



Domestication of the Rome Statute by Tanzania: An Option or Obligation?

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ABSTRACT

For the Rome Statute of the International Criminal Court 1998 to have legal force on the territory of States Parties to it, enacting legislation domesticating its norms in order to exercise their primary jurisdictions over investigation and prosecution of the international crimes (which are genocide, war crimes, crimes against humanity and crime of aggression) instead of the ICC is necessary. Tanzania is a State Party to the Rome Statute and has not passed legislation domesticating it. Being an international treaty, the Rome Statute does not form part of source of law in Tanzania, unless article 63(3) (d) of the Constitution of the United Republic of Tanzania 1977 ('the Constitution of Tanzania') is complied with. Through documentary analysis, this article examined as to whether Tanzania, a State Party to the Rome Statute has an option or obligation of domesticating the Rome Statute in order to give legal force to it. It has been revealed that Tanzania has an obligation of enacting legislation domesticating the Rome Statute in order for the Rome Statute to be one of sources of law in Tanzania. The article has recommended that Tanzania has to enact single legislation applying reference method of domestication to ensure clarity and comprehensiveness. This will be a means of performing her international obligations in order to fulfill her desire to investigate and prosecute the international crimes and punish the perpetrators and cooperate with the ICC.

Key Words: Domestication; Rome Statute in Tanzania; Option; Obligation.

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1.1 Introduction and Historical Background of the Rome Statute

The Rome Statute of the International Criminal Court (henceforth ‘the Rome Statute’)² was adopted by States in writings at Rome in Italy on 17 July 1998 by a vote of 120 entered into force on 1 July 2002 after the treaty’s ratification by 60 States;³ hence, it is an international treaty. For the Rome Statute to have legal force to States Parties to the Rome State, enacting legislation to domesticate the Rome Statute is necessary. Domestication of international treaty also known as incorporation of treaty, means enacting legislation transforming international treaties into national law.⁴ Enacting legislation domesticating the Rome Statute serves two purposes: - First, empowers States Parties to exercise their primary jurisdictions of investigating and prosecuting the international crimes under the Rome Statute (which are genocide, war crimes, crimes against humanity and the crime of aggression) in order to put end impunity for the perpetrators of the crimes and to contribute to the prevention of the crimes. Second, empowers States Parties to have legal capacity of cooperating with the International Criminal Court (herein ‘the ICC’) established under preambular 10 read together with article 1 both of the Rome Statute which has complementary and supplementary jurisdiction to national courts in investigating and prosecuting the crimes committed within its jurisdiction by individuals.⁵

Tanzania signed and deposited her instrument of ratification of the Rome Statute on 29 December 2000 and 20 August 2002 respectively;⁶ hence, a State Party to the Rome Statute. In Tanzania, international treaties do not apply directly unless article 63(3) (d) of the

² The Rome Statute of the International Criminal Court 1998 was adopted at Rome on 17 July 1998, entered in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010 available at <https://www.icc-cpi.int> (accessed 18 November 2024).

³ Malcolm Shaw, *International Law* (6th edn. CUP, Cambridge 2008) 411. See also Muhammed Ladan, ‘An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria’ (2013) 1 *Journal of Sustainable Development Law and Policy* at p. 37 available at <https://www.ajol.info> (accessed 18 November 2024); David Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, New York 2009) 241.

⁴ Gerhard Kemp, ‘The Implementation of the Rome Statute in Africa’ in G Werle et al (eds.), *Africa and the International Criminal Court* (International Criminal Court Series 1, University of Stellenbosch, Stellenbosch 2014) 64; Daley Birkett, ‘Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia’ (2019) 18 *Chinese Journal of International Law* 353 at pp. 353-354 available at <https://academic.oup.com> (accessed 18 November 2024).

⁵ *AG v. Kenyans for Justice and Development Trust* [2019] 2 E. A. 77 at p. 79. See also Daley Birkett, ‘Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia’ (2019) 18 *Chinese Journal of International Law* 353 at p. 354 available at <https://academic.oup.com> (accessed 18 November 2024); Sascha Von Bachmann and Eda Nwibo, ‘Pull and Push- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges’ (2018) 43 *Brooklyn Journal of International Law* 457 at p. 463 available at <https://brooklynworks.brooklaw.edu> (accessed 18 November 2024).

⁶ Available at <https://asp.icc-cpi.int> (accessed 18 November 2024).



Constitution of the United Republic of Tanzania 1977 (the Constitution of Tanzania)⁷ is complied with by enacting legislation giving legal force an international treaty. The idea of the existence of the Rome Statute was well-received by Tanzania with a high level of expectations to fill in the impunity gap by prosecuting the international crimes. Tanzania together with Botswana, Lesotho, Malawi, Swaziland and South Africa as delegations of the Southern African Development Community (SADC) participated in the efforts to establish the ICC as early as in 1993 when the International Law Commission presented a draft statute to the General Assembly's Sixth Committee for consideration.⁸ SADC was founded with the signing of the Treaty in Windhoek Namibia on 17 August 1992 and as of 31 July 1998; SADC had a number of 14 member States.⁹ SADC adopted principles of consensus on the ICC in 1997 and another decision was adopted the following year by SADC Ministers of Justice/Attorneys-General.¹⁰

Among the principles and objectives of SADC are: - promotion and defence of human rights, peace and security as provided for under article 4(c) and 5 (1) (c).¹¹ Further, Tanzania played key roles in the negotiation process the Rome Statute and establishment of the ICC by participating fully the United Nations Diplomatic Conference held from 15 June-17 July 1998.¹² In 1999, the 14 SADC member States reaffirmed their commitment to the ICC process through the adoption of the Pretoria Statement of Common Understanding on the

⁷[Cap. 2 R.E. 2002] as amended. Domestication of the Rome Statute is a Foreign Affair as provided for under item 2 to the First Schedule of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended; hence, falls within the jurisdiction of the National Assembly of Tanzania as provided for under article 64(1) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended and not within the House of Representatives of Zanzibar as provided for under article 64(2) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R.E. 2002] as amended read together with article 78(1) of the Constitution of Zanzibar of 1984 as amended in 2010.

