

**A COMPARATIVE STUDY ON THE IMPLEMENTATION OF THE ROME STATUTE BY SOUTH
AFRICA AND GERMANY: A CASE OF FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW**

**A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF THE
WESTERN CAPE, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE LLM
TRANSNATIONAL CRIMINAL JUSTICE AND CRIME PREVENTION**



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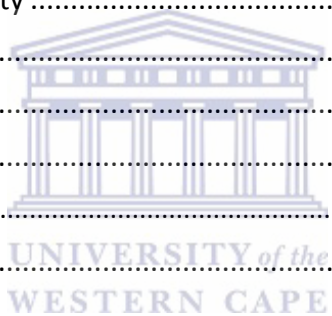
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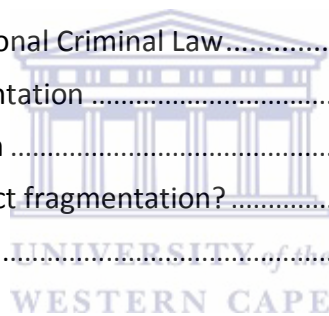
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ABSTRACT

The Rome Statute established the International Criminal Court (ICC). It provides that the Court is complementary to national jurisdictions. This entails that the primary jurisdiction over core crimes lies at the domestic level. However, in the absence of express provision for implementation, States have adopted different methods in the incorporating of the substantive and the procedural provisions of the Rome Statute. The German Code of Crimes against International Law and the South African Implementation of the Rome Statute Act considered under this study are indicative of the existing divergence. This paper argues that complementarity necessitates the divergence in approach. It further argues that the diversity is an issue of pluralism rather than fragmentation of international criminal law.



Keywords: Rome Statute; Implementation; Fragmentation; Pluralism; Comparative Study; South Africa ICC Act; German CCAIL; Core Crimes; General Principles; Jurisdiction.

DECLARATION

I, Fatuma Mninde-Silungwe, hereby declare that the work presented in this research paper entitled **“A Comparative Study on the Implementation of the Rome Statute by South Africa and Germany: A Case of Fragmentation of International Criminal Law”** is my own 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 recognised.

Student : **Fatuma Mninde-Silungwe**



Signature : _____

Date : _____

Supervisor : **Professor Gerhard Werle**

Signature : _____

Date : _____

DEDICATION

To God

In you all things are possible

To my family

For always believing in me

To my husband

For your love and patience



To myself

For daring to try and riding the tide

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To the LLM Class of 2013, may we conquer the world!

ABBREVIATIONS

ANC	African National Congress
AP I	Additional Protocol I
CCAIL	German Code of Crimes against International Law
ECCHR	European Center for Constitutional and Human Rights
ICC	International Criminal Court
ICC Act	South African Implementation of the Rome Statute Act
MDC	Movement for Democratic Change
NDPP	National Director of Public Prosecutions
SADC	South African Development Committee
SALC	South African Litigation Center
StPO	German Code of Criminal Procedure
UN	United Nations
ZANU PF	Zimbabwe African National Union Patriotic Front



CHAPTER 1

INTRODUCTION OF THE STUDY

Without knowledge of the real and existing, without comparison of different legislations, without knowledge of their relations to various conditions of peoples according to time, climate and constitution, a priori nonsense is inevitable. Feuerbach (1804)

1. PROBLEM STATEMENT

The Rome Statute of the International Criminal Court ('Rome Statute') came into force on 1st July 2002.¹ The Statute established the International Criminal Court (ICC) as a permanent institution and provides that the ICC has power to exercise jurisdiction over persons for the most serious crimes of international concern.² In addition, the Statute provides that the Court is complementary to national criminal jurisdictions and that it can only assume jurisdiction where the States Parties are unwilling or unable to investigate or prosecute.³ However, despite such a provision granting primary jurisdiction over international crimes to national jurisdictions there is no express provision under the Statute requiring Parties to implement its provisions. The preamble to the Statute provides that States Parties have a duty to exercise criminal jurisdiction over those responsible for international crimes⁴ and also that they have an obligation to come up with measures at the national level for

¹ Rome Statute of the International Criminal Court 1287 UNTS 90(hereafter referred to as Rome Statute).

² Art 1 Rome Statute.

³ Art 1, 17 and preamble para 10 Rome Statute.

⁴ Para 6 preamble Rome Statute.

effective prosecution and cooperation.⁵ The preamble provisions highlighted above and the application of the complementarity principle have collectively been interpreted as encouraging States Parties to implement the provisions of the Statute.⁶

The most convenient form of implementation is through enactment of legislation. In the absence of an express duty to implement as well as an international standard for implementation, the discretion lies with the States Parties as to the form and content their implementing legislation may take.⁷ This has resulted in diversity in approaches in relation to the methods of implementation. The divergence is also evident in how States Parties implement the substantive and procedural provisions of the Statute.⁸ Some authors use the language of 'over-inclusion' and 'under-inclusion'.⁹ The authors elaborate the terms through examples; for instance, adding a category of protected persons to the crime of genocide that is not recognised under international law is regarded as over-inclusion whereas prosecuting of international crimes as ordinary crimes is an example of under-inclusion.¹⁰

Research has also shown that jurisdictions can adopt different approaches in coming up

⁵ Para 4 preamble Rome Statute.

⁶ Kleffner JK *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008)237(hereafter Kleffner JK (2008)) also Werle G *Principles of International Criminal Law* 2ed (2009)27 (hereafter Werle G (2009) who states that the 'spirit and intent' of the Rome Statute requires incorporation of substantive criminal law into the domestic legal order.

⁷ Werle G (2009)27,119.

⁸ Cattin D 'Approximation of Harmonisation as a Result of Implementation of the Rome Statute' in Herik L & Stahn C *Diversification and Fragmentation of International Criminal Law*' (2012) 362(hereafter Herik&Stahn(2012).

⁹ Zahar A & Sluiter G *International Criminal Law* (2008) 490(hereafter Zahar & Sluiter (2008).

¹⁰ Zahar & Sluiter (2008) 494.

with implementing legislation regardless of their legal system.¹¹ Adopting a particular approach would be dependent on how a particular jurisdiction interprets the provisions of the Rome Statute in line with their constitution or political preferences. Therefore, in certain cases, in line with their understanding of their obligations under the Statute, States Parties have deviated from the definitions of crimes in the Rome Statute whilst others have merely copied the provisions of the Rome Statute.¹²

The divergence in approaches brings in some lack of harmony and this is what is referred to as fragmentation of international criminal law.¹³ It is against this background that this paper conducts a comparative study of the implementing legislations of Germany and South Africa. The study has considered only the substantive aspects of the implementing legislations and will only focus on five areas of comparative criminal law: legislative history, definitions of crimes, exercises of jurisdiction, general principles of criminal law and punishment. The paper analyses these key factors in their normative form and where appropriate in their practical context as they apply to the two countries under the study.

Delmas Marty argues that comparative criminal law is a necessary tool for the application of international criminal law.¹⁴ She further argues that as a method, it helps us discover areas

¹¹ Turns D, 'Aspects of National Implementation of the Rome Statute: The UK and other selected States' in McGoldrick, Rowe & Donnelly *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 337 (hereafter McGoldrick, Rowe&Donnelly (2004)).

¹² Herik & Stahn (2012) 42.

¹³ Report of the International Law Commission on Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law of 13 April 2006 A/CN.4/L.682.

¹⁴ Delmas- Marty M 'Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law' in Cassese A *Oxford Companion to International Criminal Justice*(2009) 97(hereinafter Cassese A (2009)).

of convergence and divergence¹⁵ which is what this research aims to do with the two countries. South Africa and Germany were part of the group of States referred to as the like minded States who supported the establishment of the ICC. They have both interpreted the Rome Statute as requiring them to adopt some implementation legislation, hence the German Code of Crimes against International Law (CCAIL)¹⁶ and The South African Implementation of the Rome Statute Act (ICC Act).¹⁷ They are an indication of divergence in the implementation methods as they depict the various degrees of implementation of the Rome Statute with South Africa carefully adopting incorporation by reference approach to implementation whereas Germany adopted a modified approach to implementation. The distinction in approach is not unique to only these two jurisdictions but is indicative of absence of harmonisation in the implementation of the Statute.¹⁸



The study is significant in analysing the extent in which implementing legislations reflect the provisions of the Rome Statute. It is based on the understanding that implementing legislations such as the CCAIL and the ICC Act are an indication of how international criminal law is reflected on the domestic level. Depending on perspective, one would consider it as 'internal internationalisation' of domestic criminal law or 'nationalisation' of international

¹⁵ Cassese A (2009)97.

¹⁶ CCAIL (2002).

¹⁷ ICC ACT No. 27 of 2002.

¹⁸ Cattin D 'Approximation or Harmonisation as a result of Implementation of the Rome Statute' in Herik&Stahn(2012) 362 who argues that there is variety in practice of states in implementation in respect of international cooperation, procedural framework and substantive law and jurisdictional elements of complementarity.

criminal law.¹⁹ The study highlights the challenge of balancing between domestic norms and the competing international norms especially considering the parochial nature of criminal law. States Parties view it as an exercise of their sovereignty to determine what or how a specific conduct should be criminalised; as such they cannot be questioned on how they have come up with a particular criminal legislation.²⁰ However, there is also a competing requirement under international criminal law whereby States Parties implementation legislation should be adequate to enable them meet the inability and unwilling threshold.²¹

On a higher level, States have an obligation to bring to accountability perpetrators of international crimes whether under the Rome Statute, customary international law or other treaties.²² This is an obligation that arises from the fact that international crimes are not simply a threat to a single jurisdiction but to the international community as a whole.²³ States help in the ending the culture of impunity and promoting world peace and security by making the perpetrators of such crimes accountable under their legal systems. In this regard, the scope of implementing legislation can limit or achieve the obligation of fighting impunity. The discretion on the form of implementing legislation can be put on a continuum

¹⁹ Werle G (2009) 25.

²⁰ Kleffner J 'Impact of complementarity on National Implementation of Substantive International Criminal Law' (2003)1(1) *JICJ* 86(hereafter Kleffner JK (2003), Fletcher G *Basic Concepts of Criminal Law* (1998) 3, Herik&Stahn (2012) 4 where it argued that criminal law is probably the most fragmented and diversified branch of law.

²¹ Article 17 Rome Statute.

²² Terracino J 'National Implementation of ICC Crimes Impact on National Jurisdiction' (2007)5*JICJ* 423 discusses how States can adopt narrow or broader definition of crimes in implementing legislation (hereafter Terracino J (2007).

²³ Dugard J *International Law: A South African Perspective* 4ed (2012) 157(hereafter Dugard J (2012).

of those who simply achieve the minimum requirements of implementation through reference to the relevant provisions of the Rome Statute like South Africa or those who expand on the provisions of the Rome Statute by modifying the crimes under the Rome Statute or include in their domestic legislation crimes recognised under customary international law that are not part of the Rome Statute such as the case with Germany.

This study will therefore seek to discover the extent to which adopting the German approach to implementation of the Rome Statute as compared to the South African approach contribute to the purpose and intent of the Rome Statute. It also seeks to clarify whether the differences in approaches amount to fragmentation of international criminal law. It will provide a point of reference on the appropriate considerations that States Parties can adopt in coming up with implementing legislation. This is against the background that even though many states have ratified the Rome Statute, not many have actually implemented its provisions²⁴ hence by drawing lessons from States which are the subject of this comparative study obvious pitfalls might be avoided when considering the CCAIL or the ICC Act as a model for coming up with implementing legislation. South Africa is considered as an example for other African States in the implementation of the Rome Statute.²⁵ As such, it is important to consider the quality of South African Legislation in order to bring insight on improvements that can be made to the legislation.

²⁴ Duplessis & Stone *Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries* available online at <http://www.issafrica.org/cdromestatute/pages/document/pdf> (accessed on 9 March 2013).

²⁵ Duplessis M 'An African Example: South Africa's Implementation of the Rome Statute of the Rome Statute of the International Criminal Court' (2007) 5(2) *JICJ* 479.

2. RESEARCH QUESTION

To what extent does the divergence between the German Code of Crimes against International law and the South African Implementation of the Rome Statute Act amount to fragmentation of international criminal law?

The subsidiary questions to be answered by the study:

- What is the Legislative history of the South African ICC Act and the Germany CCAIL?
- How do both laws compare with the Rome Statute in areas of definition of crimes, exercise of jurisdiction, general principles of criminal law and punishment?
- Do the divergence in approach amount to fragmentation of international criminal law?

3. UNDERLYING ASSUMPTIONS

This study is based on the assumption that the Rome Statute provides the minimum standard for its implementation. This paper will therefore analyse using the South African and the German approach the extent to which State Parties can deviate from its provisions without undermining its provisions and intent. The study will focus on the substantive aspect of the application of the Rome Statute in the two jurisdictions and will not consider the procedural aspects of criminal law that are unique to the two different legal systems.

