THE FORUM

UGANDA COALITION ON THE
INTERNATIONAL CRIMINAL COURT

Reviewing the Review Conference

Issue No.1, 2010
The Ugandan Coalition on the International Criminal Court (UCICC) is a coalition based campaign of the Human Rights Network with a membership of over 265 spread countrywide. The UCICC was formed in 2004, at a time when some Ugandans had publicly criticized and threatened to undermine the work of the Court in investigating the situation in Northern Uganda. HURINET-U at that time organized a workshop to bring together various key players in civil society, government and the international community to map out as well as endorse a strategy to be used in the campaign for the ICC in Uganda.

The UCICC has the following core objectives:
1. To sensitize and clarify the role of the ICC and
2. Create a platform for debate on the ICC.

The Uganda Coalition on the ICC is not a mouthpiece of the ICC; it is part of the Global Independent CICC movement with headquarter in New York, and as such does not take a position for or against the ICC. The UCICC’s member organizations have different views on the ICC. The Ugandan Coalition mainly provides information about the ICC responds to basic queries and raises awareness.

The UCICC is coordinated by a steering committee of 7 organizations which also serves as a constitutional body. These are: Human Rights Network-Uganda, Uganda Women’s Network, National Union of Disabled Persons of Uganda, and Legal Aid Project of the Uganda Law Society, ISIS-WICCE-Women’s International Cross Cultural Exchange, Public Defenders Association of Uganda and the Uganda Human Rights Commission.

UCICC has made several publications in the past in order to achieve goals outlined above. This magazine is part of a planned activity of the coalition in creating awareness amongst society about the workings of the ICC.
CHIEF EDITOR’S MESSAGE

This is the maiden issue of our magazine christened ‘The Forum’. It comes at one of the most exciting, if not challenging time in the history of the International Criminal Court: hot on the heels of the Review conference and the AU summit that have outcomes which arguably have the potential to make or break this nascent but significant institution in the architecture of the global justice system. In this issue our readers will interact with a rich plethora of opinions, perceptions and perspectives on the twin events (the review conference and the AU summit).

The promise of this magazine is to keep the spotlight on and public interest in most crucial happenings around the ICC and expose the local nuances and dynamics of these developments. It is hoped that this magazine will be an important sounding board of ideas and a platform for discourse on the most pressing issues on the international criminal justice landscape.

It is our expectation that you will be enthused, excited, and tickled enough to join in this important task of shaping the character of our global justice system through the power of ideas and words. Make this magazine a bubbling pot of ideas and intellectual stew on international criminal justice. In this we will be your unfailing and indefatigable friend. We wish you interesting reading!

Mohammed Ndifuna,
Chair of the Steering Committee, UCICC
THE SHORES OF LAKE VICTORIA IN UGANDA

“...The crime of aggression has been on the international agenda since Nuremberg and Tokyo Military Tribunals following end of World War II in 1945. It was referred to as “The Crime against Peace”. At the time, and one that comprehends all lesser Crimes.” Despite its recognition as the supreme international Crime, the Crime of Aggression has never been tried by any international criminal tribunal since Nuremberg and the Tokyo military tribunals. By Sarah Kihika.

STOCK TAKING EVENTS

“No Peace Without Justice (NPWJ) was very pleased with the results of the ICC Review Conference in Kampala, in particular the impact of the activities it undertook in partnership with the Ugandan Coalition on the ICC (UCICC) and the Human Rights Network -Uganda (HURINET-U) on the Review Conference”. By No Peace without Justice.

STOCKTAKING AT THE REVIEW CONFERENCE: A GOOD START

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POSITIVE COMPLEMENTARITY AND THE LORD’S RESISTANCE ARMY CONFLICT IN NORTHERN UGANDA

“The complementarity principle, recognized as the hallmark of the Rome Statute, is not a new invention, as it has been contemplated for several centuries. The Court is expected to complement and not supplant the prosecution of international crimes by national jurisdiction”. By Benson Chinedu Olugbuo.

VICTIMS’ PARTICIPATION IN COURT PROCEEDING: A MOMENT OF SELF REVELATION

“Victims’ participation in court proceedings is one of the achievements under international criminal justice which is making impact at all levels of different justice mechanisms. Article 68(3) of the Rome Statute provides for victim’s participation in all stages of the proceeding before the Court”. By Chris Ongom.

OPINIONS

AFRICAN CIVIL SOCIETY SHINES AT THE REVIEW CONFERENCE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

“Civil society has become a key driver behind global efforts to end impunity for grave international crimes. African Civil Society Organisations (CSOs) are no exception, having recently spearheaded several well-known initiatives (including strategic litigation) that have resulted in important victories for victims of these serious international crimes” By Jemima Njeri Kariri and Nompumelelo Sibalukhulu.

STRENGTH AFRICAN SUPPORT FOR THE ICC AT THE KAMPALA REVIEW CONFERENCE

“At the Kampala review conference, African governments played an active, positive role. This reflects important support the International Criminal Court (ICC) has on the African continent”. By Elise Keppler.

EXECUTING THE AL BASHIR ARREST WARRANT: A COMBINED OBLIGATION AND DILEMMA FOR AFRICAN STATES

“Following the issuance of the arrest warrant for Sudanese President Omar Al Bashir, tensions developed between the African States and the International Criminal Court (ICC). The Assembly of the African Union (AU) adopted a resolution calling on all African States not to cooperate with the International Criminal Court on the Bashir case”. By Stephen Tumwestigye.

PRESS STATEMENTS

UCICC and HURINET’s voice and positions on a number of events, situations and developments.

FEATURES
Interview with Mr. Ndifuna Mohammed
CEO, HURINET-U and Chair of the Steering Committee, UCICC

What is your view on the outcomes from the review conference? (In particular with regard to the four stock-taking issues: State Cooperation, Complementarity, Peace and Justice and the Impact of the Court on the victims and affected communities)

First and foremost, one needs to understand that we went to the review conference with a lot of expectations regarding the tracks for the conference: amendments and stocktaking.

Therefore one needs to find out what is different now after the review conference. I must out rightly state that it is early days to talk about the impact of the review conference on the International Justice System. Yet still, comments can be made of postures position, perspectives and goings on among the state parties soon after the review conference. After all you can tell on which tree the bird will perch by the tilt of its wings. When it comes to the issue of cooperation, this remains critical as we are now aware of Al- Bashir’s travel to Chad. At the recent concluded AU Summit, the members reiterated their original decision of last year on non-cooperation with the ICC in arresting Al Bashir. They adopted a resolution which calls for the freezing of the arrest warrants of Bashir by the Security Council and called upon Member States to work on amending provisions in the Rome Statute. Therefore, one wonders whether anything has changed fundamentally with states parties in line with co-operation.

Uganda has been in the spotlight over her double standards in failing to execute the arrest warrant for Al Bashir. Of course more other issues are still pending for example with the arrest warrant for Kony. State Cooperation therefore remains an important factor in assessing the success of the court.

On Complementarity, for example Uganda has enacted the International Crimes Act, and there is a proposal for a National Reconciliation Bill and the Transitional Justice Bill, one would imagine that unless there are problems with these Acts and the Bills, Uganda is in line with the principle of complementarity. On the impact of the court on victims and affected communities, we would like to see how the affected communities will be catered for in Uganda under the several economic and social policies like the National Development Plan. When it comes to ratification of amendments, once again we need to lobby for ratification especially for Uganda. It will be important for Uganda to be exemplary and ratify the amendments as it was the host of the review conference.

Did the civil society gain from the review conference? Was the people’s space a success? Did it achieve what it was intended for?

First of all, what did the civil society want to do? They wanted to bring the voices of the affected communities so as to be heard and the situation of the victims of the international crimes was pivotal to the discussion at the review conference. Before the review conference, the civil society (HURINET-U, NPWJ and the UCICC) organised visits of state delegates to the affected communities which helped the delegates to put forward what they had witnessed during the visits during the review conference.

A football match between the victims in the great lakes region and international dignitaries was organised on the eve of the review conference. The match was graced by the UN Secretary General and the President of the Republic of Uganda. In addition, to utilise the opportunity and space given during the review conference, the civil society issued press statements throughout the conference.

Furthermore, the civil society side events acted as a ‘one stop information centre’ for the ICC work and international criminal justice, through documentaries that were shown, books that were
displayed and some given out to the people, dialogues and the press conferences that were organised, a great deal of information was given out to the different stakeholders. To a greater even, the civil society achieved what they set out to do. The plight of the affected communities and the victims was sufficiently discussed and key decisions taken.

**How confident are you in the war crimes division’s ability to deliver justice?**

One looks at many of the dimensions, it could be looked at from a legal framework, human resource or the independence of the court. However, it becomes a problem whether this High Court division which has been attacked on several occasions will be able to do its function.

About the competency of the judges, Uganda has judges with a wealth of experience to carry out the work though one may say that the human resource needs to be a ‘cross-breed’ that is with foreign judges so as to strengthen the court and to avoid issues of bias.

On the legal framework, debts have been on the legal framework in place. Listening to Justice Ogoola, the legal framework is streamlined and there is a proposal to use the Geneva laws and the new International Crimes Acts which clearly, defines the crimes.

However, the other issue that is bound to arise will be with regard to the inconsistence of the laws for example with the recent case **Jowad Kezaala Vs The Attorney General, Constitutional Petition No. 24 of 2010** challenging the International Crimes Act. So the question is what happens in the case of inconsistence.

**What is your view with the way the crime of aggression was dealt with at the review conference?**

The crime of aggression debate became amenable much to global politics with in the UN system. Therefore, what we have on the crime of aggression is a compromised position that leaves much to be discussed.

When all is said and done though, it is a step forward. Remember in 1998 efforts were made to define the crime of aggression, but because consensus could not be reached it had to be deferred until after seven years. Therefore the Review Conference has moved us a step forward by defining the crime of aggression and setting the conditions for exercise of its jurisdiction.

**What is the future of the International Criminal Court and International Criminal Justice in Uganda?**

I think international criminal justice has come a long way. Looking back from the Nuremberg trials, there have been recent developments from having tribunals to having a permanent court. The challenge now is the testing of the new system and what is important is to learn from the past experiences.

It is the task of the International Criminal Court therefore to have a systematic way to ensure that state parties fulfil their obligation as set out in the Rome Statute.

For example members have an obligation to prosecute, surrender or arrest the person involved in any crime under the Rome Statute. Therefore, we need to look at the good, the bad and the ugly because there are lessons to learn from the earlier period.

Uganda being among the 30 African countries that ratified the Rome Statute and the first to refer a case to the Court, it is crucial that she demonstrates unswerving support to the Court and ought to lead the way by taking solid and vivid steps under positive complementarity and by cooperating with the Court.

Uganda has enacted the International Crimes Act and this is important in terms of Uganda’s ability to domesticate the Rome Statute, and established the war crimes division at the High Court to give practical effect to the principle of positive complementarity. There are however challenges that remain namely lack of capacity to investigate and prosecute international crimes, lack of resources and challenge of political interference from the executive. It should be noted that the High Court of the Republic of Uganda has been attacked and besieged twice by security operatives (‘Black Mambas’) so as to force it to deliver a political judgement...
Hope is in the engine that drives human endeavour. The argument on aggression as a crime can be traced way back in 1918. After 20 million people were killed in World War 1, the League of Nations diplomats recognised the need to eliminate war as an instrument of national policy. They advised that future wars of aggression should be punished as an international crime. The common response from powerful states was: ‘The time is not yet ripe’. Another fifty million victims perished in World War in 1945. In response, an international military tribunal was set up in Nuremberg and Tokyo to try the German and Japanese leaders responsible for Crimes against Peace (in the Charter of the International Military Tribunal of Nuremberg crime was referred to as a crime against peace), Crimes against Humanity and War Crimes.