⁸Embassy of Botswana, Note No. 118/11 EB 9/3/4 IX (13) B 8 (Brussels 14 September 2011) 4 available at <https://asp.icc-cpi.int> (accessed 10 July 2023). See also Sascha Von Bachmann and Eda Nwibo (n 6) 523.

⁹Malawi, Lesotho, Angola, Swaziland, Botswana, Zimbabwe, Mozambique, Namibia, Zambia, the United Republic of Tanzania, South Africa, Mauritius, Congo and Seychelles.

¹⁰Daniel Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 African Human Rights Law Journal at p. 257 available at <https://asp.icc-cpi.int> (accessed 18 November 2024). See also Sascha Von Bachmann and Eda Nwibo (n 6) 523.

¹¹Treaty of the Southern African Development Community, done on 17 August 1992, came in force on 30 September 1993 amended on 14 August 2001 available at <https://www.sadc.int> (accessed 18 November 2024).

¹²United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. I; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. II; Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court, Rome Italy on 16th June 1998 available at <https://legal.un.org> (accessed 18 November 2024).

ICC. The Pretoria Statement affirmed a continued support to the ICC process, accelerated ratification and adopted implementing legislation of the Rome Statute and committed Parties to further participation in the processes of the ICC.¹³

Tanzania joined hands SADC's movement and support over the negotiation process of the Rome Statute, establishment of the ICC and affirmed her strong support to the ICC jurisdiction at the Conference by providing her oral views and a written statement.¹⁴ As well, later on Tanzania signed the Rome Statute on 29 December 2000¹⁵ and deposited her instrument of ratification of the Rome Statute on 20 August 2002.¹⁶ Being a State Party to the Rome Statute, Tanzania became entitled to a right of representative in making decisions in the Assembly of States Parties (herein 'the ASP') which meets once in every year.¹⁷ Tanzania has attended several sessions of the ASP since the Rome Statute came into force to mention but few: - the 10th session,¹⁸ the 12th session,¹⁹ the general debate of the ASP to the Rome Statute,²⁰ the general debate of the 15th session²¹ and the 19th session.²²

¹³See Daniel Nsereko (n 11) 257.

¹⁴United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. I at pp. 68, 74-75; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Vol. II at pp. 38, 45, 74-75; Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court, Rome Italy on 16th June 1998 available at <https://legal.un.org> (accessed 18 November 2024).

¹⁵Available at <https://asp.icc-cpi.int> (accessed 18 November 2024).

¹⁶Ibid.

¹⁷Article 112 of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010.

¹⁸Statement by Ambassador Ombeni Sefue, Permanent Representative of the United Republic of Tanzania to the United Nations during the Tenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York 12-21 December 2011) available at <https://asp.icc-cpi.int> (accessed 18 November 2024).

¹⁹Statement by Honourable Mathias M. Chikawe (MP), Minister for Constitutional and Legal Affairs, the United Republic of Tanzania, during the General Debate of the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague 20 November 2013) available at <https://asp.icc-cpi.int> (accessed 18 November 2024).

²⁰See Statement by Irene Kasyanju Director for Legal Affairs, Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania, During the General Debate of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York 11 December 2014) 5 available at <https://asp.icc-cpi.int> (accessed 18 November 2024) p. 5.

²¹Statement by H. E. Irene F. M. Kasyanju, Ambassador of the United Republic of Tanzania to the Netherlands, during the General Debate of the 15th session of Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague Netherlands, Thursday November 2016); Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth Session, the Hague, 16-24 November 2016 (Official Records, Volume I) at p. 7 available at <https://asp.icc-cpi.int> (accessed 18 November 2024).

²²Remarks by Irene F. M. Kasyanju, Ambassador of the United Republic of Tanzania to the Netherlands, on Agenda Item 9 on the General Debate of the 19th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, The Netherlands, 14-16 December 2020) available at <https://asp.icc-cpi.int> (accessed 18 November 2024).



In those attended sessions of the ASP, Tanzania has recognized the role of the ICC in fighting for impunity, affirmed her efforts in supporting the ICC to fight for impunity, encouraged other States to give support the ICC, urged other States Parties to enact criminal legislation implementing the Rome Statute to exercise their primary jurisdictions of prosecuting the international crimes and to cooperate with the ICC in its investigation and prosecution of the crimes.²³ Another effort was in 2013, the Attorney General of Tanzania (herein 'the AG') submitted an application to the ICC to file an *amicus curiae* brief on the prosecutor's appeal against the decision on Mr. Ruto's request for excusal from continuous presence at trial.²⁴ The application filed by the AG aimed to facilitate and assist the ICC in deciding the case fairly as the issue brought under article 63 of the Rome Statute was a new to the ICC as it had not been given consideration prior. Moreover, at the general debate of the ASP to the Rome Statute held in 2014, Tanzania informed the ASP that, she was at her initial stages of enacting legislation implementing the Rome Statute in order to exercise her primacy jurisdiction of investigating and prosecuting the international crimes under the Rome Statute as her principal obligation and to accord the ICC with fully cooperation.²⁵ Apart from the affirmation of 2014 given by Tanzania at the general debate of the 19th session of the ASP to the Rome Statute held at the Hague Netherlands from 14-16 December 2020, Tanzania reaffirmed her firm commitment to the Rome Statute system.²⁶ In spite of her great role and contribution towards the Rome Statute and the ICC, Tanzania has not enacted legislation domesticating the Rome Statute in order to exercise her primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as the international crimes and legally cooperate with the ICC.

