

The Implementation of International Criminal Law in Malawi

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<i>Table of Contents</i>	ii
<i>Key Words</i>	vii
<i>Abstract</i>	viii
<i>Dedication</i>	ix
<i>Declaration</i>	x
<i>Acknowledgements</i>	xi
<i>Abbreviations and Acronyms</i>	xi
CHAPTER ONE.....	1
INTRODUCTION AND OVERVIEW OF THE STUDY.....	1
1.1 Introduction to the Study.....	1
1.2 Background to the Study.....	3
1.3 Objectives of the Study.....	5
1.4 Literature Survey.....	6
1.5 Hypothesis.....	8
1.6 Research Methodology.....	9
1.7 Overview of Chapters.....	9



CHAPTER TWO.....	11
EVOLUTION OF INTERNATIONAL CRIMINAL LAW AND THE AMBIVALENCE OF AFRICA ON THE ICC.....	11
2.1 Historical Background.....	11
2.2 The Versailles Treaty.....	12
2.3 Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter).....	14
2.3.1 Victor's Justice.....	16
2.3.2 Ex-Post Facto Laws.....	17
2.4 The International Military Tribunal for the Far East (IMFTE/Tokyo Chart.....	19
2.5 Control Council Law No. 10.....	20
2.6 The International Military Tribunal for the Former Yugoslavia (IC.....	22
2.7 The International Military Tribunal for Rwanda (ICTR)	23
2.8 The International Criminal Court (ICC).....	24
2.9 Africa's Ambivalence Towards the ICC.....	26
2.9.1 ICC Warrant of Arrest for Omar al Bashir.....	27

2.9.2	AU's Uncompromising Stand	28
2.10	Concluding Remarks.....	31
CHAPTER THREE.....		33
IMPLEMENTATION OF THE ROME STATUTE IN NATIONAL JURISDICTIONS.....		33
3.1	Introduction.....	33
3.2	Automatic Standing Incorporation.....	36
3.3	Legislative Ad Hoc Incorporation	37
3.4	Non-Incorporation	40
3.5	Rome Statute Implementation in Some States.....	41
3.5.1	Rome Statute in South Africa.....	42
3.5.2	Rome Statute in the UK.....	45
3.5.3	Rome Statute in New Zealand.....	48
3.6	Concluding Remarks.....	50

CHAPTER FOUR.....	51
DOMESTICATION OF THE ROME STATUTE IN MALAWI.....	51
4.1 Introduction.....	51
4.2 Malawi Legal System	52
4.3 International Law in Malawi.....	54
4.3.1 Court Decisions.....	55
4.3.1.1 High Court Decisions.....	56
4.3.1.2 MSCA Decision.....	61
4.4 Considerations on Domesticating the Rome Statute	63
4.4.1 Substantive Law.....	64
4.4.2 Procedural Law.....	67
4.4.3 Legal Impediments.....	69
4.4.3.1 The Constitution.....	69
4.4.3.2 Extradition Act.....	70
4.4.3.3 Immunities and Privileges Act.....	71
4.5 Concluding Remarks.....	72
CHAPTER FIVE.....	74
CONCLUSIONS AND RECOMMENDATIONS.....	74

5.1 Conclusions.....74

5.2 Recommendations.....76

REFERENCES.....78



KEY WORDS

Complementarity

Cooperation

Domestication

International Criminal Law

Malawi

Models of Implementation

Nuremberg Charter

Rome Statute of the International Criminal Court

Ratification

Treaty



ABSTRACT

On 17 July 1998, a total of 120 States, including Malawi, voted for the adoption of the Rome Statute of the International Criminal Court. The permanent ICC became operational on 1 July 2002. The ICC has jurisdiction over the crime of genocide, crimes against humanity, and war crimes. These crimes are the most serious crimes of international concern. The ICC operates under the principle of complementarity, which entails that the ICC will only assume jurisdiction over these core crimes in the event that a State Party is unwilling and unable genuinely to carry out the investigation and prosecution. States Parties have, therefore, the primary responsibility to investigate and prosecute these crimes. The States Parties must therefore establish jurisdiction to conduct investigations and prosecution of these core crimes.

It is from that background, coupled with the historical evolution and development of international criminal law, with regard to individual criminal responsibility, that this paper argues for the implementation of the Rome Statute in Malawi, through domestic legislation. The paper thus argues that only through domestic legislation can the purports of the Rome Statute be achieved and fulfilled by Malawi.

DEDICATION

In loving memory of my dear mother, Emelita Kalembera, who never lived to fully enjoy the fruits of her labour. May her soul rest in eternal peace.



DECLARATION

I, Sylvester Augustino Kalembera, declare that **“The Implementation of International Criminal Law in Malawi”** is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly acknowledged.

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Signature: _____

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ABBREVEATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CRC	Convention on the Rights of the Child
HC	High Court of Malawi
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IMTFE	International Military Tribunal for the Far East
IMT	International Military Tribunal
MSCA	Malawi Supreme Court of Appeal
UN	United Nations Organization
USA	United States of America
WW I	First World War
WW II	Second World War

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Introduction to the Study

International Criminal Law has undeniably become a very important and unavoidable feature of the international community. Prior to the end of WW I, international law and indeed international criminal law was mainly concerned with States and not individuals. It was only after WW I that attempts were made 'to establish international institutions to hold personally accountable, those responsible for the start of the war and violations of the laws of war.'¹ These attempts did not materialize. It was only after the end of WW II, that victorious Allied Powers, the United Kingdom (UK), France, the USA, and the Soviet Union, at the London Conference, finally resolved, through the London Agreement, to punish the high-ranking Nazi war criminals.² Thus the 'London Agreement and its accompanying Nuremberg Charter, resulted in the establishment of the International Military Tribunal (the IMT) at Nuremberg to prosecute individuals, especially the Nazi war criminals for crimes against peace, war crimes, and crimes against humanity.'³ Subsequently the International Military Tribunal for the Far East (the IMTFE) was established to prosecute and punish Japanese war criminals for similar offences.⁴ In an attempt to demonstrate why Malawi has to implement the Rome Statute of the

¹ Cryer (2005:32).

² Cryer (2005:37).

³ Cassese (2002:7).

⁴ Cassese (2002:7).

International Criminal Court⁵ (Rome Statute) through legislation, this research paper analyses the evolution of international criminal law culminating in the adoption of the Rome Statute, and the obligations of State Parties to the Rome Statute. This will enable a clear understanding of why Malawi is under an obligation to follow the ratification of the Rome Statute with its incorporation into the municipal law. The research paper is thus concerned with the implementation of international criminal law in national jurisdictions, with emphasis on the Republic of Malawi (Malawi). The research paper concentrates on the implementation of international criminal law in Malawi through the Rome Statute. Throughout the evolution and development of international criminal law, the main feature has been holding individuals, regardless of their official capacities, criminally liable for international crimes. With the adoption of the Rome Statute, States Parties, have strongly demonstrated their strong will to prosecute individuals for the most serious crimes of international concern.⁶

By ratifying the Rome Statute, Malawi, just like other States Parties, demonstrated her commitment towards prosecution of individuals who commit international crimes as stipulated under the Rome Statute, and thereby contributing towards bringing an end to impunity.

⁵ Rome Statute of the International Criminal Court, UN. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999.

⁶ Rome Statute, Art. 1.

1.2 Background to the Study

On July 17 1998, a total of 120 states voted for the adoption of the Rome Statute.⁷ The permanent International Criminal law (ICC) became operational on 1 July 2002, with the jurisdiction to 'try individuals or persons who are accused of the most serious crimes of international concern.'⁸ Thus, the ICC has jurisdiction over the crime of genocide, war crimes and crimes against humanity, and the crime of aggression once a definition has been adopted.⁹ This does not mean that the ICC has assumed or taken over the primary jurisdiction of States to investigate and prosecute these crimes, but its jurisdiction will only be complementary to national jurisdictions.¹⁰ 'National jurisdictions will thus, retain precedence for the prosecution of these crimes unless the state is unwilling or unable genuinely to carry out investigation or prosecution.'¹¹ Malawi having ratified the Rome Statute on 19 September 2002,¹² demonstrated and emphasized her commitment to investigate and prosecute these crimes. The ratification of the ICC alone is not enough. With the ratification of the Rome Statute, Malawi incurred further obligations since for the ICC 'to be effective, it will depend not only on widespread ratifications of the Rome Statute, but also on States Parties complying fully with their treaty obligations, which almost for every state will require some change to

⁷ UN. Doc. A/CONF. 183/9.

⁸ Rome Statute, Art. 1.

⁹ Rome Statute, Art. 5.

¹⁰ Rome Statute, Art. 1.

¹¹ Werle (2009:83), see also Rome Statute, Art. 17.

¹² Information available at:

http://en.wikipedia.org/wiki/States_Parties_to_the_Rome_Statute_of_the_International_Criminal_Court (accessed on 30.05.2010).

municipal/domestic law.¹³ Despite the Rome Statute not imposing or 'establishing any obligations regarding the incorporation of the Rome Statute's substantive criminal law into national law.'¹⁴ This paper argues that it is the responsibility of States Parties to adapt their domestic laws in line with the obligations they have assumed under the Rome Statute, in order to effectively bring to fruition the aspirations of the ICC. Malawi is no exception.

Malawi follows the English common law system. This results from the fact that Malawi was a British Protectorate for many years. In that regard the Malawi legal system is premised on the British legal system. The Republic of Malawi Constitution of 1995 is the supreme law of the land.¹⁵ All laws in Malawi derive their authority from this constitution. The constitution regulates the conduct of government business in the land. In that regard the constitution further stipulates modes of applicability of international law and international agreements in Malawi. In section 211 of the constitution it provides for and envisages three ways or instances, that is, any international agreement entered into after the commencement of this constitution shall form part of the law of the republic if so provided by or under an Act of Parliament;¹⁶ binding international agreements ¹⁷entered into before the commencement of this constitution, shall continue to bind the Republic unless otherwise provided by an Act of Parliament; and customary international law, unless inconsistent with this

¹³ Human Rights Watch (2001:3).

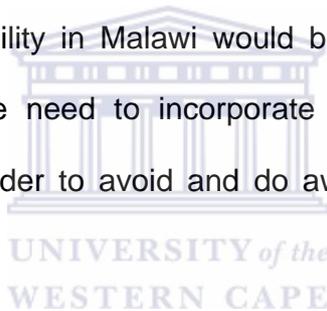
¹⁴ Werle (2009:118).

¹⁵ Republic of Malawi Constitution, s.5.

¹⁶ Republic of Malawi Constitution, s.211(1).

¹⁷ Republic of Malawi Constitution, s. 211(2).

constitution or an Act of Parliament, shall form part of the law of the Republic.¹⁸ It would seem clear therefore, that with the exception direct application of customary international law in Malawi, international agreements require legislative intervention by Parliament, in order to form part of municipal law. The Rome Statute thus would require domestic legislation in order to form part of municipal law. This constitutional provision, though, despite seemingly clear, has created legal uncertainty in Malawi, as regards applicability of international law, due to different court interpretations ascribed to it. The Rome Statute, without being domesticated by legislation, would fall into this legal uncertainty, and thereby its applicability in Malawi would be put in jeopardy. This paper therefore argues for the need to incorporate the Rome Statute in Malawi through legislation, in order to avoid and do away with the uncertainty of its applicability in Malawi.



1.3 Objectives of the Study

Despite the Rome Statute not imposing any obligations on States Parties, and Malawi, in particular, regarding the incorporation of the Statute's substantive criminal law into national/municipal law, the legal uncertainty in Malawi, weighs heavily in favour of incorporating the Rome Statute into municipal law through legislation. This is so because the legal uncertainty in Malawi, as regards applicability of international agreements, is certainly as a result of not following up ratified treaties or international agreements with the necessary legislation as stipulated by the constitution. If the Rome Statute is not incorporated into the

¹⁸ Republic of Malawi Constitution, s. 211(3).

municipal law by legislation, it will certainly fall into the category of the other international agreements Malawi has ratified without further domesticating/incorporating them into municipal/domestic laws. The objective of this paper is therefore aimed at demonstrating the need to have the Rome Statute implemented in Malawi, through legislation. Non domestication of the Rome Statute in Malawi will render its applicability in Malawi uncertain, and thereby its ratification would end up being an exercise in futility.

1.4 Literature Review

Much has been published in the field of international criminal law and its domestication. In his discussion of implementation of international criminal law, and the Rome Statute, in particular, in national jurisdictions, Werle¹⁹ first emphasizes the fact that the Rome Statute does not establish any obligations regarding the incorporation of the Statute's substantive criminal law into national law. He however appreciates that the Rome Statute encourages States to do so, and goes on to discuss different models of domesticating international criminal law. Kleffner on the other hand, argues that the principle of complementarity in Article 17 of the Rome Statute, clearly refers to national jurisdictions that have established domestic jurisdiction in conformity with international law.²⁰ He further argues that it would be a misnomer for the ICC to defer jurisdiction for the investigation and prosecution the ICC core crimes to States which have neither established domestic jurisdiction over such nor to

¹⁹ Werle (2009:118).

²⁰ Kleffner (2008:113).

