

INCORPORATING THE ROME STATUTE INTO NATIONAL LAW: LESSONS FOR MALAYSIA

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ABSTRACT

Although the former Malaysian government, due to political pressure, decided not to proceed with accession to the Rome Statute, this is not the end of the game. To join the Rome Statute had been in principle accepted by preceding governments and has been the ardent hope of the civil society. How to incorporate the Rome Statute into the Malaysian legal system has been deliberated among the Malaysian government (including the Attorney General's Chambers and the Ministry of Foreign Affairs), Malaysian Parliamentarians, and civil society since a long time ago. As adopting the Rome Statute is in the best interest of humanity as a whole, the idea will definitely revive at any time in the future when the political climate is favourable. The objectives of the present paper, therefore, are to rebut the main objections against the Rome Statute and to identify the best way of incorporating the Rome Statute into the Malaysian law once Malaysia decides to accede to it. This is a doctrinal legal research supplemented by a comparative methodology, focusing on an analysis of key provisions of the Rome Statute and the Malaysian laws that could be affected, and a comparison between the practices of selected dualist and monist countries. The paper finds that Malaysia, as a dualist State, should opt for applying the single comprehensive enactment modality rather than the multiple one. It is in the best interest of Malaysia for clarity and effectiveness purposes. It concludes with recommendations for the proposed draft implementing legislation, together with suggestions for consequential amendments.

Keywords: Rome Statute, Implementing Legislation, Dualist Theory, Single Comprehensive Enactment Modality, Consequential Amendments to National Laws.

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MENERAPKAN STATUT ROM KE DALAM UNDANG-UNDANG NEGARA: PENGAJARAN UNTUK MALAYSIA

ABSTRAK

Walaupun kerajaan Malaysia terdahulu memutuskan untuk tidak meneruskan kesertaan ke dalam Statut Rom disebabkan tekanan politik, ini bukanlah pengakhiran. Menyertai Statut Rom pada dasarnya telah diterima oleh kerajaan-kerajaan terdahulu dan telah menjadi harapan yang kuat masyarakat sivil. Bagaimana cara untuk memasukkan Statut Rom ke dalam sistem perundangan Malaysia telah juga dibincangkan dalam kalangan kerajaan Malaysia (termasuk Jabatan Peguam Negara dan Kementerian Luar Negeri), Ahli Parlimen Malaysia, dan masyarakat sivil sejak lama dahulu. Oleh kerana penerimaan Statut Rom adalah demi kepentingan yang terbaik untuk manusia secara keseluruhannya, idea itu pasti akan dihidupkan semula pada suatu masa nanti sewaktu iklim politik dalam keadaan yang baik. Oleh itu, objektif kertas kajian ini adalah untuk mematahkan bantahan utama terhadap Statut Rom dan mengenal pasti cara terbaik untuk mengubahkan Statut Rom kepada undang-undang Malaysia sebaik sahaja Malaysia memutuskan untuk menyetuainya. Ini adalah penyelidikan undang-undang doktrin yang ditambah dengan metodologi perbandingan, yang memberi tumpuan kepada analisis peruntukan utama Statut Rom dan undang-undang Malaysia yang boleh terjejas, dan perbandingan antara amalan negara Dualis dan Monis terpilih. Kertas itu mendapati bahawa Malaysia, sebagai negara Dualis, harus memilih untuk menggunakan modaliti enakmen komprehensif tunggal dan bukannya yang pelbagai. Ini adalah demi kepentingan Malaysia untuk tujuan kejelasan dan keberkesanan. Ia diakhiri dengan cadangan untuk draf undang-undang pelaksanaan yang dicadangkan, bersama dengan cadangan untuk pindaan yang terlibat.

Kata Kunci: Statut Rom, Perundangan Pelaksanaan, Teori Dualis, Enakman Modaliti Komprehensif Tunggal, Pindaan Berbangkit Terhadap Undang- Undang Negara.

INTRODUCTION

The Rome Statute of the International Criminal Court (ICC)¹ was adopted on 17 July 1998 and entered into force on 1 July 2002. It is a dream coming true for the international community which had strived

¹ The Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, entered into force on 1 July 2002, 2187 U.N.T.S 3 [hereinafter “Rome Statute”].

hard for decades to create a permanent international criminal court with the noble aim of ending impunity for perpetrators of heinous atrocity crimes such as genocide, crimes against humanity and war crimes.² Currently, 123 States are parties to the Statute, indicating that overwhelming majority of States accept it.