²³See also Statement by Tuvako N. Manongi, Ambassador and Permanent Representative of the United Republic of Tanzania to the United Nations, at the Sixth Committee of the 67th Session of the United Nations General Assembly on Agenda item 83: The Rule of Law at the National and International Levels (New York, 10 October 2012) available at <https://www.un.org> (accessed 18 November 2024).

²⁴Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania, CGA 135/291/01 (Dar Es Salaam, 09 September 2013) available at <https://www.icc-cpi.int> (accessed 18 November 2024).

²⁵See Statement by Irene Kasyanju (n 21) 5.

²⁶See Remarks by Irene F. M. Kasyanju (n 23) 4.

The main objectives of this article are to: - explain whether it is an option or obligation by Tanzania to domesticate the Rome Statute in order to exercise her primacy duty of investigating and prosecuting the international crimes. More so, significance of domesticating the Rome Statute and disadvantages of lacking legislation domesticating the Rome Statute, reasons for Tanzania to enact legislation domesticating the Rome Statute will be discussed. Lastly, approaches and methods applicable in domesticating the Rome Statute will be discussed as guidelines to Tanzania in case she decides to domesticate it, she may have wider choice of approaches and methods to adopt.

1.2 Obligations of Tanzania to Domesticate the Rome Statute

Preambular 4, 5, 6 and 10 read together with article 1 and 17²⁷ amongst others; provide a duty of each State Party to enact legislation in order to exercise its primacy jurisdiction of prosecuting the international crimes of genocide, war crimes and crimes against humanity established under the Rome Statute over those responsible for the crimes. Also, under the principle of complementarity, the ICC only complements and supplements national jurisdictions in exercising its jurisdiction of prosecuting the perpetrators of the international crimes. Thus, the ICC acts as a Court of last resort in exercising its jurisdiction over the crimes. The cited preambular and provisions of the Rome Statute require States Parties to the Rome Statute to exercise primacy duty of effective prosecution of the international crimes whereas the ICC supplements in case States Parties fail effectively to investigate and prosecute them. The cited preambular and provisions of the Rome Statute may be concluded as providing that, States Parties have obligations to enact legislations implementing the Rome Statute²⁸ in order to exercise their fully primacy jurisdictions of investigating and prosecuting the international crimes. Tanzania being a case study in this research, has no capacity to exercise primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as international crimes under the Rome Statute because Tanzania has no enacted legislation implementing the Rome Statute. Under international law, Tanzania being a State Party to the Rome Statute is bound to domesticate the provisions of the Rome Statute, perform them in good faith and respect as she freely consented to be bound by the provisions of the Rome Statute.²⁹

²⁷Of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010; Item 1 of the Declaration RC/Decl.2, Adopted at the 9th plenary meeting, on 8 June 2010, by consensus.

²⁸Item 3 of the Declaration RC/Decl.2, Adopted at the 9th plenary meeting, on 8 June 2010, by consensus.

²⁹Article 26 of the Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980.



Failure of Tanzania to enact legislation implementing the Rome Statute, the Rome Statute remains to be an international treaty with no legal force as it cannot be relied upon by any individual or authorities in Tanzania in deciding any right or duty provided for under it. An example of implication of failure to enact legislation enforcing international treaties like the Rome Statute may be drawn from *Reliance Insurance Company (T) Ltd v. CMA CGM Societe Anonyme and Another case*.³⁰ The Court of Appeal of Tanzania rejected the applicability of the United Nations Convention on Carriage of Goods by Sea 1978 (The Hamburg Rules) in deciding the case on the best reason that, though Hamburg Rules are ratified by Tanzania, they are not directly applicable in Tanzania because they have not been domesticated³¹ hence, lacking legal force in Tanzania.

To back up its position of rejecting the applicability of Hamburg Rules for failure to enact legislation enforcing the Hamburg rules, the Court of Appeal of Tanzania made reference to L. X. Mbunda in an article titled “Tanzania and International Conventions on Carriage of Goods by Sea: A Historical Study” published in the Journal of Indian Law Institute, October-December 1988 at page 473 as follows: -

It is well known that international conventions/covenants are not binding per se within a sovereign state. International legal obligations only become enforceable by domestic courts if a competent legislature implements them within its institutional jurisdiction. In essence what is enforced by the domestic court is not the international legal obligation per se but the domestic Act of Parliament implementing the obligation.

Therefore, Tanzania has international obligation to domesticate the Rome Statute criminalizing the norms of the international crimes under the Rome Statute. The legal effect of the Rome Statute lacking legal force in Tanzania is that, international crimes of genocide, war crimes and crimes against humanity established under the Rome Statute become non-punishable international crimes in Tanzania as prohibited by article 13(6) (c) of the Constitution of Tanzania read together with sections 3(1) (a) and (b) and 5 of the Penal Code and article 12(6) (c) of Zanzibar Constitution read together with sections 2(1) (a) and (b) and

³⁰(Civil Appeal No. 179 of 2020) [2023] TZCA 205 (27 April 2023) at p. 11 available at <https://tanzlii.org> (accessed 18 November 2024).