4. ARGUMENT

The CCAIL and the ICC Act exemplify divergence and convergence in the implementation of the Rome Statute by States Parties. The initial aspect of divergence is in the interpretation of the complementarity principle. This is reflected in the method of implementation that each State Party adopted in that while South Africa adopted the incorporation by reference method, Germany adopted a modified approach. The distinction being that South African considered complementarity as requirement to copy the crimes under the Rome Statute, whilst Germany considered it as a requirement to refine the crimes under the Rome Statute in order for them to be tried in German courts.

With regard to the substantive law, both countries also depict some differences with regard to how they have incorporated the issue of jurisdiction, definitions of crimes, general principles and the question of punishment. In as much as both of them have incorporated universal jurisdiction, South Africa adopted the conditional form of universal jurisdiction, whilst Germany adopted pure universal jurisdiction. There is also a distinction in relation to how courts have interpreted the scope of the jurisdiction through the analysis of the decision of *SALC & another v NDPP and Others*²⁶ in relation to South Africa and the decision of *Donald Rumsfeld and Others* with regard to German.²⁷

²⁶ (2012) 10 BCLR 1089 also Werle G & Bornkamm P 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of North Gauteng High Court in *SALC v National Director of Prosecutions*' (2013) 11 *JICJ* 659(hereafter Werle & Bornkamm (2013)).

²⁷ The discussion of the case can be found in Fischer-Lescano A 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law' (2005) 6 *German Law Journal* 689 also Gallagher K 'Universal Jurisdiction in practice: Efforts to hold Donald Rumsfeld and Other High Level United States Officials accountable for Torture' (2009) 7 *JICJ* 1087(hereafter Fischer-Lescano A (2005) and Gallagher K (2009) respectively).

The study will consider how the divergence in implementation of the Rome Statute as reflected by the provisions of the ICC Act and CCAIL amount to fragmentation of international criminal law. It will also consider the competing concept of pluralism. It will argue that complementarity necessitates divergence in approach as such fragmentation is inevitable. However, the divergence has to fall within some allowable scope so as not to have a totally different regime on the domestic level than that which international criminal law anticipated.

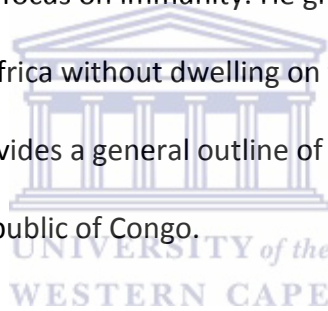
5. LITERATURE REVIEW

There has been no study specifically comparing the CCAIL and the ICC Act. A more general comprehensive comparative overview was done by the Max-Planck Institute for Foreign and International Criminal Law on national prosecutions of international crimes.²⁸ The comparative project addressed questions on how domestic criminal law of various States provide or allow for the punishment of international crimes, it outlines the deficits and the reforms have been carried out or are planned in order to permit the national prosecution of international crimes. The distinction between this comparative study and that of the Max Planck Institute is that the present study is only focused on the States Parties compliance with the duty to implement and therefore only considers those States that have implementation legislation that was inspired by the Rome Statute, as compared to the research by Max Planck which had 34 states including some non State Parties. South Africa was not one of the countries subjected to the study.

²⁸ Eser, Albin, Kreicker & Helmut (eds) *Nationale Strafverfolgung völkerrechtlicher Verbrechen - National Prosecution of International Crimes* Vol 1-7(2003-2006).

Kress & Lattanzi²⁹ provide an overview of implementation legislation in their first volume and cooperation in a second volume. In the first volume there is a general overview on the steps that the two countries in this study took to implement the Rome Statute. There is no comparative analysis on the content of the implementing legislation in the two jurisdictions as done under this study.

The study by Benson Chinedu Olugbuo³⁰ is a comparative analysis of implementation strategies in Africa. The work provides a general discussion on the Rome Statute of the International Criminal Court and focuses on the constitutional implications of implementing the Rome Statute with particular focus on immunity. He gives a general overview of the content of the ICC Act of South Africa without dwelling on the salient details of the legislation. The research also provides a general outline of the implementation law of Nigeria as well as Democratic Republic of Congo.



On his part Turns,³¹ did a comparative study on implementation approaches between selected civil law countries, which are Belgium, France and German, as well as between common law countries, New Zealand and UK, and his conclusion is that within both civil law

²⁹ Kress & Lattanzi (eds) *The Rome Statute and domestic legal orders: General Aspects and Constitutional Issues Vol I (2000)* and Kress & Lattanzi *Constitutional Issues Cooperation and Enforcement Vol II (2005)* (hereafter Kress & Lattanzi (2000) and Kress & Lattanzi (2005) respectively).

³⁰ Olugbuo B *Domestic Implementation of the Rome Statute of International Criminal Court: A Comparative analysis of strategies in Africa*, (unpublished LLM Thesis (Human Rights & Democratization in Africa) UWC, 2003).

³¹ Turns D, 'Aspects of National Implementation of the Rome Statute: The UK and other selected States' in McGoldrick D, Rowe P & Donnelly (2004) 387.

and common law countries, there are differences in implementation approaches apparent from country to country.

This study as compared to the previous studies will provide a more focused approach to comparing the implementation framework of South Africa and Germany.

6. CHAPTER OUTLINE

The study has six chapters divided as follows:

Chapter 1

This is the introductory chapter of the study. It outlines the scope of the study; it includes the problem statement, research question, argument, literature review, chapter outline and the methodology of the study.

Chapter 2

This chapter discusses the scope of the duty to implement under the Rome Statute. It also discusses the different methods of implementation.

Chapter 3

This chapter analyses the content of the South African ICC Act and the German CCAIL. The analysis focuses on the legislative history, definitions of crimes, exercise of jurisdiction, general principles of criminal law and punishment.

Chapter 4

This chapter provides a comparative analysis of the legislative approaches adopted by the two jurisdictions against the Rome Statute under the key areas named above.

Chapter 5

This chapter discusses the concept of fragmentation of international criminal law generally. It also discusses the extent to which the differences in implementation approach by the two jurisdictions under the study may or may not amount to fragmentation.

Chapter 6

This Chapter will provide the conclusions and recommendations which includes proposals for legislative reform .



7. METHODOLOGY

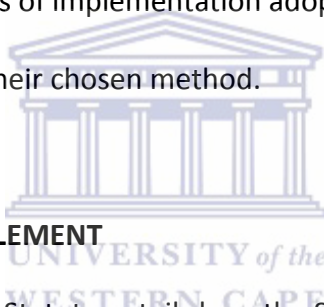
This study adopts a desktop research methodology. More precisely it adopts a comparative method of research and analyses primary and secondary sources on the implementation of the Rome Statute. With regard to primary sources it analyses the South African ICC Act, the German CCAIL and international conventions. It also considers secondary sources such as books, chapters in books, journal articles and internet resources. There are no limitations to the study.

CHAPTER 2

THE OBLIGATION TO IMPLEMENT AND METHODS OF IMPLEMENTATION

1. INTRODUCTION

This Chapter will discuss the legal basis for implementation of the Rome Statute by States Parties. It will be shown that even though there is no express provision for implementation under the Rome Statute, its provisions 'encourages' or can be interpreted as encouraging implementation by States. The Chapter will also discuss generally the different methods adopted by States Parties to implement the provisions of the Rome Statute and will conclude by discussing the specific methods of implementation adopted by South Africa and Germany and analyse the justification for their chosen method.



2. THE OBLIGATION TO IMPLEMENT

The implementation of the Rome Statute entails how the Statute is given force under the domestic law.³² The traditional approach in relation to implementation of treaties is to consider whether a particular State Party is a monist or dualist state. The distinction being that for a monist State international law applies domestically without any incorporation at the domestic level whereas in a dualist State for international law to be applied domestically, it has to be incorporated on the domestic level.³³ In relation to the Rome Statute, the practice of States Parties does not exhibit a clear cut dichotomy between the monists or dualist States this is shown by the fact that there are variations in practice

³² International Center for Criminal Law Reform and Criminal Justice Policy *Manual for the Ratification and Implementation of the Rome Statute* 3ed (2008) (hereafter referred to as Ratification and Implementation Manual (2008)).

³³ Shaw MN *International Law* 5ed (2003) 122, Dugard J (2012)42.

between the so called dualist and monist States.³⁴ Research shows that those States that have examined the question of implementation have come to the unanimous conclusion that 'regardless of their legal tradition or normal practice, the Statute requires some form of domestic implementation.'³⁵

The Rome Statute as compared to other international instruments dealing with international crimes does not contain an express obligation to implement its substantive law.³⁶The only express obligation is formulated under Article 88 in Part IX of the Rome Statute which provides that States Parties shall ensure that procedures are available under their national law for all forms of cooperation specified under Part IX of the Statute. It is rightly argued that the absence of an express obligation in the treaty text does not answer the question as to its existence.³⁷In fact, there is no rule that prohibit implied or inferred obligation.³⁸ In that regard, the obligation to implement is implicit in the provisions of the Rome Statute through the interpretation of the complementarity principle.³⁹

Complementarity is viewed as an incentive for national implementation of the Rome Statute in that States seek to safeguard their primary right to investigate and prosecute international

³⁴ Ratification and Implementation Manual (2008) 31.

³⁵ Ratification and Implementation Manual (2008) 31.

³⁶ cf Geneva Conventions (1949), Geneva Convention I(Art 49-51) 75 UNTS 31-83, Geneva Convention II (Art 50-52) 75 UNTS 85-133, Geneva Convention III(Art 129-131) 75 UNTS 135-285 and Geneva Convention IV(Art 146-148) 75 UNTS 287-417.

³⁷ Kleffner JK (2003) 92.

³⁸ Kleffner JK (2003) 93.

³⁹ Article 1 and 17, Rome Statute.

crimes so as not to be deemed unable to investigate and prosecute⁴⁰. The inability to investigate or prosecute would deprive the State their primary jurisdiction over the crimes. The inability can arise from absence or inadequacy of substantive legislation hence the need to implement.⁴¹ Other authors argue that complementarity is merely provided under the Statute as a procedural rule for admissibility of cases in the ICC and as such it is erroneous to read too much into the complementarity principle.⁴² However, the Statute provides in its preamble that 'the most serious crimes of concern to international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation'⁴³. The complementarity principle and the preamble provisions presuppose that States Parties legal systems must have the capacity to prosecute and investigate international crimes. It is therefore only logical for States to have a legal framework that enable them avoid the jurisdiction of the ICC.



Since States Parties have to derive the obligation to implement through inference or implication, they are left without a specific direction on how to implement the provisions of the Statute. By way of contrast, the Geneva Conventions expressly provides that States have to enact legislation necessary to provide effective penal sanctions for violation of the grave breaches provisions and have to apply universal jurisdiction and also provide for the duty to prosecute grave breaches on the basis of *aut dedere aut judicare* principle (either prosecute

⁴⁰ Kleffner JK (2003) 88.

⁴¹ Kleffner JK (2003) 89.

⁴² Nouwen S 'Complementarity in Uganda: Domestic Diversity or International Imposition' in Stahn C & El Zeidy M (eds) *The International Criminal Court and Complementarity: From Theory to Practice* vol II (2011)1124.

⁴³ Para 4 preamble Rome Statute.

or extradite).⁴⁴ In the absence of a similar express direction under the Rome Statute, States practice indicate some margin of discretion on how they implement the Statute provisions. States practice reveals different methods of incorporating substantive law in their legislation. The differences are justified on the basis of constitutional, political, legal system or any other reason. Therefore it is essential to consider in detail the methods that States apply in the implementation of the Rome Statute.

3. LEGISLATIVE APPROACHES TO IMPLEMENTATION

Implementation generally takes a legislative form unless where direct application of international law applies and hence no need for implementing legislation. Adopting legislative measures as a way of implementing the Rome Statute complies with the principle of legality in that the relevant implementing legislation is in written form and can easily be accessible. States in adopting their legislative framework may choose a complete overhaul to the existing legislation or some form of piecemeal approach to the conforming of the laws to the requirements of incorporating international crimes referred to as codification and amendment respectively⁴⁵. It is essential to consider that even after the implementation of the Rome Statute, in order to harmonise the whole corpus of the law some consequential amendments to other existing laws might be inevitable⁴⁶.

⁴⁴ Geneva Conventions (1949), Geneva Convention I (Art 50) 75 UNTS 31-83, Geneva Convention II (Art 51) 75 UNTS 85-133, Geneva Convention III (Art 130) 75 UNTS 135-285 and Geneva Convention IV (Art 147) 75 UNTS 287-417.

⁴⁵ Werle G (2009)121.