In December 1946, the United Nations affirmed the Nuremberg Principles and judgment. Committees were directed to draft Code of Crimes against the Peace and Security of mankind, including the crime of aggression, and to plan for a permanent international criminal jurisdiction to try offenders. Following the Nuremberg trials, the crime has not been applied by the subsequent international and hybrid criminal tribunals due to contentions by different actors regarding the subject of the exercise of jurisdiction and individual criminal responsibility. Never the less, in the preparations to the establishment of a Permanent Court of International Criminal Justice, the crime of aggression was put into consideration. At the adoption of the Rome Statute of the International Criminal Court, the crime of aggression was engraved among the other international crimes though left in limbo.

The crime of aggression as set out under Article 5 of the Rome Statute was left without a definition, defined elements or conditions under which the Court could exercise jurisdiction. Due to the contentions at that time, states agreed that this crime would next be addressed at the convened Review Conference were a consensus could be reached. In awaiting the Review conference, there was need for early preparations by the preparatory team as to enable a smooth and successful application of this crime without a lot of hustle at the time of the Review Conference.

Thus in 2003, a special working group on the crime of aggression of the Assembly of State Parties also later referred to as “The Princeton Process on the Crime of Aggression,” hosted at Princeton University was set up to prepare proposals for amendments, which if accepted would create mechanisms for the court to have jurisdiction over the crime. Since 2003 to 2009, the SWGCA (Special Working Group on Crime of Aggression) had deliberations on the question of how to define the crime of aggression. The group was further mandated to detail the conditions under which the ICC should be allowed to prosecute this in particular in light of the role and responsibility of the United Nations Security Council for maintenance of international peace and security. Later on during some of these meetings, delegates from ICC state parties, other states, and NGOs were involved in working to create a definition of the crime of aggression under the Rome Statute. By early 2009, set proposals on the crime of aggression were agreed upon by the group leaving particularly open the question relating to the role of the UN Security Council that state parties to the ICC will have to decide at the Review Conference of the Rome Statute of the International Criminal Court in Kampala from 31st May-11th June 2010. In the analyses below, several writers provide their perspective on the crime of aggression and the outcomes of this crime at the Review Conference.
FROM NUREMBERG IN 1946 TO KAMPALA IN 2010:
REFLECTIONS ON THE CRIME OF AGGRESSION

The 12th of June 2010 00:19 at the Kampala Review Conference of the International Criminal Court, marked a new dawn in the history of international criminal justice. State Parties to the International Criminal Court fulfilled a commitment they had made 12 years ago, by amending the Rome Statute to incorporate the definition and elements of Crimes for the Crime of Aggression and to also grant the international criminal Court the jurisdiction to try the Crime of Aggression.

The Crime of Aggression has been on the international agenda since the Nuremberg and Tokyo Military Tribunals following end of World War II in 1945. It was referred to as “The Crime against Peace”, at the time, and one that “comprehends all lesser Crimes.” Despite its recognition as the supreme international Crime, the Crime of Aggression has never been tried by any international criminal tribunal since Nuremberg and the Tokyo military tribunals.

The Nuremberg Charter, provided for individual criminal responsibility for the Crime against peace which was defined as the “planning, preparation, initiation or waging of a war of Aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

The General Assembly of the United Nations passed a Resolution in which it reaffirmed the definition of Aggression contained in the Nuremberg charter. The International Law Commission was later to begin the process of developing an International Criminal Code that would be enforced by a permanent international criminal court.

By Kihika Sarah, FIDA-Uganda

To initiate a war of Aggression, therefore, is not only an international Crime; it is the supreme international Crime differing only from other war Crimes in that it contains within itself the accumulated evil of the whole.1

The allied forces entered into an agreement which, established the International Military Tribunals, under the Charter of the International Military Tribunal of Nuremberg (The Nuremberg Charter), for the just and prompt trial and punishment of the major war criminals of the European Axis.6

The Rome Statute of the International Criminal Court, Article 5(2).

1 Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 3rd September and 1st October, 1946.
2 The Rome Statute of the International Criminal Court, Article 5(2).
4 Judgment of the International Military Tribunal at Nuremberg 1946.
5 Allied forces consisted of Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.
6 Charter of the International Military Tribunal , Article 1.
7 Id Article 6
8 Affirmation of the principles of international Law recognised by the Charter of the Nuremberg Tribunal. UN GAOR 1st 55th plenn. Meeting.
This process however, had to be suspended on several occasions due to the difficulties in defining aggression. In 1974, following a number of unsuccessful efforts, a series of compromises and exculpating were made by State Parties. The United Nations General Assembly by consensus adopted Resolution 3314 which recognized aggression as the most serious and dangerous form of the illegal use of force and a crime against international peace in violation of Articles 2(4) and (5) of the UN Charter.

The definition of aggression as provided for in Resolution 3314 of 1974 has been recognised as part of international customary law by the International Court of Justice in determining whether there had been unlawful use of force by states. This was in the case of **Nicaragua v. The United States** and in the case of **The Democratic Republic of Congo v. Uganda**.

In both cases the Court held that there had been unlawful use of force.

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2. Ibid. Definition.
In 1996, following years of deliberations the International Law Commission (ILC) produced a draft Code of Crimes against the Peace.\textsuperscript{15} In its commentary on the draft International Criminal Court Statute,\textsuperscript{16} the ILC noted that the Crime of Aggression was a customary law crime whose exact contours should be defined by practice.\textsuperscript{17}

It also noted that the definition of aggression contained in Resolution 3314 was designed as a guide for the Security Council, not as a definition for judicial use and should instead serve as a guide for the development of a definition of the Crime of Aggression. The ILC concluded by noting that it would be retrogressive to exclude individual’s criminal responsibility for Aggression 50 years after Nuremberg.\textsuperscript{18} The ILC’s conclusion regarding the definition of the Crime of Aggression was rejected by some leading international jurists who argued that the Crime of Aggression was already part of international customary law subject to universal jurisdiction with no room for derogation.\textsuperscript{19}

**Crime of Aggression at the Rome Conference, 1998**

In 1998 state representatives from all over the world assembled in Rome and overwhelmingly voted for the Rome Statute which led to the creation of the much desired and longed for International Criminal Court (ICC). The Rome Statute of the International criminal Court grants the ICC, subject matter jurisdiction with respect to “the most serious crimes of international concern which include genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.”\textsuperscript{20}

Whereas delegates and State representatives at the Rome conference were able to agree on the definitions for the Crime of Aggression, War Crimes and Crimes against humanity; they were unable to agree on a definition for the Crime of Aggression.

There were three contentious issues that emerged in the negotiations on the Crime of Aggression. The first issue was how to define the Crime of Aggression the second issue was whether the International Criminal Court could exercise jurisdiction over the Crime of Aggression without the involvement of the Security Council, and the third issue was what role the United Nations would have in determining aggression issue.\textsuperscript{21}

Some of the weaker and less privileged States, which needed a shield from the Aggression of powerful states, wanted the ICC to have and exercise jurisdiction over the Crime of Aggression without the involvement of the Security Council.\textsuperscript{22}

Other states most of which were Permanent Members of the Security Council, preferred not to include the Crime of Aggression in the Rome Statute arguing that it was a political issue which could only be determined by the Security Council and not by a judicial organ such as the ICC.\textsuperscript{23}

They further argued that Article 39 of the UN Charter gave the Security Council the exclusive mandate of determining an act of State Aggression.\textsuperscript{24}


\textsuperscript{17} 51st General Assembly, A/51/10, p. 15 (1996).

\textsuperscript{18} Id at 72, Art 20 (b) U.N Doc A/51/10 (1994).

\textsuperscript{19} Supra note 10.


\textsuperscript{22} Benjamin Ferencz Ending Impunity for the Crime of Aggression. Case Western Journal of International Law, Fall 2009, Vol. 41, Nos. 2 and 3.

\textsuperscript{23} Supra Note 23.

\textsuperscript{24} Supra note 24.
In a last minute compromise following days of tense negotiations in Rome, State representatives agreed to include the Crime of Aggression in the Rome Statute, but deferred the adoption of its definition, elements of the Crime and the exercise of jurisdiction by the Court to a future date after the Assembly of State Parties adopts a provision in accordance with Article 121 and 123 defining the Crime and setting out the conditions under which the Court shall exercise its jurisdiction with respect to this Crime.

To this end the Conference passed a Resolution which extended the mandate of the preparatory commission for the International Criminal Court to include preparing provisions pertaining to the definition of the Crime of Aggression, the elements of the Crime and circumstances under which the Court would exercise jurisdiction over the Crime of Aggression. Such proposals were to be submitted to the Assembly of State Parties. In execution of its extended mandate, the preparatory commission established a Special Working Group on the Crime of Aggression whose key responsibility was to receive and examine proposals on the Crime of Aggression.

After a decade of negotiation evolving drafts provisions the Special Working Group on the Crime of Aggression announced in February 2009 that it had reached an agreement on the definition of the Crime of Aggression. It was anticipated that this definition and elements of the Crime of Aggression would be adopted at the Review conference in Kampala.

**Crime of Aggression at the Kampala Review Conference**

The atmosphere in Munyonyo Kampala became tense when the debates on the draft provisions on the Crime of Aggression commenced. State representatives tried to navigate through their various geopolitical interests in order to reach a much needed consensus. State representatives from countries such as Brazil, Argentina and Switzerland spent sleepless nights as they redrafted provisions in order to find a common position between the State Parties.

**Definition and elements of the Crime of Aggression**

The definition and elements of the Crime of Aggression were adopted under Article 8(bis) with substantial agreement. They were a result of a decade’s negotiations by the preparatory commission of the Rome Statute and subsequently by the Special Working Group on the Crime of Aggression that was established in Rome. The definition contains two parts, the first part sets out the individual criminal responsibility for the Crime of Aggression and the second part defines an Act of Aggression by a state. In the latter case the amendment incorporates the elements of the definition of Aggression as contained in Resolution 3314 of 1974. Article 8(1)(bis), defines the Crime of Aggression as “… [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of Aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations” The foregoing definition specifically targets individuals who have a leadership role and have the capacity to exercise control over the state military and has the power to direct the military invasion of another state.

Article 8(2)(bis) elaborates acts that would qualify as an act of Aggression as described in Article 3 of Resolution 3314.

**Conditions for the exercise of jurisdiction.**

The conditions for the exercise of jurisdiction over the Crime of Aggression commonly referred to as the “Jurisdictional filters” were extremely contentious and a subject of heated debates at the Review Conference. Once again the disagreements in Rome had resurfaced in Kampala and created factions. On the one hand we had

25 Article 5 (1) of the Rome Statute of the ICC.
26 Rome Statute of the International Criminal Court Article 5(2).
the privileged States comprising mostly of the permanent members of the Security Council who argued for the primacy of the Security Council in determining an act of Aggression.

On the other hand, State Parties from Africa, the Non Aligned Movement and the Group of Latin American and Caribbean States who wanted the Pre-Trial Chamber of the International Criminal Court seized with jurisdiction to authorise the prosecutor to investigate a situation of aggression triggered by either state referral or exercise by the prosecutor of his/her Proprio Motu powers.