³¹Ibid, p. 12.

3(2) of Zanzibar Penal Act. More so, article 13(6) (c) of the Constitution of Tanzania and article 12(6) (c) of Zanzibar Constitution are in conformity with the principle of *nullum crimen sine lege* or prohibition of analogy.³² Thus, Tanzania has no capacity to exercise primacy jurisdiction of prosecuting genocide, war crimes and crimes against humanity as international crimes established under the Rome Statute once allegations of commission are raised or known to law enforcement agencies as well Tanzania has no legal capacity to cooperate with the ICC once requested.

1.3 Significance of Domesticating the Rome Statute and Disadvantages of its Failure.

The Rome Statute vests jurisdiction of prosecuting the international crimes established thereunder to both the ICC and States Parties. However, the primary responsibility of prosecuting the said international crimes is vested to States Parties. The ICC has been given only a complementary jurisdiction to deal with such crimes provided that, States Parties to the Rome Statute are unable or unwilling genuinely to prosecute them. The rationale of conferring jurisdiction to both the ICC and States Parties to prosecute the international crimes is to ensure that, both the ICC and States Parties exercise their duties to put an end to impunity for the perpetrators of the crimes and to contribute to the prevention of such crimes. Therefore, the significance of domesticating the Rome Statute benefits both States Parties and the ICC and the same, failure to domesticate the Rome Statute affects negatively both the ICC and States Parties as herein below explained as follows: -

1. Empowers States Parties to the Rome Statute to cooperate with the Court.³³

Article 88 of the Rome Statute requires States Parties to the Rome Statute to ensure that, there are procedures available under their national laws for all of the forms of cooperation with the ICC. It is so required because; the ICC has no police force machinery which can identify, arrest and surrenders the perpetrators of the crimes before the ICC to face trials. As the ICC depends much upon the States Parties' cooperation to identify, arrest perpetrators and submit them before the ICC to face trials in respect of the commission of the crimes, failure to enact legislation implementing the provisions of the Rome Statute is a bar to cooperate with the ICC in case there is a request for cooperation in exercise of its jurisdiction. Therefore, the ICC cannot exercise its jurisdiction of prosecuting the international crimes effectively.

³²Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law* (TOAEP, Beijing 2012) 186.

³³See *AG v. Kenyans for Justice and Development trust case* (n 6) 79.

2. Enables States Parties to exercise their primary jurisdiction over the core international crimes, thereby giving meaning to the principle of complementarity.³⁴

Preambular 4, 5, 6 and 10 read together with article 1 and 17 of the Rome Statute vest primary jurisdiction of prosecuting the international crimes to States Parties whereas the ICC has been vested with jurisdiction to prosecute the crimes as a Court of last resort to national jurisdictions. States Parties to the Rome Statute are further required to take necessary measures at their national levels to ensure that, there is effective prosecution of the international crimes within their States and by enhancing international cooperation with the ICC. Therefore, without enacting legislation domesticating the provisions of the Rome Statute, States Parties cannot exercise their primary duties of prosecuting the crimes thus, the ICC cannot act as a Court of last resort but will intervene and act as its primacy jurisdiction to prosecute the crimes, the duty which it does not have.

3. Domesticating the Rome Statute is in conformity with the spirit and broad aim of the Rome Statute namely to end impunity for the most serious crimes under international criminal law.³⁵

The chief aim of establishing the Rome Statute by States Parties was to establish the international crimes and put an end to impunity for the perpetrators of international crimes and to contribute to the prevention of such crimes in order to guarantee lasting respect for and the enforcement of international justice to children, women and men who have been victims of unimaginable atrocities. In line with ending the impunity, each State Party under the Rome Statute has been put under primary obligation of prosecuting the crimes. To ensure each State Party prosecutes the crimes, the Rome Statute vests obligation to States Parties to take measures at their national levels by enacting legislations domesticating the Rome Statute and to cooperate fully with the ICC in its prosecution of the crimes. Thus, failure of enacting legislation domesticating the Rome Statute, States Parties cannot achieve the chief aim of ending impunity for the most serious crimes hence, States Parties become in violation of the

³⁴Ibid.

³⁵See Gerhard Kemp (n 5) 63.

provisions of the Rome Statute and article 26³⁶ which provides that, a treaty is binding upon the parties to it and must be performed by the parties in good faith.

Also, failure to enact legislation enforcing the Rome Statute by States Parties, allows the ICC to intervene in prosecuting the crimes, thus States Parties' sovereign may become at jeopardy. Nonetheless, the exercise of primacy jurisdiction by the ICC in prosecuting the crimes once the States Parties fail to exercise may not be achieved well by the ICC as States Parties may not accord fully cooperation to the ICC which has no police force of identifying, arresting and surrendering the perpetrators for trial before it.

4. Enacting legislation domesticating the Rome Statute enables efficiency and effectiveness of investigation and prosecution of the international crimes by States Parties and by the ICC in case the States are unable or unwilling genuinely to prosecute the crimes.

States Parties are in a better position to have the best access to evidence, witnesses and the resources to carry out proceedings³⁷ as the crimes are committed within their territories by the perpetrators of the international crimes. Thus, prosecuting the crimes once are committed within the jurisdiction of States Parties will require less resources in terms of money, personnel and time as States Parties have police force in identifying, arresting the perpetrators, collecting evidence and surrendering the perpetrators before courts while the ICC has no police force.