⁴⁶ For example by enacting the South African ICC Act there was consequential amendment to section 18 Criminal Procedure Act ,1977 to make provision of the core crimes and section 3 of the Military Discipline Supplementary Measures Act, 1999 making provision for subjecting Military officials to the procedure under the ICC Act for any conduct that constitute an offence under section 4 and 37 of the ICC Act. The German CCAIL also had consequential amendments to the Criminal Code,1998, Code of Criminal

3.1 Amendment to the existing laws

This approach can take two different forms, either making changes to the existing criminal codes by adding some sections in the penal code containing the relevant core crimes⁴⁷, or coming up with a separate chapter in the penal code dealing specifically with crimes under international law⁴⁸. This approach is easier to adopt. In addition, although it can act as closing the gap between international and domestic law since the international law provisions are considered as part of the ordinary criminal law, it fails to consider the uniqueness of international crimes. Further, adopting this approach requires the legislator to determine the appropriate place for certain provisions since certain provisions under the Rome Statute, especially those relating to war crimes, can only make sense if included as part of military code as opposed to the penal code.⁴⁹

3.2 Codification

This is a comprehensive method of implementation of the Rome Statute. It involves coming up with a criminal law legislation that contains all the relevant international crimes, it may also include special provisions relating to definitions of crimes, general principles and cooperation in a single legislation.⁵⁰ This is the approach that both Germany and South Africa adopted in coming up with implementing legislation. This approach is advantageous in that it

Procedure, 1987, Courts Constitution Act, 1975, Act Amending the Introductory Act to the Courts Constitution Act 1977, Act on State Security Files of the Former GDR 1991 and the Repeal of a continuing provision of the criminal code of the GDR.

⁴⁷ Werle G (2009) 122.

⁴⁸ Werle G (2009) 122.

⁴⁹ Bergsmo, Harlem & Hayashi (eds) *Importing Core International Crimes into National Law* 2ed (2010) 10 (hereafter Bergsmo, Harlem & Hayashi (2010)).

⁵⁰ Werle G (2009) 122.

‘includes the possibility of compact consolidation and clarification’ of international criminal law.⁵¹ As a disadvantage it is argued that the separateness from the penal code or general criminal law legislation may be interpreted to mean that it is ‘subsidiary criminal law’.⁵² However, the separate code brings visibility of domestic international criminal law.⁵³ Having considered the legislative approaches to implementation, it is therefore essential to consider the methods in which the substantive international criminal law is actually implemented into the domestic law.

4. METHODS OF IMPLEMENTATION

Werle⁵⁴ discusses different methods applied in the incorporation of the Rome Statute into domestic law. He enumerates the methods as non-incorporation, complete incorporation, modified incorporation or combination methods. This paper will discuss these methods generally and will conclude by highlighting the methods of incorporation adopted by South Africa and Germany. This paper will not discuss non-incorporation as a method since it simply entails not having any implementing legislation.

4.1 Complete Incorporation

This method is characterised by wholesale adoption of the substantive international criminal law into domestic law. Its three forms are direct application, reference or copying.

⁵¹ Werle G (2009) 122

⁵² Werle G (2009) 122.

⁵³ Werle G (2009) 122.

⁵⁴ Werle G (2009) 119-21.

4.1.1 Direct Application

The main characteristic of this method is that international crimes under customary international law or treaty law are directly applied in the domestic legal system.⁵⁵ This method applies in those States where their Constitutions allow duly ratified treaties to be directly applied under the domestic laws.⁵⁶ Supporters of this approach argue that applying this method is one way of avoiding gaps created by non-existent or defective legislations.⁵⁷ With regard to the Rome Statute, its provisions are largely not self-executing therefore it will be difficult for a State to adopt this method of implementation.

4.1.2 Incorporation by reference

This approach is characterised by domestic law making reference to the provisions of an international treaty.⁵⁸ The Rome statute may form part of the domestic law through an annexure to the relevant implementing legislation. This method is easy in that there is no independent drafting of the core crimes since they will operate as they appear in the Rome Statute. This method is a careful approach that States can adopt in order not to depart from the content of the Rome Statute. However, it is contentious whether adopting this method is the most ideal since the provisions of the Rome Statute are a product of compromise and as such in certain circumstances are imprecise or inadequate. The South African ICC Act provides an example of how this method can be implemented and later in this chapter there will be a discussion on the details of South African method of implementation.

⁵⁵ Werle G (2009) 119.

⁵⁶ South African Constitution (1996) Article 231(4) makes a self executing agreement duly approved by Parliament part of the law of the Republic.

⁵⁷ Kleffner J (2008) 42.

⁵⁸ Werle G (2009) 119.

4.1.3 Copying

This method operates through the copying of the provisions of an international treaty verbatim into the domestic law.⁵⁹ It is distinguishable to reference in that it is 'static' or 'literal transcription', using the identical wording of the statute.⁶⁰ This method adopts the crimes or the provisions of the Rome Statute in the exact manner as provided under the Rome Statute. The same problem arising with incorporation by reference may arise in this method as already stated that the provisions of the Rome Statute are a compromise and as such there are certain areas in the law that may breach the principles of legality.

4.2 Modified Incorporation

This method is applied in by States Parties seeking to develop comprehensive implementing legislations. The modified approach aims at balancing the international norms with peculiarities of the domestic system. It provides States with an opportunity to formally document their conceptions of the scope and interpretation of international criminal law.⁶¹

It reflects the transformation theory of domesticating international obligations. The underlying principle in this theory is that international standards have to undergo some transformation in order for them to be applied at the domestic level.⁶² Complete incorporation is rejected as being too radical and fails to respect the distinction between international and domestic law.

⁵⁹ Werle G (2009) 120.

⁶⁰ Bergsmo ,Harlem &Hayashi (2010) 7.

⁶¹ Werle G (2009) 121

⁶² Knop K 'Here and There: International Law in the Domestic Courts' (1999) 32 *NYU Journal of International Law and Politics* 501 also Sloss D *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 217 (hereafter Sloss D (2009)).

Modified incorporation is also referred to as 'dynamic transcription' since it enables the legislator to complement the implementing legislation through inclusion of crimes under customary international law or other treaties such as the Additional Protocol to the Geneva Convention of 1949.⁶³ Modified incorporation allows States to incorporate broad or narrow definitions of the core crimes.⁶⁴ Through the adoption of this approach, States can consolidate their different international criminal law obligations, particularly in the area of international humanitarian law. However, as a disadvantage the approach may prove a major task for the legislator since it requires an extensive review of domestic criminal law. This is the method that Germany adopted in drafting of the CCAIL and will be considered later in this chapter.

4.3 Combination Method of Incorporation

This involves a combination or interplay of all the other methods of incorporation. In this regard, States Parties adopting this method may to a certain extent adopt non incorporation, complete incorporation to certain aspects or adopting a modified incorporation to certain aspects of international criminal law.⁶⁵

5. THE GERMAN METHOD OF IMPLEMENTATION

The German Government signed the ICC statute on 9th December 2000 and ratified it on 11 December 2000.⁶⁶ With regard to international crimes, Germany had in 1954 amended the

⁶³ Bergsmo, Harlem & Hayashi (2010)9.

⁶⁴ Terracino J (2007) 425.

⁶⁵ Werle G (2009)121.

⁶⁶ Werle G (2009)127.

German Criminal Code to incorporate the crime of Genocide.⁶⁷ Prior to and upon ratification of the Rome Statute, Germany considered aligning its laws to the provisions of the Statute. An example of this process was the amendment to Article 16(2) of German Basic Law on 29 November 2000, which had previously provided that 'no German would be extradited to a foreign country'. A new subsection was inserted to the effect that derogation from the principle may be made by statute of extradition to member states of the European Union (EU) or to an international Court as long as there is observance of the rule of law.⁶⁸

In relation to the substantive law of the Statute, Germany adopted codification as a legislative approach to the implementation of the Rome Statute.⁶⁹ The German Code of Crimes against International Law (CCAIL) went into effect on 30th June 2002.⁷⁰ The key elements of the Act are 'to comprehend the specific wrongs against international law, collection of international criminal law into one unified case in order to promote legal clarity and practical application, in line with the complementarity principle to ensure that Germany is always in a position to prosecute crimes under which the ICC has jurisdiction and to contribute to the promotion and spread of international humanitarian law.'⁷¹

The CCAIL is an example of modified incorporation in that it transforms the definitions of crimes under the Rome Statute. This approach was considered in relation to Germany for

⁶⁷ Section 220a German Criminal Code.

⁶⁸ Werle G (2009) 121.

⁶⁹ Satzger H 'German Criminal Law and the Rome Statute-A Critical Analysis of the New Code of Crimes against International Law' (2002) 2 *JCLR* 266(hereafter Satzger H (2002)).

⁷⁰ Werle G (2009) 127.

⁷¹ Werle G (2009) 128.

various reasons. Firstly, under German law there is a strict application of the principle of legal certainty. Article 103 § 2 of the German Basic Law demands some specificity on the definition of the crime and its possible penalty.⁷² Although international crimes are enumerated under the Rome Statute they do not provide specific penalties therefore the modified approach would cater for the same. In addition, on the basis of the strict application of the legality principle, prosecution of crimes under customary international law is excluded.⁷³ It was therefore essential to include them in the text of the legislation with the appropriate penalties, in order for them to be enforced in Germany.

Another reason for adopting the modified approach was to incorporate the German position on international law that the compromise at the Rome Conference could not incorporate in the Statute.⁷⁴ Germany adopted a codification in order to provide comprehension and specialised treatment to international crimes. The modified approach reflected in the CCAIL is a balancing act of strict constitutional requirements and the provisions of the Rome Statute.⁷⁵

6. THE SOUTH AFRICAN METHOD OF IMPLEMENTATION

South Africa signed and ratified the Rome Statute on 17 July 1998⁷⁶. It enacted the implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC

⁷² Kress & Lattanzi (2000) 111.

⁷³ Satzger H (2002) 266.

⁷⁴ Satzger H (2002) 266.

⁷⁵ Satzger H (2002) 268.

⁷⁶ Dugard J (2012) 201.

Act) which came into force on 16 August 2002. Prior to the enactment of the ICC Act, South Africa did not have legislation to deal with war crimes, crimes against humanity or genocide.⁷⁷ In the preparation of the Act, a national consultative group composed of various departments was set up in order to investigate which legislations would be affected.⁷⁸ The group concluded in favour of the codification approach to implementation. The group agreed that 'a single all-encompassing legislation was the best manner to address the implementation of the ICC Statute.'⁷⁹

South Africa considered the Rome Statute as bringing together a codified statement of the elements of the crimes of genocide, war crimes, and crimes against humanity.⁸⁰ In this regard, it adopted the method of incorporation by reference. Adopting this method entails that the definitions of international crimes under the ICC Act are the same as provided under the Rome Statute and they are appended to the Act by way of a schedule.⁸¹ Part 1 of the schedule mirrors Article 6 of the Rome Statute in relation to the crime of genocide, Part 2 mirrors Article 7 of the Rome Statute with regard to crimes against humanity and Part 3 does the same to war crimes as provided under Article 8 of the Rome Statute.⁸² Unlike the German approach, South Africa does not expand or alter the provision of the ICC Statute as far as the definition of crimes is concerned.

⁷⁷ Dugard J (2012) 201.

⁷⁸ Maqungo S 'Implementing the ICC Statute in South Africa' in Kress & Lattanzi (2000)183.

⁷⁹ Maqungo S 'Implementing the ICC Statute in South Africa' in Kress & Lattanzi (2000) 184.

⁸⁰ Dugard J (2012) 201.

⁸¹ Part 1 Schedule 1 ICC Act.

⁸² Duplessis M 'International Criminal Courts, The International Criminal Court and South African Implementation of the Rome Statute' in Dugard J (2012) 201.

7. CONCLUSION

This chapter has argued that despite the absence of an express obligation to implement the provisions of the Rome Statute, States Parties can imply that obligation from the application and the interpretation of the complementarity principle. Complementarity is therefore not merely understood as a procedural provision in the Rome Statute but as an incentive for domesticating of international crimes.

There are several factors that affect the method and the content of implementing legislation. For instance, the strict application of the principle of legality necessitated Germany to modify the provisions of the Rome Statute. In addition, the method and the content of implementing legislation can be based on the States Parties understanding of the principle of complementarity. For Germany, complementarity entails that they have to craft their legislation in order to ensure that it will always be in a position to prosecute international crimes. For South Africa, there is a caveat in that where the national prosecuting authority declines to prosecute or is unable to do so; they can cooperate with the ICC to prosecute international crimes. In addition, South Africa understands the Rome Statute as a self contained regime that brings together elements making up international crimes, hence the mirroring of its provisions.

The chapter has also shown that complete codification as opposed to mere amendment is the best approach in the implementation of the Rome Statute since it provides visibility to its provisions. Implementation is a necessary step in the promoting of the primary jurisdiction of States Parties in international crimes. However, the content of the implementing legislation can limit or delimit this purpose. It is therefore not only important to have

implementing legislation, but to ensure that that their content promote the intent and the purpose of the Rome Statute.



CHAPTER 3

ANALYSIS OF THE PROVISIONS OF THE SOUTH AFRICAN ICC ACT AND THE GERMAN CODE OF CRIMES AGAINST INTERNATIONAL LAW.

1. INTRODUCTION

This chapter will analyse the content of the CCAIL and that of the ICC Act. It will analyse the two legislations in the areas of legislative history, jurisdiction, definition of crimes, general principles, and punishment. These areas provide a comprehensive scope of analysis on how the provisions of the two pieces of legislation comply or compare with the Rome Statute.

