Presidential immunity (above).
  - o The LRA question and the impact on peace talks (above).
  - o Questions about the manner in which the Rome Statute was ratified. These concerns have arisen as a result of the requirement under the Ratification of Treaties Act (ch. 204) that the Attorney General should certify, for Parliament to ratify, all treaties whose implementation would require an amendment of the Constitution. It has been argued that the Rome Statute is incompatible in several respects, in particular in relation to the Presidential Immunity.
  - o There has been a division of opinion with the Ministry of Justice reluctant to introduce additional transitional justice elements in the Bill (as proposed by the Committee of the 7<sup>th</sup> Parliament in order to accommodate the LRA conflict), seeing the ICC Bill as a long term enactment to address future crimes, and not directed at the LRA conflict primarily.
  - o The provisions of the Bill give the authority to the Attorney General to sanction all prosecutions under it (s. 17) and there has been some debate about whether this measure usurps the constitutional powers of the Director of Public Prosecutions, whose independence is guaranteed and is given oversight of all prosecutions in Uganda.

Concerns relate in particular to whether the Attorney General, as a political actor, might be susceptible to pressure not to sanction the prosecution of State actors under the ICC Act. Many commentators, including the Committee of the 7<sup>th</sup> Parliament, took the view that the role of the Attorney General risked politicising the process of prosecution of offenders. On the other hand, government officials point out that the DPP would retain the power to conduct prosecutions and that the role of the Attorney General is required where the legislation derives from treaty obligations. Thus the Geneva Conventions Act and the Extradition Act processes all require the sanction of the Attorney General.

## **Co-operation with the ICC**

### ***Arrest and surrender***

Part IV of the present ICC Bill provides for arrest and surrender procedures and powers.

#### *Arrest*

The Minister of Justice (that is, the Attorney General), upon receiving a request for arrest and surrender is to satisfy him/herself that the request is accompanied by the relevant documents and then to transmit the request to a magistrate and request the endorsement of the warrant or issuance of a domestic warrant of arrest. The Minister/AG at the same time must also notify the Director of Public Prosecutions (DPP) (ICC Bill 2006 section 26). The Minister may refuse a request for arrest and surrender on grounds recognised under the Rome Statute, including: that the case is not admissible, that the ICC does not otherwise intend to proceed with the case, or, for other grounds recognised in article 90 (where there is a prior extradition request by a third country): section 27.

Under section 28, the Minister may postpone an execution of a request for arrest and surrender under the following conditions:

- Where an admissibility ruling is pending before the ICC
- Where a request would interfere with an investigation or prosecution in Uganda involving a different offence from that for which surrender to the ICC is requested

- Where a question arises as to whether or not article 98 (waiver of immunity by third state) applies

The second basis for postponement appears controversial, but section 28(2) clarifies that where a determination of admissibility has been made, the Minister shall proceed with the execution of the request as soon as possible after the decision. The current practice of the Court to make a ruling on admissibility at the same time as issuing an arrest warrant might make this provision otiose.

Where the request for arrest and surrender is proceeded with, the magistrate must be satisfied that the person named in the warrant is in fact in Uganda, or on his way to Uganda, and should then endorse the warrant or issue a national warrant, where the ICC warrant does not accompany the request. The Bill has identified the Grade 1 Magistrates and the Chief Magistrate as the appropriate judicial officers. Although this has raised concerns about the level at which ICC issues are dealt with, this is in keeping with the practice under the Extradition Act.

Under section 30 a person who is arrested either pursuant to a request for ordinary or provisional arrest is to be brought before a magistrate within 48 hours. The magistrate may enquire whether the person was lawfully arrested in accordance with the warrant and whether the person's rights have been violated. A magistrate who makes a finding of irregularities shall make a declaration to that effect but may not grant any other form of relief. A person who appears before a magistrate under section 30 is entitled to apply for bail. The magistrate shall adjourn the hearing for a maximum of seven days and notify the Minister who shall consult with the ICC to obtain recommendations from the pre-trial chamber and shall convey any comments to the magistrate. The magistrate may take those comments into account but is not bound by them.

A person who is the subject of a provisional arrest may be held for up to 60 days without bail pending receipt of a formal request for surrender. The person becomes eligible for release on bail, although the period of detention can be extended in the interests of justice: section 32.

### *Surrender*

Section 33 provides for a surrender hearing to be conducted by a magistrate. Upon being satisfied as to the identity of the individual sought to be surrendered, the magistrate should then issue a delivery order for the person

in accordance with article 59(7) of the Rome Statute, and transmit the order to the Inspector General of Police for execution and commit that person to custody or order that person's continued detention. The Commissioner and Superintendent of the prison is to be notified accordingly of the order. It is the responsibility of the Inspector General of Police to hand the person over to the custody of the ICC. A delivery order serves as the legal basis for holding a person until their surrender.

The procedure adopted under the Bill does not give the national authorities any power to review the content of the warrant. In this respect it is in line with a strict reading of the Statute. Thus, the magistrate would not have a substantive role beyond ascertaining the identity of the individual and may not look into the validity or justification of the ICC proceedings; or whether the person has already been tried for the offence (sections 33(6) (a) and (b)), or whether an arrest warrant is valid: section 34. Where the magistrate refuses to make a delivery order he or she must remand the person arrested in custody for 14 days, and must notify the Minister of the decision to refuse to make the order and to cite grounds for the decision. The Minister may appeal to the High Court against the decision of the Magistrate: section 37.

Although the Bill does not specify any grounds on which a magistrate may refuse to make a delivery order; it is implicit that where the magistrate is not satisfied as to identity of the person proposed to be surrendered, the magistrate is entitled to refuse to make the order.

### *Surrender of nationals*

Although there is no bar against the extradition of Ugandan nationals, a legal framework is certainly required. Extradition proceedings are governed by the Extradition Act (chapter 117), which specifies the types of crimes which can be the subject of extradition. A range of offences is covered, including criminal homicide and similar offences. Crimes of a political nature are excluded from extradition procedures. The Extradition Act (section 3) gives priority to Uganda to try any other offences, other than the ones for which extradition is sought. The procedures under the Extradition Act are overseen by a magistrate who receives and endorses the warrant and may order the surrender of the prisoner to the country in which the warrant was issued. A request for extradition is made by a diplomatic representative or a consular officer of the country seeking extradition, and which has entered into an extradition arrangement with Uganda: section 8(1). Any challenges to the order are made to the magistrate.

### ***Other forms of assistance to the ICC***

Part III of the Bill provides for the honouring of requests for assistance made by the ICC under Part 9 of the Rome Statute.

All the areas of assistance are faithfully spelt out in section 20 of the Bill. In addition, co-operation is provided for with respect to the following issues:

- Steps to be taken by the prosecutor under article 19(8) (which relates to various steps that a prosecutor may take with the authority of the ICC)
- Article 56 (various measures that can be taken by the Pre-Trial Chamber)
- Article 64 (various measures that can be taken by the Trial Chamber)
- Article 76 (imposition of sentences by the Trial Chamber)
- Article 109 (enforcement of fines and forfeiture measures)

Part VIII of the Bill expressly authorises the ICC Prosecutor to conduct investigations on Ugandan territory, and authorises the ICC to hold any of its sittings in the country. Consequentially, the ICC may in the course of its sittings carry out any of its powers, including administering oaths. Its orders would be out of the reach of the jurisdiction of the Ugandan courts.

Part IX of the Bill makes provision for requests for assistance going in the other direction – from Uganda to the ICC. The circumstances provided for include when assistance is needed with respect to a national investigation or trial relating to a crime within the jurisdiction of the Court or where the maximum penalty, under Ugandan law, is at least five years. The draft envisages that this assistance would extend to sharing of evidence as well as permitting a person detained by order of the ICC to be interviewed by national authorities.

Section 95 allows for Uganda to detain ICC prisoners pending ICC proceedings. An ICC prisoner would be treated as being in lawful custody in Uganda, for purposes of penalties (in the Penal Code of Uganda) associated with escaping from and aiding escape from lawful custody.

Part VI of the Bill also provides for assistance to the ICC with the enforcement of victim reparation, fines and forfeiture orders. The domestic procedures under the Trial of Indictments Act, for enforcing compensation, restitution sentences and fines, would be used for enforcing ICC sentences. In the absence of a satisfactory existing regime, the Bill introduces a new regime for enforcement of forfeiture orders. The DPP, with the consent of the Minister, would file the ICC forfeiture order with the Court which would

in turn file and enter the order as a judgement of the Court to be enforced in the normal way.

Uganda would also be able to act as a State of Enforcement for ICC custodial sentences, subject to any conditions consistent with the Rome Statute and specified in the notification to the ICC. A person sentenced by the ICC would serve their sentence in accordance with the laws of Uganda as reflected in the Prisons Act.

## **Incorporating the crimes**

### ***Measure and extent of incorporation***

In its draft legislation, Uganda has chosen to incorporate the ICC crimes by reference. Part II of the Bill is devoted to this and incorporates the substantive provisions, by reference, for the core crimes as set out in articles 6, 7 and 8 of the Rome Statute (genocide, crimes against humanity, and war crimes). With regard to war crimes, the regime of the Geneva Conventions Act is left undisturbed, and there has been no attempt to make the list of war crimes more expansive.

