



**The Ratification and Implementation of the
Rome Statute of the International Criminal Court
by the Arab States: Prospects and Challenges**

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Abstract

The Rome Statute of the International Criminal Court is a major landmark in the development of international accountability. Its preamble affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. Thus the signatory states were “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. The ICC contributes to the fight against impunity and the establishment of the rule of law by punishing violations of international legal norms. Accountability is important for the past and the future of societies. The ICC needs the support and cooperation of the states to effectively perform its mandate. So without ratification and implementation of the Rome Statute the ICC will not have jurisdiction over non-member states, unless referred by the UN Security Council. The Rome Statute does not only create the ICC but it also creates the national jurisdiction of its States Parties as these states have the primary responsibility to investigate and prosecute Rome Statute crimes.

With only five Arab states to date being State Parties to the Rome Statute, it is obvious that the region is underrepresented at the ICC. Despite their positive role played in the creation of the ICC, not ratifying the Rome Statute raises several questions, especially that the majority of states that voted against the Statute were from the Arab region. Ratifying and implementing the Rome Statute will strengthen the Arab states criminal justice system, enabling them to prosecute international crimes domestically and will deter any individual from committing them in the future, regardless his official position. It will also allow the Arab states to have the primary jurisdiction over international crimes and reinforces the entire judicial system. This research will examine the issue of ratification and implementation of the Rome Statute by the Arab states by analysing the reasons, challenges and obstacles of the Arab states for not becoming part of the international criminal justice system.

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Table of Abbreviations

APIC	Agreement on the Privileges and Immunities of the International Criminal Court
ASP	Assembly of States Parties
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EU	European Union
GC	Geneva Convention
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division (Uganda)
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	Iraqi High Tribunal

ILC	International Law Commission
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
OAS	Organization of American States
OAU	Organization of African Unity
OIC	Organization of Islamic Cooperation
OTP	Office of the Prosecutor
P-5	Permanent Members of the United Nations Security Council
PrepCom	Preparatory Committee
SADC	Southern African Development Community
SC	Security Council
STL	Special Tribunal for Lebanon
STL	Special Tribunal for Lebanon
SWGCA	Special Working Group on the Crime of Aggression
TEU	Treaty on European Union
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

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Agreement on Privileges and Immunities of the International Criminal Court 2002

Agreement on the establishment of a Special Tribunal for Lebanon

Arab Convention on the Suppression of Terrorism 1998

Charter of the International Military Tribunal at Nuremberg

Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984

Convention on the Prevention and Punishment of the Crime of Genocide 1948

Geneva Conventions and Additional Protocols, and their Commentaries 1949

Hague Convention on the Laws and Customs of War on Land 1899

Hague Convention Respecting the Laws and Customs of War on Land 1907

International Covenant on Civil and Political Rights 1966

Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

Relationship Agreement between the International Criminal Court and the United Nations 2004

Rome Statute of the International Criminal Court 1998

Statute of the Higher Iraqi Criminal Court 2005

Statute of the International Court of Justice

Statute of the International Criminal Tribunal for Rwanda 1994

Statute of the International Criminal Tribunal for the Former Yugoslavia 1993

Statute of the Iraqi High Tribunal

United Nations Charter 1945

United Nations Convention on the Rights of the Child 1989

Universal Declaration of Human Rights 1948

Vienna Convention on the Law of Treaties 1969

Introduction

Background

On 9 December 1948 the United Nations (UN) adopted a resolution mandating the International Law Commission (ILC) to begin work on the draft statute of an international criminal court.¹ The momentum was temporarily lost,² but found new strength and vigour in the 1980s when it became apparent that there was an increase in international crimes.³ By 1994, a formal draft statute for an International Criminal Tribunal was adopted by the International Law Commission and forwarded to the General Assembly (GA) for consideration.⁴

The United Nations General Assembly adopted a resolution convening the United Nations Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).⁵ The purpose of the PrepCom, as mandated by the General Assembly, was to create a text that could later be adopted by states. The PrepCom had “to prepare a widely acceptable consolidated text of a convention for an international criminal court.”⁶ The PrepCom began with a preliminary text of sixty-eight articles from the International Law Commission. After nineteen weeks of formal meetings to draft a comprehensive statute, the PrepCom sent to Rome a draft convention of 116 articles with 1,700 brackets containing disagreed language.⁷

¹ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 217 A (III), UN Doc. A/810.

² GA Res. 897 (X) (1954).

³ GA Res. 44/89.

⁴ Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 Mat-22 July 1994, UN Doc. A/49/10, chapter II, paras. 23-41; See more James Crawford, ‘The ILC’s Draft Statute for an International Criminal Tribunal’, (1994) 88 American Journal of International Law 140.

⁵ See G.A. Res. 50/46, U.N. GAOR, 50th Sess., Supp.No.49 at 307, U.N. Doc. A/50/46 (1995).

⁶ *ibid.*

⁷ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2/Add.1 (1998). [hereinafter PrepComReport].

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was to complete the negotiations,⁸ drafting, and adoption of the text within the five weeks assigned to it by the General Assembly.⁹ It met from 15 June till 17 July 1998. The Statute adopted in Rome had 128 articles, accompanied by a Final Act and seven brief resolutions.¹⁰ As requested by Resolution F of the Rome Statute, in late 1998 the General Assembly authorised the creation of the United Nations Preparatory Commission for the International Criminal Court (Commission).

After the Statute of the International Criminal Court was adopted in Rome on 17 July 1998 by a majority of the states attending the Rome Conference,¹¹ the Rome Statute subsequently entered into force in July 2002. In 2003 the first judges were elected and the Prosecutor of the Court was appointed. This can be seen as the culmination of a series of international efforts to replace a culture of impunity with a culture of accountability.

After enormous efforts from the international community, the Rome Statute created the first permanent International Criminal Court (ICC or the Court) with the objective of trying individual perpetrators of the most serious crimes, namely genocide, crimes against humanity, war crimes and aggression. The establishment of the Court was a result of several years of drafting and negotiations and passed through different historical phases.¹²

⁸ Rome Statute of the International Criminal Court, *adopted and opened for signature* July 17, 1998, by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter Rome Statute or Statute].

⁹ See G.A. Res. 52/160, U.N. GAOR, 5 2nd Sess., Supp. No. 32, U.N. Doc. A/RES/52/32 (1997).

¹⁰ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2 (1998) [hereinafter PrepComReport].

¹¹ In accordance with its Article 125, the Statute was opened for signature by all States in Rome at the Headquarters of the Food and Agriculture Organization of the United Nations on 17 July 1998. Thereafter, it was opened for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute was opened for signature in New York, at United Nations Headquarters, where it remained until 31 December 2000.

¹² See Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008).

Research Significance

This research will be a significant endeavour to provide a clearer understanding of the relationship between the Arab states and the ICC. Arab states have a significant role in the establishment of the Court.¹³ They participated in the whole process through involvement in the drafting and negotiations during the Rome Diplomatic Conference. All the Arab states, except Somalia, participated and contributed significantly with their official delegations. However, the Arab states' positive role played in the creation of Rome Statute, is not reflected in the number of ratifications by Arab states. To date, there are only five out of twenty two Arab states that have ratified the Rome Statute; these are Comoros, Djibouti, Jordan, Tunisia and Palestine.¹⁴ As the majority of states joined the ICC,¹⁵ there is much pressure on Arab states to ratify the Rome Statute, due to their geographical location, and their political and historical value in the region.¹⁶

This thesis will also provide beneficial analyses of the main reasons, which to date have prevented the majority of Arab states from ratifying the Rome Statute. Despite the enormous efforts by the international community towards Rome Statute ratification and implementation by the Arab states, there were several concerns reflected. Arab states were concerned that such a step would have an impact on their legal systems and constitutions, in addition to the political fears regarding the jurisdiction of the ICC and its effect on their sovereignty. The issue of compatibility of the Arab states' constitutions and legislations with the Rome Statute is one of the main obstacles, especially with the status of Sharia in the legal framework of the Arab states. The consistency with Sharia or Islamic law will be an additional requirement during the ratification and implementation process as most of the Arab states consider Sharia

¹³ Arab states in this context are member states of the *League of Arab States* and they consist of 22 member states.

¹⁴ The State of Palestine accedes to the Rome Statute <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2> accessed 1 April 2017.

¹⁵ 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.

¹⁶ See for example Statement of Mme Registrar at the first Regional Diplomatic Conference on the International Criminal Court in the Middle East region, sponsored by the State of Qatar and undertaken together with the League of Arab States and the ICC, 24 May 2011; Lecture by H.E. Ms. Tiina Intelmann, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Cairo University, Egypt, 7 May 2012.

a primary source for their legislations. In addition, the ratification and implementation process will require several legal and technical arrangements which most of the Arab states may not be capable of.

This research also contributes to knowledge by filling the gaps in the literature on understanding why the majority of Arab states have not join the ICC, which seems crucial after the so called “Arab spring”. The conflicts witnessed by several Arab states showed the lack of efficient judicial systems capable of investigating and prosecuting those who are responsible of serious crimes and violence. Thus the Arab states need to join the ICC to end impunity and to enhance the international criminal justice system within their domestic laws by the implementation of the Rome Statute. The incorporation of the Statute’s crimes within national legislations will enable the Arab states to try the perpetrators of these crimes domestically. It will also serve as an opportunity to amend and update the laws to make them compatible with the provisions of the Statute and fulfill their obligations towards the Court. Moreover, this research will provide recommendations on how to address the challenges and concerns in order to facilitate the ratification of the Rome Statute by the Arab states.

With just a few states from the region showing their commitment towards the Rome Statute, the majority of Arab states are miles away from adhering to international law obligations. The ratification and implementation of the Rome Statute will represent a commitment to the fight against impunity and create a policy framework, at a national level, facilitating the cooperation with the ICC and giving Arab states primary jurisdiction over crimes.

The most distinctive feature of the International Criminal Court is the complementarity of its jurisdiction to national criminal jurisdictions. The concept of complementarity entails that the ICC can gain jurisdiction only when domestic legal systems are unwilling or genuinely unable to carry out an investigation or prosecution of an accused individual. Therefore, the ICC gives preference to domestic courts if they are capable of conducting fair trials.

The International Criminal Court has jurisdiction to try people accused of the international crimes of genocide, crimes against humanity, war crimes and aggression. The temporal

jurisdiction of the Court is also limited by Article 11 to crimes occurring after the entry into force of the Statute, namely 1 July 2002.¹⁷ With respect to states that become party to the Statute after 1 July 2002, the ICC has jurisdiction only over crimes committed after the entry into force of the Statute with respect to that state.¹⁸ Notwithstanding the provisions of Article 11, there are circumstances under which the Court could have jurisdiction over acts committed in states that are not parties to the Rome Statute. This is where a non-State Party accepts the jurisdiction of the Court for specified crimes by making a declaration under the Rome Statute.¹⁹ It is therefore possible for the Court to exercise jurisdiction over Arab states that are not State Parties to the treaty as long as they are willing to accept the jurisdiction of the Court for specified crimes.

The ICC can also have jurisdiction over a non-State Party where the Security Council has determined, pursuant to Chapter VII of the UN Charter that there is a threat to the peace, a breach of peace, or an act of aggression.²⁰ Subject to the potential use of the veto power in the Security Council, the ICC will initiate proceedings irrespective of the fact that the state involved is not a State Party and has not accepted the jurisdiction of the Court. The ICC has initiated proceedings like this in two Arab states thus far: Darfur, Sudan and Libya.

Article 27 of the Rome Statute governs immunity of heads of state or government. It provides that the “official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.” This position is in direct contrast with numerous constitutional provisions in many Arab states, which grant the heads of state and government officials’ immunity by virtue of their office. However, recent experience has shown that this immunity accorded nationally has been lifted in most international instruments dealing with the prosecution of war crimes, genocide or crimes against humanity.

¹⁷ Rome Statute, Article 11.

¹⁸ Rome Statute, Article 11(2).

¹⁹ Rome Statute, Article 12(3).

²⁰ Rome Statute, Article 12(2).

Research Statement

Given the current instability in most of the Arab region, the Rome Statute of the International Criminal Court is needed now more than ever to help end impunity and promote and guarantee international human rights. The challenges, obstacles and excuses put forward by Arab states, including that international human rights law and Sharia are incompatible, can no longer be used as will be evidenced and argued within this thesis.

Objectives of the Research

The main objective of this thesis is to examine the Arab states' attitudes towards international criminal law in general, embodied in the Rome Statute and the ICC in particular. The thesis mainly argues that the Rome Statute provisions and Arab states' legislations are compatible in most areas, and it requires genuine commitment from Arab states towards justice, to overcome any inconsistency. To achieve the main objective, the thesis aims first to analyse the available methods of implementing the Rome Statute and some of the adopted approaches by existing States Parties to the Statute. The second aim is to examine some of the Arab states' constitutions and the position of Sharia within these constitutions. Through examining the topic and addressing different areas, the thesis aims to develop a holistic approach that could facilitate the process of ratification and implementation in the future, by outlining the concerns and obstacles. It will also contribute towards a better understanding of Arab states' constitutions and legislations relating to the field of international criminal law; the need for reforms and improvement in the Arab states' legal and judicial systems, particularly with regards to international crimes. Although individuals are the subject of international criminal law, Arab states have an obligation to pursue justice on behalf of their citizens. States are the actors that create the legislations and adhere to international institutions.

Arab states are usually seen as not participating widely in the international criminal justice system, and judges from the Arab states could face many challenges and problems when dealing with international crimes domestically, due to the lack of related legislations and experience. It is very useful to examine how other states have dealt with similar issues and obstacles, as these questions and obstacles regarding the Rome Statute are not unique to Arab states. As the Statute does not propose a specific procedural regime to be applied, states may choose different forms of implementation. Each particular legal system is likely to have some distinctive features or at least certain elements that differentiate it from the legal systems of other states.

As the research is devoted to examining the legal basis for international criminal justice and studying the ratification and implementation issues in the Arab states, attention must be paid to issues in the Islamic legal context—a significant gap in light of recent conflicts and instability in the region. In general terms, Sharia is consistent with international law and human rights as both call for peace, justice, and fighting impunity. The principles of Sharia align with international legal norms of truth, accountability, and compensation for victims of mass crimes and human rights abuse. But some Arab states fail to implement the true and real norms of Sharia principles, which reflect the images of incompatibility of Islamic law and international law.

Research Methodology

This research is carried out from a doctrinal legal perspective and takes the form of a systematic analysis of existing primary and secondary sources on relevant issues, encapsulated in statutory provisions and relevant judicial pronouncements thereon.²¹ The aim of the doctrinal legal research is to logically and rationally analyse the relationship between

²¹ Terry Hutchinson, *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010), 37.

legal principles by investigating the consistency and certainty of the law,²² explaining the area of difficulty and also to initiate further development of legal principles and doctrines.²³

Correspondingly, this thesis attempts to analyse certain substantive statutory provisions, that is, the provisions contained in the Rome Statute of the ICC and the provisions contained in Arab states' constitutions and domestic legislations. Applying a doctrinal legal approach by examining the interaction between domestic legislations of Arab states and international criminal law in general, and the provisions embodied in the Rome Statute in particular. The objective of this analysis is to examine the consistency of such provisions with each other. Accordingly, this analysis determines areas in which incompatibility arises in order to suggest reforms in the legal systems and improvements to the capacity of Arab states' judicial systems, particularly with regards to international crimes.

In addition, the relevant provisions incorporated in the legislation of selected States Parties to the Rome Statute will also be briefly analysed in order to identify the legislative attitudes of such states in relation to the ratification and implementation process of the Rome Statute. More specifically, this thesis provides an analysis of the relevant constitutional provisions, which are currently in place in the Arab states' constitutions, on selected topics and issues, particularly in relation to Sharia, human rights and other issues concerning the ratification and implementation process. Thus, it would identify incompatibilities between such constitutional provisions and the Rome Statute. Moreover, this research provides a critical analysis of the relevant features of the Rome Statute and the Arab states' concerns towards it during the drafting process. Therefore, it can be said that the doctrinal research approach is suitable to achieving the aims of this thesis as there is compatibility between the international aspects of domestic legislations in Arab states and the international criminal law embodied in the Rome Statute and the general principles of jurisdiction of the ICC.

²² Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Wing Hong Chui (ed.) *Research Methods for Law* (Edinburgh University Press, 2007), 19.

²³ 'Doctrine' is defined as: '[a] synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or non-binding', see Trischa Mann and Audrey Blunden(eds.) *Australian Law Dictionary* (Oxford University Press, 2010), 197.

The doctrinal legal research, as described above, is advantageous because it provides solutions to the problem and helps in identifying the legislative gaps, ambiguities or inconsistencies in the substantive law provisions concerned.²⁴ Therefore, following a doctrinal analysis, by focusing on the interaction between the international aspects of the selected Arab states' legal systems and the international criminal law represented in the Rome Statute would help in identifying conflict. In addition, the analysis of the available implementation methods and its effects on the legal systems will provide clearer options for the concerned states. Consequently, where such conflict occurs, solutions will be suggested. Similarly, his approach helps to determine the different reasons behind the reluctance of several Arab states to ratify and implement the Rome Statute. This would assist the Arab states concerned to reconsider their general attitudes towards the ICC or to amend provisions that contradict the Rome Statute. This in turn would facilitate the ratification and the implementation process of the Rome Statute. Further, a comparative approach will be adopted to compare the approach of several State Parties' towards the Statute, and in the final chapter of this thesis, a case study approach will be used to examine the different cases and situations of the Arab states concerned.

When considering empirical research methodology,²⁵ which is investigating through empirical data how law and legal institutions affect human attitudes and what impact on society they have, it can be said that empirical methodology is not appropriate to achieving the thesis aims as this research does not seek to examine the impact of the Rome Statute on the social, political or economic position of individuals or groups of people residing in the Arab states concerned. It merely analyses certain rules of the Rome Statute in order to examine its compatibility with the Arab states' legal system and their concerns towards the ICC. Moreover, the Rome Statute has not yet been ratified by most of the Arab states, thus, adopting empirical research methodology would be difficult and inaccurate conclusions could

²⁴ Terry Hutchinson, 'Doctrinal research: researching the Jury' in Dawn Watkins, Mandy Burton (eds.) *Research Methods in Law* (Routledge 2013), 10 and 23.

²⁵ Empirical methodologies is defined as: 'Fundamental research — 'Research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law', see Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada* (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) cited in Terry Hutchinson and Nigel Duncan, 'defining and describing what we do: Doctrinal Legal Research', *Deakin Law Review*, Vol.17, No.1, 2012, 102.

be obtained.²⁶ Therefore, doctrinal analysis methodology is more appropriate than empirical research methodologies in terms of achieving the aims of the thesis.²⁷

References

The analysis in this thesis is based on both primary and secondary sources of municipal and international law and is the outcome of a library-based research. The primary sources of this thesis include international treaties, statutory legislations, constitutions, and case law, especially those of the ICC. The Rome Statute of the ICC constitutes a key source for this thesis. The secondary sources consist of various references such as books, journals, websites and databases such as the International Criminal Database,²⁸ the ICC Legal Tools Database,²⁹ and the ICC Case Matrix.³⁰ The information is sourced through libraries in the United Kingdom, The Netherlands and Egypt.

Most literature relevant to this research is diverse and has thus far focused on the legal aspects. This research will contribute by targeting the constitutional and political aspects as well as analysing different legal frameworks and political motivations behind the ratification process. The most significant literature contributions to the topic are publications by Adel

²⁶ For drawbacks of empirical research methodology see Kylie Burns and Terry Hutchinson, ‘The Impact of ‘Empirical Facts’ on Legal Scholarship and Legal Research Training’ available at <http://www98.griffith.edu.au/dspace/bitstream/10072/28586/1/56796_1.pdf> accessed 12 October 2016.

²⁷ Kenneth Culp Davis, ‘Behavioural Science and Administrative Law’ 17 *J. Legal Educ.* 152 (1964-1965), 151.

²⁸ A website, hosted and maintained by the T.M.C. Asser Institute in The Hague and supported by the Dutch Ministry of Security and Justice and the International Centre for Counter-Terrorism – The Hague, offers a comprehensive database on international crimes adjudicated by national, as well as international and internationalized courts. <<http://www.internationalcrimesdatabase.org/Home>> accessed 1 July 2016.

²⁹ The Legal Tools are the leading information services on international criminal law. They equip users with legal information, digests and an application. <<http://www.legal-tools.org/en/what-are-the-icc-legal-tools/>> accessed 1 July 2016.

³⁰ The Case Matrix is a law-driven case management application, made for the investigation, prosecution, defence and adjudication of factually complex cases such as core international crimes cases. It is an open-source application that can be adapted to any criminal justice system and to different user groups such as judges, investigators, prosecutors, defence counsel, victims’ representatives and NGOs. The application can be used for legal reference, legal training and competence-building, and information or evidence database purposes. It supplements existing fact-sorting and evidence management applications. <<http://www.icc-pi.int/Menus/ICC/Legal+Texts+and+Tools/>>, accessed 1 July 2016.

Maged and Steven C. Roach, which address the issue of Arab states and the ICC. In addition to the works of Maged and Roach, Mohamed Elewa Badar, Farhad Malekian and Cherif Bassiouni, which also contribute to an understanding of the relationship between Sharia and international criminal law. This thesis draws from and builds upon, all of their important work and contributions. However, the works are not with regard to the developments of the ICC cases, and most significantly the recent events in the Arab world. There are implications related to the so called “Arab Spring” and the ICC’s current involvement in two cases concerning Sudan and Libya. The on-going conflicts and crimes, under the jurisdiction of the ICC, committed in the region need to be addressed in the context of research, as the need to get the Court involved in the region is now more necessary than ever before.

Research Structure

In this introduction, the thesis seeks to provide a brief historical background to set out the basis for the application of the Rome Statute in general and the role of Arab states in particular. The thesis is then divided into seven chapters plus a conclusion chapter. Chapter one will deal with the general issues of ratification and implementation of the Rome Statute. It reviews the Statute ratification and accession requirements and examines the different methods and the scope of implementation, by analysing the available methods and their effects on legal systems. This will provide all available options and methods for Arab states that are willing to ratify and implement the Statute.

Chapter two will review and analyse the states’ approaches towards the Rome Statute. The chapter will focus on selected States Parties to the Rome Statute, to provide a brief analysis of their legislations and approaches in relation to the ratification and implementation process. This is important as states usually benefit greatly from the experiences of other states that have already undergone the implementation process.

Chapter three will discuss most of the Arab states’ constitutions on selected topics and issues. This will provide analysis on the constitutional provisions currently in place, in relation to

Sharia, human rights and other related issues to the ratification and implementation process. Thus, the chapter will assist in the research of constitutional compatibility with the Statute.

Chapter four will explore the relevant features of the Rome Statute and the Arab states' policies towards it during the drafting process. The chapter will examine the general principles of the jurisdiction of the ICC, the crimes under the ICC jurisdiction, and finally, will analyse the general principles of the Rome Statute. All of these issues will be in accordance with the Arab states' concerns during the negotiations and drafting process, and the potential obstacles in their constitutions and legislations.

Chapter five is considered the core of this thesis as it focuses on the constitutional obstacles and the political impediments to ratifying and implementing the Rome Statute. Different constitutional issues are discussed including immunity and sovereignty. The political factors, including the situation of human rights in the Arab states and the allegations of double standards against the ICC.

Chapter six will focus on the Sharia, by identifying the common features between the Rome Statute and Sharia. The chapter will consider whether there are any fundamental incompatibilities between the Sharia and the related texts in international law, human rights norms, and the Rome Statute. The Sharia has an important role in the legal approaches in most of the Arab states, especially in regards to human rights related treaties; this will be the focus of the chapter.

Chapter seven presents case studies of selected Arab states, both State Parties and non-State Parties to the Statute. The chapter will review some of these states' approaches and the current ICC situations in the region. An important inclusion in the chapter is Egypt, as its ratification will stimulate a demand for ICC membership in the whole region.

Chapter One: General Issues of Ratification and Implementation

1.1 Introduction

The International Criminal Court is considered one of the most important international organisations after the UN.¹ States that ratify the Rome Statute accept the obligations, which are imposed on them and agree to fully cooperate with the Court in good faith according to international law.² The ICC promotes international peace and security by having jurisdiction over “the most serious crimes of concern to the international community as a whole”.³ This role shows the importance of the Rome Statute, the need for states ‘to have the commitment and political will to ratify it, and finally a full cooperation with the Court through an effective implementation of the Statute’s provisions into national legislations.

Arab states⁴ will need to go through the process of ratification and implementation of the Rome Statute to fully cooperate with the Court and to have primary jurisdiction over cases. This chapter will review the general approaches towards ratification and implementation of the Rome Statute and the issues related to it. The first section discusses the ratification process and its challenges. The second section examines the different methods of implementing the Rome Statute. The third assesses the forms and process of incorporating international criminal law into domestic legislation. Lastly, the fourth section analyses the constitutional obstacles states face during the implementation process.

¹ Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003).

² Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute- Issues-Negotiations-Results* (1st edn, Kluwer Law International, 1999).

³ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, Preamble Para. 4.

⁴ Arab states refers to the twenty-two member states of the Arab League; Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

Treaties vary from one to another; each has its own mandate and purpose. States' legal frameworks vary as well, thus the implementation methods of treaties within states. The treaty implementation, which is the process of giving force to an international treaty or convention to be applied under national law,⁵ is essential, as it will assist the states to act in accordance with their international treaty obligations.

The term implementation itself is very broad, referring to the means each state adopts towards its international obligations within its national jurisdiction.⁶ Each state, which finds itself in the need of amendments of its laws to achieve its obligations towards an international treaty, must by *pacta sunt servanda* adopt these amendments to fulfil its obligations.⁷ Accordingly, the implementation is a vital process required to complete the state's approach towards being a State Party to the Rome Statute. The whole method of incorporating international norms into national legislation differs from one state to another, depending on national laws and constitutional systems.⁸

The Rome Statute is a multilateral treaty and is subject to the provisions of the Vienna Convention on the Law of Treaties⁹ (VCLT or Vienna Convention).¹⁰ Article 26 of the Vienna Convention provides that "Every treaty in force is binding upon the parties to it and must be performed in good faith". So each state must adopt a broad definition to the term 'implementation' and apply it in good faith without restrictions or reservations that would lead to undermining the core of the treaty.¹¹ The *pacta sunt servanda* principle, which lies at the heart of Article 26 of the Vienna Convention, applies without exception to every treaty

⁵ Gibran Van Ert, 'What is Treaty Implementation?' in C.C.I.L. (ed), *Legitimacy and Accountability in International Law*-Proceedings of the 33rd Annual Conference of the Canadian Council on International Law (1st edn, Canadian Council on International Law 2005).

⁶ *ibid.*

⁷ *ibid.*

⁸ Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation' in M. Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (1st edn, Nouvelles Etudes Penales 1999).

⁹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

¹⁰ Vienna Convention, Article 1: "The present Convention applies to treaties between States."

¹¹ See Michael Kourabas, 'Vienna Convention Interpretation of the Interests of Justice Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A Great Qualitative Step forward, or a Normative Retreat, A.' (2007) 14 UC Davis J. Int'l L. & Pol'y 59.

and holds good to all stages in a treaty's life, including the interpretation.¹² Most notably, the Rome Statute provides that no reservations may be made to the Statute,¹³ however according to Article 124 of the Statute a state may declare upon ratifying that “for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.” Moreover, unilateral declarations, which specify or clarify the meaning of certain provisions, are not prohibited.

1.2 Ratification Issues

“Ratification”, “acceptance”, “approval” and “accession” are the methods in which a state establishes its consent to be bound by a treaty on the “international plane”.¹⁴ Ratification places states under a duty to fulfil their obligations under international law. Each state will normally review its national laws and/or its constitution to determine any need for amendments before ratifying a treaty. After ratification, it would not be acceptable for a national law to prevent the state from its obligation towards an international treaty.¹⁵ Most states will require amendments in their domestic laws to be able to achieve treaty requirements and objectives.

There is no common pattern that would fit all national legal systems and answer all open questions. Therefore, different approaches are employed in order to meet the minimum requirements for ratification.¹⁶ Most of the state's institutions, the legislative body, the

¹² Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 365.

¹³ Rome Statute, Article 120.

¹⁴ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 2(1) (b).

¹⁵ Joanne Lee, ‘The Ratification Process and the Entry into Force of the International Criminal Court Statute’ in ELSA International (ed), *International Law as We Enter the 21st Century: International Focus Programme 1997-99* (1st edn, Spitz 2001).

¹⁶ Daragh McGreal, ‘A Rationalist View of Rome Statute Ratification in the Pacific Region’ (2013) 11 *Journal of International Criminal Justice* 1091-1109.

executive and the judiciary, will have to deal with the issue of ratification of Rome Statute, whether the respective state becomes a State Party or not. They have to be aware of this fact in their own interest, because every domestic legal system may have to face situations, in which their political and legal institutions may have to deal with issues related to the ICC.¹⁷

The “ratification” process refers to states, which have signed and ratified the Statute before the deadline on 31 December 2000, while “accession” refers to the process of joining the Statute but after December 2000. Article 125 of the Rome Statute, which is entitled “Signature, ratification, acceptance, approval or accession”, manages the mechanisms and procedures by which states join the ICC and become Parties to the Statute. In Article 125 paragraphs 2 and 3 it differentiates between ‘signatory States’ and ‘all States’. Only signatory States can ratify, accept or approve the Statute. For all other states the Statute shall be open to ‘accession’. However, this differentiation is insignificant for the entering into force of the Statute according to Article 126 of the Statute as all have the same legal effect. However, it was one of those minor compromises leading to a broad consensus for the adoption of the Statute as all four words had to be included to respect the various modalities provided for in the different national legal systems.¹⁸

Signing a treaty may indicate the state’s acceptance to be bound by the treaty’s articles and provisions according to the Vienna Convention.¹⁹ But for the Rome Statute, it is just a preliminary act and must be followed by an act of ratification or accession.²⁰ According to Article 14.1(a) of the Vienna Convention the state’s consent to be bound by a treaty is expressed through the ratification process when the treaty provides “such consent to be expressed by means of ratification”. Moreover, during the period between signing the treaty and ratification, states are obliged to refrain from any acts that are considered contrary to the

¹⁷ Joanne Lee, ‘The Ratification process and the entry into force of the International Criminal Court Statute’ in ELSA International (ed), *International law as we Enter the 21st Century: International Focus Programme 1997 99* (1st edn, Spitz 2001).

¹⁸ See Otto Triffterer, ‘*Legal and Political Implications of Domestic Ratifications and Implementation Processes*’ in Claus Kress and Flavia Lattanzi (ed), *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues* (1st edn, Editrice il Sirente 2000).

¹⁹ Vienna Convention, Articles 11 & 12.

²⁰ See Roger S. Clark, ‘Article 125 - Signature, Ratification, Acceptance, Approval or Accession’ in Otto Triffterer (ed), (2nd edn, Nomos 2008).

treaty objectives and purposes.²¹ The state is not obliged to ratify the Statute after the signature and it can make a declaration of their intent not to ratify after initially signing the treaty.²²

Article 124 of the Statute includes a “transitional provision” or “opt-out” clause, in which a state may declare for a period of seven years after ratification that it no longer accepts the jurisdiction of the Court in relation to Article 8 crimes (war crimes). The article applies if the crimes are alleged to have been committed by the state’s own nationals or within its territory.²³ Apart from such transitional clause, the Statute does not allow the making of reservations.²⁴ Therefore, where a state makes declarations in relation to its understanding of the nature of its legal obligations under the treaty, this cannot be considered a formal reservation. The rationale for this is that a reservation is intended to “exclude or to modify the legal effect of certain provisions of the treaty in respect of their application to that state”.²⁵

It is a usual procedure for some states to attach an “interpretive declaration” during their ratification process. The UN practice in facilitating the depositing of interpretive declarations in state practice has proved to be a critical mechanism to encourage states to ratify multilateral treaties. Several states engage in this practice as a way of protecting themselves from the implications of a breach should the relevant authority be unable to secure the compliance of other principal entities. The interpretive declaration can also mitigate municipal concerns about the effect of a treaty and can be an effective technique to clarify the legal obligations or status of the parties concerned.²⁶ Accordingly, declarations can be useful in facilitating the development of confidence in multilateral treaties, with a positive effect of encouraging a full commitment even though this commitment may be demonstrated several

²¹ Vienna Convention, Article 18.

²² See more Alain Pellet, ‘Entry into Force and Amendment of the Statute’ in Antonio Cassese and others (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002).

²³ Rome Statute, Article 124.

²⁴ Rome Statute, Article 120.

²⁵ Vienna Convention, Article 2(1)(d). See also Articles 19, 20, 21 and 2.

²⁶ See more John H. Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’ (1992) 86 *The American Journal of International Law* 310.

years after ratification. In short, declarations do not provide any legal effect whatsoever in international law, nonetheless states when ratifying a treaty uses them quite often.²⁷

Most of the Rome Statute declarations upon ratification amount to an attempt to reiterate the provisions or to clarify the obligations by explanation, as opposed to restricting the obligations imposed. Some States Parties have made declarations setting out their understanding of its application, usually declarations concern the matter of interpretation or understanding of technical terms and language issues.²⁸ These declarations are not considered to be matters of high controversy, as they have no adverse impact on the legal commitment. Still others, for example Egypt's declarations, seek to highlight the Rome Statute's importance being interpreted in conformity with general principles of international law and norms concerning fundamental rights, developed over time and which have attained customary international law status.²⁹ Similarly, the United Kingdom has pointed out that it understands the term "established framework of international law" in Articles 8(2) (b) and (e) of the Rome Statute as including customary international law as established by state practice and *opinio juris*.³⁰ The declaration made by France mentioned that the Court could not preclude the exercise of the right of self-defence at international law and as expounded in the UN Convention, and seek to protect its right to the possible use of nuclear weapons. It added that it excludes, what it calls 'ordinary' crimes, including terrorism and also excludes military targets and collateral damage.³¹ While New Zealand on the other hand was concerned to ensure that Article 8 was not limited to conventional weapons, so that it should include nuclear weapons.³²

Ratification and implementation are usually related and in several states, even dependent on each other: the first may result in an automatic implementation of the whole Statute or of its

²⁷ Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 Sydney L. Rev. 507-534.

²⁸ *ibid*, 510.

²⁹ United Nations, *Multilateral Treaties Deposited With The Secretary-General* (United Nations Publications 2000), 129.

³⁰ *ibid*, 128.

³¹ *ibid*, 128.

³² *ibid*, 130.

self-executing provisions.³³ In most states, ratification and implementation follow different procedures, equally essential to enforce the Statute at a national level. Thus assuming the presence of a political will to ratify the Statute, ratification is usually then a formal procedure followed within the state.

1.3 Approaches to Implementation

There is no formal method or form of implementation required by international law or the Statute, as what matters is the end result of a comprehensive and effective legislation that reflects the Statute into domestic laws.³⁴ The process of implementation depends on the legal system each state has. In general, there are two main legal traditions that states usually follow: monist and dualist systems,³⁵ and in each legal system the way of implementing international treaties into national legislation is different.³⁶ Mainly the state's constitution or legal system determines the process of implementing international treaties. The main distinction between the two systems is related to the incorporation legislations, as for the monist system states are not required to create any new legislation after the ratification process as their constitutions allows the direct incorporation of international treaties into national law. In other words, when a state ratifies an international treaty, the self-executing provisions included in the treaty are applied directly into domestic law and overcome or prevail any contradicting or conflicting provisions in domestic law.³⁷ As for the states that

³³ Otto Triffterer, 'Legal and Political implications of domestic ratifications and implementation processes' in Claus Kress and Flavia Lattanzi (ed), *The Rome Statute and Domestic Legal Orders: General aspects and constitutional issues* (1st edn, Editrice il Sirente 2000).

³⁴ Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 *Journal of International Criminal Justice* 421-440.

³⁵ Monism: In the monist theory of international law it is accepted that there is no separation between international law and domestic law. Both are seen as part of a unified system, and it is normally accepted in such systems that international law takes precedence over the rules of domestic law.

Dualism: In other states, the two systems are said to be separate, so that international law is not necessarily part of domestic law. In such a system, which are said to apply the dualist theory of international law, it may be necessary to incorporate international law into domestic law, via, for example, specific domestic legislation.

³⁶ Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation' in M. Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (1st edn, Nouvelles Etudes Penales 1999).

³⁷ Eileen Denza, 'The Relationship between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 412, 421.

follow the dualist system, a further step is required after the treaty ratification, which is the adoption of national legislations to incorporate international obligations into the national legal system. In other words, international treaties will not take effect at a domestic level without legislation to incorporate the international treaty.³⁸ Thus, there is an obvious distinction between the two legal systems that states follow.

As for the Rome Statute and the nature of the work the Court's carry, ratifying the Statute without implementing a national legislation, which is the monist system, could not be sufficient. The ICC requires a specific type of state cooperation, for example, obligation to arrest and surrender or matters related to an official's immunity, which requires domestic legislation to regulate these matters.³⁹ As most states do not apply the monist system purely, they might have a policy, which is closer to the dualist system in some matters.⁴⁰ Even if the state adopted the Rome Statute under a purely monist system and incorporated all its articles, the national law would still require legislations to create the system of cooperation between the Court and the national authorities responsible for fulfilling the obligations.⁴¹ It could be argued that direct incorporation of the Rome Statute, under the monist system, in regards to the crimes⁴² can be effective. But as for the cooperation regime⁴³ and the obligations,⁴⁴ the competent authorities to carry out and perform these obligations will still need to be specified in the domestic legislations.⁴⁵

Another aspect in regards to the implementation process is the requirement of legislation in some of the dualist system states even before the ratifying or acceding process.⁴⁶ This could

³⁸ Ian Brownlie, *Principles of public international law* (Oxford University Press 2008) 31-32.

³⁹ Rome Statute, Articles 27 and 89(1).

⁴⁰ Eileen Denza, 'The Relationship between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 412, 422.

⁴¹ Olympia Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *Human Rights Law Review*, 499.

⁴² Rome Statute, Article 5.

⁴³ Rome Statute, Article 88.

⁴⁴ Rome Statute, Article 89.

⁴⁵ See more J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86-113; Jennifer Schense and Donald K. Piragoff, '*Commonalities and Differences in the Implementation of the Rome Statute*' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (1st edn, BWV 2003).

⁴⁶ See G. Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court' (2004) 2 *Journal of International Criminal Justice*.

affect and delay the ratification decision, as the state is required to prepare implementing legislation before ratification. As each state will follow a different approach in implementing the Rome Statute, depending on its own legal system, there are two main aspects which are considered the most vital in the implementation process, the state cooperation with the Court and complementarity.⁴⁷ Despite the establishment of the ICC and being an operational international organ, the national courts still remain the main pillar of the whole international criminal justice system.⁴⁸ Although the Rome Statute obliges states to ensure that their national laws contain provisions which allow them to cooperate with the ICC and respond to the Court's requests,⁴⁹ the Statute lacks any provision relating to the implementation of the substantive law provisions.⁵⁰

All States Parties are expected to incorporate relevant provisions of the Rome Statute into national law, particularly as the Statute has an effect on a wide array of domestic laws and contains very technical obligations for States Parties, even for a monist state. The ICC has no enforcement mechanisms at a national scale; for instance, there is no police force or prison. In that aspect, heavy reliance on state cooperation is essential to its success. A compelling argument may be made to support the claim that the starting point for the ICC's success rests with the States Parties adopting legislation.

The principle of complementarity grants primary jurisdiction to the respective State Parties on whose territory or by whose nationals, the alleged crimes, specifically defined in the Statute of Rome, are alleged to have been committed. The principle of complementarity is one that recognises the States Parties' jurisdictional sovereignty and simultaneously eases the burden of the ICC's caseload.⁵¹ In allowing for complementarity through the implementation process, States Parties must give specific attention to issues such as command responsibility, individual criminal responsibility, determination of sentences, immunity provisions, statutes of limitations, and, because the Statute sets a minimum rather than a maximum standard that

⁴⁷ See M. Cherif Bassiouni and Bruce Broomhall, *ICC Ratification and National Implementing Legislation* (Association Internationale de Droit Pénal 1999).

⁴⁸ See Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005).

⁴⁹ Rome Statute, Article 88.

⁵⁰ See Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law 869.

⁵¹ See Jimmy Gurulé, 'The International Criminal Court: Complementarity with National Criminal Jurisdiction' (2001) 2001 Amicus Curiae 21-25.

States Parties must meet, definitions of crimes and jurisdictional scope. Where allegations are made, the ICC will only have jurisdiction in clearly demarcated circumstances. Such instances include a state's acceptance of the ICC's jurisdiction, a case referred by the UN Security Council and when a State Party is either genuinely *unwilling* or *unable* to exercise its national jurisdiction.⁵² The principle of complementarity will be discussed in more detail in a later section.

1.4 Options for Implementation

The options for implementing the Rome Statute vary from state to state depending on the legal and constitutional system. The state may choose to create new legislation or amend existing law or choose not to implement and rely on ordinary crimes. The Statute does not oblige member states to create legislations nor incorporate international crimes. What matters, according to Article 17 of the Rome Statute, is the willingness and ability of the member states to prosecute.⁵³ The existence of substantive domestic law, which includes the ICC crimes, will allow states to effectively investigate and prosecute the international crimes themselves.⁵⁴ The ICC, is not only considered as court of last resort or to complement the national courts, but its importance is that it will assist in the creation of a high level of legal standard and a source of norms that member states shall follow.⁵⁵ In the end, each State Party will chose the most suitable way of implementation according to its own legal system and how best to adopt the substantive international criminal law.

⁵² See more C. Kress, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy' (2004) 2 Journal of International Criminal Justice 944-948.

⁵³ Rome Statute, Article 17.

⁵⁴ Gerhard Werle, *Principles of international criminal law* (TMC Asser Press 2005).

⁵⁵ *ibid.*

1.4.1 Amendment of Existing Law

The state choosing to amend existing laws can add new provisions containing the international crimes listed in the Rome Statute, or may add a whole new chapter or section specifically for international crimes or can opt to modify existing law. Modification of existing laws could be a simple process for a state and may not require many resources depending on the method adopted. The national legislator of the state will incorporate the substantive international criminal law into the existing domestic laws.⁵⁶ There are different rules of procedures for the amendment process in each state, in some a bill may propose to affect, modify or alter existing law, either by amending the provisions or superseding it. The proposed amendment may insert new text or strike text that might conflict with the Rome Statute requirements. A bill or draft will usually identify the specific statutory language to be struck out and provide the language to be inserted. Or it may propose a new text incorporating all the changes to be inserted in the provision.

1.4.2 Creating a New Law

The process of creating a new law to incorporate the international crimes and the Rome Statute provisions could be more complex, as it would require more effort and time. However, it would be a more efficient process, as the state will have the opportunity to create inclusive law containing all the substantive international criminal law and the general principles of the Rome Statute.⁵⁷ Such a process would result in a new code or act in the state's national legislation, specified for international criminal law, which would be more beneficial for the state practice and accessibility before its national courts. Methods for

⁵⁶ See more Michael Zander, *The Law-Making Process* (7th edn, Bloomsbury Publishing 2015); Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation* (Nouvelles Etudes Penales 1999).

⁵⁷ See K. Dormann and R. Geiss, "The Implementation of Grave Breaches into Domestic Legal Orders" (2009) 7 *Journal of International Criminal Justice* 703-721; Max du Plessis, "South Africa's Implementation of the ICC Statute: An African Example" (2007) 5 *Journal of International Criminal Justice* 460-479; A. Laursen, "A Danish Paradox? A Brief Review of the Status of International Crimes in Danish law" (2012) 10 *Journal of International Criminal Justice* 997-1016.

enacting new laws are usually described in the constitution of the state or processed through its parliamentary system.

1.4.3 Relying on Ordinary Domestic Offenses

After ratification, some states choose not to incorporate the Rome Statute provisions into their national laws, particularly the substantive part, and depend on their existing penal or criminal laws. Criminal acts such as murder, torture or rape, which are found in the elements of crimes in the Rome Statute, are found in national legal systems. Although most of the crimes and criminal acts found in international criminal law can have a similar form in national criminal law, for example wilful killing as murder or pillage as theft, the gravity of these crimes will not be similar, nor the penalties.⁵⁸ The nature of the international crimes, which are considered the “most serious crimes”, will be undermined if they are prosecuted as ordinary crimes. In addition, a state that chooses not to incorporate the Statute into its national laws might find itself unable to prosecute international crimes resulting in the ICC taking over the jurisdiction of the case according to the complementarity principle.⁵⁹

1.5 Methods of Implementation

1.5.1 Replicating the Rome Statute

A simple process of incorporating the substantive part of the Rome Statute is achievable by adopting the provisions of the Statute verbatim into domestic legislation. The domestic law would then mirror the Rome Statute with regards to the definitions of the core crimes

⁵⁸ K. Dormann, and R. Geiss, ‘The Implementation of Grave Breaches into Domestic Legal Orders’ (2009) 7 *Journal of International Criminal Justice*, 703-721.

⁵⁹ Jann K Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions* (Oxford University Press 2008), 123.

mentioned in the Statute.⁶⁰ States tend to adopt this method as it is considered an easy process and guarantees the compatibility of their domestic laws with the Rome Statute.⁶¹ This approach might not be suitable for those states in which their constitution prevents unaltered adoption of certain norms of international criminal law.⁶²

1.5.2 Reference to the Statute

Another choice for complete incorporation, is referencing to the Rome Statute, a state could allow a direct reference to an international treaty or convention within its domestic law. Therefore, the state could make reference to the Rome Statute provisions, using the definitions of the crimes mentioned in the Rome Statute. This would be another simple process if the state adopted a new legislation but still referred to the Statute for the definitions.⁶³ Although this is a simple and efficient process, it could lead to some disadvantages. Referring to the Statute would not override problems that might result from any constitutional or national law conflict. A domestic law provision could contradict with a Rome Statute article, by adopting this method, the national legislator, will not be able to amend the contradicting provisions. Moreover, in a state where its legal system requires a written national law or act to establish individual criminal responsibility, the referencing method could not be applicable.⁶⁴

The referencing method could have two different forms: static or dynamic. A static reference approach takes the form of referencing directly to the Rome Statute, whilst a dynamic reference approach pertains more to referencing international and customary laws and

⁶⁰ Rome Statute, Articles 6-8.

⁶¹ Gerhard Werle and others, *Africa and the International Criminal Court* (T.M.C. Asser Press 2014), 61.

⁶² Gerhard Werle and Florian Jessberger, *Principles of international criminal law* (Oxford University Press 2014), 147.

⁶³ See more Alejandro E. Alvarez, "The Implementation of the ICC Statute in Argentina" (2007) 5 *Journal of International Criminal Justice* 480-492; J. Hay, "Implementing the ICC Statute in New Zealand" (2004) 2 *Journal of International Criminal Justice* 191-210.

⁶⁴ Gerhard Werle and Florian Jessberger, *Principles of international criminal law* (Oxford University Press 2014), 147.

includes any future developments in international law.⁶⁵ In other words, a static reference model would refer directly to the definition of the crimes mentioned in the Rome Statute. For example, the ICC Act 2001 of England and Wales Article 50(1) reads “war crimes means a war crime as defined in Article 8.2 of the ICC Statute”.⁶⁶ Whilst on the other hand, a dynamic reference approach leaves a space for any developments in the existing definition for future amendments on the definition of crimes incorporated in national law, for example the Canadian Crimes against Humanity and War Crimes Act 2000 reads “war crime means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”.⁶⁷ Both approaches of referencing are considered easy approaches for the national legislator and in most cases they lead to an efficient result in incorporating the international criminal law into domestic legislations.

1.5.3 Direct Application

Although this process of complete incorporation could be an easy approach in which customary international law would be applied directly into domestic law without the need of written law, in practice it is not efficient as most states will not be able to prosecute individuals for international crimes without domestic legislation.⁶⁸ In common law states, the definitions of crimes under customary international law can be directly applied into their domestic laws; therefore, this method could be adopted in common law states when directly applying the Rome Statute.⁶⁹ The criminal conducts listed in the Statute’s Articles 6-8, which embody customary international law, might be already punishable under national law even

⁶⁵ K. Dormann and R. Geiss, ‘The Implementation of Grave Breaches into Domestic Legal Orders’ (2009) 7 *Journal of International Criminal Justice*, 703-721.

⁶⁶ UK: The International Criminal Court Act 2001.

⁶⁷ Canada: Crimes Against Humanity and War Crimes Act [Canada], SC 2000, c. 24, 23 October 2000.

⁶⁸ See Max du Plessis, ‘South Africa’s Implementation of the ICC Statute: An African Example’ (2007) 5 *Journal of International Criminal Justice*.

⁶⁹ Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006), 99.

before ratification of the Statute. However, courts in these states are very reluctant to apply customary international law, thus definitions of crimes usually require legislations.⁷⁰

1.6 Scope of Implementation

1.6.1 Article 88

Article 88 of the Rome Statute, entitled “Availability of procedures under national law,” reads: “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.” Thus the Statute obligates States Parties to legislate or to confirm that there are available provisions within their national laws that allow for cooperation with the Court.⁷¹ In the process of implementation, Article 88 imposes the obligation on ratified states to adopt domestic provisions or procedures to fulfil their cooperation requirements with the Court. On the other hand, there is no similar obligation to implement the substantive part of the Rome Statute, which is, in the end, left at the state’s discretion. Some scholars argue for the extension of the scope of Article 88 to include obligations to implement the substantive law, similar to the cooperation regime.⁷² Thus, states that ratify will be under the obligation to *fully* implement the Statute into their domestic legislations.

The ICC requires state cooperation to function efficiently; therefore, Article 88 is essential to ensure that states adopt legislations that provide full cooperation. The process of implementation and the procedures of cooperation are left to the choice of each state,⁷³ as long as it cooperates with the Court. As mentioned earlier, it will not be accepted that a state

⁷⁰ *ibid*, 221.

⁷¹ See more Maria Chiara Malaguti, “Article 88 of the Rome Statute: “Horizontal” versus “Vertical” Cooperation” in Maria Chiara Malaguti (ed), *ICC and International Cooperation in Light of the Rome Statute: Proceedings of the Workshop held in Lecce on October 21-22, 2005* (1st edn, Lecce: Argo 2007), 103.

⁷² Olympia Bekou, “A Case for Review of Article 88, ICC Statute: Strengthening a Forgotten Provision” (2009) 12 *New Criminal Law Review* 468-483.

⁷³ A number of provisions in the cooperation part in the Statute make reference to national law, See Rome Statute, Arts. 89(1), 91(4), 93(1), 96(3), 99(0).

cannot cooperate due to their domestic laws lacking the appropriate cooperation provisions. Beside the obligation to implement Article 88 is considered as an introductory article, which will assist the national legal systems to adopt all the cooperation provisions of the Rome Statute. It introduces cooperation requirements under the Statute into the domestic legislations, whether regarding the Court's requests or the surrendering of nationals.

A state is under obligation to cooperate with the ICC, yet is not obliged to prosecute the international crimes as the ICC can have the jurisdiction under the complementarity principle. However, a state that is willing to have full jurisdiction should ensure that it is able to and has the capacity to do so using its own legal instruments. Thus, the relationship between a state and the ICC regarding the scope of implementation can be divided into two main parts: part one is related to cooperation between the state and the ICC, which is considered an obligation to Member States. Whilst part two is related to the complementarity principle, in which the state demonstrates its willingness and ability to prosecute and investigate crimes under the subject matter jurisdiction of the ICC.

1.6.2 Cooperation Obligations

A detailed discussion of the cooperation obligations will be analysed in this section. As it was reviewed earlier, Article 88 of the Rome Statute works as an introduction to the cooperation provisions in the Statute, which are found under Parts 9 and 10. The provisions provide the general requirements and procedures related to the Court's requests and the Member States' methods of response, the requirements of cooperation in arrest and surrender of individuals matters and collection of evidence.⁷⁴ The three main types of cooperation under Part 9 of the Rome Statute are the following:⁷⁵

⁷⁴ Jennifer Schense, and Donald K. Piragoff, 'Commonalities and Differences in the Implementation of the Rome Statute' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (1st edn, BWV 2003), 239-255.

⁷⁵ Joanne Lee, 'The Ratification process and the entry into force of the International Criminal Court Statute' in ELSA International (ed), *International law as we Enter the 21st Century: International Focus Programme 1997-99* (1st edn, Spitz 2001), 121-152.

- Arrest and surrender of persons to the Court.
- Assisting the Court with the collection and preservation of evidence.
- Facilitating the eventual forfeiture of the assets of perpetrators.

As an overall obligation to cooperate, each state will apply an ideal method to ensure that its implementation process fulfils such requirements, whether on the legal or the procedural side. For the legal side, states are required to review their constitutional constraints to cooperate with international organisations like the ICC. There might be some restrictions to the duty to cooperate, which might lead to postponing the Court's requests or even denying them. Articles 89, 94, 95 and 98 of the Statute can be interpreted in a way that a state may not fulfil its obligations towards the Court.⁷⁶ A state might also consider setting the regulations for the mechanism of cooperation with the Court, for example by nominating the authorities responsible within the state to cooperate with the Court, allocating the costs of fulfilling such cooperation and protecting the shared data between the state and the Court.⁷⁷

1.6.2.1 Arrest Warrants Issues

The execution of the ICC arrest warrants or serving summons to appear would require incorporated legislation or procedures enabling the state to perform them. Implementation will allow the domestic authorities to execute ICC warrants, to respect the due process rights of the arrested,⁷⁸ enforce matters related to the tracing and freezing of assets if applicable.⁷⁹ The procedures must be carried out fairly and with scrupulous respect for the rights of the accused, thus upholding the Court's legitimacy. Without such legislation, a state might not be able to execute arrest warrants, which is vital to the efficiency of the ICC proceedings, as trials cannot be undertaken without the presence of the accused.⁸⁰ Thus states are under two

⁷⁶ Jennifer Schense, and Donald K. Piragoff, 'Commonalities and Differences in the Implementation of the Rome Statute' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (1st edn, BWV 2003).

⁷⁷ *ibid.*

⁷⁸ Rome Statute, Article 55, 66 and 67.

⁷⁹ Rome Statute, Articles 93 and 109.

⁸⁰ Rome Statute, Article 63.

objectives during the implementation process of these obligations: to ensure the efficiency and the legitimacy of its enacted legislations.⁸¹

1.6.2.2 Surrender Proceedings Issues

The issue of surrender and extraditing individuals to the ICC could be a complex issue in relation to the implementation process. A state might be in a position in which it is required to surrender a national to the ICC for prosecution. The complexity arises when the state has a constitutional constraint on the surrender of its own nationals. The admissibility of the case can be challenged, according to Articles 18 and 19 of the Statute, in which the state challenges the Court's jurisdiction over the case, or in the situation that the accused submits a challenge of *ne bis in idem* under Article 20 of the Rome Statute.⁸²

Such obstacles need a legislative framework that enables the cooperation regime to function efficiently.⁸³ Some states may amend their constitutions in order to fulfil such requirements.⁸⁴ A state might also be in a situation where cooperation may conflict with other international obligations regarding diplomatic immunities.⁸⁵ The Statute imposes strict considerations on what the national legislation contains, for example the Statute provides no grounds for refusing to surrender a person to the Court, the Statute only addresses the requirement of States Parties to comply with all requests for arrest and surrender.⁸⁶ Thus, the national legislations prohibiting the surrender of nationals cannot be considered and should reflect this with its provisions.

⁸¹ Bruce Broomhall and Claus Kreß, "Implementing Cooperation Duties under the Rome Statute" in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 518.

⁸² Jennifer Schense and Donald K. Piragoff, 'Commonalities and Differences in the Implementation of the Rome Statute' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (1st edn, BWV 2003).

⁸³ See more Goran Sluiter, 'Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605-652.

⁸⁴ See Rupert Elderkin, "The Impact of International Criminal Law and the ICC on National Constitutional Arrangements" (2015) 4 *Global Constitutionalism* 227-253; Goran Sluiter, "Implementation of the ICC Statute in the Dutch Legal Order" (2004) 2 *Journal of International Criminal Justice* 158-178, 163; M. Niang, "The Senegalese Legal Framework for the Prosecution of International Crimes" (2009) 7 *Journal of International Criminal Justice* 1047-1062, 1059.

⁸⁵ Rome Statute, Article 98.

⁸⁶ Rome Statute, Article 89(1).

1.6.2.3 Evidence Collection Issues

Under Article 93 of the Rome Statute states are obliged to support the Court in other forms of cooperation, such as the collecting of evidence related to the cases. The process of collecting, processing and transferring the evidence requires both a legal framework and technical requirements concurrently. The technical requirements include the search for evidence, examination of site and preservation of evidence. These processes will not only require domestic provisions which facilitate such procedures, but also regulate the limits of such a cooperation regime in the light of Article 72 of the Rome Statute, which protects the national security interests from the disclosure of information or documents.⁸⁷

1.6.2.4 Privileges and Immunities of ICC Personnel

Each State Party must recognise the privileges and immunities of the ICC personnel according to Article 48 of the Rome Statute. This includes the Court's Judges, Prosecutor, Deputy Prosecutor, and Registrar. As most of the states recognise immunity of diplomats, it could be an easy process of implementation to amend the relevant national law to include ICC personnel.⁸⁸ In ratifying the Agreement on Privileges and Immunities of the International Criminal Court (APIC).⁸⁹ The APIC aims to provide the ICC staff with certain privileges and immunities, which are required to perform their duties in an independent and unconditional

⁸⁷ Rome Statute, Article 72 also applies to Article, 56, paragraphs 2 and 3, Article 61, paragraph 3, Article 64, paragraph 3, Article 67, paragraph 2, Article 68, paragraph 6, Article 87, paragraph 6 and Article 93; See more "National Security Interests" Bruce Broomhall and Claus Kreß, "Implementing cooperation duties under the Rome Statute" in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005), 532.

⁸⁸ Joanne Lee, 'The Ratification process and the entry into force of the International Criminal Court Statute' in ELSA International (ed), *International law as we Enter the 21st Century: International Focus Programme 1997-99* (1st edn, Spitz 2001), 121-152.

⁸⁹ The Agreement on Privileges and Immunities of the International Criminal Court, deposited with the Secretary-General of the United Nations, was adopted on 9 September 2002 during the first session of the Assembly of States Parties. The APIC entered into force on 22 July 2004. ICC-ASP/1/3.

manner. It is a separate international treaty open for signature and ratification to all states, not only by States Parties to the Statute.⁹⁰

1.6.3 The Principle of Complementarity

One of the main features of the Rome Statute and the core of the ICC admissibility is the complementarity principle.⁹¹ The Court will not have jurisdiction over a case unless the state is unwilling or genuinely unable to carry out investigations or prosecutions. Thus, the primary responsibility upon a state is to investigate and prosecute the core crimes of the Statute. Therefore, each state has a duty to exercise its criminal jurisdiction and the ICC's jurisdiction is considered "residual" if the state fails to genuinely investigate or prosecute the perpetrators.⁹²

The presence of the complementarity principle can be considered as the purpose of or incentive for the state to implement the Rome Statute and incorporate the substantive law into its national laws. It can also be a "supervisory" element, in which state's sovereignty will not be affected by the ICC's jurisdiction unless the state fails to carry out its obligations.⁹³ States that are concerned that their sovereignty could be affected by the complementarity principle should consider that the principle gives the primary jurisdiction to the state itself. Therefore, states should use such principle to implement the Rome Statute to gain the primary jurisdiction over the crimes.

⁹⁰ See more Marko Bošnjak and Dean Zagorac, "Slovenia" in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 328.

⁹¹ Rome Statute, Preamble paragraph 10; Articles 1, 17 and 20(3).

⁹² Mohamed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law.

⁹³ J.K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 Journal of International Criminal Justice, 86-113.

The Rome Statute contains in its provisions the inadmissibility criterion, which might be contrary to the approach other international courts adopted.⁹⁴ As for the challenging of the admissibility of a case, the state will have to prove that the case falls under one of the inadmissibility criterion enunciated in Article 17 of the Statute and the case does not fall under any of the exceptions in the article.⁹⁵ As a result, such challenges and admissibility issues will affect the implementation process and the definitions of the crimes of the Rome Statute in the domestic legislations.

During the implementation process, states must consider reviewing their national laws to fulfil their obligation to investigate and prosecute the international crimes in order to keep their primary right of jurisdiction. Otherwise, the lack of or the inadequacy of substantive law related to the international crimes in the state will lead to the inability status, thus the ICC will have jurisdiction over the case. Even the presence of domestic law containing the substantive law of the Rome Statute is not enough, though it is still needed to be competent and adequate to enable the state to investigate and prosecute the international crimes in the national courts.⁹⁶ A state's inability can be for reasons other than the lack of domestic legislations, for example the existence of internal armed conflict or economic reasons in the state.

As the principle of complementarity does not oblige states to implement substantive law of the Rome Statute, it must be noted first that some of the crimes enunciated in the Statute existed under international law and customary law before the creation of the Rome Statute,⁹⁷ for example, the crime of genocide and some war crimes conducts. There is an obligation to incorporate these crimes into domestic laws deriving from other treaties or customary law.⁹⁸ As for other crimes, such as crimes against humanity and other war crimes conducts, the state

⁹⁴ Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 *Journal of International Criminal Justice*, 421-440.

⁹⁵ Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process" (2006) 17 *Criminal Law Forum* 255-280.

⁹⁶ John T. Holmes, "Complementarity: National Courts versus the ICC" in Antonio Cassese and others (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002).

⁹⁷ Leila N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (2000) 49 *DePaul L. Rev.* 909.

⁹⁸ For the crime of genocide, cf. Article V of the 1948 Genocide Convention; For war crimes, Articles 49/50/129/146 of the Four 1949 Geneva Conventions and Articles 85-87 of the 1977 First Additional Protocol to the Geneva Conventions. See more K. Dormann and R. Geiss, "The Implementation of Grave Breaches into Domestic Legal Orders" (2009) 7 *Journal of International Criminal Justice* 703-721.

finds itself under no obligation to incorporate these crimes, as the Rome Statute does not contain articles expressly putting an obligation on the state to implement substantive law into domestic laws.

Based on the complementarity principle, it has been argued that, states are obliged to incorporate into national legislation, the crimes found in the Statute.⁹⁹ Such an argument derives from a different perspective of the interpretation of the Statute's articles, for example the Preamble of the Rome Statute, which affirms that "the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes", domestic legislation is needed in order to fulfil the *duty*. Therefore, a Member State lacking the required domestic legislation to investigate and prosecute international crimes will not be able to fulfil its obligation or *duty* under the Rome Statute. Moreover, in the Preamble it is affirmed that "the most serious crimes of concern to the international community as a whole must not go unpunished; effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".¹⁰⁰ The mentioning of "at the national level" represents the vital role of the national investigations and prosecutions by the domestic authorities, which will require an efficient national legislation. The state has more resources and ability to handle the cases that fall within its jurisdiction; therefore, the goal of ending impunity enriched by the Rome Statute can be achieved through state cooperation and practice. Such state ability to investigate and prosecute the international crimes requires a domestic legislation within the state.¹⁰¹

A further argument on the obligation to implement the substantive provisions of the Statute relates to the interpretation of the Rome Statute according to the Vienna Convention and states' practice in implementing and incorporating the substantive provisions of international criminal law.¹⁰² Recently, several states created new legislations incorporating international crimes into their domestic laws, reflecting their understanding of the Rome Statute obligating

⁹⁹ J.K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice*, 86.

¹⁰⁰ Rome Statute, Preamble para. 4.

¹⁰¹ Julio Bacio Terracino, "National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC" (2007) 5 *Journal of International Criminal Justice* 421-440.

¹⁰² Vienna Convention, Article 31(3) (b).

them to do so.¹⁰³ As member states to an international treaty, they are required to fulfil the obligations enshrined in the treaty to achieve its objectives according to international law.

As one of the main purposes of the Statute is ending impunity, states denying the implementation process could lead to the undermining of the Rome Statute's purpose. Such failure will lead to the inability of the state to assert its own primary jurisdiction over the case, enabling the ICC to have jurisdiction in the situation, which could affect the overall work of the Court.¹⁰⁴ The ICC is considered under the complementarity principle as "a court of last resort". Such state practice could turn the ICC into the main court handling all cases instead. Beside the fact that states have more resources and it would be more beneficial to the state to have national jurisdiction over the cases, the ICC would become overloaded with cases from different situations, in addition to the challenges of admissibility. This could affect the notion of ending impunity and the international criminal justice in general.

Article 17(1) sets out four detailed situations in which the ICC will have jurisdiction over a case:

- Where the State is unwilling genuinely to investigate or prosecute.
- Where the State has investigated but has decided not to prosecute due to an unwillingness to do so genuinely.
- Where the State is unable genuinely to investigate or prosecute.
- Where the State has investigated but has decided not to prosecute due to an inability to do so genuinely.

¹⁰³ See more Enrique Carnero Rojo, "National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain" (2011) 9 *Journal of International Criminal Justice* 699-728; Y. S. Kim, "The Korean Implementing Legislation on the ICC Statute" (2011) 10 *Chinese Journal of International Law* 161-170; T.L.H. McCormack, "Australia's Legislation for the Implementation of the Rome Statute" in M. Neuner (ed), *National Legislation Incorporating International Crimes* (1st edn, BWV- Berliner Wissenschafts—Verlag/Wolf Legal Publishers 2003).

¹⁰⁴ Jimmy Gurulé, "The International Criminal Court: complementarity with national criminal jurisdiction" (2001) 2001 *Amicus Curiae* 21-25.

Article 17(2) adds the conditions for the determination of whether there is or has been State *unwillingness* genuinely to investigate or prosecute. In determining this issue, the ICC is to consider whether, in light of due process principles recognised by international law:

- The purpose of the national proceedings or of the decision not to prosecute was or is to shield the person in question from criminal responsibility for a crime within the jurisdiction of the ICC;
- The national proceedings have been delayed unjustifiably and in a manner inconsistent with an intent to bring the person concerned to justice; or
- The national proceedings were not or are not being conducted independently or impartially, and in a manner consistent with intent to bring the person concerned to justice.

In the analysis of the wordings of Article 17 of the Statute, which defines the complementarity principle, main keywords can be examined separately: *genuine proceedings*, *unwillingness and inability*. These three keywords could be considered the core of the principle of complementarity as they affect the implementation process, and each state must consider these terms, their definitions and understandings before incorporating international crimes. Although the Rome Statute grants the primary jurisdiction to the national courts, states could be concerned that these keywords mentioned, *genuine proceedings*, *unwillingness and inability*, could affect their jurisdiction over a case. For example, a state could investigate and prosecute a perpetrator and still the ICC can claim jurisdiction over the case if the definition of the crime in the national law is inconsistent with the Statute's definition of the crime.¹⁰⁵ This shows the importance of adequate national legislation incorporating international crimes.

The first keyword, *genuine proceedings*, is not separately defined in the Rome Statute, although it has to be read in context of the other keywords. But still the term “genuine”

¹⁰⁵ Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity” (2003) 7 Max Planck Yearbook of United Nations Law Online 591-628.

relates to the investigation or prosecution process.¹⁰⁶ The insertion of the term next to *unwillingness* and *inability* resulted in increasing the level of threshold for applying the complementarity principle, thus the ICC being able to take over the jurisdiction of a case. Although the insertion of such a term could be seen as necessary, it could also lead to complex issues in the challenges of admissibility between the states and the ICC.¹⁰⁷ In practice, the determination of the genuineness of proceedings, whether the state is unwilling or unable, will not be an easy task, especially if the state already investigated and prosecuted the perpetrator and in some cases sentenced him. This will lead to issues in relation to *ne bis in idem*, which will be discussed later. Although the complementarity principle could be a good incentive to states to implement the substantive international criminal law, it could be considered as problematic to states with regard to their sovereignty and jurisdiction over the cases. States could incorporate the international crimes into their domestic legislation and the case would still be admissible before the ICC.¹⁰⁸

As for *unwillingness*, it is considered one of the conditions where the Court might have jurisdiction over a case if the state is not carrying out the investigation or prosecution genuinely. It could be known as ‘sham’ investigation or prosecution, where the state actually initiated the investigation or the trial, but as a method to shield the perpetrator from justice.¹⁰⁹ Under Article 17(2) of the Rome Statute subparagraphs (a)-(c) the situations, in which the Court can decide sham proceedings have taken place, are listed. The first situation, which is commonly known, is to shield a defendant from criminal responsibility. For example, a national court might pretend that it is having a genuine trial, but in fact it is protecting the accused from criminal responsibility and justice. This situation can be detected in several ways and differs from one case to another. Another situation listed in the Statute is, unjustified delay. A delay in initiating the investigation or prosecution can be seen by the ICC

¹⁰⁶ Jann K Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions* (Oxford University Press 2008), 114.

¹⁰⁷ Cedric Ryngaert, “Applying The Rome Statutes Complementarity Principle: Drawing Lessons from The Prosecution of Core Crimes by States Acting Under the Universality Principle” (2007) 19 *Criminal Law Forum* 153-180.

¹⁰⁸ S. Williams, ‘*Article 17 Issues of Admissibility*’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*” (1st edn, Nomos Verlagsgesellschaft 1999) 383-394. 393.

¹⁰⁹ See more Brighton Claire, “Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court” (2012) 12 *International Criminal Law Review* 629-664.

as unwillingness to bring the accused to justice or the state has the intent in the unjustified delay to shield the perpetrators from criminal responsibility. Finally, regarding the independence and impartiality of the proceedings, the ICC may discover that the proceedings are carried out in a way that shows the intent of a national authority to not bring the accused to justice. The lack of impartiality is another situation where the Court can detect a sham trial and can decide that the state is unwilling to genuinely carry out the investigations or prosecutions. It is not an easy process for the ICC to decide the unwillingness of a state to investigate or prosecute. The matter could be complex, even politically, as the ICC would interfere in the national authorities' matters, in addition to the possibility of the state challenging the Court decisions in the admissibility processes.¹¹⁰

So the “unwillingness” situations are related to the implementation process. It could be argued that a state, which did not incorporate the international crimes into its national laws, is intentionally adopting such an approach to shield the perpetrators from prosecutions. It can also become more complex, if a state incorporates the international crimes but their domestic legislations are too inconsistent or inadequate to investigate and prosecute the accused. The ICC will determine the presence of sham investigation or prosecution from the relevant case, thus the determination, according to Article 17(1) and (2), is related to the investigation or prosecution process, and not the presence of, or lack of international criminal law in the national legislations.¹¹¹ In addition, it is difficult to predict the reasons behind the state's non-incorporation of the international crimes into its national legislation. There are various reasons for not implementing the Rome Statute after ratification, and linking the non-implementation to the unwillingness to shield a person would be contrary to the state's objective in ratifying the Rome Statute.¹¹² Although the reasons behind the non-implementation and the complexity of the cases vary, a state should not rely on non-implementation as an excuse for not investigating or prosecuting. Despite the arguments on

¹¹⁰ See more F. Megret and M. Giles Samson, “Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials” (2013) 11 *Journal of International Criminal Justice* 571-589; Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

¹¹¹ Darryl Robinson, ‘The Rome Statute and Its Impact on National Law’ in Antonio Cassese and others (ed), *The Rome Statute of the International Criminal Court: A Commentary Volume II* (1st edn, Oxford University Press 2002).

¹¹² Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (M. Nijhoff 2008), 251.

the relationship between the non-implementation of the Rome Statute and the unwillingness of the state to investigate or prosecute, each state should work on accommodating the international criminal law into its domestic legal system. The conditions listed in Article 17(2) of the Rome Statute to determine the unwillingness are considered comprehensive.¹¹³ Thus, the ICC will not have jurisdiction over a case under the complementarity principle if the state is unwilling to prosecute the case because of the lack of national legislation for international crimes.

Another aspect in relation to the unwillingness of the states to prosecute and investigate is the issue of amnesties or pardons granted from heads of states or the executive branch. The amnesties or pardons are not mentioned in the Statute under the complementarity principle, thus, if a state chose to grant amnesties or pardons to the accused, it could be seen as a process to shield the perpetrator from trial.¹¹⁴ However, it is arguable, that such an approach could be seen contrary to the obligation on states under the Rome Statute to investigate and prosecute international crimes. In addition, it could also be inconsistent with customary international law to provide amnesties for international crimes, some states adopted such an approach into its national legislations implementing the Rome Statute.¹¹⁵ If providing amnesties is a genuine procedure as part of a national reconciliation process, the ICC should consider under Article 17(2) of the Rome Statute such process and determine if it is a genuine step to achieve peace and justice rather than shielding the accused from trial.

As for the *inability* of a state to genuinely investigate or prosecute, it can be easier to determine as it relates to the capacity of the state concerned, rather than its intention to shield the accused from trial.¹¹⁶ Under Article 17(3) of the Rome Statute, the state could be in a situation where there is a collapse, total or substantial, or unavailability of its national judicial

¹¹³ S. Williams, 'Article 17 Issues of Admissibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, "Article by Article"* (1st edn, Nomos Verlagsgesellschaft 1999), 383-394, 393.

¹¹⁴ C. Van den Wyngaert and T. Ongena, "Ne bis in idem Principle, Including the Issue of Amnesty" in Antonio Cassese and et. al (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002).

¹¹⁵ Dwight G. Newman, "The Rome Statute, Some Reservations concerning Amnesties, and a Distributive Problem" (2005) 20 *American University International Law Review* 293-357.

¹¹⁶ John T. Holmes, 'Complementarity: National Courts versus the ICC' in Antonio Cassese and others (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002), 667-686, 675.

system, rendering the state unable to investigate or prosecute a perpetrator. In addition to the other reasons listed in Article 17(3), it adds that the accused cannot be obtained or the necessary evidence cannot be gathered, or finally, the state cannot carry out national proceedings.

The inability determination can be related to two main aspects: the collapse of the national judicial system or the unavailability of the national judicial system. The collapse of the national judicial system is divided into two situations; total collapse and substantial collapse. The latter is more problematic in practice, as the definition will depend on the situation in the state concerned. In other words, a state may have a substantial collapse in its national judicial system during an internal armed conflict; however, it may not affect the whole national judicial system, thus the state can continue the procedures in other unaffected areas. During the Rome Conference, the term “substantial” was inserted instead of “partial” which was in the Draft Statute, to prevent the ICC from having a jurisdiction in situations of internal armed conflicts while the state is still capable of handling the case.¹¹⁷ The total collapse could occur where the state’s entire national judicial system is non-functioning. This could be due to internal armed conflict affecting the whole state, natural disasters or any similar incident, resulting in the failure of the national judicial system to perform normally.¹¹⁸

The term “unavailability” of the judicial system, is a nonspecific definition, thus it contains broader meanings and can refer to more scenarios.¹¹⁹ The unavailability of the judicial system could be due to a lack of the required resources for the judicial system to operate. Deficiency in the judiciary system may be due to the absence of qualified judges, prosecutors, investigators or it could be the lack of substantive criminal legislation. In the latter situation, the ICC can claim the admissibility of the case, as the state would be unable to investigate and prosecute due to the non-implementation of the Rome Statute. A state, which failed to incorporate the international crimes of the Rome Statute into its domestic legislations, would

¹¹⁷ John T. Holmes, ‘The Principle of Complementarity’ in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (1st edn, Kluwer Law International 1999), 41-78.

¹¹⁸ Mahnoush H. Arsanjani, ‘Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court’ in Herman Von Hebel and et al. (ed), *Reflections on the International Criminal Court: Essays in Honour of Adrian Bos* (1st edn, T.M.C. Asser Press 1999), 56-76, 70.

¹¹⁹ Julio Bacio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’ (2007) 5 *Journal of International Criminal Justice* 421-440.

fall under the above-mentioned criterion of unavailability. It will be impossible for the state concerned to pursue a trial without the availability of relevant national legislation.¹²⁰

In a different scenario, a state might be prosecuting international crime as ordinary crime, if its national legislation lacks the definitions of the international crimes. This could be more complex as the ICC might face a situation where the state concerned initiates a trial for the accused and sentences him based on ordinary criminal law, although he has committed an international crime. For example, the accused is being tried for murder although he committed mass killings as crimes against humanity. Under the *ne bis in idem* principle, a person should not be retried by the ICC after a national court has tried him whether convicted or acquitted. This principle is reflected in Article 20(3) of the Rome Statute with exceptions relating to sham trials. So in some conditions, an individual who was tried before a domestic court can be retried before the ICC; thus, States Parties have the obligation to surrender the individual to the Court upon request. The exception found in the Rome Statute is to permit trials to be carried out before the Court where a sham trial has taken place at the national level.

For the implementation process and its impact on the *ne bis in idem* principle, the state which decides not to implement the Rome Statute and relies on ordinary crimes will prosecute the accused who committed international crimes as an ordinary criminals.¹²¹ This approach cannot be considered as a process of sham trial; thus, it falls under the exception of the *ne bis in idem* principle.¹²² Still the Court can retry the person for *conduct* if the national court did not prosecute the accused with an ordinary crime that conforms with international crime, in which the ICC finds that such proceedings are not genuine and are used to shield the perpetrator.¹²³ For example, if the accused committed crimes against humanity or genocide and has been tried for assault or the penalty is inconsistent with the gravity of the act

¹²⁰ See more Jo Stigen, *The relationship between the International Criminal Court and national jurisdictions: The Principle of Complementarity* (M. Nijhoff 2008), 313; Gregory S. McNeal, "ICC Inability Determinations in Light of the Dujail Case" (2008) 39 Case Western Reserve Journal of International Law.

¹²¹ C. Van den Wyngaert and T. Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty' in Antonio Cassese and et. al (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002), 705-729, 725.

¹²² Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 Journal of International Criminal Justice 421-440.

¹²³ Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem' (2010) 8 Santa Clara Journal of International Law 165-198, 193.

committed. Other international tribunals like the ICTY and ICTR consider the national trials using ordinary crimes an exception to the *ne bis in idem* principle and a new trial can take place. Even the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind,¹²⁴ contains a similar provision in Article 12.¹²⁵

Prosecuting the international crimes as ordinary crimes is not a violation of the state's obligations. Inserting the exception of ordinary crimes to the *ne bis in idem* principle was seen by many states during the Statute negotiations as an obligation to incorporate the international crimes into national legal systems. This was seen as a contradiction with the notion of complementarity and the state's right to legislate its own laws and have their independent national trials without the ICC interfering. After several arguments from participating states opposing the exception, the Preparatory Committee deleted it.¹²⁶ On the other hand, the ICC has to assess each case separately to assure that the national proceedings are not used to shield perpetrators and the trials are not 'sham' when the ordinary crimes are implemented.

Prosecuting for ordinary crimes will not amount to unwillingness nor an inability of the state to genuinely prosecute and with the presence of *ne bis in idem* principle, the ICC will not be able to admit the case. The ICC might be burdened with issues of admissibility, as states which prosecute international crimes as ordinary, might challenge the Court's decisions if it decides to take over jurisdiction of the case under the complementarity principle. In addition, the Court will have the burden of determining that a prosecution is not being genuinely processed. The states, that are unable to prosecute international crimes due to lack of national legislations, might also have admissibility cases with the Court. So the above-mentioned examples might overload the ICC with several cases and situations, which could result in weakening the Court and making it the primary court and not the court of last resort. States should use the complementarity principle as an incentive to implement the Rome Statute and

¹²⁴ U.N. Doc. A/51/10, at 70.

¹²⁵ Cited in C. van den Wyngaert and T. Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty' in Antonio Cassese and et. al (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002), 705-729, 725.

¹²⁶ I. Tallgren, 'Article 20 Ne bis in idem' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (1st edn, Nomos Verlagsgesellschaft 1999), 429-430.

incorporate the international crimes into their national laws instead of overloading the ICC. Such laws should be in conformity with the Statute and assist the ICC main objectives in ending impunity and prosecuting perpetrators of the most serious crimes. States can interpret the complementarity principle as an obligation to implement the Rome Statute and it would be beneficial for both states and the ICC.