2. THE GERMAN CODE OF CRIMES AGAINST INTERNATIONAL LAW

2.1 Legislative History

Germany's approach to international criminal law has over a period of time undergone some metamorphosis. It has transformed from hostility under the Versailles Treaty and the Nuremberg Charter to being supportive under the Rome Statute.⁸³ In fact, Germany's support for international criminal law is evident in the support rendered to the establishment of UN Tribunals.⁸⁴ In addition, she has contributed to the enforcement of international criminal law through prosecutions in Germany of crimes against international

⁸³ Werle & Jessberger 'International Criminal Justice is Coming Home' (2002) 13 *Criminal Law Review* 196(hereafter Werle & Jessberger (2002), see also Steinke R *The Politics of International Criminal Justice: German Perspectives from Nuremberg to the Hague* (2012).

⁸⁴ Werle & Jessberger (2002) 197.

law in the former Yugoslavia and has also cooperated in transnational criminal requests from different jurisdictions.⁸⁵

During the Rome Statute negotiations, Germany offered constructive contributions to the content of the Rome Statute, which found their way in the text of the Rome Statute.⁸⁶ She belonged to the group of the 'like minded states' that supported the establishment of the ICC.⁸⁷ After the Rome Conference, the German Federal Ministry of Justice, in October 1999, established an expert working group on the implementation of the Rome Statute.⁸⁸ The group submitted a 'Working Draft of Law for the Introduction of the Code of Crimes against International Law' in May 2001.⁸⁹ The working draft formed the basis of the CCAIL which was enacted by Parliament on 26 June 2002.



Upon ratification of the Rome Statute, the German Government declared its intention to adapt the existing criminal law to the provisions of the Rome Statute. In line with this intention, several legislations had to be changed or enacted. For instance, a change had to be made to article 16 (2) of the Basic Law which means that Germany may surrender its citizens to the international criminal court.⁹⁰ In addition, there was enactment of the ICC Implementation Act which contains the necessary regulations for cooperation with the

⁸⁵ Werle G (2009) 126.

⁸⁶ Werle & Jessberger(2002) 197.

⁸⁷ Werle G (2009) 127.

⁸⁸ Werle G (2009) 127.

⁸⁹ Werle G(2009) 127.

⁹⁰ Werle G (2009) 127.

ICC.⁹¹ The CCAIL is the main part of the comprehensive legislative framework that Germany adopted in the implementation of the Rome Statute.

According to Werle, the CCAIL has four principal aims: 'to remedy the deficiencies of prior legislation by addressing the specific crimes against international law more adequately', to 'promote legal certainty and practicality', 'to ensure that Germany itself will always be in a position to prosecute crimes that fall within the jurisdiction of the International Criminal Court' and 'to promote the ideas of international humanitarian law'.⁹² Structurally, the CCAIL consists of 14 sections divided into 2 parts. Part 1 (sections 1-5) contains general provisions. Part 2 (sections 6-14) contains definitions of crimes.

2.2 Jurisdiction

2.2.1 Principles of Jurisdiction



The Rome Statute adopts the territoriality and active personality principles of jurisdiction.⁹³ The jurisdiction of the court is restricted to crimes committed in a territory or by a national of a State Party or a State that has accepted the jurisdiction of the court. The only exception to the application of these principles is when the UN Security Council confers jurisdiction to the ICC by referring a situation to the ICC pursuant to its Chapter VII of the UN Charter powers.⁹⁴

⁹¹ Wikitzi P 'German Law of Cooperation with the ICC' (2002) *International Criminal Law Review* 195-212.

⁹² Werle G (2009) 128.

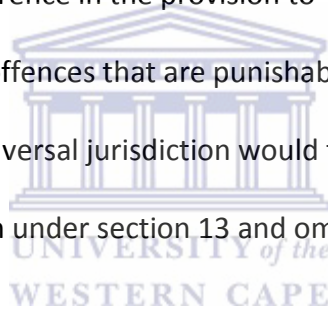
⁹³ Article 12 Rome Statute.

⁹⁴ Article 13(b) Rome Statute.

The CCAIL, in contrast, adopts the universality principle. This in principle means that Germany has jurisdiction over international crimes regardless of where or by whom they have been committed. Section 1 which provides for the scope of application of the CCAIL states as follows:

‘This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany’

It means that section 1 confers universal jurisdiction for war crimes, crimes against humanity and genocide. The reference in the provision to ‘serious criminal offences’ denote, per German criminal law, those offences that are punishable with not less than one year imprisonment.⁹⁵ In the CCAIL, universal jurisdiction would therefore not apply to the offence of violation of duty of supervision under section 13 and omission to report a crime under section 14.⁹⁶



The rationale or basis for universal jurisdiction is that crimes under international law are directed against the interests of international community as a whole therefore it is argued that ‘the international community is empowered to prosecute and punish these crimes regardless of who committed them and against whom they were committed’.⁹⁷ The authority to punish is said to be derived from the nature of the crime.⁹⁸

⁹⁵ Werle & Jessberger (2002) 201.

⁹⁶ Werle & Jessberger (2002) 201, Werle G (2009) 133.

⁹⁷ Werle G (2009) 64, see also Macedo S, *Universal Jurisdiction, National Courts and the prosecution of serious crimes under International Law* (2004) 18.

⁹⁸ Werle G (2009)65.

International law distinguishes between absolute or pure universal jurisdiction and conditional universal jurisdiction.⁹⁹ The distinction lies in that under conditional universal jurisdiction, the presence of the accused is necessary in order for a State to assume jurisdiction whereas that is not the requirement with regard to absolute universal jurisdiction. In this regard, the text of section 1 of CCAIL provides for absolute universal jurisdiction since it confers jurisdiction over international crimes to Germany regardless of whether they are connected to Germany or not.

2.2.2 Analysing the Donald Rumsfeld Decision

The effectiveness of having pure universal jurisdiction can only be assessed through an actual example in which section 1 of the CCAIL has been put to test. In this regard, it is essential to consider the efforts by organisations such as the Center for Constitutional Rights to hold Donald Rumsfeld and other high level United States officials accountable for crimes against international law.¹⁰⁰ The cases were precipitated by the absence of investigations and prosecutions for high level officials in relation to torture committed in US run detention facilities in Iraq and Guantanamo.¹⁰¹ A coalition of international lawyers made efforts to pursue justice on behalf of the former detainees of these two facilities on the basis of universal jurisdiction laws in Germany, France and Spain.¹⁰²

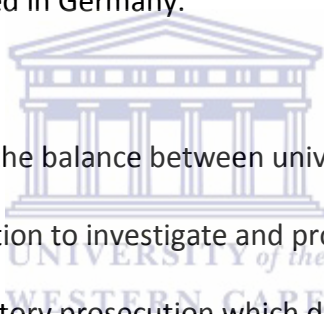
⁹⁹ La Fontaine F 'Universal Jurisdiction-The Realistic Utopia' (2012) 10 *JICJ* 1280(hereafter referred as La Fontaine F (2012)).

¹⁰⁰ Gallagher K (2009).

¹⁰¹ Gallagher K (2009) 1088, Fischer-Lescano A (2005) 689.

¹⁰² Gallagher K (2009) 1089.

The German proceedings were based on the universal jurisdiction as found in section 1 of the CCAIL. There were two complaints filed, in 2004 and 2006 respectively. The 2004 case was filed with the Federal Prosecutor in Karlsruhe.¹⁰³ The complaint provided the details of torture that the complainants were subjected to. The complaint against the senior US officials such as Donald Rumsfeld was that they had 'directly and indirectly committed, aided and abetted, and bear command responsibility for the commission of numerous crimes through the creation of a policy governing the treatment of detainees that mandated or allowed that abuses occur'.¹⁰⁴ Of the accused, three were present in Germany, whilst Donald Rumsfeld was said to often travel to Germany and the military units involved in the atrocities were alleged to be based in Germany.¹⁰⁵



This case brings up questions on the balance between universal jurisdiction and the question of prosecutorial jurisdiction to investigate and prosecute international crimes in Germany. The principle of mandatory prosecution which does not allow prosecutorial discretion where there is sufficient evidence to warrant a prosecution is part of German law.¹⁰⁶ Following the filing of a report, the prosecutor is supposed to institute investigations and where he declines to do so, he has to provide a reasoned decision to do so.¹⁰⁷

¹⁰³ Gallagher K (2009) 1100.

¹⁰⁴ Gallagher K (2009) 1100, also Jessberger F 'Universality, Complementarity and the Duty to Prosecute Crimes under International Law in Germany' in Kaleck, Ratner & Singelstein et al *International Prosecution of Human Rights Crimes* (2007) 213-22.

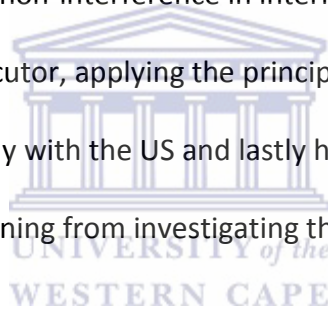
¹⁰⁵ Gallagher K (2009) 1102.

¹⁰⁶ Section 152, German Code of Criminal Procedure provides for the principle of compulsory prosecution (referred to in German as *Legalitätsprinzip*). The phrase 'except as otherwise provided by law' in the section entails that it can be limited.

¹⁰⁷ Section 152(2), German Code of Criminal Procedure prosecutor must give 'sufficient factual indications' for failure to prosecute.

The plaintiff had argued that the prosecutor had to exercise his jurisdiction to institute investigations and prosecution on the basis of firstly, the seriousness of the crimes alleged, secondly, the extensive evidence available, thirdly, jurisdiction was proper in Germany since three of the accused were based there and lastly the US was unwilling to investigate and prosecute high ranking officials for the crimes (this was supported by an expert opinion).¹⁰⁸

The prosecutor declined to institute investigations over the allegations. The reasons that the prosecutor gave for declining to investigate and prosecute were as follows: first, none of the victims were Germans and all the accused were Americans, therefore, the decision was said to be in line with the principle of non-interference in internal affairs of foreign countries, secondly, according to the prosecutor, applying the principle of subsidiarity stated that the primary competent jurisdiction lay with the US and lastly he stated that there were no indications that the US was refraining from investigating the violations.¹⁰⁹



An amended version of the case was filed in 2006 by among others the European Center for Constitutional and Human Rights (ECCHR). As in the 2004 case the prosecutor refused to investigate on the basis of the absence of some legitimizing link with Germany.¹¹⁰ Relying on the Foreign Law Branch at the headquarters of the US Armed Forces it found that no defendants were currently present in Germany and could not be expected to be present in Germany.¹¹¹ The prosecutor also focused on whether such an investigation could be

¹⁰⁸ Gallagher K (2009)1104.

¹⁰⁹ Gallagher K (2009)1105.

¹¹⁰ Gallagher K (2009) 1108.

¹¹¹ The Prosecutors decision available at <http://www.ccrjustice.org/files/ProsecutorsDecision.pdf> (accessed on 21 September 2013).

successful or whether the result would be a ‘purely symbolic prosecution’, which he did not view as having any merit. He expressed concern about ‘forum shopping’ for a state that is favourable to international law claims, and lamented the resources that could go into ‘complicated but ultimately unsuccessful investigations’.¹¹² The Plaintiff’s petition to have the prosecutor’s decision reviewed was dismissed by the Stuttgart Higher Regional Court.¹¹³ The court made a finding that the prosecutor had properly exercised his discretion under section 153(f) of the German Criminal Code. To the extent that the petition had also sought the institution of a public suit against the accused the court made the following finding:

‘...in so far as it concerns the non-prosecution of crimes under the Code of Crimes Against International Law, the implementation of a mandamus proceeding is inadmissible due to unobjectionable application of § 153(f) StPO (StPO refers to Code of Criminal Procedure) by the Federal Prosecutor (§172 (2), sentence 3, last clause, StPO in conjunction with § 153 (f) StPO)...§ 172 (2) sentence 3, last clause StPO explicitly rules out a mandamus proceeding in cases in which the prosecutor has decided not to prosecute the crime under § 153(c) to § 154 StPO.’¹¹⁴

¹¹² Prosecutors Decision see fn above.

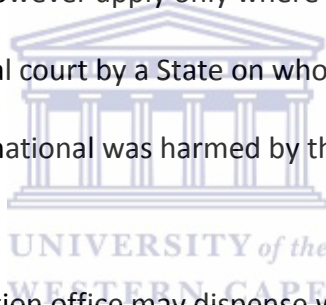
¹¹³ *Ahmed Hassan Mahawis Darweesh et al v. Donald Rumsfeld et al*, Stuttgart Regional Appeals Criminal Panel 5, Decision of 21 April 2009 available at <http://www.ccrijustice.org/files/Stuttgart%20Appeals%20Court%20Decision%20Rumsfeld%20Case%20-%20EN.pdf> (accessed on 21 September 2013).(hereafter Stuttgart Regional Appeals decision)

¹¹⁴ Stuttgart Regional Appeals decision see fn above.

