

**THE DOMESTICATION OF THE ROME STATUTE IN AFRICA
CHALLENGES AND PROSPECTS**

**WORKSHOP ORGANISED BY UGANDA COALITION ON THE
INTERNATIONAL CRIMINAL COURT**

**"THE OBLIGATIONS OF STATE PARTIES UNDER THE ROME
STATUTE"**

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PREAMBLE

The role of the International Criminal Court (ICC) in Africa has generated much comment and mixed reactions among a broad spectrum of African Society especially so having regard to the fact that all four (4) situations which are the subject of the proceedings at the ICC are in Africa.

We in civil society however cannot state our support for the intervention of the ICC more eloquently than Ms. Cheryl Gillwald the South African Deputy Minister for Justice and Constitutional Development who has said:-

“for a country like ours whose history has for decades been ravaged by daily acts of crime against humanity, the ICC has a particular and poignant significance; it offers us the prospect that these heinous crimes will never again be tolerated or perpetrated with impunity. South Africans almost without exception, have the absolute conviction that the ICC is the most important human rights institution the world has seen in recent history. That the ICC has jurisdiction over individuals not just nations, accused of genocide, war crimes, and crimes against humanity is a compelling reason for us to support its establishment.....”.

These lofty words on the jurisdiction and mandate of the ICC which was the creation of the ROME STATUTE am sure resonate deeply with all you members of parliament attending this important workshop because the words Uganda could easily be substituted for South Africa in this statement and they would be equally appropriate if spoken by our own Minister of Justice.

1.0. THE INTERNATIONAL CRIMINAL COURT:

The adoption of the Rome Statute establishing the ICC reflects decades of development in International Criminal Law aimed at combating impunity for the most serious crimes of international concern. The establishment of an ICC was first proposed at the United Nations in 1948. Since then the Nuremburg tribunals, the adoption of Key International conventions such as the Convention Against Torture and other Cruel and Inhuman and Degrading Treatment 1984 to which Uganda has acceded; and latterly the establishment of the adhoc international criminal tribunals for the former Yugoslavia and Rwanda and hybrid tribunals such as the special court for Sierra Leone have all built towards the intolerance of impunity for crimes against humanity, war crimes and genocide. The Rome statute enjoys substantial and increasing support with 139 signatories and 102 state parties, of whom 30 are African Countries.

2.0 THE ICC AND UGANDA:

Uganda attended the ROME CONFERENCE that established the ICC and ratified the ROME STATUTE on 14th June 2002. Uganda has also ratified the Agreement on Privileges and immunities of the International Court (APIC)

In December 2003 Uganda made the first state party referral to the ICC when it referred to situation concerning Northern Uganda in December 2003. The referral was made public at a joint conference in London between Uganda and the ICC prosecutor on 29th January 2004. On 27th February 2004 the Government of Uganda lodged a declaration of acceptance of the jurisdiction of the ICC dating back to 1st July 2002. The ICC has an ongoing investigation into the situation in Northern Uganda and has so far issued five (5) arrest warrants for senior members of the LRA.

3.0 CO-OPERATION:

The International Criminal Court like the adhoc tribunals for the former Yugoslavia Rwanda and Sierra Leone created by the security council of the United Nations has not been endowed with an enforcement mechanism. This is the primary weakness of the ICC because it depends on the Co-operation of states whether in the Country in which the alleged atrocities occurred or in states that maybe harboring fugitives.

Justice Hassan B. Jallow, The Chief Prosecutor of the International Tribunal for Rwanda (ICTR) has said, ***“state cooperation is our strength but it is also the Achilles heel of the system. We need to continue to find ways of ensuring it is available. In some idealistic moment I entertain the hope that someday the system of International Criminal Justice will be freed form this dependence. Perhaps someday we will envisage a system with its own International and independent authority with a police force prison and all the support facilities which a national justice system enjoys”.***

The ICC's has been compared to a giant without arms and legs which can only be provided by state co-operation.

The ICC relies on state co-operation for the performance of vital functions such as:-

- (1) Arrest and transfer of indictees;
- (2) Incarceration of convicted persons

- (3) The location of witnesses and resettlement of witnesses and acquitted persons;
- (4) Assistance with obtaining documents, examining witnesses accused persons and evidence;
- (5) Search and seizures;
- (6) The identification tracing and freezing of property and assets.