Also relevant is the ‘applicable law’ provision in the Bill which permits, but does not require, the national court exercising jurisdiction over the relevant crimes to have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute: section 19(4)(a). The Bill does not require or expressly permit the national court to have regard to the jurisprudence of the ICC or more expansively to the principles envisaged in article 21 of the Rome Statute.

The Bill does not make provision for inchoate offences relating to the core crimes. Thus, attempts, aiding and abetting, and accessories after the fact are not expressly penalised. There is arguably no reason why a national jurisdiction which is not constrained by the need to prosecute only the most responsible offenders should restrict the ambit of criminality relating to core crimes. In this regard section 2(1) of the Geneva Conventions Act by contrast is broader:

Any person, whatever his or her nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breaches of the conventions... commits an offence...

The Bill also makes detailed provision for offences against the administration of justice. This is in part because national law did not make provision for some of the issues now being addressed. Sections 10, 11, 12, 14, 15 and 16 have extraterritorial application. This is more expansive than article 70(4) of the Rome Statute.

The most controversial provisions are section 10 and 12 which give national authorities jurisdiction to arrest and try ICC judges and officials for corruption and bribery. This provision runs counter to article 48 of the Rome Statute which is proposed to be incorporated by sections 101(3) and (4) of the Bill. In addition, Uganda has ratified the Agreement on Privileges and Immunities of the International Criminal Court, and indeed it forms a Schedule of the ICC Bill (Schedule 2).

For each of the crimes, national sentences are to apply. However, for offences involving wilful killing, the penalty is to be the same as that for murder, as prescribed by the Uganda Penal Code. The Penal Code currently stipulates capital punishment for murder. The effect of the formulation adopted in the Bill is that should the sentence relating to murder change, it will not be necessary to have a consequential amendment of any ICC Act.

## **Domestic courts: Jurisdiction and principles of liability**

### ***Bases of jurisdiction***

The basis for jurisdiction over the crimes is set out in those provisions of the Bill adopting the crimes described by the Rome Statute. Each respective formulation in the Bill provides that a person will be criminally liable who 'in Uganda or elsewhere' commits the offences.

The scope of that jurisdiction is elaborated in section 18 of the Bill. Proceedings may be brought in Uganda against a person where that person fulfils any of the following conditions:

- The person holds Ugandan citizenship or permanent residence
- Employment by Uganda in a civilian or military capacity
- The person has committed the offence against a citizen or permanent resident of Uganda
- The presence of the suspect in Uganda after the commission of the offence

This formulation would appear to preclude an investigation of core crimes without any 'Ugandan interest' i.e. a crime committed in a third state by third country nationals unconnected to Uganda.

The extra-territorial reach of the national courts under the Bill contrasts with the general approach of chapter II of the Penal Code which limits jurisdiction to offences committed within Uganda, except with respect to specified offences, and even then, limits jurisdiction to nationals and permanent residents of Uganda. However, the approach in the Bill is more restrictive than the universal jurisdiction provided for in the Ugandan Geneva Conventions Act.

### ***Temporal jurisdiction***

The international offences adopted would not have retroactive effect. The language is prospective and shall cover only conduct that post-dates the enactment of the law. Retroactive criminal legislation is unconstitutional under the provisions of article 28(7) of the Uganda Constitution: 'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not, at the time it took place, constitute a criminal offence'. Thus, any conduct which predates the enactment of the law would be prosecuted as an ordinary crime.

There is some interest in the question of whether or not the jurisdiction over nationally prosecuted crimes should reach back in time in order to address all conduct in the past. This matter has been raised in relation to the conflict in northern Uganda. The option of commencing jurisdiction on 1 July 2002, when the Rome Statute came into force, or even further back, to 17 July 1998, has been discussed. There are however significant reservations about retrospective legislation because of the constitutional provision dealing with non-retroactive criminal legislation. National practice has hitherto eschewed retrospective legislation, and the wording of article 28(12) of the Constitution does not appear to permit much leeway. Although the example of Canadian legislation has been proffered, the starting point for all legislation in Uganda is the 1995 Constitution. It may be significant that the ambit of that provision is narrower than the similar provisions in international treaties which make exceptions for retrospective legislation with respect to international crimes.

### ***Principles of liability***

(See also the section below on 'available defences').



The Bill has adopted the principles of liability set out in the Rome Statute. The list of the principles is set out in section 19, which states that the principles are to apply 'with any necessary modifications'. Such modifications could not include fundamental changes, as section 19(3) clearly gives precedence to the Rome Statute principles in case of any inconsistency between them and national or wider international law. Rome Statute principles are likely to be applied as faithfully as possible to the main text.

Amongst the principles of law to be applied relates to individual criminal responsibility of 'natural persons'. This distinction would exclude the national principle of corporate criminal responsibility, thus giving the international crimes a narrower scope for application. Similarly, the exclusion of minors from the processes of the Rome Statute is maintained through the adoption of article 26 of the Rome Statute. Corporations and young offenders are therefore not to be subjected to prosecution for international crimes. This is out of step with the Geneva Conventions Act, which does not preclude prosecution of persons under the age of 18.

### ***Challenges to admissibility and jurisdiction***

The Bill does not expressly purport to exclude challenges to admissibility or jurisdiction for the purposes of a trial in Uganda under crimes created in the ICC Bill.

### **Rights of the accused**

No special provision has been made within the ICC Bill for the rights of persons facing prosecution for international crimes. General national law would therefore apply.

The rights of the accused are enshrined in chapter IV of the Constitution. Under article 28 of the Constitution an extensive list of rights is set out. All persons facing criminal charges are guaranteed:

- Rights to a fair, speedy and impartial public hearing
- The right to bail and to be presumed to be innocent
- The right to be informed of the nature of the charges, in a language that they understand
- The right to adequate time to prepare their defence and to have legal

representation, including at the expense of the state where the charges are serious and the defendant is indigent

- The right to be present during the trial and to receive the services of an interpreter if the accused does not understand the language of the court, which in most cases is English
- A defendant may call and examine supporting witnesses and shall be entitled to cross-examine prosecution witnesses
- An accused person also has a right to a copy of the proceedings and the judgement of the court

The current provisions for legal aid take into account the severity of the possible sentence but not the complexity of the crimes. It is therefore possible that persons facing certain charges under the ICC regime would not be eligible for legal aid.

The Bill does not specify the courts in which the offences will be tried. It seems that this will depend on the nature of the charges and how serious conduct charged is. The most serious offences, especially those carrying the death penalty, are tried by the High Court and those trials are governed by the Trials on Indictment Act (chapter 23). Magistrates' courts try most of the remaining offences, and are governed by the Magistrates Courts Act (chapter 16). Both legislative frameworks are extensive and uphold the rights of the accused as stipulated in the Constitution.

### **Available defences**

Section 19(1) of the Bill adopts principles for national prosecutions. These include the defences set out in the Rome Statute:

- Article 20 (which relates to crimes for which a person has previously been acquitted or convicted)
- Article 31 (grounds for excluding criminal responsibility)
- Article 32 (mistakes of fact or law)
- Article 33 (superior orders) are to be applied with necessary modifications, and, by virtue of section 19(3), ahead of national or any other international principles

Section 19(1)(c) provides that 'a person charged with the offence may rely on any justification, excuse, or defence available under the laws of Uganda or under international law'. The reference to international law is wider than the Rome Statute. The starting point for defences, however, is the provisions

of the Statute, failing which regard would be given to national as well as international law. Difficulties and complexities might arise where the national court is required to resolve an inconsistency between national law and the Rome Statute provisions in relation to defences.

- Duress: Section 14 of the Penal Code provides for the defence of compulsion. The defence is available where one offender threatens the other in terms that he will instantly kill him or her, or do him or her grievous bodily harm if he or she refuses. Threats of future injury do not however excuse any offence. Here is an example of the national legislation being at once broader (not excluding disproportionate response) and narrower (excluding future threats) than the Rome Statute defence.
- Age: Questions of age would be answered by reference to article 26 of the Rome Statute (which limits liability to persons over the age of 17). By contrast, existing national law puts the age of criminal liability at 12 and does not preclude minors over that age from facing trial, although children are subjected to special trial procedures and punishments.
- Intoxication: The principles relating to the defence of intoxication under the Rome Statute are broadly similar to national legislation, section 12 of the Penal Code. Under national law provisions, intoxication overlaps with the defence of insanity, where the effect of the alcohol is to induce a form of insanity.
- Self defence: The penal code adopts the principles of English law relating to the protection of the person and property.
- Diminished responsibility and insanity: The Penal Code presumes the sanity of every person, and a person will be taken to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved: section 10. A person will not be held criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing. Neither is a person criminally liable if as a consequence of the disease he or she did not know that that he ought not to do the act or make the omission constituting the offence.
- Mistakes of fact and law: The mistake must be honest and reasonable and must be a mistaken belief of fact and not law (section 9, Penal Code). However a mistake of law (ignorance of law) does not afford any excuse

for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence (section 6).