Following a series of negotiations, evolving drafts, and distribution of numerous “non papers”, States Parties agreed on a series of compromises that led to the adoption of the amendments by a consensus decision. This was a welcome and almost unexpected development given that there were already talks of deferring the debate on Aggression to the December meeting of Assembly of State Parties. The amendments contained two parallel provisions which vested both the Security Council and Pre-trial chamber with the mandate to serve as jurisdictional filters before the Court could exercise jurisdiction over the Crime of Aggression.

Under Article 15 (ter) the Court may exercise jurisdiction as referral by the Security Council, in accordance with article 13(b) of the Rome Statute regardless of whether the State concerned has accepted the Court’s jurisdiction or is a non State Party to the Rome Statute.

In a parallel Article 15(bis) The Prosecutor may only proceed with an investigation with respect to the Crime of Aggression in accordance with Article 13(a) by State referral; or 13(c) by his or her own exercise of Proprio Motu powers, after ascertaining that the Security Council has not made a determination of an Act of Aggression by a State concerned. If the Security Council has made such determination then the prosecutor may proceed with the investigation.31

However if the Security Council has not made such a determination, the prosecutor is required to notify the Secretary General of the United Nations of the situation before the Court. Where the Security Council fails to make determination, six months following the notification, the prosecutor may proceed with the investigation upon obtaining authorisation from the fully constituted pre-trial division of the Court.32 However the security may stop the investigation of a case on Aggression in accordance with the Article 16 of the Rome Statute and the powers vested in it under Chapter VII of the UN Charter.

The bid to obtain a consensus for the inclusion of the pre-trial division jurisdiction filter resulted in severe restrictions on the Courts jurisdictional mandate over the Crime of Aggression. For instance the Court cannot exercise jurisdiction against the nationals of Non-states Parties, or where the Crimes are committed in the territory of a Non-state Party.33

The most significant controversial of the restrictions is the “opt out clause.”34 State Parties may isolate their nationals from the jurisdiction of the Court by making a formal declaration, when ratifying the Aggression amendment, opting out of the Court’s jurisdiction over the Crime of Aggression. The opt out clause in my opinion makes little sense; it is illogical for a State Party to ratify the amendment only to make a reservation on the provision that is fundamental to the amendment.

This would defeat the purpose and object of the amendment and the State Party would rather not have ratified the amendment. However the ratification may serve a different purpose all together, as already mentioned above, the amendments are to come into effect following the ratification by 30 State Parties. An interesting scenario that could occur is where the amendments have come into effect but the Court cannot exercise jurisdiction because the State Parties have made opt out clauses. The Observer states like the United States of America played a significant role in the formulation of Article 15 (ter) they ensured that their national and armed forces were shielded from prosecution for the Crime of Aggression.

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31 Para 6 & 7 of the new art.15(bis) of the Rome Statute of the ICC.
32 Para 8 of the new art.15(bis) of the Rome Statute of the ICC.
33 Para 5 of the new art.15(bis) of the Rome Statute of the ICC.
34 Para 4 in the new art.15(bis) of the Rome Statute of the ICC.
Entry into force

The issue of when the amendments would enter into force for State Parties was also a subject of controversy. Some states argued that the amendments should come into force for States under Article 121 (5) which means that they would enter into force for a state one year after a state had ratified them. Other States argued that they should all come into effect in accordance with Article 121(4) which would bring the amendments into force for all countries upon ratification of the amendments by seven eights of the State Parties. Following a series of debates, non papers and corridor negotiations, it was agreed that the amendments would all come into force in accordance with Article 121(5).

This implies that States that ratify the amendment would only be able to invoke the referral options contained in Article 13(a) and (c) one year after the entry into force of the amendments for that State Party.

Activation of the court’s Jurisdiction

A last minute compromise to defer the activation of the jurisdiction of the Court to sometime after January 2017, led to the adoption of the amendments on the Crime of Aggression by consensus. The deferral in activating the Court’s jurisdiction persuaded State Parties that are intransigent on the exclusive role of the Security Council35 to acquiesce consensus decision.

If the latter State Parties had insisted on a vote, the adoption of the amendments would have been defeated since there was no quorum. According to the amendments, the Court’s jurisdiction over the Crime of Aggression would be activated after January 2017 following a two thirds majority decision by the Assembly of State Parties one year after the amendments have been ratified by 30 State Parties. This temporal trigger of the Court’s jurisdiction applies to both the Security Council36 and Pre-trial division37 jurisdictional filters. To mitigate the effects of the deferral in the activation of the Court’s jurisdiction, the decision of the Assembly of State Parties in 2017 can be made at a session of the Assembly of State conference and not at a Review Conference.

Additionally the substantive provisions of the amendments such as the definition and elements of the Crime of Aggression will not be open for further debate.

CONCLUSION

The inclusion of the Crime of Aggression in the Rome Statute is a giant leap in international criminal law and towards the promotion of the Human Right to peace. Although there are some rough edges to be ironed out before the 2017 meeting of the Assembly of State Parties, the historical significance of the achievements cannot be understated.

The accomplishment in Kampala would not have been possible without the hard work of international jurists like Ben Ferencz and polished diplomats like Ambassador Christian Wenaweser of Lichtenstein who is also the President of the Assembly of State Parties and Prince Zeid of Jordan both of whom have chaired the Special Working Group and were the architects of the negotiations on the Crime of Aggression. The decision in Kampala is significant in revitalizing the Court and renewing commitment to international criminal justice in the wake of various hurdles that the Court has faced in its infant years.

The delay in entry into force of the amendments should not diminish the magnitude achievement in Kampala. It is important to note that most treaties and amendments to treaties take a significant period of time before they come into force. As we await the 30 ratifications necessary for the entry into force of the Aggression amendments, an unequivocal message to powerful individuals who are prone to waging war; that this is an era of accountability and not impunity.

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35France and United Kingdom.
36 Para 3 of the new Article 15 (ter).
37 Para 3 of the New Article 15 (bis).
Kampala, Uganda played host to a historic gathering of state delegates, academics, civil society groups and victims for the first Review Conference of the ICC Rome Statute. This meeting was envisaged by the Rome Statute to be held 7 years after the Statute came into force. The Review Conference was meant to be a time of reflection and introspection on the effectiveness of the Court and provide a forum primarily for the determination, adoption and exercise of the crime of aggression.

The Conference spurred candid discussions on various aspects of the ICC including the debate on peace and justice and the impact of the Court on victim communities. All the divergent groups made constructive contributions and criticism. However, the tone of the Conference changed on the commencement of deliberations on the crime of aggression.

The main questions under analysis involved agreeing on the institution(s) that would be responsible for invoking the crime of aggression and whether there should be a filter mechanism to determine whether a crime of aggression has occurred. A crime of aggression is defined as the planning, preparation, initiation or execution of an act of aggression which is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State.

This debate was characterised by political and economic manipulation by state delegates including countries that have not ratified the Rome Statute of which some have long term vested interests in the UN Security Council. At the conclusion of the debate on the crime of aggression it was decided that if the ICC Prosecutor finds that there is a reasonable basis to proceed with an investigation or receives a referral from a state party on the crime of aggression, the Prosecutor cannot proceed with the case unless the UN Security Council has made a determination as to whether a crime of aggression has occurred.

This therefore handicaps the Prosecutor to the extent that it cannot offer any guarantees to victim States that are party to the Rome Statute that prosecution would be possible after acts of aggression. Secondly, if the UN Security Council determines that a crime of aggression has not occurred, then the Prosecutor cannot proceed with the case. This provision effectively strips the Court of independent deliberation and consideration as to whether a crime of aggression has occurred. In our minds, this is political interference with a judicial process which even at municipal level is considered as inappropriate hence the principle of separation of powers.
We have created a monstrosity of a crime which plays into the arena of international politics and subsequently potentially protects aggressor states. There is a serious and logical potential conflict of interest where an aggressor state is a member of the UN Security Council as there is no complementary check and balance. How can it be expected that a State that will potentially stand accused of the crime of aggression will make an unbiased determination that a crime of aggression has occurred irrespective of compelling evidence presented before it in its capacity as a Security Council member during the UN Security Council determination.

At the very least, the resolution adopted in Kampala should have provided that where the crime of aggression is suspected to have been perpetrated and that state is a member of the UN Security Council at the time of determination whether the crime of aggression has occurred, that the concerned State cannot exercise its right to vote at the UN Security Council on that issue. The obligation to ensure the maintenance of international peace and security does not lie exclusively with the UN Security Council, and therefore by adopting a resolution where the jurisdiction of the crime of aggression is subject to the UN Security Council at the time of determination whether the crime of aggression has occurred, that the concerned State cannot exercise its right to vote at the UN Security Council on that issue.

The world and especially states and civil society that support zero tolerance for impunity, have been watching the events in Kampala with the hope that deliberations in Kampala would provide a historical moment by positively advancing international human rights law by advancing principles that are at the very foundation of the Rome Statute. We can categorically assert that the resultant definition of the crime of aggression that was developed at the end of the review conference failed this test.

At the eighth session of the Assembly of State Parties, discussed the issues that were to be dealt with at the Review Conference and these include among them the four stock taking issues. In addition the Assembly of State Parties appointed country focal points to help in the preparations of the stock taking exercise. These issues include: cooperation (Costa Rica and Ireland), complementarity (Denmark and South Africa), peace and justice (Argentina, Democratic Republic of Congo and Switzerland) and the impact of the Rome Statute on the victims and the affected communities (Chile and Finland). Cooperation focused on how to improve state cooperation. Complementarity focused on the practical challenges and the need to increase domestic legal reform and technical assistance. Peace and justice session tried to identify efforts on how to achieve international justice in areas affected by hostilities. Lastly on impact of Rome Statute on victims and communities focused on how the ICC can enhance its impact on the affected communities. The discussion on stock taking was in the form of panel discussions and as a result, many issues arose. The following are the views of different authors on the stock taking issues:
STOCK TAKING EVENTS

A group photo with the president of the Assembly of States Parties to the ICC at the International Symposium on Stock Taking.

Facilitators at the International Symposia on Stocktaking the Process of International Justice, organized by HURINET-U and the UCICC.

The UN Secretary General, H. E. Ban Ki Moon is welcomed by the CSO team to the Peoples’ Space.

The Advocacy officer (Left) Chairperson HURINET-U (2nd from left), The Chief Executive officer (2nd from Right) and the Coordinator UCICC (Right) Pose for a picture with the Former UN secretary General, Kofi Annan (Central).

Staff of HURINET-U, NPWJ, and the UCICC pose for a photo with State delegates and staff of the Uganda Human Rights Commission (UHRC), Soroti Regional office.