Malaysia sent a delegation to participate in the Rome Conference and signed the Final Act of the Conference in 1998. There were movements by the civil society, SUHAKAM, the Malaysian Bar, and bipartisan parliamentarians to push the government to accede to the Rome Statute in particular in 2010 and 2011. The Barisan Nasional (BN) government made a unanimous Cabinet decision to accede to the Statute on 18 March 2011. However, due to opposition by the Attorney General, the preparations for implementing legislation were delayed and finally stalled. In 2019, the newly elected Pakatan Harapan (PH) government, took up the matter again and decided to accede to the Rome Statute.

The former Minister of Foreign Affairs, signed the Instrument of Accession on 4 March 2019.³ However, his announcement of accession created a public outcry. The government changed their mind and decided to withdraw from the Rome Statute on 5 April 2019.⁴

In this scenario, the PH government took two major missteps. The first was that it was rather rash to decide for accession to the Rome Statute without properly engaging with the various stakeholders and the public. Almost all Malaysians did not know at all about what the Rome Statute is and what the ICC is all about. They did not have any idea of the noble aims of the Rome Statute and how it could prevent and punish villainous criminals like Pol Pot, Milosevic, and the like. The opposition at that time cleverly won over the royalty and the

² Ibid. Preamble.

³ “Malaysia Accedes to the Rome Statute of the International Criminal Court,” *Press Release*, Ministry of Foreign Affairs: Wisma Putra, Putra Jaya, 4 March 2019.

⁴ “Malaysia Withdraws from the Rome Statute,” *The Star Online*, 5 April 2019, <https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute>, accessed August 12, 2023; See also “KL’s Rome Statute U-Turn A Move to Prevent Coup – Minister,” *The Straits Times*, 8 April 2019, <https://www.straitstimes.com/asia/se-asia/cls-rome-statute-u-turn-a-move-to-prevent-coup-minister>, accessed August 13, 2023.

ordinary people by portraying the Rome Statute as eroding Malaysia's sovereignty and affecting the immunity of the Rulers. The second misstep was the decision to withdraw. It clearly indicated that the government was not firm and could not hold its own principles.

Taking lessons from the past, Malaysia needs to move forward. Since adopting the Rome statute is the right thing to do, it is sure that the right moment will come when the political climate is favourable again. However, the preparation for the accession process, including the adoption of implementing legislation, is an enormous task and needs ample time, may be years, to complete. It is, therefore, worthwhile to embark on research with the objectives of (i) rebutting the main objections against accession to the Rome Statute, and (ii) identifying the best way of incorporating the Rome Statute into the Malaysian national law once Malaysia decides to accede to it.

This is a doctrinal legal research, focusing on an analysis of key provisions of the Rome Statute and the Malaysian substantive and procedural laws that could be affected, supplemented by a comparative methodology, by making a comparison between the practices of selected monist and dualist countries. The findings of the research and the draft implementing legislation will be submitted to the relevant government agencies.

The present paper has six parts. Part 1 is the introduction. Part 2 of the paper chronologically portrays the true story of what happened with Malaysia and the Rome Statute. Part 3 focuses on rebuttals of the main objections to the accession of the Rome Statute, encompassing the issues of State sovereignty, constitutional law, Shari'ah, and immunity of Rulers. Taking lessons from the bitter past, the paper suggests in Part 4 what precautionary measures should be taken before actually taking up the matter of accession to the Rome Statute. In Part 5, recommendations are made together with the draft of the proposed International Criminal Court Bill. Part 6 is the conclusion.

THE TRUE STORY OF WHAT HAPPENED WITH MALAYSIA AND THE ROME STATUTE

The Rome Conference to establish the ICC was held in Italy from 16 June to 17 July 1998 and Malaysia was a participant. Although Malaysia did not sign the Rome Statute itself, it signed the Final Act of

the Conference, which created the Rome Statute.⁵ The push for Malaysia to join the Rome Statute has been a strenuous and on-going effort of the civil society of Malaysia and government-linked organisations like the Human Rights Commission of Malaysia (SUHAKAM). The then President of the ICC, H.E. Mr. Philippe Kirsch, visited Kuala Lumpur on 4 October 2005, at the invitation of SUHAKAM, to deliver a talk on what the Rome Statute is and how the ICC works. During the visit, Tan Sri Abu Talib Othman, Chairman of SUHAKAM and former Attorney General of Malaysia, in his welcoming remarks, emphatically stated “that Malaysia will seriously consider subscribing to the Rome Statute and submit to the jurisdiction of the ICC.”⁶

The Malaysian Bar has been active among the civil society to support the Rome Statute. It invited a number of NGOs and political parties on February 8, 2007 to discuss the establishment of the “Malaysian Coalition for an International Criminal Court (CICC).”⁷ On 13 December 2011, the Malaysian Bar, reflecting the view of thousands of Malaysian lawyers, urged the government to accede to the Rome Statute without delay.⁸ These calls for joining the Rome Statute have been repeated again and again whenever the occasion arose.⁹

⁵ See the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, Italy, 17 July 1998, U.N. Doc. A/CONF.183/10, Annex II: List of States Participating in the Conference, <https://legal.un.org/icc/statute/finalfra.htm>, accessed August 5, 2023.