- Superior orders: Under national common law, only lawful orders of superior officers can constitute part of a defence: a servant would not be liable if he committed a crime in obedience of a lawful order of his master: *Uganda v Kadiri Matovu* [1983] HCB 27. A person has a duty to disobey an unlawful order. The principles have not been more widely elaborated, in part because the defence has seldom been raised in criminal proceedings in Uganda. In this respect, the Rome Statute sets out more detailed principles.

## Immunity

In Ugandan practice, diplomatic immunities are respected as a matter of international law and treaty obligations.

Immunity is also granted to the President by article 98 of the Constitution, article 98(4) stating unequivocally: 'While holding office, the President shall not be liable to proceedings in any court'. If the President ceases to hold office, then he or she immediately becomes liable to prosecution. On the other hand, the President may be removed from office on grounds of his conduct. Article 107 provides the criteria and procedures for the removal of a President. No other public office enjoys immunity from prosecution.

Section 25 of the ICC Bill provides that the existence of any immunity or special procedural rule attaching to official capacity of a person is not a ground for refusing or postponing a request for surrender. However, in view of article 98 of the Constitution it is difficult to see how a Minister or magistrate might move against the President.

The draft ICC Bill has not engaged with the potential conflicts between the provisions of the Rome Statute or the Bill, and the Ugandan Constitution. This aspect of the Statute and the Bill seems to have come late to the attention of politicians, especially the Members of Parliament, and is beginning to cause concern amongst the executive. It is highly likely that these provisions will be revisited in the course of the progress of the Bill.

Another potential area of conflict, not so far adequately addressed by ICC Bill, is the fact that national law also provides for amnesties and pardons. Whilst a

magistrate dealing with an ICC request issue may not under the existing draft entertain any issue regarding a previous conviction, the provisions of the Bill do not expressly bar consideration of existing amnesties and pardons. If these matters are framed as constitutional challenges, this could potentially delay the passage of the Bill or in future form the basis of a challenge to the transfer of an individual. It is unlikely that a judicial officer would ignore an apparent conflict. It is not inconceivable that this could form a basis for a decision to refuse to make a surrender order.

### **Article 98 agreements**

In June 2003 in Washington, Uganda entered into a Bilateral Immunity Agreement with the United States (The Agreement between the Government of the United States of America and the Government of Uganda Regarding the Surrender of Persons to the International Criminal Court). The BIA covers current or former government officials, employees, military personnel or nationals of one party. The agreement prevents such persons of one party present on the territory of the other from being surrendered or transferred to the ICC, either directly or through a third entity or country: section 2. Where either Uganda or the United States should extradite, surrender or transfer a person of the other Party to a third country, it shall not agree to the surrender or transfer of that person to the ICC, unless it has obtained the consent of the other Party: sections 3 and 4.

The agreement is intended to remain in force indefinitely unless terminated by one of the parties by notification, whereupon it shall lapse one year after the notification. The agreement shall continue to apply to any matter arising before the effective termination date: section 5 BIA.

There appears to be no evidence that Uganda resisted pressure from the United States to sign the BIA. The BIA was executed by the executive. Uganda has co-operated widely with the United States on regional security issues and has been a primary contributor to regional peace missions, for instance in Somalia.

### **Notes**

- 1 The author gave evidence to the Uganda Parliament in December 2004 on the draft ICC Bill, and has participated in national and international discussions of the Bill and the legal implications of implementing the Bill in Uganda.

- 2 See s. 2A Amnesty Act.
- 3 The 'National Objectives and Directive Principles of State Policy,' XXVII(i)(b), now to be read with article 8A of the Constitution which requires Parliament to make laws for giving full effect to the Objectives and Principles.
- 4 A previous challenge to the ratification of the Rome Statute, lodged in the Constitutional Court, in 2005 has been abandoned (*Magezi and Others v Attorney General*, Constitutional Petition No. 10/2005).

**CHAPTER 9**  
**A COMPARATIVE OVERVIEW:**  
**REVIEWING THE COUNTRY STUDIES**

Max du Plessis and Jolyon Ford

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This monograph has presented a comparative study of implementing efforts in five African states: Botswana, Ghana, Kenya, Tanzania and Uganda. The utility of this study lies not only in what the country reports reveal about the status and peculiarities of individual countries' responses to ratification of the Rome Statute, but also in what can be drawn and taken forward from the five studies by way of comparative insights.<sup>1</sup>

**Common barriers to implementation**

In one sense, it might be argued that it is not appropriate to draw out commonalities from across the five country studies to explain the implementation deficit. This is because in each of the countries there are a number of different historical, institutional, legal and political factors combining uniquely to affect the manner, pace and extent of the process. The country reports detailed these for each country.

However, the consultations have also revealed the following features, misconceptions, misgivings or concerns as common barriers to implementation or common reasons for delay in the process of implementation of the Rome Statute in some African countries (as the country reports above showed, these factors and difficulties can operate so as to compound one other):

***Lack of awareness***

There is a lack of awareness about the need for and significance of implementation at the highest level, among many officials, civil society, the legal profession and judiciary, and the wider community. This manifests either as a lack of awareness altogether (so that there is no local pressure on government for implementation), or 'awareness' in the sense that the issue simply has not come up in official or other circles. This obviously relates to the relevancy with which this issue is perceived (see below).

In at least one of the countries studied, there was a fairly public campaign for ratification. At the international level, these countries were very supportive of the creation of the ICC. In all cases ratification followed quite quickly after the promulgation of the Rome Statute. However, at all levels this momentum has now faded away so that with the exception of Uganda, where the issue has been topical, the matter is not one about which there appears to be much discussion either public or departmental.

### ***Lack of capacity***

There is undeniably a capacity shortfall in some of the countries studied: an over-stretched and thinly-staffed justice system, and a lack of sufficient numbers of officials with expertise in legal drafting or in international criminal co-operation. How this can manifest is that concept papers and other initiatives moving the issue up to a political level are unlikely to be undertaken, or approved, where capacity is thin. Parliaments also appear to lack some capacity to review these issues at a committee level in an informed way. This of course means that only a few issues can have priority. At present, if any capacity is devoted to international criminal issues it is to terrorism and international organised crime.

### ***Other priorities/relevance***

Perhaps the other side of the 'lack of capacity' coin is the clear indication in most of the reports that these countries have entertained other priorities, and having national laws to implement the Statute is simply not considered relevant enough to be accorded any or sufficient priority. This came through strongly in most of the reports. Many of the countries have had significant elections, or constitutional reform processes, which appear to have absorbed a good deal of political energy. This need not have prevented implementation, but has certainly not aided it.

### ***Political misgivings***

The reports revealed a number of political misgivings apparently held about implementation, and a sense that the local political risk of implementation (or the regional criticism that might come from some future surrendering of a leading figure to an international court) outweighs the risk of any international criticism for lack of implementation.



Some of the sense of political misgiving can only be inferred from the fact that implementation has not received political momentum (in Uganda, the reasons for political uncertainty about proceeding are more obvious, given the peace process ongoing there). But there is also in the reports a trace of a sentiment that having national laws in place will cause more problems and embarrassments than it will solve, or that it would be preferable that these issues be dealt with in some other way, or that international prosecutions are seen as a 'Western preoccupation'. On the other hand, the lack of movement on implementation may be the result of a preparedness to deal with any ICC request informally or on an *ad hoc* basis should one ever arise.

### ***Concerns about immunity***

A commonly expressed reason for delay in implementation is political or constitutional concerns with the immunity regime of the Rome Statute (that article 27 brooks no immunity even for serving Heads of State). This has typically arisen at a late stage in the drafting process, in those countries which have a draft in place. It is rather a significant barrier, particularly where there has been political violence in the country, and given the reportedly high degree of sensitivity resulting from what might be described as the 'Charles Taylor phenomenon' (the perception that immunities are never water-tight and that prosecution may follow at some point in the future).

As with the issue of political misgivings covered above, this is partly a problem of lack of awareness. That is, there appear to be some concerns about immunities which bear no real relation to the actual powers or interests of ICC prosecutors, or some degree of misgivings which are based on misunderstanding, as they appear to be founded on the belief that national implementation legislation will make it possible for political enemies to register spurious cases relating to events well before the creation of the Court, or local events such as forceful suppression of political dissent.

It is not well understood that such claims would mostly be incapable of founding an international criminal prosecution or a local prosecution where the legislation is based on crimes defined in the Rome Statute. While an international lawyer will recognise that one is safe from spurious local prosecutions, this may not be the impression held at a political level. There do not seem to be readily available answers for officials to give political leaders as to how implementation can proceed without displacing immunities. There is little understanding that cooperative elements could be implemented without the need for creating offences in national law too.

### ***Concerns about cost***

There is some concern in these countries about the perceived cost of implementation measures. Some of these perceptions are based on misunderstandings, for example the mistaken belief in one country that co-operation with the ICC meant undertaking the cost of building new, high quality prison cells without which criminal suspects would be able to claim that their trial was unfair or their rights abused. Some of the concerns are perhaps more understandable, such as the cost of training prosecutors and judges. This factor is not as significant as others, and seems not to underlie the principle reasons for delay in implementation.