Staff of CICC pose for a photo with Former UN Secretary General, Kofi Annan during at the Review Conference.
No Peace Without Justice (NPWJ) was very pleased with the results of the ICC Review Conference in Kampala, in particular the impact of the activities it undertook in partnership with the Uganda Coalition on the ICC (UCICC) and the Human Rights Network-Uganda (HURINET-U) on the Review Conference. Our preparations began in January 2010, when we held the first in a series of 5 visits by groups of delegates, from countries that are members of the ICC, to travel to Uganda for trips of up to a week. In Uganda, State delegates met with the key stakeholders involved in the fight against impunity in the country: communities affected by the work of the Court, victims of crimes under its jurisdiction, civil society and national and local authorities. The visits enhanced the delegates’ understanding of the impact of the ICC in one of its situation countries and helped to spread understanding of the ICC and the Review Conference in Uganda.
We were also proud to partner with the African Youth Initiative Network (AYINET) and Uganda Victims’ Foundation (UVF), who organized War Victims Day on 30 May 2010 – a day of activities designed to raise awareness of the concerns of war victims on the eve of the Review Conference. The highlight of the Day was the Football Game in which victims of conflicts in CAR, DRC, Kenya, Sudan and Uganda played alongside H.E. President Museveni of Uganda, H.E. the Secretary General of the United Nations, BAN Ki-Moon and H.E. Ambassador Christian Wenaweser, President of the Assembly of States Parties. The game was a great success – around 20,000 people attended, including thousands who came by bus from Northern Uganda, and it was broadcasted live across the North and East.

During the Conference, NPWJ was honored to partner with UCICC and HURINET in the People’s Space, a forum for civil society participation at the Conference venue. NPWJ organised several events at the People’s Space, including a presentation of the conflict mapping work of our Afghan partners, the Afghanistan Independent Human Rights Commission; a panel discussion on the definition of gender in the Rome Statute; and the launch of a book on the role of non-judicial accountability mechanisms in addressing impunity—‘Closing the Gap’.

Our activities before and during the Review Conference aimed in large part to contribute to the stocktaking exercise carried out by the States Parties at the Conference itself. NPWJ, HURINET and UCICC welcomed the momentum generated by the stocktaking exercise on a range of issues that are not usually given a high level of attention at regular meetings of the Assembly of States Parties. We also greatly appreciate the openness of the States who served as ‘Focal Points’ on the various stocktaking themes—cooperation, complementarity, the impact of the Rome Statute system on victims and affected communities; and peace and justice—to engage actively with civil society throughout the preparation of their topics. Several Focal Points took part in the visits to Uganda in advance of the Conference to experience the reality of their topics on the ground in a situation country.
Another welcome aspect of the stocktaking exercise was the positive attitude adopted by States to ensure that stocktaking was not only a worthwhile exercise in itself, but that it would also result in a stronger Rome Statute system. The specific focus on victims and affected communities has helped to raise awareness, understanding and appreciation of victims’ concerns among ICC States Parties. Many States renewed their commitment to strengthening the rights of victims and several concrete pledges were made to make contributions to the ICC Trust Fund for Victims. The discussion also identified concrete challenges that face the ICC in its interaction with victims and ways in which these can be addressed, such as by strengthening outreach and the field presence of the ICC. During the stocktaking discussions, States also reaffirmed the primary responsibility of national governments to investigate and prosecute the most serious crimes, with the ICC standing as a Court of last resort. They emphasised the importance of better cooperation among States to arrest suspects for whom warrants of arrest are outstanding and bring them to the Court to face the charges against them. The importance of advancing justice and peace together as two essential parts of a lasting solution to conflict was also highlighted during the debates.

It is important now that the States that are members of the ICC build on the progress they made in Kampala. The stocktaking discussions and process identified many challenges that continue to be faced by the ICC system: How can the ICC and its State Parties really ensure that victims and communities are kept informed about the ICC and can apply to take part in its proceedings if they wish? What can be done to make sure that governments fulfil their responsibilities to investigate the most serious crimes under international law that take place in their territory? What should ICC States Parties do to improve the way they work together to make sure that ICC arrest warrants are executed? The stocktaking exercise began to examine these questions but more work needs to be done, both by the ICC and its State Parties. We will continue to work with our partners in Uganda and elsewhere to ensure that these questions are addressed so that the promise of justice can be realised for victims of the most serious crimes.
On July 17 1998, the International Criminal Court’s (ICC or Court) treaty was adopted in a United Nations (UN) sponsored plenipotentiary conference in Rome. The Rome Statute entered into force on 1 July 2002, which resulted in the establishment of the ICC. The Court has the jurisdiction to hold accountable those responsible for the crimes of genocide, war crimes, crimes against humanity and the crime of aggression. There are currently five situations before the Court, and all of them are from Africa, while there are other countries currently under analysis by the ICC Prosecutor. As at August 2010, 112 States Parties have ratified the Rome Statute, out of which 31 are from the African continent. The ICC is a novel justice institution in the sense that it operates on the principle of complementarity that makes it the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, unlike the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). The ad hoc tribunals have primacy over national jurisdictions on the prosecution of international crimes. This paper aims to argue that the ICC should proactively engage in positive complementarity in its activities including situation countries like Uganda where the government recently established a war crimes chamber. The paper begins with discussions on the principle of complementarity and different views that exist on the issue in part two and three. The meaning of positive complementarity and the outcome of the Review Conference (RC) are discussed in part four and five. Part six brings into context the northern Uganda conflict and in conclusion, I argue for the involvement of the ICC in promoting positive complementarity in Uganda.

39 Art 126 (1) of the Rome Statute provides that, “[t]his Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.”
40 The Review Conference of the Rome Statute held in Kampala, Uganda from 31st May -11 June 2010 adopted a definition of the crime of aggression. However, the ICC will have jurisdiction over the crime subject to a decision to be taken after 1st January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. See Assembly of States Parties Resolution RC/Res.6 adopted at the 13th plenary meeting, on 11th June 2010, by consensus available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed 11th August 2010).
44 See Security Council Resolution 827 of 25th May 1993 establishing the International Criminal Tribunal for the former Yugoslavia
46 See Security Council Resolution 1315 of 14th August 2000 establishing the Special Court for Sierra Leone.
The complementarity principle, recognized as the hallmark of the Rome Statute, is not a new invention, as it has been contemplated for several centuries. The Court is expected to complement and not supplant the prosecution of international crimes by national jurisdictions. The principle is based not only on respect for the primary jurisdiction of States, but also on practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence, witnesses, and resources to carry out proceedings. Before the adoption of the Rome Statute in 1998, some international treaties had indirectly made reference to the principle of complementarity by encouraging prosecution at national levels. Among these treaties are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the International Convention on the Suppression of the Punishment of the Crime of Apartheid; and the Convention on the Prevention and Punishment of the Crime of Genocide. The current provision in the Rome Statute on the principle of complementarity has its origin in the 1994 International Law Commission (ILC) Draft Statute generally seen as the cornerstone for the construction of the notion of complementarity as currently provided in the ICC Statute.

The 1994 ILC Draft provides in its preamble that the “[ICC] is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.” The ILC Draft also proposed circumstances under which an ICC investigation or prosecution may be inadmissible.

The complementary principle went through several changes during the Preparatory Committee (PrepCom) meetings convened by the UN. It should, however, be noted that the most thorny issues surrounding the complementarity principle were agreed upon before the Rome Conference. Accordingly to John Holmes, “[t]he uniqueness of the legislative history concerning the complementarity regime is that most of the issues were largely resolved in the Preparatory Committee prior to the Rome Conference.” This shows that states were actually interested in how the ICC would affect their sovereignty and also wanted to ensure that the ICC would not take over genuine efforts by national judicial institutions to make their citizens accountable for crimes committed in their jurisdiction.

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52 According to the ILC, the Draft Statute for an International Criminal Court was adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two), [Hereinafter 1994 ILC Draft].
54 See para 3 of the 1994 ILC Draft.
55 See Art 35 of the 1994 ILC Draft.
56 The Ad hoc Committee that drafted the ILC Draft in 1994 was replaced by the Preparatory Committee in 1996.
Divergent and convergent views on complementarity

The complementarity regime ensures that States have jurisdiction over the crimes that are committed by their nationals or on their territories. However, there is currently a controversy as to whether the complementarity test in Article 17 of the Rome Statute is a two or three prong test. It has been argued by Darryl Robinson that the ICC has jurisdiction over a case when there are no national proceedings on a case or a state is ‘unwilling or unable genuinely’ to prosecute their nationals. This argument is further reinforced by the OTP where it supports the three-prong test by stating that “[t]here is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action.”

In Prosecutor v Lubanga Dyilo, the Pre-Trial Chamber stated that because the Democratic Republic of Congo (DRC) was not acting in relation to the specific charge of conscription of child soldiers, it was not exercising its jurisdiction for the purpose of complementarity and therefore held that the case was admissible. This decision and its attendant interpretation of Article 17 of the Rome Statute adding a third prong test of ‘inactivity’ beyond ‘unwilling and unable genuinely’ has been criticized by scholars. The criticisms notwithstanding, the decisions of the Pre-Trial Chambers regarding the three prong test have recently been confirmed by the Appeals Chamber stating that ‘inactivity’ is a basis for the intervention of the Court in the interpretation of Article 17 of the Rome Statute.

What is positive complementarity?

Positive complementarity has been defined as a managerial concept that organizes the relationship between the Court and domestic jurisdictions on the basis of three cardinal principles: the idea of a shared burden of responsibility, the management of effective investigations and prosecutions, and the two pronged nature of the cooperation regime. William Burke-White defines it as the process by which the Office of the Prosecutor (OTP) of the ICC “would actively encourage investigation and prosecution of international crimes within the Court’s jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.” On the other hand, the Assembly of States Parties (ASP) report of the bureau on complementarity refers to positive complementarity as:

All activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

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Uganda’s President, Yoweri Museveni (C) is helped to his feet by UN Secretary General, Ban Ki-moon (L) after he fell while participating on May 30, 2010 in a football match at Mandela national stadium in Kampala.
This definition limiting the role of the ICC as an institution has been criticized as the intention is for States to reduce the amount of money spent on the ICC.\textsuperscript{67} This is because the ASP had initially envisaged a role for the ICC in the application of positive complementarity in its activities.\textsuperscript{68} In furtherance of the principle of positive complementarity, the OTP in September 2003 issued its policy guidelines, in which it stated that “the effectiveness of the ICC should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.”\textsuperscript{69}

This is generally seen as a core activity of the ICC to ensure that states are able to hold their citizens accountable and to offer help and assistance where necessary to achieve the desired goal of complementarity and prosecutions at the national level. The ICC sees its engagement in the fight against impunity as not only the prosecution of mass atrocities but also encouraging and facilitating national judicial institutions to act effectively in cases of crimes within the jurisdiction of the ICC. This was clearly stated by the OTP that “a major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes.”\textsuperscript{70}

In its latest Prosecutorial Strategy (2009 - 2012), the OTP will operate on four fundamental principles: (i) positive complementarity; (ii) focused investigations and prosecutions; (iii) addressing the interests of victims; and (iv) maximizing the impact of the Office’s work. Regarding positive complementarity, the OTP intends to “encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance.”\textsuperscript{71}

Encouraging and facilitating states to carry out their responsibilities not only entails prosecution, but also involves other proactive activities involving both the ICC and national judicial institutions aimed at oiling the wheel of complementarity for the smooth running of the international justice project.\textsuperscript{72} The ICC stands to gain more when it partners with States Parties in the prevention and prosecution of crimes as it is obvious that it would have to ride on the back of states to achieve its prosecutorial policies. This is because the ICC does not have a police force or military firepower to ensure the arrest and surrender of those it has indicted for genocide, war crimes or crimes against humanity and would rely on states to achieve its objectives.\textsuperscript{74} Positive complementarity implies that the Court should be in the forefront of contributing to the development of effective national justice systems capable of trying those who commit mass atrocities at the national level.\textsuperscript{73}

Article 93 (10) of the Rome Statute provides that “the Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State”. It is argued that this provision and others like Articles 15, 17, 18, 53 and 88 of the Rome Statute recognize the role of the ICC in promoting positive complementarity. The reasons for positive complementarity cannot be far-fetched. The ICC can only try a few of those who bear responsibility for crimes of international concern. If there are no effective national judicial mechanisms, there would be serious issues of impunity gap which may likely undermine any success recorded by the ICC. National judicial institutions also offer the best places to try these crimes, as they would serve as a deterrent to others and give victims opportunity to participate and closely follow the proceedings.