States that have established such jurisdiction in violation of international law.²¹

In the final analysis he argues that complementarity principle envisages that States Parties have to domesticate the Rome Statute.

In his discussion on implementation of international law generally, Cassese discusses three theoretic approaches of implementation: 'monistic view advocating the supremacy of municipal law; dualistic doctrine, suggesting the existence of two distinct sets of legal orders (international law, on one side, and municipal legal systems on the other), and finally the monistic theory maintaining the unity of various legal systems and the primacy of international law.'²² He further argues that implementation of international law in domestic set up is very crucial, though he laments lack of uniformity and international regulation on the modality of such implementation.²³ He thus acknowledges that implementation of international law in national jurisdictions is dependent on the peculiar legal system of a particular State. On the other hand, Slyz discusses implementation of international law in national jurisdictions in relation to self-executing and non-self-executing provisions of treaties or international agreements. His argument is thus, self-executing treaties or international agreements can be applied directly in municipal jurisdictions, whereas non-self-executing treaties and international agreements must be grounded in municipal law in order to be applicable.²⁴ Thus, he propounds the view that domestication

²¹ Kleffner (2008:114).

²² Cassese (2005:213).

²³ Cassese (2005:219)

²⁴ Slyz (1995-1996:78).

of international agreements and treaties will depend on whether they are self executing or non-self-executing.

These authors have thus, discussed the applicability of international law from different perspectives. However, in so far as there are gaps in addressing the implementation of international law in Malawi, the research paper will complement the existing publications in taking into account the legal developments in Malawi. Although there is consensus that the Rome Statute places no obligations on States to incorporate its substantive criminal law in municipal, it is the central argument of this paper that the legal uncertainty in Malawi, as regards applicability of international law, weighs heavily in favour of domestication of the Rome Statute. Non-domestication of the Rome Statute will render its applicability in Malawi, uncertain. The legal uncertainty is demonstrated by a discussion of the two adoption cases in Malawi by Madonna.

1.5 Hypothesis

Application of international law and international agreements in Malawi, where there is lack of domestication, is primarily dependent on the whims of a particular judge. This signifies the legal uncertainty as regards international agreements that have not been incorporated into the municipal law through legislation. If the Rome Statute is not domesticated through legislation, Malawi will fail to effectively investigate and prosecute the core crimes as stipulated in the Rome Statute. Non-domestication of international agreements has resulted in the legal uncertainty on applicability of international law and international

agreements in Malawi. Only through legislative domestication can the Rome Statute be effectively applied in Malawi, anything to the contrary will render it meaningless.

1.6 Research Methodology

The study or research, is primarily desk top based. It looks at and analyses the publications available, legislation and case law primarily from Malawi, and a selected few other jurisdictions. More specifically, the paper analyses the two adoption cases by Madonna, in so far as they demonstrate and portray the uncertainty in the application of international law in Malawi. These cases demonstrate the difficulty or uncertainty of application of international law in Malawi vis-à-vis the Convention on the Rights of the Child (CRC), 1989. Malawi is a party to the CRC, but by the time these cases were decided had not yet incorporated it into the municipal law.

1.7 Overview of Chapters

This paper has five chapters. In the second chapter, an overview of the evolution of international law is provided as a basis for a clear understanding of the importance of the Rome Statute in the prosecution of individuals who commit international crimes and the fight against impunity. The paper therefore discusses the quest by international law to hold individuals and not States, criminally liable for the commission of these crimes. This chapter further discusses the ambivalent view of Africa, through mainly the AU as regards the perception of bias by the ICC in its conduct.

Chapter three discusses and analyses the different modes of implementing international law, in particular, the Rome Statute in national jurisdictions. The chapter therefore discusses the monistic and dualist views as regards different outlooks and approaches in the implementation of international law.

Chapter four discusses and analyses the legal system in Malawi, and the resultant legal uncertainty, as regards the implementation or applicability of international law and international agreements in Malawi. The chapter thus discusses the need for creating legal certainty in Malawi, through the incorporation of international agreements, in particular, the Rome Statute, into municipal law through legislation. The chapter further argues for the amendment of statutes that impede the applicability of the Rome Statute in Malawi.

Chapter five analyses the paper by way of conclusion and provides recommendations on the approach Malawi must adopt to fully implement the Rome Statute.

CHAPTER TWO

EVOLUTION OF INTERNATIONAL CRIMINAL LAW AND THE AMBIVALENCE OF AFRICA ON THE ICC

2.1 Historical Background

International Criminal Law has through the decades gone through a metamorphosis, from, as already observed, being concerned with States to individual criminal responsibility. However 'establishing individual criminal responsibility under international law faced obstacles which had to be overcome, since under classic and traditional international law, States not individuals were the exclusive subjects, and it was also necessary to overcome states' defensive attitude towards outside interference, which was rooted in the concept of sovereignty.'²⁵ In this regard, prior to the end of WW I, 'no feasible mechanism could be brought into being that could enable a State official, let alone a Head of State accused of war crimes or other outrages to be brought to justice serve by a victor State following an international armed conflict.'²⁶

This paper therefore is restricted to analyzing the evolution of international law from the end of WW I, when imposition of individual criminal responsibility was considered, from the end of WW II, when individual criminal responsibility was actually imposed on the Nazi leadership, and further developments up to the adoption of the Rome Statute of the International Criminal Court on 17 July

²⁵ Werle, (2009:3).

²⁶ Cassese, (2002:5).

1998. In this chapter, the paper therefore, gives an overview evolution of international law through the Versailles Treaty of 28 June 1919, The IMT Charter of the International Military Tribunal (Nuremberg Charter), The Charter of the Military Tribunal of the Far East (IMTFE) the International Criminal Tribunal for Rwanda (ICTR), and finally the Rome Statute. It also analyses the ambivalence of Africa on the ICC after its initial endorsement and acceptance of the ICC, and the impact it might have on applicability of the Rome Statute in Africa.

2.2 The Versailles Treaty²⁷

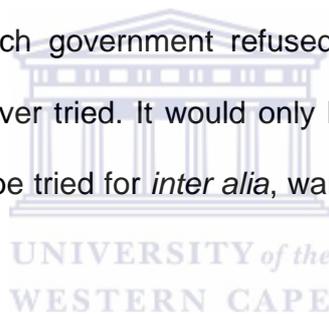
The international communities' dilemma of how to deal with war criminals continued until after WW I. In fact at the end of the said war, the Allied Powers, France, Britain and the USA, struggled with the problem of how to deal with 'the prosecution of Germany's Kaiser Wilhelm II, German war criminals and Turkish officials for crimes against humanity.'²⁸ This dilemma ended in the in the 'Treaty of Peace between the Allied & Associated Powers and Germany (Peace Treaty of Versailles or The Versailles Peace Treaty), concluded on 28 June 1919 at the Versailles Palace in Paris, France.'²⁹The international community had always failed to punish alleged war criminals in the past and the Versailles Treaty presented an opportunity to impose international criminal law on

²⁷ *Treaty of Peace Between The Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920), online at <http://history.sandiego.edu/gen/text/versaillestreaty/vercontents227.html> (accessed on 30.05.2010).

²⁸ Maogoto, (2009:14).

²⁹ Maogoto (2009:14).

individuals for the atrocities committed during the war. As a consequence, ‘the Allied and Associated powers publicly arraigned William II of Hohenzollern, formerly German Emperor, for the supreme offence against international morality and sanctity of treaties.’³⁰ It must be observed that although the arraignment was initiated by the Allied and Associated powers, who were also going to provide the judges,³¹ this was a positive development under international law. For the first time a leader of a country was going to personally for offences against international morality and sanctity of treaties as opposed to just holding, German responsible. Despite all this, the tribunal was apparently not constituted, the Dutch government refused to extradite the Kaiser, and consequently he was never tried. It would only be after the World War II, that individuals would finally be tried for *inter alia*, war crimes, under the Nuremberg Charter.



³⁰ See Versailles Treaty, Art. 227: ‘The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for supreme offence against international morality and sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the The USA, Great Britain, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the Ex-Emperor in order that he may be put on trial. (online at: <http://history.sandiego.edu/gen/text/versaillestreaty/vercontents227.html> -accessed on 30.05.2010).

³¹ Versailles Treaty, Art. 227.

2.3 Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter).

A positive development in international criminal law, that is, holding individuals criminally responsible under international criminal law occurred at the end of WW II. It was at the end of WW II, that the four victorious Allied powers, the UK, France, the The USA, and the Soviet Union, finally agreed under the London Agreement of 8 August 1945³², to prosecute the Nazi leadership. The London Agreement provided ‘for the establishment of an International Military Tribunal for the trial of war criminals whose offenses have no geographical location.’³³

Annexed to the London Agreement was the Nuremberg Charter which provided ‘that there would be individual responsibility for the following crimes under the International Military Tribunal’s jurisdiction: crimes against peace, war crimes, and crimes against humanity.’³⁴ It has been argued that the Nuremberg Charter ‘was the basis of the trial of the major war criminals, and that it can be considered the birth certificate of international criminal law.’³⁵ During the Nuremberg Trial, “*against Goering et al*” which began on ‘20 November 1945, 24 people were indicted, 21 were actually brought to trial, and one Martin Borman was tried in absentia.’³⁶ The charges brought against the defendants were, the common plan or conspiracy to wage an aggressive war in violation of international law or treaties –Crimes Against Peace (Count One); planning,

³² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (online at: <http://www.icrc.org/ihl.nsf/full/350?open> document –accessed on 30.05.2010).

³³ London Agreement, Art. 1, see also Werle, (2009:7).

³⁴ Nuremberg Charter, Art.6.

³⁵ Werle, (2009:7).

³⁶ Werle (2009:9).

preparation, or waging an aggressive war (Count Two); war crimes (Count Three); and crimes against humanity (Count Three).³⁷ At the end of the trial, 'the Tribunal delivered its judgment on 30 September and 1 October, and upon convictions, twelve defendants were sentenced to death, three were sentenced to life imprisonment, four to prison terms of between ten and twenty years, three defendants were acquitted, and four groups, the Nazi Party's political leadership corps and their staffs, the "Gestapo", the "Sicherheitsdienst" (SD) and the regular SS and "Waffen SS."³⁸

The individual criminal responsibility for international crimes was further entrenched when the Tribunal stated that, 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'³⁹ 'Absolute sovereign power was thus destroyed as previously there was a very clear and visible demarcation between domestic and international law, States were entitled to prosecute any offences committed by their nationals inside or outside their territory; and there were no international institutions for the prosecution of grave crimes.'⁴⁰ This was a major milestone in the development of international law in that individuals could now be held accountable for international crimes and they could not hide under the sovereignty principle. Despite this remarkable achievement there were some criticisms leveled against the whole process.

³⁷ Austin, B.S. Legal Strategic Issues, (online at: <http://frank.mtsu.edu/~baustin/trials.html> - accessed on 29.05.2010).

³⁸ Werle, (2009:9), (see also the Nuremberg Judgment of 1 October 1946).

³⁹ Nuremberg Judgment of 1 October 1946, p.55, see also Werle (2009:7).

⁴⁰ Tomuschat, (2006:838).

2.3.1 Victors' Justice

The Nuremberg Trial and Judgment was criticized as representing victors' justice. The Nuremberg Charter and the Tribunal were all constituted by the victorious Allied Powers. Even more 'those jurists involved in the drafting of the IMT Statute later appeared as prosecutors, for example, Justice Robert H. Jackson, the US Chief Prosecutor; or Judges, for example, Major General Ion T. Nikitchenko, the Soviet Judge.'⁴¹No judge or prosecutor from Germany or any neutral countries was involved. The Tribunal was further criticized 'for rejecting the defendants' *tu quoque defence*, the contention that Allied Powers also committed similar offences against the German people and yet only the Nazi leadership, the defendants, were being held to account.'⁴²Furthermore, the whole process was flawed from inception because of the discriminatory nature of the trial considering that the IMT had been established solely 'for the trial and punishment of the major war criminals of the European Axis countries.'⁴³It was therefore not surprising that only Nazi war criminals were being prosecuted in the absence of any of the war criminals from the Allied Powers. This apparent discriminatory nature of the prosecutions enhances the belief and contention that this was victors' justice.

⁴¹ Burchard (2006:803).

⁴² Burchard (2006:805).

⁴³ Tomuschat (2006:833).

2.3.2 Ex-Post Facto Laws

The other criticism leveled at the IMT was that the defendants were charged with offences which were non-existent before the war, for example crimes against peace (crime of aggression).⁴⁴ In that regard this contravened the *nullum crimen, nullum poena sine lege* principle under international criminal law, a principle of legality and punishment which entails that, 'at the time the crime was committed, a written or unwritten norm must have existed upon which to base criminality under international law, and the principle further forbids retroactive punishment or analogies as a basis for punishment.'⁴⁵ 'The IMT took the defense's *ex post facto* argument as an opportunity to examine (and affirm) the criminal nature of the crimes against peace at the time the crimes were committed by the defendants,'⁴⁶ stating thus, 'In the first place it must be observed that the maxim "nullum crimen sine lege" is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all

⁴⁴ Austin, *supra* note 14

⁴⁵ Werle (2009:37).

⁴⁶ Werle (2009:38).