### ***Lack of advocacy or pressure***

Related to the lack of awareness and of some significance is that in none of these countries is there a domestic pressure group either within or outside of government, regularly giving the issue of ICC implementation profile or publicity or forward momentum. There have been some NGO-organised seminars and programmes, but not on the scale that took place during the campaign for ratification. The issue lacks the international partner backing, political convenience, and perceived relevance that sees counter-terrorism and organised crime measures moved forward. Unlike the Geneva Conventions the Statute lacks the support of a single institution such as the military.

### ***In conclusion: The main barriers***

The concerns discussed above have been listed in no particular order. However, it is fair to say that the primary barrier to implementation in the countries studied appears to be that the issue (co-operation in preventing impunity for international crimes) is not considered, at the higher political levels in these countries, as having sufficient importance, relevance and priority. Viewed in this way, capacity or expertise and cost are in a sense 'secondary' factors that can be addressed once the sense of priority is accorded to them, by direction from the executive or by political leadership or consensus: for example, acquiring the services of local or international legal drafting experts, or asking the ICC itself for assistance.

Thus while real capacity constraints do hamper the justice systems of these countries, the real explanation would appear to be that once the international

credit has been obtained by ratification, actual implementation of the Rome Statute is simply not considered politically significant enough to be accorded priority.

The lack of appeal to the political decision makers appears to be both relative and absolute. Relative to other priorities for these countries, it is evident from the studies that ICC implementation legislation simply does not feature highly; any post-ratification momentum has been lost. Moreover there is no discernible constituency at home or abroad calling for action to be taken, and indeed some voices suggest it would be a distraction towards a Western preoccupation. Added to this 'relative irrelevance' issue are factors that, even if the issue gets to be before the political decision maker and so receive attention, would tend to positively militate against implementation: these are perceptions or concerns about constitutional immunities, or the misunderstandings about the reach of ICC crimes that might preclude discussing 'international crimes' for reasons of local politics (e.g. Kenya), or real concerns about the impact on local peace processes of taking forward legislation (e.g. Uganda).

It is worth noting that many of the problems with implementation noted by the authors can be seen as generic problems with treaty implementation, ones that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example. It is not necessary to explore the literature on this issue, except to note firstly that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon; and secondly, that many of the reasons for lack of implementation of human rights instruments apply equally to the Statute: political misgivings, capacity, and so on.

### **Some entry points for progress on implementation**

This monograph does not paint an entirely negative picture. The factors that, in at least these five countries, suggest that progress with implementation may be possible notwithstanding the above barriers include:

- The relative strength of the public departments in these countries: while there are real capacity issues, in these five countries the issue is not beyond the capacity, ability or interest of the officials and parliamentarians who would be involved in progressing it.

- The closeness of ICC procedures to already familiar extradition procedures.
- The strength and pride of the legal professions in the countries studied.
- The fact that since ratification there has yet to be any exhaustive campaign for implementation in these countries, such that the issue can be raised afresh.
- The fact that the legislation envisaged is unlikely to require a full public consultation and is likely to have the support of all parties and civil society (if it is not caught up as a local political issue or snagged on immunity or local amnesty issues).
- The existence of comprehensive draft legislation (and guides) which may also provide the basis of draft laws readily adaptable to other countries.<sup>2</sup>
- The willingness and ability of a range of actors (such as the Commonwealth Secretariat: all five countries studied are members of the Commonwealth) to provide technical assistance, drafting, advice, and training, and to draw on comparative examples and model laws from across the globe.
- The possibility of tying ICC implementation measures with counter-terrorism and anti-crimes measures as part of a comprehensive international crime response measure by the country. This would at once elevate the perceived urgency of the issue, and increase the likelihood of donor support (e.g. for training of prosecutors).
- The possibility of bundling ICC awareness raising and training on international criminal prosecution into ongoing human rights and constitutional education programmes. Since many local and international agencies and NGOs are involved in running educational programmes on human rights, increased attention to the problem of immunity and measures to combat it would increase the likelihood of creating a local demand by civil society and the professions for ICC implementation, and a local interest in it on the part of officials.
- The political interest of some of these countries in being recognised as leading, co-operative international citizens.
- The strength of the argument for implementation based on the entirely foreseeable scenario that a country contiguous or proximate to a

serious conflict may receive an international criminal suspect in their jurisdiction and be embarrassed by an inability to respond to the ICC or to take action locally. Were a suitably influential audience hear it, and sufficient other assurances and reassurances are given, the persuasiveness of this point is one factor that could lead to political support for proceeding with implementation.

### **In the meantime: The status pending implementation**

It is not necessarily the case that without comprehensive implementation legislation, countries such as these would be unable to respond to an ICC request or to co-operate with the ICC. The studies reveal that informal or *ad hoc* co-operation with and assistance to the ICC may well be possible. Most obviously, the delay in implementation of specific legislation in Uganda has not affected the ability or, apparently, the domestic legal capacity of Uganda to co-operate with the ICC organs using administrative and bilateral agreements. Uganda was able to assist in the investigations relating to the situation in northern Uganda under bilateral arrangements with the ICC: during 2004, organs of the Court entered into formal agreements with the government which incorporate the key obligations under the Rome Statute with respect to co-operation with various ICC processes and the functioning of the ICC in Uganda.

And, as is evident particularly in Kenya and Tanzania, the prosecuting and investigatory authorities are comfortable (pending legislation) with proceeding informally on a number of kinds of international co-operation and legal assistance. The draft legislation in Kenya, for example, specifically states that nothing in the Act prevents the Attorney General from giving assistance to the ICC otherwise than under the Act, suggesting that proceeding to respond to an ICC request otherwise than in accordance with the legislation would not invalidate the conduct: if the legislation is not yet in place, it is not evident that many forms of co-operation would be illegal even if there is no explicit legislative basis for them.

However, obvious gaps do exist which would mean that all five countries studied are at this time unable to respond fully and on a clear, prescribed lawful basis to an ICC investigation or request for arrest and surrender. There are also a number of reasons (questions of policy and practicality as well as of principle and legality), why it is of course preferable that co-operation and certain forms of mutual legal assistance take place on a formalised (legislated) basis. In addition, domestic prosecutions for extra-territorial conduct would

seem impossible in these dualist legal systems, in the absence of provisions criminalising the international crimes of genocide, crimes against humanity and war crimes.

## Notes

- 1 In deciding whether the results of this study are relevant to an Africa-wide assessment of attitudes and responses to the ICC and the Rome Statute, it is worth bearing in mind that all of the countries studied can be considered to be relatively advanced at least in a number of respects relevant to this topic. So, Botswana is (with South Africa) seen as a leading example of good governance in Southern Africa and continentally; Ghana, whose leader has the status of an elder statesman in at least West Africa, has come to be considered the most stable and well-governed of the major West African countries; although it has suffered recent instability, Kenya is a leading African state with a complex and evolving democracy, and some strong institutions (although instability has set in following the contested election results in late 2007 and current reports of violent demonstrations are of obvious concern); Tanzania, while poor, is stable, growing, and respected for its pedigree of pan-Africanism and its regional peacemaking; Uganda recently hosted the Commonwealth summit and some of the processes it has followed towards multiparty democracy, economic growth, women's empowerment, HIV prevention, etc, have been described as a model for other African countries. In considering the problems and possibilities of implementation in *other* African countries, then, it is worth remembering that this sample is of countries that could reasonably be expected to have made progress or be capable of making progress on implementation.
- 2 For example, Commonwealth Secretariat (Draft Model Implementation Laws); Human Rights Watch (Making the ICC Work: A Handbook for Implementing the Rome Statute) 2001; Amnesty International (Checklist for Effective Implementation) 2000; International Centre for Criminal Law Reform and Policy (Checklist of Implementation Considerations and Examples) 2002; Rights & Democracy Canada and ICCLR (Manual for the Ratification and Implementation of the Rome Statute) 2002.

## CHAPTER 10

# RECOMMENDATIONS

Max du Plessis and Jolyon Ford

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Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (29) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. However, as a result of the assessments undertaken in this monograph, and given the need to increase the capacity of African States to respond to ICC requests or to take action to address international crimes, the following needs and related recommendations may be outlined to enhance the prosecution of international crimes and end impunity for serious crimes in Africa:

1. That due to a need in Africa for greater public and official awareness about the work of the International Criminal Court, and a need for enhanced political support for the work of the Court and for international criminal justice more generally, the fulfilment of the aims and objectives of the ICC on the African continent are dependent on the support of African States and administrations, the AU and relevant regional organisations, the legal profession, and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC. It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. The extent to which other structures such as the Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights, and other pan-African institutions can play a role in this regard should be explored to maximise this potential.
2. That due to the perception present within certain African states that international criminal justice and the ICC is an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals, the AU should play a more significant role in building understanding and support among its member States about the importance of practical measures aimed at ending impunity for serious international crimes. In doing so it should make explicit the principled and practical reasons for building capacity to respond to international

crimes, including viewing this capacity as inherent to a developed notion of 'security' and as a key component of peacebuilding, conflict prevention, and stability. This will enhance the role and work of the ICC in Africa and encourage states to comply with their complementarity obligations under the Rome Statute.