\textsuperscript{68} Emphasis added

\textsuperscript{70} OTP (note 23 above).


The Review Conference and positive complementarity

The Review Conference (RC) of the ICC, which took place from May 31–June 11 2010 in Kampala, Uganda, offered an opportunity for participants and those interested in international justice generally to review the activities of the ICC since 2002 and chart a way forward for future engagements of the Court.

The official RC was divided into two major parts. The stocktaking issues involving: cooperation, complementarity, peace and justice and the impact of the Rome Statute on victims and affected communities. The other part was the adoption of the definition of the crime of aggression and the adoption of the definition of communities. The other part was called on States Parties to give effect to the complementarity principle by urgently adopting ICC implementing legislation. At its seventh plenary meeting, held on 3 June 2010, the RC conducted a stocktaking exercise on the issue of complementarity where several participants made interventions on their experiences. During the 9th plenary meeting on 8 June 2010, a resolution was adopted in which the Court, States Parties and other stakeholders, including international organizations and civil society where called to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of concern to the international community.

Prior to the commencement of the RC, CSOs had convened an international symposium on the ICC stocktaking process from 27–28 May 2010 in Kampala. The NGOs issued a communiqué recalling that the jurisdiction of the ICC is complementary to national jurisdiction under the Rome Statute and that States Parties have the primary responsibility to investigate and prosecute crimes of international concern. The communiqué further called on States Parties to give effect to the complementarity principle by urgently adopting ICC implementing legislation. At its seventh plenary meeting, held on 3 June 2010, the RC conducted a stocktaking exercise on the issue of complementarity where several participants made interventions on their experiences. During the 9th plenary meeting on 8 June 2010, a resolution was adopted in which the Court, States Parties and other stakeholders, including international organizations and civil society where called to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of concern to the international community.

The Lord’s Resistance Army and the ICC

The northern Uganda conflict is one of the longest running conflicts in East Africa and has been on for the past two decades. The Lord’s Resistance Army (LRA) has its origins from the Holy Spirit Movement led by Alice Auma Lakwena that was a combination of forces allied against the National Resistance Movement (NRM) of President Museveni. Alice promised her soldiers powers of invincibility if they obeyed her spiritual rules. However, the firepower of the Uganda Peoples’ Defense Force (UPDF) defeated them at a battle near Kampala in 1987. Alice fled to Kenya and Joseph Kony who is said to be related to Alice took over the remaining soldiers and transformed it into the LRA. Though some authors have claimed that the LRA has no official political agenda in its war with the government of Uganda (GoU), it has succeeded in bringing the economic fortunes of northern Uganda and environs to its knees. The LRA has

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76 See (note 3 above).
77 The RC amended Article 8 to include the prohibition of “employing poison or poisoned weapons; asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” in any conduct that took the place in the context of and was associated with armed conflict not of an international character. See Resolution RC/Res.5 Adopted at the 12th plenary meeting, on 10th June 2010, by consensus available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf (11 August 2010).
78 The RC retained Article 124 and decided to review its provisions during the fourteenth session of ASP. See Resolution RC/Res.4 Adopted at the 11th plenary meeting, on 10th June 2010, by consensus available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf (accessed 11th August 2010).
79 http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf (accessed 11th August 2010). For example, Human Rights Network of Uganda set up a Peoples’ Space at the conference centre where NGO events were organised throughout the duration of the RC.
for over two decades attacked civilians and cultural values of the Acholis and other ethnicities in northern Uganda by killing and maiming innocent citizens, raping and abducting children and turning them into sex-slaves and killing machines resulting in ‘victim-perpetrator’ identities for innocent children abducted by the LRA and trained for its onslaught against the GoU and inhabitants of northern Uganda. The LRA was alleged to operate from Sudan and there was strong allegation that the Sudanese government was supporting the LRA. The Sudanese government also accused the GoU of supporting the Sudan Peoples’ Liberation Army/Movement (SPLA/M).

There have been several processes aimed at bringing to an end conflicts in northern Uganda. The GoU through the NRM had promulgated an Amnesty Statute in 1987 targeting armed rebellions against the government. In 1998 the government introduced the Amnesty Bill of 1998. The Amnesty Bill was criticized by several people including the Acholi Religious Leaders Peace Initiative (ARLPI) who presented a memo to the government calling for unconditional amnesty to all combatants who agreed to lay down their arms and embrace peace. The Amnesty Act passed in 2000 applied to conflicts that commenced from 26 January 1986 and also had a life span of six months which could be extended by the Minister of Internal Affairs under statutory notice.

The GoU on 16 December 2003 referred the situation concerning the LRA to the Prosecutor of the ICC. There were criticisms about the referral to the extent that the culpability of the GoU in the abuses in northern Uganda was not mentioned and the ICC was urged to investigate all sides in the conflict. The prosecutor subsequently announced that the ICC would investigate all parties in the northern Uganda conflict.

Opposition also swirled up against the referral from northern Ugandans who saw the ICC as an obstruction toward peace and reconciliation. Despite several pleas and threats from those in charge of the peace negotiations, the prosecutor went ahead and charged the top leadership of the LRA with several crimes under the Rome Statute and requested warrants of arrest. The Pre-Trial Chamber II judges agreed with him and issued warrants of arrest against top commanders of the LRA.
The referral put the LRA in the spotlight and in a difficult position which made them agree to peace negotiations with the GoU. In 2006, the LRA and GoU embarked on a peace negotiation brokered by the vice president of Government of Southern Sudan (GoSS), Dr Riek Machar. According to the International Crisis Group “[t]he Juba process was initially hailed as historic for good reasons. Started in June 2006, it produced five signed protocols in 21 months, designed to conclude 22 years of conflict and guarantee the disarmament and reintegration of one of the worst human rights abusing insurgencies ever.”

Between June 2006 and July 2008 the LRA and the GoU agreed on the five main items of the peace process agenda:

1. comprehensive solutions to the conflict, including special attention to the economic recovery of the north, positions for northerners in the government and a fund to pay reparations to conflict victims;
2. accountability and reconciliation, including mechanisms for creation of a special division of the High Court to try the most serious crimes and promotion of truth telling and traditional justice mechanisms;
3. a permanent cessation of hostilities agreement;
4. disarmament, demobilisation and reintegration (DDR) principles for processing and resettling former combatants in Uganda; and
5. agreements on implementation and monitoring mechanisms, requiring the government, after the [Final Peace Agreement] is signed and during a transitional period in which the LRA is to fully assemble, to ask the UN Security Council to adopt a resolution deferring all investigation and prosecution of LRA leaders by the International Criminal Court (ICC) for up to a year.

The GoU and the LRA later signed the Annexure on Accountability and Reconciliation which enabled GoU to establish the War Crimes Division (WCD) of the Uganda High Court. However, despite assurances about his safety and the need to conclude the negotiations by signing the final peace agreement, Joseph Kony did not turn up on 10 April 2008 as earlier anticipated. He cited ICC indictment as reason for his failure to conclude the peace deal. Despite this apparent drawback, GoU proceeded to put into place mechanisms aimed at ensuring that the national judicial system is able to deal with the northern Uganda conflict by the setting up of the WCD. On 10 March 2010, the Uganda parliament passed the Rome Statute of the International Criminal Court 2006 Bill into law thereby incorporating provisions of the Rome Statute into Uganda’s domestic legal system.

President Museveni subsequently signed the bill into law shortly before the commencement of the Review Conference though the law is yet to be published in the official gazette as at August 2010. Furthermore, the GoU recently announced that it would commence the trial of Thomas Kwoyelo - a former LRA commander, presently in custody in Gulu before the WCD. The knotty issue that is yet to be resolved is whether the WCD is an answer to Uganda’s initial inability to hold
members of the LRA accountable and whether the GoU can use the International Criminal Court Act to try individuals for crimes committed in northern Uganda in the WCD in contravention of the constitutional provision of non-retroactivity.107 It has been argued that if a credible war crimes court is established in Uganda, the ICC may decide to declare the LRA case inadmissible.108 By creating the WCD, the GoU is taking steps that the ICC was created to promote through the process of positive complementarity.109 It is therefore argued that the ICC should support the effective running of the WCD thereby assisting in the development of a strong national judicial system in Uganda.

Another question that needs to be addressed is whether the Uganda government can possibly prosecute indicted members of the LRA with the current state of the criminal justice system and if the prosecution would not be seen as shielding members of the LRA from the ICC. With the referral of the conflict to the ICC, Uganda automatically submitted its jurisdiction over the LRA to the ICC but under the Rome Statute can bring an application to suspend the activities of the Court based on challenges to the jurisdiction of the Court or the admissibility of a case.110 Of course it would be the decision of the ICC judges to weigh if there are reasonable grounds to believe that the GoU can hold the LRA accountable for the crimes committed in northern Uganda.

Conclusion

The ratification and domestic implementation of the Rome Statute and the setting up of the WCD of the Uganda High Court by the GoU should be seen as a part of fulfilling its mandate under the complementarity principle and should be supported by the international community. Under positive complementarity, the OTP can help the WCD by sharing evidence it has on the LRA to help in the prosecution of those not indicted by the ICC. There have been arguments that the ICC should adopt a hybrid model of adjudication where its judges and prosecutors collaborate with those at the national level in the adjudication of international crimes.111 While there may be practical challenges associated with this proposition in relation to admissibility issues before the ICC, I suggest that the WCD should have international judges who should not necessarily be ICC judges. Judges of the WCD can also benefit from the experiences of the ICC as visiting professionals at the seat of the Court in The Hague.112 It is further argued that the Uganda criminal justice system should make provisions for victims’ participation in its proceedings and accord them the same rights as provided under the Rome Statute. The Registrar of the ICC could be supportive in this regard by offering expertise on the experiences of the ICC in relation to the protection of witnesses and their participation in proceedings before the ICC.113

In conclusion, it is our contention that positive complementarity offers the Court the opportunity to play its role as a Court of last resort by enabling national governments to hold accountable those responsible for crimes under the Rome Statute. It is hoped that events that will unfold after the RC will likely justify these arguments in relation to the activities of the Court.

107 Article 28 (7) of the Uganda Constitution 1999 provides that “[n]o 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”.
110 See Articles 17 and 19 of the Rome Statute.
111 See J Turner (note 38 above) at 2.
112 The ICC currently offers Visiting Professional placements to candidates who have extensive academic and/or professional expertise in an area of work relevant to or related to the Court. See The ICC “Visiting Professional Placements” available online at http://www.icc-cpi.int/Menus/ICC/Recruitment/Internships+and+Visiting+professionals/The+Internships+and+Visiting+Professionals+Programme.htm (accessed 11th August 2010).
Mass Graves at Obalanga in Amuria district, a reminder of the horror that the people of Northern and Eastern Uganda went through during the 5th delegate visit.

Delegates giving a public lecture to students at the faculty of Law, Makerere University.

State delegates attending a dialogue for the civil society at Imperial Royale Hotel during the 3rd Visit.