2.2.3 Prosecutorial Discretion for Crimes under the CCAIL

The text of the CCAIL provide for pure universal jurisdiction, however, as can be seen from the above cases, that does not provide a guarantee for investigations or prosecution of cases in Germany on the basis of that jurisdiction. Upon enactment of the CCAIL, there was an amendment to the Code of Criminal Procedure through inclusion of a procedural provision § 153(f) which provides in part as follows:

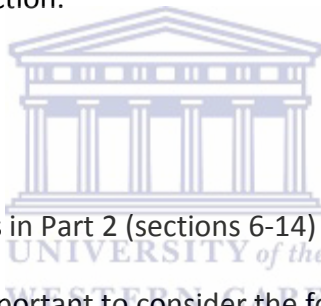
(1) The public prosecution office may dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the [CCAIL] if the accused is not present in Germany and such presence is not to be anticipated. If the accused is a German, this shall however apply only where the offence is being prosecuted before an international court by a State on whose territory the offence was committed or whose national was harmed by the offence.



(2) . . . the public prosecution office may dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the [CCAIL], in particular if:

1. There is no suspicion of a German having committed such offence,
2. Such offence was not committed against a German,
3. No suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and
4. The offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

This provision in as far as it has been applied to prevent investigations on the basis of the CCAIL, acts as a 'claw back' to what the CCAIL provides. By its nature it takes away the absoluteness of universal jurisdiction provided under section 1 through the exercise of discretion by the prosecutor. There is some mismatch between the text of the CCAIL and the practice. The disconnection between the text and the practice may render the provision as becoming another 'paper tiger'.¹¹⁵ The provision on the prosecutor's discretion acts as some sifting mechanism as to which cases universal jurisdiction would be applied. In fact, it can be argued that if one reads section 1 of the CCAIL together with the section 153(1)(f) StPO it can be concluded that Germany actually applies conditional universal jurisdiction as opposed to pure universal jurisdiction.



2.3 Definition of crimes

The CCAIL enumerates the crimes in Part 2 (sections 6-14) as genocide, crimes against humanity and war crimes. It is important to consider the form of transposition of each of the crimes into German law and make a comparison to the Rome Statute.

2.3.1 The Crime of Genocide

Genocide had formed part of the German criminal law before the enactment of the new CCAIL.¹¹⁶ It was adopted in section 6 of the CCAIL in the same format as it is in the Rome Statute (Article 6) and the Genocide Convention (Article 2). The slight deviation in Article 6(a),(b) and (e) of the Rome Statute by replacing plural 'members' with the singular

¹¹⁵ Werle G (2009) 135.

¹¹⁶ Former section 220a of German Criminal Code

'member' of the group was necessary in order to conform with the international interpretation of the norm.¹¹⁷

2.3.2 Crimes against Humanity

The structure of the crime is drafted in the same manner as provided under the Rome Statute in that there is the chapeau that contains the contextual element and the remainder of the provision comprise individual acts of the crime. In similarity to the Rome Statute, the contextual element of widespread and systematic attack on civilian population is also provided. The distinction with the Rome Statute lies with the individual acts. Under the Rome Statute, in Article 7(2) (a), "an attack on a civilian population" means "a course of conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack". This is what is referred to as the "policy element" of crimes against humanity. The policy element does not form part of the definition under the CCAIL. It is understandable because the policy element was added to the Rome Statute as a matter of compromise; there is no 'policy element' requirement for crimes against humanity under customary international law either.¹¹⁸

Another distinction with the Rome Statute lies with the arrangement of the provisions. The CCAIL arranges the crimes according to their seriousness.¹¹⁹ The CCAIL also introduces the

¹¹⁷ Werle & Jessberger (2002) 205, Elements of Crimes U.N. Doc PCNICC/2000/INF/3/Add. Elements to Article 6(a), (b) and (e).

¹¹⁸ Werle G (2009)300 the policy element was included as a price of the alternative rather than cumulative relationship between the requirements of 'systematic' and 'widespread'.

¹¹⁹ Werle & Jessberger (2002) 205.

concept of aggravating circumstances to individual crimes and also providing for relevant penalties for the same.¹²⁰

The precise formulation of the crimes is achieved by combining the individual act under Article 7(1) of the Rome Statute with its interpretation under Article 7(2). For instance instead of putting an individual act of extermination as provided under Article 7(1)(b) as read with Article 7(2)(b), the CCAIL combines both the individual act and the interpretation as provided under art 7(2) of the Rome Statute. In that regard, the offence under the CCAIL reads; 'inflicts with intent of destroying a population in whole or in part, conditions in life of that population or the parts thereof, being conditions calculated to bring about its physical destruction in whole or in part'. In order to comply with the German strict constitutional requirement on clarity certain provisions under the Rome Statute had to be restricted, for example section 7(1)(6) in relation to sexual violence as a crime against humanity does not include a catch all phrase of 'sexual violence of comparable gravity' as is provided under the Rome Statute.

In relation to forced pregnancy as a category of crimes against humanity such cases are treated as crimes against humanity if the perpetrator confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population. In contrast, the Rome Statute allows for a broader mental element in that an additional alternative is included, the Rome Statute put the offence as 'unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law', the most plausible explanation for

¹²⁰ Section 10(1)-(5) CCAIL.

this approach is that the catch all phrase of 'other grave violations under international law' is too broad to satisfy the specificity requirements under the German law.

There is also some refinement of article 7(1)(i) as read with article 7(2)(i) of the ICC Statute in relation to enforced disappearance which provides that 'enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation or support or acquiescence of a State or Political Organisation, followed by a refusal to acknowledge that deprivation of freedom or give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' The definition in article 7(2) (i) is based on the preamble of the Declaration on the Protection of All Persons from Enforced Disappearance.¹²¹ The CCAIL adopts the precision of the Elements of Crimes in relation to the offence and distinguishes that the offence consists of two alternative types of conduct, deprivation of liberty and withholding information.¹²² The CCAIL, therefore, distinguishes between alternative acts of imprisonment by order or with consent of a State or Political Organisation and the denial of information following such imprisonment which is carried out by the State or Political Organisation or which is exercised in contravention to a legal obligation whereas under the Rome Statute the two conducts are not treated separately.¹²³

Another refinement is to the catch all clause in article 7(1)(k) which provides for 'other inhuman acts of similar character intentionally causing great suffering, or serious body

¹²¹ General Assembly Resolution 47/133 of 18 December 1992, UN Doc.A/47/49

¹²² Section 7 (1) (7) CCAIL, Werle (2009) 336.

¹²³ Werle & Jessberger (2002)205.

injury to body or to mental or to physical health.’ This provision was refined under the CCAIL in section 7(1) (8) to provide that ‘causes another person severe physical or mental harm, especially of the kind mentioned in section 226 of the Criminal Code’. In this case the relevant section in the Criminal Code provides for causing grievous bodily harm as follows:

(1) If the injury results in the victim

1. losing his sight in one eye or in both eyes, his hearing, his speech or his ability to procreate;
2. losing or losing permanently the ability to use an important member;
3. being permanently and seriously disfigured or contracting a lingering illness, becoming paralysed, mentally ill or disabled.

The provision under the Rome Statute is broader than under the CCAIL. By restricting to offences under section 226 of the Criminal Code, the applicability of the CCAIL has been restricted only to those specific crimes. However, such a position is again a reflection of strict requirements of the German constitutional rules as regards specificity of criminal laws.

2.3.3 War Crimes

War crimes are provided in Part 2 (section 8 to 12) of the CCAIL. Contrary to the Rome Statute, the CCAIL removes the distinction between war crimes committed in international armed conflict and non-international armed conflict.¹²⁴ The CCAIL is structured not according to the nature of the conflict as the position under the Rome Statute but according

¹²⁴ Werle & Jessberger (2002) 207 see also *The Prosecutor v Tadic ICTY (Appeals Chamber) decision of 2 October 1995.*

to the nature of objects attacked.¹²⁵ It is argued that the structural approach adopted by Germany enables the CCAIL to have some terminological consistency that lacks under the Rome Statute, an example being the interchangeable use under the Rome Statute of ‘wilful killing’ and ‘murder’ in respect of the same thing.¹²⁶ Another distinction lies in the inclusion of crimes that form part of Additional Protocol I of the Geneva Convention.¹²⁷ These are included in as far as they form part of customary international law.¹²⁸

However, it is also argued that there is a lacuna with respect to certain crimes under the Rome Statute which are not provided for in the CCAIL.¹²⁹ This is in respect to the crimes of declaration that no quarter would be given¹³⁰ and the wilful deprivation of a prisoner of war or other protected persons’ rights of fair and regular trial.¹³¹ In this respect, there is need to conform the law to the provisions of the Rome Statute in order to fully comply with the complementarity principle¹³².



¹²⁵ Werle & Jessberger (2002) 207.

¹²⁶ Bergsmo, Harlem & Hayashi (2010) 22.

¹²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977) 1125 UNTS 3.

¹²⁸ Werle & Jessberger (2002) 207.

¹²⁹ Satzger H (2002) 265.

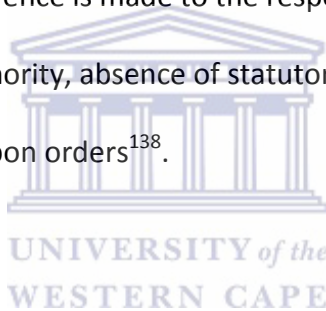
¹³⁰ Art 8 (2)(b)xii Rome Statute.

¹³¹ Art 8(2) (a) vi Rome Statute.

¹³² Satzger H (2002) 265.

2.3 General Principles

The CCAIL does not incorporate all general principles forming part of the Rome Statute. Section 2 of the CCAIL provides that the general criminal law shall apply to offences pursuant to the Act as long as there is no special provision under the Act. It was considered during the drafting of the CCAIL that for 'practical purposes' the use of the general principles under the general criminal code would lead to the same result as envisaged by the Rome Statute¹³³. Crimes under international law are incorporated into tried and tested doctrinal framework of criminal law.¹³⁴ In addition, it is argued that creating a parallel set of general principles for offences under CCAIL would have led to unforeseeable difficulties in enforcing the law.¹³⁵ However, special reference is made to the responsibility of military commanders¹³⁶ and those in authority, absence of statutory limitation for crimes against international law¹³⁷ and acting upon orders¹³⁸.



2.5 Punishment

The Rome Statute has a general penalty provision for crimes under the jurisdiction of the ICC¹³⁹. It provides for life imprisonment in aggravated circumstances¹⁴⁰ or a maximum

¹³³ Werle G (2009) 129.

¹³⁴ Werle & Jessberger (2002) 201.

¹³⁵ Werle G (2009)129.

¹³⁶ Sections 4, 13 and 14 CCAIL.

¹³⁷ Section 5 CCAIL.

¹³⁸ Section 3 CCAIL.

¹³⁹ Article 77 Rome Statute.

¹⁴⁰ Article 77(1)(b) Rome Statute.

period of 30 years of imprisonment¹⁴¹. It also provides for a fine or forfeiture of direct or indirect proceeds of crime¹⁴². In contrast, the CCAIL complies with the German constitutional requirement of certainty by providing sentences that commensurate with the seriousness of the offence under the CCAIL. The most serious punishment is mandatory lifetime imprisonment. In relation to fixed term imprisonment, the sentences are either 10, 5 or 3 years¹⁴³.

3. THE SOUTH AFRICAN ICC ACT

3.1 Legislative History

As already mentioned, South Africa belonged to the group of the 'like-minded states' that supported the creation of the International Criminal Court.¹⁴⁴ Before 1994, the apartheid regime was not keen in incorporating international crimes into its law. For instance, despite ratifying the Geneva Conventions as early as 1952, the South African apartheid Government did not enact any legislation to incorporate them into domestic law.¹⁴⁵ In addition, South Africa never ratified the Additional Protocols to the Geneva Convention due to fear that members of the African National Congress (ANC) military wing would claim prisoner of war status under the Protocols.¹⁴⁶ In fact, an attempt to invoke the Protocols as customary

¹⁴¹ Article 77(1) (a) Rome Statute.

¹⁴² Article 78(2) (a) (b) Rome Statute.

¹⁴³ Werle & Jessberger (2002) 211.

¹⁴⁴ Nsereko DN 'Implementing the ICC Statute within the Southern African Region (SADC) in Kress& Lattanzi (2000) 169.

¹⁴⁵ Strydom H South 'Africa and the International Criminal Court' (2002) vol 6 *Max Planck Yearbook of United Nations Law* 346 (hereafter Strydom H (2002)).

¹⁴⁶ Strydom H (2002) 346.

international law in the courts during that period also failed. An example of this is the case of *S v Petane*¹⁴⁷ where the Cape Provincial Division decided against considering that a member of the ANC military wing *Umkhonto we Sizwe* was entitled to prisoner-of-war status on the basis of Additional Protocol 1 of 1977 of the Geneva Conventions whose provisions accord such status to members of liberation movements.¹⁴⁸ South Africa was not a signatory to the Additional Protocols therefore the submission made to the court was that AP I 1977 had become customary international law but the court rejected the argument.