International Law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.⁴⁷ The IMT thus limited the application of the *nullum crimen sine lege principle*. In a way the IMT was clearly of the view that the crimes committed by the defendants were heinous and reprehensible that it was better to punish them anyway other than letting them free. It has further been argued that in respect of “crimes against humanity,” “there cannot be the slightest doubt that all offences set out under the title ‘crimes against humanity’ are not only morally objectionable, but deserve to be punished and must be punished because of their abhorrent character if peaceful coexistence in human society is to be maintained. Nobody can legitimately claim that he believed that such actions in which he participated and that are to be classified as ‘crimes against humanity’ were perfectly lawful. The scope of *ratione materiae* of the *nullum crimen* rule must accordingly be reduced. It should not be extended to conduct that the international community unequivocally condemns.⁴⁸ In this essence, the *nullum crimen* principle could not be used to free those responsible for these international crimes and let them go free, what was important was that their conduct was conduct which was widely condemned by the international community. In other words the end justified the means.

⁴⁷ Nuremberg Judgment of 1 October 1946, pp.52-53.

⁴⁸ Tomuschat (2006:835).

Further criticisms were that there was no right of appeal if found guilty contrary to the dictates of criminal justice.⁴⁹ The Tribunal in most part relied on hearsay evidence through admission of ex parte affidavits into evidence thereby denying the defendants the right to cross-examine witnesses.⁵⁰ The defendants also complained that they were overwhelmed with the massive and crushing documentary evidence heaped on them whose authenticity could not be ascertained yet their defence team was denied access to the archives to help them obtain exculpatory evidence.⁵¹ There were several criticisms against the Nuremberg Trial and Judgment which for purposes of this paper is not necessary to delve into. However despite all these criticisms, one thing stands out, that is, individual criminal responsibility became entrenched in international criminal law as is evident in the subsequent legal developments in international criminal law under the Control Council Law No. 10, IMTFE, ICTY, ICTR and the Rome Statute.

2.4 The International Military Tribunal for the Far East (IMTFE/Tokyo Charter)

The Tribunal was set up following the Nuremberg Tribunal, for ‘the just and prompt trial and punishment of the major war criminals in the Far East.’⁵² The

⁴⁹ Nuremberg Charter, Art. :26 ‘The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give reasons on which it is based, and shall be final and not subject to review.’

⁵⁰ Sharf, (1995).

⁵¹ Burchard (2006:804).

⁵² The IMTFE Charter, Art. 1 (online at: http://www.stephen.stratford.co.uk/imtfe_charter.htm) accessed on 20.05.2010.

Tokyo Charter was 'modeled on the Nuremberg Charter and adopted the Nuremberg crimes: crimes against peace, war crimes and crimes against humanity.'⁵³ However unlike the Nuremberg Tribunal which was constituted by the victorious Allied Powers, the IMTFE was constituted or proclaimed by the Supreme Commander of the Allied Powers, General Douglas MacArthur on 19 January 1946.⁵⁴ Its composition was also a marked departure from the Nuremberg Tribunal as it also included representations from some other neutral countries.

2.5 Control Council Law No.10

Control Council Law No. 10 (CCL) 'was enacted on 10th December 1945 for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity.'⁵⁵ Germany having been divided into zones after WW II, the CCL was thus enacted by the 'acting legislative body for all Germany (the Allied Control Council for Germany).'⁵⁶ In fact the aim of CCL was 'to give effect to the so called Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the charter issued pursuant thereto and in order *to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal* (emphasis added).'⁵⁷ This was so because not every Nazi war

⁵³ The IMTFE Charter, Art. 5: '....The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace; (b) conventional war crimes; and (c) crimes against humanity.'

⁵⁴ Cassese (2002:9).

⁵⁵ Roberge, M-C (1997:651).

⁵⁶ Roberge M-C (1997:653).

⁵⁷ Control Council Law No. 10, preamble(online at: <http://avalon.law.yale.edu/inst/imt10.asp> - accessed on 29.05.2010).

criminal was charged and prosecuted in the Nuremberg Tribunal. Others were tried in the German national courts and other military tribunals depending on the zone. However 'the law applied at Nuremberg and Tokyo was applied, confirmed and stated more precisely in these numerous trials before national courts and military tribunals.'⁵⁸ It must be noted however that the most significant development under Article II(c) of the CCL as opposed to Article 6 (c) is that 'it removed the nexus between crimes against humanity and crimes against peace and war crimes, in that CCL does not include the words "before or during the war."⁵⁹ As long as the acts constituting crimes against humanity were committed it does not matter whether they were committed during war or not, one would still be held criminally responsible. This was therefore a stark contrast to the Nuremberg Charter and therefore a significant development in international criminal law. In *Einsatzgruppen case*⁶⁰ this was buttressed when the Tribunal stated thus; 'The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.'⁶¹ Hence crimes against humanity did not require nexus to war under CCL. The offences

⁵⁸ Werle (2009:12).

⁵⁹ Roberge, (1997:660).

⁶⁰ *Einsatzgruppen case (The USA vs. Otto Ohlendorf, et al, Case No. 9)*, (online at: <http://www.mazal.org/archive/nmt/04/NMT04-T0412.htm>)-accessed on 01.06.2010.

⁶¹ *Einsatzgruppen Case* p.499.

enumerated in the Nuremberg Charter were further adopted by the ICTY and ICTR. It is important to note that the 'establishment of these ad hoc tribunals was possible due to the end of the so called Cold War and the need by the UN to assert itself by enforcing international criminal law to maintain and restore international peace and international security.'⁶²

2.6 The International Military Tribunal for The Former Yugoslavia (ICTY)

The 'ICTY was set up in 1993 by the UN Security Council, pursuant to Resolution 808 of 22 February 1993 and Resolution 827 of 5 May 1993.'⁶³The ICTR was established 'for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.'⁶⁴ This was as a result of the atrocities committed in the former Yugoslavia during what has been called 'one of the 20th century's worst conflicts on European soil.'⁶⁵The ICTY's jurisdiction therefore consisted of 'the power to prosecute natural persons responsible for grave breaches of the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, violations of the laws or customs of war, genocide, and crimes against humanity when committed in armed conflict, which are beyond any doubt part of customary international law.'⁶⁶ The crimes under the jurisdiction of the ICTY were thus essentially adopted from the

⁶² Werle (2009:15).

⁶³ Kittichaisaree (2001:22).

⁶⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 1.

⁶⁵ Werle (2009:16).

⁶⁶ ICTY Statute, Art. 2-8, see also Kittichaisaree (2001:23).

Nuremberg Charter, signifying further the importance of the Nuremberg Charter on the development of international criminal law and the need to hold individuals criminally responsible for committing such crimes. However the ICTY still maintained the nexus to war or armed conflict for crimes against humanity. Following the ICTY was the establishment of the ICTR, again by the UN.

2.7 The International Military Tribunal for Rwanda (ICTR)

The 'ICTR was set up by UN Security Council Resolution 955 of 8 November 1994 in response to genocide and other systematic, widespread, and flagrant violations of international humanitarian law that had been committed in Rwanda.'⁶⁷The ICTR was therefore established 'to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed on the territory of neighbouring States, between 1 January 1994 and 31 December 1994..⁶⁸ The ICTR therefore has jurisdiction over the crime of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the protection of war victims, and of Additional Protocol II thereto of 8 June 1977.⁶⁹ It must also be noted that just as CCL No.10, the ICTR Statute did away with the nexus between crimes against humanity and war, what is required is that particular crimes constituting crimes against

⁶⁷ Kittichaisaree (2001:24).

⁶⁸ ICTR Statute, Article 1(see also the preamble).

⁶⁹ Kittichaisaree (2001:24).

humanity be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.⁷⁰

The ICTR, it has been argued has jurisdiction over crimes committed in internal armed conflict due to the absence of the 'grave breach' regime under its statute.⁷¹

These positive and tremendous developments in international criminal law, from the end of WW I to the ad hoc tribunals of former Yugoslavia and Rwanda, culminated in the establishment of the permanent International Criminal Court.

2.8 The International Criminal Court (ICC)

The ICC was established by the adoption of the Rome Statute of the International Criminal Court.⁷² In total 120 States voted for the adoption of the Rome Statute, 21 abstentions, and 7 States including the United States of America (USA), voted against its adoption.⁷³ Thus following a protracted process, from the aftermath of WW I to the establishment of the ad hoc tribunals, ICTY and ICTR, the international community under the auspices of the UN succeeded in establishing the permanent International Criminal Court. The ICC was therefore established, 'to exercise its jurisdiction over persons for the most serious crimes of international concern, and be complementary to

⁷⁰ ICTR Statute, Art. 3.

⁷¹ Kittichaisaree (2001:27).

⁷² Adopted on 17 July 1998 and entered into force on 1 July 2002 -UN. Doc. A/Conf.183/9 (1998), 37 I.L.M 999.

⁷³ Vigorito (2002:93).

national criminal jurisdictions.⁷⁴ The most serious crimes of international concern over which the ICC has jurisdiction, have been specified as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁷⁵ These crimes have their basis in the Nuremberg Charter. However, the ICC will only exercise jurisdiction over the crime of aggression, once it has been properly and agreeably defined and a provision adopted in accordance with articles 121 and 123 of the Statute.⁷⁶ In practice therefore, the ICC can only exercise jurisdiction over the crime of genocide, crimes against humanity, and war crimes. Deriving its lessons from the Nuremberg Charter, Tokyo Charter and the ad hoc tribunals of former Yugoslavia and Rwanda, the Rome Statute has tremendously tried to address and resolve some contentious issues under international criminal law. In that regard, the ICC will 'only have jurisdiction over crimes committed after entry into force of its Statute.'⁷⁷ This is further re-enforced by the provision stipulating that, 'no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.'⁷⁸ Furthermore, 'a person shall not be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.'⁷⁹ In reality therefore, the criticisms leveled against the Nuremberg Tribunal and Tokyo Tribunal of applying ex post facto law cannot apply to the ICC. The *nullum crimen sine lege* principle has therefore been accommodated in the Statute. No person can be

⁷⁴ Rome Statute, Art.1.

⁷⁵ Rome Statute, Art.5 (1).

⁷⁶ Rome Statute, Art.5 (2).

⁷⁷ Rome Statute, Art.11.

⁷⁸ Rome Statute, Art. 24(1).

⁷⁹ Rome Statute, Art. 22.

prosecuted before the ICC for conduct which did not constitute a crime at the time it was committed. Similarly the *nulla poena sine lege* has been taken care of in that 'a person convicted by the court may be punished in accordance with this Statute.' A person cannot be punished therefore for conduct which does not constitute an offence under the Statute.

As earlier indicated the jurisdiction of the ICC is complementary to national jurisdictions. The Rome Statute thus recognizes that 'the effective prosecution of the most serious crimes to the international community as a whole must be ensured by taking measures at the national level and by enhancing international cooperation, and that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'⁸⁰ Hence State Parties have obligations under the Rome Statute to bring to fruition the aspirations of the international community as enunciated in the Rome Statute. There are several ways or modes of implementing the Rome Statute as discussed in Chapters Three and Four of this paper. However Africa through individual countries and the AU seem to have doubts on the international nature and character of the ICC.

2.9 Africa's Ambivalence Towards the ICC

African countries highly participated and contributed to the adoption of the Rome Statute. About '47 African countries were involved in the drafting of the

⁸⁰ Rome Statute, preamble paragraphs 4 & 6.

Rome Statute, and the vast majority voted for the adoption of the Rome Statute and the establishing of the ICC.⁸¹ This signifies the overwhelming support of the African countries for the adoption of the Rome Statute and the establishment of the ICC. 'Thirty (30) African countries have ratified the Rome Statute and are members of the ICC.'⁸² And 'to demonstrate Africa's commitment to the ICC approximately twenty (20) African countries have draft or final implementing legislation which incorporates crimes listed under the Rome Statute.'⁸³ What the triggered the conflicting views emanating from the AU on the ICC? It needs to be taken into consideration too that African situations currently under the ICC were actually government referrals; situation in Uganda concerning the Lords Resistant Army, the situation in Central African Republic, and the situation in the Democratic Republic of Congo. Situations in Darfur and Kenya were referred by the UN Security Council. It can therefore, be safely concluded, that the main concern for the AU is the issue concerning the President of Sudan Omar al-Bashir and the ICC, following a referral by the UN Security Council.

2.9.1 ICC Warrant of Arrest for Omar al Bashir

On 4 March 2009 the Pre-Trial Chamber I of the ICC issued an arrest warrant against al Bashir, for war crimes and crimes against humanity.⁸⁴ A second

⁸¹ Coalition for the International Criminal Court (2010).

⁸² The Review of the Rome Statute of The International Criminal Court (2010:3).

⁸³ The Review of the Rome Statute of The International Criminal Court (2010:3).

⁸⁴ Case No. ICC-02/05-01/09.

arrest warrant against al Bashir was issued on 12 July 2010, for genocide.⁸⁵ This is presumably the first time the ICC has ever issued an arrest warrant against a sitting Head of State. Al Bashir is the current President of Sudan. And Sudan is a Member State of the AU. The response of the AU in condemning the ICC for the issuance of these arrest warrants has been swift. This despite the overwhelming support of African countries for the adoption of the Rome Statute, and the subsequent ratifications of the Statute by a number of African States. This is a major test for the applicability of the Rome Statute in African countries. However, the action by the ICC demonstrates that the fight against impunity will not discriminate basing on one's official position as Head of State, no one is above the law. However, in the wake of criticisms from the AU, the practicability of implementation of the arrest warrant on African soil, and the prosecution of Al Bashir, might prove illusive. This paper, discusses this standstill, with reference to how it might negatively affect the implementation of the Rome Statute.