Writings on the wall of Freedom at the people’s space during the review conference and in the centre is the UN secretary General’s message and CEO of HURINET-U.

Delegates and the community in AMULIA District during the 5th delegate visit.
Victims’ participation in court proceedings is one of the achievements under international criminal justice which is making impact at all levels of different justice mechanism. Article 68(3) of the Rome Statute provides for victim’s participation in all stages of the proceeding before the Court. Through this, the victims will able to give their views and concerns in a manner that is not “prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.” Victims’ participation is one aspect in the international justice system which has attracted very strong and positive support from victims’ community especially in Uganda. It has sent message to them that through participation they are valued and that their input in the trials of perpetrators of crimes committed against them matters.

The step taken by Uganda government pledging to develop legislation on victims and witness protection which is in direct support to adoption and domestication of the Rome Statute is what gives victims and civil society working with victims a big encouragement in an effort of ending impunity.

Trust Fund for Victims has had its own impact in the lives of the victims, since 2007 up to date. Some victims have benefitted in a number of ways like medical rehabilitation involving specialists in various medical practices. In Uganda, they have carried out plastic surgery on victims of bomb splinters, bullets remains, burns from fire and reconstruction is provided for them. There are different civil societies benefiting from Trust Fund and providing other services like economic empowerment, psychosocial support and material support. Here it sends strong message that justice means more than just prosecution and includes services which help to ease victim’s lives.

The pre-review and review conference of the Rome Statute left a good mark with a number of commitments by different states’ parties to continue giving voluntary contribution towards Trust Fund for Victims. This is good news among the civil society organizations and victims community.

Victims’ community and the civil society fraternity in Uganda also recognized the benefits victims already got from Trust Fund. The approach has been so helpful to this victim’s community because even if there is no arrest and trial going on in Uganda, the interim reparation through Trust Fund for Victims has helped in starting the healing process of the community albeit slowly but with impact.
Civil society has become a key driver behind global efforts to end impunity for grave international crimes. African Civil Society Organisations (CSOs) are no exception, having recently spearheaded several well-known initiatives (including strategic litigation) that have resulted in important victories for victims of these serious international crimes.

This important role was recognized by the United Nations Secretary General Ban-Ki Moon during the opening of the 8th Assembly of the States Parties (ASP) to the International Criminal Court (ICC) held in November 2009 where he announced that the ICC Review Conference would be open to civil society and victims’ organisations. He reiterated the important role played by CSOs in the establishment of the Court in Rome in 1998 and called on civil society from all corners of the globe to participate actively in the Review Conference.

Civil society heeded this call, and with support from the Coalition for the International Criminal Court (CICC), approximately 600 CSOs gathered in Kampala to host official side events and participate in conference sessions on the future of the ICC. At the conference, the Secretary General again lauded the role of civil society when he noted that the existence of the ICC and the staging of the Review Conference was made possible ‘because of the immense contribution of civil society’. The former UN Secretary General Kofi Annan, focusing his remarks more on Africa and the ICC, lauded the active participation of civil society in the creation of the ICC and emphatically stated that the future of the Court depends, in part, on the will and support of civil society. In addition, both Judge Song, President of the ICC and Luis Moreno-Ocampo, the Court’s Prosecutor, acknowledged civil society’s role.

In preparing for the Review Conference, African civil society issued a declaration, which was signed by over 152 organisations, providing insights on issues of importance for the Review Conference. It also encouraged governments to make concrete commitments in support of the ICC and in particular, to make pledges at the Conference and to support the ICC towards the establishment of a liaison office in Addis Ababa. The declaration also emphasized the importance of enacting implementation legislation for the states. 100 pledges were made at the Conference, including from non-state parties.
To intensify its campaign, civil society converged in Kampala a week before the start of the Review Conference for the International Symposium on Stocktaking Processes. This Symposium aimed to enhance Civil Society’s participation in the Review Conference. The symposium, organized by the Ugandan Coalition on the ICC together with the Human Rights Network, Uganda (HURINET-Uganda) and the International Commission of Jurists, culminated in a communiqué, on the work of the ICC, which was officially handed over to the President of the Assembly of State Parties (ASP).

Moreover, various NGOs hosted official side events that highlighted civil society’s work and engagement within the Rome Statute system and continued deliberations on the stock taking topics: impact of the ICC on victims, peace and justice, complementarity and cooperation with the Court.

Despite this good progress and notable impact in Kampala, several challenges lie ahead for civil society. The task now is to ensure that governments stick to the commitments made at the Review Conference (including those contained in their official pledges) and their ongoing obligations as state parties to the Rome Statute. A particular, and new challenge, stems from the decision on the crime of aggression which will require further debate, dialogue and interrogation in order to ensure it does not create further unnecessary challenges for the Court.

African CSO also need to expand and strengthen established networks and continue to build on the relations and interactions with governments. It is important that they continue to lobby and support their governments to work constructively with the ICC when appropriate, and to strengthen domestic capacity to investigate and prosecute grave international crimes. The ICC is a court of last resort, which only has the mandate and capacity to prosecute selected high-profile offenders of international crimes. In reality, the burden of delivering justice to victims of these crimes rests on domestic courts. In Africa, civil society needs to remind governments of their responsibility in this regard, and offer technical and capacity building support where appropriate.
By Elise Keppler, senior counsel, International Justice Program at Human Rights Watch

STRONG AFRICAN SUPPORT FOR THE ICC AT THE KAMPALA REVIEW CONFERENCE

At the Kampala review conference, African governments played an active, positive role. This reflects important support the International Criminal Court (ICC) has on the African continent, and helps serve as a vital counterweight to attacks on the court advanced by a small group of African leaders largely from non-states parties since the ICC issued an arrest warrant for Sudanese president Omar al-Bashir in March 2009.

During the opening days of the review conference, high-level African officials – including two presidents, several ministers, and a number of attorneys-general and deputy ministers – were present. Indeed, the level of representation at the conference from Africa surpassed representation by any other region. While the location of the conference undoubtedly facilitated such high-level representation, attendance by many senior representatives from African governments sent an important message of support.

African governments also made many positive interventions during the conference. Eighteen African ICC states parties took the floor during the conference’s general debate (out of a total of seventy-eight ICC states parties) and expressed clear backing for the ICC. For example, a number of states – including Nigeria, Botswana, Namibia, Kenya, Sierra Leone, South Africa, and Tanzania – expressly cited the importance of cooperation with the court during their interventions. Botswana and Mauritius went even further, articulating a particular commitment to defend the court against attempts to undermine it. A few of the most salient remarks during the general debate include:

- “To eliminate the culture of impunity, and guarantee a culture of accountability, justice and the rule of law, it is imperative that States Parties, mindful of their obligations under the Statute, fully support the Court to bring justice to those victims.” Jakaya Kikwete, President, United Republic of Tanzania

- “The action triggered by the ICC Prosecutor against the authors of the crimes perpetrated in CAR between 2002 and 2003 was greeted with immense relief by the CAR population and especially by the victims... Central African Republic seizes the opportunity offered by this Review Conference of the Rome Statute to reiterate its support for the International Criminal Court and faith in its mission.” Laurent Ngon Baba, Minister of Justice, Central African Republic (translation from French by Human Rights Watch)

- “Impunity must not be tolerated and there should be no hiding place for criminals. Nigeria... pledges to do everything possible to ensure full implementation of the Statute in Nigeria.” Mohammed Bello Adoke, Attorney General and Minister of Justice, Federal Republic of Nigeria

- “South Africa would like to express its ongoing commitment to the fight against impunity and our continuing support to
The engagement of African governments at the ICC review conference is to be commended and presents a starkly different picture of African sentiment on the ICC than rhetoric by some African leaders suggests. Going forward, the challenge is to ensure that the views and commitments expressed at the review conference continue beyond this event. This includes not only implementation of pledges, but consistent backing of the ICC in relevant fora outside the Assembly of States Parties.

Defense of the ICC remains especially important at the African Union, where attacks on the court continue and overcoming misconceptions will undoubtedly be difficult. This was reflected in the most recent AU July 2010 summit decision on the ICC, which not only reiterates a call for non-cooperation in the arrest of President Al-Bashir, but “rejects for now” the establishment of an ICC liaison office. African governments have played a vital role in the establishment and functioning of the ICC to date. Firm resolve to protect and promote the court’s mission will be key to its ability to effectively implement its mandate for the benefit of victims in Africa and elsewhere.
EXECUTING THE AL BASHIR ARREST WARRANT: A COMBINED OBLIGATION AND DILEMMA FOR AFRICAN STATES

Following the issuance of the arrest warrant for Sudanese President Omar Al Bashir, tensions developed between the African States and the International Criminal Court (ICC). The Assembly of the African Union (AU) adopted a resolution calling on all African States not to cooperate with the International Criminal Court on the Bashir case. In the resolution the African Union member states noted:

“The African Union decides that in view of the fact that a request of the African Union to defer Al Bashir’s indictment has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Omar Al Bashir to the ICC”115

The above decision that was reached at by the African Union at Sitre was further buttressed by the decision of the African Union at Kampala.116 The decision, read from the outset means that the African Union called upon states to take steps not to arrest Bashir and not to allow the ICC to conduct investigations on their territory relating to the Bashir case. The resolution came at a time when the UN Security Council had failed to take up the African request for deferral of the case under Art. 16 of the Rome Statute. The AU therefore sought to use mechanisms within the Rome Statute in order to halt the Bashir case. First, there was the attempt to use an Art. 16 deferral, when this failed the AU sought to pursue Article 98 of the Rome Statute that deals with customary international Law obligations.117

This article will analyse the validity of the arguments raised by the African Union particularly focusing on whether Article 98 can be raised as a bar to the arrest and surrender of President Al Bashir to the ICC considering the existence of Article 27 of the Statute that disregards the immunities of heads of states. The subsequent part of this Article analyses the obligations that Sudan, African State Parties and Non States Parties have under the Statute. In the conclusion I point out the practical ways that can be pursued to hold President Al Bashir accountable for crimes he allegedly committed.

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115 Id
116 The decision at Kampala is actually a more radical expression of the Sitre Decision. The resolution makes reference to the conduct of the Prosecutor, and rejects the proposal to set up an ICC Liaison office at Addis Ababa.
117 See, William Schabas, ‘AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT’
Going against the tide? Head of State immunity and the relevance of Article 98

The AU invokes the use of Article 98 in its decision at Sitre. It is however noteworthy that several writers who have discussed the Al Bashir arrest Warrant have always treaded the line of Article 27 of the Statute. Article 27 of the ICC Statute disregards the official capacity of government officials by stating:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

It has been argued that Art. 27 is not simply an isolated treaty provision, but it instead exemplifies a larger trend in international criminal law. This development in international law, considers the rejection of personal immunity by the ICC as a valid customary exception to the ordinary immunity rule established under customary law and applicable with regard to international criminal tribunals. Consequently, Art. 27 is simply a reflection of a broader growing rule of customary international law, which is applicable to states including those from Africa, whether they have ratified the Statute or not. The Pre-Trial Chamber while making the decision to issue an arrest warrant for President Bashir, considered that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.

The Pre-Trial Chamber considered that Art. 27 of the ICC which provides that the Statute applies equally to all persons without distinction based on official capacity and that immunities which may attach to official capacity under national or international law shall not bar the Court from exercising jurisdiction is applicable with regard to President Bashir. The Pre Trial Chamber also noted that since the Security Council had referred the Darfur situation to the Court, it has accepted that the investigation and prosecution shall take place in accordance with the framework set out in the Statute.