1.7 Incorporating Crimes Listed under the Rome Statute into Domestic Legislations

The incorporation of definitions of the international crimes into domestic legislations will assist Member States in the investigation and prosecution process, as the state will be able to exercise their criminal jurisdiction over international crimes domestically. Although it is not an obligation under the Rome Statute, states could avoid the admissibility of a case by the ICC under the application of the complementarity principle, as mentioned earlier, through the implementation of the Rome Statute substantive law and incorporating the crimes into their domestic laws. The definitions of the international crimes listed in the Rome Statute are mostly based on customary international law and previous humanitarian treaties, like the Convention on the Prevention and Punishment of the Crime of Genocide 1948 and the Geneva Conventions of 1949 and Additional Protocols, and their Commentaries. In addition, the Rome Statute contains more elements of crimes, which developed over the years. In other words, although most of the crimes definitions in the Rome Statute existed before the drafting of the Statute, the Rome Statute is enriched with more comprehensive definitions of all the international crimes.¹²⁷

States, which already had the definitions of the international crimes, such as genocide and war crimes, implemented in their national laws prior to the drafting of the Rome Statute, should consider amendments in their legislations to cope with the current and updated definitions found in the Rome Statute. This will assist the state in its ability to investigate and

¹²⁷ Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 *The American Journal of International Law* 22-43.

prosecute international crimes domestically and fulfil its obligations towards the ICC in prosecuting the perpetrators. As the implementation process varies from one state to another, it is commonly seen that each state adopts a different approach in defining the international crimes in national laws. A state could either adopt the exact same definition of the crime as found in the Rome Statute verbatim or create a new definition. Although they all might have the same outcome, which is criminalising the conducts listed in the Rome Statute in Articles 6-8, some states' methods may have broader or more restrictive definitions of the international crimes when incorporated into their national laws.¹²⁸ Some states might add more conducts to be criminalised or more elements of crimes in their definitions of international crimes during the implementation process. While other states could have a narrower range of conducts or less elements of crimes than the ones listed in the Rome Statute. Whether states adopt identical definitions of the Statute crimes or redefine them, the incorporation of international crimes into domestic laws is essential to enable the state to investigate and prosecute any crimes committed. The different approaches and methods of defining the international crimes in national laws will be analysed in this section.

1.7.1 Genocide

Article 6 of the Rome Statute reflects the exact definition of genocide set out in Article II of the Genocide Convention.¹²⁹ During the negotiations of the Rome Statute, the definition of the crime was not changed and was kept identical to that of the Genocide Convention. This resulted in a number of states, which were parties to the Genocide Convention, already having incorporated the crime of genocide into their national laws prior to the creation of the Rome Statute. Some states that were parties to the Genocide Convention only incorporated

¹²⁸ Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge Univ. Press 2014), 269.

¹²⁹ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

the crime of genocide after joining the ICC, such as the United Kingdom in 2000 and South Africa in 2002.¹³⁰

The majority of states have adopted the exact definition of the Rome Statute,¹³¹ whilst some other states modified the genocide definition.¹³² Each state has its own discretion when drafting its domestic provisions, and the extent of these provisions. The national legislator will reflect, in the provisions, the state's perspective and policy. Many factors can affect the legislation process and the definition of the crime in national provisions, such as history, culture and political background. International crimes are not ordinary crimes, specifically, genocide. The history, culture or political views of a state might affect the definition within national laws if the state did not adopt the "international definition".¹³³

A different definition of genocide in national law could lead to inconsistency with the Rome Statute. It can be seen from the majority of states which adopted different definitions that there are two main elements affected: the "protected groups" covered in Article 6 of the Statute and the "acts" of genocide contained in the definition.¹³⁴ The protected groups in the Rome Statute are limited to national, ethnical, racial and religious groups. Some states have extended the definition of genocide and included other groups to be protected, for example, 'political groups' and 'social groups'. The inclusion of more groups to the definition of genocide is a reflection of each state's needs and aims in protecting a specific group. The reasons are different and vary from one state to another, but the implication on the crime in general must be considered. As there is a threshold for the crime of genocide, an increase in the protected groups might undermine the crime and change it from one of the most serious

¹³⁰ See W. A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'' (2003) 1 *Journal of International Criminal Justice* 39-63.

¹³¹ Austria, Art. 321 Criminal Code 1958; Belgium, Loi relative a' la repression des violations graves de droit international humanitaire, 10 February 1999; Canada, Amendment of Criminal Code, 1985; Germany Art. 220a of the Criminal Code 1955; Ghana, Section 1 Criminal Code Amendment Act 1993; Ireland, Genocide Act, 1973, Liechtenstein, Art. 321 Criminal Code 1987; Mali, Art. 30 Criminal Code; Malta ICC Act 2003; Netherlands, Law Implementing the Genocide Convention, 1966; New Zealand, ICC Act 2000; Portugal, Art. 239 Criminal Code; Rwanda, Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990; Trinidad and Tobago, Genocide Act 1977; United Kingdom, ICC Act 2000.

¹³² France : Code pénal (amendé 1999), 1 March 1994.

¹³³ Helmut Kreicker, "National Prosecution of Genocide from a Comparative Perspective" (2005) 5 *International Criminal Law Review* 313-328.

¹³⁴ O. Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677-691.

crimes to ordinary crime.¹³⁵ Each state has its own conditions and circumstances and might find it necessary to add some vulnerable groups to the list in the definition of genocide. States, which have adopted such an approach, like Switzerland,¹³⁶ and Poland,¹³⁷ have added protected groups to the definition of genocide in their domestic law during the implementation process.

Other states have excluded some of the protected groups in the definition of genocide, for example, Bolivia,¹³⁸ Nicaragua,¹³⁹ El Salvador,¹⁴⁰ and Paraguay.¹⁴¹ States, which have excluded some of these groups in their definition of genocide within their national laws, could be considered as contrary to customary international law as they excluded one of the protected groups.¹⁴² Although each state has its own will in creating its national laws, these approaches could affect the perspective of the definition and the protected groups in international criminal law.¹⁴³ Whilst some other states have expanded the list of protected groups due to historical or political reasons, the same reasons could be an excuse for other states to exclude some of the groups in the definition; thus, these groups will not be protected under the definition of genocide. This could lead to the inability of a state to prosecute a perpetrator of genocide crime committed against one of the protected groups due to the lack of the required provision in domestic legislation. This disadvantage could lead a state to investigate and prosecute the crime of genocide as an ordinary crime and/or the ICC taking over the case under the complementarity principle.

Another approach in incorporating the crime of genocide in national laws or acts is influenced by case law, in the ICTR *Akayesu* case judgement,¹⁴⁴ which added other “stable”

¹³⁵ William Schabas, *Genocide in international law: The Crime of Crimes* (Cambridge University Press 2000)

¹³⁶ Switzerland: Rome Statute legislation, Article 264 of the Loi federale portant modification de lois federales en vue de la mise en oeuvre du Statut de Rome de la Cour penale international of 18 June 2010.

¹³⁷ Poland: Penal Code 6 June 1997, Article 118(1).

¹³⁸ Bolivia: Código Penal, 10 March 1997, Article 138 LEY N 1768 LEY DE MODIFICACIONES AL CODIGO PENAL DEL 10 DE MARZO DE 1997, excluding racial groups.

¹³⁹ Nicaragua Criminal Code, Article 549, excluding national groups.

¹⁴⁰ El Salvador Criminal Code, Article 361 Criminal Code, excluding ethnic groups.

¹⁴¹ Paraguay Criminal Code, Article 319 Criminal Code, excluding racial groups.

¹⁴² Hugo Relva, ‘The Implementation of the Rome Statute in Latin American States’ (2003) 16 *Leiden Journal of International Law* 331-366.

¹⁴³ Olympia Bekou, ‘Crimes at Crossroads: Incorporating International Crimes at the National Level’ (2012) 10 *Journal of International Criminal Justice* 677-691.

¹⁴⁴ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.

groups. France adopted this approach and added to the inclusive list of protected groups any other group that could be defined in the future.¹⁴⁵ This approach is considered flexible, and it does not undermine the definition of genocide nor affect the state's ability in prosecuting the crime. It gives an additional protection of selected groups, which might be targeted in the future, but are not yet expressly included in the definition. This *ad hoc* inclusion of a group approach has the advantage of including and protecting members of a group, which were not included at the time of drafting the national law but established later in the future; thus, protecting its members from the crime of genocide.¹⁴⁶

As for the implementation of listed, genocidal acts, they are inclusive in the provisions of the Statute. Some states decided to add to these acts and to expand the list.¹⁴⁷ Some states during the implementation process and incorporation of the international crimes into their national laws, find it necessary, due to domestic circumstances, to add some acts to the existing acts found in the definition of genocide. Although this might not affect the essence of the definition of the crime, it might affect the prosecution of genocide in the considered state.¹⁴⁸ Some states might add some acts, which are not considered genocidal acts under international law, to their national laws to prosecute perpetrators for the crime of genocide. This could lead to a conflict between the national courts and the ICC. In this situation, if the concerned state was unable or unwilling to investigate or prosecute the crime of genocide according to its national law, the ICC would not have jurisdiction over the crime, as the act is not included in the Rome Statute.

Other states that have amended the acts found in the genocide definition lowered the number of acts or restricted them. States like Lithuania¹⁴⁹ and Mexico¹⁵⁰ have modified their definition of genocide in their national laws. This approach will affect the threshold required

¹⁴⁵ France: Code pénal (amendé 1999), 1 March 1994, Article 211-1 Criminal Code, covers the destruction ‘*of a group determined by any other arbitrary criterion*’.

¹⁴⁶ See more Agnieszka Szpak, “National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals” (2012) 23 *European Journal of International Law* 155-173.

¹⁴⁷ Olympia Bekou, ‘Crimes at Crossroads: Incorporating International Crimes at the National Level’ (2012) 10 *Journal of International Criminal Justice* 677-691.

¹⁴⁸ Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such” (1999) 14 *Leiden Journal of International Law* 399-408.

¹⁴⁹ Lithuania Criminal Code 26 September 2000 No VIII-1968, Article 99.

¹⁵⁰ México: Código Penal Federal, 14 August 1931, Article 149-Bis.

for the prosecution of genocide. In France, for example, the phrase “intent to destroy”, which is found in the definition of genocide in the Rome Statute and distinguishes the crime from the other crimes, was excluded.¹⁵¹

1.7.2 Crimes against Humanity

Article 7 of the Rome Statute defines the “crimes against humanity” as certain acts committed as a part of a widespread or systematic attack against a civilian population. The definition consists of three main components: the commission of one or more of the inhumane acts, which are 11 acts listed in the definition; the widespread or systematic attack directed against a civilian population; and the knowledge of the attack. As for the implementation process, most states will introduce, for the first time, the crimes against humanity into their national laws after ratifying the Rome Statute, as most of the elements of crimes did not exist in a convention before.¹⁵²

One of the main issues that face the states during the incorporation process of crimes against humanity is the “open-ended” provision found in Article 7(1)(k) of the Rome Statute.¹⁵³ This provision does not indicate the exact definition of the act, which might cause a conflict with the legality principle, *nullum crimen sine lege scripta*, when implemented.¹⁵⁴ But on the other side, this provision can expand the definition of the crime to be wider than the one found in the Statute. This will allow the states to include in its national laws, any conduct not found in the Statute, but found in customary international laws or added in the future.

Some states go beyond the Statute and add to the scope of crimes against humanity. For example, an act could constitute a crime against humanity even if it is not committed as part

¹⁵¹ France: Code pénal (amendé 1999), 1 March 1994, Article 211-1.

¹⁵² See more M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999).

¹⁵³ Rome Statute, Article 7(1)(k) reads: “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

¹⁵⁴ See more Mohamed Elewa Badar, “From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity” (2004) 5 San Diego International Law Journal 73 – 144.

of a *widespread* or *systematic attack*, even the *knowledge* of the attack directed against any civilian is not required in some legislations.¹⁵⁵ On the other hand, some states tend to narrow the scope of the crime in their domestic definition excluding some of the acts included in the Statute, while others put restrictive conditions on the Elements of Crimes.¹⁵⁶ The change in definitions in the national legislations, whether narrowed or broadened, will not automatically lead to conflict with the ICC.¹⁵⁷ The problem arises when a person commits a crime, which falls within the crimes of the ICC, but at a national level it does not amount to the same crime as in the national legislation.

As for the *policy* requirement found in Article 7(2)(a) of the Rome Statute, some states have included this requirement, mainly the states which adopted the referencing method of incorporation.¹⁵⁸ While other states, which in the main created a new legislation, do not include the *policy* requirement in their national legislations.¹⁵⁹ The differences in the states' approaches in defining the crime in domestic legislations will change the threshold of the crime from one state to another; thus a conflict might also occur with the ICC if the state does not prosecute a perpetrator for international crime, because under their national law it fails to meet the same threshold as that which is prescribed by the ICC.

1.7.3 War Crimes

Article 8 of the Rome Statute defines the war crimes, and it can be stipulated that the definition contains four main categories of war crimes; the grave breaches of the 1949 Geneva Convention; other serious violations of the laws and customs applicable to international armed conflict; serious violations of Article 3 common to the four Geneva Conventions of 1949; and other serious violations of the laws and customs applicable in non-

¹⁵⁵ Avitus A Agbor, *Instigation to Crimes against Humanity* (Martinus Nijhoff Publishers 2013), 107.

¹⁵⁶ ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

¹⁵⁷ Avitus A Agbor, *Instigation to crimes against humanity* (Martinus Nijhoff Publishers 2013), 115

¹⁵⁸ See more Claus Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision" (2010) 23 *Leiden Journal of International Law* 855-873.

¹⁵⁹ Olympia Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677-691.

international armed conflict. Most of the war crimes provisions listed in the Statute existed before and were found in international law.¹⁶⁰ The Rome Statute added some offences to the war crimes list, which did not exist before, whilst there are other offences that were not included in the Statute's definition, which exist in the international humanitarian law.¹⁶¹

Most states have already incorporated the war crimes into their domestic legislations due to the widespread ratification of the Geneva Conventions, but as mentioned, there are some variations between the Rome Statute and the international humanitarian law in the list of war crimes definitions. During the implementation process, some states incorporated a broader definition of war crimes into their national laws, by either including more acts than are originally found in Article 8 of the Rome Statute, adding to the list of "protected persons" to include both civilians and military in some provisions, or defining some acts as war crimes in non-international armed conflicts.¹⁶² Whilst some states decided not to include some of the acts that are defined as war crimes found in the Rome Statute into their national legislations, other states created war offences in their national criminal codes, which are considered a form of war crime but lower in gravity with lower penalties. Such distinction is not found in the Rome Statute.¹⁶³

The approaches of incorporating war crimes into domestic law, whether restrictive or broad, are considered positive steps towards the implementation of the Rome Statute, despite the problems that might occur. For example, a problem might occur due to inconsistency between national jurisdictions and the ICC in relation to the definitions of crimes, which will affect the domestic investigations and prosecutions. Some states add the crimes, which are under the non-international armed conflicts category to the international conflicts list. As a result, these national legislations do not distinguish between the crimes committed in international or non-international armed conflicts. This would be considered broader than the

¹⁶⁰ See more International Committee of the Red Cross, War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law – Table, 31 October 2012 <

<https://www.icrc.org/en/download/file/1420/war-crimes-comparative-table.pdf>> accessed 20 June 2016.

¹⁶¹ Knut Dörmann and others, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003), 15.

¹⁶² See more Amal Alamuddin and Philippa Webb, "Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute" (2010) 8 *Journal of International Criminal Justice* 1219-1243.

¹⁶³ Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 *Journal of International Criminal Justice* 421-440.

Rome Statute, which does distinguish the conducts in the two types of armed conflicts.¹⁶⁴ The removal of distinction in war crimes between both types of conflicts could lead to an easier approach for national courts when determining the character of conflict.

A state incorporating the war crimes using the referencing method could avoid any possible admissibility issues with the Court, as the definition of war crimes will reference the Rome Statute directly. Other states referenced their definitions to customary international law as to be able to cope with any future developments or other ratified treaties. As for states that used the copying method of incorporation and reflected the same definition verbatim, they might face a procedural issue related to the threshold of war crimes found in the Statute. The high threshold found in the Statute, to investigate “large-scale” crimes or which committed as a “plan or policy”, is mainly for the ICC, but for the states that incorporated the Statute using the copying method, will have the exact same high threshold in their national provisions.¹⁶⁵ Although this issue might not cause any major problem, states should consider such matters in their national legislation. The role of the ICC is to complement the state’s national courts; thus states should not allow any perpetrator of war crimes to “go unpunished”, by ensuring that their national legislations are adequate, that they comply with the Statute and that they prosecute all war crimes.

1.8 Constitutional Issues

Another problematic issue during the implementation process is the constitutional compatibility with the Rome Statute provisions. Several states have the concern that their domestic constitutions might be incompatible with the Rome Statute during the implementation process. These concerns were first reflected during the Rome Diplomatic

¹⁶⁴ Salvador Herencia Carrasco, “Implementation of War Crimes in Latin America: An Assessment of the Impact of the Rome Statute of the International Criminal Court” (2010) 10 *International Criminal Law Review* 461-473.

¹⁶⁵ Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation* (Nouvelles Etudes Penales 1999).

Conference.¹⁶⁶ The possible conflict between the Rome Statute and national constitutions mostly relates to the cooperation with the Court.¹⁶⁷ In some states, it would not be possible to ratify an international treaty that conflicts with the national constitution.¹⁶⁸ But during the ratification process, many states were able to overcome such obstacles in several ways. It should be noted that the general objectives of the Rome Statute and its values would not contradict with national constitutions. The Rome Statute aims to end impunity, protect human rights, and apply the rule of law and justice. The national constitutions should have similar values and principles in their contents, therefore the process of resolving any constitutional conflicts should be carried out with a view to safeguarding these objectives.

But resolving constitutional obstacles could be problematic for some states. The state cannot make a reservation on the Statute's articles.¹⁶⁹ If there is a conflict between a provision in the national constitution and provision in the Rome Statute, the concerned state cannot make reservations on such provision.¹⁷⁰ Another difficulty that a state might face is the decision of amending their constitution. Such a decision is considered problematic in some states due to the complexity of the procedures required and the political will of the state to take such a decision.¹⁷¹ Amending the constitution might have its own obstacles and it is not considered an easy process. For example, some states require a popular referendum, while other require a majority vote in their parliament.

The main constitutional issues most states face are predominantly on the following issues: the extradition of a state's nationals, the immunities of a state's officials, penalties imposed by the Court, and finally, the complementarity principle. These obstacles might affect the state's

¹⁶⁶ Philippe Kirsch and John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93 *The American Journal of International Law* 2.

¹⁶⁷ See Bruce Broomhall and Claus Kreß (n 80)., "Implementing cooperation duties under the Rome Statute" in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹⁶⁸ See Helmut Satzger, "German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law" (2002) 2 *International Criminal Law Review* 261-282.

¹⁶⁹ Rome Statute, Article 120.

¹⁷⁰ M. Fitzmaurice, "On the Protection of Human Rights, The Rome Statute and Reservations to Multilateral Treaties" (2006) 10 *SYBIL* 133.

¹⁷¹ Rupert Elderkin, "The impact of international criminal law and the ICC on national constitutional arrangements" (2015) 4 *Global Constitutionalism* 227-253.

obligation towards the ICC and even retain it from ratifying the Statute.¹⁷² Thus, each state would need to work on dissolving these obstacles to fulfil its obligations towards the Court. Some states found it necessary to amend their national constitutions, while other states interpreted their constitutions in a way to accommodate the Rome Statute in the national system. They adopted the “interpretative approach” in which they found it unnecessary to amend their constitutions.¹⁷³

The constitution amendment, as mentioned, is a hard option for most states due to the required procedures and political will; however, some states chose to adopt such a method and amended their national constitutions to adapt with the Rome Statute. Some of the states, which amended their constitutions, have mentioned the Rome Statute and the ICC within their national constitutions articles and provisions. Such an approach is to guarantee that the Statute will not contradict with any national laws during the implementation process.¹⁷⁴

As for the states that followed the interpretative approach, they tended to avoid the amendment of their constitutions provisions and rather interpret it in a way that accommodates the Rome Statute provisions.¹⁷⁵ This is usually carried out by the relevant national authority competent for such a process, which differs from one state to another. In most states the constitutional court carries out such tasks, other states could have a parliamentary committee or a council of state.

¹⁷² Bakhtiyar Tuzmukhamedov, “The ICC and Russian Constitutional Problems” (2005) 3 *Journal of International Criminal Justice* 621-626.

¹⁷³ Helen Duffy, ‘National Constitutional Compatibility and the International Criminal Court.’ (2001) 11 *Duke Journal of Comparative & International Law* 5.

¹⁷⁴ Chile 1980 Constitution (rev. 2014), Transitory Provisions Twenty-Fourth; Colombia 1991 Constitution (rev. 2013), Title II, Chapter IV, Article 93; Ireland 1937 Constitution (rev. 2012), International relations, Article 29-9; Portugal 1976 Constitution (rev. 2005), Fundamental principles, Article 77; Luxembourg 1868 Constitution (rev. 2009), Chapter XII, Article 118 reads: “The provisions of the Constitution are not an obstacle to the approval of the Statute of the International Criminal Court, done at Rome on 17 July 1998, and to the execution of the obligations that result under the conditions specified by the said Statute.”; Sweden 1974 Constitution (rev. 2012), The Instrument of government, Chapter 10, part 8, ART 14 reads: “The provisions laid down in Chapter 2, Article 7, Chapter 4, Article 12, Chapter 5, Article 8, Chapter 11, Article 8 and Chapter 13, Article 3 do not prevent Sweden from fulfilling its commitments under the Rome Statute for the International Criminal Court or in relation to other international criminal courts.”.

¹⁷⁵ Socorro Flores Liera, “Mexico” in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 191; Goran Sluiter, “Implementation of the ICC Statute in the Dutch Legal Order” (2004) 2 *Journal of International Criminal Justice* 158-178.

Both approaches adopted by states are considered positive steps towards ratifying and implementing the Rome Statute. Some other states chose not to resolve the potential conflicts between their national constitutions and the Rome Statute. These states will postpone any amendments or interpretation until the future. Most of these states believe that it is unlikely for any conflict to occur in practice as they consider them only theoretical conflicts.¹⁷⁶

An example of a possible conflict between the Statute and national constitutions is the issue of surrender and extradition of state nationals. As an obligation enshrined in the Rome Statute, the ICC may request a member state to surrender or extradite one of its own nationals, whereas most states have a national provision which prohibits such requests, whether in their national legislations or constitution. Some states amend their constitutions to allow the execution of the Court's requests in this matter.¹⁷⁷ Most of the constitutions amendments adopted took one of either way, a general amendment allowing the surrender of national person to international courts or a specific amendment allowing the surrender to the ICC.

On the other hand, some states interpreted their national constitutions to allow the surrender of their own nationals to the ICC. The Rome Statute makes a distinction between 'surrender' and 'extradition' as the latter means transferring the person from one state to another, while surrender means the state transferring the person to the Court. Some states adopted the distinction between surrender and extradition during the interpretation process and found that their constitutions are compatible with the Statute.¹⁷⁸ The Statute guarantees fair trials with the aim to end impunity. For the states that are concerned with their sovereignty issues and

¹⁷⁶ Helen Duffy, "National constitutional compatibility and the international criminal court." (2001) 11 *Duke Journal of Comparative & International Law* 5.

¹⁷⁷ See European Commission for Democracy through Law (Venice Commission), Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court, 15 January 2001, adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000) (doc. CDL-INF (2001)001) < http://www.eods.eu/library/VC.Constitutions%20and%20ICC%20Statute%20_EN.pdf > accessed 25 May 2014; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (Venice Commission), **Second** Report on Constitutional Issues Raised by the ratification of the Rome Statute of the International Criminal Court, 4 November 2008, Adopted by the Venice Commission at its 76th Plenary Session, (Venice, 17-18 October 2008), (doc. CDL-AD(2008)031) < [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)031-e) > accessed 25 May 2014.

¹⁷⁸ Håkan Friman, "Sweden" in Claus Kieß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 386.

the extradition of their own nationals to the ICC, it could be viewed that the ICC is an international entity created by ratified states; therefore, it is not considered a “foreign” court but could be an extension of domestic jurisdiction, so it should have different considerations.¹⁷⁹ In addition, some states could have concerns that extradition could violate the human rights of the accused. The Rome Statute aims to protect human rights and the purpose of the ICC is to ensure the effective application of international human rights standards. The internationally recognised human rights and the customary international law, which are enshrined in international human rights treaties, are reflected in the Statute.¹⁸⁰

There are issue of immunities for heads of states, with most states’ constitutions, providing immunity for them from criminal prosecution. According to the Rome Statute, a head of state or other official has no immunity from proceedings before the ICC, and national procedures cannot limit the jurisdiction of the Court over these officials.¹⁸¹ The absence of immunity before the ICC has roots from customary international law and other international tribunals’ jurisprudence.¹⁸² States, which have in their national constitutions provisions granting immunities to their officials, are required to amend or interpret their constitutions to allow the arrest and prosecutions of officials if they became accused, and transfer them to the Court if requested.¹⁸³ States that interpreted their national constitutions found that the international crimes found in the Statute fall outside the scope of the immunities granted to their officials and head of state. This is due to the gravity of crimes; which should not go unpunished. Other states, that faced the same obstacle, amended their constitutions and waived immunities in the scope of allowing the fulfilment of the Court’s requests and obligations.¹⁸⁴

Some amendments are considered to be general amendments and not specific to the issue of immunities, while other amendments are specific to the issue of immunity towards the

¹⁷⁹ Helen Duffy, ‘National Constitutional compatibility and the international criminal court’ (2001) 11 Duke Journal of Comparative & International law 5.

¹⁸⁰ Hakan Friman, ‘Rights of Persons Suspected or Accused of a Crime’ in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (1st edn, Martinus Nijhoff Publishers 1999)

¹⁸¹ Rome Statute, Article 27.

¹⁸² See International Criminal Tribunal for Rwanda, ICTR - Statute of the Tribunal; see also Initial Indictment, Prosecutor v. Milosevic, No. IT-99-37 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 24,1999).

¹⁸³ Rome Statute, Article 58 and 89.

¹⁸⁴ See more Rosanne Van Alebeek, ‘National Courts, International Crimes and the Functional Immunity of State Officials’ (2012) 59 Netherlands International Law Review 5-41.

ICC.¹⁸⁵ Some monarchy states, for example, did not amend the position of their monarchs in relation to their immunity and kept them with absolute immunity, as in their views it is unlikely to have any realistic application, thus the issue is left for future considerations.¹⁸⁶ It is also argued that these monarchs have no actual control within the state or military command.¹⁸⁷ The waiver of immunities before the ICC is necessary for the full function of the Court, so states should not protect their own officials who have committed mass crimes. Thus the purpose of immunities in national constitutions shall not contradict with the requirements of the Statute. Committing international crimes should be considered as a violation of the constitutional principles and values in protecting the states own nationals from human rights violations. Most constitutions are mainly framed on human rights principles; thus the perpetrator cannot rely on immunity provisions for protection against prosecutions. The different positive approaches taken by states towards the issues of concern, which cause conflict with their national constitutions, indicate that states are devoted to the fulfilment of their obligations towards the Statute and supporting the ICC.

1.9 Conclusion

The ICC cannot operate independently without States Parties. The Court is now fully functioning and once the full implementation of the Rome Statute by all states is achieved, the Court will be able to operate more effectively to end impunity for the perpetrators of the most serious crimes of international concern.

¹⁸⁵ Helen Duffy, 'National constitutional compatibility and the international criminal court.' (2001) 11 *Duke Journal of Comparative & International Law* 5.

¹⁸⁶ Goran Sluiter, "Implementation of the ICC Statute in the Dutch Legal Order" (2004) 2 *Journal of International Criminal Justice* 158-178.

¹⁸⁷ See A. Laursen, 'A Danish Paradox?: A Brief Review of the Status of International Crimes in Danish law' (2012) 10 *Journal of International Criminal Justice* 997-1016; In Article 13 of the Danish Constitution, the Queen has absolute immunity, The government proposed ratification without the need for constitutional amendment, the Explanatory Memorandum presented to the parliament notes that it must be considered extremely hypothetical that the Queen would ever be accused of such crimes and, as such, her immunity should not prevent ratification.

States, which have legal and constitutional obstacles that may prevent them from ratification and implementation of the Rome Statute, should consider reviewing their national legislations and constitutions. As presented, there are different methods and options for each state to adopt, and the state's political will is essential for such decisions. The Rome Statute contains cooperation obligations upon ratification, which will require national legislations to accommodate them, whilst in some states it will require further constitutional amendments or interpretations. As for the substantive international criminal law, the complementarity principle enshrined in the Rome Statute is considered an incentive rather than obligation to incorporate the international crimes into domestic legislations.

As many states have already incorporated international crimes into their national legislations based on previous international treaties obligations or customary international law, the Rome Statute is considered a comprehensive international treaty, which contains all the international crimes with their up-to-date definitions. Thus, it is beneficial for states that did not incorporate international crimes previously to join the ICC and consider the full implementation of the Rome Statute. This will strengthen the state's national legislation with comprehensive provisions containing the required elements for effective national prosecutions for international crimes. The method each state adopts will depend on its legal tradition or system. The incorporation process could be affected by history, culture, social or political conditions; thus, the national legislator will accommodate the Statute provisions according to the state's interests and circumstances.

Although it is recommended that states reflect the Rome Statute provisions in their national legislations without severe amendments, each state has its own discretion in this process. Some states have adopted broader definitions of international crimes in their domestic laws, while others restricted the definitions due to domestic considerations. What matters is that each state ensures that the approach adopted aims at ending impunity, applying justice and fulfilling all the Statute's objectives and principles, as the ICC will work as a court of last resort. The Court will guarantee effective national procedures and observe any attempt to shield perpetrators from being prosecuted. States, which have ratified the Statute without implementation, should receive assistance from other Member States. The Court, with the assistance of several NGOs, will work on projects to assist states to implement the Rome

Statute. There are a large number of states that have ratified the Statute and still, to date, have not implemented or incorporated the international crimes into their national legislations.

It is clear from this chapter that Arab states, if they decide to ratify and implement the Rome Statute, have several methods and approaches to adopt. Depending on their legal framework, Arab states could implement the Statute into their domestic legislations and overcome constitutional obstacles, which will be discussed in later chapters. The next chapter will review and analyse some of the approaches, adopted by States Parties, to ratify and implement the Statute. Most of the states faced challenges and obstacles to joining the Court, thus the study of these states' approaches, as an example, would be constructive to the study of Arab states' position relative to the ICC.

Chapter Two: States Approaches to Ratification and Implementation of the Rome Statute

2.1 Introduction

As the first chapter discussed the ratification process and different methods of implementation of the Rome Statute, this chapter reviews and analyses states' approaches and the methods adopted by each state to implement the Statute into domestic legislations. It does not address all the Court's member states, but selects the most significant and remarkable approaches that can be taken as positive examples for other non-member states. The chapter reviews the obstacles and challenges faced by these states, and analyses the implemented legislation. The states selected represent diverse legal systems from different parts of the world with diverse culture and political backgrounds.

Each state that has ratified international human rights and humanitarian law treaties is required to bring its domestic legislation fully into line with those treaty obligations. As far as the Rome Statute is concerned, each State Party must enact national legislation that provides for the crimes under the Rome Statute to also be crimes under national law. Thus, states will have primary jurisdiction over crimes and to ensure that the state fulfills its cooperation obligations towards the Court. In many instances, a State Party may need to amend its constitution or legislations to the extent that they are consistent with the Rome Statute. As such, the state will adopt the method of implementation that best fulfills its obligations towards the Rome Statute, and which will be most compatible with the particularities of its own legal system.

It is essential to examine and analyse selected states' approaches towards the implementation of the Rome Statute before addressing the Arab states' position with the ICC. The study of those states that have already implemented the Rome Statute will assist in the study of the obstacles and challenges facing the Arab states. Most of the states that have already ratified and implemented the Rome Statute have faced challenges in incorporating international

criminal law in their domestic legislation. Each state has its own legal framework and political and cultural background, which will affect its approach towards the Rome Statute. But based on the majority of states' experiences with regard to the implementation issue, there are common features that can be analysed and could be beneficial for other states, which are yet to ratify.

The states selected in this chapter are divided into sections according to their regions. It covers African, European, Asian and other selected states' approaches. Some of the selected states are members of The Organization of Islamic Cooperation (OIC), thus, considered Muslim states. As the majority of the African Union states and all European Union States are members at the ICC, these approaches will be compared to those of League of Arab States' members. The regional organisations policies towards the ICC will be examined as well, as they have a vital role in the ratification decisions of their member states.

In addition to the states' approaches, some international organisations and NGOs have created model laws that can be adopted by states during the implementation process. These initiatives were created to assist states that had insufficient resources to draft their own legislations. As the incorporation process requires resources, both financial and technical, some states will be unable to provide them, so model laws and guidelines to the implementation process were provided by regional organisations and NGOs. The Arab Model will be reviewed and analysed in the last part of this chapter.

2.2 African States

Africa is the most widely represented region in the ICC, 47 members of the African Union (AU) participated in the Rome Conference, 43 African states are signatories to the Rome Statute, and 34 of them have ratified the Statute to date.¹ Several African states have already

¹ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 12 April 2013.

completed and enacted comprehensive legislation incorporating the Statute in their domestic laws.² The ICC has exercised its jurisdiction in the region in different cases and various situations. The UN Security Council referrals to the ICC were for African situations as well.³

Despite the poor human rights records of African states and the decades of armed conflicts in the region, the approaches of African states towards the ICC have been distinctive and remarkable. Thus their initiatives towards ratifying and implementing the Rome Statute, despite lacking resources in some states, should be analysed and studied in a way to compare it with the approaches of Arab states towards the ICC. Odinkalu contends that:

“African states generally have a poor record of compliance with obligations under international human rights treaties. The reasons for this poor record are, on closer examination, much more complicated than a straightforward absence of will on their part to take these norms seriously, although this is clearly a factor. It is conceivable that far from being involved in deliberately subverting the relevant instruments, many of the states genuinely lack the skills, personnel and resources required to comply with the complex web of obligations and norms undertaken by them through these treaties.”⁴

All African states are members of the regional organisation, the African Union,⁵ which resembles the League of Arab States. Accordingly, the AU’s position should also be reviewed, as it shows that regional organisations can play an important role in the ratification of international treaties. The AU has taken steps to fully ratify the Rome Statute among its member states, In 1998, a resolution was issued by the African Commission on Human and

² See more O. Bekou and S. Shah, ‘Realising the Potential of the International Criminal Court: The African Experience’ (2006) 6 Human Rights Law Review 499-544; Max du Plessis, ‘South Africa’s Implementation of the ICC Statute: An African Example’ (2007) 5 Journal of International Criminal Justice 460-479; Daniel D Ntanda Nsereko, ‘Implementing the Rome Statute within the Southern African Region (SADC)’ in Claus Kreß and Flavia Lattanzi (ed), *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues* (1st edn, Editrice il Sirente 2000).

³ See ICC, *Situations and Cases* <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 15 August 2014.

⁴ Chidi Anselm Odinkalu, ‘Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa’ (2003) 47 Journal of African Law 1-37, 24.

⁵ Morocco is the only African state, which is not member to the AU.

Peoples' Rights asking all parties of the African Charter on Human and Peoples' Rights to sign and ratify the Rome Statute.⁶ The Organisation of the African Unity at that time, which is now replaced by the AU, Ministerial Conference on Human Rights, which met at Grand Bay, Mauritius in 1999, adopted a Declaration and Plan of Action, which included a request to member states to ratify the Statute.⁷ A resolution on the Rome Statute adopted in Pretoria, South Africa, by the African Commission in 2002,⁸ reiterated the need for ratification of the Rome Statute, as well as its incorporation into national legislation. Further reinforcing the importance of ratification, the AU included the need to ensure that all member states ratify the Rome Statute as one of the five commitments in its 2004-2007 Strategic Plan.⁹

Moreover, the AU member states made significant steps toward fighting impunity, in the Constitutive Act of the African Union, adopted in 2000 at the Lomé Summit in Togo, entered into force in 2001,¹⁰ and subsequent AU resolutions, as well as regional pacts, such as the Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact) adopted in Nairobi in December 2006 and entered into force in June 2008.¹¹

In 2005, in Banjul, Gambia, a resolution was issued by the African Commission in Banjul, Gambia, which urged the ratification and the implementation of the Rome Statute by the state members, and the withdrawal from the bilateral immunity agreements. Article 98 of the Rome Statute has been used as a loophole by the United States, which have been seeking to sign bilateral agreements with some AU member states in order to undermine the aims of the Court by making sure that the US nationals would be safe from being surrendered to the Court.¹² Consequently, the Banjul resolutions called for the withdrawal of the member states

⁶ African Commission on Human and Peoples' Rights, 24th ordinary session, Banjul 31 October 1998.

⁷ The first OAU Ministerial Conference on Human Rights, Mauritius 16 April 1999.

⁸ African Commission on Human and Peoples' Rights, Pretoria 1 May 2002.

⁹ The Commission of the African Union, Strategic Plan, Volume 3: 2004-2007 Plan of Action, May 2004.

¹⁰ AU Statute, Article 4(h) affirms the right of the AU to "...intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity...".

¹¹ International Conference on the Great Lakes Region, Pact on Security, Stability and Development in the Great Lakes Region, 14 and 15 December 2006, Article 8 reads, in part: "The Member States, in accordance with the Protocol on the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, recognize that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples, and undertake in particular: a) To refrain from, prevent and punish, such crimes;"

¹² See more Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98' (2008) 8 International Criminal Law Review 1-54.

from these US agreements, and condemning and rejecting impunity.

Some African Union member states like Egypt, Libya, Tunisia, Algeria, Morocco, Comoros, Djibouti, Mauritania and Somalia are also members of the Arab league, and to date only three of them, Comoros, Djibouti and Tunisia, have ratified the Rome Statute. Comoros and Djibouti are more engaged in the AU and followed the approach of the majority of African states in ratifying the Rome Statute early. Tunisia ratified the Rome Statute in 2011 after a change to its regime. Libya was the only African State to vote against the Statute.

2.2.1 Senegal

The first state in the world to sign the Rome Statute was Senegal on 18 July 1998, and ratified on 2 February 1999. Despite its early commitment to the ICC, it wasn't until 2007 that Senegal amended its Penal Code to incorporate international crimes.¹³ In reviewing its existing criminal, procedural and constitutional laws, Senegal collaborated with Niger to establish an expert committee to oversee the implementation process.¹⁴ This practical experiment shows that, even if a single state does not have the required resources, it can still cooperate with other states to achieve the goal of implementing the Rome Statute.

Cooperation between states can take various forms, and has proved to be an effective method of assisting less developed states in the implementation process. Two or more states can team-up and create a committee, commission or a task force to handle the implementation process. Bilateral outreach is another form of such cooperation, for example, the Canadian Ministry of Justice has advised and provided technical assistance to West African states.¹⁵ Another route for gaining assistance is through civil society and NGOs: for example, the Ministry of justice in the Democratic Republic of Congo, organised seminars to discuss the

¹³ Le Code Penal du Sénégal, Loi no 2007-02 du 12 fevrier 2007 modifiant.

¹⁴ Human Rights Watch, 'The Status of ICC Implementing Legislation; States Parties Need to Expedite Enactment of Implementing Legislation', < <http://www.hrw.org/legacy/campaigns/icc/docs/icc-implementation.pdf>> accessed 10 March 2013.

¹⁵ *ibid*, Canada advised on the implementation of the Rome Statute to the Economic Community of West African States (ECOWAS), while the French government provided assistance to Cameroon.

implementing of legislation with interested groups of the public.¹⁶ This approach, as adopted by Senegal and some other African states, could also be applied in some Arab states which might require technical and legal assistance in the ratification and implementation process of the Rome Statute.

As for the enacted legislation, the Senegalese legislator adopted a “direct transposition” technique by reproducing the Rome Statute texts into the Penal Code, although a different or broader text was adopted in some articles.¹⁷ For example, in the list of protected groups in the definition of the crime of genocide in Article 431-1, it was indicated by the legislator that the protected group could be ‘determined by any other criteria’.¹⁸ Such a large scope in the definition could have been adopted from the French Penal Code,¹⁹ which indicated that the legislator aimed to provide protection to more victims or groups, and so followed a well-established legal system like the French one.²⁰ A similar approach was adopted in Article 431-2 in the acts of the crimes against humanity, which are extended beyond the acts found in the Rome Statute, while on the other hand the notion of ‘persecution’ is absent from the Senegalese text.²¹ Article 431-3 of the Senegalese Penal Code, which lists war crimes, omits important provisions from the Rome Statute, for example it does not list ‘civilians under enemy control’, protected by the Fourth Geneva Convention as being one of the protected categories.²² It also omits the content of paragraph 2(b)(xxv) of Article 8 of the Rome Statute on the use of the starvation of civilians as a weapon of war, and the war crime of forced

¹⁶ See PGA and Réseau Parlementaire pour les Droit de l’Homme (Repadhoc), *Kinshasa Workshop on the Fight against Impunity Complementarity Project*, 31 May 2014 <<http://www.pgaction.org/news/kinshasa-workshop-on-the-fight-against-impunity-complementarity-project.html>> accessed 23 April 2014.

¹⁷ M. Niang, ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ (2009) 7 *Journal of International Criminal Justice* 1047-1062, 1049.

¹⁸ Loi no 2007-02 du 12 Fevrier 2007 modifiant le Code penal du Sénégal, <<http://www.justice.gouv.sn/droitp/CODE%20PENAL.PDF>> accessed visited on 08 July 2013.

¹⁹ France: Code pénal (amendé 1999), 1 March 1994, Article 211-1; The French text adds that the group can be determined by any arbitrary criterion. The word ‘arbitrary’ is not used by the Senegalese text; which would have been a clear indication of a choice of a subjective criterion when it comes to defining the protected groups.

²⁰ M. Niang, ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ (2009) 7 *Journal of International Criminal Justice* 1047-1062.

²¹ Senegal Penal Code, Article 431-2, refers to the ‘causing of bodily or mental harm based on political, racial, national, ethnic, cultural, religious or sexist motives’

²² Senegal Penal Code, Article 431-3.

pregnancy referred to in Article 8(2)(b)(xxii) of the Statute.²³

Article 28 of the Rome Statute has not been replicated by Senegal regarding command responsibility; because there is no well-known legal text or developed jurisprudence on command responsibility in Senegal, criminal liability is only attached to individuals for acts that have been committed by them as main offenders or as accomplices.²⁴ Nor did the Senegalese legislator adopt Article 27 of the Rome Statute, which removes any immunity of the head of state or government officials.²⁵ Article 101 of the Senegalese Constitution provides that immunity and privilege should be given to the President of the Republic and members of the government. Senegal also issued a law to update its criminal procedure in order to allow it to cooperate with the ICC.²⁶ Articles 677-1 to 677-11 have been added to the Criminal Procedure Code to facilitate the cooperation mechanism with the Court by covering all aspects found in Article 88 of the Rome Statute.²⁷

2.2.2 Uganda

The Rome Statute was signed by Uganda on 17 March 1999 and ratified on 14 June 2002.²⁸ Uganda is a dualist state, as such, international law cannot be applied directly as a source of law but rather has to be incorporated by enacting an Act of Parliament.²⁹ The Ugandan ICC Act, which was adopted on 10 March 2010,³⁰ and came into force in June 2010, covers both cooperation and substantive provisions. According to Section 2 of the Act, the purpose of the new law is to give the Rome Statute the force of law in Uganda, to implement obligations

²³ Amnesty International, “Senegal; Commentary on implementing legislation for the Rome Statute”, 30 September 2007, <<https://www.amnesty.org/en/documents/afr49/002/2007/en/>> 2 October 2014

²⁴ M. Niang, ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ (2009) 7 *Journal of International Criminal Justice*, 1047-1062, 1054.

²⁵ *Ibid*, 1056.

²⁶ Law no. 2007 05 of 12 February 2007.

²⁷ Amnesty International, “Senegal; Commentary on implementing legislation for the Rome Statute”, 30 September 2007, <<https://www.amnesty.org/en/documents/afr49/002/2007/en/>> 2 October 2014.

²⁸ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

²⁹ Constitution of the Republic of Uganda, Amended by the Constitution (Amendment) Act, Act 11/2005 and the Constitution (Amendment) (No.2) Act, 21/2005, Article 286.

³⁰ Uganda, International Criminal Court Act, No.11 of 2010, Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010.

assumed by Uganda under the Rome Statute, and to make further provisions in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes.³¹ The Act also provides the procedures for the arrest and surrender of individuals to the ICC.

The Rome Statute principles were adopted in the ICC Act 2010. These principles could be amended during implementation, if required by domestic legal order but without affecting the aims of the principles.³² The Act prohibits the prosecution of persons below 18 years of age - even though the age of criminal responsibility in Uganda is 12 years,³³ and the Geneva Conventions Act does not preclude prosecution of individuals below 18 years.³⁴ There have been discussions in Uganda as to whether the age of criminal responsibility should be raised to 16 years. This gives supremacy of international law over domestic law, so that those below 18 years of age who commit genocide, crimes against humanity and war crimes will not be prosecuted.³⁵

The ICC Act 2010 contains provisions relating to the issue of immunity, which provides that the existence of immunities or special procedures rules attached to the officials is not a ground for refusing or postponing a surrender request to the ICC.³⁶ Despite being similar to the Rome Statute in regards to the waiver of immunities, but the provision is limited as it only relates to persons to be surrendered to the ICC. In contrast, Article 98(4) of Uganda's Constitution of 1995 (as amended) grants the President immunity as long as he is still holding office, so a sitting Ugandan president cannot be handed over to the ICC for prosecution.³⁷

On 16 December 2003, Uganda became the first state to refer a situation to the ICC when the President of Uganda, Yoweri Museveni, referred the situation concerning the operations of the Lord's Resistance Army (LRA) in northern Uganda, to the Prosecutor of the Court for

³¹ Uganda, ICC Act, Section 2.

³² Uganda, ICC Act, Section 19.

³³ Uganda, The Children Act, Section 88.

³⁴ Uganda, Geneva Conventions Act, Chapter 363, 16 October 1964.

³⁵ See Christopher Gevers, 'Immunity and the Implementing Legislation of South Africa, Kenya and Uganda' [2011] SSRN Online Journal.

³⁶ Uganda, ICC Act, Section 25.

³⁷ Constitution of the Republic of Uganda, 22 September 1995.

further investigation.³⁸ The situation was assigned to Pre-Trial Chamber II on 5 July 2004, and the ICC Prosecutor announced the beginning of an official investigation on 29 July 2004.³⁹ In 2007, agreement was signed between Uganda and the LRA, which gave a role to national authorities as discussed in the next section. The Pre-Trial Chamber II, on 29 February 2008, requested from Uganda the provision of information on the implications of the agreement signed with the LRA on the execution of the arrest warrants.⁴⁰

2.2.2.1 The ICD

The International Crimes Division (ICD) is Uganda's complementarity-related initiative.⁴¹ The ICD (formerly the War Crimes Division) is a special division of Uganda's High Court, established in July 2008,⁴² with a mandate to prosecute genocide, war crimes, and crimes against humanity, as well as other crimes including terrorism and human trafficking.⁴³ Its establishment was a way of fulfilling the government of Uganda's commitment to the actualising of the Agreement on Accountability and Reconciliation. Considering the civil wars and the series of other internal conflicts that Uganda has experienced in the recent past, it decided to establish the ICD to try the perpetrators of war crimes and crimes against

³⁸ ICC, Situation in Uganda, Case no. ICC-02/04-01/05.

³⁹ See more Kasaija Phillip Apuuli, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 391-409.

⁴⁰ The Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 29 June 2007 in Juba, southern Sudan; The Agreement envisaged, inter alia, the establishment of national legal arrangements for ensuring justice, reconciliation and the accountability of individuals alleged to have committed serious crimes or human rights violations in the course of the northern and north-eastern Uganda conflict; The Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008; The Annexure provides for the establishment of a special division of the High Court of the Republic of Uganda, entrusted with the task of "try[ing] individuals who are alleged to have committed serious crimes during the conflict"

<http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf> accessed 15 March 2013.

⁴¹ See more Mohamed El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* 83-120; Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

⁴² The High Court (International Crimes Division) Practice Directions ("ICD Practice Directions"), Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

⁴³ ICD Practice Directions, para. 6(1).

humanity, including commanders of the LRA and other rebel groups.⁴⁴

The ICD originally meant to be part of a comprehensive peace agreement with the LRA, but then it has come to be viewed as a court of ‘complementarity’ with respect to the ICC, fulfilling the principle of complementarity stipulated in the Preamble and Article 1 of the Rome Statute. The ICD’s mission is to fight impunity and promote human rights, peace and justice. The vision is that Uganda should have a strong and independent Judiciary that delivers justice, and thereby contributes to the economic, social and political transformation of society based on rule of law, and is seen by the people to do so.⁴⁵

Section 6 of The High Court (International Crimes Division) Practice Directions, No.10 of 2011 is to the effect that, without prejudice to Article 139 of the Ugandan Constitution, the Division shall try any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act,⁴⁶ The Geneva Conventions Act,⁴⁷ The International Criminal Court Act, No. 11 of 2010 or under any other penal enactment. Penalties for the crimes under the ICD’s jurisdiction range from a few years imprisonment to the death penalty.⁴⁸

The ICD’s jurisdiction is not limited to particular individuals or categories of individuals, such as LRA members or members of the Ugandan army.⁴⁹ However, Uganda’s Amnesty Act, which provides for an amnesty for any rebel who ‘renounces and abandons involvement in the war or armed rebellion is in effect.’⁵⁰ Individuals may be barred from receiving amnesty if the minister of internal affairs obtains an ‘instrument’ from parliament to that effect, but no such instrument has yet been applied for.⁵¹

⁴⁴ See more HRW, *Justice for Serious Crimes before National Courts-Uganda’s International Crimes Division*, 15 January 2012 < <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division>> accessed 20 March 2013.

⁴⁵ *ibid.*

⁴⁶ Uganda, Penal Code Act 1950.

⁴⁷ Uganda, Geneva Conventions Act 1964, 16 October 1964.

⁴⁸ See Geneva Conventions Act, Article 2; ICC Act, Articles 7-9.

⁴⁹ ICD Practice Directions, para. 6.

⁵⁰ Uganda, Amnesty Act, Sec. 3(1)(b), 21 January 2000.

⁵¹ Uganda, Amnesty (Amendment) Act 2006, Sec.2a, 24 May 2006.

Although the ICC opened an investigation into crimes committed in northern Uganda in 2004, and has issued arrest warrants for several leaders of the LRA, national trials for serious crimes in Uganda could make a major contribution to securing justice for victims of Uganda's two decades of conflict in the north between the LRA and the Ugandan Army.⁵² There is currently no overlap between ICC and ICD suspects, and the only ICD war crimes suspect, Thomas Kwoyelo,⁵³ has never been subject to an ICC arrest warrant. At the same time, the ICC Prosecutor has noted that some of the incidents covered by the indictments against Kwoyelo include incidents that have also been investigated by the ICC.⁵⁴

The ICD approach in Uganda could be a practical choice for some of the Arab states that are facing conflicts. For example, in Syria, the war crimes tribunal in Uganda could be applied as a model example. Although Uganda is an ICC member state, it is more efficient for national courts to conduct trials of serious crimes that violate international law. National trials for serious crimes in Syria could make a major contribution to securing justice for victims of Syria's conflict if all the legal and political obstacles could be resolved. Such approaches and initiatives might be a meaningful forum for ensuring justice in the region if they were applied competently.

The approaches of other African states, like the mixed chambers of the Democratic Republic of the Congo (DRC) or the cooperation in the Kenyan situation, should also be taken into consideration in the study of the issue of the Arab states' attitudes towards the ICC. The majority of African states, supported by the African Union, have joined the ICC despite conflicts and the residual culture of impunity for senior figures in some cases. In addition, the examples of referral to the Court by some states shown above gives evidence of a strong political will to end their conflicts by applying justice and seeking reparation for victims, while their initiatives to implement the Rome Statute into their domestic legislation are a way to prevent any future atrocities from happening and to try any perpetrators.

⁵² See HRW, *Justice for Serious Crimes before National Courts-Uganda's International Crimes Division*, 15 January 2012 < <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division> > accessed 20 march 2013.

⁵³ High Court of Uganda (War Crimes Division), *Uganda v. Kwoyelo Thomas*, Case No. 02/10, Indictment, August 31, 2010; Kwoyelo was charged with 12 counts of violations of Uganda Geneva Conventions Act, including the grave breaches of willful killing, taking hostages, and extensive destruction of property in the Amuru and Gulu districts of northern Uganda.

⁵⁴ See OTP, "Weekly Briefing," issue no. 65, 23-29 November 2010, P. 1.

African states played an invaluable role in ensuring that the Rome Conference negotiations succeeded, and some were among the first to ratify the Rome Statute (Senegal being the very first state to do so). In addition, three of the situations currently before the Court were self-referred by African State Parties to the Rome Statute; Uganda, the Democratic Republic of the Congo and the Central African Republic.

Most African states suffered greatly from colonialism, like Arab states, so they could have concerns about being persuaded, especially by former colonial oppressors, to join an institution like the ICC. But despite these concerns more than thirty African states have now ratified the Rome Statute and many have amended their domestic legislations to implement the Statute. Many states in Africa have also witnessed armed conflicts, similar to the ongoing conflicts in some of the Arab states. In most of the African conflicts, the political will to end impunity was found and the path of international criminal justice was chosen by these states to put an end to the atrocities and restore peace and justice.

2.3 European States

The European Union (EU) has supported the creation of the ICC in different ways. Through diplomacy and member states' support, the EU-ICC relation is considered very successful in terms of cooperation and commitment.⁵⁵ However, as the EU is not a 'state' and it is classified as an international organisation, cooperation between the two entities can still exist to a certain degree.⁵⁶ Beside financial support,⁵⁷ the EU supported the creation of the ICC by advocating its objectives and aims as far as ending impunity, as the ICC principles "are fully

⁵⁵ Cedric Rynjaert, 'Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union' (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 46-80.

⁵⁶ Rome Statute, Article 87(6).

⁵⁷ The EU, through a dedicated budget line created by the European Parliament has provided over EUR 20 million under the European Initiative for Democracy and Human Rights (EIDHR) for projects supporting the ICC and international criminal justice; See EU Annual Report on Human Rights, adopted by the Council on 3 October 2005 <<http://www.consilium.europa.eu/uedocs/cmsUpload/HR2005en.pdf>> accessed 19 April 2013.

in line with the principles and objectives of the Union”.⁵⁸ After the creation of the ICC and it becoming operational on 1 July 2002, the relation between the EU and the ICC developed.

The main foundation of the relationship between the EU and the ICC is the Common Position on the International Criminal Court,⁵⁹ while the main instrument implementing the cooperation obligations of the Rome Statute on behalf of the EU is the EU-ICC Agreement.⁶⁰ Both instruments have been adopted under the Second Pillar covering the EU’s Common Foreign and Security Policy (CFSP).⁶¹ However, measures relating to the implementation of most other Rome Statute obligations, to which the Union has committed itself by virtue of the Common Position, have been adopted under the Third Pillar.⁶² Finally, the promotion of the principles of international criminal law in third countries has taken place pursuant to First Pillar instruments, through various international agreements concluded by the Community.⁶³

The EU committed itself to the fight against impunity by virtue of the Common Position on the International Criminal Court adopted by the European Council (EC) in 2001, which establishes the basic framework governing the EU-ICC relations. In accordance with the theory of the EU’s external relations, Common Positions establish the Union’s policy

⁵⁸ Recital 3 of Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, O.J. L 155/19, 12.6.2001.

⁵⁹ Council Common Position, 2003/444/CFSP of 16 June 2003 on the International Criminal Court, O.J. L 150/67, 18.6.2003.

⁶⁰ Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/49, 28.4.2006.

⁶¹ The First Pillar incorporating EU action in fields of European Community competence and the Third Pillar: the Police and Judicial Cooperation in Criminal matters (PJCC).

⁶² Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, O.J. L 167/1, 26.6.2002; Decision 2003/335/JHA of 8 May 2003 concerning the investigation and prosecution of genocide, crimes against humanity and was crimes, O.J. L 118/12, 14.5.2003; Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, O.J. L190/1, 18.7.2002

⁶³ The ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, it is the most comprehensive partnership agreement between developing countries and the EU. In recognising that impunity is one of the factors that contribute to cycles of violence and insecurity, the preamble and Article 11.6 of the revised Cotonou Agreement include a clear commitment of ACP and EU states to combat impunity and promote justice through the International Criminal Court. Since the ICC is based on the principle of complementarity, the 2005 revised Cotonou Agreement innovates with obligations to ensure prosecution of the most serious crimes at the national level and through global cooperation. Additionally, Article 11.6 of the Agreement includes a clear-cut provision that obliges States Parties to: “(a) Share experience on the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court and (b) Fight against international crime in accordance with international law, giving due regard to the Rome Statute. The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.”

statement on certain themes.⁶⁴ The EU assumed the obligation to contribute by raising the issue in its relations with third parties, and by assisting with implementation of the Statute.⁶⁵ The Common Position was amended in 2002,⁶⁶ and reached its current form in 2003.⁶⁷

The 2003 Common Position endorses the principles and rules of international criminal law of the Rome Statute and identifies the priorities and areas in which the European Union and its member states must act. In this respect, priority is given to the universal accession of the Rome Statute,⁶⁸ the implementation of the Rome Statute by measures taken by the European Union and its member states,⁶⁹ and the preservation of the integrity of the Rome Statute.⁷⁰ According to the Council's Common Position, the EU member states undertake measures to raise issues of ratification, acceptance, approval and accession in their negotiations with third party states, groups of states or relevant regional organisations, as well as to provide technical and financial assistance.

The Common Position provisions have been supplemented and further elaborated on, in the Action Plan to follow-up on the Common Position on the International Criminal Court, adopted in 2002 and amended in 2004.⁷¹ The Action Plan is divided into three sections: coordination of EU activities; universality and integrity of the Rome Statute; and independence and effective functioning of the ICC.⁷² Member States are also encouraged to contribute to the Special Working Group on crimes of aggression,⁷³ to put the necessary legislation in place to implement the Rome Statute.⁷⁴ This includes the Agreement on Privileges and Immunities of the ICC,⁷⁵ to co-operate with the ICC in investigating and prosecuting crimes within its jurisdiction. In particular, through the provision of judicial

⁶⁴ Treaty on European Union, Article 15.

⁶⁵ Common Position of the 2001, Article 2.

⁶⁶ See 2002/474/CFSP O.J. L 164/1, 22.6.2002.

⁶⁷ Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, O.J. L 150/67, 18.6.2003.

⁶⁸ *ibid*, Recital 7.

⁶⁹ *ibid*, Recital 8.

⁷⁰ *Ibid*, Recital 10.

⁷¹ Action Plan to follow-up on the Common Position on the International Criminal Court, Brussels, 28 January 2004, Doc 5742/04 LIMITE.

⁷² Action Plan, Preamble.

⁷³ Action Plan, Section C.2(vii).

⁷⁴ Action Plan, Section C.2(viii).

⁷⁵ Action Plan, Section C.2(x).

assistance, compliance with requests for arrest and surrender and the enforcement of sentences,⁷⁶ and promoting effective cooperation between national and European law enforcement, immigration authorities and the ICC.⁷⁷ Together with the Common Position, the Action Plan provides the framework for all direct EU action on the ICC, and lays the foundations of the relationship between the Union, the Court and individual member states.

Cooperation with the ICC is a matter for both the EU and its member states, thus EU State Parties to the Statute are under an obligation to execute any request for cooperation made by the Court.⁷⁸ The cooperation of intergovernmental organisations, such as the EU, is important for the ICC to perform its functions effectively. Recognising the significance of the role that international organisations can play in post-conflict situations or situations where serious disturbances have occurred, in which the ICC operates. The assistance such organisations may provide to the Court, led to the inclusion of Article 87(6) of the Rome Statute, enabling the ICC to request assistance from intergovernmental organisations.⁷⁹ Such a cooperation agreement could be implemented between the ICC and the League of Arab States.

The EU and the ICC had an agreement to define the terms of cooperation and assistance between them.⁸⁰ The origin of the agreement can be found in a request made by the OTP regarding strategic information from the EU about issues of concern to the OTP's investigations. The agreement, which was concluded by the EU, on the basis of Article 24 of the Treaty on European Union (TEU),⁸¹ has narrow scope and is limited to 'hardcore' elements of cooperation and assistance, focusing, as per Article 87(6) of the Rome Statute, on the provision of information and documents. The Agreement is not intended to supplant the relationships the Court has with individual member states; in fact, it is made explicit that the

⁷⁶ Action Plan, Section C.2(ix).

⁷⁷ Action Plan, Section C.2(xi).

⁷⁸ Rome Statute, Article 86.

⁷⁹ The Prosecutor may also request assistance for the initiation of an investigation from such organisations in accordance with Article 15(2).

⁸⁰ Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/50, 28.4.2006. The Agreement entered into force on the 1 May 2006.

⁸¹ Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/49, 28.4.2006.

Agreement does not cover cooperation with EU member states.⁸²

EU member states have been distinguished by the rate of their implementation of the ICC obligations - in fact, the majority of the states that have passed implementing legislations are EU member states.⁸³ This reveals a possible connection between higher implementation rates and membership of the EU.⁸⁴ It may be indirectly be attributed to the peer pressure involved in the active involvement of many EU member states in drafting the Rome Statute, and the EU's active promotion for the ICC.⁸⁵ While it was similar involvement the Arab states in the negotiations and drafting of the Statute, but it resulted in low ratifications due to several factors, which will be discussed at later chapters. The League of Arab states should be more involved in the promotion of the ICC and support ratification initiatives similar to the EU's position. Below are some examples of EU member states, which ratified and implemented the Statute, although they were faced with challenges and obstacles.

2.3.1 The United Kingdom

The UK adopts the dualist approach in relation to international treaties;⁸⁶ therefore it was necessary to pass a national law to incorporate the core crimes of the Rome Statute into the British legal system. Before the implementing legislation, legislative provisions which incorporated international crimes into the British criminal justice system were variable and were compromised mainly on three different acts; the Geneva Conventions Act 1957,⁸⁷ the

⁸² Recital 10 and also implicitly Articles 2(1) and 3(1) EU-ICC Agreement.

⁸³ Nicolaos Strapatsas, 'The European Union and its Contribution to the Development of the International Criminal Court' (2002) 33 RDUS 399-399.

⁸⁴ See more Martijn Groenleer and David Rijks, 'The European Union and the International Criminal Court: The Politics of International Criminal Justice' in Knud Erik Jørgensen (ed), *The European Union and International Organizations* (1st edn, Routledge 2009).

⁸⁵ See Common Position, Article 9(2); By virtue of this provision, the Common Position applies to Romania, Bulgaria and Turkey.

⁸⁶ See John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *The American Journal of International Law* 310.

⁸⁷ UK, Geneva Conventions Act, c.53[1957] Law Reports: Statutes 543 as amended by the Geneva Conventions (Amendment) Act 1995, c.27.

Genocide Act 1969,⁸⁸ and the War Crimes Act 1991.⁸⁹

The UK decided to prepare and implement legislation prior to submitting its ratification instrument. In England, Wales and Northern Ireland,⁹⁰ the Rome Statute was implemented by the International Criminal Court Act 2001,⁹¹ which came fully into force on 1 September 2001.⁹² The UK ratified the Rome Statute on 4 October 2001, fulfilling its aim of being amongst the first sixty states to do so.⁹³ The 2001 Act has two major purposes: to ensure that the UK is able to co-operate fully with the ICC and to enact into domestic law the substantive offences found in the Statute.⁹⁴

To take advantage of the complementarity provisions in the Rome Statute, by investigating and prosecuting offences itself, the UK had to incorporate the ICC crimes into its domestic law. This was achieved by part 5 of the ICC Act, which defines genocide, crimes against humanity and war crimes by reference to Articles 6, 7, and 8(2) of the Rome Statute.⁹⁵ Crimes against humanity and war crimes, other than grave breaches of the Geneva Conventions and Additional Protocol I, were criminalised in the UK for the first time under the ICC Act.⁹⁶ Moreover, the relevant interpretations that the British courts apply, in relation to the ICC crimes, were expanded. For example, the ICC Act provides that “in interpreting and applying the provisions of . . . [Articles 6-8(2) of the ICC Statute] . . . the court shall take into account . . . [a]ny relevant Elements of Crimes adopted in accordance with Article 9 of the Rome Statute . . .”.⁹⁷ The domestic courts are now bound and obliged to take the

⁸⁸ UK, Genocide Act, c.12 [1969] Law Reports: Statutes 75.

⁸⁹ UK War Crimes Act, c.13 [1991] 1 Law Reports: Statutes 101.

⁹⁰ The Act applies principally to England, Wales and Northern Ireland. Scotland has its own implementing legislation, the International Criminal Court (Scotland) Act 2001, 2001 ASP 13.

⁹¹ International Criminal Court Act 2001 c.17, 11 May 2001, 1 Law Reports: Statutes 1367.

⁹² Pursuant to s 82, Secretary of State Jack Straw brought the Act into force with the International Criminal Court Act 2001 (Commencement) Order 2001, 2001 SI 2161, as amended by 2001 SI 2304.

⁹³ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

⁹⁴ Robert Cryer, ‘Implementation of the International Criminal Court Statute in England and Wales’ (2002) 51 *The International and Comparative Law Quarterly* 733-743.

⁹⁵ UK, ICC Act 2001, section 50.

⁹⁶ R. Cryer and O. Bekou, ‘International Crimes and ICC Cooperation in England and Wales’ (2007) 5 *Journal of International Criminal Justice* 441-459.

⁹⁷ UK, ICC Act, Section 50(2); The Elements of Crimes were incorporated into the British legal system by Statutory Instruments, the most recent of which is the International Criminal Court Act 2001 (Elements of Crimes) (No. 2) Regulations 2004, 2004, SI 3239.

Elements of Crimes into account according to the ICC Act.⁹⁸

The ICC Act clearly incorporates the principle of command responsibility into domestic law,⁹⁹ as previously the British legal system had no general principle of liability.¹⁰⁰ There has been a debate about whether command responsibility is a form of imputed liability, secondary liability, or a form of dereliction of duty offence.¹⁰¹ The ICC Act appears to adopt the view that command responsibility is a form of secondary liability.¹⁰²

The immunity issue was one of the most difficult issues that faced the UK during the implementation process, Section 23 of the Act provides for cases of immunity, and reads: “(1) Any state or diplomatic immunity attaching to a person by reason of a connection with a State Party to the ICC Statute does not prevent proceedings under this part in relation to that person. (2) *Where*— State or diplomatic immunity attaches to a person by reason of a connection with a state other than a State that is Party to the ICC Statute, and a waiver of that immunity is obtained by the ICC in relation to a request for that person’s surrender, the waiver shall be treated as extending to proceedings under this part in connection with that request...”. There is a separation of State Parties and non-parties to the Statute for different treatment. This approach was adopted as a response to the problem of immunities. A State Party has already agreed, according to Article 27 of the Rome Statute, to waive the immunity of its officials before the ICC, thus there is no express requirement for a waiver.¹⁰³ Article 98(1) of the Rome Statute makes it clear that the obligation is on the ICC to obtain the relevant waiver. The ICC cannot place a state under conflicting obligations, one to the Court,

⁹⁸ Robert Cryer, ‘Implementation of the International Criminal Court Statute in England and Wales’ (2002) 51 *The International and Comparative Law Quarterly* 733-743.

⁹⁹ Section 65(5) of the ICC Act provides for reference to ICC and other relevant international jurisprudence for interpreting the principle of command responsibility. Section 66 of the ICC Act also incorporates the mental element described in the Rome Statute Article 30. As in the Statute, the ICC Act requires that the person accused of these ICC crimes have the mental element of intent and knowledge of the material elements of the offence to be held criminally responsible and liable for punishment for a crime.

¹⁰⁰ Colin Warbrick and others, ‘Implementation of the Criminal Court Statute in England and Wales’ (2002) 51 *International and Comparative Law Quarterly* 733-743.

¹⁰¹ See more Barbara Goy, ‘Individual Criminal Responsibility before the International Criminal Court’ (2012) 12 *International Criminal Law Review* 1-70; Mirjan Damaska, ‘The Shadow Side of Command Responsibility’ (2001) 49 *The American Journal of Comparative Law* 455; Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2005) 5 *Journal of International Criminal Justice* 159-183.

¹⁰² R. Cryer and O. Bekou, ‘International Crimes and ICC Cooperation in England and Wales’ (2007) 5 *Journal of International Criminal Justice* 441-459.

¹⁰³ Peter Lewis, ‘The United Kingdom’ in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 463.

and one to the state that is entitled to insist on immunity for its officials. A waiver obtained by the Court in relation to a request for surrender of a person from a non-State Party, will be treated as extending to proceedings for his arrest and surrender under national law.¹⁰⁴ The Secretary of State, after consulting the ICC and the state concerned, has the power to direct that proceedings shall not take place against a person who has state or diplomatic immunity.¹⁰⁵

2.3.2 The Netherlands

The Netherlands signed the Rome Statute on 18 July 1998 and ratified it three years later, on 18 July 2001.¹⁰⁶ The implementation of the Rome Statute in the Netherlands was a three-step process. Priority was given to the treaty's ratification,¹⁰⁷ which raised some constitutional compatibility issues. Next, the government and parliament put in place legislation enabling the Netherlands to provide the Court with various forms of legal assistance.¹⁰⁸ Finally, the Dutch government proposed legislative reforms, aimed at the prosecution of international crimes at national courts; the International Crimes Act came into force on 1 October 2003.¹⁰⁹ Thus the implementing legislation was prepared and adopted in two separate approaches: first, for cooperation issues and the second for substantive criminal law.¹¹⁰

As with any State Party, the Netherlands may be expected to implement all its obligations under the Statute faithfully, but these may take different dimensions because of being the host-state of the ICC. The ratification of treaties is governed by Article 91 of the Dutch constitution,¹¹¹ in which according to Article 91(3), treaties that contain provisions that

¹⁰⁴ *ibid.*

¹⁰⁵ UK, ICC Act 2001, Section 23(3)(4); See more the House of Commons Research Paper 01/39 The International Criminal Court Bill[HL], 73.

¹⁰⁶ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

¹⁰⁷ The Dutch Ratification Act 2001.

¹⁰⁸ Two acts were adopted in this respect: The Cooperation Act, entry into force 1 July 2002; and the Act containing amendments to the Dutch Penal Code enabling the prosecution of 'Article 70' crimes in the Netherlands, entry into force 8 August 2002.

¹⁰⁹ The Netherlands, the International Crimes Act, 19 April 2002, (no. 28, 337).

¹¹⁰ Göran Sluiter, 'The Netherlands' in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005).

¹¹¹ Constitution of the Kingdom of the Netherlands, June 2002.

“conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favor.” A few elements in the Rome Statute raised the question of constitutional compatibility.¹¹²

The question of immunities received considerable attention in the explanatory memorandum of the draft ratification act. The Dutch government believed that there was no conflict between Article 27 of the Rome Statute and Article 42 of the Dutch Constitution. Within the Netherlands constitutional order, the King has no powers of his own and would therefore be *de facto* incapable of committing any crimes under the Rome Statute and, even if such a situation would occur, he would be forced to step down as soon as the ICC would request his surrender, which would then be possible.¹¹³ The government took the position that “the king simply cannot commit the crimes contained in the Statute”.¹¹⁴ Nevertheless, it was established that it was more elegant to explicitly conclude that there was an incompatibility, theoretical or not.¹¹⁵ As a result, it was necessary that the Statute be adopted with a special procedure, which allows unconstitutional international treaties, to be adopted by a qualified majority vote without amending the constitution. After the adoption through this procedure, which had not been used before, the treaty concerned will be binding for the Netherlands and take precedence over all national law, including the constitution.¹¹⁶

Article 122 of the Dutch constitution provides that the government can grant pardon and amnesty, in accordance with the applicable laws and regulations.¹¹⁷ In other State Parties which may have similar provisions in their constitutions it may not be problematic because these states have no duty to execute sentences of imprisonment as they can always argue that

¹¹² Göran Sluiter, ‘The Netherlands’ in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹¹³ Goran Sluiter, ‘Implementation of the ICC Statute in the Dutch Legal Order’ (2004) 2 *Journal of International Criminal Justice* 158-178.

¹¹⁴ Explanatory Memorandum to the Ratification Act, TK, vergaderjaar 2000–2001, 27,484 (R1699), no. 3, at 9.

¹¹⁵ Goran Sluiter, ‘Implementation of the ICC Statute in the Dutch Legal Order’ (2004) 2 *Journal of International Criminal Justice* 158-178.

¹¹⁶ Council of Europe, Athens (Greece) 14-15 September 2006, 4th Consultation on the Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court-Progress Report Netherlands, at 2.

¹¹⁷ Constitution of Netherlands 1815 (rev. 2008); ARTICLE 122 reads: “1. Pardons shall be granted by Royal Decree upon the recommendation of a court designated by Act of Parliament and with due regard to regulations to be laid down by or pursuant to Act of Parliament.
2. Amnesty shall be granted by or pursuant to Act of Parliament.”

their willingness to enforce such sentences is subject to constitutional conditions. Accordingly, Article 110 of the Rome Statute could be incompatible with Article 122 of the Dutch constitution.¹¹⁸ Pursuant to Article 103(4) of the Statute, The Netherlands, as the host-state is obliged to accept and execute sentences of imprisonment if no other state is designated by the Court. As a result, The Netherlands cannot impose its own conditions as other State Parties may, and so has to forfeit its constitutional right to grant pardons and amnesties. The Dutch government solved this matter as it argued that constitution Article 122 contains a discretionary power, which pursuant to Article 92 of the constitution¹¹⁹ can allow the government to transfer such rights to an international organisation.¹²⁰

Most international crimes were criminalised in The Netherlands before implementing the Rome Statute, but in separate Acts with their own scope of application. The International Crimes Act replaced the Torture Act,¹²¹ the Genocide Act,¹²² and part of the War Crimes Act,¹²³ and incorporates all international crimes in one comprehensive act and under one general principles regime. The aim of the Act was to codify existing crimes under international law, rather than modifying substantive international law in this field. As a result, most of the definitions of the crimes have been taken from or inspired by definitions in existing multilateral instruments, especially the Rome Statute, which provides for the appropriate jurisdictional regime and incorporates key general principles of international criminal law.¹²⁴

¹¹⁸ Göran Sluiter, 'The Netherlands' in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹¹⁹ Constitution of Netherlands 1815 (rev. 2008); Article 92 reads: "Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3."; Article 91(3) reads: "Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favor."; See also Explanatory Memorandum to the Ratification Act, TK, vergaderjaar 2000–2001, 27,484 (R1699), no. 3, at 9 and 10.

¹²⁰ See more Göran Sluiter, 'Implementation of the ICC Statute in the Dutch Legal Order' (2004) 2 *Journal of International Criminal Justice* 158-178.

¹²¹ The Netherlands, Torture Act, 29 September 1988.

¹²² The Netherlands, Genocide Act, 2 July 1964.

¹²³ The Netherlands, War Crimes Act, 10 July 1952.

¹²⁴ Alper Çınar and Sander van Niekerk, 'Implementation of the Rome Statute in the Netherlands' [2007] SSRN Online Journal.

2.4 Asia-Pacific States

There are 19 Asia-Pacific State Parties to the Rome Statute of the ICC to date, including 2 Arab states (Jordan and Palestine).

2.4.1 Afghanistan

According to the 2004 Constitution, Afghanistan is an “Islamic Republic” and no law shall “contravene the tenets and provision of the holy religion of Islam”.¹²⁵ Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003.¹²⁶ The ICC may therefore exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards. The Ministry of Foreign Affairs had translated the Rome Statute into Dari and Pashto 13 years after accession on 30 May 2016 and sent it to the Ministry of Justice to publish it in the official gazette. According to the current Afghan constitution,¹²⁷ any international treaty or agreement signed by Afghanistan has to be published in the official gazette following approval by the parliament, with the documents being translated into Dari and Pashto.

The ICC has started a Preliminary Examination of the situation in Afghanistan, and it was made public in 2007.¹²⁸ It focusses on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between pro-Government forces and anti-Government forces, including crimes against humanity and war crimes.¹²⁹ The Preliminary Examination also focusses on the existence and genuineness of national proceedings in relation to these crimes. The findings of the Situation Analysis Section of the Office of the Prosecutor, published in the Preliminary Examination reports, show that two types of crimes against humanity and seven types of war crimes have been committed in Afghanistan since 1 May

¹²⁵ Afghanistan Constitution 2004; Articles 1 and 2.

¹²⁶ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

¹²⁷ Afghanistan Constitution 2004; Article 90.

¹²⁸ The Office of the Prosecutor (OTP) Report on Preliminary Examination activities 2007.

¹²⁹ OTP Report on Preliminary Examinations, 13 December 2011.

2003. The Office of the Prosecutor reports have so far only attributed potential crimes to parties of the conflict, which it sees as: 1) Pro-government forces that include Afghan National Security Forces (ANSF) and their international partners under the umbrella of International Security Assistance Force (ISAF), and, more recently, the Resolute Support Mission (RSM). 2) Anti-government forces such as the Taleban, the Haqqani network and Hezb-e Islami. Anti-government forces are accused of all nine of the crimes mentioned above. Pro-government forces have been accused of torture, only. The Office of the Prosecutor singled out the Afghan National Police (ANP) and the National Directorate of Security (NDS), as well as the CIA and the US military. In the last report issued in December 2015, the Office of the Prosecutor mentioned that, following a decision taken in October that year, it intended to send a delegation to Afghanistan to conduct admissibility assessments.

The National Security Council in Afghanistan (NSC) decided in January 2016 to establish a high-level, inter-ministerial committee,¹³⁰ led by Second Vice-President Sarwar Danish, to prepare for the ICC visit. It was to consult with international partners who provided military support regarding their position on the ICC request to send a delegation.¹³¹ The Ministry of Foreign Affairs asked NATO members and the US involved in Afghanistan about the nature of their relationship with the ICC. The US and Afghanistan signed the Bilateral Security Agreement 2015 (BSA), in which Kabul agreed neither to prosecute American soldiers, nor hand them over to a third party for the prosecution of war crimes.¹³² The US bilateral agreements under Article 98 of the Rome Statute are examined in more details in Chapter

¹³⁰ The Ministry of Interior, Ministries of Defense, Foreign Affairs and Justice, the NDS, Attorney General's Office, the Supreme Court and the Afghanistan Independent Human Rights Commission (AIHRC) all have representatives on the committee.

¹³¹ On 2 May 2012, the United States and Afghanistan signed the Enduring Strategic Partnership Agreement, a 10-year strategic partnership agreement that demonstrates the United States' enduring commitment to strengthen Afghanistan's sovereignty, stability, and prosperity and continue cooperation to defeat al-Qaida and its affiliates. On 30 September 2014, the United States and Afghanistan signed the Bilateral Security Agreement (BSA). The BSA entered into force on 1 January 2015.

¹³² Article 98 of the Rome Statute states that the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. Afghanistan is not bound to violate the 2015 Bilateral Security Agreement (BSA) and hand over any US national accused of war crimes to the ICC. However, the ICC can still prosecute US soldiers for alleged crimes committed on Afghan territory after 1 May 2003, despite the BSA and the fact that the US is not a member of the ICC. The ICC can still request the US or any of the ICC's State Parties to arrest perpetrators who are suspected of committing war crimes or crimes against humanity.

five as they are one of the concerns of some states, including the Arab states, in regards to the effectiveness of the ICC and its inability to prosecute American defendants.