Investigation and prosecution of the crimes by the ICC as her supplementary obligation will not be the best means taking into account that, the ICC has no direct enforcement mechanism and always relies upon cooperation by the States in order to fulfill its mandate.³⁸ The ICC depends much cooperation from States Parties in investigating, identifying and arresting the perpetrators, submitting them before the Court and for collection of evidence. Further, prosecution of the crimes by the ICC will require witnesses to be transferred from States Parties to the location of the ICC which is located at The Hague-Netherlands, hence will be so costly in terms of money and personnel of which the ICC budget depends upon States Parties annual contribution to run its business.

³⁶Of the Vienna Convention on the Law of Treaties of 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

³⁷Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (2nd edn. CUP 2010) p. 153.

³⁸*The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 11 July 2016) at p. 8 para. 16 available at <https://www.icc-cpi.int> (accessed 18 November 2024).



Even if witnesses may be heard by the ICC through video conference, the means may be costly as the same requires money and expert personnel to run the operation. More so, once the ICC is denied cooperation by States Parties, the ICC may fail to identify, arrest and surrender the perpetrators of the crimes to its jurisdiction to face trials. Examples may be drawn from South Africa³⁹ which disobeyed to arrest, detain and surrender the President of Sudan Omar Hassan Ahmad Al Bashir after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union despite the fact that, the Pre-Trial Chamber of the ICC had issued two warrants for his arrest. Also, disobedience by Uganda to arrest, detain and surrender him.⁴⁰

The first warrant was issued on 4 March 2009 and related to charges of war crimes and crimes against humanity and the second warrant was issued on 12 July 2010 for charges of genocide.⁴¹ The warrants were forwarded to all countries that are Parties to the Rome Statute, South Africa and Uganda including with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC to face his trial. The two examples above cited, show how cooperation by States Parties to the ICC is crucial.

5. Enacting legislation domesticating the Rome Statute for States Parties to investigate and prosecute international crimes is a means of protecting human rights.⁴²

Enacting legislation domesticating the Rome Statute is an obligation under International Criminal Law of which International Criminal Law is one of the branches of international law. Thus, International Criminal Justice is a means of protecting human rights through criminal punishment to those individuals who commit egregious human rights violations in the form of international crimes of which human rights has to be ensured through and during criminal prosecution.⁴³ The protection of human rights is to the accused persons,⁴⁴ the victims

³⁹See *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at pp. 5-6 available at www.saflii.org (accessed 18 November 2024);

⁴⁰See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 11 July 2016) at p. 8 para. 16 available at <https://www.icc-cpi.int> (accessed 18 November 2024).

⁴¹*Ibid.*, p. 3 para. 2.

⁴²See Christopher Gevers *et al*, *Curriculum on International Criminal Justice* (Institute for Security Studies 2012) 44.

⁴³*Ibid.*

and the witnesses.⁴⁵ The rights to the accused persons include; rights of persons during crimes investigation such as right not to be compelled to incriminate himself to confess guilty, not subjected to any form of coercion, duress or threat or torture⁴⁶ and the rights of the arrested persons such as right to be questioned in the presence of a counsel, right to free legal assistance where necessary, right to remain silence, right to have an interpreter in case of interrogation, right against arbitrary arrest and detention.⁴⁷ There are also other rights of the charged persons during trial⁴⁸ such as right to fair trial which includes; right to full hearing, right to be tried without undue delay and right to be given sufficient time to prepare defense, right to presumption of innocence⁴⁹ and right to compensation for unlawful arrest or conviction.⁵⁰ During investigation and prosecution of the international crimes, the victims and witnesses have the right to their protection of safety, physical and psychological well-being, dignity and privacy which is not prejudicial to the rights of the accused person and a fair and impartial trial.⁵¹ The victims of the international crimes are entitled to remedies; restitution, compensation and rehabilitation arising from any damage, loss and injury.⁵² The remedies of restitution, compensation and rehabilitation may be recovered directly from the accused or where appropriate from the Trust Fund.⁵³ Thus, failure to enact legislation implementing the Rome Statute by States Parties (the United Republic of Tanzania inclusive) in order to exercise primary jurisdiction to prosecute the international crimes in case of commission, the perpetrators of the crimes will walk free from their evil deeds whereas the victims will be left without remedies hence, a failure to protect, preserve and promote human rights, peace and security in the world.

⁴⁴Article 67 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

⁴⁵Ibid, article 68.

⁴⁶Ibid, article 55. *See also* Christopher Gevers *et al* (n 43) 45.

⁴⁷Article 59 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. *See also* Christopher Gevers *et al* (n 43) 45.

⁴⁸Articles 63, 64 and 65 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

⁴⁹Ibid, article 66. *See also* Christopher Gevers *et al* (n 43) 45.

⁵⁰Article 85 of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. *See also* Christopher Gevers *et al* (n 43) 45.

⁵¹Article 68(1) of the Rome Statute of the International Criminal Court 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

⁵²Ibid, article 75(1).

⁵³Ibid, article 75(2).