Co-operation in these aspects requires state parties to incorporate procedures in national legislation as envisaged IN PART 9 OF THE ROME STATUTE entitled International Co-operation and Judicial Assistance. Only South Africa and Senegal in Africa have passed implementing legislation to align their national systems with the ROME STATUTE.

Uganda through ratification of the Rome Statute and the execution of bilateral memorandum of understanding with ICC has co-operated with the organs of the ICC. The ICC enjoys diplomatic legal status in Uganda and enjoys immunities commensurate to that status.

Given this ongoing co-operation with the ICC without the domestication of the ROME STATUTE you may be entitled to pose the question why then domesticate the bill? In posing this question it is important for us to divorce the ongoing JUBA process from the ICC Bill especially having regard to our past history.

4.0. WHY IMPLEMENT (ENACT) THE ICC BILL?

There is pending implementing legislation in a number of African countries including Uganda (I note from your programme that there has been a brief presentation on THE ICC BILL 18/2006 by Hon. Katuntu).

The primary reason for enacting the ICC Bill to domesticate the ROME STATUTE is the constitutional imperative and principle contained under the chapter NATIONAL OBJECTIVES AND DIRECTIVE RINICIPLES OF STATE POLICY which requires under objective 28 thereof respect for International Law and Treaty obligation.

Uganda for purposes of incorporating treaty and other foreign obligations is what is referred to as a "dualist" state which implies that you must incorporate international law and treaty obligations by an Act of Parliament. This system stems from our adoption of the common law system. Ugandan courts cannot apply international or customary international law as a direct source of law.

This is especially so in criminal law because of the provisions of Act 28 (12) which provides *“no person shall be convicted of a criminal offence unless the offence is defined, and the penalty for it prescribed by law”*.

Arguably the most fundamental reason for domesticating the ROME STATUTE through passage of the ICC Bill 18/2006 would be to enable our national courts to prosecute international crimes.

Indeed the whole premise underpinning international criminal justice or the golden thread running through the ROME STATUTE is the principle of COMPLIMENTARY.

This principle which is found in Articles 1, 17, 18 and 19 re-affirms the primary and pre-eminent obligation of national criminal jurisdictions to hold individuals responsible for War Crimes. Crimes against Humanity and Genocide.

UNDER Article 17(a) of the ROME STATUTE:

A case would be inadmissible before the ICC, unless the state is shown to be unwilling or unable genuinely to carry out on investigation or prosecution.

Similarly under Art 19(2)(b) the jurisdiction of the court and admissibility of a case may be challenged on the basis that a state with jurisdiction over the case is conducting an investigation or has commenced prosecution, or concluded prosecution, of a case of interest to the ICC.

In passing the bill we shall ensure that we have legislation to try international crimes and thus give reign to the newly formed War Crimes Chamber to have jurisdiction over international crimes. We would therefore be strengthening our national criminal justice system and the rule of law in Uganda in this regard.

It would also have the secondary effect of strengthening regional security because it will give our country the ability to surrender international criminals for trial at The Hague..

More importantly a national trial for perpetrators of international crimes brings “justice home to the victims of such acts through participation and presence at trials. It also ensures that there is national ownership of the process.

Finally we will strengthen our criminal justice system by introducing Gender Based Crimes and novel concepts such as allowing victims participation and generally strengthen our witness protection measures.

CONCLUSION:

MAX DU PLEISS and JOLYON FORD in their mimeograph titled "No Justice No Peace" have said *"A states ability to maintain the rule of law and to respond to Intentional 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 enactment of our International Criminal Court Bill will be a solemn affirmation of our collective rejection of impurity, thus fostering peace and security in Uganda and across our region. We will strengthen the rule of law in Uganda by ensuring that our system is robust enough to try and prosecute individuals who commit crimes of international concern on Ugandan soil or any other country that has ratified the ROME STATUTE.

It falls upon you distinguished legislators to take your place in history and enact this bill for the benefit of future generations.

REFERENCES:

1. The Constitution of the Republic of Uganda
2. No Peace No Justice Mimeograph edited by MAX DU PLESSIS and JOLYON FORD (case studies on Domestic Implementation of the ICC in selected African Countries).
3. General Problems with State Co-operation a Review (ed Bert Stuart)
4. Application of The International Bar Associations Human Rights Institute to act as AMICUS CURIAE IN CONSTITUTIONAL PETITION 10 OF 2005 JOHN MAGEZI & OTHERS VS. ATTORNEY GENERAL.