2.9.2 AU's Uncompromising Stand

As earlier observed, African countries overwhelmingly voted for the adoption of the Rome Statute, and some of them have already domesticated it, while others are in the process of domesticating it. That support signified that they wholeheartedly endorsed its applicability. Yet the indictment of Al Bashir by the ICC is sending out a negative sign from African countries through the AU. The

⁸⁵ Case No. ICC-02/05-01/09.

current Chairman of the AU, President Bingu wa Mutharika, President of Malawi, summed up the AU's view, stating that 'the indictments against Omar al Bashir are undermining solidarity, peace and security in the region, and that the ICC's arrest warrant is a violation of the principles of sovereignty.'⁸⁶ Yet the Rome Statute stipulates that the States Parties 'are determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, thus to contribute to the prevention of such crimes,'⁸⁷and further 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'⁸⁸ It thus puts into question, the commitment shown by African countries in the adoption of the Rome Statute. However the AU has tried to tone down its criticism of the ICC by contending through its envoy to the United Nations, Tete Antonio, that 'the AU in requesting deferment of the prosecution is in no way condoning impunity, and that it is imperative to bring to justice the perpetrators of gross human rights abuse in that region.has.'⁸⁹ The AU's argument then, seems to suggest that at this time peace in Darfur is more important than justice. But what if despite efforts of all those concerned, the cores crimes continue to be committed by government forces in Sudan? What will be the image of the ICC if it starts delving into political debates and discussions warranting political solutions? Its independence will likely be compromised and it such lose the trust and confidence of those who support it. The ICC of course finds itself in a

⁸⁶ PressTV: JR/AKM (2010:1).

⁸⁷ Rome Statute, para. 5 of preamble.

⁸⁸ Rome Statute, para. 6 of preamble.

⁸⁹ Lederer (2010).

precarious position considering that, the UN Security Council, which is for all purposes highly political, referred the matter to the ICC. Thereby, the ICC finds itself drawn into a political tussle between the AU and the UN Security Council.

The AU and some African countries, have defied the ICC on the arrest warrants against al Bashir, claiming that the ICC only targets Africans in its investigations and prosecutions. The AU has further asked the ICC to invoke Article 16 of the Rome Statute and defer investigations and prosecution of al Bashir. President Bingu wa Mutharika stated thus, 'we have decided to establish our own mechanism, we are asking the United Nations to suspend for a period of twelve months the arrest warrants against al Bashir.'⁹⁰ He went on to question the mandate of the ICC to try Sudan stating 'Let us look at the position of the ICC, do they have a right to try Sudan which is not a member of the ICC? I think it is something we have to look at.'⁹¹ These might be legitimate concerns, but have the capacity to derail the work of the ICC and at the same time be viewed as condoning impunity by Heads of States, thereby undermining international criminal law. This might further derail the application of the Rome Statute, which heavily envisages the ICC relying on cooperation of States Parties to enable it achieve its mandate. Despite the AU's call against the arrest warrants other African States are willing to enforce the arrest warrants and effect the arrest of al Bashir. The South African President, Jacob Zuma, when asked in Parliament about al Bashir visiting South Africa for the FIFA World Cup 2010, he bravely stated that al Bashir would be arrested, reiterating that 'South Africa

⁹⁰ Ojambo (2010:1).

⁹¹ Ojambo (2010:1).

respects the international law and certainly we are signatories and we abide by the law.⁹²This is what would be expected of States Parties to the Rome Statute.

The obligations imposed on States Parties by the Rome Statute, entails cooperation of States Parties with the ICC. If the AU had the political will to enhance the effectiveness of the ICC, they would make sure that the arrest warrant was enforced, just as South Africa would have done. Claiming that they do not condone impunity while acting differently, will only undermine the authority of the ICC and the investigations and prosecution of perpetrators of the core crimes. The AU would have advanced the aspirations of the ICC by forcing al Bashir to step down as President of Sudan, and defend himself before the ICC. In that regard the AU would show its adherence to tenets of international law, and the Rome Statute, in particular, and its quest to do away with impunity even of Heads of States.

2.10 Concluding Remarks

The evolution of international criminal law demonstrates that individuals, and not States, are now the concern of international criminal law. Individuals who commit core crimes, crimes of genocide, war crimes, and crimes against humanity, will be held criminally responsible. Thus, individual perpetrators of these crimes cannot hide under the principle of State sovereignty, as

⁹² Times Live (2010).

prosecution of these crimes knows no boundaries. International criminal law shows that impunity will no longer be tolerated. The adoption of the Rome Statute, and the establishment of the ICC, confirms the international communities distaste of those individuals who commit these crimes. The indictment of Omar al Bashir, a sitting President, is the ultimate demonstration of the judicial independence of the ICC. The AU must demonstrate by deed not words that it respects international law, by respecting the ICC's decision to indict al Bashir. The Rome Statute and the ICC are now part of the international criminal justice system.



CHAPTER THREE

IMPLEMENTATION OF THE ROME STATUTE IN NATIONAL JURISDICTIONS

3.1 Introduction

As has already been discussed in this paper, on 17 July 1998 120 States voted for the adoption of the Rome Statute. 'With the entry into force of the Rome Statute in July 2002 and election of judges and Prosecutor of the International Criminal Court in 2003, there is need for State Parties to the Rome Statute to enact implementing legislation to domesticate the crimes defined in the treaty.'⁹³This is so because State Parties having ratified the Rome Statute, are under obligations to implement the aspirations of the Statute since the 'success of the ICC will depend not only on wide spread ratifications of the Rome Statute, but also state parties full compliance with their obligations under it.'⁹⁴ Although the Rome Statute 'does not oblige the states to enact domestic legislation pursuant to the Statute's prescriptions it encourages them to do so.'⁹⁵ It is accepted, though, that implementation of the Rome Statute in national/domestic jurisdictions is very essential but will depend on the legal system of each particular state and mainly what the constitution of a particular state stipulates. It has thus been observed that 'the experience of most state parties to the treaty is that the Rome Statute will require some form of domestic

⁹³ Olugbuo (2003:1).

⁹⁴ Olugbuo (2003:1).

⁹⁵ Werle (2009:118).

implementing legislation, even if this is not the practice of the State.⁹⁶ However the primary message of the Rome Statute as regards the quality of domestic criminal legislation is that states should be both willing and able (through their domestic legislation) to prosecute genocide, crimes against humanity, and war crimes in a capacity similar to that of the International Criminal Court.⁹⁷ Measures to ensure implementation of law and the Rome Statute, in particular are paramount.⁹⁸ It is therefore paramount that domestic criminal law be in consonant with the Rome Statute. There are well accepted though different modes of domesticating or implementing international law and treaties in national jurisdictions.

Implicit in these different modes of domestication are the monistic and dualist theories of implementing international law in national jurisdictions. The monistic theory 'propounded by an Austrian H. Kelsen presupposes that there exists a unitary legal system, embracing all the various legal orders operating at various levels; and that international law is at the top of the pyramid and validates or invalidates all the legal acts of any other legal system.⁹⁹ In essence this theory envisages that 'municipal law/national law must always conform to international law, and that where there is conflict between the two, the latter must prevail, and further that it is not necessary to transform international norms into national/municipal law.¹⁰⁰ On the other hand the dualist theory/approach envisages that international law and municipal legal systems constitute two

⁹⁶ Olugbuo (2003:1).

⁹⁷ Werle (2009:118).

⁹⁸ McCoubrey (1998:57).

⁹⁹ Cassese (2005:215).

¹⁰⁰ Cassese (2005:215).

distinct and formally separate categories of legal orders.¹⁰¹ In that regard this theory argues that the differences between these two legal systems are thus: 'the subjects of domestic legal systems are individuals and groups of individuals, whereas in case of international law are states; sources of domestic/municipal law are parliamentary statutes or judge-made law, while treaties and custom are the two principal law-creating processes in international law; and national law regulates the internal functioning of the State and the relations between States and individuals, whereas international law chiefly governs relations between sovereign States.'¹⁰² This theory therefore still perceives individuals as the exclusive domain of municipal law, and States as the exclusive domain of States. This paper therefore addresses the different modes of implementing international law in national jurisdictions from these theories perspective while at the same time, as this paper has earlier argued, keeping in mind that international criminal law has evolved to the point that it directly applies to individuals especially those who commit international crimes. It must be noted that different terminology has been employed to explain the same modes of implementation of international law in national jurisdiction, however this paper discusses these as follows: automatic standing incorporation and legislative ad hoc incorporation.

¹⁰¹ Cassese (2005:214).

¹⁰² Cassese (2005:214).

3.2 Automatic Standing Incorporation

Under this mode of incorporation of international rules, incorporation 'occurs whenever the national constitution, or law (or, in the case of judge-made law, judicial decisions) enjoin that all State officials as well as nationals and other individuals living on the territory of the State are bound to apply certain present or future rules of international law.'¹⁰³ In other States, this mode of incorporation is what is fulfilled where international rules or treaties become domestic law just by virtue of ratification.¹⁰⁴ In essence 'an internal norm or law, most often times a constitutional provision provides in a permanent way for the automatic incorporation into national law of any rule of international law more especially customary international law or even treaties.'¹⁰⁵ However in respect of treaties, this mode is only applicable in respect 'of treaties which are self-executing, that is, those treaties which require no intervention by the legislature in order to determine how the obligations under the treaties are to be carried into effect, that is, they have the force of law without the need for legislation to make them part of municipal law.'¹⁰⁶ As regards non-self executing treaties, there is always a need or requirement for implementing legislation in order to make them applicable in domestic jurisdictions, that is, to make them applicable by the courts.¹⁰⁷ In the The USA, for instance, the constitution stipulates that treaties made under the authority of the USA form part of the supreme law of the

¹⁰³ Cassese (2005:220).

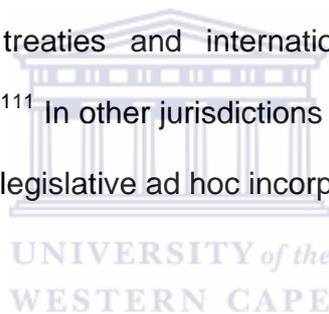
¹⁰⁴ Thamilaran (1999:2).

¹⁰⁵ Cassese (2005:220).

¹⁰⁶ Feldman (1999:4).

¹⁰⁷ Thamilaran (1999:4).

land.¹⁰⁸ In that regard the courts *inter alia* are under an obligation to apply such treaties in their decisions. However it must be noted that for a treaty or international agreement to be ratified by the US President, the President must have first submitted it to the Senate for its advice and consent by a two-thirds vote.¹⁰⁹ It is upon attaining the two-thirds vote that the President may ratify the international agreement/treaty, but he is under no obligation to do so, as he may decline to ratify the treaty.¹¹⁰ Once ratified, it becomes the supreme law of the land and US courts are under an obligation to apply it. However it must still be noted that the US President can derive authority straight from the constitution and ratify treaties and international agreements without the involvement of congress.¹¹¹ In other jurisdictions international law becomes part of municipal law through legislative ad hoc incorporation.



3.3 Legislative Ad Hoc Incorporation

Under this mode of implementation, international law other than international customary law, can only become part of national or municipal law upon legislative action. In that regard 'the provisions of ratified treaties do not become national law unless they have been enacted as legislation by normal

¹⁰⁸ The Constitution of the United States, Art. VI : 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....'(online at: <http://72.32.50.200/constitution/constitution.pdf> -accessed on 20.05.2010).

¹⁰⁹ Slyz (1995-1996:8).

¹¹⁰ Slyz (1995-1996:9).

¹¹¹ Slyz (1995-1996:10).

method, and the legislative act creating the norms as domestic law is an act entirely distinct from the act of ratification of the treaty.¹¹² In other jurisdictions, 'this method is just referred to as 'legislative incorporation' and is used for example in the UK, Commonwealth countries, and Scandinavian countries.'¹¹³ This method therefore 'differs from a jurisdiction where ratified treaties become domestic/municipal law just by virtue of ratification, that is, automatic standing incorporation or automatic incorporation.'¹¹⁴ It must however be borne in mind as already observed, that even in jurisdictions where treaties become part of municipal/domestic law by virtue of ratification, this is only applicable to what are self-executing treaties, whereas for non-self-executing treaties or provisions, enabling legislation must be passed to make them part of domestic/municipal law. Implementing domestic legislation where required, 'may consist of two principal forms: firstly the legislation may consist of an act of parliament translating the various treaty provisions, powers, and rights stemming from those international provisions (*statutory ad hoc incorporation of international rules*); secondly, the act of parliament may confine itself to enjoining the automatic applicability of the international rule within the national legal system, without formulating that rule ad hoc (*automatic ad hoc incorporation of international law*).'¹¹⁵ The generality of the applicability of treaties in the national jurisdiction is thus curtailed in that incorporation is effected on a case by case basis.'¹¹⁶ Despite these differences in approach, the

¹¹² Thamilmaran (1999:2).