This distinctive importance of Article 27 is however watered down by Article 98(1) of the Rome Statute. Article 98(1) reads;

‘The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.’

118 Von Michiel Blommestein, Dr. Cedric Ryngaert ‘Exploring the Obligations for States to Act upon the ICC’s Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity’ Available at http://webcache.googleusercontent.com/search?q=cache:HZLYfXKQuwEJ:www.zis-online.com/dat/artikel/2010_6_461.pdf+%E2%80%9C+Ca+valid+customary+exception+to+the+ordinary+immunity+rule+established+under+customary+law+and+not+applicable+with+regard+to+international+criminal+tribunals%E2%80%9D&cd=7&hl=en&ct=clnk&gl=ug (Last Accessed August 21st 2010)

119 Rome Statute of the International Criminal Court.

120 Para 51 of the decision in Congo v Belgium recognizes that immunities may not apply with regard to certain International Tribunals.

121 Para 41 of the decision to refer the

122 Id
This leads to the question whether Art. 98 does indeed permit African State parties to the Statute to refuse cooperation on the basis of the immunity of a Head of State. Until recently (emphasis mine), customary international law provided that heads of state enjoy immunity *ratione personae*, that is to say that while they are in office heads of state cannot be prosecuted or arrested abroad for crimes they have allegedly committed, whether these crimes were committed before or during their taking office.\(^{123}\)

This position was upheld by the International Court of Justice in the *Congo v Belgium*\(^{124}\) case; while rejecting the Belgian argument that procedural immunity could not apply in the case of war crimes or crimes against humanity, the ICJ emphasized the importance of this customary International Law rule.

The above customary rule is based on the fundamental principles of State sovereignty and sovereign equality and on extensive State practice.\(^{125}\) The concept of immunity for governmental representatives has its foundation in the doctrine that, by means of their domestic jurisdictions, foreign authorities should not be able to hinder the official performance of those acting for or on behalf of another State.\(^{126}\) It is on this basis that the African States could have jumped to the conclusion that they could shield President Bashir under Article 98(1) thereby assuming that, as the incumbent President of Sudan, Al-Bashir holds absolute personal immunity, which protects him from any possible domestic proceedings by foreign authorities, irrespective of his conduct or whereabouts. This becomes more apparent considering that most countries in Africa still recognize President Bashir as the *Dejure* and *Defacto* President of the Republic of Sudan.

The dilemma for the AU however lies in the fact that the customary status of immunity to which Heads of State are entitled, have, throughout the last century, been replaced by the expansive movement of global criminal justice and the fight against impunity.\(^{127}\)

The increasing push for the attribution of international criminal responsibility for gross violations of human rights and humanitarian law has led to a strong erosion of these traditional immunities. It can therefore be safely stated that the growing norm of customary international law that is aimed at ensuring the protection and defense of human rights and the fight against impunity has over the last century overtaken the erstwhile norm of immunities that was recognized states.

Despite the fact several scholars have pointed out the loophole that exists within Article 98 of the Statute, the ICC has failed to make a decision with regard to the Article and the apparent conflict between the two obligations. This compounds the dilemmas that African States are going through to execute the Al Bashir arrest Warrant.

Until the court comes out to clarify these obligations, the requested African State party would have the obligation under the Rome Statute to cooperate but an obligation under general international law (or another treaty) to accord immunity and therefore not arrest.\(^{128}\) It will therefore be the obligation of the requested State simply has to choose which it will obey. In this case, African States have chosen the immunity obligation under general international law with the risk that they act in violation of their obligations under the Rome Statute especially those that are State parties to the Statute.

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\(^{123}\) Lucas Buzzard, “Holding the arsonists foot to the fire?-The legality and enforceability of the ICCS arrest warrant for Sudanese President Al Bashir” Vol 24 No 5 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 2009.

\(^{124}\) ICJ Reports 2002 General Lists No 121.

\(^{125}\) Cherif Bassiouni, ‘INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE’, Transnational publishers, Inc. Ardsley, New York 126Id.


\(^{127}\) Steffen Wirth, ‘IMMUNITIES, RELATED PROBLEMS AND ARTICLE 98 OF THE ROME STATUTE.’ Criminal Law Forum, Vol 14, 429
Who is obliged to arrest Al Bashir?

Having pointed out the quandary that African States have found themselves in, it is important to point out their obligations under the Rome Statute of the ICC. Pursuant to the issuance of an arrest warrant for President Al Bashir, the Pre-Trial Chamber of the ICC directed the ICC Registry to transmit a request for arrest and surrender of Bashir to (i) all States Parties to the ICC Statute and (ii) all United Nations Security Council members that are not States Parties to the Statute.\(^{129}\)

The question that lingers is whether all states are obliged under International Law to arrest President Bashir. To analyse this; one would need to look at the same from 3 angels; (The obligation of Sudan, States Parties to the Rome Statute and Non states parties to the ICC Statute.)

Sudan

Sudan, not having ratified the Rome Statute, remains a non-State Party to the Court and is thus not conventionally bound to the Statute’s cooperation regime in the way that States Parties are. However, a Security Council referral under Art. 13 (b) of the Statute may oblige UN Member States to cooperate with the Court, as the relevant Security Council resolution is to be adopted under Chapter VII of the UN Charter. Indeed the UNSC in its decision to refer the situation in Darfur to the International Criminal Court, called upon Sudan to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor thereby expanding the international duty to cooperate beyond the States Parties alone.\(^{130}\)

It should be noted that with regard to Sudan specifically, the Pre Trial Chamber when considering whether or not to issue a request for Al-Bashir’s arrest and surrender, did not have to give consideration to Art. 98 (1) and the possible procedural impediment it would create. In the sense of Art. 98 (1), Sudan would have to be regarded as both the requested State, as well as the third State. Seeing how a State cannot be considered as holding international obligations of immunity towards itself, Art. 98 (1) is not applicable to Sudan and does not have a bearing on its obligations of cooperation vis-à-vis the Court.\(^{131}\)

In particular, the question may be asked whether the resolution places Sudan fully within the cooperation regime of the Court, set out under Part 9 of the Statute, or whether it imposes a disparate and stricter regime, analogous to the model used under the ad hoc Tribunals. Neither the resolution’s text, nor the record of Security Council meeting 5158 that led up to the adoption of Resolution 1593 provides a concrete answer.\(^{132}\)

Nonetheless, as far as arrest and surrender is concerned, it is fairly uncontroversial to claim that once a request to this effect has been issued by the Court, Sudan has the strict obligation to arrest any person, including Al-Bashir, and surrender him to the Court. Also, as has been noted above, Sudan has an ancillary duty to explicitly waive any immunity held by its nationals, including Al-Bashir, vis-à-vis the Court as well as with regard to those acts by States Parties that can be carried out to facilitate the proceedings of the Court. The UNSC in reference to Sudan, uses very definitive language, Clause 2 of Resolution 1593 uses the word ‘urges’ for other UN States that are not parties to the Statute; while for Sudan, the Security Council “decides” that the Government of Sudan … shall cooperate fully with and provide any necessary assistance to the Court but only “urges all States to cooperate fully.”\(^{133}\)

It is, however, one thing to state that Sudan is required to waive all immunities, but it is another to state that Sudan has already waived those immunities. In fact, until the Government of Sudan has actually officially waived the immunity of Al-Bashir, this restriction on the Court remains fully in place. As long as Sudan refuses to act on its obligation to waive Al-Bashir’s immunity, the Court is not given the authority to simply ignore the immunity from prosecution that Al-Bashir continues to hold. Instead, the Court will have to call upon the enforcement measure that is laid down in Art. 87 (7) of the Statute, which allows it, after having made a finding of non-cooperation, to refer the matter to the Security Council. In turn, the Council can bring additional pressure to bear on Sudan, pushing for a waiver of immunity.\(^{134}\)

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\(^{130}\) Resolution 1593 (2005) Adopted by Vote of 11 in Favour To None Against, with 4 Abstentions (Algeria, Brazil, China, United States)

\(^{131}\) Available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm (Last Accessed August 23 2010.)

\(^{132}\) Akande Supra Note 19.

\(^{133}\) Id

\(^{134}\) Akande Resolution 1593.
Thirty African States are signatories to the Rome Statute. Many of them also subscribed to the decision at Sitre. Only two state parties; South Africa and Botswana came up with an unequivocal decision not to support the decision at Sitre. Other countries state party to the Rome Statute continue to tread a cautious and often confusing path. Countries like Uganda have sometimes given conflicting positions from different Ministers. It is noteworthy that the Rome Statute is very definitive on the state cooperation regime. The negotiation that led to the creation and inclusion of state co-operation in the Rome Statute was shaped by two conflicting ideologies; that is whether the ICC should establish a ‘vertical’ or ‘horizontal’ paradigm with regard to the states, elaborating on the nature of these paradigms, Prof Antonio Cassese notes that the former concerns relations between two sovereign states and is therefore a reflection of the principle of equality of states, it gives rise to a horizontal relationship, the latter instead concerns the relation between a state and an international judicial body endowed with binding authority, the state cooperation regime in the Rome Statute is therefore the expression of a vertical relationship.

Parties to the ICC Statute have an obligation to cooperate with the Court and to comply with requests for arrest and surrender. The broad basis of co-operation under the statute that exists under part 9 is summarised in Article 86 which sets out the general obligation to co-operate fully with the court in the investigation and prosecution of crimes within the jurisdiction of the court and ensure that national law allows all specified forms of co-operation, it has however been argued that though the provisions set out the general law, they should just serve as general interpretive principles for the specific obligations set out in the statute.

Despite the existence of Article 98 of the Statute, the obligation to cooperate for State Parties, supersedes such customary international obligations that exist under the Statute. The obligation to cooperate for African States is also derived under Constitutive Act of the African Union that obliges States to take steps to fight impunity. Also states in Africa that are signatories to the Great Lakes protocols have obligations to either try or extradite persons accused of war crimes.

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142 Claus Kress, Supra Note 31.
It is an undisputed principle of international law that treaties are binding in principle on states parties and they do not create rights or obligations for non-state parties. Article 34 of the Vienna convention on the law of treaties also provides that a treaty does not create obligations for a third state without its consent, however co-operation with the ICC and in particular by non state parties may if analysed in terms of the authority of the United Nations Security Council (UNSC), the jurisdiction of the ICC or the general principles of international law, be an obligation of a mandatory nature in certain specific cases.

It is posited that when the UNSC refers a case to the court for investigation and prosecution, it involves the UN member states, in other words it involves the obligation to co-operate of both state parties and states not party to the Rome statute, and by virtue of article 25 of the UN charter, all decisions made by the UNSC are binding upon all UN member states.

Article 87(5) is a provision on co-operation by non-party states with the ICC. It stipulates that the Court ‘may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.’ If a state enters into such an agreement it is bound to comply with requests for assistance, if the UN therefore refers a situation to the ICC, threatening international peace and security to the ICC, the SC may use its powers under chapter VII of the UN charter to ensure that non state parties co-operate with requests for assistance like it was in the Darfur situation.

Having established that obligation, it is important to discover whether Article 98 remains an obstacle to the cooperation regime under the Rome Statute. Article 103 of the UN Charter provides that Charter obligations prevail over obligations under other international agreements it refers to Article 103 vis-à-vis Sudan’s obligation to co-operate.