3. That the collaborative relationship between the AU and ICC must be strengthened. Specifically:
  - The AU should fully extend to the ICC its assistance and support in accordance with the terms of the imminent MoU between the two organisations.
  - A targeted African campaign through the AU and other regional organisations should be launched to achieve increased levels of ratification and implementation of the Rome Statute so as to enhance the work of the ICC in Africa.
  - The AU should highlight the significance of developing the capacity of national criminal justice systems in African States, so as to ensure that international crimes can be effectively investigated and prosecuted.
4. That awareness of the ICC must be improved among the public and stakeholders (including civil society, political leadership and practitioners), including awareness of its role in Africa, international criminal justice and reconciliation, and the duties of States Parties and States' officials. This could include the establishment of an informal African network of justice stakeholders and the co-ordination of regular symposia to take stock of African progress in relation to the ICC and the prosecution of international crimes. So as to increase awareness and stimulate demand for domestic implementation, civil society and other local and foreign advocates and educators should consider incorporating awareness of the ICC in all general educational and capacity building programs on issues such as human rights.
5. That donors and providers of technical assistance (for example, the Commonwealth Secretariat) take steps to ensure that officials in States Party are advised of the availability of drafting and other technical advice and assistance towards domestic implementation of the Rome Statute.
6. That (without diluting or subverting universal values), recognised international criminal justice principles must be embedded within, and reconciled with, locally relevant, African-developed notions of justice. This would enhance the empirical legitimacy and political palatability of



international criminal justice procedures in African countries, while also guarding against the growth of any parallel mechanisms which would undermine the objectives and activities of the ICC in Africa.



**APPENDIX A**  
**STRUCTURE AND DETAIL OF THE**  
**DRAFT KENYAN ICC BILL 2007**

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Part I	Interpretation and general provisions
Part II	International crimes and offences against the administration of justice
Part III	General provisions relating to requests for assistance
Part IV	Arrest and surrender of persons to the ICC
Part V	Domestic procedures for all other kinds of co-operation
Part VI	Enforcement of penalties
Part VII	Persons in transit to ICC or serving sentences imposed by ICC
Part VIII	Protection of national security or 3 <sup>rd</sup> party information
Part IX	Investigations or sittings of the ICC in Kenya
Part X	Requests to the ICC for assistance
Part XI	Miscellaneous
Sched 1	The Rome Statute of the International Criminal Court
Sched 2	(Form of warrants in relation to property)

**Detail of the draft Kenyan ICC Bill 2007**

***Part I: Interpretation, Definitions and General Provisions***

Sections 1 to 5 deal with preliminary matters affecting the Bill as a whole. Section 1 names the proposed Act and provides for its commencement on

a date to be fixed by the Minister. Section 2 defines words and expressions used in the Bill. The term ‘international crime’ refers to genocide, war crimes and crimes against humanity (all of which are defined in the Rome Statute and in section 6) and to offences against the administration of justice of the ICC. Section 3 provides that the proposed Act will be binding on the Government of Kenya.

Section 4(1) provides that the provisions of the Rome Statute in section 4(2) shall have force of law in Kenya in relation to ICC requests and the method of dealing with these, investigations by the ICC, bringing of proceedings, enforcement in Kenya of sentences by the ICC, and Kenyan requests to the ICC. Section 4(2) lists the following parts of the Rome Statute: Part 2, Part 3, articles 51 & 52, Parts 5 to 10.

Section 5 states that the powers, functions or duties imposed on the State by the Rome Statute or ICC rules, shall be exercised by the Attorney General of Kenya (but requests for arrest and surrender under Part IV are to be made through the Minister, and all requests are to be through the ‘authorised channel’, listed as diplomatic channels, Foreign Affairs, or such channel as Kenya designates: section 21).

## ***Part II: International Crimes & Offences Against the Administration of Justice***

Rome Statute articles 6, 7, 8.

Section 6(1) provides that a person who is in Kenya or elsewhere who commits (a) Genocide, (b) Crimes Against Humanity or (c) War Crimes (or who attempts such or who is an accessory – section 6(2)) shall be liable to be punished as for murder (section 6(3)(a)) and be liable to be sentenced to life imprisonment or such other sentence as may be appropriate (section 6(3) (b)).

Section 6(4) states that the crimes listed in section 6(1) have the meaning given in articles 6, 7, and 8 of the Rome Statute.

Section 7(1) makes applicable to any section 6 offence the general principles of criminal law set out in the Rome Statute (referring to articles 20, 21, 22(2), 25, 26, 28, 29, 30 to 33). The provisions of Kenyan criminal law otherwise apply, except in the case of inconsistency, when section 7(1) applies (section 7(2)), while references to the ICC and to a Kenyan court are to be considered interchangeable as appropriate (section 7(4)).

Jurisdictional issues are covered in section 8 (the court having jurisdiction to try offences under the Act is the High Court: section 8(2)). The section provides that a person can be tried and punished for a section 6 offence if the relevant conduct took place in Kenya (section 8(1)(a)), or the person is present in Kenya ((1)(c)), or was at the time (1)(b)(i) a Kenyan citizen or Kenyan government or military employee, or (ii) a citizen of a State engaged in armed conflict with Kenya or employed by such State, or (iii) the victim or victims were Kenyan citizens or citizens of an ally of Kenya in an armed conflict (iv).

Offences against the administration of justice (bribery, obstruction of the course of justice, perjury, intimidation of witnesses, etc) are provided for in sections 9-17, with section 18 establishing jurisdiction of the High Court to try such offences. Section 19 relates to co-operation with ICC requests for assistance in relation to offences against the administration of justice.

### ***Part III: General Provisions Relating to Requests for Assistance***

Rome Statute articles 86, 87(1)(a), 93.

This Part of the Act applies to ICC requests for assistance under Part 9 of the Rome Statute (arrest, provisional arrest, surrender, ICC warrants or convictions or other forms of assistance): section 20(1)(a), and to articles 19(8), 56, 64, 76 and 109.

Section 23 is the general power to the Attorney General to execute requests under the Act 'or in any manner not prohibited by Kenyan law'. It is interesting to note that the Act provides that nothing in it is intended to limit the type of assistance the ICC may request under the ICC Rules or the Rome Statute, and nothing in the Act prevents the Attorney General giving assistance to the ICC otherwise than under the Act, including assistance of an informal nature: sections 20(2)(a) and (b).

Requests for assistance are to the Attorney General (through the Minister for Part IV requests for arrest and surrender), and all requests are to be through the 'authorised channel', listed as diplomatic channels, Foreign Affairs, or such channel as Kenya designates: section 21. Section 22 provides for responding to urgent requests (Rome Statute articles 81(1)(b), 91(1), 96(1)), and section 24 provides for the Minister or AG to consult with the ICC (for example, on requests for further information, any difficulties with locating persons, and provides for partial compliance only with the request, or for

a delay in compliance, in consultation with the ICC: Rome Statute articles 93(5), 93(8)(b) and (c), 97). Powers to enable other responses (Rome Statute articles 86, 90(8), 93(6)) are provided in section 26.

Requests from the ICC shall be kept confidential by Kenyan authorities, except to the extent that disclosure is necessary: section 25(1), and provides that authorities shall give particular best endeavours to confidentiality where particular protection is needed: section 25(2).

Rome Statute article 27(2) is incorporated by section 27, to the effect that it is no bar to proceedings that the person was acting in their official capacity at the relevant time. However, section 27 provides that this is subject to section 62 (Kenya's obligations to another State: Rome Statute article 98) and to section 115 (if the person is in the control of another State, the AG shall inform the ICC and request it to direct its request to that other State, or to postpone the request).

#### ***Part IV: Arrest and Surrender of Persons to the ICC***

Rome Statute articles 58, 59, 60(5), 89(1), 91, 92.

Requests for arrest or surrender must be made through the Minister of Justice and Constitutional Affairs, through the appropriate or designated official (section 21).

Sections 28-31 authorise the Minister to issue a warrant for the apprehension of a person suspected or convicted of an international crime, where the ICC has requested his surrender.

If the Minister is satisfied that the information described in Rome Statute article 91 is provided, the Minister may request the High Court to issue a warrant (section 29), which the High Court shall issue if satisfied the person is or is suspected to be in Kenya (or will be in Kenya), and the High Court has reasonable grounds to believe the person for whom the warrant is sought is the person named in the request (section 30) – these are the only grounds upon which the High Court may determine whether or not to issue the warrant (see also sections 35(5) and 39).

Sections 32-34 deal in similar terms with provisional arrests. They authorise a judge of the High Court to issue a provisional warrant for the arrest of a person suspected or convicted of an international crime, even though no

request has been received from the ICC for his surrender (article 92). The judge must be satisfied that the person is the subject of a warrant issued by the ICC or has been convicted of an international crime. The provisional warrant is intended to prevent an offender or suspected offender from escaping apprehension by departing from Kenya. It authorises the detention of the person concerned only until a request for surrender is issued by the ICC or until a reasonable period has elapsed during which no such request has been forthcoming.