The committee had two further tasks; collect all cases relevant to the Rome Statute that Afghanistan had prosecuted, and draft a regulation or a law to implement the Rome Statute and to establish the relationship to the ICC. The Afghanistan Independent Human Rights Commission (AIHRC), a member of the committee, is in charge of this task. The inter-ministerial committee also established a technical sub-committee consisting of qualified, mid-level officials to carry out these tasks. The inter-ministerial committee decided on 23 January 2016 to draft a regulation, but some members are lobbying for a law instead.¹³³ Approval of a law would require more time than a regulation, as a law requires the approval of the Afghan parliament while a regulation just needs the approval of the Afghan cabinet. As for the collection of information on cases relevant to the Rome Statute that have been prosecuted in Afghanistan, the government's intention is to show to the ICC their willingness to prosecute the alleged crimes, but the lack of capability of the national judiciary might cause delays.

Despite the government's preparations for the ICC visit, there are some arguments from some officials to postpone it.¹³⁴ Based on their arguments, that the cooperation with the ICC would destroy whatever trust existed between the government and Taleban.¹³⁵ However, this argument lost its strength on 25 April 2016 following a presidential speech in which Ghani, while not closing the door to negotiations, said fighting the Taleban had to take priority.¹³⁶ Another argument that the ICC visit would damage the relationship between the government and its international partners, like the US, fighting in Afghanistan against the insurgency, who are mentioned in the ICC's preliminary examination reports. Finally, the visit would

¹³³ HRW, *Afghanistan: Put Words into Action on Justice Cooperate with International Criminal Court Inquiry*, 21 April 2016 < <https://www.hrw.org/news/2016/04/21/afghanistan-put-words-action-justice>> accessed 10 August 2016.

¹³⁴ The Afghanistan Analysts Network (AAN), *The ICC's Planned Visit to Afghanistan: Crimes, capacities and the willingness to prosecute*, 30 June 2016 < <https://www.afghanistan-analysts.org/the-iccs-planned-visit-to-afghanistan-crimes-capacities-and-the-willingness-to-prosecute/>> accessed 10 August 2016.

¹³⁵ At the time, the Quadrilateral Cooperation Group, QCG, on Afghan Peace Talks and Reconciliation was still active.

¹³⁶ The Afghanistan Analysts Network (AAN), *Ghani's Speech to the Parliament: A hardening position on war, peace and Pakistan*, 27 April 2016 < <https://www.afghanistan-analysts.org/ghanis-speech-to-the-parliament-a-hardening-position-on-war-peace-and-pakistan/>> accessed 15 July 2016.

make the *mujahedin* more suspicious of the National Unity Government as they might fear prosecution. But the last argument would not be valid as the ICC could not investigate crimes before 2003.

Afghanistan is obligated to investigate and prosecute international crimes committed on its territory. The Afghan courts under the complementarity principle shall have jurisdiction over these crimes and can prosecute the perpetrators. But the lack of domestic legislation or the inability of the domestic courts to prosecute these crimes will allow the ICC to intervene. The current constitution better values international covenants and it has allocated two paragraphs for international covenants in its preface. The constitution obligates the government of Afghanistan to respect The Universal Declaration of Human Rights, international covenants and other international agreements that Afghanistan is a party to. The concern of Sharia incompatibility with the Rome Statute was never discussed or raised during the different attempts of implementing the Statute.¹³⁷ It might be one of the challenges in the future as Afghanistan is still in the process of implementing the Statute, but during the general discussions and conferences on the implementation topic, other challenges were raised.¹³⁸ There is a general understanding in Afghanistan that the law has to comply with the Sharia, the consensus of legislation with the whole body of Islamic law, including Islamic jurisprudence (*fiqh*), and the doctrine of a particular school of Islamic law is not always included.¹³⁹ The Afghanistan Constitution declares that ‘no law can be contrary to the sacred religion of Islam’, but restricts the application of the Hanafi jurisprudence in Article 130 only to cases ‘when there is no provision in the Constitution or other laws regarding the ruling on an issue’.¹⁴⁰

The main challenges that Afghanistan faces towards the process of implementation of the Statute is the lack of a reliable and stable judiciary system, the presence of a culture of

¹³⁷ According to Afghanistan Constitution Article 130: “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.”

¹³⁸ Afghanistan Watch, International Criminal Court (ICC) in Afghanistan; A Report on the Consultative Meeting on Obligations of Afghanistan under (ICC), 24 October 2009.

¹³⁹ R. Moshtaghi, Max Planck Manual on Afghan Constitutional Law, Vol. I, Structure and Principles of the State (2009), 31.

¹⁴⁰ S. Mahmoudi, ‘The Sharia in the New Afghan Constitution: Contradiction or Compliment?’, (2004), 868.

impunity, lack of political will and public awareness towards the Court. So far the domestic courts are unable to prosecute the international crimes,¹⁴¹ hence the ICC intervention. Afghanistan has faced decades of conflicts and atrocities. Most of the suspects are alive and even some of them are currently working in key government positions and enjoy government supports. Thus, the culture of impunity still prevails, in addition to the failure of the government to compensate the victims of past crimes. The lack of political will is also considered a challenge, despite the accession to the Statute, the government waited 13 years till it decided to translate it and publish it in the official gazette. Another challenge for the Afghan judiciary when trying members of armed groups, such as the Taleban, is their vulnerability to revenge. Judges and prosecutors are often targeted which affect their willingness and ability to try war crimes.¹⁴² The positive steps were only taken once the ICC decided to visit the country and initiate its preliminary examinations. There are several NGOs and civil institutions operating in Afghanistan which can assist the government in the whole process and in fulfilling its obligations towards the Court.

2.4.2 The Republic of Korea

The Rome Statute was signed by South Korea on 8 March 2000 and ratified on 13 November 2002.¹⁴³ The government then established a task force team consisting of the Ministry of Justice, two international law professors and one criminal law professor to prepare a draft

¹⁴¹ An example of the Afghan judiciary's inability to try crimes that fall under the Rome Statute is the case of Asadullah Sarwari, head of the intelligence service directorate (KhAD) during the communist PDPA regime. He was arrested on 26 May 1992 by the *mujahedin* who had just captured Kabul and accused of 'plotting against the mujahedin government'. He was tried, however, only in 2005. A judge familiar with the trial said Sarwari was accused of crimes against humanity and war crimes, but as these had never been criminalised under Afghan law, he was tried according to article 130 of the Afghan constitution, which refers to the Hanafi jurisprudence. When Sarwari committed his crimes, Afghanistan had not signed the Rome Statute so they were outside its temporal jurisdiction. Sarwari was found guilty, but of what crime exactly still remains unclear.

¹⁴² After the execution of six convicted terrorists in May 2016, for example (five Taleban, including two members of the Haqqani network, and one member of al Qaeda, the Taleban threatened the judges and prosecutors. They then followed up with three attacks on Afghan courts and members of the judiciary: against the personnel of the Maidan Wardak Appeals Court on 31 May, against the Ghazni Appeals Court on 1 June and against the Logar Appeals Court on 5 June 2016. During these attacks, a total of 22 civilians, at least half of them judges and prosecutors, were killed and 37 other civilians were wounded. See more AAN, Afghanistan's Latest Executions: Responding to calls for capital punishment, 11 May 2016 < <https://www.afghanistan-analysts.org/afghanistans-latest-executions-responding-to-calls-for-capital-punishment/> > accessed 16 July 2016.

¹⁴³ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

implementation act.¹⁴⁴ The task force reviewed, during the drafting process, other implementation legislations from different states like the UK, Germany and Canada, and some academic publications on states' approaches towards implementation, to assist them in their assignment.¹⁴⁵ Korea's State Council and National Assembly then approved the draft, after some amendments, and the ICC Act was enacted and promulgated in 2007.¹⁴⁶

The ICC Act faced some constitutional debates, during its drafting process, on the requirement of such an implementation act in general, as according to the Korean constitution "treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea".¹⁴⁷ Thus, Korea adopts the "monist" approach towards the implementation of international treaties, which means that according to the constitution, the Rome Statute has the same weight and effect as the Korean national laws. Nevertheless, Korea decided to enact an implementation act. One of the main reasons for such a decision is that the Statute does not specify the sentence lengths for each crime, which might cause difficulties for the Korean prosecutors and judges during their investigations and trials.¹⁴⁸

The most difficult issue that faced Korea during the implementation process was the head of state immunity.¹⁴⁹ The Korean constitution provides that "[t]he President shall not be charged with a criminal offence during his tenure of office except for insurrection or treason".¹⁵⁰ Accordingly, the complex issue is whether the Rome Statute is consistent with the constitution, which provides immunity to the president. The ICC Act in Korean did not provide a solution for this issue and the matter was solved by a general assumption that the constitution shall be interpreted in accordance with international obligations,¹⁵¹ an approach

¹⁴⁴ Y. S. Kim, 'The Korean Implementing Legislation on the ICC Statute' (2011) 10 Chinese Journal of International Law 161-170

¹⁴⁵ Ibid, 163.

¹⁴⁶ Korea, Law No. 8719, 21 December 2007.

¹⁴⁷ Constitution of the Republic of Korea, 12 July 1948, amended 29 October 1987, Article 6(1).

¹⁴⁸ Y. S. Kim, 'The Korean Implementing Legislation on the ICC Statute' (2011) 10 Chinese Journal of International Law 161-170.

¹⁴⁹ Tae Hyun Choi and Sangkul Kim, 'Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute' (2010) 19 Michigan State University College of Law Journal of International Law 589.

¹⁵⁰ Constitution of the Republic of Korea, Article 84.

¹⁵¹ Y. S. Kim, 'The Korean Implementing Legislation on the ICC Statute' (2011) 10 Chinese Journal of International Law 161-170.

several states adopted to avoid amending their constitutions and to facilitate the implementation process. Another issue that was addressed during the implementation process relates to the prosecution of some sex crimes such as rape, which according to the Korean Criminal Code, may be barred if the victim did not provide a formal accusation.¹⁵² Therefore, the ICC Act provided that prosecution for all acts and conducts of international crimes,¹⁵³ including rape, shall not be barred by such contingencies.¹⁵⁴

The ICC Act provides that in the case of conflict between the Korean Extradition Act,¹⁵⁵ and the Rome Statute, the Statute's provisions will prevail.¹⁵⁶ Consequently it facilitates the fulfillment of Korea's obligations towards the Court in relation to arrest and surrender requests. Likewise, the same approach applies for the Korean Mutual Legal Assistance in Criminal Matter Act,¹⁵⁷ if it conflicts with the Rome Statute's provisions or the ICC's requests.¹⁵⁸ The Korean ICC Act aimed to reach its two main goals: incorporating international criminal law into Korean domestic law and to cooperate with the ICC. In the absence of any provisions in the ICC Act for such purpose, the Rome Statute can be relied on directly according to the Korean constitution.

2.5 North & South American States

Despite the opposition of the United States to the ICC,¹⁵⁹ most of the regions' states have

¹⁵² Republic of Korea: Criminal Code, 3 October 1953, amendment entered into force on 1 January 1998, Article 306 reads: "The crimes of Articles 297 through 300 and 302 through 305 shall be prosecuted only upon complaint." Amended by Act No. 5057, Dec. 29, 1995.

¹⁵³ Korea, ICC Act, Article 7 provides that "[t]he prosecution of the crimes of genocide, ... pursuant to this Act shall not be barred by absence of a formal accusation or by the explicit objection to prosecution by the victim".

¹⁵⁴ See Tae Hyun Choi and Sangkul Kim, 'Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute' (2010) 19 Michigan State University College of Law Journal of International Law 589.

¹⁵⁵ Korea, Extradition Act, Law No. 4015, enacted 5 August 1988, amended 14 December 2005

¹⁵⁶ Korea, ICC Act, Article 19.

¹⁵⁷ Korea, Mutual Legal Assistance in Criminal Matters Act, Law No. 4343, enacted 8 March 1991.

¹⁵⁸ Y. S. Kim, 'The Korean Implementing Legislation on the ICC Statute' (2011) 10 Chinese Journal of International Law 161-170.

¹⁵⁹ See David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 The American Journal of International Law 12; John Seguin, 'Denouncing the International Criminal Court: An Examination of US Objections to the Rome Statute.' (2000) 18 Boston University International Law Journal.

ratified the Rome Statute.¹⁶⁰ Similar to the positions of some other intergovernmental and regional organisations, like the AU and the EU, the Organization of American States (OAS) also supported the Rome Statute. The General Assembly of the Organization of American States supported a resolution relating to the adoption of the Rome Statute, and since 2003 the General Assembly of the OAS has adopted several resolutions on promoting the Court. The OAS urged its member states that have not ratified yet, to consider ratifying or acceding and implementing the Statute.¹⁶¹ The OAS is the oldest regional organisation in the world, and brings together all 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the hemisphere.¹⁶² To date there are 28 OAS member states that have ratified the Rome Statute, and four have signed the Statute but not yet ratified.¹⁶³

2.5.1 Canada

Canada ratified the Rome Statute on July 7, 2000,¹⁶⁴ and was the first state to adopt comprehensive implementing legislation; the Crimes against Humanity and War Crimes Act [CAHWCA], which received Royal Assent on 29 June 2000 and came into force on 23 October 2000.¹⁶⁵ Canada also amended other legislations to cope with the new Act, such as the criminal code and other acts dealing with related matters, such as extradition, mutual legal assistance and witness protection.¹⁶⁶ The aim was to cooperate with the ICC and apply the

¹⁶⁰ See Hugo Relva, 'The Implementation of the Rome Statute in Latin American States' (2003) 16 *Leiden Journal of International Law* 331-366; Socorro Flores Liera, 'Mexico' in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005).

¹⁶¹ Resolution on "Promotion of the International Criminal Court" [AG/RES. 2728 (XLII-O/12)], 2012.

¹⁶² See more Betty Horwitz, *The Transformation of the Organization of American States: A Multilateral Framework for Regional Governance* (2nd edn, Anthem Press 2011).

¹⁶³ See Coalition for the International Criminal Court, *Americas*

<<http://www.iccnw.org/?mod=region&idureg=4>> accessed 12 April 2014.

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¹⁶⁵ Canada: Crimes Against Humanity and War Crimes Act, SC 2000, c. 24, 23 October 2000

¹⁶⁶ See William A. Schabas, 'Canadian Implementing Legislation for the Rome Statute' (2000) 3 *Yearbook of International Humanitarian Law*.

complementarity principle by having jurisdiction over the international crimes.¹⁶⁷

Canada follows a “dualist” legal system, meaning that provisions contained in treaties ratified by Canada are not directly applicable in national laws. Any treaty obligations requiring domestic legal effect must therefore be implemented by appropriate legislation. In order to avoid a situation where Canada has ratified a treaty but is unable to fulfill its obligations, it has a fixed practice of ensuring that all necessary implementing legislation is in place before ratifying the treaty.¹⁶⁸

Canada did not face many of the common constitutional obstacles that other states encountered in some of the other states during the ratification and implementation process.¹⁶⁹ The Canadian constitution does not provide immunities to any class of officials, nor does it prohibit the extradition of nationals or life imprisonment.¹⁷⁰ The issue of head of state immunity did not create constitutional problems for Canada, as the Crown may be bound by acts of Parliament; Section 3 of the CAHWCA provides “This Act is binding on Her Majesty in right of Canada or a province.” While command responsibility created complex constitutional issues for Canada during its process to ensure compliance with the due process rights and guarantees provided to individuals under Canada’s Charter of Rights and Freedoms (“the Charter”).¹⁷¹ The jurisprudence of the Supreme Court of Canada clarified that the Charter requires that the mental element of some serious crimes be based on a subjective test, as the conviction will reflect the high degree of moral stigma society ascribes to those convicted of such crimes.¹⁷²

Canada has implemented all of the cooperation obligations contained in the Rome Statute and

¹⁶⁷ Robert Hage, ‘Implementing the Rome Statute: Canada’s Experience’, *States’ Responses to Issues Arising from the ICC Statute. Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (1st edn, Ardsley, Transnational Publishers Inc 2005).

¹⁶⁸ See more Stephane Beaulac and John H. Currie, ‘Canada’, *International Law and Domestic Legal System* (1st edn, Oxford University Press 2011), 126; Gerald L Gall, *The Canadian Legal System* (Carswell 1990).

¹⁶⁹ Kimberly Prost and Darryl Robinson, ‘Canada’, *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005).

¹⁷⁰ Canada: Constitution Acts, 1867 to 1982, 29 March 1867, (rev. 2011).

¹⁷¹ Canadian Charter of Rights and Freedoms, s 8, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁷² Robert Hage, ‘Implementing The Rome Statute: Canada’S Experience’, *States’ Responses to Issues Arising from the ICC Statute. Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (1st edn, Ardsley, Transnational Publishers Inc 2005).

in some issues it broadened the scope of cooperation beyond that required in the Statute, in order to guarantee comprehensive and effective assistance to the ICC.¹⁷³ The CAHWCA implements Canada's obligation to arrest and surrender individuals by adopting surrender proceedings based on an updated version of Canada's existing extradition process.¹⁷⁴ The Extradition Act was amended in 1999 to allow for surrender to the ICTY and ICTR.¹⁷⁵ The CAHWCA therefore provided for an additional amendment to add the ICC to this list of international courts. Canada also eliminated all grounds for refusal, such as the political offence exception, that are normally applicable in cases of a state-to-state extradition and indicated that they did not apply to a request for surrender by the ICC.¹⁷⁶

Canada incorporated crimes under the jurisdiction of the ICC to take advantage of the complementarity principle. The crimes were defined by reference to customary laws and conventions that were applicable at the time and the place of their commission.¹⁷⁷ In order to provide guidance to judges and prosecutors, examples of these crimes were included in the definitions. A direct reference to the Rome Statute was also included by mentioning that all the crimes in the Statute are to be considered crimes under customary international law as of 17 July 1998, and may be crimes according to customary international law before that date.¹⁷⁸ Although the CAHWCA incorporates the core crimes of the Rome Statute it does not reproduce the texts of Articles 6-8 of the Statute as such. Definitions of crimes in the Canadian legislation are broader and more general. For example, the Act defines genocide as "an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such".¹⁷⁹ Thus the definition is different from the existing definitions, including Article 6 of the Rome Statute. As for the *ne bis in idem* principle, the scope of the principle was confined to the terms of Article 17 of the Statute. Accordingly, where prosecution in a foreign jurisdiction was intended to shield a person from criminal

¹⁷³ Kimberly Prost and Darryl Robinson, 'Canada', *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹⁷⁴ *ibid.*

¹⁷⁵ Canada, Extradition Act, S.C. 1999, c. 18, assented to 1999-06-17, last amended on 2005-07-19; An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence.

¹⁷⁶ Kimberly Prost and Darryl Robinson, 'Canada', *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹⁷⁷ See William A. Schabas, 'Canadian Implementing Legislation for The Rome Statute' (2000) 3 YHL.

¹⁷⁸ Canada: CAHWCA 2000.

¹⁷⁹ Canada, CAHWCA, Section 4(3).

responsibility, the defense will not be accepted. However, since *ne bis in idem* is enshrined in the Canadian Charter,¹⁸⁰ it is not inconceivable that a Canadian court might declare this restriction to be unconstitutional.¹⁸¹

Finally, the Act creates a ‘Crimes against Humanity Fund’, into which money obtained through enforcement of orders of the ICC for reparation or forfeiture, or from imposing a fine, is to be paid.¹⁸² The Attorney General of Canada may make payments out of this fund into the ICC’s Trust Fund, as well as to victims or their families. Such an approach could also be considered by some Arab states, which have suffered from conflicts, as a measure of reparation for victims.

2.5.2 Argentina

Argentina signed the Rome Statute on 8 January 1999,¹⁸³ ratified it on 30 November 2000 and adopted an implementation law in December 2006.¹⁸⁴ Argentina and other states in Latin America¹⁸⁵ have been firm supporters of the ICC, and have actively engaged in efforts to ratify and implement the Rome Statute in the region.¹⁸⁶ Since they are all civil law states, ratification of a treaty that recognises the rights of individuals will be immediately acknowledged without the need to adapt them into domestic legislation.¹⁸⁷ However, if the treaty prohibits certain acts, and imposes on its parties obligations to prevent and investigate, it cannot be asserted that such acts are punishable under domestic legislation unless legislation is implemented to provide for these matters. This approach usually involves the

¹⁸⁰ Canada, The Charter, Section II(h).

¹⁸¹ Kimberly Prost and Darryl Robinson, ‘Canada’, *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005).

¹⁸² Canada, CAHWCA, Section 3(1).

¹⁸³ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

¹⁸⁴ Argentina, Law 26200, 13 December 2006.

¹⁸⁵ Under this term the following 19 countries are included: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

¹⁸⁶ See more Salvador Herencia Carrasco, ‘Implementation of War Crimes in Latin America: An Assessment of the Impact of the Rome Statute of the International Criminal Court’ (2010) 10 *International Criminal Law Review*.

¹⁸⁷ See Hugo Relva, ‘The Implementation of the Rome Statute in Latin American States’ (2003) 16 *Leiden Journal of International Law*.

enactment of additional domestic laws to criminalise such acts and to specify penalties: failure to proscribe and criminalise such acts means that they cannot be punished in a national court.¹⁸⁸

Argentina chose an easy approach and method towards the implementation of the Statute by directly referring to the definitions of the Statute.¹⁸⁹ The new legislation's provisions have been taken directly from the Rome Statute, and the legislation refers specifically to those articles in the Statute that relate to the crime of genocide, crimes against humanity and to war crimes. An important consequence of deferring the definition of crimes to the Rome Statute is that the Elements of Crimes adopted by the Assembly of States Parties (ASP) automatically become part of the domestic definition of those crimes.¹⁹⁰ Torture was the only crime that was introduced via an amendment to the Criminal Code in order to meet the international obligations.¹⁹¹ Article 144 of the CC defines torture but without mentioning the subjective element envisaged by the relevant international conventions.¹⁹² In addition, the Inter-American Convention against Torture,¹⁹³ broadens the definition of the crime so as to include "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".¹⁹⁴ The implementation legislation does not introduce any changes to the CC definition of torture, but simply incorporates the references to torture contained in the Statute.¹⁹⁵

¹⁸⁸ *ibid.*

¹⁸⁹ Alejandro E. Alvarez, 'The Implementation of the ICC Statute in Argentina' (2007) 5 *Journal of International Criminal Justice* 480-492.

¹⁹⁰ *ibid.*

¹⁹¹ Argentina, Law 23097, 29 October 1984, Article 144.

¹⁹² Silvia A. Fernandez De Gurmendi and Jose Luis Fernandez Valoni, 'Argentina', *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005).

¹⁹³ Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67; Incorporated into domestic legislation through law 23952 of 29 September 1998.

¹⁹⁴ See more Amnesty International, *Argentina: Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 31 January 2005, AMR 13/001/2005, < <https://www.amnesty.org/en/documents/AMR13/001/2005/en/> > accessed 5 November 2013; Article 3 of Inter-American Convention, however, only considers as torture those acts committed by officials and not by private individuals (unless they have acted under the order of public officials).

¹⁹⁵ Alejandro E. Alvarez, 'The Implementation of the ICC Statute in Argentina' (2007) 5 *Journal of International Criminal Justice* 480-492.

The implementation legislation in Argentina fulfills its obligations towards the ICC and regulates the requests of arrest and surrender of individuals. For example, the legislation provides that, once the admissibility of the request has been established, the matter shall be referred to the competent judicial authority, which will then be responsible for issuing an arrest warrant. Consequently, the implementation legislation will make it possible for Argentina to both cooperate efficiently with the ICC and to prosecute the crimes included in the Rome Statute domestically.¹⁹⁶ Argentina was one of the most active states during the process of drafting and negotiating the Rome Statute. Despite its history of human rights violations and military dictatorship, Argentina has sought all possible ways to prevent these events from ever happening again by incorporating international crimes into its domestic legislation and joining the ICC.

2.6 Model Approaches

During the implementation process some states collaborated to produce “model laws” or “model kits” to assist them or other states in the process. Some of these model laws were provided by NGOs. Although some of these approaches weren’t adopted precisely, they were used as guidelines to facilitate the implementation process. For those states that lack the capacity and resources to develop a new legislation implementing the Rome Statute, these models have been found to be useful. It is essential to review and analyse some of these models that could be adopted by Arab states that require technical assistance. Several states lack the required resources or experience for drafting new legislations. In addition, some states do not have the financial capability to develop new laws. Thus, these states tend to adopt the model laws to incorporate a new treaty or convention into their domestic legal system. Significant models are the ones made by Amnesty International,¹⁹⁷ the Southern

¹⁹⁶ Silvia A. Fernandez De Gurmendi and Jose Luis Fernandez Valoni, ‘Argentina’, *The Rome Statute and Domestic Legal Orders Volume II: Constitutional issues, cooperation and enforcement* (1st edn, Editrice il Sirente 2005), 4.

¹⁹⁷ Amnesty International, *The International Criminal Court: Checklist for Effective Implementation*, 31 July 2000 < <https://www.amnesty.org/en/documents/IOR40/011/2000/en/> > accessed 12 November 2013.

African Development Community (SADC),¹⁹⁸ the Commonwealth Secretariat¹⁹⁹ and the League of Arab States' model that will be discussed in this section.²⁰⁰

The Arab Justice Ministers Council decided to approve “the Arab Model Law for the Repression of crimes under the Jurisdiction of the ICC” in its Decree number 598-21d dated 29 November 2005. The Model Law was drafted with a view to providing guidance to Arab states on legislation pertaining to crimes falling within the Rome Statute.²⁰¹ The first chapter of the Model Law includes rules for jurisdiction. Article 2 provides that its provisions shall be enforced irrespective of the place where the criminal acts were committed, if one of the following conditions has been fulfilled:

- The accused is a national of the state.
- The accused was present on the territory of the state after the crime was committed.
- The victim was a national of the state.

Significantly, Article 3 stipulates that the official capacity of an accused person is irrelevant and cannot be used as the basis for their exemption from prosecution. Article 3 further adds that the determination of this principle shall be left to the domestic legislature of each Arab state in accordance with its legal system. This is problematic because it provides a loophole that domestic leaders may be expected to exploit by attempting to influence the drafting of laws that exempt them from prosecution. If this were to happen, the Model Law would have failed unequivocally to establish the principle that there should be no immunity for

¹⁹⁸ See more Daniel D Ntanda Nsereko, ‘Implementing the Rome Statute within the Southern African Region (SADC)’ in Claus Kreß and Flavia Lattanzi (ed), *The Rome Statute and Domestic Legal Orders: General aspects and constitutional issues* (1st edn, Editrice il Sirente 2000).

¹⁹⁹ Commonwealth Secretariat, ‘Model Law to Implement the Rome Statute of the International Criminal Court’, 31 August 2006 <http://www.iccnw.org/documents/ModelLawToImplementRomeStatute_31Aug06.pdf> accessed 28 April 2014.

²⁰⁰ The League of Arab States, Decree no. 598-21d-29/11/2005 regarding the Arab Model Law Project on Crimes within ICC Jurisdiction; See unofficial translation provided by the Coalition for the International Criminal Court at <https://www.iccnw.org/documents/ArabLeague_ModelImplementationLaw_29Nov05_en.pdf> accessed 12 June 2015.

²⁰¹ Olympia Bekou, ‘Regionalising ICC Implementing Legislation: A Viable Solution for the Asia- Pacific Region?’ in Neil Boister and Alberto Costi (ed), *Droit Pénal International dans le Pacifique: Tentatives d’Harmonisation Régionale / Regionalising International Criminal Law in the Pacific* (1st edn, New Zealand Association for Comparative Law/Association de Législation Comparée des Pays du Pacifique, Wellington 2006).

international crimes recognised therein, they shall not be subject to any statutes of limitation, and Article 7 states that such crimes are not subject to general or special amnesties. With regard to criminal liability, Article 8 recognizes the principle of superior command responsibility, and Article 9 stipulates that following orders is no defence.²⁰²

The second chapter of the Model Law is largely consistent with Part II of the Rome Statute. Articles 10-13 of the Model Law are concerned with the definitions of crimes and jurisdiction broadly in line with Articles 5-13 of the Statute. The list of crimes set out in the Model Law includes genocide, crimes against humanity, war crimes and the crime of aggression.²⁰³ Although the definition of these crimes is largely based on the Statute, there are some notable variances, such as a narrower definition in respect of sexual offences like rape. Notably, Article 13 of the Model Law provides a detailed list of acts that falls within the scope of the crime of aggression. This reflects the strong interest taken by Arab states to develop a clearer understanding and recognition of the crime of aggression, the absence of which as noted, constituted one of the criticisms levelled against the Rome Statute. In terms of applicable penalties, the Model Law recognises capital punishment for international crimes, which is inconsistent with the Statute and developments in international human rights law towards the abolition of the death penalty.

The Model Law constitutes an important first step in developing the understanding for international criminal law in the region with a view to enhancing implementation.²⁰⁴ However, it mainly concerns questions of jurisdiction, which means that it does not address a number of other important aspects of the Statute, for example, the rights of the defence and the rights of victims, including victim protection. With respect to the institutional dimension of prosecuting international crimes, the Model Law makes no mention of the establishment of special courts or courts with the requisite expertise within the legal system of Arab states, or

²⁰² Ibrahim Aljazy, 'The Implementation of International Criminal Law In Arab States: The Jordanian Experience' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing, Ltd. 2011)

²⁰³ *ibid.*

²⁰⁴ Olympia Bekou, 'Regionalising ICC Implementing Legislation: A Viable Solution for the Asia-Pacific Region?' in Neil Boister and Alberto Costi (ed), *Droit Pénal International dans le Pacifique: Tentatives d'Harmonisation Régionale / Regionalising International Criminal Law in the Pacific* (1st edn, New Zealand Association for Comparative Law/Association de Législation Comparée des Pays du Pacifique, Wellington 2006).

for the need to guarantee the independence of such courts.

2.7 Conclusion

The enactment of domestic legislations implementing the Rome Statute to efficient standards is essential for the states to promote international criminal justice. Without the state cooperation the ICC will not operate effectively. Considering the approaches reviewed above in this chapter, it is constructive for Arab states to be guided by these states' experiences. The study of approaches adopted by states, which have already dealt with obstacles and challenges, will facilitate the process of joining the ICC, as most legal issues are common. Some of the states examined witnessed armed conflicts and their having resorted to the ICC, as a means to apply justice and end impunity, should be considered by similar Arab states that are facing conflicts. On the other hand, the ratification of the Statute is not necessarily related to human rights violations or the investigation of international crimes. In other words, several states that ratified the Statute have not witnessed armed conflicts and have good records of human rights. But their ratification and implementation of the Rome Statute serves as a commitment to international law and respect for human rights. Consequently, providing guarantees to their society against any future abuses or violations, an approach that should be adopted by all Arab states, which assumes that there is no need to incorporate international crimes due to their unlikelihood to occur on their territories.

Methods and procedures differ from one state to another depending on their legal systems. States that faced constitutional obstacles or incompatibility with the Rome Statute should either amend their constitutions or interpret them in a way that allows the implementation of the Statute domestically. The different regions examined in this chapter showed some common features and unified approaches towards the ICC. In addition to the regional organisations examined, the EU, AU and OAS, adopted policies urging their member states to ratify and implement the Statute. The Arab League could have a similar positive role amongst its member states. The initiative of the Arab Model Law is considered a positive step, but it still requires the actual implementation by Arab states. The majority of Arab states still lack legislations that prohibit international crimes. The above analysis showed that

whatever the obstacles to ratification or the incompatibility with the Statute during the implementation process; states adopt a comprehensive approach to fulfill their obligations towards the Rome Statute and the international criminal justice system in general. The next chapter will review and analyse the Arab states' constitutional systems and issues related to the ratification and implementation of the Rome Statute.

Chapter Three: Arab States Constitutional Framework

3.1 Introduction

The aim of this chapter is to examine the current constitutional framework of the Arab states. It includes a comparative study of most Arab League member states' constitutions. The chapter covers the main features of Arab states' constitutional system and emphasises the role of Sharia in those constitutions, the system of governance, the legislative power and the constitutional process for ratification and implementation of international treaties. In addition, it analyses the provisions that relate to human rights, with special focus on the crime of torture, as well as highlighting how the basic due process protections in the region's criminal procedures relate to international, regional, and general constitutional standards.

Constitutions have a role in the ratification and implementation process of international treaties and the state's political system also plays an important role in its decision as to whether or not to ratify international treaties. Thus a review of different aspects of the Arab states – their constitutional approaches and political systems - will assist the study of their positions towards the Rome Statute and the ICC in later chapters.

The previous chapter reviewed and analysed other states' experiences regarding the ratification and implementing the Rome Statute, these states were from different regions, continents, cultural backgrounds and political systems. The chapter also revealed that some states faced challenges and obstacles when joining the ICC, and the methods they adopted to ratify and implement the Rome Statute. As most of the obstacles reviewed were constitutional, it is essential to analyse the Arab States' constitutions in this chapter and to compare them with other nations' experiences.

Most constitutions contain mechanisms for ratifying and implementing international treaties or conventions in their articles and provisions, in addition to the state's authority and procedures for such processes. This chapter will also examine the main constitutional features of most Arab states in regards to their processes for ratifying and implementing international treaties. Discussion of these issues will facilitate the wider study of ratification and implementation of the Rome Statute, which will be discussed in the following chapters.

All of the Arab states have written constitutions, but they vary from one state to the other. Some have a secular approach and others have an Islamic structure.¹ Some Arab states have republican political systems,² and others have monarchical regimes.³ But despite this variation, Arab states' constitutions do have many common features generally in the preambles and the key constitution articles, which mean their legal framework, can be examined as a whole using a comparative approach. These common features identify the Arab states as a whole nation.

One of the most important common features in the provisions of Arab states' constitutions is the use of the term "Arab" or "Arab Nation",⁴ to define their identity and "Arabic" as their official language— this is mentioned in all the Arab states' constitutions (with the exceptions of Djibouti and Sudan). Some states have shown more commitment and attribution to the notion of being an "Arab Nation" in their constitutions than others. For example, the Syrian Constitution of 1973 was the first Arab constitution to adopt socialist-nationalist principles.⁵ These 5 principles stress the unity of the Arab world, stating that the Syrian revolution was part of a larger Arab revolution, and that any threats to an Arab nation are threats to the whole Arab

¹ Mansour Farhang, 'Fundamentalism and Civil Rights in Contemporary Middle Eastern Politics' in Leroy S. Rouner (ed), *Human Rights and the World's Religions* (1st edn, University of Notre Dame Press 1988).

² Tunisia, Algeria, Somalia, Iraq, Libya, Egypt, Lebanon, Mauritania, Syria, Sudan and Yemen.

³ Saudi Arabia, Kuwait, Qatar, Bahrain, Jordan and Morocco and UAE.

⁴ Algeria (preamble), Egypt (Article 1), Iraq (Article 1), Lebanon (paragraph (b) of the preamble), Libya (Article 1 of the 1969 Constitutional Proclamation), Mauritania (preamble), Oman (Article 1) Somalia (Article 1), Syria (Article 1), Tunisia (preamble), UAE (preamble and Article 6) and Yemen (Article 1).

⁵ Syrian Arab Republic: Constitution, 1973, 13 March 1973.

world.⁶ Another major feature in the constitutions of the Arab states - with the exceptions of Djibouti, Lebanon, Syria and Sudan – is the recognition of Islam as the state religion.⁷ Moreover all the Arab states - except Lebanon, Tunisia and Syria – referred to Sharia as the source of and authority for legislation in their constitutions.

Many Arab states have similar constitutional characteristics, however, a number of significant discrepancies exist between different Arab states' constitutions that correspond to differences in their respective national political systems. For example, the constitutions of both the United Arab Emirates and Sudan enshrine federalist systems of government, while the Tunisian constitution defines a semi-presidential system and Egypt's constitution features a republican system. Discrepancies even exist between the constitutions of Arab monarchies: Jordan is a constitutional monarchy, while Saudi Arabia's Basic Law defines a traditional hereditary monarchy.

3.2 The Position of Sharia within the Constitution

Religion and Sharia have a significant role in the Arab states' constitutions. Despite being the main source of legislation in most Arab states, they influence governments' approaches towards specific issues – in this situation, the ratification and implementation of the Rome Statute. Thus it is essential, before examining the role of Sharia, and its effect on the Rome Statute and the ICC, to review and analyse its status in the constitutions of individual Arab States.

Arab constitutions use different terms to describe the Islamic norms that serve as the source of their legislations. Some refer to '*fiqh*', others to 'Sharia', and still others to

⁶ *ibid.*

⁷ Article 1 of the Sudanese 1998 Constitution stipulates that Islam is the religion of the majority of the population and that 'Christianity and customary creeds have considerable followers.' In the 2005 constitution Article 1 was amended and Islam was not mentioned as religion of majority and wording was replaced with "It is a democratic, decentralized, multi-cultural, multi-racial, multi-ethnic, multi-religious, and multi-lingual country where such diversities co-exist."

‘the principles of Sharia’. Furthermore, these constitutions characterise the role of Islamic norms differently: most constitution articles describe Islamic norms either as “a chief source of legislation” or as “the chief source of legislation”,⁸ although a few use slightly different formulations.⁹

While most Arab constitutions include references to the Sharia, different states have applied Islamic law in distinct ways. For example, the Basic Law of Saudi Arabia adopts the Holy Quran as its constitution, with Royal decrees understood as being practical applications of this basic legal commitment.¹⁰ Egypt’s constitution affirms that the Sharia is the principal source of legislation, while other states maintain that Islamic law is only one source of legislation.¹¹

After a referendum on 1 July 2011, Morocco approved a new constitution, which was enacted on 29 July repealing the 7 October 1996 text.¹² The new 2011 constitution describes Morocco in the preamble as an Islamic state and provides that “Islam” is the state’s religion, while guaranteeing the freedom of religious practices to all other faiths.¹³ The new constitution is considered liberal in its nature, similar to the previous constitution, and compared to other Arab states’ constitutions that proclaim Sharia as one of the main sources of their legislations. Despite the liberal approach, still the religion is considered an integral part of the king’s power as the constitution officially recognises him as “commander of the faithful”, which could be rather diminished if Morocco was not described as an Islamic state.¹⁴

In Sudan, Article 5(a) of the 2005 interim national constitution stipulates “Nationally

⁸ Clark B. Lombardi, ‘Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State’ (1998) 37 Colum. J. Transnat’l L. 81, 87.

⁹ Constitution of the Republic of Iraq [Iraq], 15 October 2005, Article 2 reads: Islam is the official religion of the State and is a foundation source of legislation.

¹⁰ Saudi Arabia: Basic Law [Saudi Arabia], 1 March 1992.

¹¹ See Clark B. Lombardi, ‘Constitutional Provisions Making Sharia ‘A’ or ‘The’ Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?’ (2013) 28 American University International Law Review.

¹² Maroc: Constitution [Morocco], 29 July 2011.

¹³ Morocco, 2011 Constitution, Article 3.

¹⁴ Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?* 20 June 2011, Carnegie Endowment for International Peace <<http://carnegieendowment.org/2011/06/20/new-moroccan-constitution-real-change-or-more-of-same/51>> accessed 31 Jul 2014.

enacted legislation having effect only in respect of the northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people”. Section (b) of the same article, referring to the southern part of Sudan, states that it “shall have as its sources of legislation popular consensus, the values and the customs of the people of the Sudan, including their traditions and religious beliefs, having regard to Sudan’s diversity”.¹⁵ Since South Sudan gained independence from the North in July 2011,¹⁶ Khartoum is gradually moving towards the Islamisation of the Sudanese State, elements of Sharia are already being applied in the state to varying degrees, such as public floggings for alcohol consumption and even death by stoning for adultery.¹⁷ Sudan’s President Omar Al-Bashir has also announced in a speech that Sudan’s post-secession constitution will be 100 percent Islamic and it will serve as a template for the region by being devoid of any western, secular or communist influences.¹⁸

The Saudi Constitution owes much to the legal principles drawn from Islamic teaching, which affect state practice at both national and international levels.¹⁹ The Islamic identity is reflected in Article 1, which provides that the state is an independent Muslim Arab state, its religion is Islam and the Quran and the Sunna of the Prophet Mohammed constitute the ultimate and main source of its legal and constitutional rules; in addition to Articles 48 and 67, which come under Chapter 6 entitled ‘Authorities of the State’, confirms that the Islamic law is the source of both the legal rules and political powers. Although the majority of Arab states reflect such Islamic identity in their constitutions, the Saudi provision in this matter goes a little further than similar articles in other states. It enshrines, in explicit terms, the principle adopted by Islamic jurists that Islam and the state are inseparable: this is most evident,

¹⁵ Interim National Constitution of the Republic of the Sudan, 2005 [Sudan], 6 July 2005.

¹⁶ UN news, *UN Welcomes South Sudan as 193rd Member State*, 14 July 2011

<<http://www.un.org/apps/news/story.asp?NewsID=39034#.VimF7LwfeV4>> accessed 23 August 2014.

¹⁷ The Guardian, *Sudanese Woman Sentenced to Stoning Death over Adultery Claims*, 31 May 2012

<<http://www.theguardian.com/world/2012/may/31/sudanese-woman-stoning-death-adultery>> accessed 01 September 2014.

¹⁸ World bulletin, *Bashir Says Sudan to Draft New ‘Islamic’ Constitution*, 08 July 2012

<<http://www.worldbulletin.net/index.php?aType=haber&ArticleID=92247>> accessed 01 September 2014.

¹⁹ Al-Mehaimed, Ali M., ‘The Constitutional System of Saudi Arabia: A Conspectus’ (1993) 8 Arab Law Quarterly 30.

for instance, in respect of it being the source of judiciary, executive and of the structure of the family and society as a whole.²⁰

In Algeria, the 1996 Constitution makes multiple references to the state's Arab and Islamic heritage, asserting that it is a land of Islam and an integral part not only of the Great Maghreb Arab nation but also of the Mediterranean and African region.²¹ It declares that Islam is the religion of the state and acknowledges its ethnic plurality by recognising (via a 2002 amendment) the Berber language of Tamazight as one of its national languages.²²

On 3 August 2011, after Gaddafi's downfall in Libya, the National Transitional Council (NTC) issued a provisional 'Constitutional Declaration' to serve during the transitional period until a permanent constitution could be drafted and ratified.²³ Article 1 of this declaration stipulates that Islamic law - Sharia - would be the main source of future legislation. It also protects the right of non-Muslims to practice their religions and the linguistic and cultural rights of minorities.²⁴

The UAE Constitution provides for the position of Sharia within the state legal system,²⁵ Article 7 which was taken verbatim from Article 2 of the Kuwaiti constitution²⁶ states: "Islam is the official religion of the UAE. The Islamic Sharia is a main source of legislation in the UAE. The official language of the UAE is Arabic".²⁷ After the adoption of the UAE constitution, some legislators argued that, notwithstanding its relatively mild language, Article 7 required them to legislate in accordance with Sharia, and required judges to void legislation that did not conform

²⁰ See Frank E. Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (Brill 2000).

²¹ Constitution of the People's Democratic Republic of Algeria 1989 (last amended 1996, rev. 2008) [Algeria], 28 February 1989.

²² Constitution of Algeria, Article 2.

²³ See more Mehari Taddele Maru, 'On Unconstitutional Changes of Government: The Case of the National Transitional Council of Libya' (2012) 21 *African Security Review* 67-73.

²⁴ Libya: Constitutional Charter for the Transitional Stage of 2011 [Libya], September 2011.

²⁵ See Butti Sultan Butti Ali Al-Muhairi, 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause Concerning Shari'a' (1996) 11 *Arab Law Quarterly* 219-244.

²⁶ Kuwait Constitution, 11 November 1962, (reinst. 1992).

²⁷ United Arab Emirates. Constitution 2 December 1971.

to Sharia.²⁸ Basing the UAE constitution on the Kuwaiti model has resulted in constant reference being made to the Kuwaiti constitution, which in turn is based on the Egyptian constitution.²⁹ Egyptian legal advisors assisted in the drafting of many of the Arab constitutions that made Sharia norms a chief source of legislation.³⁰

The Egyptian constitution of 11 September 1971 was secular in nature and did not require laws to conform to principles of Islamic law.³¹ It remained in force – with a few amendments in 1980, 2005 and 2007³² – until the constitution’s dissolution in February 2011.³³ In 1980, in an attempt to reach out to Islamists, the Egyptian government decided to indicate a new commitment to ensuring that its legislation was consistent with Islam. To show this commitment, it amended Article 2 of the constitution and made the principles of the Sharia “the main source of legislation”. During the same period of time, a new constitutional court was established in Egypt, and in an important 1985 ruling, the new court held that Article 2 as amended created a partially justiciable requirement that law conform to Islamic principles.³⁴

Egypt had three different constitutions in the three year period between 2011-2014: the 1971, the 2012 and the 2014 Constitutions. During the drafting process of the preceding 2012 constitution, there was a commitment to keep Article 2, as to ensure

²⁸ Butti Sultan Butti Ali Al-Muhairi, ‘The Islamisation of Laws in the UAE: The Case of the Penal Code’ (1996) 11 Arab Law Quarterly 226-31.

²⁹ Mohammad Al-Moqatei, ‘Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait’ (1989) 4 Arab Law Quarterly 139-148.

³⁰ Clark B. Lombardi, ‘Constitutional Provisions Making Sharia ‘A’ or ‘The’ Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?’ (2013) 28 American University International Law Review 733-774, 754.

³¹ See Clark B. Lombardi, ‘Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State’ (1998) 37 Colum. J. Transnat’l L. 81, 87.

³² See more Nathalie Bernard-Maugiron, ‘The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power’ (2008) 22 Arab Law Quarterly 397-417; Dina Bishara, ‘Selections from the 2007 Amendments to the 1971 Constitution’ in Said Amir Arjomand and Nathan J. Brown (ed), *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran* (1st edn, SUNY Press 2013).

³³ See Jean-Pierre Filiu, *The Arab Revolution: Ten Lessons from the Democratic Uprising* (Oxford University Press 2011).

³⁴ Nathan J. Brown, ‘Egypt: A Constitutional Court in an Unconstitutional Setting’ in Justin Frosini and Francesco Biagi (ed), *Political and Constitutional Transitions in North Africa: Actors and Factors* (1st edn, Routledge 2014).

the liberals that Egypt is not going through an *Islamisation* process.³⁵ Still, the Islamists-majority constitutional assembly, were seeking to amend the article to allow more application of Sharia within the state, as a result and instead of amending Article 2, two new provisions were incorporated in relation to this matter. The new provisions inserted were to determine the meaning of the phrase “principles of Sharia” and which authority is responsible for its interpretation, which changed the manner of understanding Article 2 and the ways of its application, an approach several liberals-members of the assembly did not expect.³⁶ One of the two newly inserted provisions was Article 219, which provided that the principles of Sharia included all the “evidence, rules, jurisprudence and sources” that were accepted by *Sunnis*.³⁷ This allowed all the Islamic jurisprudence to be a source for the Egyptian legislation.³⁸

Egypt’s 2012 Constitution lasted for approximately six months as on 3 July 2013, the military deposed the Islamist president, Morsi, suspended the constitution and set up an interim government headed by the Supreme Constitutional Court President after widespread popular demonstrations.³⁹ In the new Constitution of 2014, many of the references to religion that had been included in 2012 were eliminated. Most importantly, the controversial Article 219 from the 2012 Constitution was removed.⁴⁰

The 2005 Iraqi Constitution proclaimed religious freedom, but guaranteed that Iraq was a primarily Islamic and Arab State. Article 2 of a draft that was circulated by the Constitutional Committee on 11 August 2005 provided that Islam should be the official state religion, and that it should be either “the principal source of legislation” or “a principal source of legislation.” It also provided that “it is forbidden to enact

³⁵ Zaid Al-Ali, *The New Egyptian Constitution: An Initial Assessment of Its Merits and Flaws*, 26 December 2012, Open Democracy <<http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>> accessed 10 July 2013.

³⁶ *ibid.*

³⁷ Egypt, Constitution 2012, Article 219.

³⁸ L. Lavi, An Examination of Egypt’s Draft Constitution Part I: Religion and State – The Most Islamic Constitution in Egypt’s History, 3 December 2012, The Middle East Media Research Institute <<http://www.memri.org/report/en/0/0/0/0/0/6846.htm>> accessed 10 July 2013.

³⁹ Nathan J. Brown, ‘Egypt’s Failed Transition’ (2013) 24 *Journal of Democracy* 45-58, 46.

⁴⁰ Michael Meyer-Resende, *Egypt, In-Depth Analysis of the Main Elements of the New Constitution* (European Union 2014).

laws which contradict the principles of Islam.”⁴¹ Representatives from the U.S. Embassy were mostly concerned that Iraq, which had previously been considered a relatively secular state, was in the process of becoming an Islamic “theocracy” under its watch, so the U.S. Ambassador intervened and forced the adoption of a formulation that was more acceptable to the international community.⁴² The final version of Article 2 therefore provides not only that “Islam is the official religion of the State and is a foundation source of legislation” but also that “[n]o law may be enacted that contradicts the principles of democracy.”⁴³

The 2002 Constitution of the Kingdom of Bahrain acknowledges the role of Islam by placing Sharia as a principal source for legislations.⁴⁴ The Constitution declares that one of the main goals of the kingdom is to advance the interests of a larger Islamic community, while guaranteeing the freedom of religion to others.⁴⁵ Jordan’s 1952 Constitution confirms the role of religion by stating that the state’s religion is Islam, that the king must be Muslim, and by establishing Sharia Courts, which apply the provisions of the Sharia.⁴⁶

The Syrian 1973 Constitution states that “The religion of the President of the Republic has to be Islam [and] Islamic jurisprudence is a main source of legislation”.⁴⁷ After protests in Syria during 2011, a new constitution was approved in 2012, Article 3 was kept the same in regards to Islam, but with an additional part providing that “The State shall respect all religions, and ensure the freedom to perform all the rituals that do not prejudice public order; The personal status of

⁴¹ Ashley S. Deeks and Matthew D. Burton, ‘Iraq’s Constitution: A Drafting History’ (2007) 40 Cornell International Law Journal.

⁴² Zaid Al-Ali, ‘Constitutional legitimacy in Iraq: What role local context?’ in Rainer Grote and Tilmann Roder (ed), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (1st edn, Oxford University Press 2011).

⁴³ Nathan J. Brown, ‘The Final Draft of the Iraqi Constitution: Analysis and Commentary’ (2005) 16 Carnegie Endowment for International Peace
<<http://carnegieendowment.org/files/FinalDraftSept16.pdf>> accessed 12 March 2014.

⁴⁴ Constitution of the Kingdom of Bahrain [Bahrain], 14 February 2002, Rev. 2012.

⁴⁵ See more John E. Peterson, ‘Bahrain: Reform, Promise and Reality’ in Joshua Teitelbaum (ed), *Political Liberalization in the Persian Gulf* (1st edn, Hurst 2009).

⁴⁶ Constitution of the Hashemite Kingdom of Jordan [Jordan], 1 January 1952.

⁴⁷ Syrian Arab Republic: Constitution, 1973, 13 March 1973, Article 3(1)(2).

religious communities shall be protected and respected”.⁴⁸ In Yemen, the 1991 Constitution recognises the state’s “Islamic heritage, stating that Yemen is part of a larger Arab nation and Islamic world, where Islam is the state religion, and that Islamic jurisprudence is the main source of legislation”.⁴⁹ In 1972, Qatar drafted a provisional constitution and Article 7 of which stated that “. . . the Islamic Sharia is the main source of legislation”.⁵⁰ In 2004, Qatar adopted a new constitution that demoted the role of Sharia from “the” to “a” main source of legislation.⁵¹

In Tunisia, the Constitutional Assembly promulgated the 1959 Tunisian Constitution with several amendments in 1988, 2002, 2005 and 2008 which also stressed the Islamic influence and its relation to the greater Arab community also confirming that “Arabic” was their national language.⁵² After the change of regime in 2011, the process of drafting a new Tunisian Constitution commenced in February 2012. After winning 41% of the seats in the Constituent Assembly, representatives of Al-Nahda party proposed a constitutional provision declaring Islam to be “the main source of legislation” with the goal of unifying all Tunisian legislation under the rule of Islamic law.⁵³ Al-Nahda representatives have also asserted on many occasions that domestic legislations and international treaties approved by the Parliament should be in conformity with Islamic law standards.⁵⁴ For example, some Al-Nahda members in the Constituent Assembly rejected a proposed initiative to abolish the death penalty on the grounds that such an initiative would violate Islamic law. The draft was then passed by a two-third majority of the National Constituent Assembly and the Tunisian Assembly approved the new Constitution on 27 January 2014. The resulting constitution is a liberal text that states that Islam is the state’s religion, but has no

⁴⁸ Syrian Arab Republic: Constitution, 2012, 26 February 2012, Article 3.

⁴⁹ Yemen Constitution 1991 amended via public referendum 20 February 2001, Article 3.

⁵⁰ Qatar, Provisional Constitution 1972, Article 7.

⁵¹ The Permanent Constitution of the State of Qatar 0/2004, Article 1

⁵² Constitution of Tunisia, 1 June 1959.

⁵³ Sarah J. Feuer, *Islam and Democracy in Practice: Tunisia’s Ennahdha Nine Months in*, September 2012, Crown Center for Middle East Studies-Brandeis University <<http://www.brandeis.edu/crown/publications/meb/MEB66.pdf>> accessed 15 July 2014.

⁵⁴ Asma Ghribi, *Role of Islamic Law in Tunisian Constitution Provokes Debate*, 22 March 2012, Tunisia live <<http://www.tunisia-live.net/2012/03/22/role-of-islamic-law-in-tunisian-constitution-provokes-debate/>> accessed 15 July 2014.

mention of Sharia as a source of legislation.⁵⁵

3.3 Political Systems

Each state's political system plays a major role in whether and how it ratifies and implements international treaties. The more democratic states have always shown initiatives in ratifying international treaties that relate to human rights and justice. Conversely, in several (mainly more authoritarian) states, political leaders feel that these types of treaties might affect them and jeopardise their own powers. States can be affected by binding treaties, as after their ratification they are required to implement the treaty's articles into their domestic legal systems, which might have effects on their entire political governance systems. By signing an international treaty, specifically one related to human rights, a state declares that it has agreed to the treaty's content, and intends to work towards its implementation, but only the ensuing ratification of the treaty produces a legally binding obligation under international law. Ratification is usually enacted by the head of state who represents it internationally, thus a decision to ratify or accede to a treaty like the Rome Statute might be affected by the state's political system. Therefore, it is essential to review and analyse the political system of some Arab states to facilitate the study of their position towards the ICC.

Arab states are divided in their political systems between republics and monarchies.⁵⁶ In the latter category - which mainly includes the Arab Gulf states like Bahrain, Kuwait, Qatar, Oman, UAE and Saudi Arabia, as well as Jordan and Morocco - the monarch exercises ultimate governing authority as head of state, and in some states as

⁵⁵ Maya Manaa, *Tunisia's Constitution: The Battle for Islam and Democracy*, 7 December 2012, Fair Observer < http://www.fairobserver.com/region/middle_east_north_africa/tunisias-constitution-battle-islam-democracy/ > accessed 16 July 2014.

⁵⁶ See more Al Ahmad, Wassim Hussam Eddine, 'Constitutional and Political Systems in Arab States.' (2010) Beirut: Al Halabi Law Publishers. (In Arabic); Tarboush, Qaed Muhammad, 'Systems of Government in Arab Countries: Comparative Law.' (2006) Alexandria: Modern University Bureau. (In Arabic).

head of government, and so can maintain absolute power over the whole state.⁵⁷ For example, according to Article 5 of the Saudi Basic Law, which codifies the adopted practice, the system of government is a monarchy.⁵⁸ The six member states of the Gulf Cooperation Council (GCC) are among the world's last true monarchies. The monarch of each state enjoys supreme power and other members of his ruling family hold important positions within the state.⁵⁹ Despite significant steps toward institutionalisation and the creation of governments, the structure and authority of these monarchical systems continue to be unchallenged.⁶⁰

On the other hand, some Arab republic states adopt the presidential system of government, while others adopt a mixture of the presidential and parliamentary systems. In all Arab republican constitutions, the president of the republic is the head of state. They are elected, although the methods of their election varies from one constitution to another, for example the Algerian President is elected by “universal, direct and secret suffrage” according to Article 71 of the Constitution.⁶¹

In Jordan, the 1952 Constitution created a constitutional monarchy with a king, prime minister, council of ministers, a bicameral legislature, judiciary, and high tribunals.⁶² While power is nominally divided among the three branches of government, the king retains much of the actual power of government. His duties include ratifying laws and treaties, declaring war and peace, creating and conferring military ranks and honors,

⁵⁷ Oman is an absolute monarchy in which the Sultan of Oman exercises ultimate authority. See more Nikolaus Siegfried, ‘Legislation and Legitimation in Oman: The Basic Law’ (2000) 7 *Islamic Law and Society* 359-397.

⁵⁸ Saudi Arabia: Basic Law, 1 March 1992, Article 5.

⁵⁹ See more Joseph A Kechichian, *Power and Succession in Arab Monarchies* (Lynne Rienner Publishers 2008).

⁶⁰ John E. Peterson, ‘Bahrain: Reform, Promise and Reality’ in Joshua Teitelbaum (ed), *Political Liberalization in the Persian Gulf* (1st edn, Hurst 2009), 159.

⁶¹ Constitution of Algeria 1989 (last amended 1996), 28 February 1989; Article 71 reads ‘The President of the Republic shall be elected by universal, direct and secret suffrage. He shall be elected by an absolute majority of votes cast. The other modalities of the presidential election shall be determined by statute.’

⁶² Constitution of Jordan, Chapter 4.

and granting pardons.⁶³

The Moroccan Constitution deals with the king's royal power as separate power from the executive branch. The constitution provides that the system is "a constitutional monarchy, democratic, parliamentary and social monarchy".⁶⁴ Although the political system in Morocco is supposed to be based on the separation and balance of powers; the concept of monarchy is can though be distinguished from the Western concept. The king reigns and powers are not symbolic.⁶⁵ Despite the constitutional provisions in Article 6, of "the law as the supreme expression of the will of the nation" and confirming that "all physical or moral persons, and including the public powers, are equal before it and held to submit themselves to it". Still, the constitution provides the king with supreme power without any accountability,⁶⁶ and considers him as "Amir Al-Mouminine" (Commander of the Faithful), who is the most powerful religious authority according to the constitution.⁶⁷

The 2005 Iraqi Constitution was greatly influenced by the state's political history, and created a strong parliamentary bias in favour of an elected but mainly symbolic president. The president of Iraq acts as the head of state and represents the sovereignty and unity of the state. The election of the president is undertaken by the parliament by a two-thirds vote. Once elected, the president has a four-year term, with the option for only a single re-election. The president is assisted by the council of ministers. The prime minister and the ministers are nominated by the president and approved by a majority vote of the parliament. In Iraq, the prime minister holds most of the executive power of the government, with the ability to direct the general policy of the state and to act as the commander-in-chief of the armed forces, while the council of ministers plans and executes national policy, oversees the functioning of

⁶³ See more Mohammed Torki Bani Salameh and Azzam Ali Ananzah, 'Constitutional Reforms in Jordan: A Critical Analysis' (2015) 24 Digest of Middle East Studies 139-160.

⁶⁴ Constitution of the Kingdom of Morocco, 29 July 2011, Article 1.

⁶⁵ Paul Silverstein, *Weighing Morocco's New Constitution*, 5 July 2011, Middle East Research and Information Project <<http://www.merip.org/mero/mero070511>> accessed 20 July 2014.

⁶⁶ Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?* 20 June 2011, Carnegie Endowment for International Peace <<http://carnegieendowment.org/2011/06/20/new-moroccan-constitution-real-change-or-more-of-same/51>> accessed 31 July 2014.

⁶⁷ Constitution of Morocco, Article 41.

the government and its agencies, proposes legislation, the general budget, and development plans, and negotiates international agreements. In sum, it is charged with implementing the law and policy of the state.⁶⁸

The president of Algeria is elected directly to a five-year term, and after the 2008 Constitution amendments there are no limits to the re-election terms.⁶⁹ To be eligible for presidency, the candidate must be solely of Algerian citizenship, a Muslim, have an Algerian spouse, and have either proof of participation in the 1954 revolution, or, if not old enough to have participated, proof that his parents participated.⁷⁰ The Constitution gives a great deal of power to the president, who is not only the head of state, but also the commander-in-chief of the armed forces and is responsible for national foreign policy, dismissing the government, signing presidential decrees and ratifying treaties.⁷¹

In Bahrain, the king sustains wide constitutional powers as the head of state and commander in chief of the army, and among his duties are to maintain the sovereignty of the kingdom, grant pardons and appoint the government and the Consultative Council.⁷² Yet, the king has the legislative power, which includes amending the constitution and legislations, and to propose, enact and promulgate laws, besides his power to ratify international treaties.⁷³ Kuwait adopts a constitutional monarchy system,⁷⁴ in which the head of state the Emir or Sheikh, has to be from the Al-Sabah family and accepted from the National Assembly.⁷⁵ Among the Emir's duties is to propose amendments to the constitution, but parliament's approval is still required for enactment.⁷⁶

⁶⁸ Zaid Al-Ali, 'Constitutional Legitimacy in Iraq: What Role Local Context?' in Rainer Grote and Tilmann Roder (ed), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (1st edn, Oxford University Press 2011).

⁶⁹ Constitution of Algeria 1989 (amended 1996 and 2008), 28 February 1989, Article 74.

⁷⁰ Constitution of Algeria, Article 73.

⁷¹ Constitution of Algeria, Article 77.

⁷² Constitution of the Kingdom of Bahrain [Bahrain], 14 February 2002, Rev. 2012, Article 33-43.

⁷³ *ibid.*

⁷⁴ See more Michael Herb, 'Emirs and Parliaments in the Gulf' (2002) 13 *Journal of Democracy* 41-47.

⁷⁵ Kuwait Constitution, 11 November 1962, (reinst. 1992), Article 4.

⁷⁶ Kuwait Constitution, Article 174.

In Syria's previous Constitution of 1973, the executive branch was headed by the president and the leader of the Ba'ath Party, besides being the commander in chief, the head of state was the most powerful actor in the state.⁷⁷ The 1973 Constitution was amended to reduce the required age of the president from 40 to 34 years old,⁷⁸ in addition to being elected for a seven-year term. The executive's powers included at that time, the power to grant pardons, supervising the government activities, ratifying treaties, in addition to certain legislative powers as being the leader of the Ba'ath Party.⁷⁹ After the demonstrations that started in Syria in 2011 and the adoption of the new Constitution in 2012, the single-party state system which was mentioned in the 1973 Constitution as "The leading party in the society and the state is the Socialist Arab Ba'ath Party",⁸⁰ was changed. The new Constitution of 2012 did not mention the Ba'ath Party and a new article was introduced which provided that the state's political system is based on "the principle of political pluralism".⁸¹

In Tunisia, the 2014 Constitution provided for a semi-presidential system, with the prime minister, who is appointed by the president and appoints all government ministers by consulting the parliament except those for defense and foreign affairs.⁸² Tunisia opted to establish a semi-presidential system of government, in which the president and the parliament both have significant power over government formation and dismissal processes, and in which neither the parliament nor the president can fully dominate the other.⁸³ The prime minister presides over the administration and negotiates international agreements of a technical nature, while, the overall executive authority is exercised by the president who is the head of state, and represents its

⁷⁷ Syrian Arab Republic: Constitution 1973, 13 March 1973.

⁷⁸ Syria 1973 Constitution amendment in 2000 after the death of Hafez Al-Assad, the age was lowered so Bashar Al-Assad could be president; See more Qais Fares, *The Syrian Constitution: Assad's Magic Wand*, 8 May 2014, Carnegie Endowment for International Peace.

<<http://carnegieendowment.org/syriaincrisis/?fa=55541> > accessed 16 July 2014.

⁷⁹ Constitution of Syria 1973.

⁸⁰ Constitution of Syria 1973, Article 8.

⁸¹ Syrian Arab Republic: Constitution, 2012, 26 February 2012, Article 8 reads: "The political system of the state shall be based on the principle of political pluralism, and exercising power democratically through the ballot box; 2. Licensed political parties and constituencies shall contribute to the national political life, and shall respect the principles of national sovereignty and democracy;"

⁸² The Constitution of the Republic of Tunisia, promulgated on 27 January 2014, Article 89.

⁸³ See more Zaid Al-Ali and Donia Ben Romdhane, *Tunisia's New Constitution: Progress and Challenges to Come*, 16 February 2014, openDemocracy <[https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%e2%80%99s-new-constitution-progress-and-challenges-to->](https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%e2%80%99s-new-constitution-progress-and-challenges-to-) accessed 23 July 2014.

unity and secures its independence and continuity.⁸⁴

3.4 Legislative Powers

Understanding the constitutional structure and current composition of Arab states' legislative branches is a prerequisite to analysing the process of creating new law or changing an existing law.⁸⁵ States need to enact effective implementing legislation to ensure that they can prosecute crimes before national courts and co-operate fully with the ICC. Thus states' legislation framework is an essential element in the processes of ratification and implementation of the Rome Statute. A state willing to join the ICC could face challenges when implementing the Statute into its domestic legal system if the legislative system doesn't allow for such amendments. Thus, it is essential to focus on Arab states' legislative branch, based on their constitutions, as the legislator has a fundamental role in implementing the Rome Statute.

In Saudi Arabia, legislative authority is vested in the king and the Consultative Council, "The Shura Council". This Council was set up by Article 68 of the Constitution; and its institutional and procedural framework is determined by 'The Statute of the Consultative Council' issued concurrently with the Constitution in 1992.⁸⁶ Article 15 of the Statute of the Consultative Council mentions the powers of the Council: It discusses the general plan of economic and social development, interpreting laws, studying draft laws, treaties, international agreements and concessions, before their submission to the king for issuance by Royal Decrees, as the opinions of the Council are only of a recommendatory nature. They find their way

⁸⁴ Constitution of Tunisia, Article 77.

⁸⁵ See more Al Hiti, Naaman Attallah, 'Lawmaking: A Comparative Constitutional Study: A Comparative Study of Legislative Processes and Bill Drafting across Several Arab Countries.' (2007) Damascus: House of Rislan for Printing, Publishing and Distribution. (In Arabic); Michael Barnett, 'Institutions, Roles, and Disorder: The Case of the Arab States System' (1993) 37 *International Studies Quarterly* 271.

⁸⁶ Umm Al-Qura, No. 3397, 6 March 1992.

into implementation, as stated above, if deliberated by the executive branch of government, the council of ministers.⁸⁷

In Iraq, a federal legislative system is composed of the Council of Representatives and the Federation Council.⁸⁸ The parliament is unicameral, consisting of only the Council of Representatives, with 325 members elected to four-years terms, with 8 of the seats reserved for women and minorities. In order for a bill to become law, it must first be introduced by the president, the prime Minister, ten members of parliament, or by a special committee of the legislature, and only then can it be voted upon in the Council of Representatives.⁸⁹ After majority approval by parliament, bills are presented to the Presidency Council,⁹⁰ the president and two vice presidents, who can sign them into law or veto them. Once signed, the proposed legislation becomes law after it is published in the official government gazette.⁹¹

In Kuwait, the National Assembly consists of fifty elected members. Both the Emir,⁹² and the members of the National Assembly hold the right to propose laws.⁹³ According to Article 66 of the Kuwaiti Constitution the request for review of proposed legislation shall be made by means of a Decree setting forth the reasons for the request. Where the National Assembly re-adopts the proposed legislation by a two-thirds majority of the Assembly members, the Emir shall sanction and promulgate it within thirty days of his notification.⁹⁴

⁸⁷ The Statute of the Consultative Council, *Shura Council Law Royal Decree No. A/91*, 27 Sha'ban 1412/ 1 March 1992, Published in Umm-al-Qura Gazette, No.3397, 2 Ramadan 1412 / 5 March 1992, Article 17

<<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Laws+and+Regulations/The+Shura+Council+and+the+rules+and+regulations+job/Shura+Council+Law/>> accessed 15 March 2013.

⁸⁸ Constitution of the Republic of Iraq [Iraq], 15 October 2005, Article 48.

⁸⁹ Iraq Constitution, Article 60.

⁹⁰ Iraq Constitution, Article 73.

⁹¹ Iraq Constitution, Article 129.

⁹² Kuwait Constitution, Article 65.

⁹³ Kuwait Constitution, Article 109.

⁹⁴ See more Abdo I Baaklini and others, *Legislative Politics in the Arab World: The Resurgence of Democratic Institutions* (Lynne Rienner Publishers 1999), 169.

In Jordan, the parliament, or *Majlis al-'Umma*, shares legislative power with the king, it consists of two houses - the Senate and the House of Representatives.⁹⁵ The Senate is the upper house, in which its members are appointed by the king for a four-year term, chosen from among the nation's notable figures, including former prime ministers and ministers, retired military officers, judges, and ambassadors, and those who have been engaged in civil and public service.⁹⁶ Ten or more members can make the proposal of laws, from either, the Senate or the House of Representatives,⁹⁷ who have the right to amend, accept or reject the drafts after being referred from the prime minister.⁹⁸ The new laws have to be approved by both Houses and ratified by the king,⁹⁹ before being promulgated, as the king has the power to reject the ratification on new laws.¹⁰⁰

In Bahrain, the National Assembly is composed from the Consultative Council and the Chamber of Duties, the latter has forty members who serve four-years term, but its members are elected by direct universal suffrage, while the Council has forty members appointed by the king for a four-year term. The draft has to be approved by the National Assembly and ratified by the king.¹⁰¹ The king or any member of either chamber can propose laws.¹⁰² As for the constitution amendments, it can be reviewed upon the request of fifteen members of both chambers.¹⁰³

Under Morocco's 2011 Constitution, the parliament has more powers than in the preceding constitution, especially to the Chamber of Representatives. The constitution also provided for reforms to the legislature branch by reinforcing its powers and improving its status.¹⁰⁴ The bicameral parliamentary system introduced the Chamber of Representatives (*majlis al-nuwwab*) and the Chamber of Counselors (*majlis al-*

⁹⁵ Jordan Constitution, Article 62.

⁹⁶ Jordan Constitution, Article 64.

⁹⁷ Jordan Constitution, Article 95.

⁹⁸ Jordan Constitution, Article 91.

⁹⁹ Jordan Constitution, Article 91.

¹⁰⁰ Jordan Constitution, Article 93 (3); The king may, within six months from the date of submission to him, return it to the House coupled with a statement of the reasons for the non-ratification.

¹⁰¹ Bahrain Constitution, Article 70.

¹⁰² Bahrain Constitution, Article 35.

¹⁰³ Bahrain Constitution, Article 92.

¹⁰⁴ See more Colette Donadio, 'The Role of Constitutional Reforms in Morocco During the Arab Spring' (2014) 5.10 Mediterranean Journal of Social Sciences 710.

mustasharin). Both, the prime minister or members of the parliament can submit the proposal of laws.¹⁰⁵ The king also has the power to propose laws and submit it to the parliament, and such proposal cannot be refused.¹⁰⁶ *Dahirs* have continued as one of the main features of Morocco's political system.¹⁰⁷ Their use in Morocco differs from other forms of discretionary powers that might exist in other political systems because *Dahirs* are closely attached to the king's religious authority, and are thus considered almost as sacred texts, which have never been challenged. The royal discretionary power of *Dahirs* therefore constitutes one of the most important sources of legislation.¹⁰⁸ The key royal decisions are automatically formulated as *Dahirs*, a legal reality that puts them above the law and the constitution. They are signed by the king as the commander of the faithful and are subsequently enforced as laws.¹⁰⁹ There are two types of *Dahirs*: those that allow the king to exercise his religious prerogatives and those that relate to his status as head of state.¹¹⁰ This difference does not indicate a distinction in their outcome. The constitution also distinguishes between *Dahirs* that are countersigned by the head of government and those that are signed only by the king.

In some Arab republic states, members of the parliaments only have the right to propose laws, while in other states; such a right is also granted for the head of state and government. Some Arab states' legislative authority is embodied in one entity, "parliament", while in some other Arab states it consists of two councils, the "parliament" and the "senate".¹¹¹ In Algeria, the Parliament is composed of two houses: the lower National People's Assembly and the upper Council of the Nation.¹¹²

¹⁰⁵ Morocco Constitution, Article 78.

¹⁰⁶ Morocco Constitution, Article 95.

¹⁰⁷ Mohamed Madani and others, *The 2011 Moroccan Constitution: A Critical Analysis* (International IDEA 2012), 25.

¹⁰⁸ *ibid*, 26.

¹⁰⁹ Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?* 20 June 2011, Carnegie Endowment for International Peace <<http://carnegieendowment.org/2011/06/20/new-moroccan-constitution-real-change-or-more-of-same/51>> accessed 31 Jul 2014.

¹¹⁰ Morocco Constitution, Article 41.

¹¹¹ See more Tarboush, Qaed, 'Legislative Authority in Arab States with Republican Systems.' (1993) Beirut: University Institute for Studies & Publishing. (In Arabic); The Lebanese Parliament and The United Nations Development Programme, *Developing Legislative Drafting for Arab Parliaments: Proceedings of the "Arab Parliamentary Symposium"* (2003) Beirut: The United Nations Development Programme.

¹¹² Algeria Constitution, Article 98.

The prime minister and the deputies have the right to initiate legislation.¹¹³ At least twenty members of the lower house have to introduce a bill in order to be admissible.¹¹⁴ The upper house may only deliberate on bills presented by the lower house, and a three-fourths majority is required to pass them.¹¹⁵ The president then promulgates the law.¹¹⁶ The parliament may pass legislations on general rules of criminal law and criminal procedure and particularly the determination of crimes, amnesty, and extradition.¹¹⁷

Syria adopts a unicameral parliamentary system, which is called the People's Council and consists of 250 members elected for four-years term through a direct voting system.¹¹⁸ The Parliament has the power to enact laws and ratify treaties.¹¹⁹ While in Yemen, the constitution was amended in 2001 to change the parliamentary system to bicameral,¹²⁰ which created the Consultative Council (Shura) beside the existing House of Representatives. The new Council, which consists of 111 members all appointed by the president,¹²¹ has an advisory role and can only discuss drafts without enactment. The House has the power to enact laws and create the state's national policy and budget.¹²² Both the House and the Council can hold joint sessions to vote on treaty ratifications or other issues as required by the constitution or the president.¹²³

¹¹³ Algeria Constitution, Article 119.

¹¹⁴ Algeria Constitution, Article 119.

¹¹⁵ Algeria Constitution, Article 120.

¹¹⁶ Algeria Constitution, Article 126.

¹¹⁷ Algeria Constitution, Article 122.

¹¹⁸ Syria, Constitution, Article 56.

¹¹⁹ Syria, Constitution, Article 75.

¹²⁰ Yemen, 1991 Constitution, amended via Public referendum 20 February 2001; See more HRW, *Yemen's Constitutional Referendum and Local Elections*, Human Rights Watch Backgrounder February 2001 <<https://www.hrw.org/legacy/backgrounder/mena/yemen-bck-0201.htm>> accessed 25 April 2014.

¹²¹ Yemen, Constitution, Article 125.

¹²² Yemen, Constitution, Article 92.

¹²³ Yemen, Constitution, Article 127.

3.5 Human Rights

The majority of Arab states' constitutions include extensive guarantees for human rights, illustrative examples of which are the prohibition on discrimination, equality before the law, as well as the rights to privacy, freedom of opinion, expression, thought, conscience, and religion, and fair and public trial before an independent, competent and impartial tribunal. Moreover, some of these constitutions have incorporated special provisions as guarantees of justice mirroring those appearing in both the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Despite these guarantees, most Arab states have a record of human rights violations and a history of conflicts.¹²⁴ The Rome Statute aims to end impunity and prevent future crimes and human rights violations by imposing new obligations on the ratified States. Thus it is essential to review the current related human rights articles in the Arab states' constitutions, before addressing the issue of ratification and implementation of the Rome Statute.

Most of the Arab states' constitutions deal with human rights in separate chapters. The Algerian Constitution deals with human rights under Chapter IV, entitled 'Rights and Freedoms' (Articles 29-59). Part III of the Bahraini Constitution is devoted to 'Public Rights and Duties' (Articles 17-31). The Constitution of Djibouti addresses human rights in 'Title II On the Rights and Duties of the Human Person' (Articles 10-20), while the 2014 Egyptian Constitution deals with human rights in 'Chapter Three: Public Rights, Freedoms and Duties'. The Iraqi Constitution covers human rights in Chapter III 'Fundamental Rights and Duties' (Articles 19-36). In the case of Jordan, the Constitution covers human rights in Chapter II entitled 'Rights and Duties of Jordanians' (Articles 5-23), whilst in Kuwait, the Constitution deals with human rights in 'Part III' entitled 'Public Rights and Duties' (Articles 27-49). As regards to the Constitution of Lebanon, human rights are covered in 'Chapter II' entitled 'The

¹²⁴ See T. Koraytem, 'Arab Islamic Developments on Human Rights' (2001) 16 Arab Law Quarterly 255-262.

Lebanese, their Rights and their Obligations’ (Articles 6-15). The Omani Basic Law addresses human rights in Part Three entitled ‘Public Rights and Duties’ (Articles 15-40), while Part Three of the Qatari Constitution is entitled ‘Public Rights and Duties’ (Articles 9-16).¹²⁵

The Somali Democratic Republic deals with human rights in Chapter 2 of its Constitution, entitled ‘Fundamental Rights and Duties of the Citizen ‘ (Articles 10-41). Article 3, paragraph 4 of the Somali Constitution, reads “The Constitution of the Federal Republic of Somalia promotes human rights, the rule of law, general standards of international law, justice...” Part 4 of the Syrian Constitution entitled ‘Freedoms, Rights and Public Duties’ is devoted to human rights (Articles 25-49), whilst the Constitution of the Sudan deals with human rights and duties in Part II: ‘Freedoms, Sanctities Rights and Duties’ (Articles 20-35). Chapter I of Part II (Articles 20-34) covers ‘Freedoms, Sanctities Rights’, while Part II of the same Chapter (Article 35) deals with ‘Public Duties and Observance.’ The UAE Constitution addresses human rights in Chapter Three, entitled ‘Freedoms, Rights and Public Duties’ (Articles 25-44), whilst in the Yemeni Constitution, human rights are dealt with under Part II, entitled ‘Basic Rights and Obligations of Citizens’ (Articles 40-60).

Neither the Saudi nor the Lebanese constitutions refer to the prohibition of torture or cruel, inhuman or degrading treatment.¹²⁶ In the case of Saudi Arabia, whilst Article 28 of the Imprisonment and Detention Law 31 of 1978 prohibits “any assault whatsoever on prisoners and detainees”, Article 20 of the same law explicitly sanctions methods of discipline that violate international standards, such as flogging, indefinite solitary confinement and deprivation of family visits and correspondence.¹²⁷ Some of the Arab states’ constitutions protect against acts of

¹²⁵ See more Jamil Ddamulira Mujuzi, ‘The Protection of the Right to Freedom from Torture in the Arab League States and under the Arab Charter on Human Rights’ (2010) 2 City University of Hong Kong Law Review 247-259.

¹²⁶ The Constitution of Lebanon adopted 23 May 1926, amendments of 21 August 1990, rev. 4 September 2004. None of the constitutional amendments have prohibited torture.