⁶ Shanmuga K., “International Criminal Court – An Update,” *Praxis: Chronicle of the Malaysian Bar*, July-August 2006, 35-37, at 37.

⁷ “Malaysian Bar Convenes Meeting to Discuss ICC,” *Malaysian Bar* (Badan Pengam Malaysia), 14 February 2007, <https://www.malaysianbar.org.my/article/news/barnews/news/malaysian-bar-convenes-meeting-to-discuss-icc>, accessed August 13, 2023.

⁸ “Malaysian Bar Urges the Malaysian Government to Accede to the Rome Statute of the International Criminal Court without Delay,” Press release: Malaysian Bar, 13 December 2011, <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-malaysian-bar-urges-the-malaysian-government-to-accede-to-the-rome-statute-of-the-international-criminal-court-without-delay>, accessed August 14, 2023.

⁹ “Malaysia Should Ratify the Rome Statute of the International Criminal Court,” Press Release of AG Khalidas, President of the Malaysian Bar, 16

These developments demonstrated a very strong support of the ICC from civil society in Malaysia.¹⁰

On the side of the Malaysian government, a breakthrough was achieved in March-April 2010, when the Minister of Law and Parliamentary Affairs in the Prime Minister's Department, Dato' Seri Mohamed Nazri bin Abdul Aziz, started to actively consider and promote the ICC accession matter in the Cabinet. He also accepted invitations to attend the 6th Consultative Assembly of Parliamentarians for the ICC and the Rule of Law (CAP ICC), held in Kampala, Uganda, from 28-29 May 2010 and the opening session of the Review Conference.¹¹

Furthermore, Dato' Sri Nazri even delivered a closing keynote speech at the CAP ICC and pronounced his commitment to accede to the Rome Statute. A Malaysian delegation also attended the 2010 Review Conference of the Assembly of States Parties (ASP) in Kampala from 31 May to 11 June 2010.¹²

On the part of the Parliament of Malaysia, all members of the Dewan Rakyat on 7 June 2010 unanimously supported motions calling for referring Israel's attack on the Gaza Freedom Flotilla to the ICC.¹³ This led to the then Prime Minister Datuk Seri Najib Tun Razak on 11

July 2021, <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-malaysia-should-ratify-the-rome-statute-of-the-international-criminal-court->, accessed August 15, 2023.

¹⁰ Other Civil Society organizations (CSO) which strongly support the accession to the Rome Statute include Angkatan Belia Islam Malaysia (ABIM) and the Malaysian Alliance of Civil Society Organisations (MACSA), a coalition of 52 civil society organisations. See "ABIM Supports Malaysia Move to Accede to Rome Statute of ICC," *The Sun Daily*, 05-03-2019, <https://www.thesundaily.my/local/abim-supports-malaysia-move-to-accede-to-rome-statute-of-icc-YE644643>, accessed September 10, 2023.

¹¹ "Malaysia and the Rome Statute," Parliamentarians for Global Action (PGA), <https://www.pgaction.org/ilhr/rome-statute/malaysia.html>, accessed September 28, 2023.

¹² Review Conference of the Rome Statute, Kampala, Uganda, 31 May - 11 June 2010, Assembly of States Parties (ASP), <https://asp.icc-cpi.int/reviewconference#registration>, accessed August 15, 2023.

¹³ "Malaysian Bar Urges..."

June 2010 to give a policy direction for Malaysia to join the Rome Statute in order that cases like this can be brought to the ICC.¹⁴

On 9 March 2011, the Second Asia-Pacific Parliamentary Consultation on the Universality of the Rome Statute was held in the Parliament of Malaysia.¹⁵ The President of the ICC, H.E. Judge Sang-Hyun Song, as Guest of Honour, opened the Consultation with a keynote address. The consultations were attended by bipartisan law-makers from Malaysia, headed by the Minister of Law Dato' Seri Nazri, and delegates from the civil society. In his welcoming speech, Minister Nazri made it clear that the Cabinet would soon decide on the accession matter. He emphatically stated that "*Let us henceforth not further hesitate to ratify the Rome Statute.*"¹⁶

Most of the participants, including Ambassador Datuk Noor Farida Ariffin, Director-General of the Ministry of Foreign Affairs, bipartisan Malaysian law-makers, academia, and delegates of the civil society, strongly supported the move towards joining the Rome Statute during the Consultations. The then Attorney General Tan Sri Abdul Gani Patail appeared to be the only person who was sceptical and expressed reservations to speedy accession of the Rome Statute. The main reason given by him was that the national implementing legislation must be prepared and adopted first before acceding to the Statute.