South Africa signed the Rome Statute on 18th July 1998. At that time it was the Chairperson of the Southern African Development Committee.¹⁴⁹ During the negotiation to the Rome Statute, SADC presented their contributions to the Rome Statute as a Regional Group. After the ratification, South Africa hosted the SADC Ratification Consultative Conference that produced a ratification kit, which presented a model implementation law for the Rome Statute.¹⁵⁰ The South African Government constituted a national consultative group on the Rome Statute composed of various departments in order to investigate which legislation would be affected by the Statute.¹⁵¹ The Constitution provides that treaties save for those that are self-executing have to be incorporated into the domestic law.¹⁵² The Rome Statute is not self-executing as such it was necessary for South Africa to come up with implementing

¹⁴⁷ (1988) (3) SA 51(C).

¹⁴⁸ Dugard J (2012) 27.

¹⁴⁹ Dugard J (2012)27.

¹⁵⁰ Manqungo S 'Implementing the Rome Statute in South Africa' in Kress & Lattanzi (2000) 182.

¹⁵¹ Manqungo S 'Implementing the Rome Statute in South Africa' in Kress & Lattanzi (2000) 183.

¹⁵² Art 231(3), South African Constitution.

legislation. As already discussed on the method of implementation adopted by South Africa, was incorporation by reference. In the preamble the ICC Act alludes to the South African history of atrocities and states its commitment to bring those who commit atrocities to justice, either in a court of law in South Africa in terms of the domestic laws where possible or in the event of the national prosecuting authority declining or being unable to do so, in the ICC.

3.2 Jurisdiction

3.2.1. Principles of Jurisdiction

The South African ICC Act provides for jurisdiction in Chapter 2 of the Act in Section 4 where it states as follows:



(3) In order to secure the jurisdiction of a South African court for the purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

- (a) That person is a South African citizen; or
- (b) That person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) That person after the Commission of the crime ,is present in the territory of the Republic; or
- (d) That person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

The South African ICC Act provides, therefore, for conditional universal jurisdiction.

3.2.1 Analysing the case of SALC and Zimbabwe Exiles Forum v. NDPP et al

The exercise of this jurisdiction has also been a subject of litigation in South Africa, in the case of *South African Litigation Center (SALC) and Zimbabwe Exiles Forum v National Director of Public Prosecutions and others*.¹⁵³ It is essential to analyse the case to appreciate how the provision has been applied in practice. The case was an application for judicial review against the decision of the National Director of Public Prosecutions, the Head of the Priority Litigation Unit and the National Commissioner of the South African Police Service of not to instituting investigations into crimes against humanity of torture committed in Zimbabwe. The applicants argued that the named respondents failed to discharge their obligations under international law and domestic law contemplated in the SA ICC Act. Although the nature of the case falls within the administrative law realm it is relevant to criminal law because it interprets the application of universal jurisdiction to crimes under the ICC Act.

The facts relied upon took place on 27 March 2007 in Harare, Zimbabwe. It is alleged that on that day, the Zimbabwe Police under the orders of the ruling party, ZANU PF raided the headquarters of the opposition party, MDC (Movement for Democratic Change). Over a hundred people were taken into custody; they represented various levels of the MDC. These individuals were detained for several days and were subjected to continuous and severe torture. In response to this, the SALC prepared a dossier (also referred as ‘the torture

¹⁵³ (2012) 10 BCLR 1089, also Werle & Bornkamm (2013) 659.

docket') consisting of testimony relating to the events stated above. The docket was hand delivered to the Priority Claims Litigation Unit, which is the office that has the power to investigate and prosecute crimes under the ICC Act. Apart from highlighting the incidence of torture, the report identified officials responsible for the torture and stated that these officials often visit South Africa, and that if and when they do so, South Africa was under a duty under international law and under the ICC Act to apprehend and prosecute them.

The court set aside the respondents decision not to initiate investigations under the ICC Act into the acts of torture committed by the named perpetrators in Zimbabwe. The Court held that although section 4(3) was concerned with trials (and no trials in absentia) and was silent on investigations, it was logical that investigations would be held prior to the decision of the Prosecutor whether to prosecute or not.¹⁵⁴ It also made a finding whose effect is that conditional universal jurisdiction is not only prescriptive, but also expands to enforcement. It also considered that political reasons were not valid considerations in deciding whether or not to investigate international crimes.¹⁵⁵ The respondents have appealed against the decision.

3.3 Definition of crimes

The method of incorporation adopted by South Africa entails that the definition of the crimes of genocide, crimes against humanity and war crimes under the ICC Act are the same as provided under the Rome Statute. The drafters of the ICC Act incorporated the Rome Statute definitions of the Core Crimes directly into the South African legal order through a

¹⁵⁴ Par 31 *SALC et al v NDPP et al*.

¹⁵⁵ Para 29 and 31 *SALC et al v NDPP et al*.

schedule to the ICC Act.¹⁵⁶ The schedule is divided into 3 parts. Part 1 of the schedule mirrors the wording of Article 6 of the Rome Statute in relation to the definition of the crime of genocide; Part 2 of the schedule mirrors Article 7 of the Rome Statute in relation to crimes against humanity and Part 3 mirrors Article 8 of the Rome Statute, in relation to war crimes.

3.4 General Principles

The ICC Act does not provide for general principles as set out in the Rome Statute.

Burchell¹⁵⁷ argues that most of the general principles in the Rome Statute are in most cases similar and identical to the South African Criminal Law. A clear example is given of the defence of superior orders under Article 33 of the Rome Statute which is materially similar to that under South African common law.¹⁵⁸ However, according to him an exception is Article 28 of the Rome Statute which imposes criminal liability to military commanders, persons acting as military commanders and other persons in superior subordinate relationship. For military commanders or persons acting as military commanders, they incur such liability for knowingly failing to prevent or punish or negligently failing to prevent or punish crimes of their subordinates. Non-military superior incur similar liability for knowingly or recklessly failing to prevent or punish crimes of subordinates.¹⁵⁹ This has not been incorporated in the implementing legislation.

¹⁵⁶ Schedule 1 Parts 1,2 and 3 ICC Act.

¹⁵⁷ Burchell J *South African Criminal Law and Procedure* vol 1 (2011) 7.

¹⁵⁸ Burchell (2011) 7, 179, the same applies to art 22(legality),art 25(liability of perpetrator, aider abettor, attempter and participant in a common purpose), art 31(self-defence, duress, necessity, insanity and intoxication),art 32(mistake of fact or law).

¹⁵⁹ Art 28, Rome Statute.

3.5 Punishment

There are no specific sentences for each of the crimes under the Act. Section 4(1) only provides for the general punishment for the offences under the Act. It provides as follows:

‘despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment including imprisonment for life, or such imprisonment without the option of a fine or both a fine and such imprisonment’.

This will be analysed further in the next chapter and considers how it complies with the principle of legality as provided under the South African Constitution¹⁶⁰.

4. GENEVA CONVENTION ACT OF 2012 AS A CURRENT DEVELOPMENT IN SOUTH AFRICAN INTERNATIONAL CRIMINAL LAW.



This piece of legislation was adopted by South African Parliament in 2012; some 60 years after the country became a State Party to the Geneva Conventions.¹⁶¹ It is essential to consider its contents as it also covers war crimes which are also part of the ICC Act. The Act is aimed at enacting the Geneva Conventions and its protocols into South African law, and to provide for prevention and punishment of grave and other breaches.¹⁶² It has two categories of offences; the grave breaches of Geneva Conventions and Additional Protocol

¹⁶⁰ Article 35 South African Constitution.

¹⁶¹ Du Plessis M 'The Geneva Conventions and South African Law' ISS Policy Brief .June 2013 available at <http://www.africaportal.org/dspace/articles/geneva-conventions-and-south-african-law> (accessed on 16 October 2010)(hereafter DuPlessis M(2013)).

¹⁶² Preamble Implementation of Geneva Conventions Act 8 of 2012.

I¹⁶³ and the breaches of common article 3 to the Geneva Conventions.¹⁶⁴ It provides for different jurisdictions, universal jurisdiction to grave breaches and territoriality and nationality jurisdiction to other violations.¹⁶⁵ It provides for command responsibility for offences under it.¹⁶⁶ It is retrospective in approach in that it provides for jurisdiction over crimes that occurred prior to its implementation on the basis that they were already customary international law crimes.¹⁶⁷

However, questions have been raised as to its relationship with the ICC Act since the later also domesticates the grave breaches that form part of the Rome Statute.¹⁶⁸ There is no provision within the legislation articulating its relationship with the ICC Act bearing in mind that there are some overlaps in the provisions. This paper upon considering the provisions agrees with those who argue that the Geneva Convention Implementation Act is a mere legislative 'surplusage'¹⁶⁹ that could have been avoided if comprehensive implementation approach to the ICC Act was adopted.

¹⁶³ Section 5(1)&(2) Geneva Conventions Act.

¹⁶⁴ Section 5(3) Geneva Convention Act.

¹⁶⁵ Section 7(1) provides for universal jurisdiction to grave breaches and section 5(3) provides for ordinary jurisdiction for other crimes.

¹⁶⁶ Section 6 Geneva Convention Act

¹⁶⁷ Section 7(4) Geneva Convention Act.

¹⁶⁸ Du Plessis M (2013) 3.

¹⁶⁹ Du Plessis M (2013) 2.

5. CONCLUSION

The chapter has analysed the provisions of the German CCAIL and the South African ICC Act. It has discussed the history of international criminal law in South Africa and Germany. It has also shown that both countries have had historical challenges in the recognition of international criminal law domestically. The chapter analyses how the key areas of jurisdiction, definition of crimes, general principles are incorporated in the ICC Act and the CCAIL. They indicate some diversity that has been necessitated by constitutional provisions or policy considerations. The CCAIL for instance, in defining crimes had to consider the strict legality principle of which South Africa did not consider. In relation to jurisdiction, the chapter has highlighted the challenges that States face in the attempt to apply universal jurisdiction on international crimes. Through the analysis of the SALC case and the Donald Rumsfeld decision, it is clear that the application of universal jurisdiction is not immune from political considerations. The Chapter has also highlighted the challenge of having multiple legislations dealing with the same area of the law as shown through the overlaps existing between the South African ICC Act and the Implementation of the Geneva Conventions Act

CHAPTER 4

COMPARATIVE ANALYSIS OF THE CCAIL AND THE SOUTH AFRICAN ICC ACT

1. INTRODUCTION

This Chapter will do a comparative analysis of the provisions of the two legislations. It will discuss the key distinctions between the two legislations on the matters highlighted in the previous chapter. In addition, it will also compare how the principle of complementarity is reflected in the two legislations.

2. A COMPARATIVE ANALYSIS

2.1 Legislative History

Germany's approach to international criminal law has undergone a metamorphosis from being anti-international criminal law to being pro-international criminal law. Equally, South Africa had its own challenges under the apartheid era as there was lack of political will to enact legislation dealing with international crimes.¹⁷⁰ However, during the adoption of the Rome Statute, both countries belonged to the group of the like-minded states that were in support of the establishment of the International Criminal Court. They both interpreted the Rome Statute as requiring them to come up with implementing legislation, hence the CCAIL and the ICC Act. In addition, they both considered that codification was the appropriate method of dealing with international crimes. The distinction lies in the method of

¹⁷⁰ Strydom H (2002) 346, Werle & Jessberger (2002)196.

implementation, whereby Germany adopted the modification approach whilst South Africa adopted the incorporation by reference method.

2.2 Approach to the principle of complementarity

The difference in the understanding of the principle of complementarity is evident in the scope of the implementation adopted. For Germany, complementarity entailed that she had to come up with legislation that would ensure that Germany would always be in a position to prosecute international crimes domestically.¹⁷¹ With regard to South Africa her approach to complementarity can be ascertained in the preamble provision that provides that South Africa will prosecute perpetrators of atrocities, either in South African Courts in terms of domestic law 'where possible' or ensure that the crimes are prosecuted at the ICC. This is distinct from the German approach that is based on the idea that German should always be in a position to prosecute. Based on perspective, complementarity can be viewed as liberating or restrictive. Where complementarity is viewed as liberating as exemplified by Germany, States can be creative in the formulating of provisions that suit their judicial system. Where restrictive, States can consider adopting the exact provisions of the Rome Statute as the best approach in the implementation of the Rome Statute, as the case with South Africa.

2.3 Jurisdiction

Both States have included universal jurisdiction as a ground for assuming jurisdiction over international crimes. Germany adopts pure universal jurisdiction in that the CCAIL confers jurisdiction on Germany over international crimes committed anywhere in the world despite

¹⁷¹ Werle (2009) 128.

the nationality of the perpetrator or victim.¹⁷² This is distinct from the ICC Act that requires the presence of the perpetrator in South Africa in order to assume jurisdiction.¹⁷³

The distinction in as much as it is clear on paper, it is not clear in practice. In relation to Germany, as the discussion of the case of Donald Rumsfeld would show, the practical application of the 'pure universal jurisdiction' as provided by section 1 of the CCAIL is not without limitation. The amendment to the Code of Criminal Procedure that gave some discretionary powers to the prosecutor has the effect of negating the whole essence of having pure universal jurisdiction under the CCAIL. For instance, under section 153 (f) (2) Code of Criminal Procedure the criteria that the prosecutor has to follow in order to institute an investigation or not include the nationality of the perpetrator, the presence of the perpetrator in Germany, whether Germany is a victim and whether the offence is being prosecuted by an international tribunal or by the State in whose territory the offence was committed.