¹²⁷ Saudi Arabia: The Imprisonment and Detention Law issued by Royal Decree No. M/31, 28 May 1978.

torture with various degrees of specificity and clarity, while others provide for sanctions against those who commit acts of torture or violate these guarantees. Torture is clearly proscribed in most of the constitutions. The Algerian Constitution prohibits torture and any form of physical harm as Article 34 provides that “The State shall guarantee the inviolability of the human person.”, and adds that any form of physical or moral violence or infringement of dignity shall be prohibited.”, while Article 35 reads “The infringements of rights and liberties as well as any physical or moral attacks on the integrity of the human person shall be punished by statute.”¹²⁸

Article 19(d) of the Constitution of Bahrain reads “No person shall be subjected to physical or mental torture, or inducement, or undignified treatment, and the penalty for so doing shall be specified by law.” The article adds “Any statement or confession proved to have been made under torture, inducement, or such treatment, or the threat thereof, shall be null and void.” While Article 20(d) of the same constitution states that “It is forbidden to harm an accused person physically or mentally.”¹²⁹ In Libya’s Constitution, Article 7 describes the state’s role as a safeguard of human rights and fundamental freedoms, and commits the state to join regional and international declarations and covenants to protect these rights and freedoms. In February 2013, Libya took its first steps in that direction by signing the Convention on the Rights of Persons with Disabilities and the International Convention on Enforced Disappearances; although Libya has to ratify these treaties.¹³⁰

Article 16 of the Constitution of Djibouti clearly prohibits torture: “No one may be submitted to torture, or to inhuman, cruel, degrading or humiliating actions or treatment.” The article adds that “Any individual, any agent of the State, or any public authority rendered culpable of such acts, either on their own initiative, or on instruction, shall be punished in accordance with the law.”¹³¹ Under Article 37(c) of

¹²⁸ The definition of torture contained in Article 110 of the Algerian Penal Code is very close to that contained in the Convention against Torture. See: Summary record of the public part of the 273rd meeting: Algeria.11/O4’7, UN Doc. CAT/C/SR.273. (Summary Record), para. 13.

¹²⁹ Constitution of Bahrain, Articles 19 -20.

¹³⁰ See Inmaculada Szmolka, ‘Political Change in North Africa and the Arab Middle East: Constitutional Reforms and Electoral Processes’ (2014) 36 Arab Studies Quarterly 128-148.

¹³¹ Constitution de la République de Djibouti [Djibouti], 4 September 1992.

the Constitution of Iraq “All forms of psychological and physical torture and inhumane treatment are prohibited...”¹³²

Article 5 of the 2014 Egyptian Constitution lists human rights among the foundations of the state’s political system, stipulating that discrimination and incitement to hatred are crimes with no statute of limitations. It further commits the state to achieving social justice, asserting that citizenship, equality and equal opportunity form the basis of the relationship between the individual and the state. It stipulates rights and freedoms unprecedented in previous Egyptian constitutions - for example, the right to strike peacefully - and has relaxed controls over the freedom of belief. Personal freedom is ensured as a natural right, as are the freedoms of movement, thought, opinion, artistic and literary creativity, press and publishing. The constitution prohibits forced arbitrary displacement, and ensures the rights to form political parties, civil associations and organisations upon notification. It also dedicates several articles to addressing the rights of women, children, persons with disabilities, older persons and expatriates.¹³³

The Egyptian Constitution specifies that “All forms of torture are a crime with no statute of limitations.”¹³⁴ In addition, “The state guarantees just compensation for those who have been assaulted.”¹³⁵ Egypt’s new Constitution includes a number of important improvements. It uses clear language about the issue of discrimination and violence against women and grants significant rights and affords protection to children and to the disabled. The list of socio-economic rights has been lengthened and is more detailed than it had been previously. However, the constitution does not offer any persuasive mechanism for the enforcement of these rights.¹³⁶

In the Kuwaiti Constitution, it is stipulated that “No person shall be subjected to

¹³² See more T. Koraytem, ‘Arab Islamic Developments on Human Rights’ (2001) 16 Arab Law Quarterly 255-262.

¹³³ See more Michael Meyer-Resende, Egypt, In-Depth Analysis of the Main Elements of the New Constitution (European Union 2014).

¹³⁴ Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, Article 52

¹³⁵ Constitution of Egypt, Article 99.

¹³⁶ See Nathan J. Brown, ‘Egypt’s Failed Transition’ (2013) 24 Journal of Democracy 45-58

torture or to ignominious treatment.”¹³⁷, and Article 34 declares that “The accused shall not be bodily or mentally injured.” Despite the aforementioned constitutional provision there is no defined crime of torture in Kuwait.¹³⁸ Under Article 13 of the Constitution of Mauritania “No one shall be reduced to slavery or to any form of servitude of the human being, or submitted to torture and other cruel, inhuman or degrading treatments.” The Constitution in Mauritania confirms that “These practices constitute crimes against humanity and are punished as such by the law.”¹³⁹ Article 20 of Oman’s Basic Law provides that “No person shall be subjected to physical or psychological torture, inducement or demeaning treatment.” and “The Law stipulates punishment of whomever commits such acts.”. It adds that statements or confessions obtained by torture will be void.¹⁴⁰

Article 15(2) of the Constitution of Somalia declares that “Every person has the right to personal security, which shall be safeguarded through the prohibition of illegal detention, all forms of violence, including any form of violence against women, torture, or inhumane treatment.”¹⁴¹ In Sudan, the Constitution confirms that “No person shall be subjected to torture or to cruel, inhuman or degrading treatment.”¹⁴² Syria’s constitution affirms, in Article 53 (2), that “No one may be tortured or treated in a humiliating manner, and the law shall define the punishment for those who do so;” The United Arab Emirates’ Constitution stipulates that “A person may not be subjected to torture or to degrading treatment.”,¹⁴³ while Article 28 affirms that “An accused person may not be physically or morally harmed.” The Constitution of Yemen prohibits all forms of torture and any “Physical or psychological torture at the time of arrest, detention or jail is a crime that cannot be prescribable. All those who practice, order, or participate in executing, physical or psychological torture shall be

¹³⁷ Constitution of Kuwait, Article 31.

¹³⁸ See more Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford University Press 2007), Chapter 6, *Arbitrary Arrest and Torture in Kuwait*.

¹³⁹ *Constitution de la République Islamique de Mauritanie* [Mauritania], 20 July 1991, *Loi Constitutionnelle n° 2012-015 of 2012*.

¹⁴⁰ *Oman Constitution of 1996 with amendments through 2011*, promulgated in the Royal Decree No. 101/96, 6 November 1996.

¹⁴¹ *The Federal Republic of Somalia: Provisional Constitution* [Somalia], 1 August 2012.

¹⁴² *Constitution of Sudan*, Article 33.

¹⁴³ *Constitution of UAE*, Article 26.

punished.”¹⁴⁴

3.6 Extradition Issues

Prohibition of extradition and surrender of nationals to a foreign state or court is one of the obstacles towards ratification of the Rome Statute. The issue frequently arising relates to the compatibility, of obligations to arrest and surrender to the ICC, with the prohibition on the extradition of nationals in several Arab states’ constitutions. One of the common approaches adopted by several states is to amend their constitutions to fulfill the cooperation obligations with the ICC. The main question is whether ‘extradition’ between states is in fact qualitatively different from ‘surrender’ from a state to an international court. Following the lead of the Rome Statute itself, which at Article 102 explicitly distinguish them, some Arab states’ constitutions clarify the difference and others only mention extradition.

The Algerian Constitution provides that no one may be extradited except on the basis and application of an Extradition Act.¹⁴⁵ In Bahrain the constitution only mentions political refugees and prohibits their extradition with no mention to the citizens.¹⁴⁶ The same approach is found in the Egyptian Constitution in Article 91 as it prohibits the extradition of political refugees. The Iraqi Constitution, which also affirms the prohibition of extraditing political refugees in Article 21, added that no Iraqi citizen shall be surrendered to foreign entities and authorities.

Article 21 of the Jordanian Constitution protects political refugees from extradition and in the second clause mentions that international agreements and laws shall regulate the extradition of ordinary criminals. In 2013 Jordan’s King Abdullah II endorsed the Treaty on Mutual Legal Assistance in Criminal Matters between Jordan

¹⁴⁴ Constitution of Yemen, Article 48(e).

¹⁴⁵ Constitution of Algeria, Article 68.

¹⁴⁶ Constitution of Bahrain, Article 21.

and the United Kingdom of Great Britain and Northern Ireland.¹⁴⁷ Libya has also prohibited the extradition of political refugees in Article 10 of its constitution. Kuwait followed a similar approach, as Article 46 mentions that extradition of political refugees is prohibited. In Mauritania's Constitution, Article 22 provides that no one can be extradited except by virtue of the laws and conventions of extradition.

The Syrian constitution in Article 28 provides that no citizen may be extradited to any foreign entity.¹⁴⁸ Tunisia adopted a similar approach and prohibited the extradition of their citizens as Article 25 reads: "No citizen shall be deprived of their nationality, exiled, extradited or prevented from returning to their country."¹⁴⁹ The UAE prohibited extradition of political refugees and citizens in the same article,¹⁵⁰ and the Yemeni Constitution stipulates that a Yemeni national may not be extradited to a foreign authority.¹⁵¹

3.7 Immunity Issues

Many states have been forced to consider the relationship between, on the one hand, national provisions granting immunities to heads of state and government officials, and, on the other, the obligations to arrest and surrender under the Rome Statute and the 'irrelevance of official position'.¹⁵² This has caused many states to amend their constitutions, in most cases these have related to the immunity of a monarch or head of state. Not all Arab states constitutions provide for immunity of the head of state, but of all the constitutional issues that have arisen, the question of immunities has

¹⁴⁷ The UK Government has signed a mutual assistance treaty with Jordan to ensure that radical cleric Abu Qatada can be deported. See more < <https://www.gov.uk/government/publications/treaty-on-mutual-legal-assistance-between-the-uk-and-jordan> > accessed 14 April 2016.

¹⁴⁸ Syrian Constitution 2012.

¹⁴⁹ Tunisia Constitution 2014.

¹⁵⁰ Constitution of UAE, Article 38.

¹⁵¹ Constitution of Yemen, Article 45.

¹⁵² Rome Statute, Article 27.

been the most common and the most complex.¹⁵³

The Bahraini Constitution provides that the king is head of state, and its nominal representative, and his person is inviolate.¹⁵⁴ In Jordan, Article 30 uses different wordings but with the same meaning as it provides that the king is the head of the state and is immune from every liability and responsibility.¹⁵⁵ The Kuwaiti Constitution adopts the same approach as Article 54, which states that the *Amir* is the head of the state, his person is safeguarded and inviolable.¹⁵⁶ Morocco uses the same language, as their constitution, which provides that the person of the king is inviolable, and respect is due him.¹⁵⁷ It is evident that most Arab monarchy states, which provided immunity to their head of states, used the term “inviolable” instead of “immune”.¹⁵⁸

Arab republic states used different approaches in their constitutions. In the Lebanese Constitution, the crimes and the required procedures for the prosecution of the head of state are mentioned while granting him immunity as well. The constitution stipulates, “The president of the republic cannot be accountable, while performing his functions, except in his violation of the constitution, or in case of high treason. He cannot be charged with these crimes, or with violating the constitution and high treason except by the Chamber of Deputies by a decision issued by a two-thirds majority of all its members, and is tried before the Supreme Council.”¹⁵⁹ In Djibouti, the constitution provides that the president is not responsible for the acts accomplished in the exercise of his functions except in the case of high treason, while the government officials are criminally responsible for the acts accomplished in the exercise of their functions and

¹⁵³ See more Rosanne Van Alebeek, ‘National Courts, International Crimes and the Functional Immunity of State Officials’ (2012) 59 *Netherlands International Law Review* 5-41.

¹⁵⁴ Constitution Bahrain, Article 33.

¹⁵⁵ Constitution of Jordan, Article 30.

¹⁵⁶ Constitution of Kuwait, Article 54.

¹⁵⁷ Constitution of Morocco, Article 46.

¹⁵⁸ Constitution of Qatar, Article 64 reads: ‘The Prince is the Head of the State. His person is inviolable, and his respect is a duty’; Constitution of Oman, Article 41 reads: ‘His Majesty the Sultan is the Head of State and the Supreme Commander of the Armed Forces, his person is inviolable....’

¹⁵⁹ Constitution of Lebanon, Article 60.

qualified as crimes or misdemeanors at the moment they were committed.¹⁶⁰

The Sudanese Constitution used a more vibrant language as it stated in Article 60 that the president and his vice shall be immune from any legal proceedings and shall not be charged or sued in any court of law during their office term.¹⁶¹ The Syrian Constitution adopted the same approach and provided that the president is not responsible for the acts he does in carrying out his duties except in the case of high treason.¹⁶² While in the 2014 Tunisian Constitution, it differentiates between immunity for the head of state during and after his term in office. Article 87, which is titled “Immunity”, provides that “The President of the Republic enjoys judicial immunity during his/her term in office. All statutes of limitations and other deadlines are suspended, and judicial procedures can only be recommenced after the end of his/her term. The President of the Republic cannot be prosecuted for acts that were carried out in the context of performing his/her functions.”¹⁶³

3.8 Death Penalty

Penalties were one of the issues and subjects raised and addressed during the negotiations and drafting of the Rome Statute.¹⁶⁴ Some of the Arab states delegations argued that the death penalty should be included in the Statute as it is a part of their domestic penal codes and Sharia. The debate on the inclusion of the death penalty was led mainly by the Arab states with many states expressing their opposition to a

¹⁶⁰ Constitution of Djibouti, Article 84.

¹⁶¹ Constitution of Sudan, Article 60 (2) adds: ‘Notwithstanding sub-Article (1) above, and in case of high treason, gross violation of this Constitution or gross misconduct in relation to State affairs, the President or the First Vice President may be charged before the Constitutional Court upon a resolution passed by three quarters of all members of the National Legislature. Article 60(3) adds: In the event of conviction of the President of the Republic or the First Vice President, in accordance with sub-Article (2) above, he shall be deemed to have forfeited his office.’

¹⁶² Constitution of Syria, Article 117.

¹⁶³ Constitution of Tunisia, Article 87.

¹⁶⁴ The Subject of penalties was first addressed in 1996 Preparatory Committee session; At the Rome Diplomatic Conference, a Working Group on Penalties was constituted.

provision providing for capital punishment in the Statute.¹⁶⁵

There is no clear mention of the death penalty in the vast majority of the Arab states' constitutions. However, a few references are found in the following Arab constitutional provisions. The Iraqi president, according to the constitution, is empowered to ratify the death penalty.¹⁶⁶ A clearer wording is found in the Jordanian Constitution, which provides, in Article 39 that no death sentence "shall be executed except after confirmation by the King." The article adds, "Every such sentence shall be placed before the King by the Council of Ministers accompanied by their opinion thereon." Among the functions of the president of Sudan, displayed in Article 58(i) of the Sudanese Constitution, is the function to "approve death sentences". In Yemen, Article 123 of its Constitution provides that "A death sentence shall not be executed unless endorsed by the President of the Republic.", but there is no clarification as regards to whether the president is allowed to grant a pardon. The near-complete absence of constitutional provisions limiting the use of the death penalty would suggest that the approaches taken by the Arab constitutions either took this right for granted or chose to bypass it altogether.¹⁶⁷ The Sudanese Constitution offers clear limitations on the use of the death penalty that appear to be similar to some of the standards established by Article 6 of the ICCPR with an article titled "Restrictions on Death Penalty".¹⁶⁸

¹⁶⁵ See more Daniel B. Pickard, 'Proposed Sentencing Guidelines for the International Criminal Court' (1997) 20 *Loyola of Los Angeles International and Comparative Law Review* 123-164; William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press 2002), 251.

¹⁶⁶ Constitution of Iraq, Article 73(8).

¹⁶⁷ See more Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2014), 75.

¹⁶⁸ Constitution of Sudan, Article 36 "Restrictions on death penalty" reads: "1. No death penalty shall be imposed, save as retribution, hudud or punishment for extremely serious offences in accordance with the law.

2. The death penalty shall not be imposed on a person under the age of eighteen or a person who has attained the age of seventy except in cases of retribution or hudud.

3. No death penalty shall be executed upon a pregnant or lactating woman, save after two years of lactation."

3.9 Ratification and Implementation of International Treaties

In their responses to ratifying and implementing international treaties, states tend to follow one of two stances towards international and national law; monist and dualist.¹⁶⁹ Implementation therefore depends on whether the state subscribes to a ‘monist’ (direct application) or a ‘dualist’ (application after independent, domestic enactment) theory of international law. The approach each state adopts towards implementation of international treaties is of great practical importance, as it will provide for effective implementation within domestic laws. Obviously for those states that follow the dualist model, it will be required for the treaty to be implemented into domestic law to be effective. Despite the academic value of these two theories, they currently became of no importance since most states today adopt practical approaches, in which the same constitution include monist tendencies along with some aspects of dualism at the same time.¹⁷⁰

The approaches taken by Arab states towards the adoption of international treaties varies, and each constitutional system recognises international treaties at different levels. Most Arab states’ constitutions provide that international treaties, once ratified, are equivalent to domestic legislations,¹⁷¹ but others consider international treaties as superior to domestic legislations.¹⁷² International treaties are referred to in the preambles of most Arab states’ constitutions, but some others, do not clarify the position of international treaties in their legal systems at all.¹⁷³ Thus, the approaches taken are different from one state to another, and the application of international

¹⁶⁹ See Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2008).

¹⁷⁰ Patrick Daillier, ‘Monism and Dualism: An Outdated Debate?’, *International Law and Domestic Laws, Recent developments symposium* (1st edn, Pedone 1998), 9-10.

¹⁷¹ Egyptian Constitution 2014, Article 151 provides that treaties “shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution”. The Bahraini constitution of 2002 adopts the same position in Article 37 and the Qatari Constitution of 2003 in Article 68.

¹⁷² Mauritanian Constitution 1991, amended 1996, Article 80 stipulates the following: “Treaties or accords duly ratified or approved shall, upon their publication, be superior to laws, subject to, for each treaty or accord, its application by the other party”.

¹⁷³ Jordanian Constitution provided for the treaties without expressly determining their status. The same provided in the Syrian, Saudi and Yemeni Constitutions.

treaties will vary according to the constitutional framework of each state.¹⁷⁴ Another difference is the competence to ratify treaties, which is divided between both the executive and the legislative powers. As most Arab states have still not ratified the Rome Statute to date, the analysis of this section will apply to international conventions and international human rights treaties, which have been ratified or recognised in their constitutions.

Some Arab states refer to international treaties in their constitutions' preambles or within provisions in the Constitutions' texts. Referring to an international treaty, the preamble of the Lebanese constitution declares that "it is a founding active member of the United Nations Organization, committed to its Charter and the Universal Declaration of Human Rights. The state embodies these principles in all sectors and scopes without exception."¹⁷⁵ In Lebanon, the question of international treaties becoming binding on the state is governed by the manner of their incorporation in the internal legal system, which occurs by virtue of ratification by the executive, after consent by the Parliament.¹⁷⁶ The practice of Lebanese civil courts shows that international treaties, once ratified, are given precedence over domestic laws.^{177 178}

Other Arab states that clearly recognise the internationally accepted human rights agreements in their constitutions are Mauritania, Morocco, Somalia and Yemen. The preamble to the Moroccan Constitution provides for an "attachment to Human Rights as they are universally recognized" without specifying a particular treaty. This implies that human rights treaties are included in the constitution. According to the 1997

¹⁷⁴ See more John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *The American Journal of International Law* 310.

¹⁷⁵ Lebanon Constitution, the aforementioned preamble is the result of the 1989 *Taif Agreement* which was concluded in Saudi Arabia and resulted in major constitutional amendments which were approved on 21 September 1990 by the Lebanese Parliament.

¹⁷⁶ Georges J. Assaf, 'The Application of International Human Rights Instruments by the Judiciary in Lebanon' in Eugene Cotran and Adel Omar Sherif (ed), *The Role of the Judiciary in the Protection of Human Rights* (1st edn, Springer Netherlands 1997), 85.

¹⁷⁷ Lebanon, the New Code of Civil Procedure, Legislative Decree No. 90/83, Article 2 provides that "The courts shall comply with the principle of the rules of hierarchy. In the event of conflict between the provisions of international treaties and those of ordinary law, the former shall take precedence over the latter".

¹⁷⁸ Court of appeal of Mount Lebanon, 13th Chamber (civil), decision no. 398, 18 May 2010. Court of cassation, civil chamber, decision no. 59, 9 December 1973. Single civil judge in Metn, decision no. 0, 29 March 2001. Court of cassation, civil chamber, decision no. 59, 9 December 1973.

Morocco report to the Human Rights Committee, the provisions of the ICCPR are “an integral part of domestic law. Accordingly, any breach of the Covenant’s provisions may be appealed before the competent courts.”¹⁷⁹

Article 90(q) of the Constitution of Somalia provides that among the powers of the president is the power to “sign international treaties proposed by the Council of Ministers and approved by the House of the People of the Federal Parliament.” The constitution of Yemen contains similar wording regarding the duties of the president, according to Article 119(12) of the Constitution, one of the president’s duties is to “issue decrees endorsing Treaties and Conventions approved by the House of Representatives”, and according to Article 119(13), to “to ratify agreements that do not require the approval of the House of Representatives if approved by the cabinet.” Three Arab states’ constitutions refer to treaties as having supremacy over domestic laws. Under Article 132 of the Algerian Constitution, “The treaties ratified by the President of the Republic in the conditions specified by the Constitution shall prevail over Acts of Parliament.”

The Mauritania Constitution recognises the Universal Declaration of Human Rights (UDHR) and other international conventions,¹⁸⁰ and also provides that international treaties have a superior authority to that of national laws, as Article 80 of its Constitution reads, “The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, subject, for each agreement or treaty, to their application by the other party.” As regards to the Tunisian Constitution, Article 20 states that “international agreements approved and ratified by the Assembly of the Representatives of the People shall be superior to domestic laws but inferior to the Constitution.” This article is problematic, as it does not affirm that international human rights treaties, to which Tunisia is a signatory, are binding;

¹⁷⁹ Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth periodic reports of States Parties due in 1996 Addendum, Morocco 1, UN Doc.CCPR/C/1 15/Add. 1, 6.

¹⁸⁰ Constitution of Mauritania, Preamble provides that: “Strong from its spiritual values and from the radiation of its civilization, it also proclaims, solemnly, its attachment to Islam and to the principles of democracy as they have been defined by the Universal Declaration of the Rights of Man of 10 December 1948 and by the African Charter of the Rights of Man and of Peoples of 28 June 1981 as well as in the other international conventions to which Mauritania has subscribed.”

therefore, these treaties may in effect be undermined by the constitution.¹⁸¹ There is concern that this provision could be used to narrow the scope of human rights protections provided by international treaties to which Tunisia is a signatory.¹⁸²

About half the Arab states' constitutions provide that treaties are seen as being equal to domestic laws. Article 37 of the Constitution of Bahrain stipulates that "A treaty shall have the force of law once it has been concluded and ratified and published in the Official Gazette."¹⁸³ In Egypt, Article 151 of the Constitution establishes that international conventions have the force of law pursuant to the Constitution's provisions, while Article 93 stipulates that the state must comply with the covenants, treaties and international human rights conventions, which it has ratified.

In Jordan, the Constitution does not contain specific provisions regarding the relationship between international conventions and domestic laws.¹⁸⁴ The Jordanian Constitution adopts different wording to the aforementioned constitutions regarding this issue; Article 33(2) stipulates that "Treaties and agreements which entail any expenditures to the Treasury of the State or affect the public or private rights of Jordanians shall not be valid unless approved by the Parliament..."

The Constitution of Kuwait, Article 70 affirms that "The Amir shall conclude treaties by Decree and shall communicate them immediately, accompanied by relevant details, to the National Assembly. After ratification, sanction and publication in the Official Gazette the treaty shall have force of law." Article 76 of the Omani Basic

¹⁸¹ Human Rights Watch, *Tunisia: Let Constitution Herald Human Rights Era: Judges Should Base Interpretation on International Standards*, 1 February 2014 <<https://www.hrw.org/news/2014/02/01/tunisia-let-constitution-herald-human-rights-era>> accessed 15 April 2014.

¹⁸² International Commission of Jurists, *The Tunisian Constitution in Light of International Law and Standards*, 31 January 2014 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/ICJ-Tunisian-Constitution-Position-Paper-31-01-14.pdf>> accessed 25 April 2015.

¹⁸³ Bahrain Constitution, Article 37 continues to read: "However, peace treaties and treaties of alliance, treaties relating to State territory, natural resources, rights of sovereignty, the public and private rights of citizens, treaties pertaining to commerce, shipping and residence, and treaties which involve the State Exchequer in non-budget expenditure or which entail amendment of the laws of Bahrain, must be promulgated by law to be valid. Under no circumstances may a treaty include secret clauses which conflict with those openly declared."

¹⁸⁴ See more Omar S. Al-Okur and others, 'Ranking of International Treaty in National Legislations and the Constitution of Jordan' (2013) 40 *Dirasat: Shari'a and Law Sciences*.

Law declares that “Treaties and agreements shall not have the force of Law except after their ratification. In no case, shall treaties and agreements have secret terms contradicting their declared ones.”¹⁸⁵ Article 68 of the Constitution of Qatar declares that the Prince ratifies treaties by a decree and refers them to the Advisory Council. The article adds “the treaty or the agreement shall have the force of law after ratifying it and publishing it in the Official Gazette. However, peace treaties and treaties pertaining to the State’s territory, or sovereignty rights, or public or private rights of citizens, or those that involve amendment of the State’s laws, must be issued by law, to be put into force.” Under Article 75(6) of the Syrian Constitution, the People’s Assembly approves international treaties and treaties are binding in domestic law only when new legislation comes into force. Article 91(3)(d) of the Sudanese Constitution provides that the National Assembly “shall ratify international treaties, conventions and agreements.” This implies that the National Assembly in Sudan applies the same procedures as it applies to the enactment of domestic laws. The Constitution of Iraq declares that the President is to ratify treaties after approval by the legislature. According to Article 47(4) of the UAE Constitution, the Supreme Council of the Union shall be responsible for “The ratification of treaties and international agreements. Such ratifications shall be accomplished by decrees.”¹⁸⁶

Although Article 70 of the Saudi Basic Law stipulates that “international treaties, agreements, regulations and concessions are approved and amended by Royal decree”, Article 26 declares that “The State protects human rights in accordance with the Islamic Sharia.” The Basic Law confirms that all the treaties the state concluded before the adoption of the constitution will remain effective.¹⁸⁷ This emphasises the Islamic identity of Saudi Arabia as a state and society because it guarantees the

¹⁸⁵ Omani Basic Law considers international treaties as an integral part of the national law. Article 80 of the Omani Basic Law stipulates that ‘No authority in the State shall issue regulations, statutes, decisions, or directives that contradict the provisions of the applicable laws and decrees, or international treaties and agreements which are part of the Law of the Land.’

¹⁸⁶ Constitution of UAE, Article 46 provides that “The Supreme Council of the Union shall be the supreme authority in the Union. It shall consist of the Rulers of all the Emirates making up the Union, or of those who act for the Rulers in their Emirates in the event of their absence or if they have been excused from attending.’ The article adds ‘Each Emirate shall have a single vote in the deliberations of the Council.’”

¹⁸⁷ See more Ali M. Al-Mehameed, ‘The Constitutional System of Saudi Arabia: A Conspectus’ (1993) 8 Arab Law Quarterly 30.

supremacy of principles derived from the Quran and the Sunna over all provisions of national laws, as well as of this Constitution and the rules of international law.¹⁸⁸

3.10 Conclusion

It is notable that, among the total of twenty-two Arab states, many have common features in their constitutions, since they recognise a common official language and religion. Furthermore, the similar features in the executive and legislative powers, and most significantly the influence of the culture and religion on the constitutions. The cultural, political and religious factors play a role and have influence over the ratification and implementation of international treaties and conventions, especially those treaties related to human rights. The implications of these factors were apparent during the negotiations of the Rome Statute, which are discussed and analysed in the next chapters. Also, the fact the Rome Statute does not allow for reservations is considered an obstacle to ratification and implementation of the Statute. Most Arab states usually place reservations on human rights related treaties claiming them to be contradicting with Sharia.

Ratification is shown to be influenced by the nature of domestic legal systems and to be significantly less likely to occur in states with no respect for the rule of law. If Arab states have a well-functioning constitutional democracy with strong rule of law institutions, it would be hard to conceive at any time in the future, serious mass crimes that would require the ICC. The ratification and implementation of the Rome Statute will have no impact on the sovereignty of the concerned Arab states as alleged, and the Sharia application within the state will not be affected either. Even though most Arab states constitutions provide for democratic institutions and respect for the rule of law and human rights, the current practice reveals incapable institutions, human rights violations, and officials' constitutional abuses. The Rome

¹⁸⁸ Saudi Basic Law, Article 81.

Statute could provide protection against abuses of power when constitutionalism is not strong enough to ensure the rule of law, human rights and limits on the leaders' powers. The Statute could have an impact on national constitutional arrangements and through the ICC it could provide quasi-constitutional protection through the indictments of perpetrators. As reviewed in an earlier chapter, several states have amended or reinterpreted the constitutions to ensure its conformity with international law and human rights norms, an approach that must still be considered by several Arab states.

This chapter has discussed and analysed most of the Arab states' constitutions in relation to the topic. Such analysis is essential before reviewing the negotiations and the drafting phase of the Rome Statute in the next chapter. The concerns of the delegations raised during the Rome Conference are mainly based on constitutional issues reviewed in this chapter, which affected their decisions to ratify the Statute.

Chapter Four: Arab States and the Rome Conference

4.1 Introduction

The previous chapter analysed and examined some of the Arab states' constitutions, with special attention on the articles related to the issue of ratification and implementation of international treaties. This chapter examines Arab states' attitude towards the international criminal justice system generally, and the International Criminal Court, in particular during the negotiations and drafting of the Rome Statute. Although the number of States Parties from the Arab world is low, all Arab states participated in the creation of the Court.¹ The aim of this chapter is to review and analyse the constitutional and legal issues that emerged during the negotiations of the Statute, and the main concerns the Arab states raised during the Rome Diplomatic Conference. Thus a clearer image could be provided on the different aspects and factors that affected some of these states' decisions not to sign and/or ratify the Statute. This chapter reviews and discusses the Arab states' participation in the phase of drafting and negotiations of the Rome Statute only, as later chapters will continue addressing other phases and challenges.

As delegates from all Arab states (except Somalia), participated in the Diplomatic Conference it is essential to assess the concerns raised by those delegations during the negotiations of the Statute's articles and the recommendations they submitted. As several Arab states signed the Rome Statute but without afterwards ratifying it, and others voted against the Statute, it is essential to discuss and analyse this phase during the study of the positions taken later by the majority of the Arab states towards the ICC. From the records of the Rome Conference, it appears that the Arab states' delegations fully participated in the negotiations on most of the Statute's articles and provisions, indicating that the Arab states

¹ All members of the league of Arab States participated in the Rome Conference except Somalia. Palestine joined as an organisation.

displayed a great deal of interest in the creation of the Court. The level of delegates, their positions and their numbers also showed that the issue of creating a permanent international criminal court was very important to them. The debates, recommendations and reservations about certain issues showed that most of the Arab states were willing to join the Court, which was reflected in signatures of the Statute. On the other hand, the majority that voted against the Statute were Arab states, which was expected at that time, due to arguments and concerns raised during the negotiations.

4.2 Negotiating the ICC

The Rome Conference was the culmination of a negotiating process that began in 1989 with a request by the UN General Assembly to the International Law Commission (ILC) to address the establishment of an international criminal court.² In 1993, the Assembly asked the Commission to create a draft statute for such a court as a matter of priority,³ and its draft was completed in 1994.⁴ In the same year, the General Assembly established an Ad Hoc Committee to review the major substantive and administrative issues arising out the Commission's draft statute.⁵ The Ad Hoc Committee was followed by a Preparatory Committee, which met in 1996, 1997, and finally completing its work in April 1998. While the negotiating process in the Ad Hoc Committee was of a general nature and focused on the core issue of whether the proposition to create a court was serious and viable, the discussions during this phase of the Preparatory Committee focused on the text of the Court's Statute.⁶

² GA Res. 44/39, UN GAOR, 44th Sess., Supp. No. 49, at 311, UN Doc. A/44/49 (1989). The revival of the idea of establishing an international criminal court was initiated by Trinidad and Tobago in 1989 in connection with illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities. See Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195 (1989).

³ GA Res. 47/33, UN GAOR, 47th Sess., Supp. No. 49, at 287, UN Doc. A/47/49 (1992); and GA Res. 48/31, UN GAOR, 48th Sess., Supp. No. 49, at 328, UN Doc. A/48/49 (1993).

⁴ Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

⁵ GA Res. 49/53, UN GAOR, 49th Sess., Supp. No. 49, at 239, UN Doc. A/49/49 (1994).

⁶ Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *The American Journal of International Law* 22-43, 23.

As the conference began its work in Rome on the 15th June 1998, the Preparatory Committee submitted a working text to the Rome Conference, containing 116 articles. The task facing the negotiators was daunting, and despite the work accomplished by the PrepCom, the draft statute that ultimately emerged from it was riddled with some fourteen hundred square brackets.⁷ The Rome Conference's negotiating process was modelled on that of the PrepCom. The thirteen parts of the draft Statute were divided among different working groups of the Committee of the Whole, which was ultimately responsible for negotiating the Statute as a whole. The draft included thirteen parts,⁸ most of these parts were subject to intensive negotiations, but the most controversial was Part 2. The negotiations and drafting of this part resulted in a lot of debates, as it includes the issues of jurisdiction, admissibility, applicable law, and the list and definitions of crimes. For that reason, in addition to organising the work on all parts of the Statute, the negotiating efforts of the Chairman and the Bureau of the Committee of the Whole were mainly directed at resolving problems in Part 2.⁹

Many differences existed over several jurisdictional issues: how the jurisdiction of the Court could be triggered; whether states should automatically accept the court's jurisdiction over crimes as soon as ratification took place, or be protected by some form of additional case-by-case consent; and above all, which states, if any, must accept the Court's jurisdiction before the Court could actually exercise it. On this issue, differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference.¹⁰

On some issues or groups of issues, participating states joined into various groups and discussions were conducted between regional and political groups, such as the "Non-Aligned Movement", the "Arab Group", the "Latin American and Caribbean Group", the "European Union", the "Western Europeans and others", and "like-minded states". The most organised was the "like-minded group" (LMG), which had promoted the establishment of an ICC

⁷ UN Doc. A/CONF.183/2/Add.1 (1998) The brackets contained points of disagreement, surrounding partial and complete provisions, with any number of alternative texts.

⁸ The thirteen parts: 1. Establishment of the Court; 2. Jurisdiction, Admissibility and Applicable Law; 3. General Principles of Criminal Law; 4. Composition and Administration of the Court; 5. Investigation and Prosecution; 6. Trials; 7. Penalties; 8. Appeal and Revision; 9. International Cooperation and Judicial Assistance; 10. Enforcement; 11. Assembly of States Parties; 12. Financing; and 13. Final Clauses.

⁹ Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *The American Journal of International Law* 2-12, 4.

¹⁰ *ibid*, 5.

during the PrepCom and generally favoured a strong and independent court.¹¹ It was composed of middle powers and developing states, a number of which had directly suffered from some of the crimes described in the draft statute. Egypt and Jordan were part of the LMG. Another group was established from the permanent members of the UN Security Council (P-5). The group focused on two points: an effective and strong role for the Council *vis-à-vis* the Court, and excluding the nuclear weapons from the prohibited list of weapons in the Statute. On the other hand, some Arab states, such as Egypt, were extremely suspicious of the Security Council's role and insisted on the inclusion of nuclear weapons among those whose use should be prohibited by the Statute.

Arab states have been actively involved in the negotiations and meetings of the Committee of the Whole. They created the Arab Group in which they agreed on the same positions for most of the issues. It was one of the most active informal groups, meeting frequently and adopting common positions that were not necessarily supportive of the ICC.¹² Egypt, Syria and United Arab Emirates were among the most active states in the group, acting as leaders in most meetings, presenting opinions or noting their reservations. In addition to their active participation, the Vice-Presidents of the Conference included representatives of Algeria and Egypt, the Chairman of the Drafting Committee was Professor Cherif Bassiouni, from the Egyptian delegation, and Committee members included delegates from Lebanon, Morocco, Sudan and Syria.¹³

Early in the conference, a group of Arab states (Syria, Libya, and Lebanon) were conspicuous for making many objections, proposals, and amendments, in particular to sections debated at length during the preparatory process. Their attitude was first widely seen as obstructionist, but, the source of many of their interventions was later understood to be twofold: linguistic misunderstandings due to recurrent translation inaccuracies and their lack of long-term involvement in the idea of an international criminal court. Several delegates spent time personally reassuring and explaining technicalities to these Arab representatives, an approach

¹¹ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 *Pace International Law Review* 361-378.

¹² Roy S. K Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Martinus Nijhoff Publishers 1999).

¹³ *ibid.*

that solved many problems.¹⁴

The Statute was adopted on 17 July 1998 by a vote of 120 in favour to 7 against,¹⁵ with 21 abstentions and, in accordance with Article 125, the Statute was opened for signature to all member states in Rome at the Headquarters of the UN Food and Agriculture Organization on the 17th of July 1998, and thereafter, at the Italian Ministry of Foreign Affairs until 17th October 1998. After that date, the Statute was open for signature at the United Nations Headquarters in New York until 31 December 2000. During that period, twelve Arab States signed the Statute: Algeria, Bahrain, Comoros, Egypt, Jordan, Kuwait, Morocco, Oman, Sudan,¹⁶ Syria, United Arab Emirates, and Yemen.

4.3 Crimes within the Jurisdiction of the Court

One of the key issues throughout negotiations, which began during the discussions of the Preparatory Committee, was which crimes should fall within the Court's jurisdiction.¹⁷ While there was a virtually unanimous agreement on including genocide, other crimes had diverse supporters and opponents. An overwhelming majority of states supported the inclusion of war crimes, crimes against humanity, and aggression.¹⁸ Some states, in particular the Caribbean governments, supported the inclusion of drug trafficking, and the inclusion of the crime of terrorism also enjoyed some support. In addition, some states supported inclusion of crimes against the UN and its personnel. During the latter part of the negotiations in the Preparatory

¹⁴ Fanny Benedetti and John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' (1999) 5 *Global Governance* 1-37, 31.

¹⁵ Michael P Scharf, Results of the Rome conference for an international criminal court, 11 August 1998, The American Society of International Law < <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court> > accessed 19 March 2014; Among the seven states, Iraq, Libya, Qatar and Yemen.

¹⁶ On 27 August 2008, Deng Alor Koul, Minister for Foreign Affairs of the Republic of Sudan, notified the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court, that Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.

¹⁷ Richard Dicker, 'Issues Facing the International Criminal Court's Preparatory Commission' (1999) 32 *Cornell Int'l LJ* 471.

¹⁸ Roy S. K Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999).

Committee, support for the inclusion of drug trafficking, terrorism and crimes against UN personnel slackened, as it became clear that some states were unalterably opposed. The question of the selection of the crimes to be included within the jurisdiction of the International Criminal Court and on their definition was one of the main concerns of the Arab states during the Rome Conference.

The draft list of crimes that was forwarded to the Rome Conference by the PrepCom listed “(a) the crime of genocide; (b) the crime of aggression; (c) war crimes; (d) crimes against humanity; and (e) [other crimes].”¹⁹ The first four were known as the “four core crimes”. In Rome, virtually all states supported inclusion in the Statute of the crime of genocide, war crimes, and crimes against humanity. The Conference did not have time to consider definitions of other crimes that would be acceptable to all, or to the majority of states. As it was, even the definition of the core crimes took considerable time and ran into complications. The Conference leadership appreciated that, in order to attract an overwhelming majority in support of the Statute, some accommodation among the supporters of each of the other crimes was required.²⁰

Many Arab states’ delegations wanted more crimes covered by the Statute than the four core crimes of genocide, crimes against humanity, war crimes, and aggression. Among these crimes were the so-called treaty crimes, such as illicit trafficking in drugs and terrorism (the other treaty crime, attacks on UN and associated personnel, was later included as a specific war crime).²¹ Although the Bureau of the Committee of the Whole proposed that these crimes be addressed at a later time by way of a protocol or review conference, some states (including the Arab states) insisted until the very end of the conference that treaty crimes and aggression be included in the text and that sufficient time must somehow be found to accomplish this.²²

Most Arab states advocated the inclusion of aggression among the core crimes covered by the Statute, and many favoured prohibiting nuclear weapons. Some, like Egypt and Algeria,

¹⁹ UN Doc. A/CONF.183/2/Add.1 n.18 (1998). Art.5 at 11.

²⁰ Philippe Kirsch and John T. Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’ (1999) 93 *The American Journal of International Law* 2-12, 4.

²¹ Now appearing as Article 8(b) (iii) of the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9.

²² UN Doc. A/CONF.183/C.1/L.59 (1998) Bureau Proposal, Art.5.

wanted terrorism and regional drug trafficking to be covered as well, while others considered such crimes to belong to domestic jurisdiction. The United Arab Emirates' delegation said that a convention had been signed by the members of the League of Arab States on action to combat terrorism,²³ including a precise definition of the crime. They noted that if the Statute took into account the definitions in that convention, they would not oppose the inclusion of such crimes in the Statute. Yemen's position on the inclusion of terrorism, crimes against United Nations personnel, and illicit traffic in narcotic drugs was fully in accordance with that taken by the representative of the UAE. Saudi Arabia's delegation said that the convention signed by the members of the League of Arab States defined terrorism and that it could be referred to; also agreeing with others that drug trafficking and crimes against United Nations personnel should not be included.²⁴

4.3.1 Genocide

There was a general consensus on including the crime of genocide in the Statute as it received a quick and unanimous agreement. The definition adopted in Article 6 of the draft statute was taken verbatim from Article II of the Genocide Convention of 1948,²⁵ as it was a widely accepted definition among all participants, except for the replacement of the word "Convention" with the word "Statute" in the opening clause.²⁶

The majority of Arab states' delegations participated in the meeting on the definition of genocide as agreed in the Statute, as well as on its inclusion without any remarkable comments. The Syrian delegation announced that they had no difficulty accepting the

²³ League of Arab States, Arab Convention on the Suppression of Terrorism, 22 April 1998 <https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf> accessed 20 July 2015.

²⁴ Roy S. K Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999), 85-87.

²⁵ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277; The first draft of the convention was submitted by Arab state, namely Saudi Arabia, in 1946. It described genocide as "an international crime against humanity" (UN Doc. A/C.6/86). But General Assembly Resolution 96(I) avoided the term (UN Doc. E/623/Add.1; UN Doc. E/AC.25/3) and the distinction was reinforced in General Assembly Resolution 180(II) of December 1947.

²⁶ See more W. A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"' (2003) 1 *Journal of International Criminal Justice*.

inclusion of the crime of genocide since the relevant text corresponded to that of the 1948 Genocide Convention to which Syria is a party, and the United Arab Emirates agreed with the Syrian Arab Republic's representative remarks about the inclusion of the crime of genocide in the Statute.²⁷ Saudi Arabia and Morocco endorsed their remarks with respect to the inclusion of genocide within the Court's jurisdiction, and Bahrain said that the current wording of the definition of the crime of genocide should be retained. Algeria's delegation was also in favour of including the crime of genocide within the Court's jurisdiction. Sudan agreed that the crime of genocide should be included in the Statute and Iraq said that its delegation had no problem with including genocide within the Court's jurisdiction, whilst Egypt, Libya and Djibouti agreed that the definition of genocide was satisfactory and could now be transmitted to the Drafting Committee.²⁸

4.3.2 Crimes against Humanity

One of the many significant provisions of the Rome Statute is Article 7, which defines "crimes against humanity" for the purpose of the ICC. A significant difference between the definition in the Statute and major previous definitions on crimes against humanity was that it was not imposed by victors in World Wars, as were those in the Nuremberg and Tokyo Charters,²⁹ or by the Security Council, as were those in the Statutes of the Yugoslavia and Rwanda Tribunals.³⁰ In contrast, Article 7 was developed through multilateral negotiations involving 160 states, so it is expected to be more detailed than previous definitions, given the interest of participating states in knowing the precise outlines of the corresponding obligations they would be undertaking. Different dynamics resulted not only because of the number of states involved, but also because of the need for more rigour where the definition

²⁷ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 25th meeting, 8 July 1998, A/CONF. 183/C. 1/SR.25.

²⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 25th meeting, 8 July 1998, A/CONF. 183/C. 1/SR.25.

²⁹ United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945.

³⁰ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

is not simply being imposed on others, but is potentially more broadly applicable.³¹

Although the definition in the Statute is more detailed than previous definitions, it generally seems to reflect most of the positive developments identified in previous instruments. For example, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognises the crimes of apartheid and enforced disappearance as inhumane acts. As with other parts of the Statute negotiations, the Arab states' delegations were involved and played a vital role in defining crimes against humanity. Most significantly, Dr. Waleed Sadi, the head of the Jordanian delegation at the Conference, coordinated the negotiations on the definition of crimes against humanity.³²

The Rome Statute's definition does not provide for a nexus to armed conflicts for the crimes against humanity to occur, but the definition confirms that the crimes can also occur during times of peace or civil wars, which is considered a significant feature in the Statute. Such an approach is required for an effective court, able to respond to the large-scale atrocities committed against civilian populations by their own governments.³³ While a minority of delegations participating in the Rome Conference felt strongly that crimes against humanity could only be committed in the context of an armed conflict, the majority of delegations believed that such a limitation would have rendered crimes against humanity largely redundant, as they would have been subsumed in most cases within the definition of "war crimes".³⁴ The "nexus" between crimes against humanity and armed conflict was proposed by several Arab delegations. States like Saudi Arabia and Syria were concerned that without the association between these crimes and war, the ICC or the Prosecutor would be allowed to interfere in domestic matters.³⁵ Although the majority of Arab states later agreed during the Rome Conference that this association was not required, this affected the final decisions of signature and ratification by some Arab states.

³¹ Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *The American Journal of International Law* 43-57,43.

³² A/CONF.183/13.

³³ Roy S. K Lee, *The International Criminal Court: the making of the Rome Statute : issues, negotiations and results* (Martinus Nijhoff Publishers 1999), 92-93

³⁴ *ibid*, 94.

³⁵ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 4th meeting, 17 June 1998, A/CONF.183/C.1/SR.

The Syrian delegation said that they could accept the inclusion of crimes against humanity in the case of international armed conflict, but not in the case of internal conflict, at least for the time being. They also considered that the wording ‘enforced disappearance of persons’ was unclear because it could be used in reference to liberation movements fighting for their freedom and to regain their territory.³⁶ The UAE delegation, confining the concept of crimes against humanity to international conflicts, made reservations on the wording ‘deportation or forcible transfer of population’, which they argued that it might not be in line with definitions in other international instruments. Bahrain agreed with the comments of the Syrian and the UAE representatives concerning crimes against humanity.³⁷

Tunisia interpreted crimes against humanity as taking place only in international armed conflicts, otherwise intervention by the Court would amount to interference in the state’s internal affairs, which is contrary to the principles of the United Nations. Tunisia also proposed adding the word ‘international’ before the words ‘armed conflict’. The Moroccan, Sudanese and Algerian delegations considered that crimes against humanity should be considered only in the context of international conflict, endorsing the Tunisian and Syrian view.³⁸ Iraqi’s delegation agreed that the commission of crimes against humanity should be limited to international armed conflict. While the Egyptian delegation considered that crimes against humanity could be committed in times of either peace or war, but that, to differentiate them from ordinary crimes, they should be described as systematic and widespread.³⁹

Another difficult issue in the negotiations was whether the definition should require a discriminatory motive, meaning that the crime was committed on national, political, ethnic, racial or religious grounds. Arab states agreed that the specific crime of persecution required a discriminatory motive, as discrimination is the essence of the crime of persecution, but the majority maintained that not all crimes against humanity required such motives.⁴⁰ In the end, an agreement was reached that a discriminatory motive was not a required element for all

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 4th meeting, 17 June 1998, A/CONF.183/C.1/SR.

⁴⁰ Phyllis Hwang, ‘Defining Crimes against Humanity in the Rome Statute of the International Criminal Court Dedicated to the Adoption of the Rome Statute of the International Criminal Court’ (1998) 22 *Fordham International Law Journal* 457-504.

crimes against humanity. This approach avoids the imposition of an onerous and unnecessary burden on the Court's prosecution of the crime. Moreover, the requirement of a discriminatory motive, particularly when coupled with a closed list of prohibited grounds, could have resulted in the inadvertent exclusion of some very serious crimes against humanity.⁴¹

The chapeau of Article 7 sets out the conditions in which defined acts are elevated from ordinary crimes to "crimes against humanity". These acts – as enumerated in subparagraphs 1(a) to (k) of Article 7 - are murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid and other inhumane acts. For most of the enumerated acts, some Arab delegations insisted on additional provisions that clarify these terms. Paragraph 2 of Article 7 provides further clarification of the provisions on extermination, enslavement, deportation and torture drawn from various sources. For instance, the classical reference to "rape" was expanded and clarified in subparagraph 1(g), which refers to "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." The definition of torture is based on Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, except that the definition in the Rome Statute is not limited to acts of public officials, since crimes against humanity can be committed at the behest of both state and non-state actors. The definition of "torture" in paragraph 2(e) excludes "lawful sanctions" to allay the concerns of some Arab states that certain Islamic forms of punishment not be considered as "torture" within the meaning of the Statute.

4.3.2.1 Widespread or Systematic Attack

It was agreed by all participants at the Rome Conference that not every inhumane act amounts to a "crime against humanity", and that a stringent threshold test is required. Delegations readily adopted two familiar terms from tribunal jurisprudence and other sources,

⁴¹ Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *The American Journal of International Law* 43-57, 47.

namely, the qualifiers “widespread” and “systematic”.⁴² The term “widespread” requires large-scale action involving a substantial number of victims, whereas the term “systematic” requires a high degree of arrangement and methodical planning.⁴³

The most controversial and difficult issue in the negotiations on the definition of “crimes against humanity” was whether these qualifiers should be disjunctive (i.e., widespread or systematic) or conjunctive (i.e., widespread and systematic). A group of states composed predominantly of members of the LMG argued that a disjunctive test had already been established in existing authorities - for example, the ICTR Statute requires that inhumane acts be committed “as part of a widespread or systematic attack against any civilian population”. On the other hand, another group, including some permanent members of the Security Council and many Arab states’ delegations, pointed out that, as a practical matter, a disjunctive test would be over-inclusive. For example, a legitimate question was raised whether the “widespread” commission of crimes should be sufficient, since a spontaneous wave of widespread, but completely unrelated crimes does not constitute a “crime against humanity” under existing authorities. The Syrian delegation was in favour of the wording “widespread and systematic attack”, however, would be prepared to accept the wording “widespread or systematic attack”, they suggested the inclusion of “economic embargoes” under crimes against humanity as they could amount to murder.⁴⁴

4.3.2.2 Forced Pregnancy

The inclusion of the crime of “forced pregnancy”⁴⁵ has been the subject of considerable

⁴² See Mohamed Elewa Badar, ‘From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity’ (2004) 5 San Diego International Law Journal 73-144,109.

⁴³ These terms are discussed in *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 which held: The concept of “widespread” may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources...”

⁴⁴ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 25th meeting, 8 July 1998, A/CONF. 183/C. 1/SR.25.

⁴⁵ Rome Statute Article 7 Subparagraph 2(f) specifies that “forced pregnancy” has three elements: (1) unlawful confinement, (2) of a woman forcibly made pregnant, and (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. Subparagraph 2(f) further specifies

misunderstanding. This term does not create a universal right to abortion, nor does it in any way restrict the ability of states to regulate in this sensitive area on the basis of their own constitutional or philosophical principles.⁴⁶ The term is included to recognise a particular harm inflicted on women, particularly during armed conflict, and to affirm the agreements reached in the Beijing Declaration and Platform for Action, Fourth World Conference on Women.⁴⁷

Some states were concerned that its inclusion could be misinterpreted to interfere with national laws concerning either the right to life of the unborn child or a woman's right to terminate a pregnancy.⁴⁸ Arab states opposed it on the ground that forced pregnancy was not a new crime and was the consequence of the crime of rape, which was already included in the text. They were concerned that such provision would force them to legalise abortion in their domestic laws, which would contradict their culture and religious values, and could risk leading the ICC to interfere in their national legal matters. The Saudi delegation opposed the reference to "enforced pregnancy" as their state is opposed to abortion. A compromise was reached to include "forced pregnancy" rather than the term "enforced pregnancy", with the hope that it could not be used in support of legalising abortion.⁴⁹ Another proposal was to replace the crime of "forced pregnancy" with "forcible impregnation", but the majority rejected it. The concerns of the Arab delegations were taken into consideration in the drafting of the forced pregnancy provision, via the addition of a definition of forced pregnancy in Article 7(2)(f) of the Rome Statute stating: "The definition shall not in any way be interpreted as affecting national law relating to pregnancy."

This part of the negotiations reflects the role of religion in the Arab states during the drafting of the Statute and their concerns regarding the religious or cultural values. One of the Arab

that this provision "shall not in any way be interpreted as affecting national laws relating to pregnancy." Thus, the crime of "forced pregnancy" captures situations where women are forcibly impregnated and confined to force them to bear children of a conquering ethnic group, or for other purposes in grave violation of international law, such as medical experimentation.

⁴⁶ Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *The American Journal of International Law* 43, 53.

⁴⁷ Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 Sept. 1995, para. 93, U.N. Doc. DPI/1766/Wom (1996).

⁴⁸ See more Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2000) 32 *Columbia Human Rights Law Review* 625-676.

⁴⁹ Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *The American Journal of International Law* 22-43, 31.

states, (Jordan) did not oppose the definition or the exclusion of “forced pregnancy”, presenting the opinion that since forcing a woman to “bear a child of a rapist could be considered a severe torture”, the pain and suffering from this torture constituted an element of crime against humanity.⁵⁰

4.3.3 War Crimes

During the negotiations of “war crimes”, several difficulties appeared due to the complex issues discussed, which mainly involved the inclusion of internal armed conflicts, Protocol II Additional to the Geneva Conventions, nuclear weapons and child soldiers. But despite these difficulties, there was general consensus to include “war crimes” in the Statute.⁵¹ However, the greatest controversy was concerning the crimes committed during internal armed conflicts. Most delegations accepted that common Article 3 of the 1949 Geneva Conventions would apply in internal armed conflicts, and many delegations favoured adding other serious violations of the laws and customs of war occurring in internal conflicts. However, some Arab states delegations continued to resist fiercely the inclusion of internal armed conflicts altogether, or some of the applicable laws.⁵² Several definitions proposals were submitted, which included preceding definitions ranging from the 1907 Hague Convention Respecting the Laws and Customs of War on Land,⁵³ to the 1949 Geneva Conventions and the 1977 Additional Protocols.

In its proposal, the Bureau included two sections that made clear that the Statute should include such crimes. The first section incorporated the provisions of common Article 3 of the 1949 Geneva Conventions and thus was supported by almost all delegations.⁵⁴ Even some of

⁵⁰ Steven C. Roach, ‘Arab States and the Role of Islam in the International Criminal Court’ (2005) 53(1) Political Studies 143.

⁵¹ See more Thomas Graditzky, ‘War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court’ (1999) 5 UC Davis Journal of International Law and Policy 199.

⁵² M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32 Cornell Int’l LJ 443, 462.

⁵³ International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

⁵⁴ *ibid*, 463.

the Arab states delegations, that publicly stated that they did not think the Statute should apply to internal armed conflicts, indicated privately that if it did they could accept a provision based on common Article 3. The second section, which defined the other serious violations of the laws and customs of armed conflict to be governed by the Statute, was more controversial.⁵⁵ However, to gather broader support for the inclusion of this provision, the Bureau added two safeguard clauses that had been discussed during the informal consultations.⁵⁶ The Bureau's discussion paper had included the provision from the Geneva Conventions, that the sections did not apply to internal disturbances and tensions, such as riots. To this, the Bureau's proposal added new language derived from Additional Protocol II to the Geneva Conventions of 1949: "It applies to armed conflicts that take place in the territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." The second safeguard clause, also drawn from Additional Protocol I, protected the responsibility of states to maintain or re-establish law and order.

A few Arab states' delegations continued to insist that the Statute should not apply to internal armed conflicts, irrespective of the new safeguards. Many others criticised those safeguards, on the grounds that they departed from international humanitarian law and would inhibit the Court's ability to prosecute cases occurring during internal armed conflicts. These responses eventually showed the widespread support from states for covering internal armed conflicts and a desire to ensure that any safeguards conformed to international humanitarian law.⁵⁷

Discussion over the list of weapons that would form a war crime if used, reflected divergent and clearly defined positions.⁵⁸ There was some support for including nuclear weapons and land mines in the list of prohibited weapons, but also strong resistance on the grounds that the

⁵⁵ Roy S. K Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999), 105.

⁵⁶ *ibid*, 106.

⁵⁷ Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *The American Journal of International Law* 2.

⁵⁸ See more Torbjørn Graff Hugo, *The ICC and Nuclear Weapons: Why an Explicit Reference to Nuclear Weapons in the Definition of War Crimes under the Statutes of the International Criminal Court Should Not Be a Priority*, February 2012, International Law and Policy Institute (ILPI) < <http://nwp.ilpi.org/wp-content/uploads/2015/03/PP02-12-NW-ICC.pdf> > accessed 28 March 2014.

threat or use of such weapons was not actually prohibited under existing international law.⁵⁹ Therefore, in its proposal the Bureau offered an exhaustive list that did not include land mines or nuclear weapons, but provided for an amendment procedure, of the list for such weapons as ‘become the subject of a comprehensive prohibition.’⁶⁰ The majority of Arab states were in favour and supported the inclusion of nuclear weapons to the list of prohibition,⁶¹ which was strongly opposed by some of the nuclear powers states. At the end, the reference to nuclear weapons was deleted as to encourage some of the major nuclear power states to adopt the Statute.⁶² Several Arab states delegations were unsatisfied that nuclear weapons and, to a lesser extent, land mines were not included, particularly since chemical and biological weapons were to be prohibited.⁶³ This was an extremely difficult issue as it was well known, including by the promoters of the inclusion of nuclear weapons, that such a move would permanently deprive the Court of essential support, and render it powerless.⁶⁴

Another issue that emerged during the negotiations was dealing with child recruitment under the age of fifteen to participate in hostilities.⁶⁵ These provisions were very much the result of inputs from NGOs. The texts are based on Article 38 of the Convention on the Rights of the Child,⁶⁶ and Articles 77(2) of Protocol I and 4(3) (c) of Protocol II. The text in subparagraph (b)(xxvi) speaks of “national armed forces” and the inclusion of the word “national” was intended to exclude situations like the *intifada*,⁶⁷ which is considered an attempt to attract the Arab states towards ratifying the Statute. The words “armed forces or groups” in subparagraph (e)(vii) were drafted to consider a common incident in internal armed conflicts,

⁵⁹ Ibid.

⁶⁰ ‘Bureau Proposal’, UN Doc. A/CONF.183/C.1/L.59. See more William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), Article 8, 188.

⁶¹ Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002), 597.

⁶² See more Roger S. Clark, ‘Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare’ (2009) 12 *New Criminal Law Review* 366-389.

⁶³ Rome Statute, Article 8 (2)(b)(xvii).

⁶⁴ Philippe Kirsch and John T. Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’ (1999) 93 *The American Journal of International Law* 2-12, 8.

⁶⁵ Julie McBride, *The War Crime of Child Soldier Recruitment* (T.M.C. Asser Press 2014), 47.

⁶⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁶⁷ Mahnoush H. Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 *The American Journal of International Law* 22, 34.

in which armed groups, as well as armed forces, are involved.⁶⁸

Both subparagraphs set the age limit of children at “under the age of fifteen years”, and they avoid the use of the word “recruited”. Moreover, they qualify the violation as “using them [children] to participate actively in hostilities”. The word “actively” was inserted during the negotiations and drafting process to exclude situations in which children are involved only in support functions during hostilities. Attempts were made by some states and NGOs to raise the age of the children to eighteen to make it compatible with the definition under the Convention on the Rights of the Child, Article 1 of which defines “child” as any human being below the age of eighteen; however, these attempts faced strong resistance by other states, which relied on the age of below fifteen in Article 77 of Protocol I, as well as Article 38 of the Convention on the Rights of the Child. The Syrian delegation said that its government’s concern was with international and not internal armed conflict. They suggested that reference should be made to Additional Protocol I of 1977 to the Geneva Conventions in the chapeau of Section A. They noted in that connection that some states did not consider the provisions of the four Geneva Conventions to be customary rules of international law.⁶⁹

4.3.4 Aggression

The inclusion of the crime of aggression, which received overwhelming support in the PrepCom, also faced definitional problems.⁷⁰ The complexity of the issue is in the determination of aggression and the role of the UN Security Council.⁷¹ Several states were in favour of an established and distinct definition for aggression that would not be subject to review by the Security Council. While other states, including the P-5, felt that the Security Council should determine the occurrence of aggression first, before the ICC could have jurisdiction over the crime. By the end of the negotiations in the PrepCom, there was a sense

⁶⁸ *ibid.*

⁶⁹ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 5th meeting, 18 June 1998, A/CONF.183/C1/SR.5.

⁷⁰ See David Scheffer, ‘The Complex Crime of Aggression under the Rome Statute’ (2010) 23 *Leiden Journal of International Law* 897-904.

⁷¹ See Niels Blokker, ‘The Crime of Aggression and the United Nations Security Council’ (2007) 20 *Leiden Journal of International Law*.

that the definition of aggression had become too complicated and divisive and could become a casualty in the context of a desire for a wider compromise.⁷²

At the beginning of the Rome Conference, it was still not clear whether the crime of aggression should be included.⁷³ The number of states accepting inclusion had risen over the years, but much would depend on the definition and the role of the Security Council. With respect to the definition of aggression, there were two precedents; the Statutes of the Nuremberg and Tokyo Tribunals and the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, adopted by consensus.⁷⁴ The Rome Conference negotiations were midway when it became clear that support for the inclusion of aggression was increasing. This was despite the knowledge that no agreement could be reached at the conference, either on its definition or on the role of the Security Council. The P-5 group indicated that they could agree on the inclusion of the crime of aggression only if the proper role of the Security Council, in accordance with the Charter was recognised and defined.⁷⁵

Many states distinguished between the definition of aggression for the Rome Statute and the competence of the Security Council to determine whether an act was aggression or not. Some of these states also contended that, while the Security Council had primary competence to determine whether an act constituted aggression, its competence on the subject was not exclusive. The support of the Non-Aligned Movement for inclusion of crimes of aggression and the use of nuclear weapons was particularly strong. Many European states, including some NATO members, also insisted on the inclusion of aggression. Ultimately, a compromise was reached: Article 5(2) of the Statute incorporates the crime of aggression, but the Court may exercise jurisdiction in that regard only after the crime has been defined and

⁷² See more R. S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It' (2009) 20 *European Journal of International Law* 1103-1115.

⁷³ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 3rd meeting Wednesday, 17 June 1998, A/CONF.183/C.1/SR.3.

⁷⁴ UN General Assembly, Definition of Aggression, 14 December 1974, A/RES/3314.

⁷⁵ Grant M. Dawson, 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?' (1999) 19 *New York Law School Law of International & Comparative Law* 413.

the conditions for such exercise have been agreed on.⁷⁶ Furthermore, any provision on these issues must be consistent with the Charter of the United Nations. The latter text is intended to take account of the concerns of the P-5 of the Security Council that the Statute not be used to amend the Charter by infringing on the competence of the Council to determine acts of aggression.

During the negotiations, the definition of aggression as a crime in the Rome Statute was debated, and there were many arguments and proposals from the participating delegations. It was seen that it was difficult to adopt a final definition for the crime. The debate on the definition and the difficulty in reaching a final provision was one of the prominent issues during the Rome Statute's negotiation and drafting processes.⁷⁷ Major states like the US and the UK opposed including aggression as a crime in the Rome Statute.⁷⁸ The role of the Arab states during the PrepCom sessions on the crime of aggression was significant, and their delegations were in favour of and insisted on including the crime of aggression under the jurisdiction of the ICC.⁷⁹ Arab states seemed eager to define the crime on the basis of UNGA Resolution 3314 (XXIX) so as to ensure that the right of self-determination was recognised as an exculpatory defense against the crime. States from the EU and the Non-Aligned Movement made it clear that the Statute was unacceptable without jurisdiction over the crime of aggression.⁸⁰ Egypt submitted a proposed definition along with other Arab states, as they argued that the crime of aggression should remain in the Statute after some attempts to exclude it, although the participating states failed to agree on a definition.⁸¹

The Tunisian delegation requested more time to reach an agreement on the "aggression" definition, and Algeria's delegation were of the opinion that the Bureau's proposal could be the solution for these obstacles, as they were in support of including the crime of aggression

⁷⁶ Philippe Kirsch, 'The International Criminal Court: From Rome to Kampala' (2009) 43 *The John Marshall Law School Law Review* 515.

⁷⁷ Andreas Zimmermann, 'Article 5' in Otto Triffterer and Kai Ambos (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1st edn, Nomos 2015)

⁷⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 35th meeting, 13 July 1998, A/CONF.183/C.1/SR.35.

⁷⁹ The proposal was submitted by Bahrain, Iraq, Lebanon, Libya, Oman, Sudan, Syria and Yemen.

⁸⁰ Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 *Washington University Global Studies Law Review* 551, 558.

⁸¹ The proposal was submitted by Algeria, Bahrain, Iraq, Kuwait, Lebanon, Libya, United Arab Emirates and Yemen, and reissued on 8 July, 1998. See A/CONF. 183/C.1/L.56.

within the Statute. Both states found that, despite the great support to include the crime of aggression in the Statute, it was no longer included in the Conference's agenda, thus they requested the rest of the states to provide the political will to include the crime in the Statute.⁸²

One of the Arab states' main concerns during the negotiations on the crime of aggression was the role of the Security Council, its P-5 members, and their effects on the work of the ICC. The debate of the definition and whether the ICC or the Security Council should have the role in determining the aggressor was reflected in the Arab states' concerns that this could lead to political influence on the Court. A particular concern was the proper role of the Security Council in determining an act of aggression; how to define the crime so as to satisfy the principle of legality.⁸³

The Syrian delegation pointed out that there was a great difference between determining the occurrence of aggression, which was a political act and a prerogative of the Security Council under Article 39 and other Articles of Chapter VII of the Charter of the United Nations, and formulating a definition of aggression, which was a purely legal matter. The delegation favoured the definition of the General Assembly Resolution 3314 (XXIX), which represented the work accomplished over a number of years in which a clear-cut distinction should be drawn between aggressors and freedom fighters.⁸⁴ The Iraqi delegation took into account, General Assembly Resolution 3314 (XXIX), provided that they would prefer the crime of aggression to be within the jurisdiction of the Court. Due to the lack of any other definition of the crime of aggression, the General Assembly text should be the basis of any subsequent definition.⁸⁵

The Tunisian delegation reaffirmed that they were in favour of including the crime of aggression within the jurisdiction of the Court; however, they were opposing a nexus between

⁸² UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 35th meeting, 13 July 1998, A/CONF.183/C.1/SR.35.

⁸³ Michael O'Donovan, 'Criminalizing War: Toward a Justifiable Crime of Aggression' (2007) 30 Boston College International and Comparative Law Review 507, 515.

⁸⁴ See more Roy S. K Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999).

⁸⁵ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 27th meeting Wednesday, 8 July 1998, A/CONF.183/C.1/SR.27.

the Security Council and the competence of the Court. They added that the Security Council was empowered under Chapter VII of the Charter of the United Nations to determine the occurrence of aggression, but it had a political role and no jurisdictional power.⁸⁶ Jordan's delegation supported the inclusion of aggression, if a proper legal framework could be worked out. The Libyan delegation strongly supported the inclusion of the crime of aggression in the jurisdiction of the Court as well, and they opposed the Security Council role after its failure in dealing with the aggression case against Libya in 1986.⁸⁷ They added that the Security Council role will be affected by its P-5 members' interest and positions towards the situations, which will lead to a selective policy and double standards.⁸⁸ The United Arab Emirates, Sudan, Yemen, Saudi Arabia, Oman, Lebanon and Egypt all also supported the view that aggression should be included within the competence of the Court on the same basis.⁸⁹

In the final stages of the Rome Conference, there were still many irreconcilable points of view over the definition of aggression. In order to move forward and adopt the Statute, states finally came up with a compromise by listing the crime of aggression, along with genocide, crimes against humanity and war crimes, as the crimes within the Court's jurisdiction. At the same time stipulating that the Court could not exercise its jurisdiction over the crime of aggression until a provision defining the crime and setting up the conditions for jurisdiction was adopted in accordance with the Statute.⁹⁰ Following this compromise, the PrepCom and the Special Working Group on the Crime of Aggression ('SWGCA'),⁹¹ were established by the Diplomatic Conference and the Assembly of States Parties in 1998 and 2002 respectively, and agreed to seek a reconciliation of the conflicting views over the crime. States as well as non-States Parties, were invited to take part in all the sessions of these two institutions. After

⁸⁶ *ibid.*

⁸⁷ General Assembly Resolution 41/38, declared that to be an act of aggression. A/RES/41/38, 20 November 1986, 78th plenary meeting.

⁸⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 6th meeting, Thursday, 18 June 1998, A/CONF.183/C.1/SR.6.

⁸⁹ *ibid.*

⁹⁰ Paragraph 2 of Article 5 of the Statute (before modification). It reads: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this Crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". Now this clause was deleted in accordance with RC/Res.6, Annex I of 11 June 2010.

⁹¹ Continuity of work in respect of the crime of aggression, ICC-ASP/1/Res.1, adopted at the third plenary meeting on 9 September 2002.

ten years of work, the PrepCom and the SWGCA's proposals on the provisions on aggression were finally drafted at the SWGCA in 2009,⁹² submitted to the Statute's First Review Conference⁹³ for discussion in 2010, and were adopted by the State Parties by consensus at the last moment of the Conference in 2010.⁹⁴

4.4 General Principles, Procedural and Jurisdiction Issues

The process to harmonise the general principles of criminal law and the rules of procedures of the common and civil law systems, into the provisions of the Statute's Parts 3, 5, 6 and 8, was a difficult and challenging task. It resulted in a hybrid of both common and civil law systems towards the Statute's general principles and procedural issue. For example, while the adversarial character of trials is maintained, judges are assigned much broader competence in matters dealing with investigation and the questioning of witnesses. It was obvious during the drafting of the Statute that there was no intention to insert the Islamic legal system alongside the civil and common law systems.

The Statute prescribes a strict hierarchy among the rules of law to be applied by the Court.⁹⁵ It must first apply the Statute, the "Elements of Crimes", and its Rules of Procedure and Evidence. The Elements of Crimes must be read together with Article 9, in which they are included, so as to assist the Court in interpreting and applying articles on the definition of crimes. Second, the Court must apply relevant "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". The latter phrase was intended to include the *jus in bello*. Third, the Court should apply general principles of law that it derives from the national laws of legal systems of the world including, as appropriate, the laws of the states that would normally have exercised jurisdiction over the case, as long as they are consistent with the Statute and with

⁹² Report of the Special Working Group on the Crime of Aggression, Doc. ICCAPS/7/SWGA/2 (2009).

⁹³ Assembly of States Parties to the Rome Statute of the International Criminal Court, Review Conference, 31 May - 11 June 2010.

⁹⁴ Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus, Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010.

⁹⁵ Rome Statute, Article 21.

international law.⁹⁶ The ICC may also apply its own jurisprudence, and while the applicable law sources were inspired by Article 38 of the ICJ Statute,⁹⁷ they are significantly and structurally different. The Court will neglect the Islamic legal system in this context⁹⁸ as this was a result of relying on both civil and common law systems during the drafting of the Statute. The Islamic legal tradition, and its differences with Western legal systems, constituted a huge obstacle during the Conference, thus it was neglected.⁹⁹ Despite the large participation of Arab states in the Rome Conference, the Islamic law states were considered the smallest group among other participants in the negotiations.

The provisions relating to the jurisdiction of the Court were the most complex and most sensitive, and for that reason were left subject to many options for as long as possible. The debates surrounding some of the provisions contained in the Bureau's proposal, in particular, generated strong reactions from the Arab states' delegations. One of the most difficult questions consisted of determining whether entitlement to refer situations to the Court should be vested to State Parties, the Security Council and/or to the Prosecutor. The right of State Parties to do so was overwhelmingly endorsed early on. Giving power *proprio motu* to an independent prosecutor received considerable, but not general, support. The right of the Security Council to refer cases to the Court and in particular, to force the Court to defer cases for political reasons, were vigorously opposed by various delegations.¹⁰⁰

4.4.1 Powers of the Prosecutor

Some Arab states actively objected to this power of the Prosecutor on the ground that they might be overwhelmed by non-serious complaints and attending to them would waste the

⁹⁶ Mahnoush H. Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *The American Journal of International Law* 22.

⁹⁷ See more Emilia Justyna Powell and Sara McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' (2007) 69 *Journal of Politics*.

⁹⁸ See more Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411-433.

⁹⁹ Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press 2011), 110.

¹⁰⁰ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 *Pace International Law Review* 361-378.

limited resources at his or her disposal. Concerns were also expressed that the Prosecutor might be placed under political pressure to deal with a complaint even if it might not be justifiable or helpful in a particular political context. But the majority of states took the view that, despite the potential for waste and abuse, it was better to empower the prosecutor with such independence. In addition, they argued that the Pre-Trial Chamber would have broad competence with regards to the power of the prosecutor to use his or her own initiative and to counter abuse.¹⁰¹

Sudan's delegation said that the idea of universal jurisdiction might give non-States Parties an advantage over those that were Parties, and lead states not to accede to the Statute. They added that the states, whose acceptance was needed as a precondition to the exercise of jurisdiction, should be confined to the state on whose territory the act took place and the State which had custody of the person, suspected of the crime.¹⁰² The Algerian delegation was not in favour of automatic jurisdiction of the Court over all the crimes covered by the Statute, as upon ratification states should indicate the crimes for which they accepted the Court's jurisdiction. As for the Prosecutor's powers, they did not support the initiation of investigations *proprio motu*, arguing that such powers might expose him or her to all sorts of pressures and prevent him or her from carrying out his or her work impartially and independently.¹⁰³

Yemen did not support the automatic jurisdiction of the Court, or the power of the Prosecutor to initiate investigations *proprio motu*.¹⁰⁴ Egypt supported automatic jurisdiction over core crimes, which should include aggression. But their delegation argued that states that were not parties to the Statute should not be subject to the Court by virtue of universal jurisdiction, because that would run counter to international law. As for the Prosecutor's power, the Egyptian delegation accepted the proposed Article 12 but they suggested that it should be

¹⁰¹ See more Kafayat Quadri, 'The Proprio Motu power of the ICC Prosecutor: The Reason Some States have Refused to Ratify the Rome Statute' (2014) 2 International Journal of Humanities and Management Sciences.

¹⁰² UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 30th meeting, 9 July 1998, A/CONF.183/C.1/SR.30.

¹⁰³ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 30th meeting, 9 July 1998, A/CONF.183/C.1/SR.30.

¹⁰⁴ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 28th meeting Wednesday, 8 July 1998, A/CONF.183/C.1/SR.28.

amended, limiting sources of information to official sources.¹⁰⁵

Djibouti was “in favor of automatic jurisdiction for all crimes under Article 5 of the draft Statute without distinction, and in favor of an independent Prosecutor able to act on his or her own initiative, under the judicial control of the Pre-Trial Chamber.”¹⁰⁶ Oman preferred “opting in by means of a declaration to automatic jurisdiction and the Prosecutor should not have the right to initiate investigations *proprio motu*, because he or she might be swamped by requests and exposed to political pressures, which might jeopardize his or her impartiality.”¹⁰⁷ Their delegation proposed that the “Prosecutor might be given some degree of latitude in the case of a complaint by a State, subject to a decision of the Pre-Trial Chamber, on the basis of evidence presented to it.”¹⁰⁸

On the role of the Prosecutor, Jordan’s delegation had a view that in the interests of an effective and credible Court, the Prosecutor would have to be in a position to refer matters to it, in compliance with the principle of complementarity, and to initiate investigations on the basis of information analysed responsibly and in a manner unaffected by international media coverage. Yemen’s delegation, like many others, had difficulty in accepting that the Prosecutor should be able to take the initiative to open investigations or present cases, as that was a matter for states alone. The Iraqi delegation had a similar view and added that the Prosecutor might be subject to political influence. On the other hand, Morocco was in support of the Prosecutor having an independent role, able to initiate investigations *ex officio*. However, their delegation confirmed that such action should be subject to the agreement of the Pre-Trial Chamber, and information should only be obtained from states and organisations in the United Nations system.¹⁰⁹ The Libyan delegation supported the previous views, that the Prosecutor should not initiate investigations, but he can open inquires *ex officio* on receipt of a complaint from the state.

¹⁰⁵ See more M. Cherif Bassiouni, *The legislative history of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005).

¹⁰⁶ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 28th meeting Wednesday, 8 July 1998, A/CONF.183/C.1/SR.28.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ See more M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005).

Egypt's delegation referred to a concern that many states would be deterred from acceding to the Statute if the Court were to allow other persons to trigger Court action. They proposed certain safeguards regarding the Prosecutor's right to receive information from any source, allowing the Pre-Trial Chamber to check the accuracy of information. Saudi Arabia provided that the Prosecutor should not be able to trigger an investigation on his own initiative, but only in connection with a complaint by a state or the Security Council in cases within its competence. They pointed to the phrase 'from any source' and the references to intergovernmental organisations and victims and said that it should be deleted and reaffirmed on the Pre-Trial role.¹¹⁰

Bahrain's delegation believed that the Prosecutor should not take action on his or her own initiative, and that the role he or she played should be subject to clear limits. They added that the sources of information used had to be limited too, so that information would be accurate and credible. The delegation also requested the removal of the expression 'any source' in Article 12, as well as the mention of different sources. Tunisia announced during the negotiations that it had some doubts about the Prosecutor's role; the delegation proposed that investigations are triggered upon the state's complaint.¹¹¹ Algeria's delegation stated that the role assigned to the Prosecutor in the draft text posed certain problems with regards to the principle of complementarity. Their delegation was opposed to granting the Prosecutor powers to initiate investigations *ex officio*. They added that such investigations could in any case only proceed subject to the approval of the Pre-Trial Chamber, and it considered that Article 12 should either be deleted or completely redrafted. The United Arab Emirates agreed that to give the Prosecutor an *ex officio* role could be dangerous as the role of initiating action belonged solely to states, and its delegation did not support Article 12.¹¹²

¹¹⁰ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 9th meeting Monday, 22 June 1998, A/CONF.183/C1/SR.9.

¹¹¹ *ibid.*

¹¹² UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 10th meeting, Monday, 22 June 1998, A/CONF.183/C. 1/SR.10.

4.4.2 The Role of the Security Council

The anticipated role of the UN Security Council was highly contentious, and the debate centered around two forms of involvement encompassed by ILC Draft Articles 23(1) and 23(3).¹¹³ One concern throughout the negotiations, expressed mostly by the Security Council's P-5 members, was the possibility of conflict between the jurisdiction of the Court and the functions of the Council. There may be situations in which the investigation or prosecution of a particular case by the Court could interfere with the resolution of an ongoing conflict by the Council, hence the proposal for a provision that would automatically exclude the Court's jurisdiction over any situation under consideration by the Council. Many Arab states found this too sweeping and feared it would undermine the Court, for situations could remain pending before the Council indefinitely without taking any serious or final action.¹¹⁴ A compromise formula was finally reached, which provided that the Security Council, acting under Chapter VII of the UN Charter, could adopt a resolution requesting deferral of an investigation or prosecution for a period of twelve months and that such a request could be renewed at twelve-month intervals.¹¹⁵ As the Security Council acting under Chapter VII, may refer a "situation" to the Court,¹¹⁶ the word "situation" is intended to minimise politicisation of the Court by naming individuals.¹¹⁷

The Syrian delegation was of the view that the Security Council's role might politicize the cases, thus they suggested that the GA shall replace the SC in case it failed to adopt the required actions by the veto votes. The delegation added the view the SC had been previously selective towards some situations, and providing it with such powers against non-States Parties would be in violation of the Vienna Conventions.¹¹⁸ Oman's delegation had indicated their support of these views; however, they suggested that the role of the SC should be

¹¹³ Bruce Broomhall, 'Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law' (1997) 8 Criminal Law Forum 317-334, 327.