The former Attorney General of Malaysia, Tommy Thomas, at the Forum on "Malaysia and Rome Statute", held at Universiti Malaya, emphatically affirmed that "the Cabinet of the previous BN government on 18 March 2011 decided that Malaysia would accede to the Rome Statute." He observed that "That Cabinet decision was never revoked and also not implemented until now."¹⁷ Datuk Noor Farida

¹⁴ "Malaysia and the Rome Statute," (PGA).

¹⁵ Second PGA Asia-Pacific Parliamentary Consultation on the Universality of the Rome Statute of the International Criminal Court, Parliament of Malaysia, Kuala Lumpur, 9-10 March 2010, <https://www.pgaction.org/news/kuala-lumpur.html>, accessed August 15, 2023.

¹⁶ Welcoming Address of Dato' Seri Mohamed Nazri bin Abdul Aziz, Minister of Law and Parliamentarian Affairs in the Prime Minister's Department, *Parliament of Malaysia, Kuala-Lumpur, 9 March 2011*.

¹⁷ Speech by Tommy Thomas, the former Attorney General of Malaysia, at the Forum on "Malaysia and Rome Statute," held at Universiti Malaya,

Ariffin, at the same Forum, confirmed that there was indeed a Cabinet decision to accede to the Rome Statute in March 2011. She recollected:

“It was my department that had prepared the Cabinet paper on the Rome Statute and as per customary procedure had sent the Cabinet paper to all the relevant agencies. And everybody, all the agencies which we sent to, agreed with our proposal or our recommendation to the Cabinet to act for Malaysia to accede to the Rome Statute of the ICC, except surprisingly the Attorney-General’s Chambers who were vehemently against it.”¹⁸

Datuk Noor Farida replied to the Reporters that “The AG’s Chambers prepared a memorandum giving all the reasons. But we rebutted every single reason that they gave against accession, and the Cabinet was persuaded by us, by our arguments. The Cabinet overrides the AG’s objection and decided to accede.” She added that the instrument of accession to be deposited to the United Nations Secretariat was prepared by her department and that for reasons not known, the foreign minister nevertheless did not sign it.¹⁹

The drive for acceding to the Rome Statute resurfaced with the shooting down of Malaysian Airlines Flight MH 17 on 17 July 2004.²⁰ In response to the public outcry, the Cabinet again decided on 5 August 2015 to ask the AG’s Chambers to present the Cabinet memorandum to join the Rome Statute in order that Malaysia may bring responsible persons to the ICC. However, no fruitful results could be seen.²¹

Kuala Lumpur on 27 April 2019. See Ida Lim, “AG Calls Out Hypocrisy, Says BN Government Agrees to Rome Statute Since 2011,” *Malay Mail*, 27 April 2019, <https://www.malaymail.com/news/malaysia/2019/04/27/ag-calls-out-hypocrisy-says-bn-government-agreed-to-rome-statute-since-2011/1747513>, accessed August 15 2023.

¹⁸ Speech by Datuk Noor Farida Ariffin, the former Director-General of the Ministry of Foreign Affairs, at the Forum on “Malaysia and Rome Statute.”

¹⁹ Datuk Noor Farida’s response to reporters at the same Forum.

²⁰ See Ewa Jasiuka, Anna Konerta, Aleksandra Detyniecka, Elwira Targońska, “The Responsibility of a State in the Shooting Down of Malaysian Airlines Flight MH 17,” *Transportation Research Procedia* 43 (2019):113–118.

²¹ See Ida Lim, “AG Calls Out Hypocrisy...”.

In 2018, there was a drastic political change in Malaysia. The long ruling Barisan Nasional (BN) Party was defeated in the general elections and the Pakatan Harapan (PH) coalition formed the new government. On 12 December 2018, the new Cabinet, in accordance with the advice of the new Attorney General, decided to accede to the Rome Statute.²²

After signing of the Instrument of Accession to the Rome Statute by the Minister of Foreign Affairs on 4 March 2019, it was deposited with the UN Secretariat,²³ which acknowledged it with a note that “the Statute will enter into force for Malaysia on 1 June 2019 in accordance with article 126(2) of the Rome Statute.” However, the sudden announcement of accession to the Rome Statute created an unrest. There was outcry of opposition and demonstrations against the move to accede to the Rome Statute. The Government succumbed to the opposition and decided to withdraw from the Rome Statute on 5 April 2019.²⁴

The Foreign Minister sent to the UN Secretariat the notification of withdrawal of the instrument of accession on 5 April 2019.²⁵ The UN Secretary-General confirmed that Malaysia’s withdrawal of the instrument of accession was effective on April 29, 2019, that is just one day before the Statute entered into force for Malaysia.²⁶ Since the Rome Statute never entered into force for Malaysia, Malaysia was not a party to the Statute and Malaysia’s withdrawal was, unlike the withdrawal of a few other States, not a withdrawal from being a party

²² Ida Lim.