On the contrary, the South African ICC Act does not provide for pure universal jurisdiction, however, the interpretation of section 4 of the ICC Act in the decision of the *SALC v National Director of Public Prosecutions* extends the duty to prosecute and includes the duty to investigate international crimes regardless of the absence of the perpetrators in South Africa. The court also made a finding that political considerations should not be taken into account when assuming jurisdiction over international crimes. The two court decisions bring into consideration how the law can be limited or enhanced through practice. The German

¹⁷² Section 1, CCAIL.

¹⁷³ Section 4(3) ICC Act.

scenario presents a case of limitation, whereas the South African scenario represents a case of enhancement of the law through interpretation.

In relation to universal jurisdiction, some authors have distinguished between the universal jurisdiction to prescribe and the universal jurisdiction to enforce.¹⁷⁴ In relation to the jurisdiction to prescribe, it is said to mean the State's authority under international law to assert the application of its criminal law to a given criminal conduct, whether by primary or subordinate legislation, executive decree or judicial ruling.¹⁷⁵ On the other hand, enforcement jurisdiction refers to State's authority under international law to actually apply its criminal law through its police, courts and other executive action.¹⁷⁶

Supporters of universal jurisdiction argue that the lesser prosecutorial discretion the better since this helps in avoiding political calculations in universal jurisdiction cases.¹⁷⁷ The political control of the applicability of the universal jurisdiction is viewed negatively.¹⁷⁸

However, as seen from the case of South Africa and Germany, political considerations do play a role in the exercise of universal jurisdiction. In this regard, some authors such as Cassese advocate for what is termed the 'sensible notion' of jurisdictional base that does not jeopardize international relations while contributing to 'a consolidated international

¹⁷⁴ O'Keefe R Universal Jurisdiction: Clarifying the Basic Concept (2004) 2 *JICJ* 736(hereafter O'Keefe R (2004)).

¹⁷⁵ O'Keefe R (2004)736.

¹⁷⁶ O'Keefe R (2004)736.

¹⁷⁷ Lafontaine F (2012) 1282

¹⁷⁸ Lafontaine F (2012)1282.

criminal justice'.¹⁷⁹ He proposes some three conditions that can be applied to realise his notion and these are the presence of the accused person in the territory of the prosecuting state, the applicability of the subsidiarity principle whereby universal jurisdiction will only be exercised as a default jurisdiction and lastly that states respect the principles of immunity.¹⁸⁰ The issue of immunity is adequately dealt with under the Rome Statute.¹⁸¹ However, as evident from the SALC Case and the Rumsfeld case, there are practical considerations of availability of the accused in the territory that seek to assume jurisdiction. Therefore, adopting this sensible notion for universal jurisdiction is a practical and realistic approach for providing for jurisdiction over international crimes.

2.4 Definitions of Crimes

In relation to the definition of crimes, the two countries have adopted different approaches. South Africa incorporated the crimes under the Rome Statute without any modification. Germany has modified the crimes in order to fulfil the strict requirements of clarity under its law. Some changes are practical for instance where the Elements of Crimes or customary international law clarifies the proper formulation of a crime; it is only prudent to modify the Rome Statute provision to that effect. This is evident for instance in how the crime of genocide has been formulated or how the distinction between international and non-international conflict is ignored under the CCAIL. However, there is a lacuna in the law since the CCAIL does not incorporate certain crimes under the Rome Statute and these are crime of declaration of no quarter¹⁸² and wilful deprivation of prisoners of war rights to fair

¹⁷⁹ Lafontaine F (2012) 1277.

¹⁸⁰ Lafontaine F (2012) 1278.

¹⁸¹ Art 27 Rome Statute.

¹⁸² Art 8(2)(b)xii Rome Statute.

trial¹⁸³. It has been argued that when assessing the States discretion to deviate from the international criminal law norm it should be considered that 'crimes definitions' are constructions of international law as such any deviation should not undermine the essential content or rationale of the international crime.¹⁸⁴ Germany's modification does not negate the essential content of the crimes but is an attempt to come up with a formulation of the crimes that could be enforced under its legal system.

2.4.1 Universal Jurisdiction and the definition of crimes

Germany and South Africa had different considerations in the adopting of the method of implementation and how the crimes were structured. It has been argued that where states seek to apply universal jurisdiction, they need to consider carefully how they define international crimes. In adopting a broader definition for genocide, crimes against humanity or war crimes states are not supposed to go beyond the definitions recognised by customary international law as this may amount to a conflict with the legality principle.

Adopting the same definitions as under the Statute may make it easy for the States to apply universal jurisdiction especially where the Statute has precisely provided for crimes that are already recognised under customary international law. As already mentioned in this paper, the Rome Statute is a product of compromise and this compromise is also apparent in how some crimes are formulated. The effect is that they cannot be considered as a replica of customary international law of which universal jurisdiction would apply.

¹⁸³ Art 8(2)(a)vii Rome Statute.

¹⁸⁴Terracino J (2007) 421.

2.4.2 The Principle of Legality and the definition of crimes

The principle of legality means that punishment can only be inflicted for contraventions of clearly defined crimes that were in existence before the time of contravention.¹⁸⁵ As already discussed earlier article 103 § 2 of the German Basic Law demands some specificity on the possible penalty to be given to a crime.¹⁸⁶ This principle is not uniquely German, South Africa also has the principle under its constitution in s 35(3) (l) – (n) as part of the rights to fair trial. By way of comparison article 103 § 2 of the German Basic Law and s35 of the South African Constitution are formulated as follows:

Article 103 § 2 of the German Basic Law

‘An act may be punished only if it was defined by a law as a criminal offence before the act was committed.’



Section 35 (3) (l)-(n) South African Constitution

Every accused person has the right to a fair trial, which includes the right-

- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed Punishments of the offence has been changed between the time that the offence

¹⁸⁵ Burchell(2011) 34.

¹⁸⁶ Kress & Lattanzi (2000) 111.

was committed and the time of sentencing.

In South Africa, the traditional approach to legality is that a court can only find an accused guilty of a crime if the conduct was already recognised by the law as a crime (*ius acceptum* principle).¹⁸⁷ Common law and statutory crimes must be defined with reasonable precision (*ius certum* principle)¹⁸⁸ and there can be no conviction of or punishment for conduct not previously declared to be a crime (*ius praeivium* principle).¹⁸⁹ Several decisions show the courts reluctance to expand the definition of crimes to circumstances not envisaged by the legislature. For instance in the case of *Masiya v Director of Public Prosecutions, Pretoria and Another* a rape case where the accused was tried and convicted by a magistrate court of anally raping a 9 year old girl. The magistrate and later the high court had held that the common law definition of the crime of rape, which restricts it to penile-vaginal intercourse, was archaic, irrational and discriminatory. However, the Constitutional Court refused to extend the definition of rape to anal penetration of men citing that the principle of legality prevents extending the common law definitions of crimes and that any development should take place in parliament.

In relation to international crimes, the issue would be whether crimes under customary international law would be prosecuted in South African Courts. Although customary international law is recognised as a source of law, South African Courts would not try a person for international crimes in the absence of domestic legislation penalising such

¹⁸⁷ s 35(3)(l) Constitution.

¹⁸⁸ Burchell (2011) 35. s35(3)(a) is said to reinforce this by providing the right to be informed of the charge with sufficient detail.

¹⁸⁹ Burchell(2011)35.

conduct.¹⁹⁰ This proposition was challenged in the case of *S v Basson*¹⁹¹ where the court found it unnecessary 'to consider whether customary international law could be used as a basis in itself for prosecution under the common law.'¹⁹² The case involved an apartheid agent who committed war crimes and crimes against humanity against anti-apartheid fighters. At the time of commission South Africa was a part to the Geneva Conventions but had not domesticated the grave breaches law. In this regard, one can argue that South Africa also applies some strict legality principles and as such it is questionable whether South African courts would try crimes under customary international law, where the same has not been clearly provided for under any written law.

2.5 General Principles

Both jurisdictions considered the general principles under their ordinary criminal law as being sufficient and almost similar to those under the Rome Statute. The only distinction is that even though both countries' ordinary criminal law has no provision for command responsibility as provided under Art 28 of the Rome Statute, only Germany incorporated it into its implementing legislation whilst South Africa did not. This is a lacuna in the South African Act that should be addressed. However, following the enactment of the Geneva Convention Act South Africa provides for command responsibility for the grave breaches criminalised under it. In the absence of interplay between the ICC Act and the Geneva Conventions Act¹⁹³ this does not rectify the absence of command responsibility under the ICC Act.

¹⁹⁰ Dugard J (2012) 201.

¹⁹¹ 2005(12) BCLR 1192.

¹⁹² Para 172.

¹⁹³ Duplessis M (2013) 3.

2.6 Punishment

The two pieces of legislations deal with the question of punishment differently. The CCAIL provides for different gradations of punishments. All the offences are given the requisite punishment pursuant to their gravity. It makes provision for aggravating factors. The South African legislation has a blanket provision for sentences. The crimes are not graded according to their gravity as such the court has the discretion to mete out an appropriate sentence in relation to the set of facts before it. This is despite the fact that the South African Constitution also provides for the legality principle.¹⁹⁴

3. CONCLUSION

This chapter provided a synthesis of the provisions of the two statutes. It has discussed the similarities and differences in the provisions of the CCAIL and ICC Act. This Chapter highlights that a State Party can consider the principle of complementarity as liberating or restrictive depending on their perspective. This is reflected in the implementation of the substantive law of the Rome Statute. The Chapter has also shown that incorporating universal jurisdiction in State Parties implementing legislation has to be guided by the principles underlying a 'sensible notion' of universal jurisdiction. Adopting pure or absolute universal jurisdiction can be attractive on paper but may bring in challenges of enforcement which have been highlighted in relation to the CCAIL and ICC Act. The Chapter has also highlighted the importance of considering the principles of legality as a guiding principle toward specificity in implementing legislation.

¹⁹⁴ Art 35, South African Constitution.

CHAPTER 5

IMPLEMENTATION OF THE ROME STATUTE AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW

1. INTRODUCTION

This Chapter will analyse how the divergence in approach in the implementation of the Rome Statute as reflected under the CCAIL and the ICC Act can fit into the debate on fragmentation of international criminal law. It will consider the concept of fragmentation of international criminal law against a competing concept of pluralism. It will also analyse how complementarity as principle relates to the issue of fragmentation.

2. DEFINING FRAGMENTATION

2.1 Fragmentation of International Law

Fragmentation of International law became topical through the work of the International Law Commission through its report on *Fragmentation of International Law: Difficulties arising from diversification and expansion of international law*¹⁹⁵. At this stage the International Law Commission was dealing with the issue of proliferation of tribunals and growth of autonomous branches of law that had led to fears that international law is in the process of fragmenting into separate structures, the so called 'self-contained regimes'. It was feared that the self contained regimes were a threat to the universality of international law. However, the report concluded that the proliferation had not seriously undermined the unity of international law.

¹⁹⁵ Fragmentation of international law: Difficulties arising from diversification and expansion of international criminal law, Report of the study group of International Law Commission(2006)(finalised by M Koskenniemi) A/CN.4/L682.

2.2 Fragmentation of International Criminal Law

The emergence of international criminal law as a specialist regime reinvigorated concerns relating to fragmentation.¹⁹⁶ International criminal law is intrinsically divergent in nature in that it reconciles three dimensions of international law which are public international law which exhibit some universalist aspects, humanist aspects of human rights law and the legality and fairness oriented aspects of criminal law.¹⁹⁷ It is a blended branch of law that is shaped by jurisprudence from different legal regimes as such it is said to consist of its own internal fragmentation.¹⁹⁸ Fragmentation is also evident in the analysis of the jurisprudence of different tribunals applying international criminal law. It is therefore argued that fragmentation of international criminal law can be structural, through different forums assuming jurisdiction over international crimes, procedural through differences in applicable rules and substantive, through the differences in the substantive law applicable.¹⁹⁹ As can be deduced from the comparison of the CCAIL and the ICC Act, the Rome Statute has been diversely implemented by different States Parties and this in itself brings into question the issue of fragmentation of substantive international criminal law.

3. COMPLEMENTARITY AND FRAGMENTATION

The Rome Statute through its complementarity principle provides for indirect enforcement of international criminal law. As previously discussed, the Statute does not expressly provide

¹⁹⁶Stahn C & Herik L 'Fragmentation', 'Diversification' and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the Box? in Castern & Herik (2012) 22 see also Koskenniemi & Leino 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553-79.

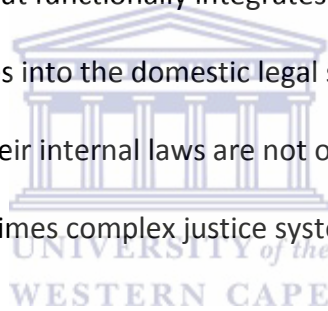
¹⁹⁷ Stahn & Herik (2012) 23.