¹¹⁴ Human Rights Watch, Summary of the Key Provisions of the ICC Statute, 1 December 1998 <<http://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute> > accessed 12 April 2015.

¹¹⁵ Rome Statute, Article 16.

¹¹⁶ Rome Statute, Article 13.

¹¹⁷ See more Fanny Benedetti and John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' [1999] Global Governance 1-37.

¹¹⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 7th meeting Friday, 19 June 1998, A/CONF.183/C.1/SR.7.

limited to the referral of the crime of aggression only, and in regards to the suspension of procedures, it should be subject to a non-renewable time limit.¹¹⁹ Libya had a very strict opinion regarding the SC role and suggested the removal of any reference to the SC in the Statute. Libya argued that the SC is a political body and any role assigned to it would undermine the ICC's credibility, impartiality and independence. As a result, the ICC could be used as political tool to put pressure on other states.¹²⁰

Egypt urged that the Security Council's role should be kept within narrow limits to avoid politicising the Court, and the Council should be empowered to trigger the Court's action only when acting under Chapter VII of the Charter of the United Nations, then the Court should take the final decision. The delegation added that the role of maintaining peace and security did not belong only to the Security Council, as understood in Article 39 of the Charter, but also to other United Nations bodies, notably the General Assembly. They also rejected the idea that the Security Council should be permitted to impose restrictions on the Court. The Council should have the right to deal with some matters initially but should only be empowered to prevent the Court from dealing with them for a limited, nonrenewable period.¹²¹ Morocco's concern was that political decisions taken by the Security Council might unduly influence the Court's decisions or hinder its action. Their delegation added that the Council's role should be limited to referrals of situations involving acts of aggression.¹²²

Algeria, Sudan, United Arab Emirates and Yemen's delegations all held similar views, that providing the Security Council with a referral role in bringing cases to the ICC, would undermine the Court. Some suggested that if a UN organ should have a role, it should be then assigned to the General Assembly to avoid the P-5 members' influence.¹²³ Finally, during the negotiations Syria criticised the UK proposal to limit the ICC jurisdiction with respect to the crime of aggression until the SC first determines whether a state committed aggression or not.

¹¹⁹ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 28th meeting Wednesday, 8 July 1998, A/CONF.183/C.1/SR.28.

¹²⁰ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 10th meeting Monday, 22 June 1998, A/CONF. 183/C. 1/SR.10.

¹²¹ See more M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005).

¹²² UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 10th meeting Monday, 22 June 1998, A/CONF. 183/C. 1/SR.10.

¹²³ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 30th meeting, 9 July 1998, A/CONF.183/C.1/SR.30.

Syria argued that the SC had failed to take such decisions in over 200 previous cases. The Syrian delegation referred to the SC as a “club of superpowers” in which the *veto* right could block prosecuting thousands of international criminals before the Court. Thus Syria held the position that any role of the SC should be removed from the Statute.¹²⁴ The Statute’s final articles on the position of the Security Council, although they reflect some compromise to the positions discussed above, do not address the concerns of the Arab states.

4.5 Penalties

Part 7, Penalties, is composed of four articles. The question of the death penalty was difficult to negotiate because its supporters from the Arab states, could not agree to its exclusion from the Statute, as it could undermine their own national laws permitting capital punishment. The Arab states were in favour of its inclusion, not only did these states feel that the core crimes should be punished by the maximum penalty, but they feared that the prohibition of the death penalty in the Statute would affect their own domestic laws.¹²⁵ A compromise formula was reached under the leadership of Norway in which the death penalty was excluded from the Statute, but the President of the Rome Conference read a statement in the plenary to the effect that “there was no international consensus on the inclusion or exclusion of the death penalty.”¹²⁶ The statement indicated that, by virtue of the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals in accordance with their own laws. In such compromise an individual convicted of a crime under the Statute may receive the death penalty in a national court, but not under the Rome Statute if the ICC convicted that person for the same crime.¹²⁷ Article 80 of the Statute confirms this understanding on non-prejudice to the national application of penalties and national laws.

¹²⁴ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 11th meeting Monday, 22 June 1998, A/CONF.183/C.1/SR.11.

¹²⁵ M. Cherif Bassiouni, *The legislative history of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers 2005).

¹²⁶ Roy S. K Lee, *States’ Responses to Issues Arising from The ICC Statute* (Transnational Publishers 2005).

¹²⁷ Mahnoush H. Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 *The American Journal of International Law* 22-43,40.

Lebanon's delegation said that its "legislation provided for the death penalty" and they would have required that the Statute provided for capital punishment, but accepted the compromise. Saudi Arabia, Qatar and UAE supported Lebanon's view, and confirmed that they would not "break the consensus". Iraq's delegation affirmed "the fact that capital punishment was not provided for in the Statute would have no legal effect whatever on its national legislation."¹²⁸

4.6 The Principle of Complementarity

The complementarity principle is considered one of the pillars of the Rome Statute.¹²⁹ Most Arab states' delegations during the negotiation process stressed the importance of such a principle, allowing national courts full jurisdiction over cases. The ICC can only investigate and prosecute core international crimes when national jurisdictions are unable or unwilling to do so genuinely.¹³⁰ Article 17 of the Statute, which reflects the complementarity principle mechanism, as well as the preamble and Article 1, influenced many states including some Arab delegations, to adopt the Statute.

The concern that the ICC will have jurisdiction over national cases is hardly applicable in states that have a reliable and impartial judiciary system. Arab states' concerns over the interference in their domestic matters by the ICC exercising jurisdiction over their nationals was reflected in the preconditions of jurisdictions and admissibility governed by Articles 17-19 of the Statute. The Court cannot prosecute any individual who committed mass crimes anywhere without preconditions, as it is not a court of universal jurisdiction,¹³¹ thus the ICC serves as a court of last resort.

¹²⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 41st meeting Thursday, 16 July 1998, A/CONF.183/13.

¹²⁹ Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law 869-975,870.

¹³⁰ See John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations - Results* (1st edn, Kluwer Law International 1999).

¹³¹ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008) 338.

Most of the Arab states' delegations supported the principle of complementary to be included in the Statute. The Tunisian delegation said that it "fully supported the notion of complementarity in the interests of respecting the sovereignty of States Parties and achieving the largest possible number of accessions by states."¹³² Syria, too, preferred the "alternative approaches, which embodied the idea of complementarity." Their delegation added that the "Court should not have jurisdiction in cases that were being investigated or had been dealt with by a State." Algeria's delegation said that it "was important to clearly define the principle of complementarity in the Statute, in order to ensure that the entire international community would accept the Court."¹³³

4.7 Other Issues

The question of reservations was discussed intensely during the preparatory phase of the Statute negotiations.¹³⁴ Some Arab states preferred the possibility of reservations to some articles or provisions, in which case the Vienna Convention would apply. While some other Arab states had the opposite view. The Syrian delegation preferred that "there would be no article on reservations such as Article 19 of the Vienna Convention, which had already established the principle that reservations to a treaty were not permissible if they were incompatible with the purpose of the treaty." Iraq, Kuwait, and Oman supported that opinion for the reasons already advanced by the Syrian representative.¹³⁵ The majority of states during the negotiation felt that reservations could undermine the Statute, consequently, none were allowed.¹³⁶

The surrender of nationals was one of the issues that concerned some of the Arab states

¹³² UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 8th meeting Friday, 19 June 1998, A/CONF.183/C.1/SR.8.

¹³³ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 12th meeting Tuesday, 23 June 1998, A/CONF.183/C.1/SR.12.

¹³⁴ See M. Fitzmaurice, 'On the Protection of Human Rights, The Rome Statute and Reservations to Multilateral Treaties' (2006) 10 Singapore Year Book of International Law and Contributors 133.

¹³⁵ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: 19th meeting Monday, 29 June 1998, A/CONF.183/C.1/SR.19.

¹³⁶ Rome Statute, Article 120.

during the negotiations.¹³⁷ The Sudanese delegation pointed out that “the constitutions of a number of states, including its own, prohibited the surrender of its nationals, and hoped that the Court, once established, would take that difficulty into account.”¹³⁸ Libya’s delegation recorded their reservation on the deletion of Article 87, paragraph 3 (b), in view of the fact that “the prohibition of the surrender of nationals was one of the most important provisions in its legislation.” Algeria also expressed that its “Constitution and legislation prohibited the extradition of its nationals”.¹³⁹

4.8 Conclusion

Despite their interest in establishing the ICC, Arab states’ delegations expressed their concerns towards the Court during the Statute negotiations. Over time, these concerns have increased due to the region’s conflicts and SC referrals, which have impeded the ratification of the Statute. The participation of the Arab states in drafting the Statute should not be ignored by States Parties or the international community, as it showed their positive approach towards the creation of the ICC. It was obvious that during the negotiations several Western states have compromised to accommodate the Arab states’ observations. The divergence between the views of Arab states and the Statute provisions that surfaced at Preparatory Commission and the Rome Conference, have indeed affected their decision not to sign or ratify the Statute at a later stage. The concerns discussed in this chapter should be taken into consideration in the assessment of the Arab states’ position towards the ICC, as it is considered an imperative factor.

The political success of the Rome Conference was only a partial victory, as to date only five Arab states have ratified the Statute. The enthusiasm and momentum generated by Arab states at the Rome Conference must be built on. The situation in the Arab states has changed

¹³⁷ See more Philippe Kirsch and John T. Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’ (1999) 93 *The American Journal of International Law* 2.

¹³⁸ UN Diplomatic Conf., Summary records of the meetings of the Committee of the Whole: Wednesday, 15 July 1998, A/CONF.183/C.1/SR.38.

¹³⁹ *ibid.*

since 1998 and the level of acceptance for international instruments and organizations is now improved. Several Arab political regimes have now changed, in addition to many amendments witnessed in their legal framework. Examining the national procedures necessary for ratification and implementation, with particular attention to constitutional issues or other major political and legal obstacles, is thus needed. The next chapter will assess these factors and concerns.

Chapter Five: Challenges to the Ratification and Implementation of the Rome Statute

5.1 Introduction

This chapter assesses the concerns of the Arab states towards the Rome Statute of the ICC. There are several concerns and reasons, whether legal or political, that could be behind the reluctance of some Arab states to join the ICC. The political will of states leaders are one of the major factors affecting the Arab states' memberships to the Court. Culture and religion are also factors that have an impact on the Arab states' decisions to join the Rome Statute.

The previous chapter discussed the positions and opinions of the Arab states towards the Rome Statute during the negotiations and drafting phase. This chapter will address the challenges and obstacles of the Statute ratification and implementation. Some Arab states showed reluctance in ratifying the Statute despite signing it, while other Arab states did not sign the Statute and some others voted against its adoption during the Rome Conference.

The chapter will analyse the legal issues, which are mainly constitutional, that are considered by some of the Arab states as obstacles towards the ratification of the Rome Statute. In the second part, the chapter will examine the political concerns some of the Arab states have towards the ICC, which is mainly the leaders' fear of being prosecuted by the Court. The chapter will also review the Court's practice towards the cases and situations, and its possible effect on the Arab states' position. Finally, the last section of the chapter will provide alternatives to the non-ratification of the Statute by examining other methods to apply international criminal justice and end impunity within Arab states.

5.2 Constitutional Obstacles and Concerns

The majority of Arab states' legal systems are considered an obstacle towards the ratification of the Rome Statute. Some of these states have been reluctant to ratify the Rome Statute as a result of alleged contradictions with their constitutions or legislations.¹ Ratification and implementation requires, as in other legal systems, that states constitutions and statutory laws conform with the Statute, which may necessitate a string of legislative reforms. This task is likely to pose considerable difficulties, largely due to the complex procedures for amending constitutions.² For instance, the majority of Arab states find that the abolition of the immunity of Heads of States for international crimes goes against their constitutions. Thus, the consistency of constitutional immunities with the duty imposed on State Parties to arrest and surrender suspects, irrespective of their official status is widely considered an obstacle.³ Other major constitutional obstacles are the fear among some Arab states that the ICC might infringe national sovereignties, and the compatibility of a state's constitutional prohibition on the extradition of its own nationals with the absolute obligation on State Parties to arrest and surrender suspects to the Court.⁴

5.2.1 Sovereignty Issues

State sovereignty is an internationally recognised legal status that entitles a state entity to exercise authority over a territorially defined set of borders. As such, each state has the right to exercise its jurisdiction over crimes committed in its territory known as the territoriality principle.⁵ Most Arab states' constitutions refer to the state as an independent sovereign

¹ Adel Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8 *International Criminal Law Review* 477-507.

² See Rupert Elderkin, 'The Impact of International Criminal Law and the ICC on National Constitutional Arrangements' (2015) 4 *Global Constitutionalism* 227-253.

³ See more Abdo I Baaklini and others, *Legislative Politics in the Arab World: The Resurgence of Democratic Institutions* (Lynne Rienner Publishers 1999).

⁴ Helen Duffy, 'National Constitutional Compatibility and the International Criminal Court.' (2001) 11 *Duke Journal of Comparative & International Law*.5-38, 6.

⁵ See more Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003).

“Arab” state; their sovereignty, in a formal legal sense, makes them free to decide on the relationships between their own national legal orders and any international institution such as the ICC.

Like all other states, Arab states are also concerned with sovereignty, but some scholars find that one of the main concerns of Arab states towards the ICC is related to the concept of sovereignty.⁶ All Arab states were subject to colonialism for many decades, and their inspiration has always been to achieve their freedom from colonial powers and to overcome any limitation on their national sovereignty. This experience seems to have left a deep concern in the minds of some Arab states in relation to any possible external interference in their national affairs.⁷ As a result, some of these states believe that the current system of international criminal justice could be used to enforce the political agenda of certain Western governments, and to erode their national sovereignty.⁸ This applies to most international and internationalised criminal justice institutions; some mistakenly regard the ICC as an alien institution that could affect their independence and infringe their territorial sovereignty.⁹

For example, after the Iraq War in 2003 and the trial of former Iraqi President Saddam Hussein, many Arab leaders had more concerns that similar hybrid or international tribunals created by the Coalition,¹⁰ or other foreign entities, could be a great threat to their sovereignty and used to excuse interference in their internal affairs. Arab public opinion has continued to view Saddam’s trial as an American-backed enterprise intended to justify an unpopular war.¹¹ Many Arab states also saw the indictment of the Sudanese President Al-Bashir as an intervention in Sudan’s national affairs.¹² On learning of the first list of charges against him,

⁶ See Adel Maged, ‘Arab States’ in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders* Volume II: Constitutional Issues, Cooperation and Enforcement (1st edn, Editrice il Sirente 2005) 469-478.

⁷ Adel Maged, ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Justice’ (2008) 8 *International Criminal Law Review* 477-507, 486.

⁸ Sam Sasan Shoamanesh, *The ICC and the Middle East: A Needed Relationship*, (2009) *Jurist Legal News and Research Online* <<http://jurist.org/forum/2009/09/icc-and-middle-east-needed-relationship.php>> accessed 22 May 2015.

⁹ Adel Maged, ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Justice’ (2008) 8 *International Criminal Law Review* 477-507, 486.

¹⁰ The Coalition Provisional Authority voted to create the Iraqi Special Tribunal (IST), consisting of five Iraqi judges, on 9 December 2003, to try Saddam Hussein and his aides for charges of war crimes, crimes against humanity, and genocide.

¹¹ Telhami Shibley, *Arab Public Opinion and the Trial of Saddam Hussein*, (2006) *The Brookings Institution Online* <<http://www.brookings.edu/research/opinions/2006/05/11iraq-telhami>> accessed 1 May 2015

¹² Case No. ICC-02/05-01/09 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.

Al-Bashir used his power to drive humanitarian agencies out of Sudan, claiming that the Court was an imperialistic tool and discriminatory towards Arab states.¹³ Moreover, there is widespread belief in Arab public opinion and their governments that the arrest warrant against Al-Bashir is a continuation of a Western strategy aiming to undermine the Arab world.¹⁴

Another issue related to sovereignty revolves around the Rome Statute's complementarity regime. A fundamental problem that faced the drafters of the Statute was the role the institution would play in relation to national courts.¹⁵ It is often claimed that the complementarity regime in fact serves to protect or support sovereignty, in the sense that the ICC will always give priority to the exercise of national jurisdiction.¹⁶ However, states with well-developed criminal justice systems that have greater ability and the capacity to investigate and prosecute international crimes would benefit more from this regime. States from the Arab region may complain that Western states can take cover behind the principle of complementarity to preserve their own exercise of jurisdiction, whereas it will be precisely those systems, of the Arab states, that will be judged to be incapable of holding genuine proceedings. For these Arab states, it is said, the ICC will not protect their sovereignty - rather it will be even more exposed. In addition, judges from those same Western-based states will assess their systems.¹⁷ During the drafting of the Statute, some Arab delegations, while supporting the establishment of an ICC, were unwilling to create a body that could impinge on national sovereignties.¹⁸ They argued that it would have been impossible to create an effective ICC, even if those with the most fair and credible legal systems, were willing to accept some compromise in their national criminal jurisdiction, that is, to relinquish part of

¹³ Kurt Mills, "Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 Human Rights Quarterly 404-447, 405.

¹⁴ Noha Bakr and Essam Abdel Shafi, *Arab Official Positions towards President Al-Bashir's Indictment*, in *The Gap between Narratives and Practices, Darfur: Responses from the Arab World*, (2010) FRIDE <http://fride.org/download/OP_Darfur_President_alBashir2_ENG_mar10.pdf> accessed 1 May 2015.

¹⁵ Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law 869-976, 890.

¹⁶ Adel Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8 International Criminal Law Review 477-507, 486.

¹⁷ *ibid.*

¹⁸ John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations - Results* (1st edn, Kluwer Law International 1999)

the their sovereign rights.¹⁹

The concern based on the complementarity principle and state sovereignty was also reflected when the Darfur situation came before the ICC. Sudan claimed that its national courts had assumed its responsibilities in holding the perpetrators of violence accountable, but the ICC still claimed jurisdiction over crimes committed in the Darfur region.²⁰ Thus, some of the Arab states' concerns reflected during the negotiations of the Statute were seen to be justified by the Court's practice several years later. Such actions were a major factor in the reluctance of the Arab states to ratify the Statute.

5.2.2 Immunity Issues

The Rome Statute explicitly does not recognise head of state immunity traditionally accorded under international law, as a reason not to comply with obligations under the Statute. In fact, the treaty overrides any immunity that states may grant to presidential, parliamentary, or legislative officials in their domestic systems,²¹ which means that proceedings before the Court cannot be barred by the position of the person concerned in his or her own state. Additionally, the OTP announced that they would focus on high-level offenders.²² This statement is considered a threat to some governments, and particularly those of Arab states, which have to weigh up and consider this issue when deciding whether to ratify the Statute or not. Article 30 of the Jordanian Constitution stipulates that “[t]he King is the Head of State and is immune from any liability and responsibility” – but this has not prevented Jordan from ratifying the Statute.

¹⁹ Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 Michigan Journal of International Law 869-976, 890.

²⁰ See Jakob Pichon, ‘The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court’ (2008) 8 International Criminal Law Review.

²¹ Rome Statute, Article 27.

²² According to the Prosecutor’s Office they “will initiate prosecutions of the leaders who bear most responsibility for the crimes” in *Paper on Some Policy Issues Before the Prosecutor Office of the Prosecutor* September 2003 <<http://www.iccpi.int/ONR0rdonlyres/04780FCDE-7428-455A-BE01-E3BEE06920B402484620372619.pdf>> accessed 13 April 2015.

Most Arab states' constitutions provide their head of states and government officials with immunity from prosecution, which varies from one state to another. In recent years, the ICC Prosecutor has asserted his discretionary power by issuing arrest warrants against two Arab heads of state, Omar Hassan Al-Bashir, the current president of Sudan, and the late Muammar Al-Qaddafi of Libya.²³ The Prosecutor's actions have raised concerns about the ICC's powers towards heads of state and thus made some Arab leaders more reluctant to join the ICC. The arrest warrants issued by the Prosecutor will make some Arab states more reluctant to join the Court. But it has to be noted that neither of the indicted presidents have joined the ICC as the cases were referred by the Security Council. This means that even if some Arab states' leaders think they are immune from the ICC by not ratifying the Statute, and concerned that they might be prosecuted, the examples of Sudan and Libya should be taken into consideration.²⁴

The Arab states grant constitutional immunity to their officials and head of state, so eventually the Rome Statute will affect the constitutional framework within these states. Arab states are required to make general amendments to their respective constitutions to allow for cooperation with the ICC, if they are willing to ratify or for those that already ratified the Statute. If these constitutional amendments are considered by Arab states, any potential conflict between domestic legislations and the Statute's obligations will be eradicated.²⁵

5.2.3 Extradition Issues

The ICC Member States are obliged to comply with surrender requests issued by the Court. They cannot invoke any grounds for refusal based on the accused nationality or on

²³ In line with Article 13(b) of the Rome Statute and acting under Resolution 1593, the Council, on 31 March 2005, decided to refer the situation in Darfur, Sudan since 1 July 2002 to the Prosecutor of the Court for investigation and prosecution, S/RES/1593(2005). Likewise, the Security Council by virtue of Article 13(b) decided in Resolution 1970 to refer the situation in Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor for investigation and prosecution, S/RES/1970 (2011).

²⁴ See more John J. Liolos, 'Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes' (2012) 35 Boston College International & Comparative Law Review.

²⁵ Rupert Elderkin, 'The Impact of International Criminal Law and the ICC on National Constitutional Arrangements' (2015) 4 Global Constitutionalism.

constitutional provisions prohibiting the extradition of nationals.²⁶ The Arab states are not required to adopt new legislative measures other than one that would provide for such an obligation. Arab states can also avoid the need for constitutional amendments as they can adopt the interpretative approach if their constitutions prohibit the extradition of nationals.²⁷ This would create a simple procedure that avoids the obstacles and will result in a legal framework which complies with the Statute. Moreover, Arab states could clarify the distinction between the extradition of nationals to a foreign state, which is prohibited under their constitutions, and the surrender of nationals to an international judicial organisation, like the ICC.

5.3 Definitions of International Crimes Concerns

Defining international crimes that fall within the ICC's jurisdiction has constituted an even greater obstacle for Arab states. Article 7 of the Rome Statute, for example, defines crimes against humanity in very broad terms. Most of the various crimes against humanity provided therein are derived from international human rights treaties and declarations, such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights respectively. For these reasons, many Arab states have expressed the same objections that they had already expressed in relation to these international human rights treaties and declarations when considering the scope of the article, claiming that it does not take into consideration the social and cultural characteristics prevailing in their countries. This pattern was reflected in the reservations during signature on previous human rights treaties, which mainly related to the contradictions with Sharia law.²⁸

²⁶ Rome Statute Article 102 provides that 'for purposes of this Statute: (a) 'surrender' means the delivering up of a person by a state to the Court, pursuant to this Statute'.

²⁷ See Inmaculada Szmolka, 'Political Change in North Africa and the Arab Middle East: Constitutional Reforms and Electoral Processes' (2014) 36 *Arab Studies Quarterly* 128-148.

²⁸ M. Fitzmaurice, 'On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties' (2006) 10 *SYBIL*.

Some Arab states have sought to prescribe certain punishments arising under Sharia, including lashings or amputation of limbs in their domestic legislation.²⁹ These legislations may be considered to fall within the scope of Article 7 of the Rome Statute. Thus, these states may be concerned that the notion of crimes against humanity may be used in this context against their political regimes. These concerns will constitute an obstacle to their ratification decisions for the Statute.³⁰

5.4 Political Concerns

Many Arab states' leaders did not join the ICC because of political reasons, despite not being announced in public, but fears from being prosecuted or fears from politically motivated trials are always a concern for them. The relationship between international criminal law and politics originated in the emergence of the international criminal justice system. The modern history of international criminal law began auspiciously with the Nuremberg trials in the aftermath of World War II. For political reasons, the agenda of the universally prosecute responsible for the most serious crimes, promised by these trials, was never completed.³¹ The ICC, which embodies the promise of universal justice irrespective of a perpetrator's capacity, race, nationality or political weight, has so far only initiated trials against African and Arab defendants.

Some Arab leaders have portrayed international criminal law as a tool of Western domination whose claim to universality is nothing more than an empty ideological superstructure. These criticisms threaten to undermine the legitimacy of international criminal law.³² Bias and

²⁹ See Committee against Torture, 2002, Concluding Observations: Saudi Arabia. UN Doc. CAT/C/CR/28/5, para 4(b). In Concluding Observations, the CAT Committee has commonly classified Sharia punishments as breaches of the Convention, but it has failed to specify whether the breaches were of Article 1 or 16.

³⁰ See H. Abtahi, 'The Islamic Republic of Iran and the ICC' (2005) 3 *Journal of International Criminal Justice* 635-648.

³¹ See more Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015).

³² Maryam Jamshidi, 'The International Criminal Court and the Arab Spring: Overcoming Bias, Increasing Engagement' in Saul Takahashi (ed), *Human Rights, Human Security, and State Security: The Intersection* (1st edn, ABC-CLIO 2014).

political selectivity are also subjects of criticisms towards the international criminal justice system as there have been no trials for some Western states leaders' who were responsible for war crimes or torture allegations, like in Iraq, Afghanistan or Guantanamo.³³ Saddam Hussein, Omar Al-Bashir and Muammar Qaddafi all relied on the charge of political bias in order to challenge the legitimacy of the courts trying them.

In March 2009, The Arab League issued a statement expressing its “solidarity with Sudan and rejection of the ICC decision”. The opposition of the Arab states, in their official statements, towards the ICC reflect their concerns from further indictment. Moreover, the controversy surrounding the Darfur case and allegations about the politics behind the Security Council's involvement have increased the opposition against the Court.³⁴ Despite not being a Member State to the ICC, the US has a political authority to deprive the Court's jurisdiction through its *veto* power in the Security Council. In 2005, when the Security Council referred the situation in Darfur to the ICC by Resolution 1593, the US introduced to the Resolution some paragraphs upon its request.³⁵ For example, in paragraph 6 the SC granted a broad and unprecedented exemption for all American citizens. The US was able to limit the ICC jurisdiction, contrary to what was granted by the Rome Statute and defined by its Parties, the US introduced its own national interest.³⁶ Thus, it has the power to control the Court's referrals and add its influence on the international criminal justice system in general, which has a negative effect on other states towards the Court and its future.

The legal and political considerations should be completely separated when international criminal law is being applied. After all, fairness is a main criteria of justice, which can only be guaranteed if the same rules are applied to similar cases irrespective of other considerations. But in international relations it might be difficult to guarantee that. The current setup of the international system makes it very difficult for international tribunals and

³³ See more Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005).

³⁴ See Lyal S. Sunga, ‘Has the ICC Unfairly targeted Africa or has Africa Unfairly Targeted the ICC?’ in Triestino Mariniello (ed), *The International Criminal Court in Search of Its Purpose and Identity* (1st edn, Routledge 2014).

³⁵ Corrina Heyder, ‘The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status’ (2006) 24 *Berkeley Journal of International Law* 650-671, 657.

³⁶ *ibid*, 659.

courts to pursue justice free of all political considerations.³⁷ Political calculations play a role in the decision to prosecute or not in a particular case. If the ICC can build a reputation for professionalism and responsible action within that narrow framework, it may eventually grow into a more broadly relevant and effective international institution. On the other hand, if it is generally perceived to be exceeding its agreed jurisdiction, it risks feeding a politicisation controversy that could undermine its credibility and future development.³⁸

5.4.1 Double Standards

To date, all suspects brought before the ICC in The Hague have been from Africa. This is despite the fact that human rights violations have occurred in many other parts of the world since July 2002.³⁹ It is true that some of the violations occurring outside Africa do fall outside the jurisdiction of the ICC, as they were committed in states that have not ratified the Statute. The UN Security Council was quick to give the ICC Prosecutor the power to commence investigations into Darfur in 2005 and Gaddafi's government in 2011, while back in early 2009, there was no such resolution passed in relation to Israel's war in Gaza. These actions from the UNSC are controversial and raise many doubts. Powerful states attempt to justify the non-application of international criminal law in certain cases,⁴⁰ for example in the position set out by former US Secretary of State Henry Kissinger, he claims that throughout history the "dictatorship of the virtuous" has often led to inquisitions and witch-hunts, and warns of the danger of "substituting the tyranny of judges for that of governments".⁴¹ The territorial restrictions on the jurisdiction of the ICC mean that the veto powers, China, Russia and the US will be outside the Court's jurisdiction. Israel, as a non-Member State was also

³⁷ Patrick Wegner, 'Law versus Politics in International Criminal Justice' (2011) *Justice in Conflict*, Online <<http://justiceinconflict.org/2011/07/28/law-versus-politics-in-international-criminal-justice/>> accessed 28 August 2015.

³⁸ Bartram S. Brown, 'The Politicization of International Criminal Law' (2007) Chicago-Kent College of Law, Online <<http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp07/CourseDocs/IVOnThePoliticizationofInternationalCriminalLaw.pdf>> accessed 21 August 2015.

³⁹ See Olympia Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *Human Rights Law Review*.

⁴⁰ Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015) 4.

⁴¹ Henry A. Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86.

outside the Court's jurisdiction, until Palestine became a Member State in 2015, as a result the Court has jurisdiction with regards to crimes committed on its territory.

There has been much criticism of the Court's handling of criminal complaints against Tony Blair and other British citizens in connection with war crimes committed during the war in Iraq from 2003 onwards. A complaint submitted to the Office of the Prosecutor by an international group of professors focused on torture and the use of cluster bombs by British forces in and around Basra, as well as on allegations of war crimes in the context of detainee abuse.⁴² They argued that the use of cluster ammunitions in urban areas represents war crimes due to the intentional infliction of disproportionate civilian casualties, although these weapons are not banned as such. In a letter to those who submitted communications, the Prosecutor Moreno-Ocampo said that prosecutions had not been opened, as the crimes denounced were not of sufficient gravity to fall within the jurisdiction of the ICC.⁴³ Without undertaking any further inquiries, the prosecution assumed that the denounced prisoner abuse involved a relatively small number of victims and argued that the incidents were of minor gravity in comparison with the crimes in Darfur. The letter also argued that the crimes were not part of a plan or policy, which under Article 8 (1) of the Rome Statute is a consideration to take into account in establishing the Court's jurisdiction in cases of war crimes.⁴⁴

The Court's jurisdiction extends only to crimes committed since July 2002 and is also subject to certain geographical limitations. There can be no doubt that the first three situations to be addressed by the ICC, which concerned the DR Congo, Darfur and Uganda, involved human rights violations on a massive scale. The issue becomes less clear in relation to the investigations with regard to Kenya, Côte d'Ivoire and Libya, all of which concern human rights violations which, in terms of duration, intensity and structure, are on a markedly smaller scale than the initial three. Situations of comparable gravity have occurred in a range of other settings, namely Burma, Iran, Syria and Sri Lanka. However, none of these states

⁴² The Telegraph, Hague Investigation into British 'War Crimes' in Iraq; The International Criminal Court Has Begun Looking at Allegations British Troops Committed War Crimes in Iraq, 13 May 2014 <<http://www.telegraph.co.uk/news/uknews/defence/10828393/Hague-probe-into-British-war-crimes-in-Iraq.html>> accessed 22 July 2015.

⁴³ ICC Press Release Office of the Prosecutor, "Communications Received by the Prosecutor of the ICC concerning the situation in Iraq", The Hague 09 February 2009.

⁴⁴ See Bill Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish 2008) 64.

have signed the Statute and unlike Darfur and Libya, the UN Security Council has not referred any of these situations to the Court. Great power politics make a referral in these cases seem very unlikely, as at least one veto power has a stake in all of these situations.

After the first unanimous SC referral of a case to the Court, in Libya's situation, the ICC's actions also gave rise to a debate on the impartiality. The exclusion of certain groups from the Court's jurisdiction, which was included in the referral resolution, is problematic. Shielding certain nationalities or groups will expose the Court to criticisms and wider negative implications as to its credibility and impartiality. This was reflected after NATO forces, which had been intervening in Libya, were granted immunity from prosecution before the ICC, despite evidence of numerous civilian deaths caused by NATO airstrikes.⁴⁵

The same charge of political selectivity should not yet be applied to the case of the Gaza war in light of the jurisdictional problems encountered by the Court due to the long-lasting uncertainty surrounding Palestine's status as a state. This delicate question has, however, been resolved by the UN General Assembly when it recognised Palestine as having non-member observer state status, in November 2012.⁴⁶ It followed that Palestine accepted the jurisdiction of the ICC with regard to "crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014" by virtue of an ad hoc declaration on 1 January 2015, and ratified the Statute on the following day.⁴⁷ On 16 January 2015 the OTP initiated a preliminary examination of the situation in Palestine.⁴⁸ Needless to say, any investigation into Israeli suspects would probably expose the Court to the staunchest political criticism by Israel and its Western allies and especially the USA. However, this is precisely how the Court could now prove its independence, by carrying out effective investigations into crimes committed by Israel and Hamas during the 2014 war. Past experience, for example with regard to British crimes in Iraq, suggests that there is some scope to hope for effective investigations, although the Court will probably be slow to actively engage with this politically sensitive topic. NGO efforts could play a key role

⁴⁵ See Seumas Milne, *If There Were Global Justice Nato would be in the Dock over Libya*, 15 May 2012, The Guardian < <http://www.theguardian.com/commentisfree/2012/may/15/global-justice-nato-libya> > accessed 22 April 2015.

⁴⁶ A/RES/67/19.

⁴⁷ ICC-CPI-20150105-PR1080.

⁴⁸ ICC-OTP-20150116-PR1083.

in keeping up pressure for the investigations to go ahead and in exposing any existing domestic unwillingness to investigate and prosecute. In addition, it is a great opportunity for the ICC to bring accountability to years of conflicts in the region and end all the criticisms of political selectivity.

But contrary to the Arab League hostile opposition towards the ICC, after Al-Bashir's arrest warrant, the Arab League passed resolutions that condemned the Gadhafi regime's violence against protestors, banned the Libyan delegation from participating in the League meetings, and requested the UN to impose a no-fly zone over Libya.⁴⁹ This shows that Arab leaders could also be politically motivated and act in bias towards similar issues in implementing justice. Still, accusations about the political nature of the Libya referral have been provoked after the Security Council's failure to act towards the situation in Syria. The obstacles facing a Security Council referral of the situation in Syria shows the important role of politics and the power of the veto rather than humanitarianism, a fear most of the Arab states raised during the Rome Conference. The case of Sudan and conflicts in Libya and Syria shows that political influence from both Western and Arab states have a major role. Despite the similarity in the three situations with respect to human rights violations and violence, but each situation was dealt with in a different manner according to the political agenda of the role key players.

5.4.2 The United States' Policy towards the ICC

As a non-State Party the US has no obligations whatsoever under the Rome Statute, including the obligations to comply with requests for the surrender and transfer of suspects to the Court and to provide requested evidence, even though no state has the legal right to shield its citizens from prosecution abroad for genocide, crimes against humanity or war crimes.⁵⁰ A major concern for the US is that the ICC will open the door to politicised prosecutions of US

⁴⁹ Al Arabiya news, *Arabs Demand Libya Halt Violence, Eye nNo-fly Zone*, 02 March 2011 <<http://www.alarabiya.net/articles/2011/03/02/139891.html>> accessed 2 August 2015.

⁵⁰ See Bartram S. Brown, 'U.S. Objections to the Statute of the International Criminal Court: A Brief Response' (1999) 31 NYU Journal of International Law and Politics 855-891, 871.

nationals. As far as the protection of nationals from prosecution abroad is concerned; the Statute does little to change the *status quo ante*.⁵¹ As a result, the US government has launched a robust campaign of anti-ICC policies;⁵² some of these actions do politicise the international criminal justice system. Immediately after the final text of the Rome Statute was adopted in 1998, some US policy-makers suggested that the US should embark on an active campaign against the ICC.⁵³ US ICC policy has focused on gaining assurances from other states that they will never transfer US nationals to the custody of the ICC. States can reassure the US on this point either by declining to become parties to the Statute, or by signing a so-called Article 98 agreement with the US.⁵⁴

These Article 98 Agreements are only one part of a coordinated US response to the Rome Statute and its State Parties. US federal law mandates that “no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.”⁵⁵ States that sign Article 98 Agreements with the US may be exempted from this prohibition. Thus, the current US policy is to punish states when they ratify the Statute unless they also agree to an Article 98 Agreement. This policy of coercion by threat of aid cut-off may not be illegal, but it politicises international criminal law and could undermine its effectiveness.⁵⁶

There is no doubt that the US policy towards the ICC has an impact on the Arab states’ position towards the ICC. The controversial US- Arab relation and the ongoing Palestinian-Israeli conflict affected the Arab states’ decisions to not ratify the Statute. The US, being Israel’s biggest ally, would block any potential Security Council referral of Israel to the ICC,

⁵¹ Bartram S. Brown, ‘Depoliticizing Individual Criminal Responsibility’ in Michael Scharf and Leila Sadat (ed), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (1st edn, BRILL 2008) 120.

⁵² See more David J. Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 *The American Journal of International Law* 12.

⁵³ Former Senator Jesse Helms, speaking as Chairman of the Senate Foreign Relations Committee in 1998, stated that “[r]ejecting this treaty is not enough . . . The United States must . . . be aggressively opposed to this court.” Toni Marshall, *Helms Vows Retaliation for New World Court*, *The Washington Times*, July 24, 1998, Part A; Pg. A1.

⁵⁴ See more Attila Bogdan, ‘The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98’ (2008) 8 *International Criminal Law Review* 1-54

⁵⁵ The American Service Members’ Protection Act, 22 USC § 7426(a) (2005).

⁵⁶ Bartram S. Brown, *The Politicization of International Criminal Law*, (2007) Chicago-Kent College of Law <<http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp07/CourseDocs/IVOnthePoliticizationofInternationalCriminalLaw.pdf>> accessed 21 August 2015.

using its veto power. Such discretionary power of the Security Council, undermines the international criminal justice system in general and weakens the ICC's role in ending impunity. Some of the Arab states have concerns that adhering to the Rome Statute would limit their powers to defend themselves against any aggressor under the current role of the Security Council on deciding the occurrence of the crime of aggression.⁵⁷ Also, the failure of prosecuting crimes committed by both, the US in Iraq and Afghanistan, and its most strategic partner in the Middle East, Israel in Palestine and Lebanon raises the Arab leaders' doubts as to the effectiveness of the international criminal justice system.

5.5 The ICC Practice in Africa

The Court practice in handling cases and situations has been observed by several Arab states, including both the Arab States Parties and those considering ratifying the Statute. Such practice, if positive and efficient will definitely affect Arab states decision to join the Court; however, if the Court's practice is incompetent or selective, some of these states will be more hesitant to join the Court.

While the establishment of the Court was initially greeted with great optimism and praise, many critical voices have emerged over the decade. Although it is true that the eight formal proceedings opened by the Court till date exclusively concern African states, it is worth noting that two of these were referred to the Court by the UN Security Council and four others were referred by the states in relation to themselves. Against this background, it becomes clear that there are accusations of bias or of a neocolonial attitude against the OTP and the Court in general.⁵⁸

Among accusations of African bias was the AU Commission Chairman's statement "Why not

⁵⁷ Adel Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8 *International Criminal Law Review* 477-507, 487.

⁵⁸ See more Lyal S. Sunga, *Has the ICC Unfairly Targeted Africa or has Africa Unfairly Targeted the ICC?* (1st edn, Routledge 2014).

Argentina? Why not Myanmar... Why not Iraq?”, and the President of Rwanda who accused the ICC that “it was created to prosecute Africans and others from poor countries”.⁵⁹ The ICC must consider these accusations in its policy towards the cases and situations, by initiating investigations, through the OTP, into allegedly committed crimes in other states under its jurisdiction, whether the states are considered “wealthy and powerful” states or not. Failing to address the African states’ concerns, which is now reflected by the Arab states, will affect the Court’s credibility. On the other hand, the AU has declared that on some occasions, the Court’s practice towards the situations in Africa has obstructed the peace process efforts.⁶⁰ It is based on the premise that “peace and stability outweigh justice”.⁶¹ In both the Al-Bashir and Kenyatta cases, the AU was involved in a peace process in Darfur and sponsored a mediation process that resulted in a coalition government in Kenya.⁶² The argument about delaying prosecutions in the interests of a peace process could help in facilitating impunity, especially if the peace process contains amnesties and pardons. Thus the ICC could face a complex situation when ignoring the peace agreements and prosecuting perpetrators of crimes.

The controversy of the ICC jurisdiction mainly relates to the situations referred by the SC; most African leaders have objected to cases that were referred by the Council only. Arguments of those against the Court are due to the Security Council’s role in Africa and its lack of action in other places or towards other conflicts. These arguments against the Court should perhaps be diverted to the SC’s role. Amongst the eight African states that currently have cases being investigated and prosecuted by the ICC, only Libya has challenged the Court’s jurisdiction.⁶³ Thus, the majority of concerned African states are not objecting to the

⁵⁹ See more Rowland JV. Cole, ‘Africa’s Relationship with the International Criminal Court: More Political than Legal’ (2013) 14 Melbourne Journal of International Law 670-698.

⁶⁰ Report of the Implementation of Communiqué of 142nd Meeting of the Peace and Security Council held on 21st July 2008, which reviewed the situation in Darfur in light of the application made by the Prosecutor of the International Criminal Court (ICC); See more Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, “‘To be or not to be?’ The African Union and Its Member States Parties’ Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)’ (2015) 33 Nordic Journal of Human Rights 243-268, 266.

⁶¹ Bruce Baker, ‘Twilight of impunity for Africa’s Presidential Criminals’ (2004) 25 Third World Quarterly 1487-1499, 1490.

⁶² See more Steve Odero, ‘Politics of International Criminal Justice, the ICC’s Arrest Warrant for Al Bashir and the African Union’s Neo-Colonial Conspirator Thesis’ in Chacha Murungu and Japhet Biegon (ed), *Prosecuting International Crimes in Africa* (1st edn, Pretoria University Law Press 2011), 153.

⁶³ Sudan has objected to the indictment of Al-Bashir and others, but it has not challenged the admissibility of the case.

ICC's jurisdiction. The unaffected African states and their leader's criticism of the ICC are controversial. Claims against the ICC as being "anti-African" are weak as the concerned states welcomed the intervention, and those who are not affected by the conduct rejected it. The ICC has been on the agenda of every AU summit since al-Bashir's indictment, and subsequently led to huge division between the African leaders themselves. In the main, the West African states are in support of the ICC, while East African states display some hostility towards the Court, which is expected as the ICC indicted two leaders from the region.

The African states that support to the ICC cannot be ignored, and neither can the atrocities nor the number of victims in the region. The DRC, Benin and Tanzania voted in favour of the UN Security Council referral of the Darfur situation to the ICC.⁶⁴ South Africa, Gabon and Nigeria voted in favour of the UN Security Council referral of the Libya situation to the ICC.⁶⁵ Ivory Coast accepted the jurisdiction of the ICC and undertook to cooperate with the ICC.⁶⁶ Kenya's president and prime minister showed support to the Prosecutor's independent decision to open an investigation into crimes in Kenya *proprio motu* despite withdrawal of charges later on.⁶⁷ Most recently, Mali referred to the ICC crimes occurring on its own territory since January 2012 and this was supported by ECOWAS.⁶⁸

No arrest has been secured following the ICC's first-ever arrest warrant for a sitting head of state and this has been interpreted as an indication of the weakness of the Court. In fact, there were a number of other factors at play. The UN Security Council failed to provide sufficient support to the Court after it had made its referral. No sanctions were taken against Sudan to force the state to co-operate with the Court and no action was taken by the Security Council against the states that hosted state visits by Al-Bashir, including State Parties to the Statute. In the face of these obstacles, the ICC's Prosecutor Fatou Bensouda, announced in December 2014 that she would suspend investigations into the Darfur situation due to a lack of support

⁶⁴ Resolution 1593 (2005) Adopted by Vote of 11 in Favour to None Against, with 4 Abstentions (Algeria, Brazil, China, United States).

⁶⁵ Resolution 1970 (2011) Unanimously adopted.

⁶⁶ ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire.

⁶⁷ ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta; *The Prosecutor v. Uhuru Muigai Kenyatta*.

⁶⁸ ICC-01/12; ICC-OTP-20130116-PR869, ICC Prosecutor opens investigation into war crimes in Mali.

by the Security Council.⁶⁹ Despite the support from several Arab states of al-Bashir, the weak image of the ICC, gained after the failure to arrest the Sudanese president, had an impact on the ratification decision by the Arab states. States usually tend to join strong and powerful international institutions or organisations; yet, the Darfur situation has exposed the Court's weakness on the international stage with regard to persuading states to cooperate.

5.6 Human Rights in Arab States

The last two decades have seen human rights violations in virtually all regions of the world, which have, in various situations amounted to international crimes, and even where criminal prosecutions would be legally possible and indeed obligatory, the perpetrators of such crimes all too frequently continue to enjoy complete impunity. The reasons for this vary, but in most situations may be due to the immunity of the perpetrator. Some authoritarian governments, among the Arab states, have committed a wide range of human rights abuses, including arbitrary detention and torture, against their own nationals under their control. Some of these regimes have changed but allegations of human rights abuses and violations by governments in some of the Arab states still exist.⁷⁰ The current human rights situation would be considered as one of the reasons for a reluctance to join the ICC on the part of some Arab states. The ICC's role is to end impunity and prosecute those who are responsible for international crimes; however, the lack of appropriate domestic legislations, the existence of corruption, insufficient political will and the overburdened judiciary within Arab states, makes such progression difficult. Moreover, the tyrannical political systems holding powers for decades in some Arab states create irreparable damage to the society and the

⁶⁹ Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005).

⁷⁰ See more Amnesty International UK, *Arab Spring' Five-Year Anniversary: Region Remains Mired in Repression - New Factsheet*, 16 December 2015, Press releases < <https://www.amnesty.org.uk/press-releases/arab-spring-five-year-anniversary-region-remains-mired-repression-new-factsheet>> accessed 18 December 2015.

institutions.⁷¹

Despite the ratification and implementation of human rights treaties by several Arab states, the fulfilment of treaty obligations are still seen to be missing. In addition, the accountability of authorities is being challenged with denied international supervision. For those Arab states that ratified human rights treaties, only a few of them have ratified the Optional Protocol to the ICCPR that allows victims to submit individual complaints against human rights violations by states.⁷² Another example is the CEDAW,⁷³ where Arab states have placed reservations on the crucial provisions, which resulted in the undermining of the treaty and contradicting its main purpose.⁷⁴ As for the Torture Convention's review mechanism, under its Articles 20-22, Arab states rejected the Committee's authority for investigating claims of torture submitted by other states or individuals.⁷⁵ Most of the Arab states have certain concerns and fears towards the human rights issues and consider it as a sensitive issue when it is discussed in the political arena. Most of them failed to provide efficient legislations to protect human rights and those who did, have still failed to provide effective mechanisms to implement these legislations. The ambiguity of Arab states' governments towards protecting human rights is also, obviously reflected in their hostile opposition towards human rights NGOs, as there have been cases of total prohibition and undermining of NGOs activities, and harassment of activists.

Human rights violations and abuses within the Arab states differ in forms, scales, and records. Some of the acts and violations practiced could result in the responsible officials being referred to the ICC, thus the reluctance in ratifying the Rome Statute by some Arab states. These acts include torture and ill-treatment of detainees by security officials, which has amounted to an industrial scale in some cases. Commonly reported torture methods

⁷¹ Tamás Vince Ádány, 'The Possible Role of National Courts in the Aftermath of the Arab Spring' in Carlo Panara and Gary Wilson (ed), *The Arab Spring: New Patterns for Democracy and International Law* (1st edn, M. Nijhoff Publishers 2013) 224.

⁷² UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁷³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

⁷⁴ Amnesty International, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women - Weakening the Protection of Women From Violence in the Middle East and North Africa Region*, 1 November 2004, IOR 51/009/2004.

⁷⁵ Abdullahi Ahmed An-Na'im, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 *Human Rights Quarterly* 701-732, 710.

includes “beatings on the soles of the feet, beatings while suspended by the limbs, prolonged standing or squatting in stress positions, electric shocks to the genitals and other sensitive areas, threats against the detainee and their family and, in some cases, rape and other sexual abuse”.⁷⁶ Usually torture was used to during interrogations to get information or confessions, and is often used as a method against activists and governments’ opponents, to deter and harm them. The main problem in some of these Arab states is that often the perpetrator is under the state’s policy and is granted immunity or rarely prosecuted, thus impunity prevails.

Despite the on-going armed conflicts in several parts of the region that began after the so called “Arab-spring”, and even from before in Iraq and Sudan, millions of people have suffered from human rights violations and violence. The political tensions in the Arab region have led to internal armed conflicts in some states, which could have been avoided if these states had established the rule of law, democracy and reliable institutions. The lack of legislations that protect human rights and the lack of an independent judicial body that applies justice, were among the reasons that fueled the conflicts. The weak parliaments among many Arab states and their missing scrutiny, functions towards the abuse of some government’s officials, furthermore the non-commitment towards international law obligations, all led to deterioration of the situation in the Arab region. The heads of state or military leaders, in Syria, Iraq, Libya and Yemen, who were behind the international crimes committed by their forces during the armed conflicts, and other leaders who are accountable for human rights violations in other Arab states, still benefit from the failure or incapability of domestic justice systems in the region. These leaders hold the view that the ICC will jeopardise their political positions, thus the ICC’s role in ending impunity is required.

5.6.1 Discrimination and Persecution

Another major problem in the region is the discrimination and treatment of Arab women,

⁷⁶ Vicken Cheterian, *Torture and the Arab System, Old and New*, 23 November 2011, openDemocracy < <https://www.opendemocracy.net/vicken-cheterian/torture-and-arab-system-old-and-new>> accessed 18 December 2014.

who suffer from inequality and are vulnerable to discrimination both in law and in practice.⁷⁷ Women face discrimination and restrictions in most fields: lack of education; illiteracy, polygamy, divorce, child marriage or forced marriage. Such acts are considered systematic discrimination, in both laws and social customs. Policies such as these may be blamed on various interpretations of the Sharia and on adopting the strict interpretation of Sharia, which may result in women being considered to have a subordinate status amongst citizens in some of the Arab states.⁷⁸ For example, women do not enjoy the same rights as men and there are also gender-based restrictions in some labour and personal status laws. In addition, several Arab states have failed to provide the required measures to protect women against sexual violence and domestic abuse. Issues like early and forced marriages still exist in some Arab states without appropriate protection from the state, and female genital mutilation is still practiced in some areas. Finally, imposing some restrictions on women only, like the driving ban or dress code in Saudi Arabia, are considered by several activists to be acts against the rights of women.

The Rome Statute includes gender crimes as both war crimes and as crimes against humanity. Under war crimes, the language makes it clear that the enumerated crimes are crimes of the gravest nature. The inclusion of ‘or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’,⁷⁹ indicates that the enumerated crimes (rape, sexual slavery, etc.) are themselves grave breaches of the Geneva Conventions. It also indicates that acts of sexual violence can be charged as sexual violence crimes or as the other grave breaches of international law listed in Article 8(2)(a) such as murder, torture, mutilation, enslavement, etc. The characterisation of sexual violence crimes is therefore important to the ICC’s capacity to indict sexual violence crimes in multiple ways. The Rome Statute is the first international treaty specifically listing the crime of forced pregnancy, and codifying for the first time the crime of sexual slavery.

Some Arab states during the Rome Conference were against inserting the term “gender” in

⁷⁷ See Pippa Norris and Ronald Inglehart, ‘Cultural Obstacles to Equal Representation’ (2001) 12 *Journal of Democracy* 126-140.

⁷⁸ See more Daniela Donno and Bruce Russett, ‘Islam, Authoritarianism, and Female Empowerment: What are the Linkages?’ (2004) 56 *World Pol.* 582-607.

⁷⁹ Rome Statute, Articles 8(2)(b)(xxii) and (e)(vi).

the Statute's provisions,⁸⁰ as in their views, it could include the sexual orientation. But such opposition has also been towards other provisions in the Statute that aimed to promote women's rights. Their arguments and concerns regarding gender issues were considered a great threat, by several participants in the Conference, against the insertion of some gender crimes and non-discrimination provisions in the Statute.⁸¹

Gender-based persecution, such as the sexual apartheid regime in some states, involves the intentional and severe deprivation of fundamental rights by reason of the victim's gender.⁸² Previously, the crime of persecution contained only political, racial or religious grounds, but not gender.⁸³ This suggested that gender-based persecution was less important or less prevalent than persecution on the other enumerated grounds. The inclusion of the ground of gender in the Rome Statute was an important step to ensuring that gender-based persecution would receive greater attention. This certainly had a direct impact on the Arab states' positions towards the Statute, and adds to the list of factors that makes Arab states reluctant to ratify.

The question of 'minorities', which has been one of the key issues to human rights organs including the UN High Commissioner for Human Rights,⁸⁴ is a concern to several Arab states. Persecution of minorities, mostly relating to the freedom of religion, ethnicity, political affiliation, gender, and culture, is considered a crime against humanity and has always been on the agenda of several NGOs.⁸⁵ For example, authorities in Saudi Arabia have placed a restrictive policy on Shi'a opponents from the eastern province, which includes imprisonment for their activists, unfair trials and death penalties.⁸⁶ In Kuwait, many Bidun residents suffer from the withdrawal of their citizenship, while in Bahrain, the Shi'a majority considers themselves discriminated against, denied an equal voice in governance, and many of their

⁸⁰ The Arab states that made statements opposing the term "gender" included: Qatar, Libya, Egypt, United Arab Emirates, Saudi Arabia, Kuwait, Syria, Sudan, Bahrain, Yemen and Oman. The delegates who led the negotiations for this group were from Syria and Qatar.

⁸¹ See more Valerie Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice' (2005) 18 Harv. Hum Rts. J. 55.

⁸² Rome Statute, Articles 7(1)(h) and 2(h).

⁸³ ICTY Statute Article 5; ICTR Statute Article 3.

⁸⁴ A/HRC/28/27.

⁸⁵ See more Will Kymlicka and Eva Pföstl, *Multiculturalism and Minority Rights in the Arab World* (OUP 2014), 74.

⁸⁶ *ibid.*

leaders are imprisoned by the ruling Sunni minority.⁸⁷ Religious and ethnic divisiveness and sectarianism were also witnessed in the Arab region by non-state armed groups. This is most brutally reflected in the conflicts in Iraq and Syria, where many people have been and are still being arrested, abducted, ethnically cleansed from their homes, or killed on account of their place of origin or their religion. It was evident, too, in Libya, where killings on ethnic or tribal grounds were common and on the rise.⁸⁸

There are major human rights violations and abuses within the Arab states, varying from one state to another, but some have already implemented reforms and enhanced their records, while others still have a severe situation of widespread violations. Joining the ICC and ratifying the Statute could assist in improving such conditions, by introducing domestic legislations to end abuses and impunity.

5.7 Alternatives to the Ratification of the Rome Statute

Several Arab states have faced serious human rights violations in the past, but despite state knowledge of these violations, few people have been prosecuted for the considerable crimes that have been committed in the region. This culture of impunity is undoubtedly one reason for the recurrence of such human rights violations, notably those committed during the so-called “Arab spring”. The existence of immunity from prosecution, in most of the Arab states’ legislations has lead to perpetrators of crimes not being tried. The fight against impunity for the most serious crimes is an important way of preventing further violations. The Arab states’ concerns and obstacles towards the Rome Statute might indicate that most of these states will not ratify the Statute anytime soon. Five alternatives remain available in these circumstances: declarations of acceptance, UN Security Council referrals, creation of *ad hoc* tribunals, adoption of national accountability measures, and universal jurisdiction.

⁸⁷ See more Toby Matthiesen, *Sectarian Gulf: Bahrain, Saudi Arabia, and the Arab Spring That Wasn’t* (Stanford University Press 2013).

⁸⁸ See Christopher Phillips, ‘Sectarianism and conflict in Syria’ (2015) 36 *Third World Quarterly* 357-376; Daniel Byman, ‘Sectarianism Afflicts the New Middle East’ (2014) 56 *Survival* 79-100; Maya Bhardwaj, ‘Development of Conflict in Arab Spring Libya and Syria: From Revolution to Civil War’ (2012) 1 *Washington University International Review* 76-96.

5.7.1 Declarations of Acceptance

Arab states that have yet to ratify can declare acceptance of the Statute, and so submit themselves to the jurisdiction of the ICC.⁸⁹ By lodging a declaration with the ICC Registrar, the concerned Arab state, which is not party to the Statute, accepts the Court's jurisdiction on an *ad hoc* basis. These declarations relate only to the scope of the Court's jurisdiction and do not trigger an investigation. The authorisation of the Pre-Trial Chamber to the Prosecutor is required to open an investigation, after he pursued preliminary examinations. The declaration of acceptance, as an alternative, is an efficient approach for Arab states that have the political will to accept the ICC jurisdiction over alleged crimes in a particular situation without being fully adhered to the Statute in other situations. Upon lodging the declaration, the state will recognise the jurisdiction of the Court within the mentioned territory and since the specified date, and accordingly with respect to the crimes referred to in Article 5 of the Statute of the relevant situation.

The Palestinian National Authorities submitted such a declaration in January 2009, in which it accepted the jurisdiction of the ICC in Palestinian territory. However, the OTP concluded that it did not have the competence to determine whether Palestine was a state, so declined to pursue the Palestinian declaration any further.⁹⁰ A second declaration was submitted by Palestine in 2015, which was accepted by the ICC. Finally, a controversial declaration submitted in relation to Egypt was also sent to the ICC. These declarations are discussed in more detail in chapter seven.

5.7.2 UN Security Council Referrals

The Security Council referred two Arab states, Libya and Sudan, to the ICC. It was considered as alternative due to the severe nature of the conflicts and the number of victims.

⁸⁹ Rome Statute, Article 12(3).

⁹⁰ See more Malcolm N. Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 *Journal of International Criminal Justice* 301-324.

The SC referral mechanism, which was discussed earlier, could be considered as “against the state’s will” alternative to the Statute’s ratification. The self-referral or the declaration of acceptance usually involves the state’s own will to get the ICC involved in the case by transferring its primary jurisdiction to the Court. The SC referrals will probably be challenged and opposed by the concerned state, and in some occasions the state will not accept its legitimacy, like Sudan’s position towards Darfur situation.⁹¹ Despite the domestic attempts by Sudan to investigate and prosecute the crimes in national courts, it was seen by many as sham trials. In addition, Sudan lacks the required legislations and judicial competence to try these crimes.

A similar situation occurred in Libya, who were opposed to the ICC and refused to ratify the Statute. After the uprising in 2011, the Security Council used its trigger mechanism for the second time and referred the situation to the Court. The two SC referrals could have significance on other Arab states’ leaders as it indicates that they will or could still be indicted for serious crimes, even if they do not ratify the Statute. A similar situation occurred in Libya, who opposed the ICC and refused to ratify that Statute. After the uprising in 2011, the Security Council used its trigger mechanism for the second time and referred the situation to the Court. Thus, Arab states should consider the two SC referrals as a reason to comply with international law requirements and consider the ratification of the Statute.

Despite being an effective alternative mechanism, the SC referrals have shown its weakness with regards to the situation in Syria. The conflicts in Syria have resulted in war crimes and crimes against humanity, according to the International Commission of Inquiry on Syria.⁹² China and Russia predictably vetoed a French UN Security Council proposal to refer Syria to the ICC.⁹³ Without Syria’s ratification of the Rome Statute, the Security Council is the only body that can refer the situation to the ICC. Although this window has effectively closed, other options exist to hold the perpetrators accountable for the mass crimes and the gross human rights violations that have occurred in Syria over the past periods.

⁹¹ See Dapo Akande, ‘The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice* 333-352.

⁹² Established on 22 August 2011 by the Human Rights Council through Resolution S/17-1.

⁹³ SC/11407, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution. 22 May 2014. 7180th Meeting (AM)
<<http://www.un.org/press/en/2014/sc11407.doc.htm>> accessed 25 April 2015.

5.7.3 Ad Hoc and Hybrid Tribunals

The *ad hoc* tribunals have existed since the beginning of the modern international system, with the aim of settling disputes between states and sometimes other international actors. *Ad hoc* tribunals dealing with criminal cases against individuals have been created to deal with the core international crimes, and to investigate, prosecute and try individuals accused of serious violations of international humanitarian law and international human rights law.⁹⁴ Their structure and applicable law consist of both international and national elements. The development of these legal mechanisms remains a significant aspect of some post-conflict scenarios.⁹⁵ Considering the facts of the region's lack of membership to the ICC and that the region has recently faced conflicts, these types of tribunals could be a solution to such issues. They could work towards peace and reconciliation for a state and to meet justice demands for victims of mass violations of human rights. They will also help to deter the commission of further crimes, deliver justice for the community and establish the truth of what happened in the past as part of a future process of peaceful co-existence. Although the creation of the ICC was intended to complement such *ad hoc* tribunals, the lack of participation of the Arab states in the Court could make the *ad hoc* international or hybrid tribunals the only solution.

5.7.3.1 Lebanon

In response to the 14 February 2005 attack that killed 23 people, including the former Prime Minister of Lebanon, Rafiq Al-Hariri, the Lebanese government requested on 13 December 2005 that the UN create a tribunal of *international character*. The UN Security Council acknowledged the request on 15 December 2005 in Resolution 1644.⁹⁶ The UN and the Lebanese government signed an agreement for the establishment of the Special Tribunal for Lebanon (STL) on 23 January 2007, and the agreement was handed to the Lebanese parliament to ratify. But the speaker of the parliament, for political reasons, refused to

⁹⁴ See Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2005), 21.

⁹⁵ See more Lilian A. Barria and Steven D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of The ICTY and the ICTR' (2005) 9 *The International Journal of Human Rights*.

⁹⁶ S/RES/1644, Resolution 1644 (2005).

convene parliament to vote on its ratification. A petition signed by a majority of the Lebanese MPs was sent to the UN Secretary General requesting that the Security Council form the tribunal. The Security Council created the STL, which has issued landmark decisions on the conformity of in absentia proceedings with international human rights law and on the customary international law definition of terrorism.⁹⁷ The STL represents an evolution in the development of international justice with a number of features that do not exist in other international tribunals or courts. It is the first international tribunal to try crimes under national law, prosecuting crimes relating to terrorism and offences against life and personal integrity, illicit associations, and failure to report crimes and offences under the Lebanese criminal code. The STL is also the first tribunal of its kind to deal with terrorism as a distinct crime that the United Nations Security Council has described as a “threat to international peace and security”.⁹⁸

5.7.3.2 Iraq

The Iraqi High Criminal Court was established to bring justice to Iraqi nationals and to prosecute those accused of atrocities and other crimes committed during the thirty-five-year period of Ba’athist power. The Iraqi Governing Council originally set up the court in late December 2003.⁹⁹ At this time, Iraq was still occupied by the United States and its allies. The Coalition Provisional Authority had to delegate special authority to the Iraqi Council for this purpose. A number of key international elements have been built into the court’s structure and practice. For example, the Iraqi court statute makes provisions for international advisers and there is an option for international judges to be appointed to the court’s judiciary. The definitions of most of the crimes that the court has power to try are based on settled international definitions and the judges may rely on international case law to assist them in

⁹⁷ S/RES/1757, Resolution 1757 (2007).

⁹⁸ The tribunal is applying the Lebanese legal definition of terrorism, an element of which is the use of a means “liable to create a public danger”, such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents. The STL appeals chamber ruled on 16 February 2011 that the list of means of attack is illustrative, rather than exhaustive. In the same ruling the appeals chamber defined terrorism as an international crime for the first time.

⁹⁹ M. Cherif Bassiouni and Michael Wahid Hanna, ‘Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein’ (2006) *Case Western Reserve Journal of International Law* 21, 50.

reaching their decisions.¹⁰⁰

On 17 July 1998, under Saddam Hussein's regime, Iraq was one of the seven states that voted against the Rome Statute. Following the change of regime in 2003 and the consequent phases of occupation and transition, on 15 February 2005, the Council of Ministers of Iraq's Interim Government led by Prime Minister Iyad Allawi issued Order Number 20, announcing Iraq's decision to accede to the Rome Statute.¹⁰¹ The relevant press release stated that Iraq's accession would become effective from the date it was published in the Official Gazette and noted that the Council of Ministers had decided to join the Court because the provisions of the Rome Statute embody the highest values shared by all humanity and also because most of its provisions can be found in existing international treaties. However, on 1 March 2005, Iraq's Interim Government withdrew its accession to the Rome Statute and cancelled its earlier decision to join the ICC.¹⁰² There have been no reports on decisions about the ICC by subsequent Iraqi administrations. The ICC was unable to try Saddam Hussein and other Ba'athist leaders because Iraq is not a party to its Statute and, although non-parties may by special declaration accept the Court's jurisdiction, the Court cannot try crimes committed before 1 July 2002, the date on which the Statute entered into force. Thus virtually all of the atrocities committed during the period of Saddam Hussein's rule lie beyond the reach of the ICC.

5.7.3.3 Syria

Syria has not signed up to the Rome Statute, and the Syrian government is not about to accept the ICC jurisdiction. If the current regime of Bashar Al-Assad falls, the next government may ask the ICC to investigate and prosecute alleged crimes, but given that all sides to the current conflict seem to be committing mass atrocities, it does call into question whether there would be a genuine desire to get the ICC involved. The Security Council is unlikely to refer the

¹⁰⁰ Michael A. Newton, 'The Iraqi High Criminal Court: Controversy and Contributions' (2006) 88 *International Review of the Red Cross*.

¹⁰¹ Coalition for the International Criminal Court, Iraq <<http://www.iccnw.org/?mod=country&iduct=80>> accessed 16 April 2014.

¹⁰² *ibid.*

matter to the ICC Prosecutor, when it cannot even agree on the need to intervene for humanitarian reasons.¹⁰³

As an alternative and to apply justice, on 27 August 2013, several chief prosecutors of the various international criminal tribunals, convened at the Chautauqua Institution and called for some form of accountability for the atrocities and crimes committed in Syria.¹⁰⁴ The initiative by a so-called Blue Ribbon Panel of Experts drafted a statute for a tribunal, called the ‘Chautauqua Blueprint’.¹⁰⁵ This ‘Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes’ has been prepared by a group of international experts as a starting point to an accountability mechanism that is fair and effective in the particular circumstances in Syria.¹⁰⁶ There was strong reaction that this Tribunal should be mainly domestic, but with international elements. The participants identified characteristics of the Syrian domestic criminal justice system that could be integrated into the structure and procedure of an extraordinary tribunal to ensure that such a justice mechanism is uniquely tailored to the situation in Syria. The purpose of a Syrian Extraordinary Tribunal would be to prosecute those most responsible for atrocity crimes committed in Syria by all sides of the conflict when the political situation permits, presumably following a change in government. It would be complementary to Syria’s ordinary criminal and military courts, which would prosecute lower level perpetrators, whereas the international tribunal, assuming its establishment, would prosecute the highest-level of perpetrators.¹⁰⁷ If the tribunal was to be set up outside Syria, there would be more challenges when considering costs, security issues, and witness protection measures.

¹⁰³ Michael G. Karnavas, *Red Lines and Game Changers—The Legality of Unilateral or Collective Use of Force in Syria*, (March 2014), Michael G. Karnavas Blog <http://www.michaelgkarnavas.net/files/BrownUSeminar_27Feb14.pdf> accessed 1 March 2014.

¹⁰⁴ Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, *A Step Towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria*, April 2015, Cease re Centre for Civilian Rights <<http://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>> accessed 8 June 2015.

¹⁰⁵ Blue Ribbon Panel of Experts; “The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes”, 27 August 2013 <<http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf>> accessed 3 March 2014.

¹⁰⁶ Julian Ku, *Putting the Cart Before the Horse?* In Top Panel of International Criminal Law Experts Proposes “Extraordinary” Criminal Tribunal for Syria, 27 September 2013, *Opinio Juris* <<http://opiniojuris.org/2013/09/27/putting-cart-horse-top-panel-international-criminal-law-experts-proposes-ad-hoc-hybrid-criminal-tribunal-syria/>> accessed 3 March 2014.

¹⁰⁷ Annika Jones, ‘Seeking International Criminal Justice in Syria’ (2013) 89 *International Law Studies* 802, 812.

5.7.4 Universal Jurisdiction

The armed conflicts and mass human rights violations in the region will often remain outside the ICC's jurisdiction as long as the absence of Arab states from the Rome Statute continues. This can lead to a stagnation of justice and impunity, as international measures are excluded and territorial states remain inactive. If the other criminal justice mechanisms to prosecute individuals who are criminally responsible for conduct prohibited by the Rome Statute are not available, this can lead to justice being sought elsewhere, through universal jurisdiction.

Universal jurisdiction is a principle of international law, which permits states to exercise criminal jurisdiction over individuals who have committed crimes outside the physical boundaries of the prosecuting state, regardless of the nationality of either the criminal or victim. The application of universal jurisdiction is reserved for mass international crimes, which the international community views as so abhorrent to civilisation that all states are legally obliged to prosecute alleged perpetrators when the concerned state fails to do so.¹⁰⁸ Several states have used the universal jurisdiction principle to oversee the prosecution of individuals for the commission of international crimes.¹⁰⁹ Since the principle of universal jurisdiction applies to international crimes occurring in the Arab region, it would be applicable to exercise universal jurisdiction by third party states, including other neighbouring Arab states, which may provide an alternative route to justice.

5.7.5 Reconciliation and National Accountability Measures

In recent years, there has been increasing demand and calls for the need for post-conflict reconciliation as a measure for the prevention of further conflict. Establishing an investigatory commission, also known as truth commission of inquiry, is a pursued method

¹⁰⁸ Mahmoud Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81.

¹⁰⁹ See more Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford University Press 2001), 168.

for accountability in several states that have witnessed widespread serious human rights violations.¹¹⁰ Societies that have experienced conflicts or civil wars are likely to face a vicious circle of repeated conflicts if matters are not resolved peacefully, whereas states that resolve conflicts peacefully are inclined to continue living in peace. Some scholars argue that war and human rights abuses become a self-perpetuating process if anger and hatred are not addressed effectively.¹¹¹ Reconciliation and truth-seeking processes are practical solutions and sustainable alternatives for some Arab states that are facing conflicts, and have concerns from extraterritorial or international prosecutions and trials.

The importance of the domestic prosecution of international crimes cannot be underestimated, but the task of delivering justice for serious crimes domestically is complex, which could be a challenge for some Arab states due to lack of resources. A domestic accountability mechanism should be applied as part of a strong and consistent legislative framework. The lack of such frameworks exposes such mechanisms to political interference. Judicial officials are sometimes forced to defy powerful political interests that oppose prosecutions, and in some cases, the judiciary cannot rely on the police or state security forces to protect investigators, prosecutors, or witnesses.¹¹²

5.7.5.1 Tunisian National Dialogue Quartet

In Tunisia, the National Dialogue Quartet was formed in 2013 when the democratisation process was in danger of collapsing as a result of political assassinations and widespread social unrest.¹¹³ It was comprised of four key organisations in Tunisian civil society, which represented different sectors and values.¹¹⁴ On this basis, the Quartet exercised its role as a mediator and driving force to advance peaceful democratic development in Tunisia with great

¹¹⁰ *ibid*, 228.

¹¹¹ Alfred Allan and Marietjie M. Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 *Behavioral Sciences & the Law* 459-477.

¹¹² See more Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (2014) 20 *Journal of Conflict and Security Law* 27-60.

¹¹³ "The Nobel Peace Prize 2015 - Press Release". Nobelprize.org. Nobel Media AB 2014.

<http://www.nobelprize.org/nobel_prizes/peace/laureates/2015/press.html> accessed 22 October 2015.

¹¹⁴ See Jonathan Murphy and Virpi Orvokki Malin, 'How Does Dialogue Really Take Place in a Democratic Transition?' (2015) 2015 *Academy of Management Proceedings* 17250.

moral authority. It established an alternative, peaceful political process at a time when Tunisia was on the brink of civil war. It was thus instrumental in enabling Tunisia, in the space of a few years, to establish a constitutional system of government guaranteeing fundamental rights for the entire population, irrespective of gender, political conviction, or religious belief.

5.7.5.2 Bahrain Independent Commission of Inquiry

After the 2011 incidents that occurred in Bahrain, which witnessed demonstrations and unrest and caused deaths and casualties, the Bahrain Independent Commission of Inquiry (BICI) was established on 29 June 2011 in pursuant to Royal Order No. 28.¹¹⁵ The Commission was tasked with investigating and reporting on the events that took place in Bahrain from February 2011, and to make the recommendations that it deems appropriate towards the human rights violations. The Commission was also required to provide a complete narrative of the events, by describing any acts of violence that occurred, as well as the actors involved in such acts and to investigating instances of alleged police brutality and violence by protestors and demonstrators against others. The Commission explored the circumstances and appropriateness of arrests and detentions, and examined allegations of disappearances and torture. Although Commissions of Inquiry are often created by external mandates, the BICI was the product of internal decision-making and benefited from a consultation process with various bodies, including the United Nations High Commissioner for Human Rights.¹¹⁶

5.8 Conclusion

Political concerns and constitutional obstacles, reflected in the chapter, should not impede the

¹¹⁵ King of Bahrain, Royal Order No.28 of 2011

<<http://www.bici.org.bh/wpcontent/uploads/2011/08/RoyalOrder28of2011.pdf>> accessed 23 March 2015.

¹¹⁶ Anne Massagee, 'Building a Future, Exhuming the Past: The Struggle for Accountability in the Wake of Regional Uprisings' in Kirsten J. Fisher and Robert Stewart (ed), *Transitional Justice and the Arab Spring* (1st edn, Routledge 2015), 44.

Arab states from ratifying the Rome Statute if there is real interest in applying justice and ending impunity in the region. Solutions are available and implemented by several states, whether constitutional amendments or interpretations, but most importantly the political will to reform. Constitutional obstacles, however complex, have not prevented the ratification in other states. Alleged contradictions, yet possible, are often so speculative and remote that states will effectively make consistency with the Statute and proceed to ratify notwithstanding. For example, the head of state immunity concern in some of the Arab-Gulf states, like UAE or Qatar, a monarch committing an ICC crime, although possible, is rarely likely to happen. Likewise, in relation to sovereignty issues, comfort is found in the *limited* nature of any intervention into national jurisdiction by the Prosecutor or the Court and in respect of *ne bis in idem*, the fact that the ICC might proceed with a second prosecution only in very exceptional circumstances.

Initially, the Arab states supported the ICC, but several factors discussed in this chapter, caused them to actively walk away from the Court. The main arguments against joining the ICC are rooted in its constitutionality, state sovereignty, the role of the UN Security Council and the politicised trials. But the ICC is considered a court of last resort and will override domestic courts unless the state is unwilling or unable to prosecute. The Arab states constitutional and legal concerns are clearly proven. What holds the Arab states back from ratification is not a legitimate concern over matters of due process. It is the fear of several Arab states' leaders and officials of being held accountable for their actions. The Court plays an important role in international law and it could be considered as the judicial body for prosecuting gross violations of human rights worldwide. The Arab states have to engage in international law and ratify the Rome Statute; and drop their alleged claims and the nationalistic role.

The next chapter examines another major concern and obstacle towards the ratification and implementation of the Rome Statute, which is the Sharia. As reviewed in earlier chapters, some concerns raised during the negotiations of the Statute were related to Sharia. The possibility of contradiction between Sharia and the Statute is based on the fact that most of the Arab states, enacted constitutions containing provisions that declare the Sharia to be a source of legislation.

Chapter Six: Islamic Law and the Rome Statute

6.1 Introduction

In the previous chapter, several factors that impact on most of the Arab states' position towards the ICC were examined. The legal obstacles and political concerns affected some of these states' decisions to ratify. As examined in chapter three, Sharia has a prominent position in the Arab states' constitutions and a significant influence on their legal systems. It is considered the source of legislation in many Arab states, and it affects their approach towards international treaties, such as the Rome Statute.

This chapter assesses the relationship between Sharia, the Rome Statute and the Arab states in different aspects. During the Rome Conference some Arab delegations expressed the view that there could be a conflict between Sharia and the Rome Statute, a view that will be examined and analysed in this chapter. The common practice of most of the Arab states is to make reservations to provisions of international treaties that contradict the principles of Sharia, specifically those related to human rights. Such approach by Arab states should also be taken into consideration in the study of their attitude to the Statute. In order to address the challenges placed before the international community an adequate understanding of Islamic law is required.

The first section shall identify the mechanisms through which Islamic law is developed, before going on to analyse it in relation to the international criminal justice system and human rights. This will emphasise the compatibility between the Islamic legal system and international criminal law in general. And as a result, it will argue that there are no major conflicts between Sharia and the Rome Statute, but rather, that they have common principles and could accommodate each other. On the other hand, the chapter will also examine supposed conflicts or differences between

principles of Sharia and the international criminal law as embodied by the Rome Statute.

In the second section, the influence of Sharia on the negative attitude of most of the Arab states towards the ICC will be examined based on the existence of human rights norms and principles in Sharia and its compatibility. Some Arab states consider that implementation of the Rome Statute in their domestic legislations would conflict with their constitutions and legal systems which is based on the Sharia, and thus it affects their decision to ratify or accede the Rome Statute. Finally, the Sharia based concerns as well as the possible methods to accommodate the Statute within the Arab state's legal systems without affecting the presence and status of Sharia will be analysed. It is absolutely paramount to establish reconciliation between modern international law and Islamic law so as to create a system more adapted to the contemporary needs of the world today.

6.2 Sources of Islamic Law

The Islamic law, which is made up of *Sharia* and Islamic jurisprudence (*Fiqh*), is recognisable among the world's legal systems.¹ It consists of the legal codes, principles and rules to which all jurists, state clerical leaders and administrators must appeal when applying the rule of public law.² The terms *Sharia* and *Fiqh* are often referred to as Islamic law, but they are not technically the same and the traditional misconception about Islamic law being wholly divine and immutable usually arises

¹ Mashood A. Baderin, 'Understanding Islamic Law In Theory And Practice' (2009) 9 *Legal Information Management*, 186-187. Rene David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Simon and Schuster, 1978), 421.

² Abdullahi Ahmed An-Na'im, 'Islamic Law, International Relations and Human Rights: Challenges and Response' (1987) 20 *Cornell International Law Journal*, 320.

from the non-distinction between the two terms.³ Sharia means the path to follow God's law and refers mainly to the sources and the corpus of the revealed law as contained in the *Quran* and *Sunna*, while *Fiqh* mainly refers to the methods of Islamic law and the understanding, interpretation, and application of the Sharia.⁴ Sharia is holistic or eclectic in its approach to guiding the individual in most daily matters, and controls and provides instructions and regulations on all public and private behaviour.⁵ It also prescribes specific rules for prayers, fasting, and many other religious matters. The Sharia can also be used in larger situations than guiding an individual's behaviour. It can be used as a guide for how an individual behaves in society, how one group interacts with another, how to settle border disputes between nations,⁶ and how to settle international disputes, conflicts and wars.⁷ In addition, it addresses core issues of the rules of combat,⁸ protection of civilians, protection of cultural property, prohibition of aggression, prohibition of murder and torture and compensation of victims of serious crimes.⁹

There are five sources of Sharia and the *Quran* is considered the first primary source. The second primary source is *Hadith* (oral traditions attributed to the Prophet) and the *Sunna*, (historical narratives typically about the Prophet but also his companions).¹⁰ It

³ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003), 33-34.

⁴ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008), 1.