1.4 Reasons for Tanzania to Domesticate the Rome Statute.

Many extrajudicial killings, torture, abductions, arbitrary detentions, disappearances to elderly people, people with albinism, religious leaders specifically Islamists and political leaders/members have been reported to have been committed in different parts of Tanzania. In 2018, it was reported that, about 380 Islamists were missing since 2017 and members of parliament were pushing for formation of a team to investigate the allegations as the Government officials (security forces) were accused in abducting the Islamists.⁵⁴ Killings and brutal torture by amputations of albinism; children and young people began to spread in Tanzania in the late 2000's as the perpetrators believe that, the bodies of people with albinism can bring them good luck.⁵⁵ Elders have not been left from being killed over witchcraft suspicions. It was reported that, between 2005 and 2011 an average of 500 elderly people were killed due to suspicions that, they were witches.⁵⁶

Further, it was reported that, in 2012, 630 elderly people were killed due to witchcraft beliefs, a figure that rose to 765 (505 of them being women) in 2013.⁵⁷ In 2020, the Amnesty International urged Tanzanian authorities to launch a prompt, thorough and independent investigation into allegations of unlawful killings and torture of opposition members and supporters arrested and arbitrarily detained following the 28.10.2020 general elections.⁵⁸ It was so urged following the accusations by members of civil societies and opposition groups to have accused security forces of indiscriminately using excessive force in killing at least 22 people.⁵⁹ It was further reported that, according to lawyers acting for opposition parties, at least 77 opposition leaders and supports were arbitrary detained since Election Day.⁶⁰

⁵⁴Available at <https://theeastafrican.co.ke> of Saturday 05.05.2018 (accessed 18 November 2024).

⁵⁵Available at <https://hrw.org> of 09.02.2019 at 03:01AM EST (accessed 10 July 2023). See also Anna Henga and Felista Mauya (eds.), *Human Rights Reports 2021, Legal and Human Rights* (Dar Es Salaam, March 2022) 7-10; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Asha-Rose Mtengeti Migirom (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2015/2016 (Dododma, May 2015) at pp. 5-6 available at <https://www.sheria.go.tz> (accessed 18 November 2024); Oyeniyi Abe, *The State of Business and Human Rights in Africa* (The Friedrich-Ebert-Stiftung African Union Cooperation Office, August 2022) 39.

⁵⁶Available at <https://thecitizen.co.tz> of Sunday 15.06.2014 updated on 22.04.2021 (accessed 18 November 2024).

⁵⁷*Ibid.* See also Anna Henga and Felista Mauya (n 56) v-vi, 9-10.

⁵⁸Available at <https://amnesty.org> of 20.11.2020 (accessed 18 November 2024).

⁵⁹Available at <https://amnesty.org> of 20.11.2020 (accessed 18 November 2024).

⁶⁰Available at <https://amnesty.org> of 20.11.2020 (accessed 18 November 2024).

Tanzania's authorities were urged to launch independent, impartial and thorough investigations into all allegations of killings, torture and hold suspects into account. More so, after the General Election of 28th October 2020, formal complaints alleging commission of crimes against humanity by Tanzania Government top officials against civilians were lodged before the ICC requesting for special inquiry and the ICC confirmed receipt of two formal letters alleging human rights violations.⁶¹ The two letters were from The Alliance for Change and Transparency (ACT-Wazalendo) an opposition party and the other was from Maria Sarungi Tsehai an independent human rights activist. However, it has been reported by Human Rights Watch that, the Government authorities have not conducted meaningful investigations into serious abuses that marred the 2020 general elections.⁶² The Tanzania 2021 Human Rights Reports,⁶³ report that, "... according to opposition leaders and NGOs, there were at least 100 opposition activists and supporters who were detained or abducted on the mainland Tanzania prior to and after the 2020 general elections." These few cited examples of criminal allegations fall within the ambit of crimes against humanity and crimes of genocide.

Therefore, Tanzania needs to enact legislation domesticating the Rome Statute on the following reasons: - One, to fulfill her international obligations in good faith bestowed under preambular 4, 5, 6, article 1 and 17 of the Rome Statute read together with article 26⁶⁴ as doing so, Tanzania will be acknowledging the obligations under the Rome Statute and the outcry of the international community. Two, criminalization of the international crimes of genocide, the war crimes and crimes against humanity under the Rome Statute, Tanzania will demonstrate commitment to enforce the crimes as international crimes and assure smooth realization of human and peoples' rights.

Moreover, criminalization of the crimes as international crimes will be in compliance with article 63(3) (d) of the Constitution of Tanzania which requires enacting legislation domesticating international treaties read together with article 13(6) (c) of the Constitution of Tanzania and article 12(6) (c) of Zanzibar Constitution which forbid applicability of retroactivity of legislation. Three, enacting legislation domesticating the Rome Statute will

⁶¹Available at <https://theeastafrikan.co.ke> of Saturday 14.11.2020 (accessed 18 November 2024). See also <https://thecitizen.co.tz> of Sunday 10.01.2021 (accessed 18 November 2024).

⁶²Available at <https://hrw.org> (accessed 18 November 2024).

⁶³Country Reports on Human Rights Practices for 2021, United States Department of State (Bureau of Democracy, Human Rights and Labor) at p. 11 available at <https://www.state.gov> (accessed 18 November 2024).

⁶⁴Of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

enable Tanzania to have fully primacy jurisdiction of investigating and prosecuting the crimes as international crimes in case of commission as a means of preventing them. Letting the crimes not be investigated and prosecuted will compel the ICC to intervene in prosecution an act which may interfere with national security and sovereignty of Tanzania. As well, letting the ICC to investigate and prosecute the international crimes may not be possible as the ICC acts as a Court of last resort and depends upon States Parties' cooperation in identifying, arresting and surrender of offenders to the ICC for trials.