Sections 35-38 deal with procedures after arrest – the granting of bail or the holding on remand, as provided for by the Rome Statute in article 59. Section 35(1) provides that the person must be brought before the High Court as soon as possible (articles 59(2)-(4)). The person is not entitled to bail as of right (section 35(2)) and the High Court in considering bail may impose such conditions as it sees fit (subsection 3), including issues such as the gravity of the charge, and whether there are safeguards in place to enable Kenya to fulfil its international duties (subsection 4). In considering bail, the High Court ‘shall not be concerned with whether the warrant by the ICC was properly issued’ (subsection 5). Section 36 provides that the ICC is to be notified of the application for bail – the ICC can put arguments against bail to the High Court, through the Minister. Except as otherwise provided, the High Court has the same jurisdiction and powers as if the person were charged locally (section 37), while section 38 deals with the provisions of the Statute in article 59(5).

Eligibility for surrender is covered by section 39 (Statute article 59). Sections 39-42 require the High Court, when a person is brought before it under a warrant of apprehension, to determine whether the person is eligible to be surrendered to the ICC pursuant to a request for such surrender. The matter is to be determined by the High Court – the person is eligible if there is a warrant or judgment of the ICC (section 39(3)(a)), the High Court is satisfied the correct person has been identified (subsection 3(b)), a proper article 59(2)(b) arrest process was followed (subsection 3(c)), and the person’s article 59(2)(c) rights have been respected (subsection 3(d)): but the High Court is constrained in that subsections (c) and (d) do not apply unless the accused puts them at issue: section 39(4). The person before the High Court is not entitled to adduce (and the High Court is not entitled to receive) evidence to contradict the allegations in issue: section 39(6)(a) and (b). Surrender by consent (article 92(3)) is provided for in section 41.

After the surrender processes (section 39 or 41), the High Court shall issue a warrant for detention pending surrender to the ICC: section 42(2); the

person shall not be surrendered for 15 days after this order, and may apply for directions in the nature of habeas corpus, (section 42(2)(c)) or appeal against the surrender order (section 63), or apply for bail (section 42(3)). If the person is not removed from Kenya within two months, he may apply to the High Court to be discharged from detention (section 42(2)(e)). If the High Court is not satisfied the person is eligible for surrender, it may order his discharge: section 42(4). This regime reflects the settled law under the Kenyan extradition legislation, and also requires the person to be informed of the entitlements to apply.

With a section 42 detention warrant issued, sections 43-50 deal with surrender orders. Essentially the scheme compels the Minister to order the surrender to the ICC of any person eligible for such surrender, except in cases where there are good grounds, in terms provided by the Bill, for such surrender to be refused. These exceptions include, for example, a case where the suspect is wanted for other crimes in Kenya. The Minister shall determine (section 43) whether to surrender the person (giving reasons to the High Court for any refusal to surrender), but section 43(2) provides that the Minister must make the surrender order unless the mandatory or discretionary restrictions in sections 51 and 52 apply (see below), the Minister postpones the surrender (section 52) or issues a section 45 temporary surrender order (This section does not apply to section 41 consent orders, or section 65 waivers by the person of the right to apply for *habeas corpus* or appeal.) The person shall be surrendered 15 days after a section 42 order or any final determination on applications, and the Minister shall ensure the person is delivered to the ICC without delay: sections 43(3) and (6). Section 49 deals with the form of a section 43 surrender order. (Section 44 deals with delaying surrender pending serving of a Kenyan sentence; sections 45 and 46 deal with temporary surrender where the ICC requests surrender and the person faces Kenyan proceedings for a different offence and where the Minister has secured undertakings from the ICC for the return of the person.) Section 50 provides that the order may, if the ICC so directs under article 111 of the Rome Statute, require surrender of the person concerned to another State.

Sections 51–62 deal with restrictions on surrender of persons pursuant to an ICC request. Mandatory restrictions on surrender, where it must be refused, are dealt with in section 51(1) (such as previous proceedings, inadmissibility, etc: see sections 53(3), 55(3) or 56(2) below). Surrender may also – as a matter of discretion – be refused if there are competing requests from the ICC and a non-party State: section 51(2), but subject to section 59(4) (see below). Section 51(3) makes clear that subsections (1) and (2) are the only grounds for refusal of surrender (along with the grounds given in section 19(2) which



deals with offences against the administration of justice where the Minister or AG is of the opinion that the circumstances make it unjust or oppressive to assist or to surrender), and that none of the restrictions on surrender in the Extradition Act apply. Thus the limitations on extradition contained in the Kenyan extradition laws are excluded from the Minister's consideration of an ICC request for surrender. He must instead have regard to the provisions of the Rome Statute, as expressed in the provisions of the Bill. Section 52 deals with postponing execution of a surrender request.

Section 53 deals with the question of surrender in the eventuality (Rome Statute articles 20(1), (3), 89(2) of previous proceedings in the ICC or another court on article 6, 7 or 8 crimes. Kenyan officials are to consult with the ICC (section 53(1)) – if the ICC rules the matter is admissible, surrender cannot be refused on the grounds of 'previous proceedings', but no surrender is to follow if the ICC rules the matter inadmissible under article 20: sections 53(2) and (3). Section 54 deals with ongoing investigations and section 56 with other challenges (Rome Statute articles 94 and 95).

Where a prosecution is ongoing in Kenya for the same offence (Rome Statute articles 17(1), 19(2)(b), 95) this is covered by section 55. In such a case, the surrender may be postponed, refused following an ICC inadmissibility ruling, or proceeded with if there is no inadmissibility concern: sections 55(2)-(4).

Parallel requests from the ICC and another State in relation to the same conduct are dealt with in section 57. Notification is to be made, and a determination made by reference to sections 58 and 59 (with regard also for the requirements of the Extradition Act) whether the ICC or the other State receives the co-operation. Where the other request is from a State Party to the Rome Statute, priority is given to the ICC request (section 58, Rome Statute article 90(2)); where the requesting State is not a Party, priority is given to the ICC request, unless Kenya is obliged to extradite and the ICC has ruled the matter admissible – but there can be no surrender to the State (this would be done under the Extradition Act) until the ICC decision on admissibility: section 59 (Rome Statute articles 90(4)-(6)).

The remainder of the Part makes provisions for the following: section 60 (Rome Statute article 90(7)); section 62 (article 98); sections 63-67 deal with appeals and allow a person who has been determined to be eligible for surrender pursuant to an ICC request to appeal against such a determination on a question of law. The appeal is to be heard and determined by the Court of Appeal; sections 68-70 provide for the discharge of a person in custody pursuant to a request if the surrender is not proceeded with.

Sections 72-75 are miscellaneous provisions relating to surrender requests. Sections 72 and 73 empower an officer executing a warrant of apprehension to search the suspects premises and to seize evidence of any international or local crime, and provide for the disposition of anything seized. Evidence of an international crime is to be forwarded to the ICC. Section 74 requires certain records to be made in relation to the detention of a person under a warrant in connection with a surrender request. Section 75 allows the Minister, in accordance with Article 101 of the Rome Statute, to consent to the punishment of a person by the ICC for crimes other than the crimes for which he was surrendered to them.

### ***Part V: Domestic Procedures for all other Kinds of Co-operation***

Rome Statute articles 19(8), 55, 56, 64, 93.

Part V (sections 76-118) prescribes the manner of dealing with ICC requests other than requests for surrender, as contemplated in article 93 of the Rome Statute. Various sections create necessary powers by giving effect to the equivalent Rome Statute provisions.

Sections 76 to 83 apply in respect of ICC requests for assistance in locating persons or things, or obtaining evidence. The Attorney General is to determine whether and how the request is to be complied with and to co-ordinate the Kenyan response by referring the request to an appropriate Kenyan agency. Obtaining evidence pursuant to any such request will in general proceed according to the law of Kenya, subject to certain exceptions provided by the Rome Statute and its Rules. Section 80 deals with protection of witnesses.

Sections 84 and 85 prescribe the rights of a person being questioned, pursuant to a request by the ICC for his questioning, in relation to an international crime. The provisions reflect the relevant provisions of the Rome Statute.

Sections 86 to 89 prescribe the manner of dealing with ICC requests for assistance with service of documents and arranging the appearance of witnesses in connection with proceedings of the ICC.

Sections 90 to 94 prescribe the manner of dealing with ICC requests for the temporary transfer of a Kenyan prisoner to the ICC, to assist the ICC in any proceedings or investigation being conducted by it, and makes provision for the effect of the absence on the sentence of the prisoner concerned.

Sections 95 to 105 prescribe the manner of dealing with ICC requests for evidence of international crimes for the purposes of ICC proceedings or an ICC investigation. Compliance with such requests may involve search of premises and vehicles, seizure of evidence, production of documents and records and protection of potential witnesses. Search requests are, if approved by the Attorney General, to be executed by warrant issued by the High Court. Members of the police force are given appropriate powers for search and seizure and provision is made for safe keeping of evidence seized.