¹¹³ Thamilmaran (1999:2).

¹¹⁴ Thamilmaran (1999:3).

¹¹⁵ Cassese (2005:221).

¹¹⁶ Cassese (2005:221).

end result is the same, that is, the treaties in question will have the same force of law in the national jurisdiction. What matters is the legislative act of incorporating the treaties into municipal law, hence the courts or any other public bodies can now apply the provisions of the treaties just as any other municipal law.

It is thus clear that self-executing treaties become part of municipal law just by an act of ratification, whereas non-self-executing treaties will always require an act of legislation to make them part of municipal law. Similarly customary international law in most States become directly applicable as municipal law as provided in the constitutions of those States. The different mechanisms of applicability of international law have thus been adequately summarized in relation to Scandinavian countries as follows: 'Whereas in some countries, either by virtue of a provision in the Constitution or by virtue of customary constitutional law, international agreements automatically become part of the international legal system as soon as they have been ratified and published, it is a longstanding practice in Sweden as well as in other Scandinavian countries that international agreements cannot be applied by national courts or other authorities unless they have been incorporated into the national legal system by a particular legislative act. Thus, if the existing legislation does not contain any rules equivalent to the provisions of the agreement, or where the rules of the

national law are in conflict with these provisions, the national law has to be supplemented or amended.¹¹⁷

It is therefore very important that States should have clarity in their legal systems, most importantly in their constitutions as to how international law is to be applied in their jurisdictions. In the event that this is not clarified, there is likely to be a tag-of-war as to whether to apply international law or municipal law when certain international law issues arise. In that respect this paper argues that in the case of Malawi and applicability of international law, in particular, the Rome Statute, there is need for enabling legislation to domesticate it.



3.4 Non-Incorporation

Under this option, States can decide just 'to use their ordinary criminal law to cover crimes under international law adequately, for example under the definitions of murder, deprivation of liberty, and the like.'¹¹⁸In this regard, the core crimes will in essence, be investigated and prosecuted just like ordinary crimes. Following this route of non-incorporation will create confusion and uncertainty in that it might be discovered that the punishments under ordinary criminal law might not be adequate enough for the core crimes.¹¹⁹Furthermore the offences under ordinary criminal law might not capture clearly and

¹¹⁷ Sperduti (1977:47), quoting Summary of a report by a Governmental Committee entitled in Swedish: *Internationella Overenskommelser och Svensk ratt* (English translation 'International Treaties and Swedish law'), SOU 1974, 100.

¹¹⁸ Werle (2009:120).

¹¹⁹ Werle (2009:120).

adequately the magnitude and gravity of the core crime,¹²⁰ and this might lead to a dilution of the seriousness of the core crimes. It has however been argued that where there is inadequacy in the ordinary criminal law, that will possibly result in the ICC assuming jurisdiction and prosecuting those crimes as stipulated in the Rome Statute.¹²¹ That would definitely be an indication of the State's inability to investigate and prosecute those core crimes. However, it has further been argued that though non-incorporation is an option, 'to comply fully with the spirit and plan of the Rome Statute, States should adapt their substantive criminal law.'¹²² Incorporation of the Rome Statute into municipal law is therefore, a preferred option. Several States Parties to the Rome Statute have domesticated the Statute, and others are in the process of so doing. Malawi would therefore benefit by emulating the examples of such States.

3.5 Rome Statute Implementation in Some States

Other States Parties to the Rome Statute have already implemented the Statute into their municipal laws. The domestication of the Statute therefore makes it applicable in those States, as municipal law. These States have therefore established jurisdiction over the core crimes as provided for in the Rome Statute. For purposes of this paper, the discussion is restricted to implementation of the Rome Statute in South Africa, Kenya, New Zealand and England.

¹²⁰ Hay (2004:193).

¹²¹ Werle (2009:120).

¹²² Werle (2009:121).

3.5.1 Rome Statute in South Africa

South Africa was one of the so called 'like-minded nations at the Rome Conference in 1998 who supported the creation of the ICC, and on 18 July 1998 the South African Parliament passed the Implementation of the International Criminal Court Act 27 of 2002 (the ICC Act).¹²³ The introduction to the ICC Act demonstrates South Africa's commitment in creating a legal framework for the full implementation of the Rome Statute, as regards providing for the core crimes, prosecution of persons committing these crimes within and outside South Africa, surrender of such persons to the ICC, and all other cooperation requirements with the ICC.¹²⁴ Worth noting is that South Africa decided to implement the Rome Statute through legislative ad hoc incorporation. Ratification alone was not sufficient, but incorporation through legislation. In that regard South Africa made sure that the expectations and aspirations of the Rome Statute are adequately met. In Chapter One, the ICC Act further reiterates the objects of the Act as being, *inter alia*, 'to ensure that the Statute is effectively implemented in the Republic; to ensure that anything done in this Act conforms with the obligations of the Republic in terms of the Statute; to provide for the crime of genocide, crimes against humanity and war crimes, and in the event of the national prosecuting authority declining or being

¹²³ Du Plessis (2003:1).

¹²⁴ To provide for a framework to ensure the effective implementation of the Rome Statute of the ICC in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute, to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for matters connected therewith.

unable to prosecute a person contemplated in paragraph (d), to enable the Republic to cooperate with the Court in the investigation and prosecution of persons accused of having committed crimes or offences referred to in the Statute, and in particular to- (i) enable the Court to make requests for assistance; (ii) provide mechanisms for the surrender to the Court of persons accused of having committed a crime referred to in the Statute; (iii) enable the Court to sit in the Republic; and (iv) enforce any sentence or order made by the Court.¹²⁵ Furthermore, South Africa inserted an all inclusive provision in the ICC Act, to make sure that any weakness in drafting the Act, does not compromise the full application of the Rome Statute. The ICC Act thus provides that, 'In addition to the Constitution and the law, any competent court in the Republic hearing a matter arising from the application of this Act must also consider, and where, appropriate, may apply –(a) conventional international law, and in particular the Statute (emphasis added); (b) customary international law; and (c) comparable foreign law.'¹²⁶

In essence therefore the ICC Act has attempted to a great extent to cover fully South Africa's obligations under the Rome Statute. One significant aspect of the ICC Act is its provision on the question of immunity from prosecution. The ICC Act provides that, 'notwithstanding any other law to the contrary, including customary and conventional international law, the fact that a person.....is or was a Head of State or Government, a member of a government or parliament, an elected representative or a government official....is neither –(i) a defence to

¹²⁵ Implementation of the International Criminal Court Act, s. 3 (a)-(e).

¹²⁶ Implementation of the International Criminal Court Act, s. 2.

a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.¹²⁷ There is no doubt, therefore, that no one accused of these crimes will enjoy immunity in South Africa. This provision mirrors *mutatis mutandis* Article 27 of the Rome Statute. Official capacity of a person is therefore, not a bar to prosecution before both the ICC and South African courts. Du Plessis has hailed this ICC Act provision as ‘a significant aspect of the ICC Act and one which is to be welcomed, signaling as it does South Africa’s intention of acting hand in hand with the International Criminal Court to bring government officials, whatever their standing, to justice.’¹²⁸ The ICC Act has further entrenched provisions regarding cooperation with the ICC relating to investigations and prosecutions, enforcement of ICC sentences, confiscation orders, and various aspects of cooperation required. And as regards substantive law, the ICC Act has adopted wholesale the wording of the Rome Statute as regards the core crimes.

All in all, the implementation of the Rome Statute, by legislation, demonstrates South Africa’s commitment to fully abide by the Rome Statute. The fact that the South African President had indicated that al Bashir would be arrested, if he came to South Africa, further demonstrates that applicability of the Rome Statute can be further achieved, by legislation coupled with political will.

¹²⁷ Implementation of the International Criminal Court Act, s. 4 (2)(a).

¹²⁸ Du Plessis (2003:7).

3.5.2 Rome Statute in the UK

The experience of UK in implementing the Rome Statute is quite unique. UK first passed the International Criminal Court Act 2001 (ICC Act), which came into force on 1 September 2001, for the implementation of the Rome Statute in England and Wales, and Northern Ireland before ratifying the Rome Statute.¹²⁹The purport of the Act is ‘to give effect to the Statute of the International Criminal Court; to provide for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court, and for connected purposes.’¹³⁰ It has further been observed that the ICC Act has two major purposes, ‘to ensure that the UK is able to cooperate fully with the ICC, and to enact into domestic law the substantive offences, that is genocide, crimes against humanity, and war crimes, the ICC may assert jurisdiction over when it comes into being.’¹³¹ The ICC Act has thus made its provisions in line with the Rome Statute in all aspects, that is, relating to incorporation of the core crimes, investigations and prosecutions of the core crimes, cooperation with the ICC, and all other incidental procedural matters connected thereto, which makes the full implementation of the Rome Statute a reality in the UK. There are inevitably issues which need to be highlighted.

¹²⁹ Warbrick (2002:734).

¹³⁰ International Criminal Court Act, preamble.

¹³¹ Warbrick (2002:734).

The ICC Act deals differently with the issue of immunity of persons who are nationals of a State Party and a non-State Party to the Rome Statute.¹³² In case on non-State Parties, the ICC would be required to obtain a waiver of immunity from the state concerned,¹³³ whereas in case of State Parties there is no requirement of a waiver as that is consistent with Article 27 of the Rome Statute. And commenting on non requirement of express waiver for States Parties in the ICC Act, Warbrick concedes that this is justified 'for having ratified an instrument creating a court to prosecute international crimes, and in front of which no immunities may be pleaded, it would seem inconsistent for a State to assert that its immunities prevent surrender.'¹³⁴ Warbrick further quotes Lord Averbury who buttressed the point stating that 'in accepting Article 27, a State Party to the ICC Statute has already agreed that immunity of its representatives, including its Head of State, may be waived before the International Criminal Court and that their status is not a barrier to their arrest and surrender to the Court. A non-State Party to the ICC Statute has not accepted that provision [Art. 27] and the immunity of their diplomats remains

¹³² Section 23 of the Act stipulates: (1) Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person; (2) where –(a) state or diplomatic immunity attaches to a person by reason of a connection with a state party to the ICC Statute, and (a) waiver of that immunity is obtained by the ICC in relation to that persons surrender, the waiver shall be treated as extending to proceedings under this Part in connection with that request; (3) a certificate by the Secretary of State (a) that a state is or is not a party to the ICC Statute, or (b) that there has been such a waiver as is mentioned in subsection (2), is conclusive evidence of that fact for purposes of this Part; (4) the Secretary of State may, after any consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching a person shall not be taken against that person.

¹³³ Rome Statute, Art. 98 (1).

¹³⁴ Warbrick (2002:738).

intact unless there is an express waiver.¹³⁵ It is thus clear that in implementing the Rome Statute, issues of immunity must be carefully and critically addressed as failure so to do, might compromise the applicability of the Rome Statute, and hence derail the investigation and prosecution of these core crimes. To avoid this kind of uncertainty the South African ICC Act just provided a general provision whose effect is that there shall be no immunity for these core crimes. It is acceptable that each State will have different approaches to implementation of the Rome Statute, but what is critical is that the purport and spirit of the Rome Statute must not be lost in whatever legislation style is adopted and used. The primary aim should be to effectively realign the municipal law to the objects of the Rome Statute, and thereby establishing national or domestic jurisdiction to investigate and prosecute core crimes.

Hence the realization by UK of the weakness of its domestic legislation in covering international crimes was also an incentive for domesticating the Rome Statute.¹³⁶ Therefore the UK had 'to incorporate the core crimes or ICC crimes into domestic law, in order to avail itself to the complementarity provisions under the Rome Statute, and thereby be able to investigate and prosecute the core crimes itself.'¹³⁷ The ICC Act therefore provides for the crime of genocide, crimes against humanity and war crimes, and defines these crimes by reference to the definitions in the Rome Statute.¹³⁸ In this regard, the ICC Act fully incorporates these crimes without diluting their effect by redrafting them.

¹³⁵ Warbrick (2002:738).

¹³⁶ Warbrick (2002:739).

¹³⁷ Warbrick (2002:739).

¹³⁸ International Criminal Court Act, s. 50.

The elements of these crimes are thus captured by the ICC Act. By thus, incorporating the Rome Statute by legislation, the UK has demonstrated its commitment to upholding the rules of international criminal law, and the Rome Statute, in particular.

3.5.3 Rome Statute in New Zealand

New Zealand ratified the Rome Statute on 7 September 2000 becoming the 17th State to ratify the Statute.¹³⁹ This is so because under the New Zealand legal system, before treaty action is taken, Cabinet must approve, and then the treaty is tabled before a Parliamentary select committee and then legislation is passed before New Zealand can become a party.¹⁴⁰ The approach in New Zealand is similar to that in the UK, in that implementation legislation, in the form of the International Crimes and International Criminal Court Act (ICC Act), was enacted before ratification of the Rome Statute.¹⁴¹ Another unique feature was that New Zealand, 'due to its territorial jurisdiction, could not prosecute its citizen who committed, for example, genocide, outside New Zealand if it did not incorporate the core crimes and even amend its Crimes Act.'¹⁴² It was therefore prudent to adopt the core crimes as provided for in the Rome Statute. In that regard, New Zealand would establish and did establish jurisdiction to prosecute the core crimes. The ICC Act thus adopts the approach of defining the crime of

¹³⁹ Hay (2004:191).