1.5 Approaches in Domesticating the Rome Statute

The Rome Statute does not provide any approach as to how States Parties should enact criminal legislation domesticating the Rome Statute into their national legal systems. States Parties have been left with their own choice on how the Rome Statute should be domesticated.⁶⁵ The following are some of the approaches which are applied in domestication of international treaties like the Rome Statute: -

1.5.1 Single Act Approach

States parties may implement the Rome Statute by drafting a single and comprehensive piece of legislation covering all relevant provisions to be domesticated as the approach creates one point of reference for legal actors in searching of information.⁶⁶ Examples of States Parties to the Rome Statute which have adopted this approach are: - The Republic of Trinidad and Tobago⁶⁷ and Uganda.⁶⁸ Also, Germany, Lithuania and Bangladeshi are said to have adopted this approach.⁶⁹

1.5.2 The Amendment Approach

Instead of enacting a new single national legislation, a State Party to the Rome Statute may opt to incorporate the provisions of the Rome Statute by amending the existing penal and

⁶⁵See Fatuma Silungwe, *A Comparative Study on the Implementation of the Rome Statute by South Africa and Germany: A Case of Fragmentation of International Criminal Law* (LL.M Dissertation, The University of the Western Cape 2013) 13 available at <https://www.researchgate.net> (accessed 18 November 2024); 15-16.

⁶⁶See Olympia Bekou and Katerina Mairiti, *International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court* (Centre for International Law Research and Policy 2017) 18. See also Fatuma Silungwe (n 66) 17; Saidat Nakitto, *The Implementation of the Rome Statute of the International Criminal Court in Uganda and South Africa: A Critical Analysis*, (PhD Thesis in Law, Brunel Law School, Brunel University London 2017) at 31 available at <https://bura.brunel.ac.uk> (accessed 18 November 2024).

⁶⁷See section 181(1) of the International Criminal Court Act, Act No. 4 of 2006 of 21st February 2006.

⁶⁸The International Criminal Court Act No. 11 of 2010 of 25th June 2010.

⁶⁹See Saidat Nakitto (n 67) 31.

procedural laws within the legal system of the State Party. It is argued that, the method is useful where national legislation already covers some elements typically some of the core international crimes and can therefore be amended to incorporate further aspects without the need for significant re-drafting.⁷⁰

As well, Norway⁷¹ has followed this approach by amending her respective criminal legislation (known as General Civil Penal Code) to incorporate additional elements including – but not limited to the crimes against humanity, the crime of genocide and the war crime. Moreover, Senegal has followed this approach by amending her Code of Criminal Procedure through Act No. 2007-05 of 12th February 2007⁷² concerning domestication of the Rome Statute where the crime of genocide, the war crimes and the crimes against humanity among others have been incorporated. The Senegalese national courts have been vested with criminal jurisdiction to try the mentioned international crimes.

1.5.3 The Model Approach

The Commonwealth Secretariat,⁷³ the South African Development Community and the League of Arab States,⁷⁴ among others, have attempted to prepare model laws to the Rome Statute implementation as they provide a template that States Parties may use in drafting their own national implementing legislation.⁷⁵ Samoa is one of the States Parties which has chosen the model approach for its court legislation.⁷⁶

1.5.4 The Combination Approach

A combination approach is followed by States when incorporating international criminal law norms by enacting a new specific legislation to incorporate the core international crimes into domestic law and the same by amending the existing penal and criminal procedure

⁷⁰See Olympia Bekou and Katerina Mairiti (n 67) 18. See also Saidat Nakitto (n 67) 27-28.

⁷¹Act of 20 May 2005 No. 28 (in force from 1 January 2006 pursuant to the Decree of 21 December 2005 No. 1580). See also Olympia Bekou and Katerina Mairiti (n 67) 18-19; Saidat Nakitto (n 67) 28.

⁷²See Ministry of Justice of the Republic of Senegal, Information and Comments by Senegal on General Assembly Resolution 74/192 of 18 December 2019, entitled “The Scope and Application of the Principle of Universal Jurisdiction at p.1; Directorate of Human Rights of the Ministry of Justice of the Republic of Senegal, Information and Observation on the Scope and Application of Universal Jurisdiction, p. 2; Opening Address by Mr. Sidiki K, Minister of Justice of the Republic of Senegal, Plenary Discussion on Cooperation at the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court on Protection of Witnesses: Strengthening States’ Support of the Court (The Hague, 22 November 2013) p. 2, para. 2 available at <https://www.un.org> (accessed 10 July 2023).

⁷³Model Law to Implement the Rome Statute of the International Criminal Court (2017).

⁷⁴Decree Regarding the Arab Model Law Project on Crimes within ICC Jurisdiction, Decree No. 598-21d of 29th November 2005.

⁷⁵See Olympia Bekou and Katerina Mairiti (n 67) 19.

⁷⁶Ibid. See also International Criminal Court, Act No. 26 of 2007 of 09th November 2007.

legislations or entails combining various methods discussed above depending on the specific needs and local circumstances of each State.⁷⁷ Examples of States Parties which have adopted the approach are: - Canada which has enacted a new specific penal legislation⁷⁸ and amended criminal and procedure legislations,⁷⁹ South Africa which has enacted new legislation⁸⁰ and amended some existing laws,⁸¹ Germany,⁸² Ireland,⁸³ Kenya⁸⁴ and United Kingdom.⁸⁵

1.6 Methods of Domesticating the Rome Statute

States Parties wishing to domesticate the Rome Statute may follow replication or reference methods of domestication. The two methods are said to reduce resources and little expert knowledge of international criminal law and that the ICC might exercise its jurisdiction because of an inaccurate domestication of the ICC crimes is considerably reduced, if not eliminated.⁸⁶ The two methods are discussed below: -

1.6.1 The Replication Method

The method is adopted by States Parties in domesticating the Rome Statute by copying the words of the provisions creating the crimes identically or verbatim to the provisions of the Rome Statute.⁸⁷ Examples of States Parties to the Rome Statute adopted the method are;

⁷⁷See Olympia Bekou and Katerina Mairiti (n 67) 19. See also Fatuma Silungwe (n 66) 21; Saidat Nakitto (n 67) 32.