⁵ Abdullah Saad Alarefi, 'Overview of Islamic Law' (2009) 9 *International Criminal Law Review* 708; See more Hisham M Ramadan, *Understanding Islamic Law: From Classical To Contemporary* (1st edn, Rowman Altamira 2006).

⁶ See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld 2008).

⁷ Mahmoud Cherif Bassiouni, Sources of Islamic Law and The protection of Human rights, in Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications, New York, 1982), 13; see also Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 70.

⁸ Mohammad Hamidullah, Muslim Conduct of State: Being A Treaties On Siyar, That Is Islamic Notion Of Public International Law, Consisting Of The Laws Of Peace, War And Neutrality, Together With Precedents From Orthodox Practice And Preceded By A Historical And General Introduction, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 204-207.

⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003); see also Karima Bennoune, 'As-Salāmū 'Alaykum? Humanitarian Law in Islamic Jurisprudence', *Michigan Journal of International Law*, Vol. 15, Winter 1994, 605-643, 607.

¹⁰ As noted by Abou El Fadl: "While Muslim jurists agreed that the authenticity of the Qur'an, as God's revealed word, is beyond any doubt, classical jurists recognized that many of the traditions attributed to the Prophet were apocryphal. In this context, however, Muslim jurists did not just focus on whether a particular report was authentic or a fabrication but on the extent or degree of reliability and the attendant legal consequences. Importantly, Muslim jurists distinguished between the reliability and normativity of traditions. Even if a tradition proved to be authentic, this did not necessarily mean that it

is worth noting that *Quran* is not meant to be a legal document. Rather, it lays the basic foundation from which legally binding provisions could be derived. Out of approximately 6,666 verses in the *Quran*, Muslim jurists give an estimation of only 350-500 verses containing legal elements, and some estimate even much less.¹¹ The third source is *Ijma*, or consensus among Muslim jurists on a particular question of law.¹² The fourth source of law is *Qiyas*, which is an analogical deduction from the *Quran* and *Hadith*.¹³ The last source is, *Ijtihad* (independent reasoning). These last three sources are subsidiary or sometimes even referred to as methods of Islamic law rather than sources.¹⁴

Principles of Islamic jurisprudence otherwise known as *Uṣūl al-fiqh* (or simply *fiqh*) are the study and critical analysis of the origins, sources, and principles upon which Islamic jurisprudence is based.¹⁵ The notion of exercising one's intellect in determining a matter of law is called *ijtihad*, which is the core of *Uṣūl al-fiqh*, a legal approach in ranking the sources of law, their interaction, interpretation, and application.¹⁶ It also includes the decisions of judges and rulings of scholars, which direct individual Muslims in their everyday life, inclusive of the *Qiyas* and the *Ijma*. This process is called *fiqh*, which simply means human understanding and knowledge of reasoning and applying the instructions of Sharia in real or theoretical situations.¹⁷ Accordingly, it does not command the same authority as the Sharia and there are different scholarly methods between the Sunni and Shi'a approaches, or schools of thought,¹⁸ where there are four Sunni and one Shi'a.¹⁹ The distinction between

is normatively binding, because most jurists differentiated between the Prophet's sacred and temporal roles." Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman & Littlefield, 2014), xxxv-i

¹¹ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003), 36.

¹² Ahmed Souaiaia, 'On The Sources of Islamic Law and Practices' (2004) 20 *Journal of Law and Religion*.

¹³ *ibid.*

¹⁴ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003), 35-37.

¹⁵ Muhammad Jarir, 'Methods of Teaching Islamic Fiqh' (2013) 20 *Al-Ta'lim*, 386.

¹⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003), 469.

¹⁷ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld 2008), 40.

¹⁸ Sunni and Shi'a: They both agree on the fundamentals of Islam and share the same Holy Book (The Quran), but there are differences mostly derived from their different historical experiences, political and social developments, as well as ethnic composition. These differences originate from the question of who would succeed the Prophet Muhammad as leader of the emerging Muslim community after his

schools of Islamic jurisprudence and jurists represent “different manifestations of the same divine will” and are considered as “diversity within unity”.²⁰

The Sharia interpretation has discrepancies, similar to other legal systems, amid Arab and Muslim states that apply it. There is general agreement among Muslims on the authority of the Quran, as it is the word of God, but there is disagreement between Sunni and Shi’a, on which *Sunna* aspects to follow in the presence of different ancient scholars’ perspectives.²¹ Sunni Muslims tend to follow all of it, while Shi’a Muslims do not follow that portion written by Umar, the second Sunni Caliph.²² Arguments among some Muslim scholars that the presence of *fiqh* improperly merges revealed and unrevealed truth and that the Quran and Sunna shall be held separate as basics from the *fiqh*, which is a constantly evolving body of the law.²³ Thus, the term *fiqh* refers mainly to the *corpus juris* that is developed by the *madhahibs* (legal schools),²⁴ individual jurists and judges by recourse to *ijtihad* and issuing of legal *fatwas* (verdicts).²⁵ The practical legal rules (*al-ahkam al-amaliyyah*) developed by the *ulema* (the learned ones) derive from the process of narrowing down the *Sharia* to definitive ordinances from the *Quran* which are expounded in positive legal terms, known as the *nusus* (clear injunctions).²⁶ A divergence of opinion on numerous doctrinal writings on different subject matters arose due to the origins of the *madhahibs*, stemming back and evolving over fourteen centuries. As a result, the

death; See more Christopher M. Blanchard, *Islam: Sunnis and Shiites*, February 2005, Library of Congress Washington DC Congressional Research Service < <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA476265>> accessed 12 July 2015.

¹⁹ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law*, 416.

²⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003) 169.

²¹ Zafar Iqbal and Mervyn Lewis, *An Islamic Perspective On Governance* (1st edn, Edward Elgar 2009), 28.

²² Michael J. Kelly, ‘Islam & International Criminal Law: A Brief (In) Compatibility Study’ (2010) iii *Pace International Law Review Online Companion*, 14.

²³ Ali Khan, ‘The Reopening of the Islamic Code: The Second Era of Ijtihad’ (2011) 1 *University of St. Thomas Law Journal* 17.

²⁴ For a detailed discussion of the *Madhhabs* see: Mahmoud Cherif Bassiouni, *The Shari’a and Islamic Criminal Justice in Time of War and Peace*, (New York: Cambridge University Press, 2014), 45-48; Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 68-99; Christopher Gregory Weeramantry, *Islamic Jurisprudence: An International Perspective*, (Palgrave Macmillan, 1988), 46-56.

²⁵ Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 3; See also Muhammad Salam Madkur, *Al-Madkhal al-Fiqh al-Islami*, (Cairo: Dar al-Qawmiyyah li al-Daba ah wa al-Nashr, 1384/1964), 17.

²⁶ *ibid*, 17.

diverging interpretations produced in the diverse cultures of the world of Islam rendered it impossible to establish an authoritative codex embodying all the views of the *madhahibs*.²⁷ This in turn has hindered uniformity within Islam, preventing certainty as to the application of the legal rules which underpin the Islamic tradition.²⁸

The *corpus juris* of *fiqh* is dually divided into *ibadat* (devotional matters), which is predominantly concerned with the five pillars of the Islamic faith, and *mu'amalat* (civil transaction), which concerns the regulating laws of human relations.²⁹ The latter are generally studied under the following headings: exchange of values (including contracts), matrimonial law, equity and trusts, civil litigation, the rules pertaining to dispute settlements, and administration of interests, all subsumed under what is known in the secular Western model as civil law.³⁰ Crimes and penalties (*al-uqubat*) are studied separately, as they are rules pertaining to state and government (*al-ahkam al-sultaniyyah*), finding its equivalence in the Western model as constitutional and administrative law.³¹ The body of law which regulates international relations, war and peace is known as *ilm al-siyar*.³²

Hence, Islamic law is fundamentally rooted in the *Sharia*, comprised of its primary sources (*adilla qat'ya*), implying the *Quran* and *Sunna* as the law creating processes on the one hand, and the secondary sources (*adilla ijtihadya*), implying arguments obtained by *ijtihad* as law determining agencies.³³ Whilst the basic objectives of the *Sharia* are absolute and immutable, their means attaining them are subject to the needs of time and circumstance, the result of which allows for the adaption of law in line with the changing needs of society. As such, matters concerning the *ibadat* (devotional matters) comprise the fundamental tenets of the faith and remain

²⁷ Mahmoud Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, (New York: Cambridge University Press, 2014), 52. See also Abdal Hakim Murad, *Understanding The Four Madhhabs: The Facts About Ijtihad and Taqlid* (1st edn, Islamic Publications International 1998).

²⁸ *ibid.*, 48-52; see also Lesley Hazleton, *After the Prophet: The Epic Story of the Shia-Sunni Split*, (New York, USA: Random House Books, 2010); Muḥammad Zakariyyā, *The Differences of the Imams* (1st edn, White Thread Press 2004).

²⁹ Christopher Gregory Weeramantry, *Islamic Jurisprudence: An International Perspective*, (Palgrave Macmillan, 1988), 30-31.

³⁰ Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 42.

³¹ *ibid.*

³² *ibid.*

³³ Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, (The Hague, Netherlands: Martinus Nijhoff, 1968), 108.

permanent. Whereas the *Sharia* becomes flexible regarding the larger part of the *mu'amalat* (civil transaction), in matters such as criminal and civil law, governmental policy, fiscal policy, taxation and international affairs.³⁴

6.2.1 Islamic Criminal Law

Sharia, like other legal systems, contains “sources” (*al-masadir*) and “guiding principles” (*al-usul*), which mandate the types of “evidence” (*al-adilla*). Moreover, Sharia includes and uses equally “legal maxims” (*alqawa'id*) and employs some fundamental “objectives” (*al-maqasid*) to underpin the structure of its legal theory.³⁵ Despite the divergence of opinion on the bearing of Sharia, its religious intonations persist no matter what interpretation it is given. The criminal aspects of Sharia contain these intonations, similarly in the origins of Western criminal law, which contained these religious intonations before being discarded and replaced with the current secular approach.³⁶

Criminal offences in Sharia are divided into three *complex* categories, which combine the gravity of the penalty prescribed, the used methods of punishment, and the type of interest affected by the punishable act.³⁷ The first category is *hudud* crimes, which are punishable by fixed penalties as required in Quran and Sunna.³⁸ The second category is *qisas* and *diyya* crimes; *qisas* being the punishment for murder or injury, which inflicts on the offender the exact injury he inflicted on the victim; while *diyya* is the victim's right to compensation, or the victim's next of kin in the case of murder.³⁹ The

³⁴ Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 49-50; See also M. Haris Z Deen, *Shari'ah: A Case for Legal Pluralism* (1st edn, AuthorHouse 2015).

³⁵ See Tāhā Jābir Fayyād 'Alwānī and A. S Al-Shaikh-Ali, *Source Methodology in Islamic Jurisprudence* (International Institute of Islamic Thought 1994); Gavin N Picken, *Islamic Law* (Routledge 2011); Mohamed Elewa Badar, 'Islamic Criminal Justice in the 21st Century' (2009) 9 *International Criminal Law Review* 591-593.

³⁶ Harold J Berman, *Law and revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983).

³⁷ See Mahmoud Cherif Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications 1982).

³⁸ Aly Aly Mansour, 'Hudud Crimes' in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (1st edn, Oceana Publications 1982), 195.

³⁹ Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge University 2005), 45.

qisas and *diyya* crimes fall into two types, homicide and battery,⁴⁰ and accordingly they are treated in Sharia as private and not public offences.⁴¹ The last category is *ta'azir* crimes, which are punished with penalties prescribed by the ruler or judge, as they are not specified in the Quran or Sunna, and they are usually acts that infringe the community or private interests of public order.⁴²

International criminal law and Islamic criminal law share many overlapping functions which are suitable for the prevention and prohibition of core international crimes, including prohibition against torture and war crimes. What could be referred to as Islamic international criminal law,⁴³ or the Islamic concept of international crimes has many provisions dealing in various ways with the Rome Statute crimes, namely genocide, crimes against humanity, war crimes and aggression. These will be examined in details in section 6.3 together with a detailed comparative study as shown in table 1.1 in section 6.5 below.

6.3 Sharia and International Crimes

The compatibility of Sharia with crimes under the subject matter jurisdiction of the ICC was one of the main concerns of Arab states delegations during the negotiations phase,⁴⁴ as most of the Arab states' constitutions consider Sharia as the main source of their legislations, as discussed in the chapter three. The following parts will compare and analyse some of the common features found in both Sharia and international criminal law in relation to core international crimes. Furthermore, the table 1.1 below compares the Rome Statute to Islamic law.

⁴⁰ Mahmoud Cherif Bassiouni, 'Qesas Crimes' in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (1st edn, Oceana Publications 1982), 203.

⁴¹ See Wael B Hallaq, *Crime and Punishment in Islamic Law* (Cambridge University Press 2005).

⁴² G. Benmelha, 'Ta'azir Crimes' in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (1st edn, Oceana Publications 1982), 213.

⁴³ Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman/M. Nijhoff 1994), 3.

⁴⁴ Mahmoud Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal*, 499.

6.3.1 Genocide

Genocide is the denial of the existence of a particular ethnic, national, racial or religious group and thus, is prohibited.⁴⁵ The Quran and the concept of Islamic international criminal law puts an extra emphasis on peace and that peace should be the ultimate objective of the Muslim state,⁴⁶ which proves further that the mass killing of people in it-self would be a serious crime under Islamic law.⁴⁷ The crime entails any plans and practice created with the intent to try and destroy a group and or nation in any way or form. Thus, the concept of genocide is prohibited within the provisions of Sharia and Islamic jurisprudence, which implies strict prohibition of acts that are conducted in order to kill, in whole or in part, the population of a nation or city.⁴⁸ According to Sharia, the systematic annihilation or physical extermination of a part or whole of a group of people or the infliction of destructive conditions of life, would fall under the most sinful acts that the Sharia condemns.⁴⁹ The evidence of this being a crime under Islamic law is in the rules that prohibit the killing of members of groups whether committed in whole, in part or against only one member of that group. It is the intention of killing, causing serious bodily harm, destroying or imposing forcible measures upon the members of that group which amounts to a crime under Islamic criminal law. This is due to the fact that bloodshed is forbidden in the Islamic law and it is an act which is not forgiven unless the appropriate punishment has been

⁴⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

⁴⁶ See Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 311-312; see also Quran Verse: 8:61.

⁴⁷ Quran Verse 4:105 mentioned earlier “Shed not blood of your people, nor expel your people from their homes and cities, then you made a firm promise, and you yourselves are witness.”; see also Jaques Waardenburg, *Islam: Historical, Social and Political Perspectives* (Walter De Gruyter GmbH and Co, Germany 2002), 321; Marko Milanovic ‘State Responsibility for Genocide’, (2006), Vol.17, No.3, *The European Journal of International Law*, 555 & 563.

⁴⁸ Farhad Malekian, ‘The Homogeneity of International Criminal Court with Islamic Jurisprudence’ (2009) 9 *International Criminal Law Review* 595-621, 599.

⁴⁹ Adel Maged, ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Justice’ (2008) 8 *International Criminal Law Review* 477-507, 482.

carried out.⁵⁰

Furthermore, the principle of equality is a priority in Islam and thus, any discrimination or killing of one group for any reason or even due to its ethnic identity or colour is forbidden as seen in this verse: “O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.”⁵¹ The Prophet further pointed out “O, men, verily your God is one, and your father is one. No Arab is superior to a non-Arab except in righteousness, nor black to red or red to black except in righteousness.” Then he [the Prophet] said: “Did I convey?” and they said: ‘Yes.’ He said: “Hence, he who is attendant ought to convey to who is absent.”⁵² Any discrimination is thus, forbidden against any Muslim or non-Muslim alike regardless of their colour or race, hence the prohibition of the act of genocide under Islamic criminal law.⁵³ Moreover, mass killing and destruction is regarded and provided for within Islamic criminal law as acts which are against the whole theory of the Islamic legislation within the Quran; regarded also as a crime on the community of nations, which are considered as an integral part of one nation by Islamic law.⁵⁴

The crime of genocide is provided within the realm of the crimes of *Qisas* under Islamic law, which is the second category of crimes within the Islamic law attracting some of the harshest punishments.⁵⁵ Crimes under this category include murder and

⁵⁰ See Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 91-92.

⁵¹ Quran 49:13.

⁵² M. Shokry El-Dakkak, ‘Genocide from the Perspectives of International and Islamic Law’, *Criminal Justice in Islam: Judicial Procedure in the Shari’ah* (1st edn, IBTauris 2003), 131-141; Marko Milanovic ‘State Responsibility for Genocide’, (2006), Vol.17, No.3, *The European Journal of International Law*, 555 & 563.

⁵³ M. Shokry El-Dakkak, ‘Genocide From The Perspectives Of International And Islamic Law’, *Criminal Justice in Islam: Judicial Procedure in the Shari’ah* (1st edn, IBTauris 2003), 131-141.

⁵⁴ Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 92.

⁵⁵ Quran 1:78: “O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman, but if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from you Lord. After this whoever exceeds the limits shall be in grave penalty.”

thus, genocide falls under these categories consisting of firstly, murder and secondly the intention to kill, even if the act did not result in the death of a victim.⁵⁶ Furthermore, human rights in Islam, particularly under the rules of warfare prohibit murder, killing and intentional injury, regardless of the excuse and are punishable crimes.⁵⁷

Sharia also presents a stronger and broader concept of genocide than the one found in international criminal law. For example, it not only clearly prohibits, by all means, physical attacks on religious, racial and ethnical groups, but also adds any form of psychological humiliation of a group or nation to the definition of genocide. Even total destruction of a food source with the purpose of causing serious starvation in members of a group may be considered as genocide.⁵⁸ In other words, genocide may also be committed against the natural environment.⁵⁹ Thus, compared to international criminal law, Sharia takes a slightly different perspective on genocide. The Quran verse reads: “Shed not blood of your people, nor expel your people from their homes and cities, then you made a firm promise, and you yourselves are witness.”⁶⁰

6.3.2 Crimes against Humanity

The theory of Sharia is essentially, the protection of human beings and any act that may go against an individual’s rights is forbidden.⁶¹ Such rights include the right to life, the right not to be, humiliated, tortured, raped, sexually degraded, exploited, forced to evacuate one’s own property, the right not to be discriminated against by

⁵⁶ Ibn Qudamah, *Al-Mughni*, Vol.11, p.462 in Haneef, S.S.S., *Homicide in Islam: Legal Structure and the Evidence Requirements* (A.S. Nordeen, Kuala Lumpur, Malaysia: 2000), 101-102; see also Sara Liwerant ‘Mass Murder: Discussing Criminological Perspectives’, (2007), Vol.5 *Journal of International Criminal Justice* No.5, 917-939.

⁵⁷ *ibid.*

⁵⁸ Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman/M. Nijhoff 1994), 129.

⁵⁹ See more Muhammad Shettima, ‘Effect of The Legal Maxim: “No Harming And No Counter Harming” on The Enforcement of Environmental Protection’ (2011) 19 *IIUM Law Journal* 291.

⁶⁰ Quran 4:105.

⁶¹ Farhad Malekian, ‘The Homogeneity of International Criminal Court with Islamic Jurisprudence’ (2009) 9 *International Criminal Law Review* 595-621, 601.

various political or civil methods, and the right not to be persecuted based on religious, racial, or cultural attitudes. Thus, the Quran provides “God commands justice, the doing of good...,”⁶² and also provides that “O ye who believe! Stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear God... for God is well-acquainted with all that ye do”. The Hadith following this verse provides; “O my subjects! I forbade injustice to myself, and forbade it among yourselves. Do not do others injustice.”⁶³ The conducts violating the fundamental rights of an individual may fall under crimes against humanity.⁶⁴ Moreover, the crimes “extermination”, “enslavement”,⁶⁵ “torture”, “persecution” and “trafficking” are defined in the Sharia and are considered crimes against humanity.⁶⁶

The definition of crimes against humanity in Sharia is also broader than the one found in international criminal law. According to Sharia, an act recognised as a crime against humanity does not necessarily need to be widespread or systematic because Islamic law places its emphasis on human value, not on whether an attack is widespread or systematic.⁶⁷ Another difference is that, the term ‘any civilian population’ formulated in Article 7 of the Statute applies to all categories: both Muslim and non-Muslim. This clarification was not necessarily meant to distinguish

⁶² Quran 16:90; see also for crimes against humanity; Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 77-78.

⁶³ Related by Muslim Ibn Al-Hijjaj (according to Abi Dhar Al-Ghaffary), in his Sahih (The Genuine) in Sheikh Wahbeh Al-Zuhili, *Islam and International Law, International Review of the Red Cross*, Vol.87, No.858 June 2005, 269-283.

⁶⁴ *ibid.*

⁶⁵ In the early days of Islam, slavery, which was a common practice before Islam, was not abolished. Moreover, it has been argued that slavery was authorised and institutionalised by Islam. However, this has been challenged on the basis that although slavery existed and was allowed at the outset of Islam, Islam has encouraged the freeing of slaves to make up for shortcomings and wrongdoings. (See Quran 4:92) Additionally, creating a new slave is not allowed in the Quran. Moreover, Islam praises individuals who release their slaves. (See Quran 24:33) Consequently, Islam has followed the gradual elimination approach in addressing the issue of slavery rather than outright abolition. This gradual elimination is harmonised with the Islamic approach, which focuses on gradual social change. Therefore, the economic and social foundations of the community would have been upset by the immediate abolition of slavery. See more Mohamed Y. Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’ (2010) UNOV/DM/CMS/EPLS/Electronic Publishing Unit 1.

⁶⁶ Muḥammad Ṭal‘at Ghunaymī, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff 1968), 190.

⁶⁷ Farhad Malekian, ‘The Homogeneity of International Criminal Court with Islamic Jurisprudence’ (2009) 9 *International Criminal Law Review* 595-621, 601.

between Muslims and non-Muslims but rather to protect a minority group from social prejudice, including any serious attack on their rights.⁶⁸

6.3.3 War Crimes

Islamic Law is one of the earliest legal systems to codify rules for the conduct of war, national or international,⁶⁹ leading to a body of rules similar to that referred to on an international level as ‘Humanitarian Law’.⁷⁰ It includes more prohibited conducts and more strict rules of warfare than those found in international law.⁷¹ Therefore, Islamic law does not contradict the definition of war crimes, but it includes all the grave breaches and prohibited acts.⁷² The rules of conduct of Muslims during war time is strictly regulated by the Quran, the words of the Prophet and the commands of Abu Bakr As-Siddiq (632-634), the first Caliph of Islam, and some rulings from other Muslim commanders as seen in different Hadiths.⁷³ Although Islam always calls for peace and to refrain from war, but when necessary there are conditions to follow. Those conditions place certain limitations on the conduct of relations before, during and after the conflict. One important rule to follow when fighting is to fight in the way of Allah, as provided by Surat Al-Nisa (4:74) “So let those fight in the cause of Allah who sell the life of this world for the Hereafter. And he who fights in the cause of Allah and is killed or achieves victory - We will bestow upon him a great

⁶⁸ *ibid.*

⁶⁹ Mahmoud Cherif Bassiouni, Sources of Islamic Law and The protection of Human rights, in Bassiouni, The Islamic Criminal Justice System (Oceana Publications, New York, 1982), 13; see also Farhad Malekian, The concept of Islamic International Criminal Law: A Comparative Study, (Graham and Trotman, London 1994), 70.

⁷⁰ See also Karima Bennoune, ‘As-Salāmū ‘Alaykum? Humanitarian Law in Islamic Jurisprudence’, *Michigan Journal of International Law*, Vol. 15, Winter 1994, 605-643, 607.

⁷¹ Farhad Malekian, ‘The Homogeneity of International Criminal Court with Islamic Jurisprudence’ (2009) 9 *International Criminal Law Review* 595-621, 602.

⁷² Farhad Malekian, The Concept of Islamic International Criminal law: A Comparative Study (Graham & Trotman/M. Nijhoff 1994), 72.

⁷³ Roger Algase, Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities, *Revue De Droit Penal Militaire et De Droit de la Guerre*, vol.16, 1997, 246-265, in Ahmed Abou-El-Wafa, *Islam and The West: Coexistence or Clash?* (Dar Al-Nahda, Cairo 2006), 269-278.

reward.”⁷⁴ This verse limits Muslims during hostilities to take care and not exceed the limit when fighting as evident in the term ‘fight in the way of Allah’. Thus, when fighting in the way of Allah they must have mercy and not fight when it is not needed in self-defence keeping to the principle of proportionality.⁷⁵ Thus, the Islamic law of war strikes a balance between military necessity and respect for human life in a manner which gives higher priority to saving lives of non-combatants than do modern international laws.⁷⁶

Accordingly, there are three fundamental legal rules based on some fundamental requirements ascertained through the Quran, Sunnah and interpretation are; necessity, humanity and chivalry which are the basis of the following rules;

- A non-combatant, who is not taking part in warfare, whether by action, opinion, planning or supplies, must not be attacked.
- The destruction of property is prohibited, except when it is a military necessity to do so, for example for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses.
- Principles of humanity and virtue should be respected during and after war.
- It is permitted to guarantee public or private safety on the battlefield, and to prevent as far as possible the continuation of warfare.⁷⁷

Thus, if these rules are broken then it is regarded as a war crime.⁷⁸ This includes killing for no reason, or killing non-combatants, committing acts of genocide, continuation of killing when the enemy is defeated, breaking peace treaties, using

⁷⁴ Translated by Al-Hilali-Khan Al-Madinah King Fahd Quran verse 4:74 cited in Gene W. Heck, Ph.D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (King Faisal Centre for Research and Islamic Studies, Riyadh 2006), 33.

⁷⁵ See Quran verse 2:190; see also Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, (Islamic Texts Society, Cambridge London 2008), 54 & 55.

⁷⁶ Roger Algase, Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities, *Revue De Droit Penal Militaire et De Droit de la Guerre*, vol.16, 1997, 245-261, in Ahmed Abou-El-Wafa, *Islam and The West: Coexistence or Clash?* (Dar Al-Nahda, Cairo 2006), 278.

⁷⁷ See for different rulings under these headings; Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 204-207 & 223-228; see also Sheikh Wahbeh Al-Zuhili, *Islam and International Law*, *International Review of the Red Cross*, Vol.87, No.858 June 2005, 269-283.

⁷⁸ Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 63-160.

poisonous weapons, forcing prisoners to fight against their own forces, killing those impartial to the result of war, killing refugees, burning prisoners or property, amputation of body parts, killing women, pregnant women, children, mothers and all those incapable of fighting (e.g. those with disabilities), sexual abuse of any sort including rape.⁷⁹ Also, the killing of a national of an enemy state who is already resident under the jurisdiction of another, killing of neutrals including physicians and journalists, mistreatment of prisoners, torture, excess and wickedness, degrading treatment of the sick, wounded and prisoners of war, humiliation of men, treachery and perfidy, killing civilian populations and destroying their property/establishments, forcing anyone to fight, killing peasants, unnecessary destruction of property, agriculture, forests, and mutilation of beasts, slaughtering of beasts if not necessary for food and burning animals.

As for the protection of non-combatants, the Quran and Hadiths prevent the attack of specific categories of enemy non-combatants including; women and children, the aged, the blind, the sick the incapacitated, the insane, and the clergy.⁸⁰ It is maintained that if children and woman stand guard over the enemy's army or strongholds, or they warn the enemy or throws stones at the Muslim army, they still cannot be targeted.⁸¹ The Hadith provides; "move forward in the name of God, by God, and on the religion of God's Prophet. Do not kill an elderly, or a child, or a woman, do not misappropriate booty, gather your spoils, do good for God loves good doers."⁸² Thus, it is unanimously believed that women and children should be protected at wartime and should not be targeted.⁸³ Jurists outlined that those under the

⁷⁹ *ibid.*

⁸⁰ Hadith 17932, 17933, 17934, 17935, 17936, 17937, 2613 and 2614 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*; Hadith 2608 and 2663 in Sulayman Ibn Al-Ash'ath Abu Dawud, *Sunan Abi Dawud* < <https://www.sunnah.com/abudawud/15> > accessed 12 September 2016; see also Mohammad Abu Nimer, A Framework for Nonviolence and Peace-building in Islam, *The Journal of Law and Religion*, Vol.15, No.1/2, 2000-2001, 217-265; Ali Ahmad, The Role of Islamic Law in the Contemporary World Order, *The Journal of Islamic Law and Culture*, Vol.6, 2001, 157-172.

⁸¹ Karima Bennoune, 'As-Salāmū 'Alaykum? Humanitarian Law in Islamic Jurisprudence', *Michigan Journal of International Law*, Vol. 15, Winter 1994, 605-643

⁸² Related by Al-Byhaqi (according to Malik Ibn Anas), in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*; see also Hadith 2608 and 2663 in Sulayman Ibn Al-Ash'ath Abu Dawud, *Sunan Abi Dawud* < <https://www.sunnah.com/abudawud/15> > accessed 12 September 2016.

⁸³ Mohammad Ibn Ahmad Ibn Mohammad Ibn Rushd, *The Distinguished Jurist's Primer: Bidayah Al-Mujtahid*, Vol.1 Translated by Imran Ahsan Khan Nyazee, reviewed by Mohammad Abdul Rauf.

age of fifteen are protected and immune,⁸⁴ from being attacked and from taking part in war.⁸⁵ This is also the age limit provided for the protection of children under the Geneva Conventions Additional Protocol I.⁸⁶ Therefore, fighting can only be committed against enemy combatants as provided by the Quran “And fight in the way of God those who fight against you.”⁸⁷ Thus, within this context jurists developed a distinction of two categories of enemy; *Al-muqatilahl ahl Al-qitall al-muharibah* (combatants, fighters, warriors) and *Ghayr al-muqatilahl ghayr al-muharibah* (non-combatants, non-fighters and non-warriors).⁸⁸ The majority of jurors believed that when looking at who qualifies as a legitimate target in war it must be determined what the Islamic *casus belli* is and thus, the majority found that it is the aggression of the enemy that initiates war and not the fact that he is an unbeliever as few jurists believe. They based their rulings on the Quranic text, Hadith and other rulings.⁸⁹

The extensive destruction of property without military necessity justification is a war crime under the Rome Statute and it is prohibited in Islamic law, except when it is a military necessity. For example, for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses. The Prophet is quoted to have said: “Do not destroy the villages and towns, do not spoil

(Reading, Garnet, reprint 2002), 280; Abdulrahman Mohammad Alsumaih, *The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought*, Ph.D Thesis, University of Newcastle Upon Tyne, 1998, 117; John Kelsay, *Islamic Law of War*, *Encyclopaedia of Religion and War*, ed. Gabriel Palmer-Fernandez (Rutledge, New York 2004), 221-225.

⁸⁴ Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 204-207 & 223-228.

⁸⁵ See Maryam Elahi, *The Rights of the Child under Islamic Law: Prohibition of the Child Soldier*, *Columbian Human Rights Law Review*, Vol.19, No.2, 1988, 265, 274 & 279.

⁸⁶ Additional Protocol to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 77; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

⁸⁷ Quran 2:190.

⁸⁸ See Hamidullah who defines combatants according to Islamic law as “those who are physically capable of fighting” in Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 59; see also Ali Ahmad, *The Role of Islamic Law in the Contemporary World Order*, *The Journal of Islamic Law and Culture*, Vol.6, 2001, 157-172.

⁸⁹ Mohammad Ibn Ahmad Ibn Mohammad Ibn Rushd, *The Distinguished Jurist's Primer: Bidayah Al-Mujtahid*, Vol.1 Translated by Imran Ahsan Khan Nyazee, reviewed by Mohammad Abdul Rauf. (Reading, Garnet, reprint 2002), 281.

the cultivated fields and gardens, and do not slaughter the cattle.”⁹⁰ Plundering is also prohibited, when Mecca is captured from Quraysh, the Prophet prohibited killing and looting, and allowed the population to go in peace. Further, Abu Bakr also provided many commandments based on Prophetic guidance to his commander Yazid Ibn Abi Sufyan. For example; “I prescribe Ten Commandments to you: Stop, O people, that I may give you ten rules for guidance on the battle field. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. do not kill a woman, a child, or an aged man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any of the enemy’s sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness.”⁹¹ The Hadith also confirms that the Prophet strictly prohibited the destruction of fruit-trees and tilled lands in enemy territories. Also the Quran reveals that: “. . . and what you cut of the date palms or what you leave standing on their trunks is by the leave of Allah and to punish the evildoers.”⁹²

Accordingly, the Quran and the traditions of the Prophet consider that war, as a method of dispute settlement, is strictly restricted and even prohibited. Moreover, as highlighted above should war be unavoidable then all measures must be taken by the parties concerned in order to evade acts forbidden under Islamic jurisprudence, similar to those provisions of the Rome Statute.

⁹⁰ Majid Khadduri, *War and Peace in the Law of Islam*, (Johns Hopkins Press, Baltimore M.D. 1955), 102-107; see also Ahmad Zaki Yamani, *Humanitarian International Law: A General Outlook*, Vol.7 *Mich. YBI Legal Studies* (1985), 189-215.

⁹¹ Related by Imam Malik; see also the Muwatta hadith < <https://sunnah.com/malik> > accessed 13 September. 2016; Gene W. Heck, Ph.D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (King Faisal Centre for Research and Islamic Studies, Riyadh 2006), 71.

⁹² Quran 59:5.

6.3.4 Aggression

In Sharia, the Quran stresses that every individual is entitled to safety, and that only unfair aggressors should be attacked. On that meaning, the Quran declares in the broadest terms that: “there shall be no hostility except against the aggressors”.⁹³ This verse prohibits committing any act of hostility against those who have not committed acts of aggression, and only allows hostility against aggressors.⁹⁴ Sharia uses the term aggression, in some situations, to denote the unlawful waging of war.⁹⁵ Muslim scholars have cited, among the examples of unlawful wars, those conducted for the purpose of occupation, seizure or partition of territories for the purpose of avarice, selfish glory, or economic gains.⁹⁶ Each of such aggressive acts of unjustified violence is considered an aggressive war and has been prohibited under Sharia.⁹⁷ Thus, Islam tries to protect life against aggression, and the Sharia has provided rules on when warfare is allowed while respecting principles of humanity, which is reflected in the Islamic code of conduct for war. The three reasons that legalise warfare include; self-defence, a breach of a treaty/peace treaty and the prevention of oppression.⁹⁸

Self-defence is strongly protected under Islamic jurisprudence, based on the principle of proportionality.⁹⁹ States are, in the course of self-defence, legally obliged not to take an action that might violate the criteria of self-protection and, therefore, be recognised as aggression.¹⁰⁰ The Quran states: “if then any one acts aggressively

⁹³ Quran 2:193.

⁹⁴ See Mahmoud Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2013).

⁹⁵ See Mohammad Hashim Kamali, ‘The Right to Personal Safety (Haqq Al-Amn) and the Principle of Legality in Islamic Shari’a’ in Muhammed Abdel Haleem and others (ed), *Criminal Justice in Islam: Judicial Procedure in the Shari’a* (1st edn, I.B.Tauris 2003).

⁹⁶ Adel Maged, ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Justice’ (2008) 8 *International Criminal Law Review* 477-507, 482.

⁹⁷ Farhad Malekian, *The Concept of Islamic International Criminal law: A Comparative Study* (Graham & Trotman/M. Nijhoff 1994), 49.

⁹⁸ Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, (Islamic Texts Society, Cambridge London 2008), 53-54.

⁹⁹ Ahmad Fathi Bahanssi, ‘Criminal Responsibility in Islamic Law’ in M. Cherif Bassiouni (ed), (1st edn, Oceana Publications 1982), 184.

¹⁰⁰ See Niaz A. Shah, ‘Self-defence in Islamic Law’ (2005) 12 *YB Islamic & Middle EL* 181.

against you, inflict injury on him according to the injury he has inflicted on you, and fear God, and know that God is with those who refrain from doing evil deeds and are righteous ones.”¹⁰¹ Moreover, in the outset of Islam, an Islamic state which acts in self-defence must give the opportunity for the enemies to accept the faith of Islam, or to accept a peace treaty, or pay tribute in recognition of Islam’s sovereignty.¹⁰² However, if all failed to reconcile and it became necessary to fight, the hostilities had to be restricted to combatant soldiers and only on the battlefield.¹⁰³ This rule exists as result of the Islamic system’s demands to prohibit war between all human kinds.¹⁰⁴ Therefore, the system recognises that conflicts between nations must be solved through negotiations, mediation, sending of diplomats, arbitration and other peaceful means of settlement.¹⁰⁵ This is also similar to the provisions of the United Nations Article 2(3) in regards to settling disputes peacefully and Article 53(1) asking members to first seek solutions through mediation, arbitration and more.¹⁰⁶

¹⁰¹ Quran 2:194.

¹⁰² Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 164-170 & 190-193.

¹⁰³ *ibid*, 204-207.

¹⁰⁴ Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, (Islamic Texts Society, Cambridge London 2008), 53-54; see generally Karima Bennouna, “As-Salāmū ‘Alaykum? Humanitarian Law in Islamic Jurisprudence”, *Michigan Journal of International Law*, Vol. 15, Winter 1994, 605-643; Mahmoud Cherif Bassiouni, ‘Sources of Islamic law and The protection of Human rights’, in Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications, New York, 1982); Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 70-93; see also Ahmed Abou El-Wafa, *Islam and The West: Coexistence Or Clash?* (Dar Al-Nahda Al-Arabia, Cairo 1427-2006), 249-278.

¹⁰⁵ See Mahmoud Cherif Bassiouni, ‘Sources of Islamic law and The protection of Human rights’, in Bassiouni, *The Islamic Criminal Justice System* (Oceana Publications, New York, 1982), 13.

¹⁰⁶ Gene W. Heck, Ph.D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (King Faisal Centre for Research and Islamic Studies, Riyadh 2006), 26; see also Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 63-73; see The Charter of the United Nations Article 2(3) and 53(1); see also Majid Khadduri, *War and Peace in the Law of Islam*, (Johns Hopkins Press, Baltimore M.D. 1955), 51-101.

6.4 Sharia and the General Principles of International Criminal Law

It appears to be that there are no serious differences between Sharia and international crimes defined in the Rome Statute, and there are also similarities between Sharia and the general principles of international criminal law. These principles are briefly considered below to illustrate the fundamental compatibility between international and Islamic legal principles.¹⁰⁷

Although Sharia is a rather old concept, it deals with nearly all the elements of responsibility found in the structure of the ICC. Of particular importance are the provisions in Islamic international criminal law governing the criminal responsibility of people in authority, i.e. commanders and other superiors.¹⁰⁸ Traditionally, any person who violated the provisions of Islamic spiritual legislation was deemed responsible for his act, depending on the gravity of the crime. In Sharia, the arbitrary rule by individual or group is not found.¹⁰⁹ The Islamic criminal justice system depends on an implicit principle of legality.¹¹⁰ Evidence of this principle can be found in the following Quranic verses: “Nor would We visit with our wrath until we had sent a messenger (to give warning).”¹¹¹ And “Messenger, who gave good news as well as warning, that mankind, after (the coming) of the apostles, should have no plea against Allah. For Allah is Exalted in Power, Wise”.¹¹² Criminal responsibility of a superior or commander was of particular concern in times of war. The Prophet has commanded superiors to be attentive about their actions during the course of hostilities.¹¹³ The concept of criminal responsibility of a subordinate, an ‘inferior’, did

¹⁰⁷ Table 1.1 also compares other principles.

¹⁰⁸ See Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law* (Office of International Criminal Justice, University of Illinois, Chicago 1991).

¹⁰⁹ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411-433, 423.

¹¹⁰ Taymour Kamel, ‘The Principle of Legality and its Application in Islamic Criminal Justice’ in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (1st edn, Oceana Publishers 1982) 149.

¹¹¹ Quran 17:15.

¹¹² Quran 4:165.

¹¹³ The Prophet is reported to have said: “There is no obedience in transgression; obedience is in lawful conduct only” *Sahih Muslim, Kitab al-Amanah, Bab Wujub Taat al-Umara’ fi Ghayr al-Ma’siyah wa*

not release his superior from attribution of the concept of criminal responsibility for his own wrongful conduct.¹¹⁴ In other words, individuals of higher rank bear a heavier responsibility than their subordinates, based on their special function and position. One slight difference between the law of criminal responsibility in the Rome Statute and Islamic international criminal law is that the ICC cannot punish people of lower rank for criminally wrongful conduct, based on the fact that implementation is nearly impossible, and therefore does not apply here. However, the situation is entirely different under Islamic international criminal law. Every individual under Islamic law is responsible for his own wrongdoing, regardless of his position.¹¹⁵

Muslim scholars agreed upon one of the basic legal maxims, in which any physical or verbal action should be measured and judged according to the person's intention.¹¹⁶ Consequently, the act is punishable after the person's intention has been established. This legal maxim is adopted from the Quran and reads: "That man can have nothing but what he strives for".¹¹⁷ The Rome Statute defines the mental element required to trigger the individual's criminal responsibility for international humanitarian law violations in Article 30, which goes further by assuring that the mental element consists of two components: the volitional component of intent and a cognitive element of knowledge.¹¹⁸ As a principle in Sharia an individual shall not be held responsible for mere allegations.¹¹⁹ Three conditions have to be established in relation to international crimes: planning, a free will to commit the act, and the knowledge of the unlawfulness of the act.¹²⁰ The exclusion of recklessness as a responsible mental

Tahrīmuha fi'l-Ma'siyah, Hadith no. 39. This hadith is reported in both Bukhari and Muslim. "There is no obedience to a creature when it involves the disobedience of the Creator." Abu Dawud al-Sijistani, Sunan Abu Dawud, tr. Ahmad Hasan, Hadith no. 2285, cited in Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411-433, 430.

¹¹⁴ See Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman/M. Nijhoff 1994).

¹¹⁵ See John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2007).

¹¹⁶ See Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Bloomsbury Publishing 2013).

¹¹⁷ Quran 53:39.

¹¹⁸ Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473-518.

¹¹⁹ *ibid*, 477.

¹²⁰ Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411-433, 427.

element within the meaning of Article 30 of the Statute runs in harmony with the basic principles of Sharia that no one shall be held criminally responsible for *hudud* crimes or *qisas* crimes unless he or she has wilfully or intentionally committed the crime at issue.¹²¹

Individuals convicted under Islamic international criminal law enjoy the principle of *nulla poena sine lege*,¹²² which means that punishment should be in accordance with the law, such a rule is found in all major human rights instruments.¹²³ For instance, the Quran reads: “Whoever took the right Path, so he took only the right Path for the benefit of his own soul and whoever had gone astray, then the loss of his going astray only he has to suffer and no bearer of a burden can bear the burden of another, nor it was becoming of Us that We punishing until We raised an Apostle”.¹²⁴ This means that punishment cannot be applied for acts not recognised as criminal before becoming known to mankind. It is on this account that Sharia, and its system of jurisprudence, totally rejects the principle of retroactivity or *ex post facto law*.¹²⁵ In addition, an act cannot be recognised as wrong if not already recognized as wrong in the primary and secondary sources of Sharia, i.e., the Quran and Sunna. Traditional Islamic jurisprudence essentially supports the principle of *de lege lata*, but not *de lege ferenda*.¹²⁶

6.5 Table of comparison: Islamic Law and the Rome Statute

The following table (1.1) will compare between the Islamic law and the Rome Statute on the compatible and incompatible areas. This will summarize the crimes and

¹²¹ *ibid*, 432.

¹²² The Rome Statute, Article 23.

¹²³ William Schabas, *The International Criminal Court* (Oxford University Press 2010), 403.

¹²⁴ Quran 17:15.

¹²⁵ Farhad Malekian, *The concept of Islamic international criminal law: A comparative study* (Graham & Trotman/M. Nijhoff 1994), 13.

¹²⁶ *ibid*, 14.

principles examined earlier in addition to other areas of concern.

Legal Issue / Crime / Principle	Rome Statute	Islamic law
1. Genocide	<p>Article 6 of the Rome Statute defines the crime of genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:</p> <ul style="list-style-type: none"> • Killing members of the group • Causing serious bodily or mental harm to members of the group • Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part • Imposing measures intended to prevent births within the group • Forcibly transferring children of the group to another group. 	<p>Quran 4:105: “Shed not blood of your people, nor expel your people from their homes and cities, then you made a firm promise, and you yourselves are witness.”</p> <p>Islamic jurisprudence implies strict prohibition of acts that are conducted in order to kill, in whole or in part, the population of a nation or city.</p> <p>Sharia provides for a broader concept of genocide. For example: it adds any form of psychological humiliation of a group or nation to the definition of genocide.¹²⁷</p>
2. Crimes Against Humanity	<p>Crimes against humanity are defined in Article 7 as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> • Murder • Extermination • Enslavement • Deportation or forcible transfer of population • Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law • Torture • Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity • Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other 	<p>An act recognised as a crime against humanity does not necessarily need to be part of widespread or systematic attack. The Islamic law places its emphasis on human value, not on whether an attack is widespread or systematic.¹²⁸</p> <p>Any conduct violating the rights of a person may fall under crimes against humanity. Under Islamic law, a person is a “self-contained unit”, not necessarily an integral part of a particular group. Thus the concept of crimes against humanity differs in international criminal law and in Islamic law along the borderline or conditions for its recognition.</p> <p>Under traditional Islamic law, the term ‘any civilian population’ formulated in Article 7 of the Statute applies to two categories: one Muslim and one non-Muslim. This clarification was not</p>

¹²⁷ M. Shokry El-Dakkak, *Genocide from the Perspectives of International and Islamic Law, Criminal Justice in Islam* (n.d.), 131-141; Marko Milanovic ‘State Responsibility for Genocide’, (2006), Vol.17, No.3, *The European Journal of International Law*, 555 & 563; Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 91-92.

¹²⁸ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (1st edn, Brill Academic Publishers 2011), 213.

	<p>grounds that are universally recognized as impermissible under international law</p> <ul style="list-style-type: none"> • Enforced disappearance of persons • The crime of apartheid • Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. 	<p>necessarily meant to distinguish between Muslims and non-Muslims but rather to protect a minority group from social prejudice, including any serious attack on their rights.¹²⁹</p> <p>The term ‘forced pregnancy’ in Article 7 of the Statute is subject to debate under the provisions of Islamic law.¹³⁰</p>
<p>3. War Crimes</p>	<p>Under the Rome Statute Article 8, war crimes are any of the following breeches of the Geneva Conventions of 12 August 1949, perpetrated against any persons or property:</p> <ul style="list-style-type: none"> • Wilful killing • Torture or inhuman treatment, including biological experiments • Wilfully causing great suffering, or serious injury to body or health • Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly • Compelling a prisoner of war or other protected person to serve in the forces of a hostile power.¹³¹ • Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial • Unlawful deportation or transfer or unlawful confinement • Taking of hostages. <p>Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8, subparagraph (b) of the Rome Statute</p> <p>In the case of armed conflict not of an international character, the Court’s jurisdiction will cover breeches of Article 3 common to the four Geneva Conventions of 12 August 1949.</p> <p>Article 8(2)(b)(iv) of the Rome Statute prohibits “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the non-human environment</p>	<p>The Quran devoted a number of verses concerning the law of war. The Islamic law codify rules for the conduct of international and non-international armed conflict, and provides for the precise rules during a state of war.</p> <p>The Quran delineate fixed guidelines for conventional war (“<i>harb</i>”), it also sets strict restrictions on unconventional (“<i>asymmetric</i>”) warfare conducted by “<i>irregulars</i>” (“<i>foot soldiers without portfolios</i>”), which it carefully constrains.”¹³³</p> <p>Furthermore, when fighting in self-defence the law limits the conduct of war with principles of morality and legality.¹³⁴ This is evidenced through the Prophet’s practice. The Prophet allowed invitations to cease-fire in order to help the wounded fighters. Additionally, the act of self-defence in proceeding with this war has to be proportional and thus, war is limited with that of the ‘principle of proportionality’.¹³⁵</p> <p>In regard to the use of weaponry, Islamic law is similar to the <i>Jus in Bello</i> criterion of proportionality where there is a possibility of certain tactics harming others such as non-combatants/civilians.¹³⁶</p> <p>Islamic principles do not contradict provisions of the Rome Statute as they introduce similar concepts for the recognition of war crimes in addition to strict rules of warfare.¹³⁷</p> <p>War crimes under Islamic law are divided</p>

¹²⁹ *ibid.*

¹³⁰ See more Kristen Boon, ‘Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent’ (2000) 32 Columbia Human Rights Law Review.

¹³¹ See more Mohamed El Zeidy and Ray Murphy, ‘Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War’, International Criminal Law Review, vol. 9/no. 4, (2009), 623-649.

	<p>which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹³²</p>	<p>into several categories: (1) the act of killing protected persons in the course of hostilities; (2) performing certain acts or conduct that is definitely prohibited during the course of war; (3) the act of humiliation, which may result in killing; (4) the act of direct attack on civilians and their installations; and (5) the act of damaging the natural environment, its food or producers.¹³⁸</p> <p>The maxims: “no harming and no counter-harming” (<i>la darara wa la dirara</i>) and “harms should be eliminated” (<i>Ad-dararu yuzal</i>) in addition to their subsidiaries, prohibit causing of harms in any form at any time. They also provide guidelines for elimination of damages caused to environment and reveal the compliance of Sharia and its applicability to all matters at any imminent era.¹³⁹</p>
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¹³³ Gene W. Heck, Ph. D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (King Faisal Centre for Research and Islamic Studies, Riyadh 2006), 26.

¹³⁴ Mohamed Abdel Dayem and Fatima Ayub, ‘In the Path of Allah: Evolving Interpretations of Jihad and Its Challenges’ (2008) 7 *UCLA J. Islamic & Near E.L.*, 67-120

¹³⁵ Gene W. Heck, Ph.D, *The Islamic Code of Conduct for War and Peace: An Inquiry into the Doctrinal Prescriptions of Islam in the Conduct of Foreign Policy*, (King Faisal Centre for Research and Islamic Studies, Riyadh 2006), 26; see also Abdullah Allahdin, *Extracts from the Holy Quran and Sayings of the Holy Prophet Mohammad*, 7th ed. (India 1933, 193); Farhad Malekian, *The concept of Islamic International Criminal Law: A Comparative Study*, (Graham and Trotman, London 1994), 70-71; Mohammad Hamidullah, *Muslim Conduct of State: Being A Treaties On Siyar, That Is Islamic Notion Of Public International Law, Consisting Of The Laws Of Peace, War And Neutrality, Together With Precedents From Orthodox Practice And Preceded By A Historical And General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 154.

¹³⁶ John Kelsay, *Arguments Concerning Resistance in Contemporary Islam*, in the *Ethics of War: Shared Problems in Different Traditions*, Richard Sorabji and David Rodin ed., (Ashgate Publishing Limited, England 2007), 65.

¹³⁷ For the compatibility of Islamic law and the law of armed conflict see generally, Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (1st edn, Routledge 2011).

¹³² A number of problems substantially limit the Article’s ability to punish wartime environmental damage: the vagueness of its *actus reus*, in particular the requirement that damage be “widespread, long-term, and severe”; the subjective of *mens rea*, which make it nearly impossible to find that a perpetrator “knew” that attack would be disproportionate; and its non applicability to non international armed conflicts. See more Mark Drumbl, ‘Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes’ (1998) 22 *Fordhan International Law Journal*, 122, 145; Jessica C. Lawrence and Kevin Jon Heller, ‘The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Eccentric Environmental War Crime’ (2007) 20 *Georgetown International Environmental Law Review*.

¹³⁸ See more Ahmad Zaki Yamani, *Humanitarian International Law: A General Outlook*, Vol.7 *Mich. YBI Legal Studies* (1985), 189-215; Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (1st edn, Brill Academic Publishers 2011), 201.

¹³⁹ See more Muhammad Shettima, ‘Effect of The Legal Maxim: “No Harming and No Counter Harming” on The Enforcement of Environmental Protection’ (2011) 19 *IJUM Law Journal* 291.

<p>4. Aggression</p>	<p>The crime of aggression is defined in Article 8bis in the Rome Statute adopted at the 2010 Review Conference in Kampala. In essence, three elements are required:</p> <p>First, the perpetrator must be a political or military leader, i.e. a “person in a position effectively to exercise control over or to direct the political or military action of a State”.</p> <p>Second, the Court must prove that the perpetrator was involved in the planning, preparation, initiation or execution of such a State act of aggression.</p> <p>Third, such a State act must amount to an act of aggression in accordance with the definition contained in General Assembly Resolution 3314, and it must, by its character, gravity and scale, constitute a manifest violation of the UN Charter. This implies that only the most serious forms of illegal use of force between States can be subject to the Court’s jurisdiction. Cases of lawful individual or collective self-defence, as well as action authorized by the Security Council are thus clearly excluded.</p>	<p>In the Quran verses 2:190-193 “Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors.”</p> <p>“And kill them wherever you overtake them and expel them from wherever they have expelled you, and fitnah is worse than killing. And do not fight them at al-Masjid al- Haram until they fight you there. But if they fight you, then kill them. Such is the recompense of the disbelievers.”</p> <p>“And if they cease, then indeed, Allah is Forgiving and Merciful.”</p> <p>“Fight them until there is no [more] fitnah and [until] worship is [acknowledged to be] for Allah. But if they cease, then there is to be no aggression except against the oppressors.”</p> <p>Aggression may be defined as an action or inaction, which directly or indirectly jeopardizes the jurisdictional independence and security of another state by means of ideological conflicts and/or armed invasions.¹⁴⁰</p> <p>A war which is conducted, in one-way or another, for the purpose of glory or economic gains is certainly considered an aggressive war.</p> <p>War is permitted in certain situations for the path of brotherhood or for the protection of the rights of man from unjustified acts of aggression and therefore a war which does not contain these aims or is combined with the purposes of luxury is considered unlawful.¹⁴¹</p> <p>A war which is conducted for the purpose of occupation, colonialization, and seizure of territories or to reduce a territory to the status of trusteeship is also considered an aggressive war and is thus prohibited under Islamic law.</p>
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¹⁴⁰ See generally Majid Khadduri, *War and Peace in the Law of Islam*, (Johns Hopkins Press, Baltimore M.D. 1955); see also Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 311-316.

¹⁴¹ See more Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (1st edn, Brill Academic Publishers 2011), 175.

<p>5. Principle of legality and Non-Retroactivity</p>	<p>Article 22 of the Rome Statute confirms the core prohibition of the retroactive application of the criminal law together with the other two major corollaries of this prohibition, namely the rule of strict construction and the requirement of <i>in dubio pro reo</i>.¹⁴²</p>	<p>The Islamic system of criminal justice operated on an implicit principle of legality.¹⁴³ Evidence on the existence of the principle is found in the Quran.</p> <p>Quran 17:15: “Nor would We visit with our wrath until we had sent a messenger (to give warning).”</p> <p>Quran 4:165: “Messenger, who gave good news as well as warning, that mankind, after (the coming) of the apostles, should have no plea against Allah. For Allah is Exalted in Power, Wise.”</p> <p>Quran 8:38: ““Say to the Unbelievers, if (now) they desist (from Unbelief), their past would be forgiven them; but if they persist, the punishment of those before them is already (a matter of warning for them)”</p>
<p>6. Presumption of Innocence</p>	<p>Article 66 of the Rome Statute enshrine the provision on presumption of innocence</p>	<p>Under Islamic law, no one is guilty of a crime unless his guilt is proved through lawful evidence.¹⁴⁴</p> <p>The Prophet is reported to have said ‘everyone is born inherently pure’¹⁴⁵</p> <p>The legal principle of <i>istishab</i>, which is recognized by the Shafi’i and Hanbali schools, the presumption of continuation of a certain state exists, until the contrary is established by evidence.¹⁴⁶</p>
<p>7. Principle of <i>de lege lata</i></p>	<p>The Rome Statute is based on the principle and the ICC can solely function on its provisions.</p>	<p>Islamic law fully respects the principle and underlines what actions are considered war crimes, crimes against humanity or genocide.</p> <p>The crimes are recognised and divided into different categories; <i>hudud</i>, <i>qisas</i> and <i>ta’zir</i> crimes, in which each of them had</p>

¹⁴² See Bruce Broomhall, ‘Article 22: Nullum crimen sine lege’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 714.

¹⁴³ See more T. Kamel, ‘The Principle of Legality and Its Application in Islamic Criminal Justice’, in Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), 149–150.

¹⁴⁴ Abu Yusuf, *Kitab al-Kharaj*, 152, in M. H. Kamali, *Shari’ah Law: An Introduction* (2008), 181; see more Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 416, 426.

¹⁴⁵ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2005), 103.

¹⁴⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Text Society 2003), 384

		own legal discipline and could be evaluated differently. ¹⁴⁷
8. Principle of <i>nullum crimen sine lege</i>	The Rome Statute in Article 22 (1) provides that “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”	Islamic principles do not permit violation of the principle of <i>nullum crimen sine lege</i> . Article 19 (e) of the Cairo Declaration on Human Rights in Islam which is based on the principles of the main source of Islamic law provides that: “A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence. It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him.” ¹⁴⁸
9. Principle of <i>nulla poena sine lege</i>	The Rome Statute in Article 23 emphasises on the application of the principle of <i>nulla poena sine lege</i> . The principle may be violated in the case of the implementation of those crimes that have not already been accepted by certain states. This means that even though, those crimes are not criminalized in domestic legislations of certain states, their individuals can still be brought before the ICC because of the commission of the international crimes.	In Islamic law, a crime should have a specific legal provision and consequently, there can be no punishment without such a pre-existing law. Since a person cannot be held criminally liable for conduct not forbidden by law, he cannot be held criminally accountable for conduct that happened before such conduct was criminalized. In other words, the existence of the law must come before its application. ¹⁴⁹ Evidence of this principle can be found in the following Quran verse 17:15: “Nor would We visit with our wrath until we had sent a messenger (to give warning).” And Quran verse 4:165: “Messenger, who gave good news as well as warning, that mankind, after (the coming) of the apostles, should have no plea against Allah. For Allah is Exalted in Power, Wise.” Similarly, Islamic law allows the prosecution of international crimes without due regard to the provisions of the legislation of some states. “This theory is based on the concept of crimes against

¹⁴⁷ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 Leiden Journal of International Law 411-433, 427.

¹⁴⁸ The Cairo Declaration on Human Rights in Islam (CDHRI), member states of the Organisation of the Islamic Conference adopted in Cairo, Egypt 1990.

¹⁴⁹ T. Kamel, ‘The Principle of Legality and Its Application in Islamic Criminal Justice’, in M. C. Bassiouni (ed.), The Islamic Criminal Justice System (Oceana Publications 1982), 149–50

		mankind and violation of the fundamental principles of natural law.” ¹⁵⁰
10. Principle of <i>ne bis in idem</i>	Article 20 (1) of the Rome Statute provides that the ICC should not prosecute a person for a conduct which formed the basis of crimes for which the relevant person has already been convicted or acquitted. ¹⁵¹	Under Islamic criminal jurisdiction, no one should be prosecuted for the conduct that has already received appropriate attention by a genuine criminal jurisdiction. ¹⁵² Arab Charter on Human Rights provides in Article 19 (1) and (2) that “No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.” and “Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered.” ¹⁵³
11. Criminal Accountability	The principle of the international criminal responsibility of individuals is originally based on the assumption that individuals are the most essential characters in the commission of international crimes and therefore liable to prosecution and punishment and this is regardless of their official position and includes heads of states or governments. In the system of international criminal law by the term ‘international criminal responsibility of individuals’ means all those who have, in one way or another, participated in the commission of certain acts constituting international crimes.	Islamic law provides for all the concepts of crimes found within the framework of the Rome Statute. In Islamic criminal jurisdiction, responsibility is based on three key elements, similar to the Rome Statute; these are legal, physical, and mental elements. ¹⁵⁴ The provisions of Islamic law cannot properly be enforced without the concept of the responsibility of its subjects. Thus, responsibility in Islamic law constitutes the core principle of the implementation and application of the principles of Islamic jurisdiction. Islamic law bases the concept of responsibility exclusively to individuals and on the offenders’ intentional or deliberate abuse of the freedom of choice.
12. Joint Criminal Enterprise	The concept aims to criminalize all acts of participation in different manners and forms for the accomplishment of a criminally wrongful conduct. The contribution of two or more persons in	Islamic law applies punishment to all those who have, in complicity with one another, committed crimes against humanity, war crimes or genocide. Thus, the criminal accountability falls on all of those who

¹⁵⁰ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411-433, 423.

¹⁵¹ See generally Immi Tallgren & Astrid Reisinger Coracini, *Ne Bis in Idem*, in Triffterer, Rome Statute of the International Criminal Court: A Commentary (Nomos Verlagsgesellschaft 2015), 899.

¹⁵² Birgit Krawietz Helmut Reifeld, *Islam and the Rule of Law: between Sharia and Secularization*, Konrad-Adenauer-Stiftung 2008 < http://www.kas.de/wf/doc/kas_13008-544-2-30.pdf > accessed 23 September 2016.

¹⁵³ The Arab Charter on Human Rights (ACHR) was adopted by the Council of the League of Arab States on 22 May 2004.

¹⁵⁴ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (1st edn, Brill Academic Publishers 2011), 393; see more Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2006), 20.

	<p>carrying out a crime requires, therefore, a common design, plan or purpose to commit a crime. This means that all defendants are answerable for the charges before a court.</p>	<p>have participated in the commission of a crime.¹⁵⁵</p> <p>In the Quran verse 5:32: “whoever killed a human being should be looked upon as though he had killed all mankind.”</p> <p>And in Quran verse 8:23 “guard yourselves against an affliction which may smite not only those who committed injustice among you in particular (but all of you).”</p>
<p>13. Duress and Superior Orders</p>	<p>According to the Rome Statute Article 31 (1)(d)(i) and 31 (1)(d)(ii) the ICC recognizes two forms of duress as grounds for excluding criminal responsibility, namely duress and duress of circumstances.</p> <p>For superior orders to be a valid defence before the ICC, three conditions have to be established: the defendant must be under a legal obligation to obey orders of a government or superior; the defendant must not know that the order was unlawful; and the order must not be manifestly unlawful.</p> <p>The ICC allows the defence of duress to murder.</p>	<p><i>ikrah</i> (Duress) is a situation in which a person is forced to do something against his will.</p> <p>The Quran acknowledges such a situation and prescribes in verse 16:106 “Save him who is forced thereto and whose heart is still content with Faith”</p> <p>The Prophet is reported to have said: “My <i>Ummah</i> will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness.”¹⁵⁶</p> <p>Islamic law recognizes two kinds of duress:</p> <ol style="list-style-type: none"> 1. Duress imperfect – a kind of duress that does not pose a threat to the life of the “agent.” 2. Duress proper—a kind of duress in which the life of the “agent” is threatened.¹⁵⁷ <p>Both the consent and the choice of the agent are neutralized. Under duress proper, certain forbidden acts will not only cease to be punishable, but will become permissible.¹⁵⁸</p> <p>Murder or any fatal offence are unaffected by duress and will not become either</p>

¹⁵⁵ *ibid*, 398.

¹⁵⁶ Al-Bayhaqi, *al-Sunan al-Kubra*, *Kitab al-Da’wa wa al-Bayyinah*, Bab al-Bayyinah ‘ala al-Mudda’ a wa al-Yam n ala al-Mudda’a’alayh’, quoted in L. Zakariyah, ‘Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari’ah Law in Northern Nigeria (1999–2007)’, D. Phil. thesis, University of Wales, 2009, 73.

¹⁵⁷ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 416, 426.

¹⁵⁸ See more A. Q. Oudah, *Criminal Law of Islam*, Vol. 2 (2005), 293 cited in Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411-433, 429.

<p>14. Irrelevance of Official Capacity / Immunity</p>	<p>Article 27 of the Rome Statute aims at providing the ICC with jurisdiction over crimes committed by state officials enjoying immunity <i>ratione materiae</i> or immunity <i>ratione personae</i>, thus can be held responsible for committing international crimes.</p>	<p>permissible acts, thus Islamic law doesn't allow the defence of duress to murder.¹⁵⁹</p> <p>There is no recognition of special privileges for anyone and rulers are not above the law.</p> <p>The Prophet made his stance on the equality of everyone before the law: "The nations that lived before you were destroyed by God, because they punished the common man for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in His hand that even if Fatima, the daughter of Muhammad, had committed this crime, then I would have amputated her hand."</p> <p>Quran 4:135 "O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your kin, and whether it be (against) rich or poor, for Allah can best protect both. Follow not the lust (of your hearts), Lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well acquainted with all that ye do."</p>
<p>15. Mens Rea</p>	<p>Article 30 of the Rome Statute provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. The mental element consists of two components: a volitional component of intent and a cognitive element of knowledge.</p>	<p>In Sharia, one of the basic legal maxims agreed upon by Muslim scholars is <i>al-umur bi maqasidiha</i>, which implies that any action, whether physical or verbal, should be considered and judged according to the intention of the doer.¹⁶⁰</p> <p>For an act to be punishable, the intention of the perpetrator has to be established. Evidence of this maxim can be found in the Quran 53:39: "And that there is not for man except that [good] for which he strives"</p> <p>And verse 33:5: "Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful."</p> <p>The general rule in Sharia is that a man</p>

¹⁵⁹ *ibid.*

¹⁶⁰ Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Criminal Law Forum 473-518.

		cannot be held responsible for a mere thought. In Islam, a good thought is recorded as an act of piety and a bad thought is not recorded at all. The difference between intentional and unintentional results is in the degree of punishment. ¹⁶¹
16. Other Issues/ General Remarks	<p>The ICC is based on treaty law.</p> <p>The basis for the creation of the Court should not be interpreted as permission to go against other criminal jurisdictions in the world. This means that the “establishment of the Court” stated in part 1 of the Statute does not necessary contradict the basic principles of criminal justice within other legal systems.</p> <p>The Court aims to bring the perpetrators of international crimes before its jurisdiction.</p>	<p>The treaty law is one of the fundamental sources of Islamic law, if it does not violate its provisions.¹⁶²</p> <p>Several Muslim states have ratified the Rome Statute as its provisions do not contradict Islamic criminal norms.</p> <p>The Statute would not have been ratified if there were serious contradictions between the two legal systems.</p> <p>The aims of the ICC are similar to Islamic law by the fulfilment of Islamic provisions for the prosecution of criminals, but, in an international standard and by international prosecutors and judges.</p>

6.6 Sharia, Human Rights and International Criminal Law

The natural connection between human rights and international criminal law cannot be ignored. It is instructive to review the efforts taken by many Arab states to set themselves apart from the international human rights regime that has developed since the end of the Second World War. Many Arab states, which implement Sharia, have joined treaties that prohibit international crimes. For example, Saudi Arabia is a state party to the Convention against Torture,¹⁶³ the Convention on the Rights of the

¹⁶¹ Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411-433.

¹⁶² See more Jamshed A. Hamid, *Status of Treaties in Islam: A Comparison with Contemporary Practice* (1st edn, Shari’ah Academy 2001); Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (1st edn, British Institute of International and Comparative Law 2008).

¹⁶³ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: resolution / adopted by the General Assembly, 10 December 1984, A/RES/39/46.

Child,¹⁶⁴ the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁶⁵ and the Genocide Convention.¹⁶⁶ As a matter of fact, the very first draft of the genocide convention was submitted by Saudi Arabia during the 1946 session of the General Assembly.¹⁶⁷ Nevertheless, the interpretations of rights that these treaties and conventions provide are restrictive in Saudi Arabia. Yet, beside the restrictive interpretation, a fundamental disagreement exists in regards to the very package of rights guaranteed. The Islamic perspective provides that human rights enshrined in Sharia are actually more universal than those prescribed by the UN conventions and treaties.¹⁶⁸

Sharia is very often invoked at the international level as a justification for the impossibility of implementing human rights standard and norms into domestic legislations. But the use of the same Sharia could lead to harmonisation between international standards of human rights and those implemented in Arab states' legislations. The inherent flexibility of Sharia encompassing different legal tools creates room for interpretation and adaptation to changes of context and circumstance.¹⁶⁹ Several legislations in the region show that the compatibility of legislation with the international human rights standards does not imply a secular framework and could be carried out within the framework of Sharia.¹⁷⁰ The idea that the rules of Sharia are unchangeable is misleading. Rather, reform of law within the framework of Sharia is necessary in order to reflect the constantly evolving norms of society. Hence, the relation between human rights and Islam cannot be perceived as

¹⁶⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3.

¹⁶⁵ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180.

¹⁶⁶ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

¹⁶⁷ UN Doc. A/C.6/SR.23 and UN Doc. A/C.6/86, 26 November 1946, Sixth Committee, Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of genocide.

¹⁶⁸ See Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 45-50.

¹⁶⁹ See Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Kluwer Law International 2001).

¹⁷⁰ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations* (British Institute of International and Comparative Law 2008) 112.

static but rather, constantly changing.¹⁷¹ Several Arab states have recently adopted reforms to their laws, to conform to the human rights norms, whilst remaining within the framework of Sharia.¹⁷²

The ratification and implementation of human rights treaties and conventions are not entirely sufficient in enforcing human rights into domestic practice, other means must be considered. In the case of Arab states, a particularly important and powerful tool is the implementation of human rights within the framework of Sharia. It appears that ‘custom’ and ‘culture’ are among the reasons behind the failure of some Arab states to effectively implement international human rights norms, particularly provisions related to the protection against international crimes. It is arguable that by making legitimate and well-publicised reforms within the framework of highest norm in society and Islam, domestic practices within the State could improve considerably.¹⁷³

6.6.1 Islam and Human Rights

In Arabic the term ‘right’ equates to *haqq* (pl. *huquq*) which, among several interpretations, translates to the phrase ‘due to God or man’,¹⁷⁴ as well as translating to ‘that which is established and cannot be denied.’¹⁷⁵ From an early period of Islamic history Muslim jurists differentiated between three kinds of rights: the ‘rights of God’ (*huquq Allah*), the ‘rights of persons’ (*huquq al-’ibad*) and ‘dual rights’ shared by

¹⁷¹ See John C. Campbell and Abdullahi Ahmed An-Na’im, ‘Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law’ (1990) 69 *Foreign Affairs* 196. Abd Allāh Aḥmad Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990).

¹⁷² For example, Morocco: Personal Status Code of 2004, Egypt: Law No. 1 of 2000 concerning the woman’s right to divorce, Tunisia: Article 18 Code of Personal Status 1956 concerning the abolition and criminalisation of polygamous marriage.

¹⁷³ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations* (British Institute of International and Comparative Law 2008) 119.

¹⁷⁴ Encyclopaedia of Islam, *Hakk*, (2nd edn, Leiden: Brill, 1960); see also Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 201.

¹⁷⁵ Muhammad Ali al-Jurjani, *Kitab al-Ta’rifat*, Ibrahim al-Ibyari (eds) (Beirut: Dar al-Kitab al-’Arabi, 1405/1985 AD).

God and persons.¹⁷⁶ Whilst the ‘rights of god’ are both rights and duties grounded in devotional matters, such as observing the five pillars of Islam reciprocated through the acquisition of virtue, the ‘rights of persons’ are secular and civil, attached to social interests such as the right to health.¹⁷⁷ The Sharia comprises Islamic rights and obligations whilst the jurists of the present time are left to decipher the rationale underpinning the rights where the *Quran* and *Sunna* are silent. Thus, the correlation between the ‘rights’ of God and persons’ and the ‘dual rights’ pertaining to the former renders them absolute and immutable under the banner of moral status. However, unlike the modern concept of human rights which acknowledges the innate nature of rights arising as a human being,¹⁷⁸ Islamic rights are granted on fulfilment of obligations. In the same vein that Islamic law is created, God confers rights on persons yet human authority mediates these rights.¹⁷⁹

It is important to address the common misconception that Islam fails to recognise fundamental rights for the individual. This view stems from the reciprocal nature of Islamic law as a system of duties and obligations.¹⁸⁰ The ambiguity regarding the many translations of *haqq* has fuelled this notion to develop a misguided view that Islamic obligations are inherent and rights are not recognised as such, rather they are ultimately dependent on the fulfilment of the duty. However, the *Quran* and *Sunna* possess an affirmative stance on the rights of the individual which include the right to life, justice and equality supporting Islam’s fundamental commitment to the advocacy of human rights.¹⁸¹ The misconception that Islam advocates the violation of secular human rights is derived from the greater emphasis placed on a Muslim duty to adhere to the moralist teachings of the Sharia, rather than an unconditional set of inherent rights. This conclusion, which pays more attention to linguistic analysis and style

¹⁷⁶ Ibn Amir al-Haj, *al-Taqrir wa 'l-Tahbir*, vol. 2 (2nd edn, Beirut: Dar al-kutub al-'Ilmiyya, 1403/1983); ‘Abd al-Razzaq al-Sanhuri, *Masadir al-Haqq fi' l-Fiqh al-Islam*, vol. 1, (Cairo: Dar al-Ma'arif, 1967), 14; Baber Johansen, *Secular and Religious Elements in Hanafite Law: 'Function and Limits of the Absolute Character of Government Authority'*, in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, (Leiden: E. J. Brill, 1999), 210-216.

¹⁷⁷ Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’, *Journal of Law and Religion*, Vol. 15, No. 1/2, (2001), 192.

¹⁷⁸ Jack Donnelly, *The Concept of Human Rights*, (London: Routledge, 1985), 1.

¹⁷⁹ Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’, *Journal of Law and Religion*, Vol. 15, No. 1/2, (2001), 193.

¹⁸⁰ Joseph Schacht, ‘Law and Justice’, in P. M Hold (eds) *The Cambridge History of Islam*, (Cambridge: Cambridge University Press, 1970), 541.

¹⁸¹ Mohamed Hashim Kamali, *Shariah Law: An Introduction*, (Oneworld Publications, 2008), 201

rather than meaning and substance, is supported by the fact that the *Quran* does not speak in the language of the contemporary world, implying a negative position of freedom and justice.¹⁸² For the purpose of evidential analysis, this negative position can be formulated into specific areas of problematic conflict, for instance; the freedom of faith, the status of non-Muslims and the rights and equality of women.

6.6.2 The Compatibility of Islamic Human rights and the Secular Western Model

Historical evidence proves that human rights as postulated in the Sharia have been widespread and systematically neglected by Arab states.¹⁸³ Thus, an underlying yet predominant issue clouds the analysis of establishing a compatible system of human rights between Islam and the Western model. At one end of the spectrum lie modern concepts in law which identifies all of human kind as equal under the eyes of God. At the other end lies the dogmatic application of the Sharia, applied by a number of Arab and Muslim states¹⁸⁴ over the course of Islamic history which has ‘permitted’ the perpetration of gross human rights violations.¹⁸⁵ It then appears that a conflict exists between theory and practice which is intertwined with establishing the universality of human rights. The need to establish a universal human rights system is paramount

¹⁸² *ibid*, 202.

¹⁸³ Mahmoud Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, (New York: Cambridge University Press, 2014), 96-7.

¹⁸⁴ For examples of human rights violations committed by both Muslim States and Islamist militants see Stephen Kinzer, *Turkish Terror Victim Espoused a Tolerant Islam*, N.Y. Times Foreign Desk (Jan. 26, 2000); Charles Hirschkind, *Heresy or Hermeneutics: The Case of Nasr Hamid Abu Zayd*, 12/7 The Am. J. Islamic Soc. Sci. 463 (1995)

¹⁸⁵ Bassam Tibi, ‘Islamic Law/Sharia, Human Rights, Universal Morality and International Relations’, *Human Rights Quarterly* 16 (1994), 278. ‘During the United Nations Human Rights conference in Vienna human rights activists from countries such as Iran and Sudan were drawing attention to the severe violations in their own countries whilst ministers of foreign affairs of the very same states convening in the higher floors of the Vienne Centre were emphasising the specific character of their culture claim of the universality of human rights. This emphasis seemed to serve as legitimating of the well-known violations of human rights in these States.’

although there lacks a global authority to implement such a model.¹⁸⁶ Analogous to this paradigm is the lack of a one world culture, the result of which has caused a divergence of opinion regarding the inherent nature of human rights norms. The underlying issue lies with the fact that the human rights concept finds its origins in the West, namely Europe. This secular system hinders the concepts ability to be implemented on a global cross-cultural level, the enforcement of which poses as a legitimate concern of all human kind.¹⁸⁷ In order to create such a complimentary system between Islamic law and contemporary international law it must first be established that within Islam exists a recognised body of human rights.

6.6.3 Treaty Reservations

Sharia, which is either fully or partially applicable in the domestic law of Arab states, is often met with criticism by human rights activists as being the main reason behind the human rights violations.¹⁸⁸ In fact, the phenomenon of the high number of reservations made by Arab and Muslim states which on the basis of Sharia, and the common reference to Sharia by these states in their periodic reports submitted to the bodies established under the UN human rights treaties and the Charter bodies in which they justify its practices, might seem to support the opinion that sees the Sharia as incompatible with human rights.¹⁸⁹

The rule *pacta sunc servanda* (i.e. good faith in contractual obligations) is one of the

¹⁸⁶ Tore Lindholm, *The Cross-Cultural Legitimacy of Human Rights*, (Oslo: The Norwegian Institute of Human Rights, 1990); see also F. S. C. Northrop, *The Taming of Nations: A Study of Cultural basis of International Policy*, (Woodbridge, CT: Ox Bow Press, 1990).

¹⁸⁷ Abdullah Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, (Syracuse, NY: Syracuse University Press, 1990), 187; see also Human Rights in International Society, in R. J. Vincent, *Human Rights and International Relations*, (Cambridge: Cambridge University Press, 1986), 92-108.

¹⁸⁸ Human Rights Watch, "*Political Shari'a*"? *Human Rights and Islamic Law in Northern Nigeria*, 21 September 2004 <<https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria#page>> accessed 16 July 2015.

¹⁸⁹ Mashood Baderin, 'Human Rights and Islamic Law: The Myth of Discord' (2005) 2 *European Human Rights Law Review* 165-185.

fundamental principles of Sharia.¹⁹⁰ The principle is established in the Quran, “And fulfill the covenant of Allah, when you have made a covenant, and break not the oaths after making them”.¹⁹¹ Thus, all treaty obligations must be implemented in good faith and respected accordingly subject to the proscription that the treaty provisions do not contradict Islam.¹⁹² It follows that when signing international treaties, according to Sharia, Arab states are expected to ensure that all of their contractual obligations are clearly set out because contracts are considered sacred.¹⁹³ Indeed, the rule to respect international obligations is so strong that it could not be overridden by Ijtihad as the Quran commands “yet it is your obligation to help them in the matters of faith if they ask for your help, except against a people with whom you have a treaty. Allah is observant of all your actions”.¹⁹⁴

Although reservations and interpretative declarations are a well-accepted practice, they can have a negative effect on the integrity of human rights instruments.¹⁹⁵ The detrimental phenomenon of high numbers of reservations is evident in the position of many Arab states in relation to several international human rights conventions. Most of their reservations are unnecessary and are often broadly worded, referring to Sharia in general as the reason for reservation, in language such as: “... so far as it is incompatible with the provisions of the Islamic Shariah”,¹⁹⁶ or “inasmuch as it conflicts with the provisions of the Islamic Sharia, Islam being the official religion of the State”,¹⁹⁷ or “in case of contradiction between any terms of the Convention and the norms of Islamic law, the Kingdom is not under an obligation to observe the contradictory terms of the Convention”.¹⁹⁸ The general reservations entered by these

¹⁹⁰ See generally Mohammad Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, Rev. 4th ed. (Sh. Muhammad Ashraf Kashmiri Bazar, Lahore 1961), 311-312; see also Quran 8:61.

¹⁹¹ Quran 16:91.

¹⁹² Joseph Schacht, ‘Islamic law in Contemporary States’ (1958) 8 *American Journal of Comparative Law* 133, 139.

¹⁹³ Emilia Justyna Powell and Sara McLaughlin Mitchell, ‘The International Court of Justice and the World’s Three Legal Systems’ (2007) 69 *J of Pol* 397-415, 400.

¹⁹⁴ Quran 8:72.

¹⁹⁵ See Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties* (M. Nijhoff 1995).