¹⁴⁰ Hay (2004:192).

¹⁴¹ The Act was assented to on 6 September 2000, came into force on 1 October 2000 (as per section 2).

¹⁴² Hay (2004:192).

genocide, crimes against humanity and war crimes by reference to the Rome Statute.¹⁴³ Furthermore, the general principles of criminal law emanating from the Rome Statute, have been incorporated in the ICC Act by reference to the Articles in the Rome Statute.¹⁴⁴

Under New Zealand legal system there is no supreme law governing immunities, and as such complexities might arise under the ICC Act, only where a foreign national with immunity status is being prosecuted.¹⁴⁵ However this difficulty might be cured by the ICC assuming jurisdiction over the matter, and seeking a waiver of the immunity, and surrender of the individual to the ICC under Article 97 of the Rome Statute. Otherwise the ICC Act has endeavored to as much as possible replicate the Rome Statute under municipal law. It has also provided for procedural issues relating to cooperation with the ICC as envisaged in the Rome Statute. The ICC Act has further criminalized conduct relating to corruption and bribery of an official of ICC, giving false evidence on matters relating to the ICC, fabricating evidence before the ICC, conspiracy to defeat justice in ICC and interference with witnesses or officials in relation to ICC matters.¹⁴⁶ This innovation of including new offences in the ICC Act is encouraging and enhances New Zealand's commitment to fully realize the objects of the Rome Statute within its jurisdiction. Thus New Zealand, just like the UK and South Africa, has demonstrated that despite the Rome Statute

¹⁴³ International Crimes and International Criminal Court Act, s. 9-11.

¹⁴⁴ International Crimes and International Criminal Court Act, s. 12.

¹⁴⁵ Hay (2004:198).

¹⁴⁶ International Crimes and International Criminal Court Act, s. 17-21.

imposing no obligations for the domestication of the Statute, it is advantageous so to do, if the objects of the Statute are to be realized.

3.6 Concluding Remarks

There are various modes of implementing international law and international agreements in national jurisdictions. National jurisdictions appear hesitant, despite their constitutional provisions, to apply customary international law. Clarity is only achieved with regard to applicability of international law and international agreements, through legislative process. For the Rome Statute to be effectively domesticated, municipal legislation to that effect is the key. The true nature of the substantive criminal law in the Rome Statute must not be bypassed in domesticating the Rome Statute. State Parties must also exercise their flexibility, as New Zealand has demonstrated, to include other crimes in their municipal law which have the objective of enhancing the objectives of the Rome Statute

CHAPTER FOUR

DOMESTICATION OF THE ROME STATUTE IN MALAWI

4.1 Introduction

The Republic of Malawi (Malawi) ratified the Rome Statute on 19 September 2002.¹⁴⁷ As a result of the ratification Malawi just as other States Parties to the Rome Statute, has obligations to bring to fruition the aspirations of the Rome Statute. As has already been alluded to in this paper, the ICC was established 'to exercise jurisdiction over persons for the most serious crimes of international concern, and shall be complementary to national jurisdictions.'¹⁴⁸ In that regard, it is envisaged that national courts shall remain the first port of call as regards the prosecution of these most serious crimes, that is, the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁴⁹ The principle of complementarity of the ICC thus 'denotes that the court is only to exercise its jurisdiction if States remain wholly inactive *vis-à-vis* ICC crimes or, in case States investigate prosecute and adjudicate cases, if they prove to be unwilling or unable to do so genuinely.'¹⁵⁰ Malawi is therefore under an obligation to contribute to the effectiveness of the ICC by prosecuting ICC crimes in its national courts. This paper therefore argues that Malawi must incorporate the Rome Statute into its national laws and thereby create legal certainty as regards the suppression of these ICC crimes. This will inevitably

¹⁴⁷ Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute (2001:3).

¹⁴⁸ Rome Statute, Art. 1.

¹⁴⁹ Rome Statute, Art. 5.

¹⁵⁰ Kleffner (2008:4).

depend on the constitutional provisions in Malawi, as well as amendment of other laws which might run counter to the aspirations of the Rome Statute. An understanding of how Malawi can implement the Rome Statute in her jurisdiction would be futile without understanding *inter alia* the constitutional order and the legal system in Malawi, how Malawi implements international agreements, experiences of other States in implementation of the Rome Statute, and the procedural issues as regards cooperation with the ICC.

4.2 Malawi Legal System

Malawi was formerly a British Protectorate and therefore follows the English common law and is a dualist system. This is so because of the historical background of Malawi. On 14 May 1891 Malawi was proclaimed a British Protectorate under the Africa Order-in-Council of 1889.¹⁵¹ In 1907 the Nyasaland Order-in-Council was adopted, and under this Constitution, the name of the protectorate changed from British Central Africa to Nyasaland.¹⁵² On 6 July 1964 Malawi attained independence status and assumed a new name, Malawi; and on 6 July 1966 became the Republic of Malawi.¹⁵³ The Republic of Malawi Constitution, 1966 vested in the president absolute executive authority and power,¹⁵⁴ and created a one-party State with the

¹⁵¹ Hara (2007:5).

¹⁵² Hara (2007:5).

¹⁵³ Chirwa *et al* (2005:4).

¹⁵⁴ Republic of Malawi Constitution, 1966, s.8(1).

Malawi Congress Party as the only party on the land.¹⁵⁵ However, as regards international law the constitution provided that 'the Government and the people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights, *and of adherence to the Law of Nations.*'¹⁵⁶ (Emphasis added). This was a recognition of international law and adherence to it, though the provision fell short of providing the effect and applicability of international law in Malawi. However practice showed that international law, especially treaties had to be ratified and incorporated into domestic law.

Eventually Malawi did away with dictatorship and became a multi-party State with the adoption of an interim constitution on 18 May 1994 which became the substantive constitution on 18 May 1995.¹⁵⁷ The supremacy of the constitution is one of its underlying values, whose essence is that the three organs of State, the Executive, Legislature and the Judiciary are all subordinate to the constitution and are bound by its provisions.¹⁵⁸ Hence all laws derive their authority from the constitution and 'any law contrary to or inconsistent with the provisions of the constitution shall, to the extent of such inconsistency, be invalid.'¹⁵⁹ It is therefore from this constitutional background that the implementation of the Rome Statute in Malawi has to be discussed.

¹⁵⁵ Republic of Malawi Constitution, 1966, s.4 (1), (2).

¹⁵⁶ Republic of Malawi Constitution, 1966, s.2(1)(iii).

¹⁵⁷ Chigawa (2006:12).

¹⁵⁸ Republic of Malawi Constitution, 1995, ss. 4 & 5.

¹⁵⁹ Republic of Malawi Constitution, 1995, s.5.

4.3 International Law in Malawi

As has been demonstrated the supreme law in Malawi is the constitution. It guides all organs of State in the conduct of their affairs and affairs of State. It thus provides for the status of international law, international agreements and treaties in the Malawi legal system. The constitution envisages three scenarios of applicability of international agreements and international law in Malawi. That is, any international agreement entered into after the commencement of the constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament;¹⁶⁰ binding international agreements entered into before the commencement of this constitution shall, continue to bind the Republic unless otherwise provided by an Act of Parliament;¹⁶¹ and customary international law, unless inconsistent with the constitution or an Act of Parliament, shall form part of the law of the Republic.¹⁶² The scenario as envisaged by the constitution is that international agreements can only be implemented through national legislation or legislative incorporation, or in case of customary international law, as long as it is not in conflict with the constitution or an Act of Parliament. It is quite obvious, therefore, that ratification only of an international agreement is not enough for the said international agreement to be part of the domestic/municipal law in Malawi. However as regards international agreements entered into before commencement of this constitution, it seems like the constitution envisages a scenario where those agreements would be law in Malawi without any

¹⁶⁰ Republic of Malawi Constitution, 1995, s.211 (1).

¹⁶¹ Republic of Malawi Constitution, 1995, s.211 (2).

¹⁶² Republic of Malawi Constitution, 1995, s.211 (3).

legislative action. This would definitely create a problem of applicability in Malawi as the mechanism of its applicability is not clearly defined.

4.3.1 Court Decisions

The court hierarchy in Malawi comprises of the Magistrates courts (subordinate courts),¹⁶³ the High Court of Malawi (HC)¹⁶⁴ and the Malawi Supreme Court of Appeal (MSCA).¹⁶⁵ The subordinate courts have limited criminal and civil jurisdiction. The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. The Supreme Court of Appeal has appellate jurisdiction to hear appeals from the High Court and is the highest appellate court in Malawi.¹⁶⁶ The decisions of the MSCA are therefore final and depict the position of the law in Malawi. The decisions of the HC unless reversed by the HC will also depict the position of the law in Malawi. The interpretation of the constitution, statutes and the applicability of international law rest with the HC and the MSCA. Thus the focus of this paper as regards applicability of international law and international agreements in Malawi is limited to the HC and the MSCA as opposed to the magistrates courts.

¹⁶³ Republic of Malawi Constitution, 1995, s.110.

¹⁶⁴ Republic of Malawi Constitution, 1995, s.108.

¹⁶⁵ Republic of Malawi Constitution, 1995, s.104.

¹⁶⁶ Republic of Malawi Constitution, 1995, s.104 (2).

4.3.1.1 High Court Decisions

The HC in Malawi has, however, dating back from the time of the 1966 constitution grappled with the applicability of international law where it is seen to be inconsistent or in conflict with the constitution or any domestic law. The HC has generally interpreted such international agreements to be inapplicable in Malawi if they are found to be inconsistent with the constitution. In the case of *Gondwe v Attorney General*¹⁶⁷ the plaintiff's action was for the recovery of his property, forfeited by the previous government under the now repealed Forfeiture Act which allowed the government to seize property in the interest of the economy. His argument was that the Forfeiture Act was unconstitutional and contrary to the Universal Declaration of Human Rights which was part of the laws of Malawi. In dismissing the plaintiff's claim the court stated thus: 'The doctrine of state sovereignty and supremacy of Parliament in legislating, are the basis, I believe, upon which, in common law jurisdictions, international law must be incorporated in municipal law for it to be enforceable. It logically follows therefore that sovereign states have the authority to determine the extent and limit to which they wish to incorporate international law. This is exactly what Parliament did by enacting s.2(1) of the 1966 Constitution and the proviso in s. 2(2) thereof.'¹⁶⁸ The court went further to hold that 'where there is a conflict between international law and municipal law, in cases where they are both applicable law, the question is one of interpretation and construction in order to

¹⁶⁷ [1996] MLR 492 (HC).

¹⁶⁸ [1996] MLR 492 at 496 (HC).

determine the intention of the legislature.¹⁶⁹ In resolving this conflict the court decided that 'municipal law within a sovereign territory, is supreme to international law, if a conflict can be avoided by construction let the courts do so.'¹⁷⁰ The court was obviously of the view that it was up to any sovereign state just like Malawi to decide how international law would be applied in its territory and within whatever limits are put in place by the legislature. It must also be borne in mind that this case was decided on the basis of the old constitutional order and not on the basis of the 1995 Constitution. In fact the court was just following the reasoning of an earlier court decision in *Mwakawanga v The Republic*¹⁷¹ on the supremacy of municipal law over international law where there is a conflict between the two. However the court in both cases did appreciate the fact that in interpreting domestic law the court should adopt an interpretation which would not be in conflict with international law. However this interpretation that domestic/municipal law is supreme as regards international law, would in the present international criminal law regime be counter to the universality of prosecuting individuals accused of committing the ICC crimes or international crimes under the Rome Statute. This is so because States Parties to the Rome Statute have an obligation to participate in the suppression of those crimes since as already observed the ICC is supposed to be complementary to national jurisdictions in that regard.

In the current constitutional order courts in Malawi have continued to have a disjointed approach in the applicability of international law. It is unfortunate that

¹⁶⁹ [1996] MLR 492 at 496 (HC).

¹⁷⁰ [1996] MLR 492 at 497 (HC).

¹⁷¹ (1968-70) 5 ALR (Mal)14.

cases available are civil cases as opposed to criminal cases. However that weakness is cured by the fact that the principles employed with regards to international law in Malawi are the same. In some instances the courts have just referred to an international agreement as forming part of the municipal law in Malawi but fall short of a detailed discussion as to its status as regards applicability. In the case of *Kambiningi Khazi Jones et al v The Refugee Committee (The Attorney General)*¹⁷² the plaintiffs were challenging by way of judicial review the decision stripping them of their refugee status in Malawi. The court casually referred to the 1959 Geneva Convention on the Status of refugees and its 1967 New York Protocol as municipal law in Malawi by virtue of Malawi signing and ratifying it, and held that the decision being challenged was justified.¹⁷³ One would have expected the court to make an in depth analysis of the applicability of the Convention in Malawi and give reasons for applying the Convention. The constitution however empowers the court in interpreting the constitution to inter alia, where applicable, have regard to current norms of public international law and comparable foreign case law.¹⁷⁴

However as the jurisprudence has been and is being developed on the applicability of international law in Malawi, courts are more willing to uphold the importance of international law in Malawi. This is more evident in the first adoption case of an infant, David Banda by the famous singer, Madonna, in Malawi.¹⁷⁵ Having considered that Malawi ratified the Convention on the Rights

¹⁷² Miscellaneous Civil Cause No. 313 of 2005 (HC).