²³ UN *Depositary Notification of the Rome Statute* (March 4, 2019) UN Doc C.N.69.2019.TREATIES-XVIII.10.

²⁴ “Malaysia Withdraws from the Rome Statute,” *The Star Online*, 5 April 2019, <https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute>, accessed August 15, 2023; See also “KL’s Rome Statute U-Turn A Move to Prevent Coup – Minister,” *The Straits Times*, 8 April 2019, <https://www.straitstimes.com/asia/se-asia/cls-rome-statute-u-turn-a-move-to-prevent-coup-minister>, accessed August 15, 2023.

²⁵ UN *Depositary Notification of the Rome Statute* (May 15, 2019) UN Doc C.N.185.2019.TREATIES-XVIII.10.

²⁶ “UN Confirms Malaysia’s Withdrawal from the Rome statute,” *New Straits Times*, 16 May 2019, <https://www.nst.com.my/news/nation/2019/05/488950/un-confirms-malysias-withdrawal-rome-statute>, accessed August 16, 2023.

to the Statute but merely a withdrawal or cancellation of the instrument of accession before it became legally effective.²⁷

This is the true story of what actually happened with Malaysia and the Rome Statute. There are many lessons for Malaysia to be taken. Based on the above chronological accounts, what is clear is that the years 2010 and 2011 were the heyday of the Rome Statute in Malaysia. One can see the whole-hearted support of the SUHAKAM, the civil society, the Malaysian Bar, and the academia. The Cabinet of the time unanimously decided to accede to the Rome Statute. There was meaningful cooperation between the government and opposition lawmakers, and also bipartisan Parliamentarian's support. It means that there was a solid support for the Rome Statute by the Government, the legislature and the civil society.

The opposition came only from the Attorney-General. He vehemently opposed it. He insisted that the implementing legislation should be in place first before joining the ICC.²⁸ It is fine that Malaysia should adopt implementing legislation first. However, the big question mark is whether the AG's Chambers in fact performed its obligation as the government agency primarily responsible for implementing legislation.

It can fairly be concluded that accession to the Rome Statute was not the brain child of the PH government in 2019. It has been the dream of the civil society, parliamentarians from both sides of the divide, and the successive governments of Malaysia since 2010. The Rome Statute became the unfortunate causality of the politically motivated attacks against the PH government in 2019. It is believed that the push for accession to the Rome Statute will revive once Malaysia is stable and the political climate is favourable again. With this firm belief, it is worthwhile to embark on a research aiming at considering all the

²⁷ Burundi, the Gambia, the Philippines, and South Africa notified their withdrawal from being a party to the Rome Statute under Article 127. Withdrawals of Burundi and The Philippines have been confirmed and the Gambia and South Africa rescinded their withdrawals.

²⁸ "M'sia Should Not Ratify ICC Just to Look Good, Says Gani Patail". *BERNAMA*. 10 March 2011; "AG: Don't Join the ICC to Look Good," *Malaysia Kini*, 10 March 2011, <https://www.malaysiakini.com/news/158296>, accessed August 19, 2023.

necessary preparations and law reforms to be made leading towards incorporating the Rome Statute into the Malaysian legal system.

REBUTTING MAIN OBJECTIONS AGAINST ACCESSION TO THE ROME STATUTE

The main objections raised by those who oppose the Rome Statute are that it is incompatible with the constitution, that it is inconsistent with Shari'ah, and that it affects the position of Yang di-Pertuan Agong and the immunity of Rulers.²⁹ The following are rebuttals of these objections.

Objection based on incompatibility with the constitution

After careful perusal of the Malaysian Federal Constitution *vis-a vis* the Rome Statute, it is found that there is no glaring incompatibility between the Rome Statute and the Constitution. As everyone knows, the primary objective of the Rome Statute is to prosecute and punish those criminals who commit heinous atrocity crimes. There is nothing in the Federal Constitution that prohibits this main objective of the Statute. There is also nothing in the Federal Constitution that prohibits that an international court shall not exercise jurisdiction over Malaysians if they commit certain heinous crimes. Even ordinary foreign domestic courts can exercise jurisdiction over Malaysians who committed crimes. In principle, therefore, the Rome Statute is not incompatible with the Federal Constitution.