Sections 106 and 107 prescribe the manner of dealing with ICC requests for the identification, tracing, freezing and seizure of property for the purpose of eventual forfeiture. Section 107 gives effect to the 2<sup>nd</sup> Schedule to the Bill which provide for searches for such property, freezing of assets and related matters. Section 108 provides for compliance with ICC requests, of any kind not covered by the preceding provisions, for assistance with its proceedings or investigations.

Sections 109 to 115 provide for restrictions on compliance with ICC requests for assistance with its proceedings or investigations. Assistance may be postponed, or refused outright, for a number of reasons, including a failure by the ICC to comply with conditions on which the assistance is offered, a decision by the ICC that a case is not to proceed, a possible compromise of Kenyan security, a conflict between an ICC request and a similar request from a friendly nation, or where compliance with the request would entail a contravention of Kenyan law.

Sections 116 to 118 contain miscellaneous provisions relating to compliance with ICC requests under the preceding provisions.

### ***Part VI: Enforcement of Sentences***

Part VI (sections 119-130) provides for the enforcement in Kenya of certain penalties imposed by the ICC. The penalties concerned are in the nature of orders against property. Sections 121-129 deal with orders of the ICC requiring forfeiture of assets derived from international crime. The assets are forfeited to Kenya on registration in the High Court of the ICC forfeiture order, subject to hearing any claim from a third party against the property concerned. Section 130 provides that assets recovered by or forfeited to Kenya must be transferred to the ICC.

Sections 119 and 120 deal with ICC victim reparation orders. Such orders are to be enforced in Kenya as civil judgments or restitutions under section 178 of the Criminal Procedure Code.

### ***Part VII: Enforcement/Persons in Transit to ICC or Serving Sentences***

Rome Statute articles 89(3), 93, 103(1), (2)ff.

Part VII (sections 131-151) makes provision with respect to the transfer of persons in custody to or from the ICC or other States (article 89(3)), and with the enforcement in Kenya of ICC sentences of imprisonment (article 103). These sections provide for powers to hold persons in transit to the ICC pursuant to a valid request (section 131) and for Kenyan enforcement of ICC punishments: Kenya may act as the state of enforcement (the service in Kenya of an ICC sentence of imprisonment): sections 134 to 143, including the transfer of prisoners to the ICC for review of a sentence or for other purposes, the transfer of prisoners to other States for completion of their sentences and related matters. It provides for extradition of escaped ICC-convicted persons (section 144). Sections 145-151 are general provisions relating to the issue, amendment and revocation of certificates and orders under the preceding provisions.

### ***Part VIII: Protection of National Security or 3<sup>rd</sup> Party Information***

Rome Statute article 72.

Part VIII (sections 152-160) relates to ICC requests for assistance which could, if complied with, compromise Kenyan security.

Sections 152 to 158 prescribe the procedure for dealing with such requests and deal with the protection of information in the interests of national security. If the Attorney General believes that compliance would constitute a security risk, he is obliged to consult with the ICC in an effort to resolve the matter. If the matter cannot be resolved, the request may be refused (any issue is to be dealt with 'in the manner provided for in Art. 72 of the Rome Statute'). Sections 159 and 160 deals with requests for disclosure, to the ICC or another State, of a document or information that did not originate in Kenya but was supplied by another State or the ICC. The information of 3<sup>rd</sup> parties is protected under section 159, which provides for seeking consent to any disclosure.

### ***Part IX: Investigations or Sittings of the ICC in Kenya***

Rome Statute articles 54(3) and 57.

Part IX (sections 161-167) deals with the holding by the ICC of investigations and proceedings in Kenya, in accordance with its rights under the Rome Statute, and makes provision for the facilitation by Kenyan authorities of such investigations or proceedings, including detention or removal of persons in custody in connection with them. So the ICC Prosecutor may conduct proceedings in Kenya (section 161) and the ICC may sit in Kenya (sections 162 to 167).

### ***Part X: Requests by Kenya to the ICC for Assistance***

This Part (sections 168-170) provides a basis in Kenyan procedural law for the making by Kenya of requests to the ICC, in exercise of Kenya's rights under the Statute.

### ***Part XI: Miscellaneous***

Rome Statute article 48.

Part XI (sections 171–174) contains supplementary provisions relating to evidentiary certificates and regulations. The making of regulations is provided for in sections 171 and 172, while section 174 provides for an amendment to be made to the Privileges and Immunities Act (Ch. 179) to accord quasi-diplomatic privileges such that judges and other staff of the ICC, and any counsel, experts or witnesses are to have the privileges and immunities set out in article 48 of the Rome Statute.



**APPENDIX B**  
**SUMMARY OF UGANDA'S INTERNATIONAL  
CRIMINAL COURT BILL 2006**

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Part I of the ICC Bill provides for preliminary matters and for the Rome Statute to have the force of law in Uganda and for the implementation by Uganda of obligations arising under the Rome Statute.

Part II provides for the incorporation of the international criminal acts set out in Part I of the Rome Statute, including genocide, war crimes and crimes against humanity and offences against the administration of justice. It also provides for consent for prosecutions and sets out the jurisdiction of the national courts for offences committed outside the country and for the application of general principles of criminal law.

Part III provides for Uganda to respond to official requests for assistance from the ICC. It provides for the manner and form of the request, the necessary consultations to be made with the ICC, and the responses.

Part IV provides for response by way of arrest and surrender of suspected offenders to the ICC, including provisional arrests and transit or transfers. The Part also provides for the right to a fair hearing during surrender procedures including the right to bail.

Part V deals with domestic arrangements for other forms of co-operation with the ICC. The list is long and includes the identifying or locating of persons or things, the facilitation of appearance by witnesses, temporary transfer provisions, and examination of places and sites. Provision is also made for search and seizure and the transmission of materials to the ICC.

Part VI provides for the enforcement of penalties, assistance with victim reparation, fines and forfeiture orders. It permits Uganda to act as a state for enforcement of ICC sentences in Uganda and for certificates and removal orders.

Part VII provides for protection of national security and third-party information and also for the discretion of the ICC to refer any matter to the Security Council of the United Nations.

Part VIII deals with the investigations of the ICC and the sittings of the ICC in Uganda, and in particular the powers of the ICC while sitting in Uganda.

Part IX makes provision for the Minister to request the assistance of the ICC and the types of requests and assistance.

Part X deals with miscellaneous provisions relating to certificates given by the Minister, and also empowers the Minister to make regulations for the implementation of the Act.

Attached to the Bill as Schedules are the text of the Rome Statute and the Agreement on the Privileges and Immunities (APIC).



**APPENDIX C**  
**TABLE OF AFRICAN STATES THAT HAVE  
SIGNED OR RATIFIED THE ROME STATUTE<sup>1</sup>**

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No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
1	Algeria	28/12/2000	-	-	-	Algeria is not a State Party
2	Angola	07/10/1998	-	-	Signed: 03/05/2005 Ratified: 21/06/2005	Angola is not a State Party
3	Benin	24/09/1999	22/01/2002	Signed: 10/09/1999 Ratified: 22/01/2006	Signed: 09/2005 <sup>4</sup>	Benin has draft legislation implementing complementarity and cooperation obligations, contained in 'L'Avant projet de mise en oeuvre du statut de la Cour Pénale Internationale au Bénin'
4	Botswana	08/09/2000	08/09/2000	-	Signed: 30/06/2003	No implementing legislation has been drafted to date
5	Burkina Faso	30/11/1998	16/04/2004	Signed: 07/05/2004 Ratified: 10/10/2005	Signed: 25/05/2004	During July 2006 Burkina Faso initiated the process of drafting implementing legislation
6	Burundi	13/01/1999	21/09/2004	-	A United States waiver was granted on 29/11/2004	In the process of drafting implementing legislation on complementarity obligations

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
7	Cameroon	17/07/1998	-	-	Signed: 01/12/2003 <sup>5</sup>	Cameroon is not a State Party
8	Cape Verde	28/12/2000	-	-	Cape Verde has signed and ratified the Bilateral Immunity Agreement <sup>6</sup>	Cape Verde is not a State Party
9	Central African Republic	07/12/1999	03/10/2001	Signed: 10/10/2006	Signed: 06/04/2004	Central African Republic currently has some form of draft implementing legislation, which implements both complementarity and cooperation obligations
10	Chad	20/10/1999	01/11/2006	-	Signed: 21/07/2003	No implementing legislation has been drafted
11	Comoros	22/09/2000	18/08/2006	-	Signed: 30/06/2004 <sup>7</sup> Entered into force on the same date	No implementing legislation has been drafted
12	Republic of Congo (Brazzaville)	17/07/1998	03/05/2004	-	Signed: 08/2004	Congo-Brazzaville has draft legislation implementing both complementarity and cooperation obligations, contained in 'Loi No 8-98 du 31 octobre 1998: portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité'