¹⁷³ Miscellaneous Civil Cause No. 313 of 2005 (HC), p.4.

¹⁷⁴ Republic of Malawi Constitution, s.11 (2) (c).

¹⁷⁵ Adoption Cause No. 2 of 2006 (HC).

of the Child in 1991, and also that Malawi is a party to the African Charter on the Rights and Welfare of the Child, the court held that these conventions are binding on Malawi.¹⁷⁶ This was despite the fact that these conventions have not been incorporated as part of the municipal law in Malawi. The court then went on to address the issue if any, of inconsistency between these conventions and municipal law and rightly in my view, held and directed as follows, 'If for a moment the argument that the Conventions are not part of our law found favour, then at least on part of the court the duty is to interpret and apply our Statutory law, so far as the spirit of the Statute could allow, so that it is in conformity and not in conflict with our established obligations under these Conventions. And therefore that unless the statute, by its words and spirit compels the courts to ignore international laws that is binding on us, the practice of our courts is to avoid a clash and the way is to construe the domestic statute in such a way as to avoid breaching the obligation.'¹⁷⁷ The court was therefore interpreting the municipal law in such a way that it does not breach international law. However it is worth noting that the court held that the international conventions were binding on Malawi despite that they had not been incorporated into the municipal law after ratification.

In the second adoption case of yet another infant, Mercy James, by again Madonna,¹⁷⁸ the dilemma of the courts on the applicability of international law in Malawi is evident. The court in this case, decided by a different Judge, again referred to the CRC and the ACHPR and never critically discussed the

¹⁷⁶ Adoption Cause No. 2 of 2006 (HC), p. 10.

¹⁷⁷ Adoption Cause No. 2 of 2006 (HC), p.10.

¹⁷⁸ Adoption Case No. 1 of 2009.

applicability of these instruments in Malawi. The court in reference to the definition 'of the best interests of the child' as provided in the instruments/conventions, with reference to the Malawi statute, only stated that 'the second issue to be considered is the issue of the welfare of the child. In my attempts to make sense of this requirement under section 4 of the Act, I referred to two international instruments: the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACHPR) to which Malawi is a signatory.'¹⁷⁹ Firstly the court confused ACHPR as standing for the African Charter on the Rights and Welfare of the Child instead of the African Charter on Human and Peoples' Rights. However the point to be noted is that the court is just referring to these instruments without stating the position of their applicability in Malawi. Thus two HC decisions depict two different approaches to how courts deal with international agreements ratified by Malawi where incorporation did not materialize. This clearly demonstrates that section 211 of the constitution already referred to, creates legal uncertainty on the applicability of international agreements ratified by Malawi, but not incorporated into municipal law. In that regard one would have expected the MSCA to offer clear and unambiguous direction on the interpretation of section 211 of the constitution, and thus the status of international agreements and customary international law in Malawi.

¹⁷⁹ Adoption Case No. 1 of 2009, p.5.

4.3.1.2 MSCA Decision

The HC in second adoption case by Madonna, having declined to grant her the adoption order, she appealed to the MSCA¹⁸⁰ and the MSCA had the opportunity to decide on the said application and status of international agreements and customary international law by interpreting the provisions of section 211 of the Constitution. Section 211 of the Constitution provides as follows: '(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament; (2) Binding international agreements entered into before the commencement of this Constitution shall, continue to bind the Republic unless otherwise provided by an Act of Parliament; (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic.' The MSCA was thus vexed with **inter alia**, the interpretation of section 211 of the Constitution. Thus the MSCA in its quest to interpret section 211 adopted the approach of supremacy of the constitution and statutes over international agreements and customary international law. The MSCA stated and directed as follows: 'We think that the correct reading of that section is to follow the clear language that has been employed. If one does that one will find that the clear thread that runs through the fabric of all the subsections of section 211 of our Constitution is that all international agreements entered into prior to the Constitution or after the Constitution are only binding if they are not in conflict with the clear provisions

¹⁸⁰ MSCA Adoption Appeal No. 28 of 2009.

of our statutes. *Put differently, whether an international agreement forms part of our law, regardless on when it was entered into, will depend on whether there is no Act of Parliament that provides to the contrary. And the question whether customary international law forms part of our law will depend on whether it is consistent with our Constitution or our statutes.*¹⁸¹ (Emphasis added). The MSCA went on and stated that 'If the executive branch of Government wishes any of the international conventions which it has freely acceded to, to have any force of law, then it should bring such convention before parliament which has the Constitutional mandate to make all laws of the land.'¹⁸²

It is thus the position of the law in Malawi, as interpreted by the MSCA, that international agreements or conventions entered into, or ratified by Malawi must be incorporated into municipal law by legislation through parliament. If this is not done, they cannot form part of the municipal law. Furthermore, that such international agreements/conventions must not be inconsistent with the Constitution or statutes to be applicable in Malawi. Similarly that customary international law can only be applicable in Malawi if it is also not in conflict with the constitution and statutes. This then creates an impediment to the applicability of the Rome Statute in Malawi without legislative incorporation. This position of the MSCA further runs contrary to the expectations of the Rome Statute and norms of customary international law as regards holding war criminals or those who commit the ICC crimes liable for prosecution by every State Party to the Rome Statute. A war criminal arrested in Malawi might thus

¹⁸¹ MSCA Adoption Appeal No. 28 of 2009, p.13.

¹⁸² MSCA Adoption Appeal No. 28 Of 2009, p.13.

not be prosecuted in Malawi if the Rome Statute is not incorporated into municipal law of the land, this regardless of the fact that Malawi ratified the Rome Statute. However the courts in Malawi are not creating any new ground with their approach as it has been widely accepted that 'national courts are generally hesitant, in case of conflict between applicable international law and national norm, to recognize international obligations and they end up giving precedence to local law.'¹⁸³ What is of paramount importance in Malawi is that legislative incorporation should always follow ratification of international agreements. Even in the UK, 'a treaty ratified by the Queen will have no effect under municipal law until an Act of Parliament is passed to give effect to it.'¹⁸⁴ The Rome Statute must therefore be domesticated in Malawi through legislation in order to make it part of the municipal law. Moreover treaty law requires that 'a treaty must be performed by according to its tenor.'¹⁸⁵ In that regard, and considering the obligations of Malawi under the Rome Statute there are several issues to be considered in incorporating the Rome Statute into municipal law for Malawi to effectively contribute in the suppression of the ICC crimes.

4.4 Considerations on Domesticating the Rome Statute

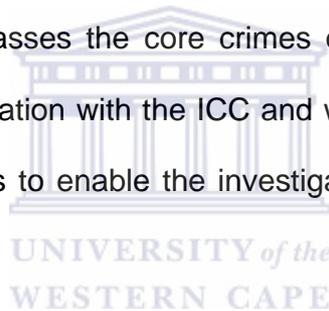
As has already been observed, in the suppression of the crime of genocide, crimes against humanity and war crimes, national jurisdictions have the primary jurisdiction to investigate and prosecute such crimes, and the ICC is just

¹⁸³Benvenuti (1993:162).

¹⁸⁴ Akehurst (1982:45).

¹⁸⁵ Elias (1980:44).

complementary to national jurisdictions.¹⁸⁶ The principle of complementarity thus 'denotes that the ICC will only exercise its jurisdiction if States remain wholly inactive vis-à-vis these ICC crimes or, in case States investigate, prosecute and adjudicate cases, if they prove to be unwilling or unable to do so genuinely.'¹⁸⁷ It must always be the understanding of States Parties that 'the ICC should only be activated when no domestic alternatives exist.'¹⁸⁸ States parties, just like Malawi, have to critically analyse their legal systems in line with the complementarity role of the ICC, and must establish jurisdiction over the core crimes. This will entail a critical look at the substantive criminal law and whether it fully encompasses the core crimes or the ICC crimes, procedural issues relating to cooperation with the ICC and whether domestic legal system has sufficient safeguards to enable the investigation and prosecution of these ICC crimes.



4.4.1 Substantive Law

Under the Rome Statute 'substantive law is understood as encompassing the crimes defined in Articles 6-8, that is, the crime of genocide, crimes against humanity and war crimes, and the general principles of criminal law spelled out in Part 3 of the Rome Statute.'¹⁸⁹ In that regard, a State party like Malawi, must examine its penal laws to see if they provide for these core crimes, and if they

¹⁸⁶Rome Statute, Art. 1.

¹⁸⁷ Kleffner (2008:4).

¹⁸⁸ Shany (2003:141).

¹⁸⁹ Kleffner (2003:87).

are in tandem with the definition of the core crimes as defined in the Rome Statute. This analysis will inevitably show whether Malawi can effectively investigate and prosecute these core crimes. In Malawi the Penal Code¹⁹⁰ is the statute which establishes a code of criminal law and thus defines conduct which is criminal and punishable. There are offences like murder,¹⁹¹ rape,¹⁹² kidnapping,¹⁹³ and abduction of girls under sixteen¹⁹⁴, which might constitute genocide, war crimes and crimes against humanity. However the definition of these offences and their elements do not conform to those in the Rome Statute. Murder is committed under the Penal Code 'where any person with malice aforethought causes the death of another by an unlawful act or omission.'¹⁹⁵ Genocide is committed when certain acts are committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such,'¹⁹⁶ whereas, crimes against humanity to entail criminal liability require that certain acts, such as murder, 'be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'¹⁹⁷ Although it is possible to prosecute an individual for genocide or crimes against humanity under the Penal Code, in Malawi, where murder committed, the gravity of the offence of genocide or crimes against humanity will be lost out. This is despite that in Malawi the severest punishment is reserved for those who commit murder, where the maximum sentence is death. Likewise in New

¹⁹⁰ (Cap 7:01) of 1930.

¹⁹¹ Penal Code, s.209.

¹⁹² Penal Code, s.132.

¹⁹³ Penal Code, s.257.

¹⁹⁴ Penal Code, s. 136.

¹⁹⁵ Penal Code, s. 209.

¹⁹⁶ Rome Statute, Art. 6.

¹⁹⁷ Rome Statute, Art. 7(1).

Zealand despite having general offences which could constitute the ICC offences, they adopted the ICC offences under the International Crimes and International Criminal Court Act, 2000 'because their general offences could not and did not completely capture for example the nature of the offence of genocide as the Rome Statute provided.'¹⁹⁸ Hay further argues that this is also because 'the mental element required for the offence of genocide is more specific than that required for murder, and more over if an incident that amounted to genocide did not involve the death of a person, the maximum penalty available could be comparably low.'¹⁹⁹

Similarly in Malawi one might also be prosecuted under the Penal Code for war crimes, where one causes grievous bodily harm to another. Again the gravity of the offence will be lost. Under the Penal Code the offence is simply committed where any person unlawfully does grievous harm to another.²⁰⁰ Whereas war crimes have to be committed as part of a plan or policy or as part of a large scale commission of such crimes.²⁰¹ It is therefore required to effectively investigate and prosecute the ICC offences under domestic law, that domestic law must specifically provide for substantive law regarding these crimes as is envisaged in the Rome Statute. It has been stated that the ICC complementarity to be effective, 'States must respond, and have responded by adopting implementing legislation enabling their authorities to enforce

¹⁹⁸ Hay (2004:193).

¹⁹⁹ Hay (2004:193).

²⁰⁰ Penal Code, s. 238.

²⁰¹ Rome Statute, Art. 8(1).

international criminal law as applicable to the core crimes.²⁰² 'Inability of a State to effectively investigate and prosecute the core crimes might arise from inadequacies of substantive legislation, that is, defects of domestic laws.'²⁰³ Although 'the Rome Statute does not impose or establish any obligations on States parties regarding the incorporation of the Statute's substantive criminal law into national law,'²⁰⁴ it envisages that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'²⁰⁵ It is safe to conclude that 'such a duty entails establishing jurisdiction, and the practice of States parties to implement the substantive law clearly establishes such an agreement, understood as a common understanding about the meaning of the treaty as requiring them to do so.'²⁰⁶ General criminal law, entails the State being concerned as opposed to the Rome Statute with apprehending and punishing criminal within its borders.²⁰⁷ Malawi as a State party to the Rome Statute cannot rely on her Penal Code to effectively investigate and prosecute the core crimes without transposing or incorporating the core crimes into the municipal law.

4.4.2 Procedural Law

Further considerations must relate to issues requiring cooperation with the ICC.

It is a mandatory obligation or requirement for States Parties to 'cooperate fully

²⁰² Kleffner (2003:87).

²⁰³ Kleffner (2003:90).

²⁰⁴ Werle (2009:118).

²⁰⁵ Rome Statute, para. 6 of preamble.

²⁰⁶ Kleffner (2003:92).