¹⁹⁸ Stahn & Herik (2012) 24.

¹⁹⁹ Stahn & Herik (2012) 25.

for the duty to implement its provisions. However, States have interpreted the complementarity principle as requiring them to implement the Rome Statute in order for them to have original jurisdiction over international crimes.

Complementarity is an outcome of a compromise. It is viewed as a product of the need to incorporate two competing needs; the need to accommodate the sovereignty concerns of States Parties and the need to have a court that will fill up the gaps left through the ineffectiveness of national jurisdictions.²⁰⁰ In order for the principle to be effective comprehensive implementation is indispensable.²⁰¹ The challenge is to conceptualise, design or implement a judicial system that functionally integrates national and international law.²⁰² Incorporating international crimes into the domestic legal system is not a simple process. States Parties have to assess if their internal laws are not only compatible with the Rome Statute but also with their sometimes complex justice system.²⁰³



In the implementation of the Rome Statute States Parties are said to fulfil both a domestic as well as an international role.²⁰⁴ According to Kleffner, the international role entails that national criminal jurisdictions act as organs of international community through the acknowledgment that the prohibition of war crimes, crimes against humanity and genocide

²⁰⁰ Kleffner JK (2008) 3.

²⁰¹ Kleffner JK (2003) 94.

²⁰² Kleffner JK (2008) 3.

²⁰³ Terracino J (2007) 423.

²⁰⁴ Kleffner JK (2008) 25.

is at the centre of international community.²⁰⁵ In order to fulfil the national role, State Parties must develop comprehensive domestic systems in order to have the capacity to investigate and prosecute the core crimes.²⁰⁶

The need to balance the competing needs at international law and domestic law lead to different approaches in the incorporation of the Rome Statute substantive law. As such, in order to avoid misinterpretation of international law, a State Party may adopt the same definitions of the crimes as under the Rome Statute, the South African ICC Act is an example of this approach. Whereas in order to ensure that the domestic legal system is adequately equipped to deal with every international crime, a State Party can modify its crimes in order to ensure that they can be tried locally at all times as exemplified by the German CCAIL. A crucial aspect to the question of fragmentation is the role of the courts, whereby even though the provisions in the implementation legislation may be the same as that of the Rome Statute, national courts may confer a different interpretation from what the text of the domestic law provides.²⁰⁷

4. FRAGMENTATION VERSUS PLURALISM

Fragmentation is regarded as a chameleon-like phenomenon that changes in accordance with the perspective of one applying it.²⁰⁸ For a universalist, fragmentation is a negative concept whereas to the pluralist, it is a positive concept that considers the diversity in legal

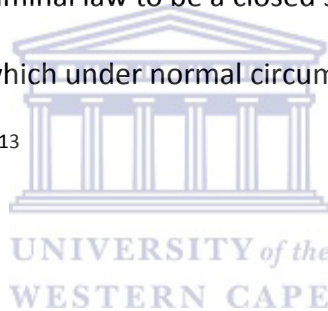
²⁰⁵ Kleffner JK (2008) 27.

²⁰⁶ Kleffner JK (2008) 27.

²⁰⁷ Terracino J(2007) 424.

²⁰⁸ Stahn & Herik (2012) 25.

systems.²⁰⁹ There are several proponents of the concept of pluralism as opposed to fragmentation. According to Sliedregt²¹⁰, when discussing the heterogeneity of international criminal law, pluralism should be favoured as a term as opposed to fragmentation. She argues that fragmentation has a negative connotation as such there is need to recognise the pluralistic nature of international criminal law and find ways of managing it rather than countering it.²¹¹ Greenawalt²¹² also adopts the pluralist approach to international criminal law. He challenges the idea that international criminal law should require uniformity in all aspects of its doctrine and practice arguing that the search for consistency and uniformity is misguided, he further argues for ‘a hybrid’ or ‘pluralistic’ model of international law that does not assume international criminal law to be a closed system but instead takes seriously the domestic laws of the states which under normal circumstances would be expected to assert jurisdiction over the case.²¹³



It is further argued that the proper question to ask is not whether fragmentation can be halted or whether it is a positive or negative development but rather how to mitigate its

²⁰⁹ Delmas-Marty M 'A Pluralistic Conception of International Criminal Law' (2003) 1 *JICJ* 13-25.

²¹⁰ Sliedregt E 'Pluralism in International Criminal Law' (2012) 25 (4) *Leiden Journal of International Law* available at SSRN: <http://ssrn.com/abstract=2158016> (accessed on 20 October 2013) (hereafter Sliedregt E (2012)).

²¹¹ Sliedregt E (2012) see fn above.

²¹² Greenawalt K 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1064 available at SSRN: <http://ssrn.com/abstract=1566523> (accessed on 20 October 2013)(hereafter Greenawalt K (2011)).

²¹³ Greenawalt K (2011)1064.

effects.²¹⁴ This is based on the understanding that the application of the complementarity principle entails that the future of international criminal law is domestic. Stahn and Herik therefore propose that international criminal law can only be subjected to two limitations and these are the principle of legality whereby heterogeneity has to be reconciled with the principle of legal certainty and the recognition that the special nature of particular provisions may curtail States discretion, for instance, *jus cogens* norms.²¹⁵ The proper approach is said to distinguish between definitions of crimes on one hand and modes of liability, defences and procedural law on the other²¹⁶. The rule of the thumb being crime definitions are a construction of international law therefore deviations should not undermine the essence of the crime.²¹⁷ In relation to general principles States usually maintain their domestic structures in order to avoid domestic inconsistencies. It is argued that to a certain extent this can create some partial disconnect between the crimes and the general principles such as the individual criminal liability attaching to them.²¹⁸ The proposed rule is that the maintenance of the domestic equivalent would be acceptable where the said equivalent captures the essence of general principles under the Rome Statute.²¹⁹ By way of extension where the international principle is not catered under the domestic law, the implementing legislation has to make provision for it.

²¹⁴ Stahn & Herik, L, 'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-The-Box?' (2012) 17 available at SSRN: <http://ssrn.com/abstract=2165001> (accessed 20 October 2013)(hereafter Stahn & Herik (2012)).

²¹⁵ Stahn & Herik(2012)17 see fn above

²¹⁶ Stahn& Herik (2012) 17

²¹⁷ Terracino J (2007) 421.

²¹⁸ Stahn & Herik (2012) 18.

²¹⁹ Stahn & Herik (2012)18.

5. DO THE CCAIL AND ICC ACT REFLECT FRAGMENTATION?

The divergence in the CCAIL and the ICC Act are a clear indication of fragmentation of international criminal law. However, the prevailing approach is that scholars seem to consider pluralism as not merely semantic but also normative and as such the best approach is to consider the divergence in approach as a form of pluralism.²²⁰ The basis being that the approach adopted by South Africa and Germany in coming up with implementing legislation reflects some unique challenges that States face in implementing the Rome Statute. For instance, the approach adopted by the CCAIL is targeted at achieving clarity as required under the German Basic Law. In addition, the CCAIL and ICC Act adapt to existing criminal legal system through the application of general principles under the ordinary criminal law.



6. CONCLUSION

Complementarity entails that domestic jurisdictions have to have the capacity of handling international crimes. The challenge for States Parties is to come up with legislation that caters for both international criminal law norms and domestic norms. The balance can either tilt more in favour of domestic law than international law or vice versa. For instance, the ICC Act puts its crimes to be the equivalent to the Rome Statute whereas the CCAIL seek to comprehend the domestic law in order to ensure that the international crimes can adequately be prosecuted at the domestic level. With regard to implementation of the Rome Statute, the language of fragmentation is no longer appropriate but rather that of pluralism. Pluralism that is acceptable is that which does not defeat the essence of international criminal law.

²²⁰ Steer C 'Legal Transplants or Legal Patchworking? The creation of International Criminal Law as a Pluralistic Body of Law' (2013) Amsterdam Center for International Law Research Paper No.2013-31 p.20 available at SSRN: <http://ssrn.com/abstract=2275233> (accessed on 24 October 2013).

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

1. CONCLUSIONS

1.1 Complementarity necessitates divergence in approach to the implementation of the Rome Statute

Complementarity as a principle entails that the primary jurisdiction over the core crimes lies in national jurisdictions. It also entails that States Parties have to incorporate the provisions of the Rome Statute in their domestic legal systems. In so doing, States Parties when drafting their implementing legislations have to consider other factors such as their constitutional provisions and political considerations. This has resulted in diversity in the methods of implementation as well as the substance of the legislations. The challenge for States Parties is to design a system that incorporates both the international and domestic norms. The CCAIL and the ICC Act are an example of the extent of such diversity.

1.2 Diversity in implementation should be regarded as pluralism as opposed to fragmentation

In the universalist language, the divergence in the incorporation of substantive and procedural provisions of the Rome Statute is regarded as fragmentation of international criminal law. Fragmentation has a negative connotation whereas pluralism is a more appropriate and acceptable. As already discussed the complementarity principle entails that States Parties have the duty to integrate international principles in their domestic systems. In this regard, fragmentation cannot be stopped or halted. Acknowledging the pluralistic

nature of international criminal law entails recognising the diversity as representing pluralism as opposed to fragmentation. Pluralism is acceptable as long as domestic systems do not undermine the essence of the Rome Statute and international criminal law generally.

1.3 Complementarity is liberating as opposed to restrictive

In order to achieve complementarity, some States Parties may view that they should come up with implementing legislations that are an equivalent to the Rome Statute. This approach regards complementarity as restrictive rather than liberating. The liberating aspect of complementarity acknowledges that the future of international criminal law, lies on the domestic plane and as such the domestic judicial systems have to be adequately capacitated to enable investigations and prosecutions of international crimes at the domestic level. In this regard crimes can be defined in order to comply with the principle of legality, punishments adequately provided for and incorporating general principles that do not form part of the domestic criminal law system. In addition international crimes that are not part of the Rome Statute but are part of customary international law or other international treaties can also be incorporated in the implementation legislation.

2. RECOMMENDATIONS

The comparison of two legislations has identified areas of convergence and divergence. It has also informed how the legislations can be improved as such there are some recommendations for the two jurisdictions under the study.

2.1 South Africa

2.1.1 Adopting Incorporation by reference is a missed opportunity

This paper has argued that complementarity should be viewed as liberating rather than restricting. As such by adopting the same definitions of crimes as under the Rome Statute, the ICC Act does not consider the several developments that have occurred in international law in the interpretation of the crimes. An example is that of the crime of genocide, where the international interpretation of the crime entails that killing a single person with a genocidal intent suffices as genocide. It can be argued that courts can apply the correct principles on interpretation, but this is something that the legislator could have easily clarified.



Secondly, South Africa through the adoption of incorporation by reference does not include crimes under customary international criminal law as well as other treaties. The strict application of the legality principle as provided under the constitution entails that such crime cannot be prosecuted in South Africa. The obligation to fight impunity does not only lie in the crimes under the Rome Statute, but to every other crime whether under another treaty or customary international law.

Thirdly, there is need to include command responsibility in the ICC Act since ordinary criminal law does not cater for it. This recommendation is related to my last proposal of the need to come up with a comprehensive and consistent legal framework dealing with international criminal law.

2.1.2 The need to harmonise legislative framework dealing with international criminal law

The adoption of the Implementation of The Geneva Conventions Act of 2012 indicates some fragmented efforts in dealing with matters of international criminal law. The fact that there are overlaps with the provisions of the ICC Act consolidates the argument that a more comprehensive legislation was necessary as opposed to the current approach under the ICC Act.

2.2 Germany

2.2.1 Adoption of a sensible notion of universal jurisdiction

There is need to adopt a sensible notion of universal jurisdiction. The provision of pure universal jurisdiction in the CCAIL fits the description of a 'paper tiger' since the provision can be restricted through the exercise of discretion by the prosecutor. The criteria for the exercise of prosecutorial discretion apply principles that are characteristic of conditional universal jurisdiction. In order to provide certainty it was essential that the CCAIL provides for conditional universal jurisdiction that requires the crime to have some connection with Germany as opposed to leaving it in the discretion of the prosecutor.

2.2.2 Incorporation of crimes not included under the CCAIL.

Another recommendation for Germany is to incorporate the crimes that were excluded in the drafting of the implementation legislation and these are crimes of declaration of no quarter and wilful deprivation of prisoners of war rights to fair trial.

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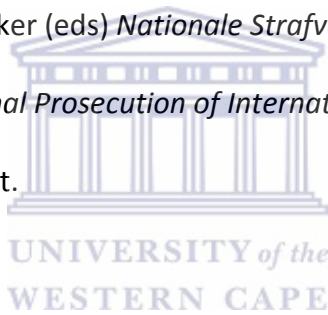
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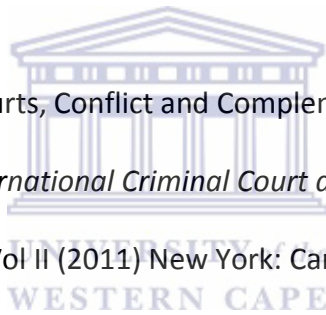
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