In its resolution to refer the situation to the ICC, the UNSC makes no reference to Article 103 with regard to non state parties. It could therefore be comfortably noted that non State parties owe obligations to Sudan and therefore respect the immunities of President Bashir, however these states are legally bound to accept that the Court has jurisdiction in the circumstance in which the Security Council has conferred jurisdiction. It will therefore be important for the court or the UNSC to clarify the relationship between Article 98 of the Rome Statute and Articles 103 and 25 of the UN Charter with regard to Non State Parties.

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Conclusion

One would conclude that, as a result of the Security Council referral, Al-Bashir falls within the jurisdiction of the ICC and that the Court, under Art. 27 of the Statute read together with relevant customary international law, has the authority to prosecute him as a sitting Head of State without immunity serving as an impediment. However, before the Court can do so, it must, naturally, first manage to obtain custody over Al-Bashir. As a judicial institution without a private police force or any inherent enforcement powers for this, the ICC is fully dependent on the cooperation of national authorities. This is further buttressed by the fact that Art. 27 has intrinsic legal force. As noted above, a new and emerging international criminal law rule a customary exception to the rule of absolute personal immunity has arisen. This Exception would allow any State official to be prosecuted before international criminal courts, irrespective of any immunity that may be attached to his office or position.

With regard to States Parties, these cannot rely on Art. 98 (1) because of the superseding obligations under the Rome Statute and for African States, there are other obligations under the Constitutive Act of the African Union and the Great Lakes Protocols. It is also noteworthy that the Rome Statute system provides definitive provisions that would be resorted to in case a State is in a dilemma of Article 98. It is submitted that a State Party could do this by consulting with the Court without delay in order to resolve the matter in accordance with Art.

Despite the general trend towards the attenuation of immunities in international Criminal Law, the immunities of Heads of States will continue to play an important role in the proceedings of the court. The manner in which the International Community handles the Al Bashir situation will determine how the two important customary international law rules; Head of State immunity and the evolving trend towards the fight against impunity and the respect for human rights law, will play out. African States have taken a position that reinforces the fact that though they recognize the obligations under International Law, they cannot ignore the political ramifications that underlie international law especially with regard to respect for Head of state immunity.

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144 Paulo Gaeta, ‘Official Capacities and Immunities’
145 Id
146 Akande above.
PRESS STATEMENTS
UCICC AND HURINET’S VOICE AND POSITIONS ON A
NUMBER OF EVENTS, SITUATIONS AND DEVELOPMENTS.

INTERNATIONAL JUSTICE DAY-17th JULY 2010: WORLD CELEBRATES 12TH ANNIVERSARY
OF NEW GLOBAL SYSTEM TO END IMPUNITY

On IJD, HURINET-U and UCICC reaffirm the statement made by His Excellency Ban Ki-Moon during the Review Conference of the International Criminal Court that:- “The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new age, AN AGE OF ACCOUNTABILITY”.

At the recent ICC Review Conference in Kampala, Uganda the Assembly of States Parties, the body that governs the Court, passed the Kampala Declaration RC/Decl.1 acknowledging July 17th as International Justice Day. This is in honour of adoption of the Rome Statute, the founding treaty of the International Criminal Court, which was agreed upon on the 17th day of July 1998. To date there are 111 States Parties that have ratified the treaty. It is on this day that we celebrate international criminal justice and the achievements of the International Criminal Court.

Human Rights Network Uganda (HURINET-U) and Uganda Coalition for the International Criminal Court (UCICC) in this light join the whole world in commemorating the World Day for International Justice. On this day we call for end of impunity and encourage the embracing of this new age of accountability. Remembering the just concluded Review Conference of the ICC, we call upon States Parties to the Rome statute to operationalise and honour the declarations, pledges and commitments made during the conference. Referring to Review Conference Decl. 2 on state cooperation, we stress the importance of effective and comprehensive cooperation by States. We are therefore disturbed by the recent media1 reports indicating, that the Government of Uganda has invited President Omar Al-Bashir to attend the African Union summit slated for 19th to 27th July 2010 in Kampala. HURINET-U and the UCICC would like to remind the Government of Uganda that she has obligations as:
1) A member of the UN Security Council (which Security Council passed a resolution referring the situation in Darfur, Sudan to the ICC);
2) A State party to the Rome Statute (Is presently seeking cooperation from other States to apprehend the indicted LRA Commanders);
3) A State Party that had the mandate from 110 other States to host the just concluded 2010 ICC Review Conference; and
4) A State party that re-affirmed the Integrity of the Rome Statute at the AU Addis Ababa Meeting of the 30 African members of the Court between the 8th-9th June 2009, to, unequivocally disassociate herself with the resolution not to cooperate with ICC and arrest and surrender Omal Al Bashir upon citing him on the Ugandan territory.

Moreover, the Pre-trial chamber 1 of the International Criminal Court on 12th July, 2010 issued a second arrest warrant against President Omar Al Bahir of the Republic of Sudan on Charges of genocide. Therefore on the occasion of the International Justice Day, we wish to urge the Government of Uganda to emulate the government of Botswana for its firm position on its commitment to the ICC, and the state parties to fully cooperate with the Court. It is only then that we can genuinely say the era of impunity is over.

FACTS AND FICTION: WHAT WAS MISSED BY THE AU SUMMIT, JULY 2010

The 15th Ordinary Summit of the African Union (AU) was held in Kampala in July 2010. In addition to the agenda theme items of maternal, infant and child health and development in Africa addressed, there was the request made by a number of Civil Society Organizations with
support of a number of African states parties to the International Criminal Court (ICC) to open up an ICC liaison office at the AU head quarters in Addis Ababa Ethiopia which was rejected ‘for now’ by the AU member states. This request followed a similar proposal at the Review Conference of the ICC in June 2010 in Kampala.

This request to open up an ICC liaison office was presented considering the strained relationship between the Court and the African Union. Central to this is the arrest warrants issued against President Omar Al Bashir of Sudan on charges of crimes against humanity and war crimes in 2009 and crimes of genocide in 2010.

Following these arrest warrants, there have been a number of undermining statements directed towards the ICC and her officers by different African leaders not in support of these warrants. They have persistently called upon the ICC to withdraw the said warrants and further requesting that the United Nations Security Council intervene to enable the suspension of the arrest warrant, so that the AU can investigate the matter and come up with its own independent findings.

The above is based on the following arguments:
1. That the ICC has no jurisdiction over the situation in Sudan since Sudan is not a state party to the Rome Statute of the ICC.
2. That the information at hand accusing the Sudanese president Omar Al Bashir of the said crimes is not sufficient and hence does not satisfy the heads of states.

3. That issuing a warrant of arrest against a sitting President infringes on the principle of state sovereignty; and,
4. That the ICC practices double standards by concentrating on the African continent alone, ignoring other places where similar crimes have been committed.

On these grounds the Human Rights Network Uganda (HURINET-U) and the Uganda Coalition on the International Criminal Court (UCICC) takes the initiative to clarify on the operation of the ICC in relation to the African situation and in particular on the subject of President Omar Al Bashir that:-

1. On the issue of the Court Jurisdiction over the matter in Sudan

a) Jurisdiction *ratione temporis* -Article 11, Rome Statute 2002

The ICC has jurisdiction only with respect to crimes of genocide, crimes against humanity and war crimes committed after 1st July 2002, after entry into force of the Rome Statute, and for states that have become party to it. Currently there are 111 states that have ratified the statute, thirty (30) of whom are from the African continent.

b) Exercise of Jurisdiction -Article 13, Rome Statute 2002

The UNSC by resolution referred the situation in Darfur-Sudan in March 2005, to the ICC requesting the prosecutor of the ICC to investigate following an international outcry on the atrocities being committed against the people of Darfur. Consequent to the investigations, in May 2007, the Pre Trial chamber 1 of the ICC issued an arrest warrant for then Sudanese Humanitarian Affairs Minister Ahmad Mohammad Harun and the alleged Janjaweed militia leader Ali Mohammad Ali Abdu-Al- Rahman who where identified as key suspects and accused of war crimes and crimes against humanity. In March 2009, the Pre Trial Chamber again issued a warrant of arrest against President Omar Al Bashir.

The relationship between the UN and ICC has been created and defined under the Rome Statute and a subsequent agreement as directed by the Rome Statute.

It follows from this relationship established and, acting under Chapter VII of the UN Charter that resolution 1593 was passed by the UNSC in March 2005 to refer the situation in Darfur-Sudan to the International Criminal Court for investigation, there by placing Sudan under the jurisdiction of the ICC.

2. On the issue that there is insufficient evidence against president Omar Al Bashir by the ICC

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arrest warrants against President Omar Hassan Ahmad Al Bashir for war crimes and crimes against humanity. On 12th July 2010, the Pre-trial Chamber 1 issued a second arrest warrant against President Bashir on charges of genocide.

The commencement of the three trials awaits the surrender of/by the suspects who will be given the chance to defend themselves at trial as due court process requires. This is based on the fundamental principle of law that one is innocent until pronounced guilty by a court of competent jurisdiction.

3. On the defense of principle of State sovereignty

It is true that Sudan is a sovereign state as recognized by international law. However, international law also recognizes the peremptory norm—jus cogens as a fundamental principle from which no derogation is permitted. The effect of this is that they cannot be violated by any state “through international treaties or local or special customs or even general customary rules not endowed with the same normative force.” It has been generally accepted that crimes under the Rome Statute are inter alia considered to be of a jus cogens nature.

4. On the issue that the ICC is focusing on Africa alone

The argument that ICC only focuses its work on Africa alone is a misconception considering that three of the situations before the ICC were referred to the court by States’ Parties themselves. There are five of Africa’s situations before the ICC and these were referred to the court as follows:

(a) Republic of Uganda—This was a referral made by the President of the Republic of Uganda His Excellency President Yoweri Kaguta Museveni in December 2003 after his decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the ICC.

(b) Democratic Republic of Congo—This was referred by the President of the Democratic Republic of Congo (DRC) in a signed letter to the Prosecutor of the ICC, Luis Moreno Ocampo referring to him to the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1st July 2002.

(c) Central African Republic—The referral of the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1st July 2002, was made in a letter to the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, on behalf of the government of the Central African Republic.

(d) Republic of Sudan—Resolution 1593 of 2005 by the UNSC to refer situation of Darfur-Sudan since 1st July, 2002 to the prosecutor of the ICC.

(e) Republic of Kenya—This was done on the Prosecutor’s own motion requesting the Pre-Trial Chamber II (PTC) to begin an investigation into acts constituting crimes against humanity in the Republic of Kenya. This process is still on going.

Notably, there are currently situations under analysis by the ICC as confirmed by the ICC prosecutor and they include Georgia, Colombia, and Afghanistan, countries that are not in Africa.

Save for the above, HURINET-U and The UCICC would like to state and remind African States—governments that while in vehement support for President Omar Al Bashir, consideration should also be geared towards the aspirations and hopes of the people of Darfur and millions of Africans who have suffered decades of violence through abuse of power with impunity.

HURINET and the UCICC therefore call upon the member states to the ICC not to shy away from their obligations to the ICC and cooperate by apprehending the perpetrators and handing them over for trial. We call upon the African Union to soon reconsider her decision to halt the opening of an ICC liaison office at Addis Ababa-Ethiopia and grant the request made. We also further call for more African States to ratify the Rome Statute and cooperate with the ICC because together we can say no to the old era of impunity and say yes to the new age of accountability.
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