⁷⁸The Crimes Against Humanity and War Crimes Act of 29th June 2000. See also Olympia Bekou and Katerina Mairiti (n 67) 19.

⁷⁹Criminal Code (R.S.C., 1985), Canada Evidence Act (R.S.C., 1985), Mutual Legal Assistance in Criminal Matters Act (R.S.C., 1985) and Seized Property Management Act (S.C. 1993).

⁸⁰The Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002.

⁸¹See section 39 and Schedule 2 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002 where Criminal Procedure Act, 1977, Act No. 51 of 1977 and Military Discipline Supplementary Measures Act, 1999, Act No. 16 of 1999 are listed to have been amended.

⁸²The Code of Crimes against International Law (CCAIL) of 26 June 2002 whereas article 2 amended the Criminal Code of 13th November 1998 (Federal Law Gazette I page 3322).

⁸³Section 65 of the International Criminal Court Act, Act No. 30 of 2006 of 31st October 2006 whereas International War Crimes Tribunals Act 1998 is indicated to have been amended.

⁸⁴See section 174 of the International Crimes Act No. 16 of 2008 of 1st January 2009 where the Privileges and Immunities Act, Cap. 179 is said to have been amended.

⁸⁵The International Criminal Court Act 2001, Cap. 17 of 11th May 2001, a new legislation which applies in England, Wales and Northern Ireland was enacted and the same under section 74 amended some armed forces legislation.

⁸⁶See Olympia Bekou and Katerina Mairiti (n 67) 21-22.

⁸⁷Ibid, 22. See also Gerhard Kemp (n 5) 63; Fatuma Silungwe (n 66) 20; Saidat Nakitto (n 67) 30.

South Africa⁸⁸ has replicated the definitions of the war crimes, crimes against humanity and genocide,⁸⁹ the Republic of Trinidad and Tobago⁹⁰ where the explanations of genocide, crimes against humanity and the war crimes have been copied. Germany⁹¹ replicated the explanations of genocide, crimes against humanity and war crimes under the Rome Statute. Netherlands, Lesotho and Malta have adopted this approach as it enables national authorities to prosecute similar conducts as set out in the Rome Statute.⁹²

1.6.2 The Reference Method

Is a method of domesticating the Rome Statute by referring the meaning of the international crimes as defined under the provisions of the Rome Statute as the method ensures clarity and comprehensiveness.⁹³ Examples of States Parties which have adopted this method are:- Kenya,⁹⁴ Ireland,⁹⁵ Uganda,⁹⁶ Samoa,⁹⁷ United Kingdom,⁹⁸ New Zealand, Mauritius, Bosnia and Herzegovina⁹⁹ which have referred the definitions of the crimes against humanity, war crimes and crime of genocide as explained under the Rome Statute.

1.7 Conclusion

Tanzania being a State Party to the Rome Statute is under obligation to enact legislation domesticating the Rome Statute in order to exercise her primacy jurisdiction to investigate and prosecute genocide, war crimes, crimes against humanity and aggression as international crimes. Domesticating the Rome Statute will also empower Tanzania to have legal capacity to cooperate effectively with the ICC in exercise of its jurisdiction under the principle of complementarity. Failure by Tanzania to domesticate the Rome Statute is a violation of her international obligation provided for under preambular 5, Article 1 and 88 of the Rome Statute and the principle requiring her to perform the provisions of the Rome Statute in good

⁸⁸Section 1(i), (ii) and (iii) of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, Act No. 27 of 2002 of 18th July 2002.

⁸⁹See Olympia Bekou and Katerina Mairiti (n 67) 22.

⁹⁰See sections 9(2), 10(2) and 11(2) all of the International Criminal Court Act, Act No. 4 of 2006 of 21st February 2006.

⁹¹Sections 6, 7 and 8 all of the Code of Crimes against International Law (CCAIL) of 26th June 2002.

⁹²See Saidat Nakitto (n 67) 30.

⁹³See Olympia Bekou and Katerina Mairiti (n 67) 22-23. See also Gerhard Kemp (n 5) 63; Fatuma Silungwe (n 66) 19; Saidat Nakitto (n 67) 29.

⁹⁴Section 6(4) of the International Crimes Act, Act No. 16 of 2008 of 1st January 2009.

⁹⁵Section 6(1) of the International Criminal Court Act, Act No. 30 of 2006 of 31st October 2006.

⁹⁶Articles 7(2), 8(2) and 9(2) all of the International Criminal Court Act, 2010, Act No. 11 of 2010 of 25th June 2010.

⁹⁷Sections 5(2), 6 (2) and 7(2) all of the International Criminal Court Act, Act No. 26 of 2007 of 9th November 2007.

⁹⁸Section 50(1) of the International Criminal Court Act 2001, Cap. 17 of 11th May 2001.

⁹⁹See Saidat Nakitto (n 67) 29.



faith and respect (*pacta sunt servanda*) provided for under Article 26 of the Vienna Convention on the Law of Treaties 1969. The article recommends that Tanzania has to enact legislation domesticating the Rome Statute as a means of performing her international obligations in order to fulfill her desire to investigate and prosecute the international crimes and punish the perpetrators and cooperate with the ICC. Lastly, the article recommends that, in case the process of domestication of the Rome Statute takes its motion in Tanzania, enacting single legislation applying reference method of domestication is the best means of ensuring clarity and comprehensiveness.