¹⁹⁶ Reservation to CEDAW by Bahrain.

¹⁹⁷ Reservation to CEDAW by Kuwait.

¹⁹⁸ Reservation to CEDAW by Saudi Arabia.

states often give the international community the impression that they do not want to take the risk with the conventions articles or provisions that might affect their commitment to Sharia.¹⁹⁹ This phenomenon has, of course, a negative impact on the application of human rights internationally, and more particularly, it deprives large populations within those states of some essential rights, creating a perception of Sharia as an incompetent, unfair legal system.²⁰⁰

The Rome Statute prohibits treaty reservations under Article 120, but it allows for unilateral declarations, which can specify or clarify the meaning of some provisions.²⁰¹ The prohibition and inadmissibility of reservations applies to the Statute as a whole and any future amendments to preserve the Statute's integrity. The ICC's inherent jurisdiction over core crimes could be affected and undermined by reservations, as states by submitting reservations could redefine crimes, add inconsistent defences or avoid their obligations towards the Court.²⁰² Declarations are not *per se* inconsistent with the Statute provided that they do not attempt to alter it, but merely clarify the meaning or scope attributed by the declarant to certain of its provisions.²⁰³ Some Arab states criticised the final clauses of the Statute that no reservations may be made.²⁰⁴ As most Arab states usually aim to exclude or amend the legal effect of certain provisions of the treaties in their application, according to Sharia, they will reconsider the decision to ratify the Rome Statute. As described by two of the delegates who supported the inclusion of Article 120, they explained that "Those who feared that there might be some (not necessarily central) questions in the

¹⁹⁹ Lindsay J. Leblanc, 'Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice' (1996) 4 *International Journal of Children's Rights* 357-381, 368.

²⁰⁰ Shihanah Azzaz, 'Ijtihad, an Effective Mechanism of Upholding International Human Rights with Islamic Law' (2008) 4 *J. Islamic St. Prac. Int'l L.* 21, 23.

²⁰¹ Jordan upon signing the Rome Statute declared that "that nothing under its national law including the Constitution is inconsistent with the Rome Statute of the International Criminal Court. As such, it interprets such national law as giving effect to the full application of the Rome Statute and the exercise of relevant jurisdiction thereunder".

²⁰² Amnesty International, *International Criminal Court: Declarations Amounting to Prohibited Reservations to the Rome Statute*, 24 November 2005, IOR 40/032/2005

<<http://www.refworld.org/docid/45be009d2.html>> accessed 6 October 2015.

²⁰³ Gerhard Hafner, 'Article 120' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes. Article by Article* (1st edn, Nomos Verlagsgesellschaft 1999) 1259-1260.

²⁰⁴ Alain Pellet, 'Entry into Force and Amendment of the Statute' in Antonio Cassese and others (ed), *The Rome Statute of the International Criminal Court: A Commentary* (1st edn, Oxford University Press 2002).

definitions of crimes that could cause them acute political problems domestically tended to support a right to make reservations.²⁰⁵

6.7 Sharia-based Concerns

It is argued that Arab states that apply Sharia are less likely to join the international criminal justice system than Western or secular states as their legal systems are derived from religious authority rather than secular.²⁰⁶ Table (1.2) below shows the percentage of states representing each of the legal systems during the year 1998, in which the Rome Statute was open for signature, and the percentages of states' signature and ratification. Although there is no serious difference between international and Islamic justice, it could be the interests and motivations of some political leaders of the Arab or Islamic states behind that alleged conflict.²⁰⁷ Thus pure Islamic justice does not contradict the Statute.

Table (1.2)²⁰⁸

Legal systems	% of all states	% Signature	% Ratification
Civil law	53.1	56.2	63.3
Common law	24.0	23.3	26.5

²⁰⁵ Tuiloma N. Slade and Roger S. Clark, 'Preamble and Final Clauses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations - Results* (1st edn, Kluwer Law International 1999).

²⁰⁶ Michael J. Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study' (2010) iii Pace Int'l L. Rev. Online Companion, 29.

²⁰⁷ Farhad Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence' (2009) 9 *International Criminal Law Review* 595-621, 620.

²⁰⁸ Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press 2011), 112.

Islamic law	13.0	12.3	5.1
Mixed law	9.9	8.2	5.1

It is necessary to appreciate the fact that as long as Islam is deeply rooted in the culture, politics, and the laws of the Arab states, creating religious legitimacy for international human rights is necessary in order to have them accepted by the public and governments. By using methods based on religion, such as Sharia interpretation, to support and promote human rights, this can be more effective than encouraging or putting pressure on Arab states to participate or sign international conventions and treaties on human rights. It may be just symbolic gesture to become a party to the international convention, only to be a cover undertaken in order to reduce political pressure, which most of Arab governments face, but in reality there may be no implementation of the international treaties within these states.²⁰⁹

There is variation in the role of Sharia principles and jurisprudence among Arab states' constitutions and in some issues may be limited to specific matters. Usually the state that declares itself to be an Islamic state, according to its constitutional provisions, aims to distinguish itself by promoting a broader and more significant role for Islam within the state. The role of Islam can be seen as obvious in different ways, and the practical ramifications of a constitution declaring an Islamic state are not uniform.²¹⁰ Among Arab states, there is evident diversity in customs and cultures, and differences in the extent and methods for applying Sharia within domestic legislations,²¹¹ which contains various schools of thoughts and different

²⁰⁹ See Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *The Yale Law Journal* 1935.

²¹⁰ Tad Stahnke and Robert C. Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 36 *Georgetown Journal of International Law*, 954.

²¹¹ Professor Bassiouni divides the Muslim states into three categories. The first category comprises secular states, like Turkey or Tunisia, who, despite their moral or cultural connection with Islam, do not subject their laws to the Sharia. States from the second category, such as Iraq and Egypt, expressly state in their constitutions that their laws are to be subject to the Sharia; therefore, their constitutional courts decide on whether a given law is in conformity with the Sharia and can also review the manner in which other national courts interpret and apply the laws to ensure conformity. The third category of

interpretations over the criminal law content.²¹² Thus, the extent and aspect of Sharia applied should be considered a factor, as participation is more likely if it is limited to commercial or non-divergent aspects of Sharia only, whereas participation is less likely if criminal or more divergent aspects are involved.²¹³ The definitions of crimes found in Sharia are not defined in the same way as other jurisdictions, which can lead to abuse in their application, in addition to the complexity in their application and sometimes misapplication due to the various schools of Sharia and misinterpretation, which also leads to further obstacles in harmonising between national and international law.²¹⁴

Another Sharia concern is that to date none of the international criminal tribunals, whether national or international, have adequately accommodated Islamic interests, although some of the tribunals are related to Arab Islamic states, with Muslims perpetrators and victims. Thus, the belief of international criminal law as a Western-driven process, which some Arab states believe in, affects the level of participation of these states. Adopting and applying Sharia in some Arab states was a result of a direct rejection of Western criminal legislations implemented during the colonial era, which replaced Sharia.²¹⁵ The Islamic legal system, which is recognised by a large significant part of the world, should be included in the comparative studies as to complete the picture of world's legal systems,²¹⁶ from which the general principles of law are derived and used by international judges.²¹⁷ The international criminal law and international criminal tribunals were formed on the basis of Western law, especially the civil law iteration, by infusing international criminal process with the

states proclaims the direct applicability of the Sharia, like Saudi Arabia. M. C. Bassiouni, *The Shari'a and Post-Conflict Justice* (2010), 15 cited in Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411-433, 414.

²¹² Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations' (1994) 16 *Human Rights Quarterly* 277.

²¹³ Michael J. Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study' (2010) iii *Pace Int'l L. Rev. Online Companion*, 29.

²¹⁴ See Ahmad E. Nassar, 'The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law' (2003) 4 *Chi. J. Int'l L.* 587.

²¹⁵ Michael J. Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study' (2010) iii *Pace International Law Review Online Companion*, 29.

²¹⁶ See Clark B. Lombardi, 'Islamic law in the jurisprudence of the International Court of Justice: An Analysis' (2007) 8 *Chicago Journal of International Law* 85.

²¹⁷ Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411-433.

Western predilections.²¹⁸

6.7.1 Human Rights Issues

There is an assumption that has proved problematic for those who approach human rights from the perspective of Sharia, that human rights are a secular Western concept and the rejection of human rights by some Arab states is based on this secularism.²¹⁹ Although it is often claimed that secularism of human rights is adequate and necessary to accommodate the diversity of world cultures since it provides “neutrality”.²²⁰ However, on the contrary, it is this secular approach precisely that some religious and philosophical cultures reject.²²¹ Also, it has to be understood by advocates that in case of conflict between Sharia and international law, these states cannot be reasonably required to subordinate or abandon their religion in order to uphold contrary demands of international human rights law which are man-made.²²²

On the other hand, it is essential for Arab states to understand that, although international human rights emerged from the West, their fundamental basis exists under Sharia.²²³ An example in the Quran which contains very similar principles to those expressed in international human right standards for human welfare is found in the verse “God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that you may receive admonition”.²²⁴ Also the Sharia in many aspects is fully compatible

²¹⁸ Michael J. Kelly, ‘Islam & International Criminal Law: A Brief (In) Compatibility Study’ (2010) iii Pace International Law Review Online Companion, 16.

²¹⁹ See Mohammed Arkoun, *Rethinking Islam* (Westview Press 1994) 111.

²²⁰ See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 284-290.

²²¹ Shihanah Azzaz, ‘Ijtihad, an Effective Mechanism of Upholding International Human Rights with Islamic Law’ (2008) 4 J. Islamic St. Prac. Int’l L. 21, 32.

²²² Bassam Tibi, ‘Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations’ (1994) 16 Human Rights Quarterly 277.

²²³ Ann Elizabeth Mayer and Mashood A. Baderin, ‘International Human Rights and Islamic Law’ (2005) 99 The American Journal of International Law 302.

²²⁴ Quran 16:90. See more Raed Abdulaziz Alhargan, ‘Islamic Law and International Human Rights Norms’ (2013) 9 Muslim World Journal of Human Rights.

with the international human rights law. Thus, finding such roots of human rights within Islam dismisses the claim that the concept of human rights is a Western culture that should be rejected.²²⁵

6.7.2 Penalties

Sharia, in contrast to the Rome Statute, has historically provided very harsh penalties based on the nature of the crime.²²⁶ One major difference between penalties within the Rome Statute and Sharia is the abolition of capital punishment. Most of the Arab states are concerned about the issue of capital punishment, as most of them apply it in their courts' sentences.²²⁷ Despite being a sentence in the penal codes, most of the Arab states find the use of capital punishment is based on Sharia, thus they have an obligation to use it as one of the main reasons for its justification is that the Quran permits it.²²⁸ There are various methods of execution among Arab states, including beheading, firing squad, hanging and stoning, in addition to public executions in some states, like for example Saudi Arabia, to heighten the element of deterrence.²²⁹ During the negotiations of the Rome Statute, the wording of Article 80 on "Non-prejudice to national application of penalties and national laws" was inserted after the influence of some Arab and Islamic states as to confirm that the existence of death penalty in Sharia will not contradict with the Statute.²³⁰

²²⁵ Shihanah Azzaz, 'Ijtihad, an Effective Mechanism of Upholding International Human Rights with Islamic Law' (2008) 4 J. Islamic St. Prac. Int'l L. 21, 36.

²²⁶ Farhad Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence' (2009) 9 International Criminal Law Review 595-621, 619.

²²⁷ See Madoka Futamura and Nadia Bernaz, *The Politics of the Death Penalty in Countries in Transition* (Routledge 2013).

²²⁸ Although capital punishment is still widely supported in Islamic States and nations, there are views that support the abolition of the death penalty. See more Penal Reform International, *Sharia law and the Death Penalty: Would Abolition of the Death Penalty Be Unfaithful to the Message of Islam?* July 2015 < <http://www.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf> > accessed 19 July 2015.

²²⁹ See Rudolph Peters, *Crime and Punishment in Islamic law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2005).

²³⁰ H. Abtahi, 'The Islamic Republic of Iran and the ICC' (2005) 3 Journal of International Criminal Justice 635-648, 644.

Sharia creates strict conditions for the use of capital punishment and includes various opportunities to avoid or change punishment, which in practice would make it almost impossible to carry out an execution.²³¹ This could be leading to abolition in law without being in conflict with Islam.²³² Furthermore, Sharia explicitly encourages life over death through the overarching themes of forgiveness, mercy and repentance as alternatives to punishment, as well as through the undeniable protection of life as one of the five ‘indispensables’ in Islam.²³³ Another issue is capital punishment as a punishment for adultery, the punishment mentioned in the Quran is lashing.²³⁴ There is a controversy on the penalty of adultery between scholars and whether it is stoning to death or lashing and its applicability to married/unmarried. There is nothing to prove the contention of stoning to death being the punishment for adultery in Quran.²³⁵ On the contrary there are clear indications in Quran that punishment of 100 lashes is for all adult and sane individuals committing adultery, be they married for unmarried, men or women. Further, Quran verse 4:15 reads “Those who commit unlawful sexual intercourse of your women - bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way.” So earlier, when a married woman was guilty of adultery, she was to be permanently confined to her house till the

²³¹ The system of proof applicable for *hudud* and *qisas* makes it very difficult and sometimes almost impossible to prove a crime. The Quran, 24:4 states: “And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes and reject their evidence ever after, for such men are wicked transgressors.” See more S. Tellenbach, ‘Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law’ (2004) 64 *Zaoerv* 929-941, 930.

²³² Bernard Weiss, ‘Interpretation in Islamic Law: The Theory of Ijtihad’ (1978) 26 *The American Journal of Comparative Law* 199.

²³³ Penal Reform International, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty Be Unfaithful to the Message of Islam?* July 2015 < <http://www.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf>> accessed 19 July 2015.

²³⁴ Quran 24:2 “The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.”

²³⁵ The penalty for adultery is not stoning to death unless he is a hardened and habitual sinner who is a perpetual disturber of peace of the society. Quran 24:8 “But it will prevent punishment from her if she gives four testimonies [swearing] by Allah that indeed, he is of the liars.” Scholar Ibne Qayyim, in ‘Zaadul Ma’ad has stressed upon this. He writes “The punishment condoned for that woman through Li’aan (The procedure of oath described in the verses 24: 6-9), is the same which is mentioned in this order of Allah - and let a party of the believers witness their punishment (that is flogging)’. Note that the woman in verse 8 is married woman accused of adultery by her husband. It further proves that Quran prescribes a punishment of flogging for both, adulterer and fornicator irrespective of their marriage status.” cited in S. Abdullah Tariq (*Islamic Voice*, April 1999).

revelation of new ordinance,²³⁶ and lashing replaced the confinement till death.²³⁷ Thus, the legitimacy of the death penalty as a punishment for adultery can be seriously questioned.²³⁸ Furthermore, Sharia provides that those who recant or repent of these offences should be forgiven.²³⁹ Where punishment is mentioned in the Quran and authentic *sunna*, repentance and forgiveness is encouraged as a way of avoiding or commuting punishment.²⁴⁰

Human rights violations are usually found and linked to the category of crimes against humanity, where penalties prescribed by Sharia such as stoning, whipping or limbs amputations are considered by some activists and human rights NGOs as inhumane acts and torture. Therefore, considering these penalties as crimes against humanity makes the issue more complicated in the presence of the term “attack” in the chapeau elements of Article 7 of the Statute, which does not require armed conflict. The insertion of the terms “widespread” and “systematic” during the Rome Conference was alternative, despite some attempts made to present them cumulatively.²⁴¹ For some Arab states, which still apply these types of punishments and penalties, like Saudi Arabia, they will be reluctant to ratify the Rome Statute. It could be the situation that the ICC would consider these according to the sub-paragraphs of Article 7(1) of the Rome Statute in relation to crimes like imprisonment or other severe deprivation of physical liberty, torture, gender related crimes, persecution and enforced disappearance. As such, some of the Arab states are concerned in relation to crimes against humanity and that Sharia could be questioned.

²³⁶ Quran 24:2.

²³⁷ According to Quran verse 4:25, there is no half punishment of stoning to death, Allama Rasheed Raza in his Quran commentary ‘Almanar’, writes; “As for free women, the apparent words of the verses manifest that she will be inflicted with a hundred lashes, be she married or unmarried. The words of the verse are general. Were there no traditions, one would have a right to say about the verse that by free sinning women here means free married women. It is because in this verse married maid captives are compared with married free women.”, Haqeeqat-e-Raj’ m, 49, cited in S. Abdullah Tariq (Islamic Voice, April 1999).

²³⁸ See William A. Schabas, ‘Islam and the Death Penalty’ (2000) 9 Wm. & Mary Bill Rts. J. 223.

²³⁹ Quran 4:17 reads “The repentance accepted by Allah is only for those who do wrong in ignorance [or carelessness] and then repent soon after. It is those to whom Allah will turn in forgiveness, and Allah is ever Knowing and Wise.”

²⁴⁰ Mahmoud Cherif Bassiouni, ‘Death as a Penalty in the Sharia’ in Peter Hodgkinson and William A. Schabas (ed), *Capital Punishment: Strategies for Abolition* (1st edn, Cambridge University Press 2004).

²⁴¹ H. Abtahi, ‘The Islamic Republic of Iran and the ICC’ (2005) 3 Journal of International Criminal Justice 635-648, 645.

In the application of a reform approach towards a specific obstacle like punishments, modern-day systems of punishment have developed throughout the world that look at offenders as people that need to be rehabilitated and reformed, rather than receive punishment based on notions of revenge or retribution.²⁴² Systems of punishment under traditional Islam therefore seem to be outdated for contemporary society. It has been argued by Muslim reformers that the severe punishments under Sharia were appropriate within the historical and social contexts in which they originated. However, in modern times they are considered inappropriate and the Islamic principles and norms need to be in a different form to comply with the modern societies. In the words of Professor Ali A. Mazrui, he states that the punishments laid down fourteen centuries ago “had to be truly severe enough to be a deterrent” to those who might commit offences that were deemed harmful to Islamic society in seventh century, but “since then God has taught us more about crime, its causes, the methods of investigation, the limits of guilt, and the much wider range of possible punishments.”²⁴³

Currently there are new approaches to criminal justice that were not available in the early days of Islam and which aim to ‘repel harm’. These include imprisonment, providing opportunities for reform, rehabilitation, educating offenders, monitoring and tracking the movement of offenders, and tools to provide restitution to victims or communities. Such alternative punishments still have the ability to uphold justice and protect society from dangerous individuals, and it is reasonable to suggest a move away from the physical harm system of punishment, like limb amputation, to a system of punishment that is more suitable for our time and place, and more conducive to the achievement of the modern-day aim of punishment.

²⁴² See David Garland, *Punishment and Modern Society: A Study in Social Theory* (3rd edn, University of Chicago Press 2012).

²⁴³ Ali A. Mazrui, ‘Liberal Islam versus Moderate Islam: Elusive Moderates and the Siege Mentality’ (2005) 22 *American Journal of Islamic Social Sciences* 83.

6.7.3 Trials

Although under Islamic jurisprudence, a trial can take place anywhere at the law's discretion, i.e., there is no particular limitation as to locality under Islamic law,²⁴⁴ but there is a concern that, a Muslim must be prosecuted in an Islamic court, with Muslim judges. Traditionally, the rights of the defendant could also vary from one province to another, depending on the circumstances of the time and locality. This was because neither the Quran nor the Sunna provided special rules for criminal procedure. Procedures were usually based on the ruler's responsibility to decide about special cases, i.e., at the discretion of the governor or relevant ruler.²⁴⁵

The lack of Muslim judges and the presence of judges, from common and civil law backgrounds, who may not be familiar with Sharia principles, could be an additional reason for some Arab states reluctance to join the ICC.²⁴⁶ However, Article 36(8)(a)(i) of the Statute mentions the "representation of the principal legal systems of the world", and does not provide for the religious background of the judges as a criterion for election. Nevertheless, considering the fact that the overwhelming majority of Islamic states are in Africa and Asia, it is possible that Article 36(8)(a)(ii) on "equitable geographic representation" is the main provision that would contribute to ensure that judges familiar with Sharia are elected.²⁴⁷

6.8 Reforms of Sharia

There is, in the West, a stereotypical perception of Sharia as a system, which is considerably discriminatory against women and inhuman in its criminal punishment.

²⁴⁴ Farhad Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence' (2009) 9 *International Criminal Law Review* 595-621, 616

²⁴⁵ *ibid*, 613.

²⁴⁶ H. Abtahi, 'The Islamic Republic of Iran and the ICC' (2005) 3 *Journal of International Criminal Justice* 635-648, 646.

²⁴⁷ *ibid*, 647.

This is only part of why Sharia is seen as a defective system when it comes to protecting human rights.²⁴⁸ Governments may use religion as a cover for other reasons to retain the human rights abuses, such as elimination of actual and potential enemies to the government and to disseminate fear in society while also encouraging a superficial sense of security. Islamic criminal law recognises many of the basic rights of defendants encoded in the Rome Statute, such as the right to freedom from arbitrary arrest, presumption of innocence, and the right to public trial.²⁴⁹ But such rights do not address the more pressing issue of the lack of specificity of the elements of crimes.²⁵⁰ While crimes are circumscribed under Islamic law, elements of crimes are often not codified. Consequently, the criminal justice system is ripe for abuse, especially if there are no real democratic structural or political constraints on the government.²⁵¹

Among Muslims, the interpretations of religion propagated by these regimes are not unchallenged. Some believers are of the opinion that religion and politics ought not to be mixed. Others are in favour of the establishment of an Islamic state, but believe that the introduction of Islamic criminal laws is not justified until a real Islamic society has been created and everybody's basic needs are satisfied.²⁵² The introduction of Islamic criminal law through legislation is a relatively recent phenomenon.²⁵³

Most of the Arab states are about where the Western world was sixty years ago regarding the international criminal law, they agree on the broad outlines of the crimes but disagree on their particulars. These obstacles were eventually overcome in

²⁴⁸ See T. Koraytem, 'Arab Islamic Developments on Human Rights' (2001) 16 *Arab Law Quarterly* 255-262. Raed Abdulaziz Alhargan, 'Islamic Law and International Human Rights Norms' (2013) 9. *Muslim World Journal of Human Rights*. Anthony Chase, 'Liberal Islam and 'Islam and Human Rights': A Sceptic's View' (2006) 1 *Religion & Human Rights* 145-163.

²⁴⁹ See Mohamed Elewa Badar, 'Islamic Criminal Justice in the 21st Century' (2009) 9 *International Criminal Law Review* 591-593.

²⁵⁰ Steven C. Roach, 'Arab States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies* 143-161, 147.

²⁵¹ Michael J. Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study' (2010) iii *Pace Int'l L. Rev. Online Companion*, 16.

²⁵² Rudolph Peters, 'The Islamization of Criminal Law: A Comparative Analysis' (1994) 34 *Die Welt des Islams* 246-274, 254.

²⁵³ *ibid*, 255.

the West during the Nuremberg Trials.²⁵⁴ The situation prevailing now in most of these states is very similar to the situation that existed before the large-scale reception of Western law.²⁵⁵ Unfortunately, the international community has a preconceived notion that Sharia is immutable and unable to evolve to meet the contemporary understanding of crime and justice or to reflect universal human rights. This understanding is inaccurate, and Sharia is subject to evolution to reflect the changes of the times or the changing conditions of society' through the legal methodology, *fiqh*.²⁵⁶

There is a need to establish a globally shared legal framework spanning cross-cultural foundations.²⁵⁷ On the one hand, imposing a secular human right system based on alien Western notions is fundamentally rejected and often met with a hostile reception by most of the Arab states.²⁵⁸ On the other hand is the West's misguided view of Islam which only acknowledges the fundamentalist call for the strict implementation of the Sharia.²⁵⁹ It is this application, spearheaded by the radical Islamist narrative, which is incompatible with the modern human rights system. Human rights violations which have become common place in the Arab and Muslim world must be faced on an international level, as humanity can no longer disclaim responsibility for the fate of human beings in any part of the world.²⁶⁰ In essence, the underlying theme of establishing a compatible Islamic system of human rights, which seeks to relinquish

²⁵⁴ Michael J. Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study' (2010) iii Pace Int'l L. Rev. Online Companion, 30.

²⁵⁵ Rudolph Peters, 'The Islamization of Criminal Law: A Comparative Analysis' (1994) 34 *Die Welt des Islams* 246-274, 254.

²⁵⁶ See more P. J. Riga, 'Islamic Law and Modernity: Conflict and Evolution' (1991) 36 *The American Journal of Jurisprudence* 103-117. Abd Allāh Aḥmad Na'im, *Islam and the Secular State* (Harvard University Press 2008).

²⁵⁷ Bassam Tibi, 'Islamic Law/Sharia, Human Rights, Universal Morality and International Relations', *Human Rights Quarterly* 16 (1994), 285.

²⁵⁸ Edward S. Herman, 'The United States versus Human Rights in the Third World', *Harvard Human Rights Journal*, 4 (1991), 85. 'The United States mostly acts as a source of human rights violations, rather than as a world leader devoted to their elimination' which is one of many factors contributing to Islamic rejection of the secular rights system.

²⁵⁹ Edward Said, *Orientalism*, (London: Penguin Books, 1995), 1-5; see also Halim Rane, 'The Impact of *Maqasid Al-Sharia* on Islamist Political Thought: Implications for Islam-West Relations', *International Institute of Advanced Islamic Studies (IAIS) Malaysia* (2011), 339: "An aversion to values, norms, systems and institutions perceived as 'Western' has since been prevalent in Muslim masses. Colonisation left an intellectual legacy on both Muslim and non-Muslim thinkers characterised by a view of the other as a distinct, contrasting and opposing entity".

²⁶⁰ Abdullah Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, (Syracuse, NY: Syracuse University Press, 1990), 185.

the innocent from gross violations at the hands of strict Islamic law implementation, is to highlight that Islam in its nature does not permit this behaviour. Rather than to highlight Islam's conformity to the Western human rights model which depicts a view that the latter is superior, as this would fundamentally undermine the process of establishing a cross-cultural human rights system which enhances universal peace and justice.

Islam as a religion contains the ability to adapt to contemporary social conditions. It is in this light that a compatible body of law may be established through a medium which demonstrates the *maqasid al-Sharia* (higher goals and purposes). This in the Islamic legal sense acknowledges that legal order is based on and derived from the *Sharia* but is not interpreted to mean that a narrowly defined code of behaviour is to be imposed on society.²⁶¹ Rather, it regards democracy, economic prosperity, good governance, human rights and pluralism as fundamental Islamic objectives.²⁶²

6.8.1 Maqasid al-Shariah

The term *maqsid* (plural: *maqasid*)²⁶³ transfers to purpose, objective, principle, intent and goal.²⁶⁴ As such, the *maqasid* of Islamic law relates to the objectives, purposes and principles which underpin Islamic rulings.²⁶⁵ It is based on the idea that Islamic law is purposive in the sense that it serves to promote the welfare of the people whilst

²⁶¹ Louay Safi, 'The Islamic State: A Conceptual Framework', *The American Journal of Islamic Social Sciences* 8, no. 2 (1991), 227.

²⁶² Halim Rane, 'The Impact of *Maqasid Al-Sharia* on Islamist Political Thought: Implications for Islam-West Relations', *International Institute of Advanced Islamic Studies (IAIS) Malaysia* (2011), 338.

²⁶³ For an elaborate explanation on the development and evolution of the *maqasid al-Sharia*, see Mohamad Hashim Kamali, 'Goals and Purposes (*Maqasid*) of *Shari'ah*: History and Methodology' in *Shari'ah Law: An Introduction* (Oneworld Publications, 2008), 123-141.

²⁶⁴ Mohamed al-Tahir Ibn Ashur, *Ibn Ashur-Treatise on Maqasid al-Sharia*, Mohamed El-Tahir El-Mesawi (trans), vol. 1, (London-Washington: International Institute of Islamic Thought (IIIT), 2006), ii.

²⁶⁵ *Ibid*, 183.

protecting them from harm.²⁶⁶ The *maqasid* is used interchangeably with *al-masalih al-'ammah* (public interest) and denotes that the principles of Islamic law are there for the 'interest of humanity', giving precedence to the latter over an illogical literalist interpretation.²⁶⁷ The relevance of such a concept stems from its embodiment of divine intents and moral concepts upon which Islamic law is based, thus representing the link between Islamic law and contemporary human rights.²⁶⁸ Modern scholarship introduced a universal *maqasid* through direct induction from the primary sources. Over time these contemporary scholars, who recognised the need for reform, expanded the universal application of the *maqasid* in correlation with the prevailing socio-political climate surrounding them.²⁶⁹ The fundamental purposes of the universal principles, derived from the higher values of the Sharia, are to maintain 'orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fitrah*).²⁷⁰ Added to the universal *maqasid* was the maintenance of human dignity and human rights, the equal treatment of women and the development of civilisation (*imran*), the result of which positioned justice and freedom at the top of the *maqasid* hierarchy.²⁷¹ Thus the significance of this innovative approach allows

²⁶⁶ Adis Duderija, *Contemporary Muslim Reformist Thought and Maqasid cum maslaha Approaches to Islamic law: An introduction*, (Palgrave Macmillan, 2014), 2.

²⁶⁷ Abdul-Malik al-Juwaini, *Ghiath Al-Umam Fi Iltiyath Al-Zulam*, Abdul-Azim al-Deeb (eds) (Qatar: Wazarat al-Shu'un al-Diniyah, 1400 H), 253; see also Abu Hamid al-Ghazali, *Al-Mustasfa fi 'ilm ul usul*, (vol. 1, Beirut: Dar al-Kutub al-Ilmiyyah, 1413), 172; Abu Hamid al-Ghazali, *Maqasid Al-Shari'ah Al-Islamiya*, 183; Abu Bakr al-Maliki Ibn al-Arabi, *Al-Mahsoul Fi Usul Al-Fiqh*, Hussain Ali Alyadri and Saeed Foda (eds), vol. 5 (1st edn, Amman: Dar al-Bayariq, 1999); Al-Amidi, *Al-Ikham*, vol. 4, 286.

²⁶⁸ Jasser Auda, *Maqasid Al-Sharia as Philosophy of Islamic Law: A Systems Approach*, (London-Washington: The International Institute of Islamic Thought, 1428 AH/2007 CE); see also Jasser Auda, *Maqasid Al-Sharia: An Introductory guide*, (London-Washington: The International Institute of Islamic Thought, 2008).

²⁶⁹ For the past and present work of the *maqasid*, see Al Tirmidhi Al-Hakim's *Al-Salah wa Maqasiduba* in Ahmad al-Raysuni, *Nazariyyat al-Maqasid 'ind al-imam al-Shatibi*, (1st edn, Herndon: IIIT, 1992); Abu Zayd Al-Balkhi's *al-ibanab 'an ;ilal al-Diyanah/masalih al-Absan wa al-Anfus* in Muhammad K. Imam, *Al-dalil al-irshadi Ila Maqasid al-Shariah al-Islamiyyah*, (London: Maqasid Research Centre, 2006); Ibn Babawayh al-Qummi's *'Ilal al-Sharia* in Ed. Mohammad Sadiq Bghar al-ulum (Najaf: Dar al Balaghah, 1966); Abu Al-Ma'ali Al-Juwayni's *Al-Burhan fi usul al-Fiqh* in Ed. Abdul al Azim al-Deeb (Mansurah: Al-Wafa, 1998); Al-'Izz Ibn Abd Al-Salam, *Qawa'id al-Ahkam fi masalih al-Anam*, (Beirut: Dar al-nashr, n.d.); Al-Shatibi, *Al-Muwafaqat fi usul al-Sharia*, (Misr: Matba'at al maktabah al-tujariyah, 1920); R. Rida, *Al-Wahi al-Mohammadi: Thubut al-Nubuwwah bi al-Quran*, (Cairo: Mu'asasah 'izz al-din, n.d.).

²⁷⁰ Al-Tahir Ibn Ashur, *Maqasidid al-Shariah al-Islamiyyah*, Mohamed el-Tahir Mesawi (Kuala Lumpur: al-Fajr, 1999), 183.

²⁷¹ Mohammad Rasheed Rida, *Al-Wahi Al-Muhammadi: Thubut Al-Nubuwwah Bil-Quran*, (Cairo: Mu'asasat Izziddin, without date), 100; see also Jamal Atiyah, *Nahwa Taf'Il Maqasid al-Sharia*, (Amman: Al-Ma'had al- 'Alami li al-Fikr al-Islami, 2001), 49; Yusef al-Qaradawi, *Kayf Nata'amal*

for the fusion of the scripts and contemporary needs by which the method of induction from the sources produces a multi-dimensional structure, consisting of levels of necessity, scope of rulings, scope of people, and levels of universality to allow for reform and development of Islamic law.²⁷² The induction-orientated approach produces a departure from the literalist body of *fiqh* literature of the legal schools whose immutable approach to the teachings of Islam remains Islam's biggest contemporary hurdle. At this point it is important to note that compliance with matters of *ibadat* (worship) are absolute and immutable in accordance with the traditions of Islam. Whereas, the consideration of purposes is permissible in matters of *mu'amalat* (worldly dealings).²⁷³ In essence, the shortfalls arising from the legal theory of the *usul al-fiqh*, which has in some part failed to establish a contemporary law making system, can potentially be overcome through the medium of the *maqasid al-Sharia*.²⁷⁴

The inherited premodern Islamic tradition in contemporary society, with regard to Islamic law and its underlying world view, episteme, and various methodologies underpinning this body of thought are not adequately equipped to meet the global challenges of today's Muslims.²⁷⁵ To establish a compatible system of human rights between Islam and the West which is feasible in both theory and practice would require a *maqasid*-orientated Islamic reformation. This approach can be observed among Turkey's Justice and Development Party (AKP) who possess a progressive political programme that covers fundamental rights and freedoms, as well as Malaysia's People's Justice Party (PKR) and Indonesia's Prosperous Justice Party (PKS) whose proposed policies advance justice, human rights, education, government

Ma'a Al-Quran Al- 'Azeem? (1st edn, Cairo: Dar al-Shorouk, 1999); Tahir Jabir al-Alawani, *Maqasid Al-Sharia*, (1st edn, Beirut: IIIT and Dar al-Hadi, 2001), 25.

²⁷² Jasser Auda, *Maqasid Al-Sharia: An Introductory guide*, (London-Washington: The International Institute of Islamic Thought, 2008), 10. For a historical example of this approach, see Mohamed Biltaji, *Manhaj Omar Ibn Al-Khatab Fil Tashree'*, (1st edn, Cairo: Dar al-Salam, 2002), 190. "Second Caliph Omar thought that applying prescribed punishment for theft, while people are in need of basic supplies for their survival, goes against the general principle of justice. Which he considered fundamental".

²⁷³ Abu Ishaq *Al-Muwafaqat fi 'Usul al-Sharia*, Abdullah Diraz (eds) (Beirut: Dar al-Ma'rifah, no date) vol. 2, 6.

²⁷⁴ Mohammad Hashim Kamali, 'Issues in the Legal Theory of *Usul* and the Prospects for Reform', *Islamic Studies* 40 (2001), 1-21; Mohammad Hashim Kamali, 'Methodological Issues in Islamic Jurisprudence', *Arab Law Quarterly* 2 (1996), 1-34; Mohammad Hashim Kamali, '*Maqasid Al-Shar'ah: The Objectives of Islamic Law.*' *Islamic Studies* 38 (1998), 193-209.

²⁷⁵ Adis Duderija, *Contemporary Muslim Reformist Thought and MAqasid cum maslaha Approaches to Islamic law: An introduction*, (Palgrave Macmillan, 2014), 1

accountability and transparency.²⁷⁶ Positive developments in Muslim states such as these are often eclipsed by consistent emphasis in the media of horrifying events occurring in other parts of the Muslim world.²⁷⁷ Yet these states, whose genesis was far from secular, have a genuine Islamic foundation underpinning a genuine internalisation of democracy and human rights concepts. This is not to say that in these Muslim states human rights violations do not occur frequently and systematically, as that is the hard truth of the matter, but the root of these violations do not find their justification in the principles of the Sharia. Rather they occur due to the political will of governments who act to maintain their power through preservation of the current status quo. This prohibits the very nature of the Sharia as a potential means for reform in the interest of human rights.²⁷⁸

Thus, the *maqasid*-orientated approach is holistic in the sense that it does not restrict itself to one narration or view, but rather focuses on the implementation of the higher purposes of unity, reconciliation and justice.²⁷⁹ The adaptability of Islamic law which underpins this approach is paramount to the progression of Islam and its compatibility with the secular world. This approach, which would take precedence over the literalist applicability of the *usul al-fiqh*, would create a departure from the method of interpreting narrations as absolute and unconditional. However, it is beyond the ambit of this thesis to devise a methodology for the universal adoption of the *maqasid* in the Muslim world. It must be noted that until there is a global readiness to accept such a reform, the literalist application of the Sharia, which utilises theological abrogation as a tool for religious legitimacy, renders it near impossible to establish a compatible system of human rights. Yet at the heart of the Sharia, devoid of its historical, geographical and socio-political influence, lies a body of law, which is not just limited

²⁷⁶ Halim Rane, 'The Impact of *Maqasid Al-Sharia* on Islamist Political Thought: Implications for Islam-West Relations', *International Institute of Advanced Islamic Studies (IAIS) Malaysia* (2011), 352.

²⁷⁷ 'Preface', in Jan Michiel Otto (eds), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010), 13.

²⁷⁸ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study*, (London: British Institute of International and Comparative Law, 2008), 173-175.

²⁷⁹ Jasser Auda, *Maqasid Al-Sharia: An Introductory guide*, (London-Washington: The International Institute of Islamic Thought, 2008), 12.

to its compatibility, but has the potential to enhance a cross-cultural system of universal human rights.²⁸⁰

6.9 Conclusion

This chapter examined and analysed the relation between Sharia, international criminal law and human rights in different aspects. The principles of Sharia are, in most cases, compatible with the Rome Statute and both share the same values and norms. There is no conflict in the main objectives of the Statute and Sharia in regards to protecting serious violations of human rights, achieving justice and ending impunity. Islam as a religion and Sharia as a legal system both promotes and contributes to the restoration of peace and prevention of crimes and acts of violence. It is apparent that the current application of Sharia, in some states, could be contrary to such principles and values, but this is mainly due to governments' incorrect interpretations. If the situation in these Arab states continues as it is, the Rome Statute provisions will contradict with Sharia and could affect the ratification process. Moreover, the ICC may have jurisdiction over cases from these states due to the human rights violations. The current application of Sharia in some Arab states could be an obstacle to joining the ICC. Reforms to Sharia by implementing modern interpretation to the jurisprudence and principles would be an effective way. The Sharia, as a legal system, allows for such an approach to be adopted and it is in fact adopted in other branches of law. But the issues of human rights and the questions about reforms have always met with reluctance from several governments. In order to establish a compatible body of law with that of the modern law of nations, a positive discourse which opens the gates of rational interpretation must be made. This will allow for an effective analysis which objectively addresses the flow of thought

²⁸⁰ For an example, see Ebrahim Moosa, 'Islam and Human Rights in South Africa' in 'The Dilemma of Islamic Rights Schemes', *Journal of Law and Religion*, Vol. 15, No. 1/2, (2001), 211-214.

between Islam and the West, seeking to inaugurate a compatible system which is mutually enhancing. With the growing importance of the Islamic world in the global community, this is absolutely paramount in order to achieve the objectives underpinning international law; that is the attainment of humanity's fundamental goals of advancing peace, prosperity and human rights. The next chapter will discuss and examine selected Arab states' approaches towards the Rome Statute, relative to the ICC, and the status of international criminal justice within these states.

Chapter Seven: Case Studies

7.1 Introduction

This chapter takes the form of case studies of selected Arab states, and examines their main constraints and challenges to ratification and implementation, taking into consideration the political situation, legal framework and geographical and social contexts involved. The chapter is divided into two parts. The first part will discuss and cover the Arab Member States of the ICC - namely Jordan, Tunisia, Comoros, and the most recent member, Palestine - as well as briefly reviewing the position of the ICC in those states. The second part covers some of the Arab Non-member States, Sudan and Libya, who have cases before the ICC, and a final section on Egypt. This will discuss Egypt's attempts to incorporate international criminal law into its domestic legislation and its relation with the ICC, as Egypt's position has a special impact and importance on the whole region.

The renewed engagement of Arab states with international criminal justice issues has been propelled by the Arab Spring. The current level of engagement by Arab states with the ICC is unprecedented. In the early days of the Arab Spring, issues of justice and accountability were front and centre. Within days of Tunisian President Zine Al-Abidine Ben Ali being pushed from power, an arrest warrant was issued for him, and Tunisia declared that it would ratify the Rome Statute. Egypt has also expressed its desire to ratify the Statute, and has taken steps towards putting ousted leader Hosni Mubarak on trial. The UN Security Council referred Libya to the ICC, and the Prosecutor requested arrest warrants for Gaddafi, his son Saif al-Islam and the ex-head of intelligence services. The conflicts in Bahrain, Syria, Iraq and Yemen have also led to calls for applying justice.

Chapter two examined examples of civil and common law states, including Muslim states, which have ratified and implemented the Rome Statute. The state's domestic

legal systems create different tendencies with respect to their willingness to join adjudicatory bodies and the intention of their commitments to international courts. States use materials about the similarities between the Court's main principles and their domestic legal rules to aid their decision about whether to recognize the Court's jurisdiction. Thus, they tend to push for rules and procedures that imitated those of their domestic legal systems to help reduce uncertainty regarding the Court's future decision-making processes.¹

Figures show that common and civil law states were keen to join the ICC, after the negotiations of the Statute, in comparison to Islamic law states. This is a result of the nature of the Court's, which is mainly compromised from common and civil law systems.² The domestic legal systems influenced the decisions of the negotiating states to join the ICC after its creation. Some scholars describe the Rome Statute as a true compromise between common and civil legal traditions,³ but the third major legal tradition of the world, Islamic law and its differences with Western legal systems constituted a large obstacle at the Rome Conference and was largely neglected in the negotiations. Since the Islamic legal tradition is the least widespread among the three major legal systems of the world, Islamic law states constituted by far the smallest group amongst the negotiators.⁴ Thus, their negotiating power in comparison with civil or common law states was much smaller.

The growing influence of Islamic law on the national legislation and jurisprudence of Muslim and Arab states, and the growing number of international criminal cases in the Arab world raises the question of compatibility of the set of principles and provisions of the international criminal law with Islamic law. The Rome Statute,

¹ Emilia Justyna Powell and Sara Mitchell, 'The Creation and Expansion of the International Criminal Court: A Legal Explanation', *Midwest Political Science Association Conference* (2008), 2.

² *ibid*, 3.

³ See Vladimir Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"' (2004) 15 *Criminal Law Forum*; Mauro Politi and Federica Gioia, *The International Criminal Court and National Jurisdictions* (1st edn, Ashgate 2008).

⁴ In 1998, the year that the Rome Statute was signed, the distribution of domestic legal families was as follows: 51% civil law states, 25% common law states, 14% Islamic law states, and 10% mixed law states, cited in Emilia Justyna Powell and Sara Mitchell, 'The Creation and Expansion of the International Criminal Court: A Legal Explanation', *Midwest Political Science Association Conference* (2008).

which embodies the modern form of international criminal law, opens the door for the application of Islamic law principles in its Article 21(1)(c), but on a subsidiary basis. Out of the present 124 State Parties to the Statute, 24 are members of the Organization of Islamic Cooperation (OIC),⁵ which means that about 20% of the ICC Member States have an Islamic background.

7.2 Member States

To date, Jordan, Comoros, Djibouti,⁶ Tunisia, and Palestine are the only Arab States Parties to the Rome Statute. This part discusses all these states except Djibouti.

7.2.1 Jordan

Jordan is a Muslim state,⁷ the constitution stipulates that the state religion is Islam, but provides for the freedom of other practices. In 1956 the Jordanian National Assembly adopted a new criminal code and code of criminal procedure. Both were based on the Syrian and Lebanese codes, which in turn were modelled on French counterparts. Within the realm of criminal jurisprudence, Jordan retained only nominal application of sharia.⁸ Although Jordanian legislation is based on European Laws, Sharia remains in effect for matters concerning personal status. The Jordanian civil court system hears all civil and criminal matters that do not fall under one of the special courts. The religious courts in Jordan have jurisdiction solely over personal

⁵ These states are Afghanistan, Albania, Bangladesh, Benin, Burkina Faso, Chad, Comoros, Djibouti, Gabon, Gambia, Guinea, Guyana, Jordan, Maldives, Mali, Niger, Nigeria, Palestine, Tajikistan, Tunisia, Senegal, Sierra Leone, Suriname, and Uganda.

⁶ Djibouti signed the Rome Statute on 7 October 1998. Djibouti deposited its instrument of ratification of the Rome Statute on 5 November 2002, becoming the 82nd State Party to the Rome Statute.

⁷ The Jordanian Constitution (1952) Art. 2. This Article states that '[i]slam is the religion of the State'.

⁸ See more Cindy Moors, Jordan: A Modern Criminal Justice System Amidst Turmoil, 15 *Crime and Justice International* 27, Apr. 1999, <<http://www.cjimagazine.com/archives/cji56d0.html?id=283>> accessed 13 September 2016.

matters. These include areas of family law such as marriage or divorce, child custody, adoption, and inheritance matters. Each major religious group administers its own religious laws. For example, the Sharia court system is used for Muslim citizens, while Christian sects have religious councils that fulfil a similar purpose. The Sharia court, which has family law jurisdiction for Muslims, applies Islamic law adhering to the Hanafi school of Islamic jurisprudence, except in cases that are explicitly addressed by civil status legislation. The other courts in Jordan are limited to specialized or specific jurisdictions. For example, the military court deals with offenses involving military personnel and with national security crimes. There was no evident concern regarding Sharia during the ratification and implementation process of the Rome Statute in Jordan. This was confirmed by the Interpretive Declaration upon signing the Statute affirming that “the Government of the Hashemite Kingdom of Jordan hereby declares that nothing under its national law including the Constitution is inconsistent with the Rome Statute of the International Criminal Court. As such, it interprets such national law as giving effect to the full application of the Rome Statute and the exercise of relevant jurisdiction thereunder.”⁹ As for the status of international law in Jordan, the Court of Cassation of Jordan has ruled that international law has supremacy over national law and that the former should be applied in case of a conflict between the two.¹⁰

Jordan signed the Rome Statute on 7 October 1998 and deposited its instrument of ratification of the Rome Statute on 11 April 2002,¹¹ by enacting the International Criminal Court Ratification Law Number 12 of 2002.¹² Article 2 of this law stipulates that the Rome Statute, annexed to the law, is ‘valid and effective’, which means that it becomes part of Jordanian law. After the ratification of the Rome Statute, the

⁹ United Nations, Treaty Series, vol. 2187, p. 3; depositary notifications C.N.577. 1998.TREATIES577. 1998.TREATIES-8 of 10 November 1998 and CN.604. 1999.TREATIES604. 1999.TREATIES-18 of 12 July 1999.

¹⁰ See for example Court of Cassation ruling 4211/2004 of 15 May 2005, Decision No. 2294/2006 Date 31/3/2007 and Decision No. 3569/2000 Date 20/3/2001. See also article 24 of the Civil Code.

¹¹ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&lang=en> accessed 11 April 2014.

¹² Ibrahim Aljazy, ‘The Implementation of International Criminal Law in Arab States: The Jordanian Experience’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing, Ltd 2011).

‘Committee for the legal harmonization of Jordanian law with the ICC Rome Statute’ was established pursuant to a resolution by the Council of Ministers in August 2002.¹³ The main task of the Committee was to prepare the requisite legal reforms, namely by reviewing national law and proposing amendments with a view to adopting legislation in conformity with the Rome Statute. Several laws were reviewed and amended to ensure such harmony, including the Penal Military Code, which was amended by means of Penal Military Code Number 30 of 2002 and Number 58 of 2006.¹⁴ Jordan has taken significant steps towards incorporating the Statute into its domestic legal system; particularly in the form of draft laws. The work of the Committee has also comprised a new law known as the Law of the National Court for International Crimes, the first draft was completed in 2008, but further revisions are still being made.¹⁵

7.2.1.1 The Jordanian Draft Law

Article 2 of the draft law provides that international crimes are any of those crimes recognised in the Rome Statute - genocide, crimes against humanity and war crimes – also, referring to any other crime included within the ICC’s jurisdiction unless the crime was subject to a reservation by Jordan, which can be understood as an indirect reference to the crime of aggression. Article 11 of the draft law reproduces the definition of the crime of genocide as stipulated in Article 6 of the ICC Rome Statute verbatim. Article 12 reproduces the definition of crimes against humanity found in Article 7(1) (a-j) of the Statute, however, omitting the text of Article 7(1)(k), namely “[o]ther inhumane acts of similar character intentionally causing great suffering, or

¹³ Prime Ministry, The Hashemite Kingdom of Jordan, <http://www.pm.gov.jo/arabic/index.php?page_type=decision&part=4&id=10> accessed 20 July 2015.

¹⁴ The Military Criminal Code no. 43 of 1952 was replaced by Military Criminal Code no. 30 of 2002 and by the law no. 58 of 2006. Jordanian Military Penal Code 58 (2006), Official gazette, No. 4790, 11.01.2006, p. 4274-4293 No. 58 of 2006, available in Arabic at < <https://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/69FA2185B09E0DB6C12576A20036241E/TEXT/Jordan%20-%20Military%20Criminal%20Code%2C%202006%20%5Bara%5D.pdf>> accessed 20 July 2015.

¹⁵ Ibrahim Aljazy, ‘The Implementation of International Criminal Law in Arab States: The Jordanian Experience’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing, Ltd 2011) 183.

serious injury to body or to mental or physical health". This reflects concerns that the broad definition contained in Article 7(1)(k) of the Rome Statute may prompt national judges to find that certain conduct of the country's justice system constitutes crimes against humanity, contrary to the intention of the legislature.¹⁶

Articles 13-16 of the draft law also provide for a detailed description of war crimes, including crimes against persons, attacks on property, on humanitarian operations and their emblems, and several crimes relating to the methods of combat which apply to both international and non-international armed conflict in line with Article 8 of the Rome Statute. In addition to the provisions included in the draft law, the Jordanian Penal Military Code number 58 (2006) also deals with war crimes, and includes Article 41 of the Penal Military Code, which was inserted with a view to implementing the Rome Statute, and sets out a list of acts that are considered war crimes if committed during armed conflicts.¹⁷ These provisions were amended in connection with Jordan's accession to the Rome Statute of the International Criminal Court in order to bring Jordan's Military Criminal Code in accordance with Jordan's international obligations. Article 41 of the Penal Military Code is compatible with Article 8 of the Rome Statute. However, unlike the Rome Statute, Jordanian law imposes the death penalty for some of the listed war crimes, notably crimes related to arrest, detention, torture and inhuman treatment, if these offences lead to the death of the victim.¹⁸ The death penalty is also prescribed as the penalty for persons who incite and participate in the listed war crimes.

Distinct from the penalties stipulated in Article 77 of the Rome Statute, which envisages a maximum of life imprisonment, the crimes recognised in Article 11-16 of the draft law are subject to the death penalty or permanent hard-labour only. Moreover, persons contributing to the commission of the crime, such as by instigating it, assisting the main perpetrator(s), or acting as co-perpetrators, are subject to the same penalties as those provided for the actual perpetrator. Importantly, the draft law

¹⁶ *ibid*, 186.

¹⁷ Article 44 of the law states that this is not limited to the military personnel covered by the law, but equally applies to civilians.

¹⁸ See Article 41 and 42 of the Penal Military Code.

also recognises that military commanders or superiors are liable on the grounds of command or superior responsibility for the failure to prevent or suppress the commission of crimes falling within the law's scope, and are subject to the same penalties as set out above if found guilty.¹⁹

According to the draft law, the public prosecutor has the power to prosecute the crimes set out in Articles 11-16 of the draft law and provides for the establishment of a special National Court for International Crimes in Jordan to be tasked with the hearing of criminal trials pertaining to such crimes. The envisaged court shall be composed of a number of civil and/or military judges. The appointment of military judges in the court's structure gives rise to concerns regarding their impartiality, particularly regarding whether they can remain independent from pressure applied by their military superiors. This point is of particular significance when considering that many of the individuals accused of or prosecuted for international crimes may have been part of the military in the countries concerned, often either as army generals or other high-ranking army leaders.²⁰

Article 8 of the draft law gives the court jurisdiction over: (1) persons who commit any of the crimes stipulated in this law inside the kingdom; (2) Jordanian nationals who commit any of the crimes stipulated in this law outside the kingdom; (3) foreign nationals who reside as permanent residents in the kingdom and who commit any of the crimes stipulated in this law outside the kingdom where no extradition has been accepted or requested pursuant to the provisions of the Rome Statute. It therefore recognises territorial jurisdiction, the active personality principle and a limited form of extraterritorial jurisdiction.²¹ However, the requirement of permanent residence in Article 8(3) sets a high threshold that leaves foreseeable gaps in relation to other foreign nationals present in Jordan, who may not be extradited to stand trial abroad, in

¹⁹ Ibrahim Aljazy, 'The Implementation of International Criminal Law in Arab States: The Jordanian Experience' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing, Ltd 2011).

²⁰ Ibrahim Aljazy, 'The Implementation of International Criminal Law in Arab States: The Jordanian Experience' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing, Ltd 2011) 187.

²¹ *ibid*, 188.

particular, where such an extradition would lead to sending a person to another state where he or she may be at risk of torture or other ill-treatment.²² The final part of the draft law includes some general provisions that are similar to those included in the Arab Model Law on crimes within the ICC jurisdiction.²³ Importantly, it provides that statutes of limitation shall not apply in relation to the prosecution of crimes and the execution of punishment for the same, that fall within the scope of the draft law.

Jordan's ability and willingness to adopt and apply effective implementing legislation fulfils its obligations towards the ICC, and although there are some shortcomings in the light of international standards, such as omissions relating to crimes against humanity, the provision of the death penalty for international crimes and the role assigned to military courts. Nevertheless, the steps Jordan has taken towards implementation of the Statute are considered an achievement for Jordan and the whole region.

7.2.2 Tunisia

Tunisia deposited its instrument of accession of the Rome Statute on 24 June 2011,²⁴ and in doing so became the 32nd African state, the first North African state, and the fourth member of the Arab League to become a State Party. Tunisia went still further than some other State Parties and, acceded to the Agreement on Privileges and Immunities of the ICC on 29 June.²⁵ However, Tunisia has not ratified the Amendment to Article 8 of the Rome Statute, which was adopted on 10 June 2010 by

²² The US Government has pressured Jordan to enter a Bilateral Immunity Agreement since August 2003. For the agreement to enter into force, it must be ratified by Jordan's parliament. On July 14, 2005 the lower house rejected it by an overwhelming majority, concluding that it is contrary to Jordan's obligations under the Rome Statute, however, in 2006 the upper house decided to approve it.

²³ Decree no. 598-21d-29/11/2005 regarding the Arab Model Law Project on Crimes within ICC Jurisdiction. See unofficial translation provided by the Coalition for the International Criminal Court at <https://www.iccnw.org/documents/ArabLeague_ModelImplementationLaw_29Nov05_en.pdf> accessed 12 June 2015.

²⁴ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 11 April 2014.

²⁵ *ibid.*

Kampala Review Conference of the Rome Statute,²⁶ nor has it adopted the Amendments on the crime of aggression to the Rome Statute (also adopted at the Kampala conference).²⁷ Tunisia's domestic legal framework has not yet been revised to reflect its obligations under the Rome Statute.²⁸ To date, there is no draft legislation to implement the Rome Statute but Tunisian parliamentarians are seeking technical and political assistance to proceed with the drafting of Rome Statute legislation.²⁹

Now that Tunisia has ratified the Rome Statute, it is obliged to implement effective laws for cooperating comprehensively with the ICC and meeting its obligations, further strengthening its commitment to human rights and the victims of abuses. Implementing the Rome Statute would strengthen the transitional justice mechanism by serving as a model to improve national legislation on various topics, including substantive elements of international crimes and modes of criminal responsibility.

7.2.2.1 Tunisia's Transition

In the years since the fall of former leader Zine Al-Abidine Ben Ali and the appointment of the Constituent Assembly in 2011, people in Tunisia have been seeking justice and reparation for past wrongs.³⁰ Civil society has flourished since the revolution, reclaiming its proper role and forming new groups and organisations. However, under the former Tunisian regime, civil society and other actors have had limited exposure to issues such as justice, accountability and reparation for human

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Human Rights Watch, Tunisia: Reform Legal Framework to Try Crimes of the Past, 3 April 2014 <<http://www.hrw.org/news/2012/05/03/tunisia-reform-legal-framework-try-crimes-past>> accessed 4 May 2015.

²⁹ Parliamentarians for Global Action, Rabat 2012, 5th Meeting - Universality of the Rome Statute in the Middle East and Mediterranean Conference <<http://www.pgaction.org/campaigns/icc/me-med/tunisia.html>> accessed 5 May 2015.

³⁰ Amnesty International, Tunisia Continues Human Rights Abuses in the Name of Security, 20 August 2009, available at: <<http://www.refworld.org/docid/4a8d54af20.html>> accessed 15 August 2015.

rights violations. To tackle these issues now, the awareness and understanding of transitional justice challenges must be increased and strengthened.³¹

A number of NGOs have gathered together and taken up the initiative of providing the support needed to increase and build up knowledge on transitional justice issues in Tunisia and strengthen the capacity of key actors.³² By organising activities like training seminars,³³ advanced courses and follow-up sessions, such activities have focused mainly on civil society groups. These include individual actors and NGOs involved in work related to transitional justice and human rights. In addition to participants from the media, the judiciary, legal professionals and academics, policy and decision-makers, political parties and members of the Constituent Assembly, have become members of institutions and commissions working on areas relevant for transitional justice. Such processes will contribute to raising awareness about this topic, reinforcing key actors and civil society to advocate effectively at the political level. They will play a dynamic role in supporting transitional justice processes. Implementation of the Rome Statute would strengthen the transitional justice mechanism by serving as a model to improve national legislations.

Although Tunisia did not witness severe conflicts during the Arab spring, compared to other neighbouring states, the approach Tunisia adopted was very effective. The decision to accede to the Rome Statute and seek assistance from international experts to incorporate international crimes into their domestic legislation, to examine existing legislations and amend their legal system with the aim of enhancing justice, is a process that should be adopted by other Arab states.

³¹ Human Rights Watch, Tunisia: A Move against Human Rights Defenders, 17 June 2010, available at: <<http://www.refworld.org/docid/4c2073ba1e.html>> accessed 15 August 2015.

³² Tunis, December 2011, the Transitional Justice Academy was publicly launched by its founding partners Al-Kawakibi Democracy Transition Center (KADEM) and the Arab Democracy Foundation (ADF), in partnership with No Peace Without Justice (NPWJ) and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ); See more <<http://www.npwj.org/node/3602#sthash.f51d4LwF.dpuf>> accessed 15 August 2015.

³³ On 20 June 2013, a conference on the topic “Transitional and International Justice in the Arab Region”, was held in Tunisia. The Conference saw the participation of the Prosecutor of ICC, Ms Fatou Bensouda.

7.2.2.2 Current Status of Tunisian Legislation

Tunisia has not implemented the Rome Statute as of yet, but the current domestic legislation covers some of the international crimes defined in the Statute. Tunisia is a signatory of the CAT,³⁴ in which ratified states have treaty obligation to incorporate crime of torture into domestic law. The Tunisian Penal Code covers all international criminal offences,³⁵ in addition to terrorism, which is regulated by the Counter-Terrorism Law 2003.³⁶

Tunisia also ratified the Optional Protocol to the CAT on the 29 June 2011,³⁷ which contains, among others, the obligation for State Parties to establish National Preventive Mechanisms against the use of torture. Tunisia is thereby the first Arab state to establish this body under the Optional Protocol.³⁸ Article 23 of the Tunisian Constitution establishes the prohibition of torture and confirms that “The state protects human dignity and physical integrity, and prohibits mental and physical torture, crimes of torture are not subject to any statute of limitations.”³⁹

Article 101 of the Tunisian Penal Code prohibits the use of violence against individuals by public officials or similar in the course of or in connection with the performance of their duties, punishing these acts with five years of imprisonment.⁴⁰ Torture is defined in this article as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from them or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected to have committed, intimidating or coercing him or a third person, or when pain or suffering is inflicted

³⁴ Adopted by General Assembly resolution 39/46 of 10 December 1984. Tunisia ratified the Convention against Torture on September 23, 1988.

³⁵ Penal Code was adopted on 6 June 2005 by the Law 2005-46.

³⁶ Loi no 2003-75 du 10 decembre 2003 relative au soutien des efforts internationaux de lutte contre le terrorisme et a la répression du blanchiment d’argent.

³⁷ Adopted by General Assembly Resolution A/RES/57/99 of 18 December 2008,

³⁸ UN Press, *UN rights office welcomes Tunisian law on national anti-torture body*, 11 October 2013 <http://www.un.org/apps/news/story.asp?NewsID=46247#.U_27bmPCp6Y> accessed 3 June 2015.

³⁹ The Tunisian Constitution of 2014 was adopted on January 27, 2014 by the Constituent Assembly elected on 23 October 2011.

⁴⁰ Incorporated by the Law 99-89, 2 August 1999.

for any reason based on discrimination of any kind.”⁴¹ This definition is similar to the definition of torture found in Article 7(2)(e) of the Rome Statute.

The UN Committee against Torture, in its general comment on the Convention against Torture stated that “[t]hose exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.”⁴² In addition, Tunisia’s membership in the ICC requires it to adopt the principle of criminalising command responsibility for torture, in instances in which the torture in question is so widespread and systematic in nature that it meets the criteria of a crime against humanity.

Tunisian law is not well-equipped enough to address command or superior responsibility, the legislation provides that persons can be held criminally accountable only for the direct commission of a crime or for complicity in it.⁴³ Article 32 of the Penal Code sets out the meaning of complicity, which can take the form of either facilitating the commission of the crime by aiding, abetting or assisting, giving instructions to commit it, or conspiring with others to fulfil the criminal purpose. Such forms of criminal responsibility do not cover the liability known in international law as command or superior responsibility.⁴⁴

On 22 October 2011, the interim government promulgated an amendment to the Penal Code’s provisions on torture that introduced a statute of limitations of fifteen years from the time of the commission of the offense, after which prosecutions cannot be

⁴¹ See also: ‘Tunisia: Torture Prevention Mechanism in new constitution’, Association for the Prevention of Torture (APT), 22 May 2012, available at < http://www.apr.ch/en/news_on_prevention/tunisia-mechanism/#.ViAVBLwfeV4> accessed 16 August 2015.

⁴² General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2/CRP. 1/Rev.4, 23 November 2007.

⁴³ Human Rights Watch, Flawed Accountability Shortcomings of Tunisia’s Trials for Killings during the Uprising, 12 January 2015 < <https://www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> > accessed 16 August 2015.

⁴⁴ *ibid.*

brought. Before this amendment, torture as a crime under Tunisian law had a statutory limitation of ten years, as for all other crimes. However, international customary law has long recognised that a statute of limitations should not apply to serious violations of human rights.⁴⁵

7.2.3 Comoros

On 18 August 2006, the Union of Comoros deposited its instrument of ratification of the Rome Statute which entered into force on 1 November 2006.⁴⁶ The Comoros then ratified the Rome Statute and enacted legislation on cooperation on 7 February 2007.⁴⁷ However, substantive provisions, particularly the definitions of crimes, were missing. A new draft law was aimed at amending the Decree 07-013 in order to fully implement the principle of complementarity, but parliament did not deal with the amended bill for more than a year until legislation n.11-022/AU implementing the Rome Statute, covering both cooperation and complementarity, was adopted by Parliament on 13 December 2011. The legislation is considerably progressive and broader than the Rome Statute in significant aspects, including the explicit prohibition of amnesties, universal jurisdiction and superior orders.⁴⁸ The Comorian implementing legislation also provides for the creation of a trust fund for victims, effective provisions for the protection of victims and witnesses, and on the freezing of assets.⁴⁹

⁴⁵ Human Rights Watch, Tunisia: Reform Legal Framework to Try Crimes of the Past, 3 May 2012 <<http://www.refworld.org/docid/4fa3a9602.html>> accessed 16 August 2015.

⁴⁶ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 11 April 2014.

⁴⁷ Decree No. 07-013/PR promulgating Law No. 07-002/AU on Cooperation with the International Criminal Court.

⁴⁸ Amnesty International, Comoros: Analysis of the Draft Implementing Legislation of the Rome Statute of the International Criminal Court, 1 December 2007 <<https://www.amnesty.org/en/documents/AFR21/001/2007/en/>> accessed 20 August 2015.

⁴⁹ Parliamentarians for Global Action (PGA), Conference on Implementing Legislation of the Rome Statute of the ICC in African Indian Ocean Countries, February 25-26, 2010, National Assembly of the

7.2.3.1 Communication with the ICC

On 14 May 2013, the OTP received a referral on behalf of the authorities of the Comoros with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip.⁵⁰ On the same day, the Prosecutor announced that her office had opened a preliminary examination into the situation, and the Presidency assigned the situation to Pre-Trial Chamber I on 5 July 2013.

Of the eight vessels in the flotilla, only three were registered in states that were parties to the Rome Statute. The Court has territorial jurisdiction under Article 12(2)(a) of the Rome Statute (“State of registration of that vessel”) over crimes committed on board these three vessels, registered respectively in the Comoros (the *Mavi Marmara*), Cambodia (the *Rachel Corrie*), and Greece (the *Eleftheri Mesogios/Sofia*). Cambodia and Greece have been States Parties to the Rome Statute since 11 April 2002 and 15 May 2002, respectively.⁵¹ The situation forming the subject of the referral began on 31 May 2010 and encompasses all alleged crimes flowing from the interception of the flotilla by Israeli forces, including another related interception of the *Rachel Corrie* on 5 June 2010.⁵²

The OTP has concluded that there was a reasonable basis to believe that war crimes under the jurisdiction of the ICC were committed on one of the vessels, the *Mavi Marmara*, when Israeli Defence Forces intercepted the ‘Gaza Freedom Flotilla’ on 31 May 2010. However, after carefully assessing all relevant considerations, the OTP concluded that the potential case(s) likely to arise from investigating this incident

Union of Comoros, Moroni < <http://www.pgaction.org/news/conference-on-implementing-legislation-of-the-rome-statute-of-the-icc-in-african-indian-ocean-countries.html> > accessed 20 August 2015.

⁵⁰ See Referral of the Union of Comoros with respect to the 31 May 2010 Raid on the Humanitarian Aid Flotilla bound for Gaza Strip and attached Letter from Elmadağ Law Firm to Fatou Bensouda, Prosecutor of the International Criminal Court, 14 May 2013. (“Comoros Referral”), para. 25, available at <<http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>> accessed 21 April 2014.

⁵¹ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 11 April 2014.

⁵² BBC News, *Israel Diverts Gaza Aid Ship Rachel Corrie to Ashdod*, 5 June 2010 <<http://www.bbc.co.uk/news/10245176> > accessed 12 August 2015.

would not be of “sufficient gravity” to justify further action by the ICC.⁵³ The OTP concluded that the legal requirements to open an investigation under the Rome Statute were not met and announced that the preliminary examination had been closed. Under the Rome Statute, the referring state, in this case the Union of the Comoros has the right to request the judges of the ICC to review the Prosecutor’s decision not to proceed to open an investigation, pursuant to Article 53(3)(a) of the Statute.⁵⁴

Although this is legally permissible under Article 53(3)(a) of the Rome Statute, it has to be said that the powers of judicial review on prosecutorial decisions are limited, particularly when it is either the Security Council or a State Party that requests a review of the prosecutor’s decision. Article 53(3) (a) does not categorically provide that when either a State Party or the United Nations Security Council requests a judicial review of the prosecutor’s decision, the judges can overturn such a decision and order the Prosecutor to open an investigation.⁵⁵ All the judges can do is request that the prosecutor reconsiders the original decision, there is no provision within the Rome Statute to suggest any course of action to be taken in the event that the prosecutor maintains the original stance not to proceed. Nonetheless, the situation would be different if the Pre-Trial Chamber decides to act on its own initiative, which is legally possible only if the Prosecutor’s decision not to proceed is based on the gravity of the crime and the interest of justice - under such circumstances the prosecutor’s decision would be tied to the outcome of the Pre-Trial Chamber review process.⁵⁶ Consequently, if the Comoros were to request the judges to review the decision, the Prosecutor could simply maintain her stance without being compelled to give in to any form of external pressure to alter it. The rationale for such an approach in the Rome Statute is to ensure that the OTP enjoys institutional independence from

⁵³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met” 06/11/2014.

⁵⁴ Russell Buchan, ‘The Mavi Marmara Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies’, *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (1st edn, TMC Asser Press 2014) 479-503.

⁵⁵ Kafayat Motilewa Quadri and Hunud Abia Kadouf, ‘States That Did Not Pass the Preliminary Examinations of the OTP’ (2015) 3 *International Journal of Humanities and Management Sciences* < <http://www.isaet.org/images/extraimages/P315224.pdf>> accessed 25 August 2015.

⁵⁶ Carsten Stahn, ‘Judicial Review of Prosecutorial Discretion: Five Years On’ in Carsten Stahn and Goran Sluiter (ed), *The Emerging Practice of the International Criminal Court* (1st edn, Martinus Nijhoff publishers 2009).

other organs of the Court. Still, such an approach makes the OTP susceptible to external criticism of unjust selective enforcement of international criminal law.⁵⁷

7.2.4 Palestine

On 1 January 2015, Palestine lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”.⁵⁸ On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary General, who accepted Palestine’s accession to the Rome Statute on 6 January 2015, and Palestine became the 123rd State Party.⁵⁹ The Statute entered into force for Palestine on 1 April 2015,⁶⁰ in accordance with its Article 126 (2), which stipulates that “For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession”.⁶¹

Likewise, on 7 January 2015, the Registrar of the ICC informed Palestinian President Abbas of his acceptance of the Article 12(3) declaration lodged by the Government of Palestine on 1 January 2015 and that the declaration had been transmitted to the

⁵⁷ James Nyawo, *The Union of Comoros’s; A Typical Referral to the International Criminal Court and the Office of the Prosecutor’s Cryptic Decision to End the Preliminary Examination on the Flotilla Raid*, 1 December 2014, International Law Blog, <<https://aninternationallawblog.wordpress.com/2014/12/01/the-union-of-comoros-atypical-referral-to-the-international-criminal-court-and-the-office-of-the-prosecutors-cryptic-decision-to-end-the-preliminary-examination-on-the-flotilla-raid/>> accessed 26 August 2015.

⁵⁸ ICC-CPI-20150105-PR1080, *Palestine Declares Acceptance of ICC Jurisdiction since 13 June 2014*, <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx> accessed 18 August 2015.

⁵⁹ U.N. Treaty Collection, *Rome Statute of the International Criminal Court, Ratifications and Signatories*.

⁶⁰ *Depositary Notification of Accession to the Rome Statute by the State of Palestine Reference: C.N.13. 2015.TREATIES-XVIII.10 (Depositary Notification)*.

⁶¹ Rome Statute, Article 126 (2).

Prosecutor for her consideration.⁶² Moreover, the President of the Assembly of State Parties to the Rome Statute, Minister Sidiki Kaba welcomed the State of Palestine's deposit of the instruments of accession to the Rome Statute, and to the Agreement on the Privileges and Immunities of the International Criminal Court (APIC), which was notified on 6 January 2015 by the Secretary General of the United Nations acting in his capacity as depositary.⁶³

On 16 January 2015, the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation were met.⁶⁴ A preliminary examination is not a full investigation but a process of examining the information available in order to reach a properly informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criterion established by the Rome Statute. Specifically, under Article 53(1) of the Rome Statute, the prosecutor must consider issues of jurisdiction, admissibility and the interests of justice in making this determination.⁶⁵

The OTP previously conducted a preliminary examination of the situation in Palestine upon receipt of a purported Article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009.⁶⁶ The office carefully considered all legal arguments submitted to it and after thorough analysis and public consultations, concluded in April 2012 that Palestine's status at the United Nations as an "observer entity" was determinative, since entry into the Rome Statute system is through the UN Secretary General, who acts as treaty depositary.⁶⁷ At the time, the Palestinian authorities "observer entity", as opposed to "non-member State" status at the UN,

⁶² 2015/IOR/3496/HvH, letter to the government of Palestine accepting this declaration and transmitted it to the Prosecutor for her consideration.

⁶³ ICC-ASP-20150107-PR1082.

⁶⁴ ICC-OTP-20150116-PR1083.

⁶⁵ See more Chris Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?' (2003) 14 *King's Law Journal*.

⁶⁶ Palestinian National Authority, Ministry of Justice, Office of the Minister, "Declaration Recognizing the Jurisdiction of the International Criminal Court," Signed in The Hague, The Netherlands, 21 January 2009.

⁶⁷ See more Yael Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities' (2010) 8 *Journal of International Criminal Justice* 3-27.

meant that it could not sign or ratify the Statute.⁶⁸ As Palestine could not join the Rome Statute at that time, the OTP concluded that nor could it lodge an Article 12(3) declaration bringing itself within the ambit of the treaty, as it had sought to do.⁶⁹

On 29 November 2012, the UN General Assembly adopted Resolution 67/19 granting Palestine “non-member Observer State” status in the UN with a majority of 138 votes in favour 9 votes against, and 41 abstentions.⁷⁰ The OTP examined the legal implications of this development for its own purposes and concluded, on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward, pursuant to Articles 12 and 125 of the Rome Statute.

The Office of Prosecutor considers that, since the UNGA granted Palestine Observer State status in the UN, it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula).⁷¹ Additionally, as the OTP has previously stated publicly, the term “State” employed in Article 12(3) of the Rome Statute should be interpreted in the same manner as the term “State” used in Article 12(1). Thus, a state that may accede to the Rome Statute, may also lodge a declaration validly under Article 12(3). The focus of the inquiry into Palestine’s ability to accede to the Rome Statute has consistently been the question of Palestine’s “status” in the UN, given the UN Secretary General’s role as treaty depositary of the Statute. The UN General Assembly Resolution 67/19 was therefore determinative of Palestine’s ability to accede to the Rome Statute pursuant to Article 125, and equally, its ability to lodge an Article 12(3) declaration.

⁶⁸ James. R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 421.

⁶⁹ John Quigley, ‘The Palestine Declaration to the International Criminal Court: The Statehood Issue,’ *Rutgers Law Record*, Volume 39, Spring 2009.

⁷⁰ A/RES/67/19 of 4 December 2012.

⁷¹ James. R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 421.

The process of implementing the Rome Statute or incorporating international crimes into domestic legislations is not yet initiated by the Palestinian government. In addition, there is not any indication or intention to conduct domestic trials, as Palestine referred the case to the ICC. Thus, not any Sharia based concerns or challenges faced to date. Upon ratification of the Statute, Palestine did not make any declarations regarding Sharia. The legal system in Palestine is founded on the Basic Law which functions as a temporary constitution for the Palestinian Authority, until the establishment of an independent state and a permanent constitution for Palestine can be achieved. It was passed by the Palestinian Legislative Council in 1997 and ratified by President Yasser Arafat in 2002. Article 4(2) of the Basic Law states that “the principles of Islamic Shari’a shall be a principal source of legislation.”⁷²

7.2.4.1 ICC Preliminary Examination

Palestinian leaders said that they are pursuing a new strategy to put pressure on Israel after decades of armed conflicts and on-and-off peace talks that have failed to end the Israeli-Palestinian conflict. They describe their strategy as “internationalizing” the issue.⁷³ The Palestinians want to establish an independent state on the boundaries as existed before the 1967 war in the West Bank and Gaza, with East Jerusalem as its capital, and they see recourse to the courts as a way of diplomatically isolating and increasing pressure on Israel.

The Palestinians believe some Israeli military actions in Gaza amounted to war crimes. During the 50-day conflict in 2014, more than 2,100 Palestinians were killed - most of them civilians, according to the UN and tens of thousands of homes in Gaza were destroyed or badly damaged.⁷⁴ On the Israeli side, 67 soldiers and six civilians were killed. The Palestinians also plan action against the expansion of Israel’s

⁷² The Palestina Basic Law 1998, Amended 2003 and 2005.

⁷³ BBC news, *Will ICC Membership Help or Hinder the Palestinians’ Cause?* 1 April 2015 < <http://www.bbc.co.uk/news/world-middle-east-30744701>> accessed 22 April 2015.

⁷⁴ Amnesty International, *Justice for Victims of War Crimes in Gaza Conflict, 2014* < <https://www.amnesty.org/en/latest/campaigns/2015/07/justice-victims-war-crimes-gaza-conflict/> > accessed 20 April 2015.

settlements in the West Bank and East Jerusalem - land it has occupied since the 1967 Middle East war. According to Article 8 of the Rome Statute the unlawful deportation, transfer or confinement of protected persons - those living in territory which is under military occupation - constitute war crimes. Since it occupied the Palestinian territories in 1967, Israel has facilitated the movement of its citizens into West Bank settlements, including East Jerusalem.⁷⁵

While the Palestinian Islamist movement, Hamas, officially supported joining the ICC, its leaders could face charges of ordering indiscriminate attacks against civilians when the ICC Prosecutor considers the recent Gaza conflict. Militants from Hamas and other groups fired thousands of rockets and mortars at Israeli towns and cities. Israel, for its part, carried out hundreds of air strikes in Gaza and launched a ground offensive. Israel's government is expected to use third-party NGOs to pursue its own complaints against Palestinians in the ICC. Already, Shurat HaDin, an Israeli human rights group, has formally asked the ICC to investigate alleged war crimes committed by Palestinian leaders.⁷⁶

The OTP confirmed that prosecutors would be looking at the Gaza conflict, as well as other issues that include Israel's construction of settlements on occupied Palestinian lands. They will also examine alleged war crimes committed by Hamas, which controls Gaza, including its firing of thousands of rockets at Israeli residential areas from crowded neighbourhoods.

7.2.4.2 Political Factors

Palestine did not participate in the negotiations of the Rome Statute as a state as its small delegation consisting of only two representatives was in the form of an

⁷⁵ HRW, *Separate and Unequal; Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, December 2010.

⁷⁶ Press release, *5th January 2015*; Shurat Hadin files war crimes complaints against top PLO officials in International Criminal Court. < <http://israellawcenter.org/pr/shurat-hadin-files-war-crimes-complaints-against-top-plo-officials-in-international-criminal-court/>> accessed 15 April 2015.

observing “organization”.⁷⁷ It did not have the opportunity to sign the Statute like the other Arab states in 1998, its decision to accede to the Statute later on could be based on some political factors. Although some Arab states’ leaders are not willing to join the ICC because of political reasons and fear of prosecutions, the political factor played a major role in the Palestinian example. As the ongoing Arab-Israeli conflict affects some of the Arab states’ decisions to ratify the Rome Statute,⁷⁸ Palestine used the same conflict as a reason to join the ICC once it had the opportunity. The political will played a major role in the Palestinian example of an Arab state joining the ICC.

Israel and the US object to what they see as unilateral approaches by the Palestinians to international bodies, saying they undermine the chances for a negotiated peace deal. When Palestinian leaders applied to join the ICC, Israeli Prime Minister Benjamin Netanyahu said they had chosen “a path of confrontation” and that Israel would “not sit idly by”.⁷⁹ The Israeli Government’s first punitive move was to stop the transfer of about \$400m in tax revenues collected on behalf of the Palestinian Authority between January and March 2015. The Palestinian Chief Negotiator, Saeb Erekat, called this an act of “piracy”.⁸⁰ As a result, 160,000 Palestinian Government employees were paid only 60% of their salaries for three months.⁸¹

The US was firmly opposed to Palestine’s moves at the ICC.⁸² The US State Department said it does not believe Palestine is a sovereign state, and therefore is not qualified to join the ICC.⁸³ Washington is the second biggest donor to the Palestinian

⁷⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998 Official Records Volume II Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.183/13 (Vol.11).