The common constitutional issues that can be found in the constitutions of most countries include the immunity granted to the head of State or government,³⁰ and non-extradition of own nationals of a State.³¹ Of these common constitutional issues, the issue of extradition is not touched at all in the Federal Constitution and thus

²⁹ “Malaysian Bar Urges ...”

³⁰ Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court, CDL-INF (2001) 1, adopted by the Venice Commission, Strasbourg, 15 January 2001, hereinafter, Venice Commission Report 2001) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2001\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)001-e), accessed 2 September 2023, 4-6.

³¹ Venice Commission Report 2001, 6-8.

there is no incompatibility. How to amend the Extradition Act 1992 to be in line with the Rome Statute will be considered in a later section.

With regard to the issue of the immunity of Rulers, the Malaysian Federal Constitution is not incompatible with the Rome Statute as the immunity of Rulers has already been removed by the Constitution (Amendment) Act 1993. This matter will also be discussed at length in a later section. Since the Rulers have already lost their immunity under the constitutional amendment, accession to the Rome Statute will not be a violation of Article 38(4) of the Federal Constitution. On 20 December 1994, Malaysia acceded to the Genocide Convention 1948, which also does not allow rulers and heads of States any immunity.³² Malaysia is a party to the Genocide Convention, which is legally binding on Malaysia. Rome Statute, therefore, is not the first case and accession to the Genocide Convention is a striking precedent of the Malaysian State practice, affirming the fundamental rule of international criminal law that official capacity as rulers or heads of State is irrelevant.

Objection based on incompatibility with Shari'ah

In-depth research and scholarly writings have indicated that there is generally no conflict between the Rome Statute and Shari'ah.³³ General principles of international criminal law as enshrined in the Rome Statute such as the principle of legality, non-retroactivity, and the irrelevance of official position are in accord with the values of *Maqasidul Shari'ah* and core principles of Islamic law. It is also noteworthy that Islamic legal maxims (Al-Qawā'id Al-Fiqhiyyah) may prove particularly useful for international criminal law.³⁴

³² Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951. Article IV reads: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

³³ See, Mohamed Elewa Badar, "Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?", in Tallyn Gray (ed.), *Islam and International Criminal Law and Justice*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 201-232.

³⁴ Badar, "Place for Islamic Law...", 213.

Principle of Legality

The principle of legality (*nullum crimen sine lege*: no crime without a law) is enshrined in Article 22 of the Rome Statute that confirms the core prohibition of the retroactive application of the criminal law.³⁵ This is supplemented by the rule of *nulla poena sine lege*, no punishment without a law, in Article 23.³⁶

In fact, long before the principle of legality was first proclaimed in secular human rights instruments in 1789, the Islamic system of criminal justice operated on it.³⁷ Evidence of this principle can be found in the following Qur'anic verses:

“And We never punish until we have sent a Messenger (to give warning).”³⁸

“Messengers are bearers of good news as well as of warning in order that mankind should have no plea against Allah after the (coming of) Messengers. And Allah is Ever-All-Powerful and All-Wise.”³⁹

Islamic law includes a number of legal maxims that complement this principle. A legal maxim declares that “permissibility is the original norm,” which means that “all things are permissible unless the law has declared them otherwise.”⁴⁰ The tradition of the Prophet (S.A.W) also illustrates the point: “When ‘Amr Ibn Al ‘Ass embraced Islam, he pledged allegiance to the Prophet (S.A.W.) and asked whether he would be held accountable for his previous transgressions.

³⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press: Oxford, 2010), 403; Bruce Broomhall, “Article 22: *Nullum crimen sine lege*,” in *Commentary on the Rome Statute of the International Criminal Court*, ed. Otto Triffterer and Kai Ambos), 2nd. ed., (Nomos: Baden-Baden, 2008), 714.

³⁶ Rome Statute, Art. 23.

³⁷ Taymour Kamel, “The Principle of Legality and Its Application in Islamic Criminal Justice,” in *Islamic Criminal Justice System*, ed. M. Cherif Bassiouni, (Oceana Publications: New York, 1982) 149–50.

³⁸ Al Qur'an, Surah Al-Isra, 17:15.

³⁹ Al Qur'an, Surah Al-Nisa, 4: 165.

⁴⁰ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (One world Publication: Oxford, 2008), at 186.