²⁰⁷ Sanders and Young (2000:2).

with the ICC in its investigation and prosecution of crimes within its jurisdiction.²⁰⁸ To fulfill that obligation States Parties are under obligation 'to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Part IX of the Rome Statute.'²⁰⁹ The ICC will require cooperation from States Parties with regard to *inter alia* surrender of arrested persons to the Court,²¹⁰ provisional arrest of the person sought,²¹¹ assistance in relation to investigations or prosecutions,²¹² and cooperation in respect of waiver of immunity and consent to surrender.²¹³ It is thus imperative for States Parties in order that they offer the assistance required by the ICC, to have legislation to that effect. States parties may also be required to amend their existing statutes which might impede their cooperation with the ICC, *inter alia*, relating to extradition or surrender of persons to the ICC and immunities of Heads of States and diplomats. Article 93 of the Rome Statute envisages several forms of cooperation required.²¹⁴ The UK, New Zealand and South Africa, have succeeded in encompassing in their

²⁰⁸ Rome Statute, Art. 86.

²⁰⁹ Rome Statute, Art. 88.

²¹⁰ Rome Statute, Art. 89.

²¹¹ Rome Statute, Art. 92.

²¹² Rome Statute, Art. 93.

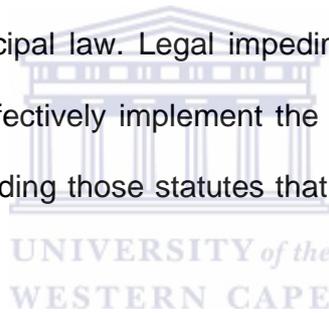
²¹³ Rome Statute, Art. 98.

²¹⁴ These include: identification and whereabouts of persons or the location of items; the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; the questioning of any person being investigated or prosecuted; service of documents, including judicial documents; facilitating the voluntary appearance as persons as witnesses or experts before the court; temporary transfer of persons as provided in custody; examination of places or sites, including the exhumation of grave sites; execution of seizures or searches; the provision of records and documents; protection of victims and witnesses and the preservation of evidence; identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the eventual forfeiture, without prejudice to the rights of bona fide third parties.

respective legislations domesticating the Rome Statute, to adopt the procedural issues relating to various cooperation requirements of the ICC.

4.4.3 Legal Impediments

Malawi, as has been demonstrated, is a State Party to the Rome Statute. Apart from the need for domestication of the Rome Statute, Malawi has to critically analyse her statutes, in order to bring them in tandem with the Rome Statute. It would be an anomaly to ratify the Rome Statute and then fail to apply it due to conflict with some municipal law. Legal impediments must therefore be done away with in order to effectively implement the purports of the Rome Statute. This might require amending those statutes that hinder effective domestication of the Rome Statute.

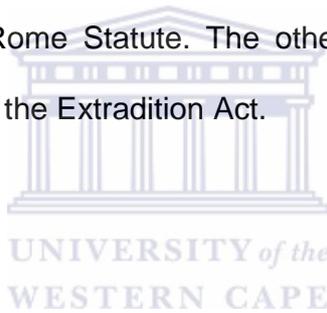


4.4.3.1 The Constitution

The starting point must be the constitution itself. The Malawi Constitution stipulates that 'No person holding the office of President shall be charged with any criminal offence in any court during his (or her) term of office.'²¹⁵ This would be a legal impediment in that if the President committed the core crimes during his tenure, he would not be liable to prosecution until he left office. The dilemma would be if for example, like Mugabe of Zimbabwe, he just clings to power by whatever means. However the Al Bashir situation demonstrates that

²¹⁵ Republic of Malawi Constitution, s. 91(2).

the ICC would then assume jurisdiction over the matter. It must also be admitted that even if the constitution did not provide such immunity it would possibly still be practically impossible to prosecute a sitting President within the domestic set-up unless if he were to be impeached first. Holding individuals criminally liable for these core crimes is premised on prosecuting any individual who commits such crimes regardless of his or her official capacity. Heads of States are therefore, not immune under international criminal law. In that regard, the ICC assuming jurisdiction in such a case would seem to be a more plausible alternative. But still the constitution must be re-aligned to the tenets and aspirations of the Rome Statute. The other legal impediment relates to extradition treaties under the Extradition Act.



4.4.3.2 Extradition Act

The Extradition Act empowers the Government of Malawi ‘to enter into arrangements with the government of any country, for the surrender on a basis of reciprocity, of fugitive offenders.’²¹⁶ This provision might seem non-problematic as regards the application of the Rome Statute in Malawi. However, Malawi might enter into such extradition treaties with non-parties to the Rome Statute, and if a national of such non-state is caught by the provisions of the Rome Statute, Malawi would be in a dilemma. It has been noted that on ‘23 September 2003, Malawi signed such agreement with the The USA, a non-Party to the Rome Statute, the effect of which was to compel

²¹⁶ Extradition Act, s. 3(1).

Malawi, not to cooperate with the ICC regarding USA personnel indicted by the ICC.²¹⁷ Such an agreement, under the Extradition Act, thus constitutes a legal impediment to Malawi's cooperation with the ICC as required of a State Party by the ICC. Malawi, must therefore, have a relook of the Act in order to bring it in tandem with the Rome Statute, thereby removing the impediment. This might require inserting a provision in the Act to the effect that where there is a conflict in respect of different extradition request primary consideration will be to the ICC. A good example occurred in Germany where according to Satzger, 'upon ratification of the Rome Statute, Article 16(2) of the Basic Law had to be altered in order to make it possible to extradite German citizens to the ICC.'²¹⁸ Apparently it was initially against the Basic Law to extradite a German citizen. Malawi can therefore amend it's the Extradition Act to remove the legal impediment to the applicability of the Rome Statute, hence facilitate effective cooperation with the ICC. This would have to be done, though, bearing in mind the provisions of Articles 90 and 98 of the Rome Statute as regards competing requests, and cooperation with respect to waiver of immunity and consent to surrender.

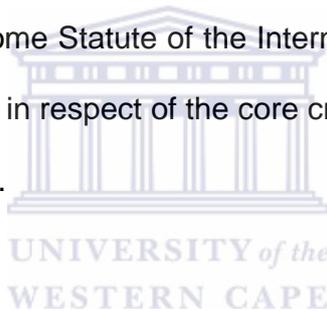
4.4.3.3 Immunities and Privileges Act

This is an Act which purports to determine the extent of the immunity of foreign states from the jurisdiction of the courts of Malawi; to provide for diplomatic and

²¹⁷ Kayira (2010:9).

²¹⁸ Satzger (2002:262).

consular privileges and immunities. Malawi must consider that according to Article 27 of the Rome Statute, immunity is not a bar to the ICC assuming jurisdiction in a particular matter or issue. However, this impediment might be overcome by the ICC itself as it is empowered under Article 98 to seek waiver of immunity of a particular person from any concerned State. However the Act must provide for such eventuality in order to be in tandem with the Rome Statute, and avoid any impediments. This will entail Malawi establishing jurisdiction to investigate and prosecute the core crimes, without being unable so to do and waiting for the ICC to assume jurisdiction. The South African Implementation of the Rome Statute of the International Criminal Court Act has boldly removed immunity in respect of the core crimes. This might be a possible route for Malawi to follow.



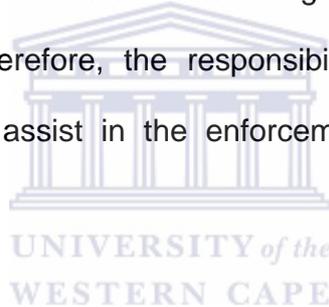
4.5 Concluding Remarks

The 'utility of a legal system and the law depends on its certainty.'²¹⁹ There is legal uncertainty in Malawi in so far as application of international law and international agreements is concerned. This affects the applicability of international law and international agreements. The courts have further contributed to this uncertainty through judgments that are at most contradictory as regards the application of international law in Malawi. As demonstrated, there are also some Statutes or legal impediments which would render the applicability of the Rome Statute almost meaningless and ineffective. It is of

²¹⁹ Dhokalia (1970:39).

utmost importance that Malawi should surmount the existing legal impediments, and implement the Rome Statute, through necessary legislation. This would create certainty in the legal system as the judiciary would be able to have uniformity in the application and interpretation of the Rome Statute.

It is also imperative that the incorporation of the Rome Statute be carried out in such a way that the meaning and effects of its provisions is not lost. The domesticating legislation must thus, incorporate the Statute's substantive criminal, procedural law, and all aspects envisaged in the Statute. International law by its very nature suffers from a general weakness in lack of enforcement.²²⁰ It is therefore, the responsibility. and obligation of States Parties, like Malawi to assist in the enforcement of the Rome Statute by domesticating it.



²²⁰ Schachter (1991:227).

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Throughout the development and evolution of international criminal law, the golden thread that weaves through, is individual criminal responsibility. The ultimate apparatus for holding individuals criminally responsible for commission of the core crimes, that is, genocide, crimes against humanity, and war crimes, is the Rome Statute and the ICC. However, the ICC has not usurped the jurisdiction of States Parties to investigate and prosecute these core crimes. States Parties still retain the primary jurisdiction to investigate and prosecute the core crimes, and the ICC is expected just to complement the States Parties' jurisdictions.²²¹ The ICC will only assume jurisdiction if a State Party is unwilling and unable genuinely to investigate or prosecute.²²² A State Party must therefore establish jurisdiction in order to be able to investigate and prosecute core crimes. This entails effective implementation of the Rome Statute in municipal or domestic law. And implementation of the Rome Statute must be carried out in such a way that it leaves no doubt about its applicability under municipal law. If there is doubt about the Rome Statute's applicability, that will create uncertainty, and as such, its objects and aspirations will not be fulfilled.

The paper therefore argues that full implementation of the Rome Statute in national jurisdictions, can only be meaningfully achieved through legislation. In

²²¹ Rome Statute, Art. 1.

²²² Rome Statute, Art. 17.

that regard, the paper argues, and has demonstrated that for Malawi, to effectively fulfill obligations arising from ratification of the Rome Statute, it must implement it through legislation. The uncertainty which exists in Malawi, on the applicability of international law and international agreements, weighs heavily on the side of domesticating the Rome Statute through legislation. Malawi already recognizes the need and importance of domesticating the Rome Statute through necessary legislative action. The then Minister of Justice, Professor A.P. Mutharika stated that ‘the ICC lacks many of the institutional structures necessary for a comprehensive handling of a criminal matter. It has no police of its own and no prisons. To a large extent, the ICC relies on national institutions to co-operate in bringing the culprits to book. *Therefore, in order to co-operate fully with the ICC, a State Party is obliged to have a range of powers, facilities and procedures in place. The best way to achieve this is by promulgating the necessary laws and regulations aimed at domesticating the Rome Statute.*²²³ (Emphasis added). It therefore clear that there is political will to domesticate the Rome Statute in Malawi through legislation. However, political will alone is not enough if it is not translated into action, which action is the actual domestication of the Rome Statute in Malawi.

The paper has further demonstrated that there are different modes of implementing international law and international agreements. However with the constitutional framework in Malawi, this paper argues, that for Malawi,

²²³ Speech delivered at a workshop on the International Criminal Court: Rome Statute Implementing Legislation for Malawi, on 26-27 February 2010, Crossroads Hotel, Lilongwe, Malawi. In attendance was Deputy Prosecutor of the ICC, Madam Fautou Bensouda.

legislative incorporation is the key to effective implementation of the Rome Statute.

5.2 Recommendations

Malawi by ratifying the Rome Statute assumed international obligations for the suppression of genocide, crimes against humanity and war crimes. These crimes, according to the Rome Statute, are the most serious crimes of international concern. Malawi must therefore, demonstrate its commitment to the aspirations of the Rome Statute by enacting enabling legislation to incorporate the Rome Statute in its municipal law. Ratification alone is insufficient. Section 211(1) of the Constitution already provides the legal framework through which international agreements can only be implemented in Malawi, through legislation. Malawi must therefore adhere to that Constitutional provision. Examples are abound on how other States Parties have domesticated the Rome Statute without diluting its objects. Malawi should emulate those examples.

All laws which impede the effective domestication of the Rome Statute must be amended to bring them in *pari pasu* or in conformity with the Rome Statute. These include but not limited to, the Extradition Act, the Immunities and Privileges Act and the Criminal Procedure and Evidence Act. Extra-territorial jurisdiction must also be created to enable the investigation and prosecution of the core crimes even in instances of their commission taking place wholly

outside Malawi. Where appropriate, the provisions of the domesticating legislation may be drafted with reference to the relevant Articles in the Rome Statute. For the substantive criminal law of the Rome Statute, that must be incorporated wholesale into the domestic law so that the grave nature of the crimes is not lost through redrafting.

On immunity of persons, the domestic legislation must be clear that no one will be protected if they commit the core crimes regardless of their official capacity, and diplomatic status. This will send a clear signal that Malawi is not a haven for perpetrators of these core crimes. The South African ICC Act can be emulated in that regard. President al Bashir failed to travel to South Africa because he had no immunity there and he faced arrest if he went there.

All in all Malawi must ensure that it enacts legislation, which will fully domesticate the Rome Statute in Malawi. Ratification of the Rome Statute is meaningless without domesticating it in Malawi, through legislation. And Malawi should, just like New Zealand be at liberty to incorporate, in addition to the core crimes, other serious crimes which will enhance Malawi's obligations under the Rome Statute, and Malawi's resolve in fighting impunity.

(Word count: 19,130 words)

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