⁷⁸ Adel Maged, ‘Arab States’ in Claus Kreß and others (ed), *The Rome Statute and Domestic Legal Orders Volume II: Constitutional Issues, Cooperation and Enforcement* (1st edn, Editrice il Sirente 2005), 470.

⁷⁹ RT News, *Netanyahu: Israel ‘Won’t Let Its Soldiers Be Dragged’ to ICC*, 4 January 2015 < <https://www.rt.com/news/219735-israel-soldiers-icc-netanyahu/>> accessed 25 January 2015.

⁸⁰ BBC News, *Will ICC Membership Help or Hinder the Palestinians’ Cause?* 1 April 2015 < <http://www.bbc.co.uk/news/world-middle-east-30744701>> accessed 15 May 2015.

⁸¹ BBC News, *Israel-Palestinian ‘War Crimes’ Probed by the ICC*, 16 January 2015 < <http://www.bbc.co.uk/news/world-middle-east-30851121>> accessed 18 August 2015.

⁸² Jeff Rathke, *Statement on ICC Prosecutor’s Decision*, 16 January 2015, Bureau of Public Affairs Office of Press Relations Press Statement, Washington, DC.

⁸³ C.N.64. 2015.TREATIES-XVIII.10 (Depositary Notification), 23 January 2015, USA: Communication to The Secretary-General of the United Nations.

Authority after the European Union, giving \$400m each year, however, under US law, this support will be cut if the Palestinians press claims against Israel at the ICC. In December, President Barack Obama signed into law an appropriations act that would cut off some aid to the Palestinian Authority if the Palestinians “initiate” or “actively support” a “judicially authorized” ICC investigation “that subjects Israeli nationals to investigation for alleged crimes against Palestinians.”⁸⁴ Seventy-five US Senators have also urged the Obama Administration to make clear that the ICC is not a “legitimate or viable path for the Palestinians.”⁸⁵ Palestine is facing challenges in its attempts to establishing justice and peace in the territory. The ICC could face similar challenges during investigations, collecting evidence and enforcing its decisions, due to the expected lack of cooperation from Israel. However, it is still considered a positive step towards ending decades of impunity in the region.

7.3 Non-Member States

This part considers the cases of Sudan, Libya and Egypt, all of which are non-member states.

7.3.1 Sudan

Sudan participated in the Rome Conference with 9 representatives in its delegation and signed the Statute on 8 September 2000.⁸⁶ However, on 26 August 2008 a communication received from the Government of Sudan informed the Secretary-

⁸⁴ USA, Consolidated and Further Continuing Appropriations Act, 2015
<<https://congress.gov/113/bills/hr83/BILLS-113hr83enr.pdf>> accessed 20 August 2015.

⁸⁵ Letter addressed to John Kerry, Washington DC, 29 January 2015
<http://www.rubio.senate.gov/public/index.cfm/files/serve/?File_id=72123469-50ce-4d35-972e-4d8ff013d000> accessed 20 August 2015.

⁸⁶ UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

General that “Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”⁸⁷ Although Sudan participated actively in the Rome Statute negotiations, despite its subsequent signature, its non-ratification to date means the Court has no jurisdiction over Sudan.

The Court has jurisdiction over situations in any state where the situation is referred by the United Nations Security Council acting under Chapter VII of the UN Charter. The UN Security Council referred the situation in Darfur to the Prosecutor of the ICC in Resolution 1593 (2005) on 31 March 2005, which required Sudan and all other parties to that conflict to cooperate with the Court.⁸⁸ It also invited the Court and the African Union to discuss practical arrangements that would facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region.

UN Secretary-General Kofi Annan established the International Commission of Inquiry on Darfur in October 2004. The Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to the ICC.⁸⁹ When the Prosecutor receives a referral, the Statute requires that the Prosecutor carry out a preliminary examination, or analysis, of the available information in order to determine whether there is reasonable basis to proceed with an investigation. Multiple sources of information have been used for the OTP’s analysis, including reports from the Government of Sudan, the African Union, the United Nations, and other organisations, local and international media, academic experts and others.

⁸⁷ Sudan communication to the SG, UN Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

⁸⁸ UN Security Council, Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan, 31 March 2005, S/RES/1593 (2005).

⁸⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004.

Following the referral from the United Nations Security Council on 31 March 2005, the Prosecutor received the International Commission of Inquiry on Darfur's document archive. The OTP also requested information from a variety of sources, leading to the collection of thousands of documents, and also interviewed over 50 independent experts. While the Government of Sudan established Special Courts to try individuals for crimes committed in Darfur, there are justifiable concerns on the efficiency of the courts and their role in restoring justice.⁹⁰ These courts have so far only dealt with low-level officers and civilians and according to the president, where there is no mechanism in place to protect witnesses.⁹¹ Therefore, based on the Rome Statute, as long as the Sudanese justice system showed an inability to deal with these concerns, the Court may continue with its cases.⁹² After thorough analysis, the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied.⁹³

On 14 July 2008, Moreno-Ocampo requested an arrest warrant for President Al-Bashir for genocide, crimes against humanity, and war crimes against members of the Fur, Masalit, and Zaghawa groups between 2003 and 2008.⁹⁴ President Al-Bashir was indicted on 4 March 2009 as an indirect perpetrator. The ICC found that there was enough evidence that he had used the Sudanese military, as well as Sudan's Government, to carry out criminal activities. He was indicted for five counts of crimes against humanity and two counts of war crimes. Pre-Trial Chamber I issued a second warrant of arrest on 12 July 2010 in which he was indicted for a further three counts of genocide.⁹⁵

⁹⁰ Jakob Pichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 185-228.

⁹¹ Dawn Yamane Hewett, 'Sudan's Courts and Complementarity in the Face of Darfur.' (2006) 31 *Yale Journal of International Law* 276.

⁹² Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo. to the Security Council Pursuant to UNSC 1593 (2005). 13 December 2005.

⁹³ ICC-OTP-0606-104 The Prosecutor of the ICC opens investigation in Darfur.

⁹⁴ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 (March 4, 2009).

⁹⁵ ICC-02/05-01/09.

7.3.1.1 The Incorporation of International Crimes

After the Security Council referred the Darfur situation to the ICC, the Government of the Sudan took certain legal measures by enacting the Armed Forces Act 2007⁹⁶ and the Criminal Act 1991⁹⁷ (later amended in 2009) in order to incorporate the international crimes of genocide, crimes against humanity and war crimes. The Armed Forces Act 2007 contains provisions on these crimes within a whole chapter on international humanitarian law. The Criminal Law amendments of 2009 added a new chapter (Chapter 18) with a total of seven articles,⁹⁸ which had been drafted by a special committee formed in the Ministry of Justice following the ICC intervention in the Darfur situation.

The incorporation of the aforementioned crimes as part of the Sudanese criminal justice system, is a significant step towards prosecuting international crimes domestically and ending impunity. However, the incorporation process showed that many gaps still existed in the body of the new legislation and its subsequent amendments.

7.3.1.1.1 Genocide

The definition of the crime of genocide in the Criminal Act 1991 (as amended in 2009) is not in conformity or harmony with the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Convention has been incorporated into the many statutes of international criminal tribunals, including Article 6 of the Rome Statute. In Sudan, the definition of genocide in Article 187 of the Criminal Act 1991(as amended in 2009) reads as follows:

⁹⁶ Sudan: Armed Forces Act 2007 [Sudan], 5 December 2007.

⁹⁷ Sudan: Criminal Code of 1991, Date of adoption 31 January 1991, Date of entry into force 20 February 1991.

⁹⁸ Amendments adopted on 25 May 2009 by the National Assembly and signed on 28 June 2009 by the President of Sudan.

“There shall be punished with the death penalty, life imprisonment or any other lesser punishment whoever commits, attempts or abets the commitment of a crime or crimes of homicide against members of a national, ethnic, racial or religious group with intent to exterminate or destroy them, in a whole or in part and in the context of a systematic and widespread conduct directed against that group and commits in the same context any of the following acts:

“killing a member or more of a group; (b) torture, or causing serious harm or bodily or mental harm to a member of the group; (c) deliberately inflicting on a member or more of the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent a member or more within the group from births; (e) forcibly transferring a child or more from the group to another group.”

The definition of genocide in Article 187 is only partially in line with the 1948 Genocide Convention definition and the Rome Statute. Three critical points should be highlighted here. First, whereas the 1948 definition of the crime of genocide stipulates that “any of the following acts” constitute genocide, Article 187 makes “homicide” the essential constituent act of genocide if the other elements of the crime are present.⁹⁹ The reference to homicide appears to narrow the definition and is bound to create serious confusion.¹⁰⁰

Secondly, the relationship between homicide and the other five acts listed at the end of Sudan’s Article 187 is not clear. A literal interpretation of the definition seems to suggest that they are cumulative, which could mean that there needs to be the act of homicide as well as any of the five enumerated acts.¹⁰¹ In the 1948 definition, the five acts are clearly distinct from homicide, because genocide is characterised by the intent to destroy a protected group by the enumerated means. Only one of the five acts

⁹⁹ REDRESS and KCHRED, Comments on the Proposed Amendment of the Sudanese Criminal Act, September 2008 < http://www.redress.org/downloads/country-reports/Penal_Code_Amendment_Position%20Paper%20_2_.pdf> accessed 20 June 2015.

¹⁰⁰ *ibid.*, 5.

¹⁰¹ *ibid.*, 6.

concerns homicide, whereas the other four acts do not need to result in the death of the targeted members of the protected group, even though the ultimate intention must be to destroy that group, in whole or in part.¹⁰² The 1948 definition thus recognises that there are a number of means or ways, in addition to homicide, that can bring about the destruction of a group; making homicide an essential element of the crime of genocide as provided for in Article 187 which does not fully capture the nature of this crime.

Thirdly, Article 187 introduces new elements to the definition of the crime of genocide that could confuse genocide with crimes against humanity. The article provides that genocide can be committed ‘against members of a national, ethnic, racial or religious group with intent to *exterminate* or *destroy* them, in whole or in part, and *in the context of a systematic and widespread conduct* directed against that group.’ This definition creates confusion with regard to the elements of the crime of genocide, recognised under the Genocide Convention of 1948 and Article 6 of the ICC Rome Statute. As a result, Article 187 introduces a higher threshold for the prosecution of the crime of genocide, because two separate aspects need to be proved: (a) intent to exterminate or destroy members of the group; (b) that the crime was committed ‘in the context of a systematic and widespread conduct’. No doubt the latter element confuses genocide with crimes against humanity.¹⁰³

7.3.1.1.2 Crimes against Humanity

Article 186 of Sudan’s Criminal Act 1991 (as amended in 2009) includes a similar definition to Article 7 of the ICC Rome Statute. It states: ‘[t]here shall be punished with capital sentence, imprisonment for life or any lesser punishment whoever commits alone or jointly, encourages or supports any widespread or systematic attack directed against any civilian population with knowledge of the attack, where he/she in

¹⁰² See William Schabas, *Genocide in International Law* (Cambridge University Press 2000), 151.

¹⁰³ Mohamed Abdelsalam Babiker, ‘The Prosecution of International Crimes under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing Ltd. 2011).

the same context commits any of the following acts.’¹⁰⁴

The definition of the crime against humanity contained in Article 7 of the Rome Statute requires that an attack must be carried out ‘pursuant to or in furtherance of a state or organizational policy to commit such attack’. In the *Tadic* case, the Yugoslav Tribunal held that, under customary international law, crimes against humanity could also be committed ‘on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a ‘de jure’ state or by a terrorist group or organization’.¹⁰⁵ However, Article 186 does not reflect this definition.

7.3.1.1.3 War Crimes

Article 188 of the Criminal Act 1991 (as amended in 2009) criminalises “war crimes against persons”. The offence carries “capital punishment, life imprisonment or any lesser punishment against whoever knowingly commits in the context of an international or non-international armed conflict certain criminal acts”. The act further identifies four other categories of war crimes, namely “(i) war crimes against properties and other rights” in Article 189; “(ii) war crimes against humanitarian operations” in Article 190; “(iii) war crimes related to the prohibited methods of warfare” in Article 191; and “(iv) war crimes related to the use of prohibited weapons” in Article 192. These five categories do not reflect the structure of Article 8 of the Rome Statute, which consists of just four categories of war crimes, two of them in international armed conflicts and two in non-international armed conflicts.¹⁰⁶

The 1991 Sudanese Criminal Act deals with five categories of crimes, all of which can be committed in the context of either international or non-international armed

¹⁰⁴ Article 186 Sudan Criminal Act 1991.

¹⁰⁵ *Prosecutor v Tadic* (Case No. IT-94-1-T), opinion and judgement 7 May 1997, para 654.

¹⁰⁶ Mohamed Abdelsalam Babiker, ‘The Prosecution of International Crimes under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing Ltd. 2011).

conflicts. This phrasing is confusing, as it makes no distinction between the crimes committed in an international context and those committed in internal armed conflicts: this can be problematic because the prosecution of a particular category of crime can often therefore require complex prior assessment of the type of armed conflict involved. Courts are required to distinguish between international and non-international armed conflicts, and this is further complicated by the fact that within the sub-set of the latter there are two distinct categories.¹⁰⁷

The definitional threshold for war crimes under Articles 188, 190, 191, and 192 of the Criminal Act requires knowledge, which makes the threshold for committing war crimes very high. The phrase “whoever *knowingly* commits in the context of an international or non-international armed conflict the following criminal acts” is problematic because it requires knowledge of the commission of war crimes. In contrast to the Rome Statute, Article 188 of the Criminal Act on war crimes against persons does not include “(i) sexual slavery; (ii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the UN, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; and (iii) the transfer, directly or indirectly, by an Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory.”¹⁰⁸

The Armed Forces Act 2007 also introduced in Article 153 on war crimes offences that might be committed by combatant personnel against civilians during military operations; Article 154 on offences against persons enjoying special protection; Article 155 on attacks against civilians; Article 162 on threatening and displacing the populace; and offences against prisoners of war. However, such offences are confusing because the definition and elements of the crimes are mixed with the elements of the crime of genocide and crimes against humanity. This applies to

¹⁰⁷ *ibid.*

¹⁰⁸ REDRESS, Sudan: Amendment of Armed Forces Act runs counter to international standards and risks fostering further human rights violations < http://www.redress.org/downloads/Submission-on-Amendment_Sudan-Armed-Forces-Act_23July2013.pdf > accessed 20 June 2015.

crimes such as torture, the forceful transfer of children, and intentionally subjecting groups to conditions of livelihood, with intent to destroy them totally or partially. It also applies to offences of the murder of an individual, or individuals of a national, ethnic, racial or religious group, with intent to partially, or totally exterminate or destroy that group ‘within the context of a clear methodical conduct, directed against such group’. Similar confusion concerns war crimes and crimes against humanity in relation to crimes committed against a civilian population, such as slavery and unlawful detention ‘within the framework of a methodical direct and widespread attack directed against civilians’.¹⁰⁹

The Criminal Act 1991 (as amended in 2009) does not include adequate provisions that govern accountability for the commission of international crimes. The act does not recognise criminal liability on the grounds of command/superior responsibility. Article 22 of the Armed Forces Act 1999 shields superior army officers from criminal responsibility in Sudan’s civil courts for acts committed by their subordinates. Article 39(7) (Immunities and Privileges) also provides that ‘members of the people’s armed forces have no right to take legal proceedings in front of the civil judiciary during and after the service for any negative effects impacted upon them as a result of executing any lawful orders issued to them by those superiors during their service’.¹¹⁰ This article directly contravenes Article 28 of the Rome Statute, which provides for criminal responsibility of commanders and other superiors, and also contravenes Articles 27(1) (Irrelevance of official capacity) and 33 (Superior orders and prescription of law) of the ICC Rome Statute. Both articles apply equally to all persons (whether civilian or military) including heads of states or governments, members of governments or of parliaments, elected representatives or government officials who shall in no case be exempted from criminal responsibility under the ICC Statute.¹¹¹ These above-mentioned provisions were not substantially changed in

¹⁰⁹ Human Rights Watch, Sudan: New Law Allows Military Trials of Civilians-Repeal Amendments to Armed Forces Law, 9 July 2013 < <https://www.hrw.org/news/2013/07/09/sudan-new-law-allows-military-trials-civilians>> accessed 16 August 2015.

¹¹⁰ Mohamed Abdelsalam Babiker, ‘The Prosecution of International Crimes under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing Ltd. 2011).

¹¹¹ See Article 27(1) of the Rome Statute.

subsequent legislative amendments.

Under the Armed Forces Act 2007, the Police Act 2008 and the National Security Act 2010, police officers, security forces members and collaborators and members of the armed forces are granted substantive and procedural immunity. They can only be subjected to a full investigation, prosecution and trial if the head of the respective forces explicitly lifts their immunity. Many current laws provide legal (criminal and civil) immunities for state agents, for acts including human rights violations, committed in the course of their duties.¹¹²

The immunity provisions contained in the Police Act 2008, the Armed Forces Act 2007 and the National Security Act 2010 are not in harmony with international criminal law standards and recognised practices, particularly when such provisions are applied in the context of the several armed conflicts that have taken place in Sudan over decades. Which have seen the commission of war crimes and crimes against humanity. To legalise immunities in such a context, has serious implications.¹¹³

In Sudan, the Criminal Procedure Act 1991 (as amended in 2009)¹¹⁴ introduced immunities related to the prosecution of international crimes by non-Sudanese courts and other international bodies. Its Article 3 provides for procedural immunities, as it “prohibits investigations or proceedings outside Sudan against any Sudanese person accused of committing any violation of international humanitarian laws, including crimes against humanity, genocide and war crimes.” It also prohibits “anyone in Sudan from assisting in the extradition of any Sudanese for the prosecution of the above crimes.” These amendments act as legal deterrents to any individual or group contemplating cooperation with the ICC, and the provisions involved run counter to

¹¹² Article 42(2) of the Armed Forces Act 2007, Article 45(1) of the Police Act, 2008, and Article 52(3) of the National Security Act of 2010.

¹¹³ Mohamed Abdelsalam Babiker, ‘The Prosecution of International Crimes under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations’ in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (1st edn, Ashgate Publishing Ltd. 2011).

¹¹⁴ Amendment of the Criminal Procedure Act, adopted in the National Assembly on 20 May 2009 and signed into law by the President of the Republic on 9 July 2009.

international trends and obligations, to agree on legal mechanisms to assist and cooperate in the prosecution of international and transnational crimes.¹¹⁵

The incorporation of the international crimes of genocide, crimes against humanity and war crimes into the Sudanese criminal justice system constitutes progress, although the process has many gaps remaining in the body of the new legislation and its subsequent amendments. This applies in particular to international criminal law principles as part of the criminal and military laws. In the absence of such principles the effective prosecution of international crimes will face serious legal obstacles at the substantive and procedural levels. The definitions of international crimes need to be reviewed so as to be in harmony with the standards of the ICC and the dynamic interpretations recently adopted by international tribunals and courts.

7.3.2 Libya

Libya did not sign the Rome Statute, and as a matter of fact, it was among the seven states that voted against the adoption of the Statute.¹¹⁶ There was no clear sign that Libya would join the ICC during the Gaddafi regime., There were some reports that the Libyan government has a legal committee that has been following developments at the ICC closely, also preparing Libya's input on the crime of aggression and other issues for the 2010 Review Conference. Libyan delegates at the UN and some Libyan international law professors have expressed their support for the ICC and their optimism that Libya will eventually become a State Party. Libya had attended the Assembly of States Parties sessions as an observer.¹¹⁷ Previously, Libya had concerns about the Rome Statute provision that allows for Security Council referral of

¹¹⁵ REDRESS, Sudan: Amendment of Armed Forces Act Runs Counter to International Standards and Risks Fostering Further Human Rights Violations < http://www.redress.org/downloads/Submission-on-Amendment_Sudan-Armed-Forces-Act_23July2013.pdf > accessed 20 June 2015.

¹¹⁶ Four of the seven states that voted against the Statute were Arab states: Libya, Iraq, Qatar and Yemen. U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories.

¹¹⁷ The Coalition for the International Criminal Court (CICC), Updates on Libya, 2 May 2008 < <http://www.iccnw.org/?mod=newsdetail&news=187> > accessed 1 July 2015.

situations to the ICC.

Following the popular protests that had spread across the Arab region, Libya witnessed the most violent conflicts. Peaceful protests that began on the 15 February 2011 in the eastern city of Benghazi quickly escalated with violent reprisals by the government. Libya's civil war continued for eight months, and with the help of NATO air forces, the rebels succeeded in taking the capital city of Tripoli in September 2011, effectively ending the Gaddafi regime's 42-year rule.¹¹⁸

7.3.2.1 The Security Council Referral to the ICC

On 26 February 2011, the UN Security Council adopted Resolution 1970 by a vote of 15-0 referring the situation in Libya to the ICC.¹¹⁹ The resolution granted the ICC jurisdiction over crimes committed in Libya from 15 February 2011, in which the OTP revealed that an investigation into the situation in Libya would be launched.¹²⁰

On 27 June 2011, the ICC judges authorised three arrest warrants related to the Libya investigation for Muammar Gaddafi, his son, Saif al-Islam, and former Intelligence Chief, Abdullah Senussi.¹²¹ The three were wanted on charges of crimes against humanity for their roles in attacks on civilians, including peaceful demonstrators, in Tripoli, Benghazi, Misrata, and other locations in Libya. The ICC's proceeding against Muammar Gaddafi was terminated following his death on 20 October 2011, while anti-Gaddafi forces apprehended Saif al-Islam Gaddafi on 19 November 2011 in southern Libya and are holding him in the town of Zintan.¹²²

¹¹⁸ Amnesty International UK, 2011 uprising in the Middle East and North Africa, 26 April 2013 < <http://www.amnesty.org.uk/2011-uprising-middle-east-arab-spring-syria-tunisia-egypt-bahrain-libya#.ViGBdbwfeV4> > accessed 2 July 2015.

¹¹⁹ S/RES/1970 (2011).

¹²⁰ ICC-CPI-20110302-MA89.

¹²¹ ICC-CPI-20110627-PR689.

¹²² BBC News, Gaddafi's Son Saif al-Islam Captured in Libya, 19 November 2011 < <http://www.bbc.co.uk/news/world-middle-east-15804299> > accessed 13 July 2015.

Libya challenged the admissibility of the cases against both Saif Al-Islam Gaddafi and Abdullah Al-Senussi, claiming that Libyan courts were functioning appropriately and that Libya was prepared to try them for more or less the same crimes they would be tried for at the ICC.¹²³ Libya submitted that the case was “of historic importance to the Libyan people” as part of its historic transition, and that the Libyan courts were “genuinely committed to pursuing the prosecution of both accused.”¹²⁴ Based on the principle of complementarity, Libya maintained that the national system was actively investigating Mr. Gaddafi and Mr. Al-Senussi.¹²⁵ But neither accused had been able to meet with their counsel of choice, and there is little credible evidence from which to conclude that the courts in Libya, whether in Zintan or Tripoli, are functioning properly. The impartiality and the independence of the Libyan courts are dubious and there is little to suggest that they are capable of providing fair trials.

On 31 May 2013, the Pre-Trial Chamber rejected Libya’s challenge to the admissibility of the case against Gaddafi and concluded that “Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that Libya’s domestic investigation covered the same cases as were before the ICC”.¹²⁶ The Pre-Trial Chamber also found that “Libya was genuinely unable to carry out the investigation and prosecution of Gaddafi because of its inability to secure the transfer of Gaddafi into state custody from his place of detention in Zintan, the lack of capacity to obtain necessary testimony, and the inability of judicial and governmental authorities to exercise full control over certain detention facilities and to provide adequate witness protection, as well as significant practical impediments to securing legal representation for Gaddafi”.¹²⁷ On 21 May 2014, the Appeals Chamber rejected Libya’s appeal against the Pre-Trial Chamber’s

¹²³ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, Motion on Behalf of the Government of Libya Requesting an Oral Hearing in Respect of its Admissibility Challenge Pursuant to Article 19 of the ICC Statute (2 May 2012).

¹²⁴ *ibid.*, paras. 8–10.

¹²⁵ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-343, Libyan Government’s Response to the Saif Al-Islam Gaddafi “Addendum to the ‘Urgent Defence Request’ of 21 January 2013, and Request for Finding of Non-Compliance”, (29 May 2013).

¹²⁶ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, No. ICC-01/11-01/11, Pre-Trial Chamber, 31 May 2013.

¹²⁷ *ibid.*

decision.¹²⁸

Ultimately, the Court has decided that the ICC must try Gaddafi, but Al-Senussi may be tried in Libya.¹²⁹ There are three main differences in the ICC's reasoning in these cases. The two cases were factually different, whereas the allegations against Gaddafi had a broad geographical and temporal scope, spanning events occurring across Libya, the case against Al-Senussi concerned conduct only occurring during the repression of demonstrations in Benghazi.¹³⁰ As such, the amount and quality of evidence and testimony required in each case differed. The Appeals Chamber determined that, although Libya had demonstrated its capacity to collect sufficient evidence against Al-Senussi, the same could not be said in the Gaddafi case. Secondly, the Appeals Chamber confirmed the Pre-Trial Chamber's approach to the issue of whether Libya could exercise control over the two accused. At the time of the admissibility proceedings, Saif Gaddafi was in the custody of a local militia in Zintan, while Al-Senussi was held in a supposedly government-controlled detention facility in Tripoli.¹³¹ The third major difference explaining the divergent decisions was the ICC Prosecutor's position in relation to the admissibility challenges. In the Al-Senussi case, the Prosecutor supported Libya's argument in favour of national prosecution, but opposed Libya's challenge in the Gaddafi's case.¹³²

Libya's obligation to the ICC is via UN Security Council Resolution 1970, which referred the case of Libya to the Court and obliges Libya to comply with the Court's

¹²⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', No. ICC-01/11-01/11 OA4, Appeals Chamber, 21 May 2014.

¹²⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi', No. ICC- 01/11-01/11 OA6, 24 July 2014; See more Carsten Stahn, 'Libya, the International Criminal Court and Complementarity A Test for "Shared Responsibility"' (2012) 10.2 *Journal of International Criminal Justice* 325-349.

¹³⁰ Kevin Jon Heller, *Libya Challenges the Admissibility of the Cases Against Gaddafi and Al-Senussi*, 2 May 2012, *Opinio Juri* <<http://opiniojuris.org/2012/05/02/libya-challenges-the-admissibility-of-the-cases-against-gaddafi-and-al-senussi>> accessed 10 April 2014.

¹³¹ *ibid.*

¹³² See more Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC.' (2012) 10.2 *Journal of International Criminal Justice* 299-324; Mark S Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Cambridge Scholars Publishing 2014).

demands. Though Libya is not party to the Rome Statute, it is a UN Member State and is thus bound by Resolution 1970. This reasoning implies that a non-Party State would not typically be bound to the ICC's demands because that state has not ratified the Rome Statute. In the case of Libya, however, the state's obligations to the Court are resolved because UN Security Council Resolutions have binding authority over any UN Member State. The Rome Statute explicitly states that the Security Council can refer cases to the ICC and, therefore, UNSC Resolution 1970 binds Libya to the Rome Statute though the state of Libya is not a party to it.¹³³

7.3.2.2 Complementarity Issues in Libya

Complementarity presents another problem for the ICC and its relationship with states.¹³⁴ Three “unresolved tensions” exist in the debate over whether domestic or ICC proceedings ought to hold primacy of jurisdiction; the scope and implications of the “same conduct test”; the relationship between cooperation and admissibility; and the impact of due process and sentencing determination on admissibility.¹³⁵ The same-conduct test refers to the examination of whether the relevant state, if engaged in a proceeding against an individual wanted by the ICC, is trying the individual for the same crimes for which the ICC has brought charges. Many crimes - like torture, genocide, and war crimes that are codified under international law and against which the ICC is likely to bring charges - are rarely codified under domestic law, making it difficult for a state to pass the same-conduct test. Additionally, if the state fails to address the scope and gravity of crimes, it may not satisfy the requirements outlined by the ICC.¹³⁶

Some concern exists over the Court's ability to pass an objective judgment on a

¹³³ See more Brenan Leanos, ‘Cooperative Justice: Understanding the Future of the International Criminal Court through its Involvement in Libya’ (2012) 80 Fordham Law Review 2267-2304.

¹³⁴ See Sarah M. H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

¹³⁵ Carsten Stahn, ‘Libya, the International Criminal Court and Complementarity A Test for “Shared Responsibility”’ (2012) 10.2 Journal of International Criminal Justice 325-349.

¹³⁶ Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 Criminal Law Forum 255-280.

state's willingness or ability to engage in domestic proceedings. A number of states have expressed concern about the power of the ICC to determine unilaterally whether a state has the capacity to undertake national prosecutions.¹³⁷ Some scholars have proposed the creation of a "Third Party Advisory Council", independent of the ICC and composed of international legal scholars, to test the admissibility of a case before the ICC.¹³⁸ An independent panel would legitimise the proceedings of the Court and further encourage the development of domestic institutions, enhancing the Court's legitimacy and credibility in the eyes of the public.¹³⁹ They argue that a number of challenges the Court now confronts in dealing with cases in Libya and Sudan might be resolved by establishing a third party to determine admissibility. At the very least this would add legitimacy to the Court, and delegitimise the arguments made by states hoping to delay the process of investigation by making appeals to the ICC. The Arab League could have such a role, as a well-established organisation, and act as an advisory party. It would be similar to the involvement of the African Union in the case of Sudan; however, such involvement as an advisory council, should be regulated by rules or regulations that guarantee the impartiality of the advisory party; it could be in the form of an agreement between the ICC and the Arab league.

A number of options exist for the ICC to engage in shared responsibility with Libya. The Court should hold proceedings in Libya as opposed to The Hague.¹⁴⁰ Article 62 of the Rome Statute makes it possible to decide to hold trials elsewhere than at The Hague. The judges in situations concerning Kenya and the Democratic Republic of Congo have sought submissions in this regard in the past, although in both instances it was decided to proceed in The Hague due to infrastructure and security concerns in the countries in question. By holding ICC proceedings in Libya the Court can use the trial as a model for future proceedings, by widely promoting the case, and exposing it to the Libyan people and its government as an example of the proper conduct of judicial proceedings. Proceeding in this manner might pave the way for a more

¹³⁷ Mark S. Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) *Florida Journal of International Law* 15 215, 240.

¹³⁸ *ibid*, 240.

¹³⁹ Jamie Mayerfeld, 'Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights' (2003) 25 *Human Rights Quarterly* 93-129.

¹⁴⁰ Carsten Stahn, 'Libya, the International Criminal Court and Complementarity a Test for "Shared Responsibility"' (2012) 10.2 *Journal of International Criminal Justice* 325-349.

satisfactory development of Libya's domestic judicial institutions.¹⁴¹

The ICC can establish a policy of shared responsibility in Libya and Sudan, thus can create an effective and efficient judicial system.¹⁴² The ICC should retain jurisdiction in cases where it is apparent that the state is unwilling to prosecute an individual accused of crimes for which the ICC has brought charges. However, the inadmissibility of the case of Al-Senussi before the ICC indicates that the Libyan national authorities were at least willing to proceed in the trials. In cases such as Libya, where it appears that the state is merely unable to conduct a trial in a manner consistent with ICC obligations, the Court has a duty to aid in the development of national courts and judicial systems so they can conduct future trials on their own.¹⁴³

Arab states usually lack incentives to engage in legal actions against accused individuals of international crimes because they determine that the costs of such action outweigh the potential benefits. However, it can be argued that the existence of an international tribunal with coexisting jurisdiction could provide structural incentives that change the cost-benefit calculation, resulting in the use of national proceedings that would otherwise have been neglected.¹⁴⁴ An investigation by the ICC might have negative political effects on some of these states that would have no control over such proceedings. The ICC can incentivise Arab states to develop their domestic institutions by "offering the threat of an international investigation".¹⁴⁵ The ICC therefore, can have a role as a mechanism for building national institutions and in encouraging national courts to perform its duties.¹⁴⁶ On being sworn in as the first Chief Prosecutor of the ICC, Louis Moreno-Ocampo reflected that "the absence of trials before this Court, as a consequence of the regular functioning of national

¹⁴¹ Christian Rodriguez, 'Libya and the International Criminal Court: A Case Study for Shared Responsibility' (2013) Cycle 4, PIT Journal < <http://pitjournal.unc.edu/article/libya-and-international-criminal-court-case-study-shared-responsibility>> accessed 16 July 2015.

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ Anne-Marie Slaughter and William Burke-White 'The Future of International Law Is Domestic (or, the European Way of Law)' (2006) *Harvard International Law Journal* 47 327, 341.

¹⁴⁵ Christian Rodriguez, 'Libya and the International Criminal Court: A Case Study for Shared Responsibility' (2013) Cycle 4, PIT Journal < <http://pitjournal.unc.edu/article/libya-and-international-criminal-court-case-study-shared-responsibility>> accessed 16 July 2015.

¹⁴⁶ Eve La Haye, 'The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction' (1999) 46 *Netherlands International Law Review* 1.

institutions, would be a major success”.¹⁴⁷

7.3.3 Egypt

Egypt has always been a fervent supporter of the idea of a permanent international criminal court. From the start of the negotiations towards the Rome Statute, which established the ICC, Egypt assumed a leading role, and was influential in drafting the Rome Statute.¹⁴⁸ Egyptian representatives were among the Vice Presidents of the Conference, and members of its General Committee – in fact, the Chairman of the Drafting Committee was Professor Cherif Bassiouni, a member of the Egyptian delegation.¹⁴⁹ But despite the role and efforts of the Egyptian delegation during its negotiations,¹⁵⁰ and being a signatory state to the Statute, Egypt has still not ratified the Rome Statute,¹⁵¹ thus rendering the ICC’s jurisdiction ineffective in Egypt’s domestic legal system.

Since Egypt signed the Statute (in 2000) there have been no official relationships between Egypt and the Court, or attempts at ICC jurisdiction in Egypt. Since the Arab spring and the Egyptian Revolution of 2011 that led to the fall of that regime, some hopes have started to emerge that Egypt would become a Member State of the ICC. In a news conference with German Foreign Minister Guido Westerwelle in April 2011, Foreign Minister al-Araby announced that “Egypt would ratify the Rome Statute”. The conference stated that Egypt was “currently taking the required steps to join all United Nations agreements on human rights”, was working hard to become a “legally-

¹⁴⁷ Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor.

¹⁴⁸ R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*. (The Hague: Kluwer Law International, 1999) 591–592.

¹⁴⁹ A/CONF.183/13 (Vol.11). United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June-17 July 1998. Summary records of the plenary meetings and of the meetings of the Committee of the Whole.

¹⁵⁰ M C Bassiouni, ‘The Universal Model: The International Criminal Court’, in M. C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, NY: Transnational Publishers, 2003) 813–828.

¹⁵¹ Egypt signed the Statute on 26 December 2000. <[https://treaties.un.org/pages/ViewDetails.aspx? src=TREATY&mdsg_no=xviii-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=xviii-10&chapter=18&lang=en)>, accessed 30 June 2014.

constituted state” and “wishes to follow the rule of law”.¹⁵² In doing so, Egypt would be following in the footsteps of Tunisia, whose interim government approved Tunisia’s accession to the Rome Statute after the Tunisian Revolution and the fall of the country’s previous regime.

Despite its non-ratification of the Rome Statute, Egypt has ratified most of the significant international treaties dealing with international crimes.¹⁵³ The Egyptian Penal Code criminalises, for example, acts of murder and torture, even if it fails to proscribe them as international crimes in compliance with the definitions of international law. Consequently, the Penal Code falls short in addressing the crimes of genocide, war crimes including grave breaches, and crimes against humanity.¹⁵⁴ Some states that have ratified the Rome Statute still choose not to incorporate its provisions into their national laws, but to continue to depend on their existing penal or criminal laws. As the substantive international criminal laws cover criminal acts like murder, torture or rape that are within the Rome Statute’s definitions of crimes against humanity or genocide, such states apply the criminal provisions that already exist in their national legal systems. Although most of the criminal acts found in international criminal law are found in similar forms in national criminal laws (for example, wilful

¹⁵² Human Rights Watch, ‘Egypt: Important Commitment to Ratify Rome Statute’ <<http://www.hrw.org/pt/news/2011/04/29/egypt-important-commitment-ratify-rome-statute>> accessed 9 July 2014.

¹⁵³ On 10 November 1952, Egypt ratified the 1949 Geneva Conventions, while on 9 October 1992 ratified the Two Additional Protocols. It also ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide on 8 February 1952 and on 26 June 1987, made accession to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Also, on 13 June 1977, it made accession to the International Convention on the Suppression and Punishment of the Crime of Apartheid.

¹⁵⁴ With the exception of Article 317(9) of the Penal Code, which states: “[a] penalty of imprisonment shall be imposed in case of crimes of theft committed during war against a wounded even from the enemy power.” Moreover, Articles 136 and 137 of the Code of Military Regulations No. 25/1966 cover few other acts. Article 136 stipulates: “[h]e who enters a zone of military operations and steals from a dead or wounded or sick soldier even if the latter belongs to the enemy power shall be sentenced to death or a lighter penalty as set out in this law.” Article 137 states: “[h]e who commits any act of violence against a wounded or sick soldier hors de combat shall be imprisoned or subjected to a lighter penalty as set out in this law.” Although Article 137 refers only to acts of violence, arguably if interpreted in wide sense it may cover most of the grave breaches. It is clear from reading the above provisions that Articles 136 and 137 of the Military Code were added to supplement Article 137 (9) which was drafted earlier in 1940. Still Egyptian laws do not regulate other obligations amounting from the 1949 Geneva Conventions and the Protocols thereto. As cited in Mohamed El Zeidy, ‘Egypt and Current Efforts to Criminalize International Crimes’, 5 *International Criminal Law Review* (2005), 247-265.

killing as murder, or pillage as theft).¹⁵⁵ Neither the gravity of these crimes, nor the penalties involved, will be the same as when they are elements of international crimes such as genocide, which is considered the ‘most serious crime’, and whose gravity risks being undermined if they are prosecuted simply as ordinary crimes.

Despite the fact that the sentencing provisions of the Egyptian Penal Code are no less than those required for international crimes, still there is a difference between defining some acts as ordinary crimes and others as international crimes. The existing provisions of domestic laws are insufficient to deal with international crimes, it follows that the Egyptian Public Prosecution Office and Courts are not legally competent to investigate and try human rights violations that are serious enough to amount to international crimes. Unfortunately, Egypt’s current status means it falls short of meeting its international obligations.¹⁵⁶

7.3.3.1 The Communication Submitted to the ICC

Since 2011, Egypt has struggled with continued political turmoil and violence that has led to hundreds of deaths. In 2012, Mohammed Morsi was elected Egypt’s first civilian and Islamist president after the overthrow of President Mubarak’s government in 2011.¹⁵⁷ But Morsi only lasted a year in power before being ousted by the military on 3 July 2013, after massive street protests demanding his removal, which resembled those against Mubarak in 2011. Thousands of supporters of Morsi and the Muslim Brotherhood group, Egypt’s oldest and largest Islamist organisation, of which former President Mohammed Morsi is a member. Protestors set up camps in Nahda Square and near the Rab’a al-Adawiya mosque in Cairo, the Egyptian capital, demanding his reinstatement and refusing to disband. On 14 August 2013, after the government’s declaration to disperse the sit-ins by force, riot police and military

¹⁵⁵ K. Dormann and R. Geib, ‘Implementation of Grave Breaches into Domestic Legal Orders’, *Journal of International Criminal Justice* (2009), 703-721.

¹⁵⁶ M. El Zeidy, ‘Egypt and Current Efforts to Criminalize International Crimes’, *5 International Criminal Law Review* (2005), 247–265.

¹⁵⁷ Carrie R. Wickham, *The Muslim Brotherhood: Evolution of an Islamist Movement* (Princeton University Press, 2013), 2-4.

troops stormed the two protest camps and hundreds of people from both sides were injured or killed due to resistance and violence.

On 16 August 2013, the Muslim Brotherhood's political wing, the Freedom and Justice Party (the FJP), appointed a London-based law firm ITN Solicitors,¹⁵⁸ to represent it against the Egyptian government. On 13 December 2013, ITN lawyers, acting on behalf of FJP and the MB, submitted documents to the ICC Registrar seeking to accept the exercise of the ICC's jurisdiction pursuant to Article 12(3) of the Rome Statute, with respect to crimes alleged to have been committed on Egyptian territory since 1 June 2013.¹⁵⁹

All states, which are party to the Rome Statute accept the Court's jurisdiction with respect to crimes referred to in Article 5 of the Statute when committed on their territories or by their nationals. States that – like Egypt – are not party to the Rome Statute, may choose to accept the Court's jurisdiction on an *ad hoc* basis by lodging a declaration to that effect with the Registrar in accordance with Article 12, paragraph 3 of the Statute.¹⁶⁰ Such declarations relate only to the scope of the Court's jurisdiction, and do not trigger investigations by the Court. The investigations can only be instituted following the referral of a situation to the ICC Prosecutor by a state that is party to the Rome Statute, or by the United Nations Security Council, or on the authorisation from a Pre-Trial Chamber to the Prosecutor to open such an investigation.

¹⁵⁸ Irvine Thanvi Natas Solicitors, <<http://www.itnsolicitors.com/Home>> 1 June 2014.

¹⁵⁹ International Criminal Court, Communication Seeking to Accept the ICC's Jurisdiction over Egypt (ICC-CPI-20140501-PR1001).

¹⁶⁰ Article 12 of the Rome Statute reads the following: Article 12 Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.

2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3.

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national. [135]

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

The lawyers representing the Muslim Brotherhood argued that officials of the ousted Morsi government made the communication, and that the Court should recognise it because it remained the legitimate, democratically elected government. “We hope, and we have good reason to believe, that the Court will take this declaration seriously” said John Dugard, a South African human-rights lawyer involved with the case who has also worked with the UN.¹⁶¹ On receiving the communication (as per its established internal procedures) the Court Registry attempted to verify with the Egyptian authorities whether or not it had been sent on behalf of the State of Egypt, but did not receive a positive confirmation. The OTP’s statement says that, after a rigorous factual and legal analysis of the communication and of additional information received from the applicants, it determined that the communication sent to the Registrar on 13 December 2013 was not (in terms of international law) submitted by a person with the requisite authority, in other words, bearing “full powers” to represent the State of Egypt for the purpose of expressing that state’s consent to the exercise of ICC jurisdiction. In short, the applicants lacked *locus standi* to ask the Court to exercise *ad hoc* jurisdiction pursuant to Article 12(3) of the Rome Statute. The documents submitted (which were dated 10 August 2013) purported to be signed on behalf of the Government of Egypt. After careful consideration of all the facts, the OTP concluded that, as a matter of international law the applicants neither exercised the requisite authority, nor were they in possession of “full powers”¹⁶² on behalf of the State of Egypt; on the date when the declaration was signed or when it was submitted to the Registrar of the Court.

The Registrar informed the petitioners that the communication received could not be treated as a declaration asking for the ICC to exercise its jurisdiction pursuant to Article 12(3) of the Rome Statute. The applicants lacked the requisite authority under international law to act on behalf of the State of Egypt for the purpose of the Rome Statute. The Registrar did though state that the assessment should in no way be construed as determining the nature of any alleged crime committed in Egypt or the

¹⁶¹ Paul Waldie, ‘Egypt’s Muslim Brotherhood Appeals to World Criminal Court’, *The Globe and Mail*, 6 January 2014.

¹⁶² See the Vienna Convention on the Law of Treaties (1969), Articles 2.1 and 7.1; UN Legal Counsel, “Full Powers Guidelines,” LA41TR122 11 Full Powers Guidelines 12010.

merits of any evidence presented. The OTP therefore determined that the documents submitted should rather be treated as a communication pursuant to Article 15 of the Rome Statute. However, as the allegations referred to in the communication fell outside the Court's territorial or personal jurisdiction, the OTP also determined that it could not proceed any further with the applicants' complaint or examine the crimes alleged to have been committed.¹⁶³

It may be argued that the Muslim Brotherhood's legal team has wrapped questions of democratic impropriety (who the rightful leader of Egypt is, and whether the coup was legitimate) up in issues of international criminal law. It is a bold move – and perhaps a politically intelligent one, in that it seeks to gain added publicity and attention to on-going events in Egypt, as well as to earn sympathy for the Brotherhood. But the ICC has shown itself to be very hesitant to take on such highly controversial politicised cases.¹⁶⁴ It seems, therefore that the Brotherhood's efforts are doomed to fail. Had the Morsi government filed its declaration while it was still in power (as in the Cote d'Ivoire situation), that would have been one thing – but it did not; and while there are interesting political questions about the legitimacy of the military-led coup/revolution, the Muslim Brotherhood is clearly no longer the government of Egypt in terms of “effective control”.¹⁶⁵

An application for a declaration of ICC jurisdiction under Article 12(3) can gain substantial media attention for a particular political cause, which can increase public awareness and allow an issue to be framed as an international crime. So non-State Parties can use the option to lodge a declaration for political gain,¹⁶⁶ although it should be remembered that it is within a State's sovereign discretion whether or not to lodge such an application, and it can choose to do so only when it can benefit itself.

¹⁶³ International Criminal Court, The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt (ICC-OTP-20140508-PR1003) accessed 8 May 2014.

¹⁶⁴ Mark Kersten, *ICC Says No to Opening Investigation in Egypt*, 1 May 2014, <justiceinconflict.org/2014/05/01/icc-says-no-to-opening-investigation-in-egypt/> 30 May 2014.

¹⁶⁵ Kevin J Heller, *Why the Muslim Brotherhood (Wrongly) Believes the ICC Can Investigate*, 6 January 2014, <opiniojuris.org/2014/01/06/muslim-brotherhood-wrongly-believes-icc-can-investigate/> accessed 30 May 2014.

¹⁶⁶ S. Freeland, 'How Open Should the Door Be? – Declarations by Non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court', 75 *Nordic Journal of International Law* (2006), 222.

A declaration might be lodged when there is a political benefit – such as discrediting or threatening political opponents – rather than being based on genuine interests of justice. A declaration could lead to negative publicity or threat of prosecution for those over whom jurisdiction is granted. A non-State Party could also try to limit investigations into the “crime in question” and shield its own nationals, while using the declaration as a political weapon against its enemies. However, the recent ICC decisions noted above seem to indicate that the judges are keen to limit such attempts to use the Court for political purposes. As there is no judicial scrutiny until an investigation is requested, it cannot be known whether such a declaration is valid, but the OTP can take actions as a result of its preliminary examination.¹⁶⁷

It is also worth noting that the Brotherhood’s communication sought the ICC’s jurisdiction with respect to alleged crimes committed on the State of Egypt’s territory after 1 June 2013. The selected date was an attempt to limit the Court’s jurisdiction to a certain time period, i.e. from one month before the ousting of Morsi. By doing so, all the crimes that were alleged to have occurred during the year Morsi was in power – for which he and other Muslim Brotherhood leaders are currently being prosecuted, and in some cases have been sentenced – would be outside the Court’s jurisdiction.

The politicisation of the ICC is a major worry for those States Parties who have ratified the Rome Statute,¹⁶⁸ as it would undermine the Court’s international legitimacy and trust in the OTP’s *proprio motu* powers.¹⁶⁹ Such a politicisation could also antagonise non-States Parties, and would risk the Court losing international standing and support as a result of this political influence; might dissuade other states from becoming parties to the Rome Statute, all of which would risk hampering the ICC’s ability to achieve its aim of preventing the perpetrators of international crimes enjoying impunity.

¹⁶⁷ Chan James, *Judicial Oversight over Article 12(3) of the ICC Statute*, FICHL Policy Brief Series No. 11 (2013), Torkel Opsahl Academic EPublisher, <http://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/FICHL_PB11.pdf> accessed 9 July 2014.

¹⁶⁸ Allison M Danner, ‘Prosecutorial Discretion and Legitimacy’, 97 *American Journal of International Law* (2003), 510.

¹⁶⁹ William A Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press, 2004) 120.

There have been repeated calls for to Egypt to join the ICC, but communications such as that from the Muslim Brotherhood could slow down this process if not stall it completely, given the political tensions between the Egyptian government and the Muslim Brotherhood and Egypt's decision to declare it a banned group and a terrorist organisation.

In a press statement released on 8 May 2014, the OTP confirmed that it had held meetings with the Muslim Brotherhood's lawyers.¹⁷⁰ However, this press release could create the impression that the prosecutor has established close ties with the MB, and so could be mistaken as indicating that the OTP was siding with the MB against the current Egyptian government. Or, in turn, the Court's reluctance to admit and act on the MB's communication could be seen as giving the government political support against the Brotherhood. Such statements can still be used in the media by a party submitting a communication as evidence that the ICC does not deny that internal crimes were committed in (or perhaps by) the state.¹⁷¹ The OTP mentioned in its statement that it should in no way be construed as a determination on the nature of any alleged crimes committed in Egypt or on the merits of any evidence presented. Any statements suggesting a particular person is a suspect can discredit that individual and his affiliated institutions – so even interim actions by the OTP could influence the standings of individuals and/or political groups.

In a general statement, the OTP reported having received 10,470 “communications” pursuant to Article 15 of the Rome Statute by the end of 2013.¹⁷² It is clear that the public were not made aware of the vast majority of these, which makes the OTP decision to issue a press statement about the communication considered in this paper questionable. The statement has led to several political consequences, resulting in

¹⁷⁰ International Criminal Court, *The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt (ICC-OTP-20140508-PR1003)* 8 May 2014.

¹⁷¹ Ikhwanweb, *Press Statement: ICC Confirms Egypt Complaint Still under Consideration*, 23 April 2014

<[www.ikhwanweb.com/article.php?id=31638&utm_source=CICC+Newsletters&utm_campaign=aa7dd8d41-4_25_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-aa7ddd8d41-408795633&ct=t\(4_25_14_GlobalJustice_Weekly\)](http://www.ikhwanweb.com/article.php?id=31638&utm_source=CICC+Newsletters&utm_campaign=aa7dd8d41-4_25_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-aa7ddd8d41-408795633&ct=t(4_25_14_GlobalJustice_Weekly))> accessed 9 July 2014.

¹⁷² International Criminal Court, *Preliminary Examinations*, <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx> accessed 9 July 2014.

political and publicity gains for one party and suspicion for another, despite the fact that the communication in question could have simply been ignored for lack of legal merit, valid arguments and (most importantly) grounds for jurisdiction. The Court dismisses thousands of other similar communications, but no public announcements are made, nor does the OTP issue press statements about them or how they are handled.

It is apparent from the ICC's various organs' decisions and the Rome Statute that the Court could not have jurisdiction over Egypt in the alleged situation submitted by the MB and their lawyers. Without undermining the victims right to seek justice, the ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine. Most importantly, the Court is based on a treaty, to which Egypt is not a member,¹⁷³ so efforts seeking justice should be directed to a jurisdiction that can prosecute alleged crimes. Assuming that Egypt is a Member State of the ICC, the Court will respect the primary jurisdiction of Egypt, based on the principle of complementarity. Consideration will be given to the efficiency and effectiveness of Egypt's legal system, as it will generally have the best access to evidence and witnesses and the resources to carry out proceedings.¹⁷⁴

Since 2011, Egyptian courts have begun conducting trials under the Egyptian Penal Code against political leaders and security officials from both the Mubarak and Morsi regimes for crimes committed during their periods in power, including murder, torture and inhumane treatment. Mubarak, his Minister of the Interior, El-Adly, and other senior security officers are being tried for the murder of protestors during the 2011 revolution.¹⁷⁵ Morsi and other Muslim Brotherhood leaders, including the Supreme

¹⁷³ Hector Olásolo, 'The Prosecutor of the ICC before the Initiation of an Investigation: A Quasi-Jurisdictional or a Political Body?', 3 *Int. Criminal Law Review* (2003) 87-150.

¹⁷⁴ JT Holmes, 'Complementarity: National Courts versus the ICC', in Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford, 2002), at 667-686.

¹⁷⁵ Human Rights Watch, *Egypt: Q&A on the Trial of Hosni Mubarak*, 28 May 2014
<<http://www.hrw.org/news/2012/05/28/egypt-qa-trial-hosni-mubarak>> accessed 10 July 2014.

Guide, Muhammad Badie are also being tried for similar crimes.¹⁷⁶

The question as to whether or not the crimes committed, under both regimes, should be defined as international crimes is controversial. In their communication to the ICC, the lawyers representing the MB asked the Court to investigate alleged crimes against humanity which targeted civilians, since 1 June 2013. Despite the capability of Egypt's national judicial system to deal with these alleged crimes, the MB decided not to pursue their prosecution via Egypt's domestic system, but to submit a complaint to the International Criminal Court.

Egypt has a justice system that is well-recognised within the Middle East,¹⁷⁷ and would be able and willing to prosecute serious human rights violations and crimes. Moreover, Egyptian courts function well and are respected for their independence and impartiality.¹⁷⁸ Since the 2011 uprising, the Egyptian Public Prosecutor has charged senior officials responsible for the deaths of protesters and other victims of political clashes. The Egyptian judiciary system is able and willing to prosecute genuinely all perpetrators responsible for the crimes committed. Mubarak, for example, has been charged with conspiring in the killing of protesters, and was found guilty in June 2012 and sentenced to life imprisonment.¹⁷⁹

The Muslim Brotherhood leaders, including the ousted President Morsi, are now being tried for alleged crimes including murder and torture of protesters, which could be considered crimes against humanity under the definitions of international law.

¹⁷⁶ Amnesty International, *Egypt: Trial of Mohamed Morsi*, 3 November 2013, <<http://www.amnesty.org/en/library/asset/MDE12/064/2013/en/7a7a3599-34a5-466a-9b1b-cbaa87f714a2/mde120642013en.html>> accessed 9 July 2014.

¹⁷⁷ Nathan J Brown, *Arab Judicial Structures: A Study Presented to the United Nations Development Program*, <www.undp-pogar.org/publications/judiciary/nbrown/egypt.html> accessed 1 September 2004. For an overview of the Egyptian judiciary, see Adel Omar Sherif, 'An Overview of the Egyptian Judicial System, and Its History', 5 *Yearbook of Islamic and Middle Eastern Law* (1998-1999) 3, 14–28.

¹⁷⁸ Adel O Sherif and Nathan J Brown, *Judicial Independence in the Arab World: A Study Presented to the Program of Arab Governance of the United Nations Development Program*, <www.deontologie-judiciaire.umontreal.ca/en/textes%20int/documents/ONU_jud-independence_MONDE_ARABE.pdf> accessed 17 June 2014.

¹⁷⁹ In January 2013, an appeal against his conviction was upheld and the case was retried in May 2013. In May 2014, he was convicted (in a different case) of embezzlement and subsequently sentenced to three years in prison.

MB leaders attempts to have the ICC indict and try some Egyptian officials in The Hague, were dismissed. The crimes were allegedly committed when Morsi was ousted and could be seen as being motivated by political factors, rather than as an attempt to apply justice; more about political gain and propaganda efforts than as serious legal endeavours under international criminal law.

7.3.3.2 The Incorporation of International Crimes

On 2 August 2014, the Egyptian Cabinet (Council of Ministers) published a draft law on “Combating Genocide, War Crimes, Crimes against Humanity and Aggression”¹⁸⁰ to be issued later, after passing all legislative processes and obtaining final approval of the Cabinet, by a Presidential decree. The draft law is considered a major turning point in the Egyptian legislation history as it incorporates for the first time the core international crimes into the Egyptian domestic laws. In Egypt, all laws must adhere to constitutional provisions and Sharia, the legal system, being considered as a civil law system, is based upon a well-established system of codified laws. The draft law, which is inspired mainly from the Rome Statute, has no mention of Sharia and does not contain any provisions related to Islamic law. According to Article 2 of the Egyptian Constitution 2014, “Islam is the State’s religion ... and the principles of the Sharia are the principal source of legislation.” The application of Sharia is most visible in the laws of personal status, which cover matters such as marriage, divorce, child custody, and inheritance.

Such draft law is considered a positive step towards the strengthening of criminal justice, especially that the Egyptian Penal Code has not been subjected to these types of crimes before, despite their gravity and violation of human rights. For the Egyptian government to seek legislation in this regard is a positive step towards the accountability and prosecution of those involved in the commission of the most serious crimes of concern to the international community, the fight against impunity,

¹⁸⁰ A copy of the draft law in Arabic was obtained from the Egyptian Cabinet by the author for research purposes. The Author translated the draft law to English.

and improving human rights in Egypt.

The draft law consists of 6 chapters and 41 articles. The first chapter is titled “Definitions”, the second chapter is “Crimes and Penalties”, third chapter is “General Provisions”, fourth chapter “Procedural Provisions”, the fifth chapter “International Criminal Cooperation” and the last chapter titled “Protection of Victims, Witnesses and Informers”.

In application of the provisions of the draft law, Article 1 describes the protected persons under this law as everyone who enjoys the minimum level of protection during an international armed conflict without any adverse distinction. In particular the distinction founded on grounds such as race, colour, religion, belief, gender, ethnicity, language, birthplace, wealth, culture, social origin, or political or geographical affiliation. This applies to the non-participating persons in the hostilities, including the armed forces personnel who gave up their weapons, those who are unable to fight, the wounded, the sick, the drowning, or prisoners of war.

Articles 4, 5, and 6 define the responsibility of commanders, superior, and subordinates. The articles come at the top of Chapter 2 before the definitions of the crimes. As defined in Article 4, the military commander, or person effectively acting as a military commander shall be punished with the same penalty for the crimes prescribed by the law if committed by the forces under his actual command or authority, and either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes, and he did not give orders or take measures - imposed upon him by his actual power - to prevent or cease their commission or to submit the matter to the competent authorities for arrest or investigation or prosecution. The wordings of the article are similar to Article 28 (a) (i) and (ii) of the Rome Statute.

Article 5 of the draft law defines the superior responsibility, similar to Article 28 (b) of the Rome Statute. It reads that every superior shall be punished with the same penalty for the crimes prescribed in this law if committed by subordinates under his effective authority and control, if he has information that would make him aware,

under the existing circumstances, that his subordinates have committed or about to commit any of such crimes, and he did not take decisions and measures – imposed upon him by his actual power – to prevent or cease their commission or to submit the matter to the competent authorities for arrest or investigation or prosecution.

Article 6 of the draft law, which sets out the responsibility of subordinates, is very similar in language to Article 33 of the Rome Statute on superior orders and prescription of law. It reads that a person shall not be discharged from criminal responsibility for the crimes prescribed in this law pursuant to an order of a government or of a superior, whether military or civilian, unless the following two conditions are available:

- There was a legal obligation to obey orders of the government or the superior in question;
- The person did not know that the order was unlawful; and the order was not manifestly unlawful, and orders to commit genocide or crimes against humanity are manifestly unlawful.

As for the definitions of crimes Article 8 of the draft law defines genocide and in the same article indicates the penalties for the crime, which are the death penalty, or a life sentence, or imprisonment for not less than ten years. The definition of genocide is taken verbatim from Article 6 of the Rome Statute. The crimes of against humanity definition in the Egyptian draft law is also inspired from the Rome Statute Article 7, despite stating the death sentence in the definition, the whole definition is similar with the insertion of “widespread or systematic attack” and the affirmation that being directed against “any civilian population”. As for the acts that constitute the crimes against humanity, the Egyptian draft law listed fifteen acts and defined each of these acts. The definitions of the acts included the act of torture, rape, sexual slavery and enforced disappearance. The acts also include the persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds. It is considered the first time that an Egyptian legislation will include such acts protecting these identified groups. The definition of the acts is similar to the acts described in Article 7(a)(k) of the Statute, and even included forced pregnancy,

which was highly objected to by Arab states during the negotiations of the Statute.

War crimes are listed in the draft law under seven different articles, which mainly divided the provisions of Article 8 of the Rome Statute into different articles as an attempt from the Egyptian legislator to categorise the related acts together under several articles. Yet, the war crimes are defined to be committed in the context of international and non-international armed conflicts. The crime of aggression is inserted in the draft law, which is considered an evolution to the Egyptian domestic laws, especially that the adopted definition is verbatim to the Rome Statute's Article 8 *bis*.¹⁸¹ Thus, Egypt is aiming to incorporate the international crimes in accordance to the definitions found in the Statute, including the recent amendments. The draft law also removed all immunities, including to head of state, as grounds for excluding criminal liability according to Article 21.

The Rome Statute's general principles are also incorporated in the draft law, and according to Article 24 of the draft the crimes listed shall not be subject to any statute of limitations. The principle of *ne bis in idem* is provided in Article 34 of the draft law, which is similar to Article 20 of the Rome Statute. Chapter five of the draft law (International Criminal Cooperation) allows in Article 35 and 36, cooperation with the ICC in the future. The Court is not mentioned, but the draft law provides for cooperation with "foreign judiciary entities" in all related matters, including extradition and other cooperation obligations found in the Statute. Such an approach will facilitate the ratification of the Rome Statute in the future if Egypt decided to join the ICC, as the domestic legislation will not contradict with the Statute's obligations. Finally, the draft law provides for witnesses and victims reparations and protection mechanisms in Articles 39 and 40. It creates a new department in the ministry of justice called "the Protection Division" which will be responsible for all victims and witnesses issues, including their protection. Egypt is aiming to provide efficient, comprehensive legislation that allows it to have national jurisdiction over international crimes and to cooperate with the ICC if the Statute is ratified. The draft

¹⁸¹ Amendment to Article 8 of the Rome Statute of the International Criminal Court
Kampala, 10 June 2010.

law is currently under review by the Egyptian Council of State, and then it will be passed to the parliament for discussion and approval during its session in 2016.

7.4 Conclusion

Jordan was the first Arab state to ratify the Rome Statute, followed by Djibouti, Comoros, Tunisia and Palestine. Despite the different circumstances that influenced these states to join the Court, it indicates that in the presence of a state political will to reform legislations and to commit to international law, any obstacles can be overcome. Whilst Djibouti and Comoros were more influenced by the AU approach and its members' commitment to ratify the Statute, in general, the initiatives taken by these states towards the Rome Statute should be considered by other Arab states, which did not ratify the Statute. Libya and Sudan were among the states opposing the ICC and currently the Court has jurisdiction over them. It could be seen as an incentive to other Arab states to ratify and implement the Statute and have primary jurisdiction over international crimes, but the complementarity and admissibility issues raised from these two situations could lead to more complex concerns. The region lacks efficient international criminal justice systems and transitional justice mechanisms that are required in those states that have witnessed conflicts. Although the situations differ from one state to another, the implementation of international criminal law by Arab states would prevent the gross violations of human rights, and provide legal and constitutional safeguards against human rights abuses and other forms of repression. The Tunisian step towards human rights instruments and the Rome Statute shall be followed by other Arab states, especially those that shared the uprisings and change of regimes. Palestine needs the support of the Arab League and its member's states in the step taken towards the ICC. Palestine is facing strong hostility from major powers that oppose such steps of involving the Court in the Israeli conflict. The ICC now has a great opportunity to respond to all the claims raised by some Arab states regarding double standards in applying justice and starting investigations in the situation currently under preliminary examination.

For the states examined in this chapter and for other Arab states in general, the political system of each state has a strong and important role in the ratification decision. Democracy is a strong predictor of whether or not the state will ratify the Rome Statute. Although the majority of democratic states have ratified the Statute, there are exceptions to such an approach, like the US, which has some concerns about the ICC, for example, those related to the protection of its military personnel. Some Arab states were able to move from authoritarian regimes peacefully and implement democracy, while others were dragged through severe armed conflicts as a result of decades of injustices. States that are currently involved in internal armed conflicts are less likely to ratify the Rome Statute. The rise of Islamist groups onto the political scene, like in Egypt and Tunisia, has also affected the democratic processes and reforms in the region. The experience in Egypt and the violence witnessed once the Islamists assumed power has diverted the democratic path of the popular uprisings in the region and the calls for justice. Now the region is facing several challenges, including the Gulf-Arab states, as there are on-going conflicts and the terror threat of the so-called Islamic State (ISIS), which gained control of large parts of Iraq and Syria. Accountability in those affected states will be required when formulating transitional justice policies. The involvement of the ICC and other international organisations will be essential to assist the Arab states in this phase. Although the question of legitimacy was raised by the Arab states during the Darfur situation referral, the acceptance of international assistance in Libya, Syria, Iraq and Yemen situations could indicate that there is change in this conception.

Conclusion

The Arab world has witnessed one of the most challenging periods in recent history, featuring uprisings, protests, civil wars and armed conflicts, that have left thousands dead and entire cities destroyed, whilst millions more are displaced internally or dispersed throughout the region. Although some Arab states have not yet been disturbed, they are still affected by the instability in the region and the continuing conflicts beyond their frontiers. In some situations, they have even led military interventions in such regional conflicts. The so-called “Arab Spring” in 2011, and events before, have shown that the majority of, if not all Arab states lack the rule of law, whilst their populations face human rights abuses, corruption and a struggle against the impunity of those committing crimes.

The principles of the rule of law require structural reforms, constitutional amendments, new legislations, true democratic governance and a culture of political awareness among the people; but most importantly, commitment and respect of human rights and international law norms. The absence of effective legislation incorporating international crimes into domestic law in most of the Arab states is a problem that contributes to the unstable situation in the region.

There are other challenges facing the Arab states, including the complexity of human rights violations, the culture of impunity that exists in the region, the large numbers of both perpetrators and victims, and the lack of national precedents or experience in prosecuting these types of cases. Nevertheless, if these Arab states did have the political will to end impunity, an attempt might be made to apply international law and jurisprudence and to support the efforts to end impunity through participation in the international criminal justice system. This could be achieved by encouraging them to implement the required legislations so that the fight against impunity for international crimes can be fought at the national level.

The belief that the ICC will primarily target and prosecute all the miscreant Arab leaders once the Rome Statute is ratified still prevails across the region, and while this point of view cannot be ignored and still might occur on some level, the explanation of the unlikelihood of this situation is the duty of all the ICC stakeholders. At the political level, Arab states' leaders must be aware that by implementing international law and incorporating international crimes into their domestic legislations, this would keep the ICC away from intervening in their jurisdiction as long as there are fair domestic trials for these grave crimes. The implementation of international criminal law is not necessarily linked to the ratification of the Rome Statute, as a state could adopt an approach, in which it has a full comprehensive national legislation prohibiting international crimes and prosecuting them domestically in fair trials without even being a member of the ICC. This approach would not only fulfill the state's obligations under international law, but also help to end impunity. Thus, complete isolation from the international law obligations or the refusal to ratify the Rome Statute will not provide a "safe haven" for perpetrators, especially under the current alternatives for applying justice.

The concerns raised by some Arab states regarding sovereignty are challenging and are related to the main problem in the region, yet if these states provide for and respect the rule of law, human rights, and principles of justice genuinely, as well as commit themselves to prohibiting and punishing international crimes, their sovereignty will be preserved. The implementation of the Rome Statute may be the first step, as that in itself does not guarantee success. Indeed, this point is demonstrated through Arab states having ratified and even implemented several human rights treaties and conventions, yet in practice, several basic human rights and freedoms are still missing from the domestic legislations and are not fulfilled or guaranteed in the region. Thus, they must demonstrate that they are truly committed to the protection and promotion of the inviolable human rights of their citizens and not allow violations and violators to go unpunished.

The decision to be taken by Arab states and their leaders to ratify the Rome Statute must be their own, without any political pressure. Arab states must independently acknowledge that applying justice and ending impunity is the true path for their countries and populations to move forward and live in peace. External influences on

Arab states to enhance and reform their legal and judiciary systems, and to respect the rule of law will ultimately provide changes and improvements based on “shaky” foundations.

The unaddressed conflicts and human rights violations in the region will also continue to feed impunity. Without eliminating the culture of impunity that is embedded in the Arab region and offering accountability, any solutions brought or implemented will be temporary and vague. Several Arab states must consider post-conflict or transitional justice mechanisms as a response to the mass crimes that occurred during armed conflicts or authoritarian regimes. Peace will not emerge without accountability, and those affected Arab states have to consider alternative mechanisms, whether tribunals, reconciliation, truth commissions or domestic legal reforms, in rebuilding their communities. The lack of accountability is and will continue to be a key obstacle in the development of the Arab states.

Arab states can examine and even benefit from comparing the experiences and solutions of other states emerging from armed conflicts, which were reviewed in chapter two. They could determine that according to the demands of modern criminal policy, their criminal justice system is not up-to-date to prosecute international crimes or even to maintain human rights standards as developed by relevant international instruments. Arab states that have not faced internal conflicts can still review other states’ approaches and engage with them in discussions on relevant issues, as this will provide them with the advantage of receiving feedback and recommendations to develop their own legal systems.

The use of a “model law”, which some states adopted during their implementation process could be practical to some Arab states, as the Arab League has already drafted one. The Arab model law addressed most of the concerns raised by Arab states. Some Arab states decided not to adopt the Arab model law and instead draft their own legislation, as did Jordan. Egypt’s initiative in the proposed draft law is considered a positive step, as even though Egypt is not a party to the Statute, the draft law will implement most of the Statute’s main principles and definitions of crimes.

In the process of constitutional reform, most of the developed states have focused on two issues: the limitation of the executive power by the separation of powers within the state, and the establishment of a constitutional guarantee of popular rights and freedoms. Instead, most Arab states focused on religion-related issues and enhancing the executive's powers during their constitutional reforms process, whilst debating the application of Sharia and its role within the state. Despite the recent amendments and adoption of new constitutions within the region, heads of state are still privileged with broader constitutional powers and authority, including legislative roles.

The Sharia and its position in the Arab states' constitutions, which seems to be one of the obstacles in the reform process and consistency with international law norms, must be addressed with great attention and sensitivity among these states. Most of the Arab states have inserted an article or more referring to the Sharia as a source or the exclusive source of their legislations, such as Egypt. While in Tunisia, a new approach has been adopted, which is to ignore or remove any constitutional provisions dealing with or referring to Sharia or Islam. This approach could be found within the region prior to the Islamists' movement in the Middle East, but due to this movement, it would be extremely difficult to apply the Tunisian approach in most modern day Arab states due to the strong impact that Islam has on the region.

A possible solution could be to adopt an approach that is based on the reconciliation between Sharia and international law norms. Resolving the inconsistency between Sharia and human rights standards should be the main aim and treated as first priority. As reviewed in chapter six, Sharia and international law hold the same basic principles, so it comes down to the states' malpractice or misinterpretation that has led to the current instability and incompatibility between the two. Implementing reforms and interpretations based on true Islamic values will assist in the reconciliation approach to accommodate the inclusion of at least a minimal international protection of human rights into Arab states' constitutions and legislations.

The constitutions form the backdrop to all legal considerations within the state, and the role of the Sharia as a source of law, as prescribed by the Arab states'

constitutions, is important. Thus, whatever the diverse purposes underpinning particular constitutional provisions, their purpose was plainly not to facilitate the commission of international crimes or to provide impunity in respect thereof. The ICC was created pursuant to the international peace and security of the international community, and the enforcement of justice. The Rome Statute, as a treaty, protects human rights within its objectives, purpose and procedural norms. Accordingly, the provisions' compatibility between the Statute and the constitutions exist, as there is no contradiction in the main principles, values and norms.

Arab states are not isolated from the international community and their laws are made compatible with "Western" legislations in other fields, like commercial and banking. Some Arab states strictly apply Sharia, yet their banking and commercial laws and daily transactions with Western companies are contrary to their own interpretation of Sharia. After examining their own interests, they are able to overcome these constraints to deal with Western companies according to the Western legislations, conventions, and arbitration rules.

Constitutions and domestic legislations should not be drafted or interpreted to preclude the application of international law. Several states have already included international law as part of the constitutional framework whether directly or indirectly, explicitly or implicitly. Most Arab states are already party to other conventions and treaties, like the Geneva Conventions, which obligate them to include international law within their constitutions. This commitment to international law should negate any constitutional provisions that prohibit the investigation and prosecution of international crimes, such as immunities, as these are inconsistent with international law and international human rights law, including the Rome Statute.

Procedural Steps Towards Ratification of the Rome Statute

Chapters one and two reviewed and analysed the different steps and approaches towards the ratification of the Rome Statute. There are variations from one state to the another in regards to the domestic legislative procedures required for accepting a legally binding treaty, like the Rome Statute. For Arab states that are willing to ratify or accede to the Rome Statute, there are some general steps that could be applicable to them and should be considered as guidance to such a process. These steps are outlined below.

First, the relevant ministries within the state should start by preparing an evaluation of all the costs and collect all related, required documents that are associated with becoming a party to the Rome Statute. These costs, for example, should include the costs of drafting new legislations, constitutional amendments, and administrative costs that are required to ratify and implement an international treaty within the state.

Second, the relevant government authorities, which are usually the legal department in the ministry of foreign affairs or the ministry of justice, should start drafting the ratification instruments for international treaties. As the matter differs from one state to another, each authority should allocate a decision-making entity to approve the ratification or accession to the international treaty, like the Rome Statute. The responsibility of signing the instrument for ratification will usually fall upon the head of state.

Third, the decision-making entity noted in the step above would organise the plan required for the endorsement process, by outlining the necessary documentations and the decision-making process to complete the signing and depositing of the Statute. Such administration procedures may differ slightly from one state to another as some states might require parliamentary or government approvals or judicial reviews, but assuming there is a political will within the state, these steps could be arranged without any obstacles.

Fourth, the state should decide whether it needs to make any declarations with the submission of the ratification instrument. The Rome Statute does not allow for treaty reservations; therefore, some states decide to make declarations during the ratification or accession process.

Fifth, the entitled authority should then sign the ratification instrument and any other instruments of declaration after completing all the national legislative and administrative processes necessary.

Finally, the Permanent Mission of the state to the United Nations Headquarters in New York should deposit the instrument of ratification with the UN Secretary General, as without such process, the ratification would not be effective. Instruments are delivered to the Treaty Section of the UN and the deposit date will be recorded as the date in which the instrument is received. Although it is not required that the person who delivers the instrument of ratification by hand should have the full power, the instrument can also be delivered to the Treaty Section by mail or fax, and subsequently deliver the original soon after.

Recommendations

The ICC, the Rome Statute States Parties, embodied in the ASP, and all of their related stakeholders must be more engaged with the Arab states to promote the Court and its role in fighting impunity, and to provide a better understanding of the Statute to overcome any and all misunderstandings. In addition, the ICC should promote the principle of complementarity and raise awareness among the Arab states of such principle, and its benefits to States Parties and the Court.

Recommendations and Responsibilities of the Court

The Court should sponsor and provide technical assistance and expertise to the Arab states that require capacity building or transitional justice support. Thus, the ICC promotes and reassures the importance of national mechanisms and efforts to provide accountability for international crimes under the jurisdiction of domestic courts. The ICC should have a dedicated department or office for the Arab states, which could be a regional office in one of the Arab Member States, like Jordan. Through this office, the Court could engage more closely with Arab states and play a major role by encouraging and assisting them to ratify the Rome Statute and implement its provisions. Operating from a regional office from one or more of the Arab Member States could be an incentive to the other states to cooperate more with the Court. In addition, the ICC could choose selected figures, be it politicians or scholars, to promote the Court in the region. By establishing a role in the region, the ICC can continue to work with the Arab states that have ratified the Statute to strengthen prospects for deterrence and enhance its impact on national prosecutions.

Recommendations and Responsibilities of Arab Member States.

Arab states that have already ratified the Statute should also support the ICC by fulfilling their obligations to the Court, including financial and political support, commitment to the Statute aims through efficient implementation, and by incorporating the Statute crimes into their domestic legislations. This will enhance positive complementarity and improve national capacity. Finally, the Arab states that have ratified the Rome Statute, members of the League of Arab States, should urge other states to ratify or accede to the Statute during the ministerial and heads of states meetings. Through cooperation between the ICC and the Arab States Parties, an agreement or protocol could be signed between the ICC and the Arab League, similar to the agreement between the EU and ICC. Additionally, Arab States Parties should provide support to the ICC by seeking the assistance and expertise of the ICC

throughout their own processes. They should also provide support to non-member states by promoting the implementation of the Statute and offering expertise, experiences, and resources before, during, and after the implementation of the Statute into other national legislations. Ideally, by setting an example and supporting both the ICC and other states in the region, those States Parties would play a vital role in the promotion and commitment to international human rights in the region.

Recommendations and Responsibilities of Arab States

As for the role of Arab states, the accountability for international crimes should be promoted as well as safeguards should be provided for the victim's reparation. Legislations should be amended to introduce command responsibility and substantive elements of crimes using the Rome Statute as a reference. Most of the Arab states' legislations need reforms and amendments, particularly in regards to international criminal justice and human rights. Thus, implementing a widely accepted treaty, like the Rome Statute, in such a reform process would assist in introducing new efficient legislations.

Apart from the Rome Statute, the Arab states shall ratify other international human rights treaties and implement them. Reforms should also include the judicial institution by training judges and prosecutors to enhance the justice mechanism within each state. Police and security forces should also be trained in up-to-date law enforcement tools and provided with human rights education. Civil society and NGOs could likewise assist the governments in enhancing the international criminal justice system by promoting the ICC and engaging with the relevant public authorities on the importance of ratification and implementation of the Statute. Several NGOs have already assisted states through the ratification process by providing technical assistance and model laws. Their experience could be beneficial to several Arab states that lack the required tools for such a complex process.

Recommendations and Responsibilities of the UN Security Council

The UN Security Council's role is also vital to the acceptance or promotion of the Statute and the ICC within the Arab region and other regions. As discussed in chapters four and five, the Security Council's referrals are meant to be an effective alternative to applying justice and providing the ICC with jurisdiction to investigate and prosecute criminals that are usually out of its reach, like Darfur and Libya. However, the selective and inconsistent referral process of the Security Council produces negative attitudes towards the ICC and the P-5. Their failure to refer situations such as Syria, perhaps because of their own national interests, shows the inconsistency, and confirms the fears and concerns that were outlined during the negotiations of the Statute. This must be amended at future ASP meetings, as the perceptions of legitimacy and the integrity of the Court depend on it

The Security Council's role in referring situations could be assigned to the UN General Assembly, as this would then include the input and opinions of a wider audience and would provide more consistency in the decisions away from political influence, impede the shielding of perpetrators from prosecutions due to nationality or relationship to powerful states. It will also avoid the use of the veto power in preventing justice. The SC's role should be effective and beneficial to the Court, not a hindrance. Examples of this are, using their power and influence to enforce the ICC's decisions and arrest warrants. Currently, one of the major problems that hinders the efficiency and integrity of the Court and the international justice system as a whole is the non-enforcement of the arrest warrants. The Security Council should use its power and resources to arrest defendants or the accused by using all means, including peacekeeping troops, imposing sanctions, freezing assets, visa bans, or embargoes. This would give Arab states more confidence in the credibility of the ICC without being influenced by the SC political powers, and the Court will have more efficient mechanisms in enforcing its decisions and carrying out its mandate.

To conclude, this study represents a small but important first step towards the issue of ratification and implementation of the Rome Statute by Arab states. It has critically

assessed some of the main obstacles, concerns and challenges that could deter some Arab states from joining the ICC. The Rome Statute is not perfect and the ICC has faced several challenges within its first decade of operation. However, it provides what is arguably the most effective means of dealing with international crimes. Arab states have some valid concerns and unanswered questions about the Statute, but still their legal systems need reforms and the Sharia needs reinterpretation. The Rome Statute should be revised and amended continually through the ASP to close loopholes. The ICC needs the wider support of Arab states, including their financial support, in order to achieve justice. International law will assist in building the rule of law in the Arab states by setting out and enforcing certain standards. The ICC can act as a catalyst for national reforms by urging Arab states to enact the required legislation to reinforce justice and protect human rights, which are the solutions for many social and political problems across the region.

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