To this, the Prophet (S.A.W.) replied: ‘Did you not know, O ‘Amr, that Islam obliterates that which took place before it?’⁴¹

Rulers are not above the law (irrelevance of official capacity/immunity)

Similarly to Article 27 of the Rome Statute (irrelevance of official capacity), in Islamic law, there is no recognition of special privileges for anyone and rulers are not above the law. Muslim jurists have unanimously held the view that the head of State and government officials are accountable for their conduct like everyone else.⁴² Equality before the law and before the courts of justice is clearly recognised for all citizens alike, from the most humble citizen to the highest executive in the land.⁴³

This is primarily founded on the fundamental Islamic law principles of equality of all human beings regardless of race, language, religion, and social or official status and non-discrimination. Affirmative evidence of equality and non-discrimination in Islam can be found in the primary sources of Shari’ah: the Quran and the Sunnah. The practice of the Rightly-Guided Caliphs also contributes greatly to the confirmation of these principles. Allah SWT ordains in the Holy Quran:

“O humanity! Indeed, We created you from a male and a female, and made you into peoples and tribes so that you may get to know one another. Surely the most noble of you in the sight of Allah is the most righteous among you. Allah is truly All-Knowing, All-Aware.”⁴⁴

In the Sermon of the farewell Hajj, the Prophet S.A.W. proclaimed:

“O people! Your creator is one, and all mankind is from Adam and Eve. An Arab has no superiority over a non-Arab, nor does a non-

⁴¹ Muslim, Sahíh Muslim, Kitáb Al-Imán, Báb al-Islam; see Kamali, *Shari’ah Law*, at 188.

⁴² Mashood A Baderin, “Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an ‘Object and Purpose’ cum ‘Maqásid’ Approach,” in *Islam and International Criminal Law and Justice*, ed. Tallyn Gray, (Torkel Opsahl Academic Epublisher, 2018) 79; Kamali, above note 54, at 180.

⁴³ Abul A’la Mawdúdí, *Human Rights in Islam*, (Islamic Foundation: London, 1980) 33.

⁴⁴ Al Qur’an, Surah Hujurat, 49:13.

Arab have any superiority over an Arab; a white has no superiority over a black, nor does a black have any superiority over a white; [none have superiority over another] except by piety and righteous conduct.”⁴⁵

Equality before the law means that all men are equally subject to the rule of law without any discrimination, and there is no recognition of any privileges in this regard for anyone, including government leaders and the Heads of State.⁴⁶ The Prophet-cum-Head of State confirmed this in his last sermon:

“O people! If I have flogged anyone [wrongly], let him retaliate here and now. If I have insulted anyone, let him reciprocate. If I have taken any-one’s property, let him claim it and take it from me. Let no one fear any animosity on my part.”⁴⁷

A tradition was reported by A’isha. When a woman from a noble family was brought before the Prophet (S.A.W.) in connection with a theft and it was recommended that she be spared punishment, the Prophet (S.A.W.) made his point candidly on the equality of everyone before the law and that he would enforce the law even on his own daughter Fatimah:

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 Fatimah, the daughter of Muhammad, had committed this crime, then I would have amputated her hand.⁴⁸

The Rightly-Guided Caliphs also followed the Prophet’s example and claimed no privileges in relation to the rule of law and equal treatment before the courts of justice. The first Caliph Abu Bakr and also his successor ‘Umar ibn al-Khattab addressed the people in their inaugural speeches upon taking office and asked that they withhold their assistance and obedience to their leaders if the leaders

⁴⁵ Prophet Muhammad (S.A.W.)’s final sermon was delivered during the *Hajj* of the year 632, thtoninth day of Dhul Hijjah, the 12th month of the lunar year, at Arafat, the most blessed day of the year.

⁴⁶ Mohammad Hashim Kamali, *Freedom, Equality, and Justice in Islam*, (Ilmiah Publishers: Petaling Jaya, 2002) 55.

⁴⁷ Prophet Muhammad (S.A.W.)’s final sermon.

⁴⁸ Muslim, *Sahíh Muslim*, Kitáb Al- Hudud, Book 17, Hadith 4187.

themselves deviated from the right path.⁴⁹ It is reported that on one occasion, the Caliph ‘Umar struck a man. When the man complained, the Caliph replied; “You are right. Here I am ready for you to retaliate.”⁵⁰

Who is nobler and higher in status than the Prophet himself, his beloved daughter Fatimah, and the Rightly-Guided Caliphs?