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
13	Democratic Republic of Congo (Kinshasa)	08/09/2000	11/04/2002	-	Signed: 18/03/2003	The DRC has a Draft ICC Implementation Bill entitled 'Loi modifiant et complétant certaines dispositions du code pénale, du code d'organisation et de la compétence judiciaires, du code pénal militaire et du code judiciaire militaire, en application du statut de la cour pénale internationale'
14	Djibouti	07/10/1998	05/11/2002	-	Signed: 24/01/2003	Djibouti has neither drafted nor enacted implementing legislation
15	Egypt	26/12/2000	-	-	Signed	Egypt is not a State Party
16	Equatorial Guinea	-	-	-	Signed: 25/09/2003 <sup>8</sup>	Equatorial-Guinea is not a State Party
17	Eritrea	07/10/1998	-	-	Signed: 08/07/2004	Eritrea is not a State Party
18	Ethiopia	-	-	-	Signed: 08/10/2004	Ethiopia is not a State Party
19	Gabon	22/12/1998	20/09/2000	-	Signed: 15/04/2003	Gabon currently has draft legislation implementing complementarity and cooperation obligations

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
20	The Gambia	07/12/1998	28/06/2002	-	Signed: 05/10/2002 Ratified: 07/2003	The Gambia has not drafted any implementing legislation to date
21	Ghana	18/07/1998	20/12/1999	Signed: 12/09/2003	Signed: 17/04/2003 Ratified: 30/10/2003	Ghana currently has some form of draft implementing legislation, which implements both complementarity and cooperation obligations
22	Guinea	08/09/2000	14/07/2003	Signed: 01/04/2004	Signed: 06/04/2004 <sup>9</sup>	Guinea has neither drafted nor enacted implementing legislation to date
23	Guinea-Bissau	12/09/2000	-	-	-	Guinea-Bissau is not a State Party
24	Ivory Coast	30/11/1998	Ivory Coast has not ratified but during 09/2003, it accepted the ICC's jurisdiction over crimes committed since 19/09/2002	-	Signed: 30/06/2003	Ivory Coast is not a State Party
25	Kenya	11/08/1999	15/03/2005	-	Publicly rejected a Bilateral Immunity Agreement	Kenya has drafted the 'International Crimes Bill 2005' which implements both complementarity and cooperation obligations. The Bill is not yet in force.
26	Lesotho	30/11/1998	06/09/2000	Ratified: 16/09/2005	Publicly rejected a Bilateral Immunity Agreement	Lesotho currently has some form of draft implementing legislation, implementing both the complementarity and cooperation obligations

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
27	Liberia	17/07/1998	22/09/2004	Signed: 16/09/2005	Signed: 08/10/2003  US State Department waiver granted on 29/11/2004	No implementing legislation has been drafted
28	Libyan Arab Jamahiriya	-	-	-	-	Libyan Arab Jamahiriya is not a State Party
29	Madagascar	18/07/1998	-	Signed: 12/09/2002	Signed: 23/04/2003	Madagascar is not a State Party
30	Malawi	03/03/1999	09/09/2002	-	Signed: 20/09/2003 <sup>10</sup>	No implementing legislation has been drafted or enacted
31	Mali	17/07/1998	16/08/2000	Signed: 20/09/2002  Ratified: 08/07/2004	Publicly rejected the Bilateral Immunity Agreement	Law reform processes have begun with a view towards implementation of the Rome Statute. The draft legislation implements only complementarity obligations and is contained in 'Loi no. 01-079 du 20 août 2001, portant Code Pénal'
32	Mauritania	-	-	-	Signed: 17/09/2002  Ratified <sup>11</sup>	Mauritania is not a State Party
33	Mauritius	11/11/1998	05/03/2002	-	Signed: 25/06/2003  On 01/07/2003, President Bush issued an ASPA waiver	Mauritius has neither drafted nor enacted implementing legislation to date
34	Morocco	08/09/2000	Ratification requires a constitutional amendment on the issue of immunity of the King	-	-	Morocco is not a State Party

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
35	Mozambique	28/12/2000	-	-	Signed: 06/2003 <sup>12</sup>	Mozambique is not a State Party
36	Namibia	27/10/1998	25/06/2002	Signed: 10/09/2002  Ratified: 29/01/2004	Publicly rejected the Bilateral Immunity Agreement	No implementing legislation has been drafted to date
37	Niger	17/07/1998	11/04/2002	-	Publicly rejected the Bilateral Immunity Agreement	Niger has drafted legislation implementing only complementary obligations
38	Nigeria	01/06/2000	27/09/2001	-	Signed: 30/06/2003 (entered into force on 06/10/2003)  President Bush issued an ASPA waiver	Nigeria has drafted legislation implementing only complementarity obligations, which is contained in 'The Rome Statute of the international Criminal Court (Ratification & Jurisdiction) Bill 2001'
39	Rwanda	-	-	-	Signed: 04/03/2003	Rwanda is not a State Party
40	Sahrawi Arab Democratic Republic	-	-	-	-	Sahrawi Arab Democratic Republic is not a State Party
41	São Tomé and Príncipe	28/12/2000	-	-	Exchange of notes on 06/11/2003 and 12/11/2003 in Libreville and São Tomé <sup>13</sup>	São Tomé and Príncipe is not a State Party
42	Sénégal	18/07/1998	02/02/1999	Signed: 19/09/2002	Signed: 21/06/2003	On 12/02/2007 Sénégal adopted the 'ICC Implementation Act' into National legislation, which implements both complementarity and cooperation obligations

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
43	Seychelles	28/12/2000	-	-	An agreement has reportedly been signed in 06/2003	Seychelles is not a State Party
44	Sierra Leone	17/10/1998	15/09/2000	Signed: 26/09/2003	Signed: 31/03/2003 Ratified: 06/05/2003	No implementing legislation has been drafted to date
45	Somalia	-	-	-	-	Somalia is not a State Party
46	South Africa	17/07/1998	27/11/2000	-	Publicly rejected the Bilateral Immunity Agreement	South Africa has enacted legislation implementing only cooperation and complementarity obligations. 'The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002' was adopted on 26/06/2003
47	Sudan	08/09/2000	Sudan is not a party to the ICC statute but referral of the situation in Sudan to the ICC by the Security Council brought it under the Court's scrutiny	-	-	Sudan is not a State Party
48	Swaziland	-	-	-	-	Swaziland is not a State Party
49	Tanzania	29/12/2000	20/08/2002	-	Publicly rejected the Bilateral Immunity Agreement	No implementing legislation has been drafted by Tanzania
50	Togo	-	-	-	Signed: 13/06/2003	Togo is not a State Party

No	Country	Signature	Ratification/ Accession	Agreement on Privileges and Immunities <sup>2</sup>	Bilateral Immunity Agreement <sup>3</sup>	Implementing legislation
51	Tunisia	-	-	-	A Bilateral Immunity Agreement has been signed	Tunisia is not a State Party
52	Uganda	17/03/1999	14/06/2002	Signed: 07/04/2004	Signed: 12/06/2003	Uganda has the draft 'International Criminal Court Bill 2006' which implements both complementarity and co-operation obligations
53	Zambia	17/07/1998	13/11/2002	-	Signed: 01/07/2003	Has some form of draft implementing legislation, which implements both the complementarity and cooperation obligations
54	Zimbabwe	17/07/1998	-	-	-	Zimbabwe is not a State Party

## Notes

- 1 Acknowledgment is given to the Coalition for the International Criminal Court for the majority of the information contained herein.
- 2 Article 48 of the Rome Statute provides privileges and immunities to the Court and its officials that are necessary for the effective functioning of the Court.
- 3 Bilateral Immunity Agreements essentially provide amnesty for US citizens. According to article 98(2) of the Rome Statute, '[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'. The purpose of the Bilateral Immunity Agreements is to prevent the States concerned from transferring through whatever procedure, without the consent of the United States, any 'current or former Government officials, employers (including contractors), or military personnel or nationals' of the United States either to the ICC or to a third State or entity with the purpose of eventual transfer to the ICC.
- 4 The Bilateral Immunity Agreement has the status of an unconfirmed executive agreement.
- 5 It is possible that this agreement takes the form of an executive agreement.
- 6 The dates upon which the signature and subsequent ratification of the Bilateral Immunity Agreement took place are as yet unconfirmed.
- 7 The Bilateral Immunity Agreement has the status of an executive agreement.
- 8 An Executive Agreement was entered into on 6 May 2004.
- 9 The 'signature' took the form of a public announcement.



10 This agreement takes the form of an Executive Agreement.

11 Apparently, the Bilateral Immunity Agreement has been ratified, but it is unknown exactly when this took place.

12 The Bilateral Immunity Agreement was approved by the Council of Ministers in February 2004 and published in the official gazette in March 2004.

13 It is possible that an Executive Agreement was entered into on 12 November 2003.

## **Rome Statute of the International Criminal Court**

- Signatures: 44 countries
- Ratifications: 29 countries
- Implementing legislation drafted: 15 countries [Benin; Burundi; Central African Republic; Republic of Congo; Democratic Republic of Congo; Gabon; Ghana; Kenya; Lesotho; Mali; Niger; Nigeria; Uganda; Zambia]
- Implementing legislation enacted and in force domestically: South Africa and Senegal

## **Agreement on Privileges and Immunities**

- Signatures: 12 countries
- Ratifications: 5 countries

## **Bilateral Immunity Agreement**

- Signatures: 34 countries
- Ratifications: 5 countries