The well-established Islamic precept of equality and non-discrimination of all human beings before the law has been reaffirmed in the land mark *Provisional Assembly* case decided by the Federal Shari’ah Court of Pakistan.⁵¹ In this case, a Member of the Provincial Legislative Assembly claimed special privilege before a court under the Immunities and Privileges Act 1988. The Federal Shari’ah court had to address the issue of whether such privileges were in conflict with injunctions of Islam on equality before the law. The Act itself was also disputed and considered to be contrary to Shari’ah and therefore unconstitutional. The Court referred to several Quranic verses (including al-Hujurat, 49:13 and al-Nisa, 4:135) and also cited hadith on equality and held that in Islam everyone is equal before a court of justice and that no one, including the Head of State, could be granted any special privileges.⁵²

It can fairly be concluded that the Islamic legal system is not fundamentally in conflict with the Rome Statute. Since the core international crimes over which the ICC has jurisdiction are the most heinous crimes affecting the entire humanity, punishing them will not definitely be against the basic precepts of Islamic criminal law because Islam is not meant for one race, one country or one people, but for the entire humanity. Islam is founded on Tawhid: one Creator, one God, and one humanity. The Holy Quran ordains: “Mankind was one single nation....”⁵³

⁴⁹ Muhammad Abu Zahrah, *Tanzim al-Islam li'l-Mujtama*, Cairo: Dar al-Fikr al-‘Arabi, 1385/1965, 160, cited in Kamali, *Freedom, Equality*, at 56.

⁵⁰ Abu Yusuf, *Kitab al Kharaj*, 5th ed. (Cairo: al-Matba’ah al-Salafiyyah, 1396AH), cited in Kamali, *Freedom, Equality*, at 56.

⁵¹ *N.W.F.P. Provincial Assembly (Powers, Immunities, and privileges) Act 1988*, All Pakistan Legal Decisions (1988) Federal Shari’ah Court, 283.

⁵² *Provincial Assembly case*, 283.

⁵³ Al Qur’an, Surah Al Baqarah, 2:213.

Objection based on immunity of Rulers

It has been argued that “concern for Malay Rulers who may lose their immunity in the international court is the main reason why the government is hesitant to accede to the Rome Statute.”⁵⁴ A question may right away be raised whether Rulers have immunity from the legal process even under the Malaysian law, that is, the Federal Constitution.

Although Rulers did have immunity in the past,⁵⁵ the immunity, in respect of acts in their personal capacity, has been removed⁵⁶ by the 1993 amendments of the Federal Constitution.⁵⁷ The amended Article 181(2) reads as follows: “No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV.” Therefore, if a Ruler committed a crime in his personal capacity, he will not be immune and will be criminally liable. He cannot, however, be brought to an ordinary court and shall be brought before a “Special Court” established under Part XV, of the Federal Constitution, entitled “Proceedings against Yang di Pertuan Agong (YDPA) and Rulers.”⁵⁸

Before international courts, no immunity for Rulers who committed international crimes

⁵⁴ “Minister: Fear of Malay Rulers losing immunity reason Putrajaya yet to ink Rome Statute,” *Malay Mail*, 7 Nov 2013, citing the speech of the de facto Law Minister Nancy Shukri, <https://www.malaymail.com/news/malaysia/2013/11/07/minister-fear-of-malay-rulers-losing-immunity-reason-putrajaya-yet-to-ink-r/558033> accessed November 17, 2023.

⁵⁵ See Federal Constitution, original Articles 32(1), 71(1), 181(1) and 182(2) before 1993 amendments. See also Andrew Harding and Harshan Kumarasingham, “The Malay Monarchies in Constitutional and Social Conception,” *Asian Journal of Law and Society*, 9(3) (2022): 399-417.

⁵⁶ See Mark R. Gillen, “The Malay Rulers’ Loss of Immunity,” *Occasional Paper #6*, (University of Victoria: Canada, 1994); Mustafa, Che Norlia, *The 1993 Royal Immunity Crisis: the Kerajaan, the Constitution and the Dilemma of a New Bangsa*. Doctor of Philosophy (PhD) thesis, University of Kent, (2000), 75-79, <https://kar.kent.ac.uk/86148/>, accessed September 17, 2023.

⁵⁷ Constitution (Amendment) Act 1993, Act A848, came into force on 30 March 1993.

⁵⁸ See Federal Constitution, Article 182.

In the international sphere, when it comes to international crimes, a rule of customary international law has been established to the effect that “official capacity is no bar to prosecution by the competent international courts and tribunals.”⁵⁹ Immunity for international crimes has been removed by virtue of successive international treaties, such as the Nuremberg and Tokyo Charters, the Genocide Convention, the four Geneva Conventions for the protection of victims of armed conflicts of 1949, the Statutes of the ICTY and the ICTR, and the Rome Statute of the ICC. Article 27 of the Rome Statute is in fact a codification of this existing customary international law. The International Court of Justice affirmed in the *Arrest Warrant* case that an incumbent or former Senior State official may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction, explicitly referring to Article 27(2) of the Rome Statute.”⁶⁰ This principle of irrelevance of official capacity is founded on the universally accepted rule of ‘equality before the law.’ All human beings shall be treated equally before the law whether they are ordinary citizens, kings, rulers, presidents, or commanders-in-chief.

Principle of ‘complementarity’ will bar the ICC to exercise jurisdiction over YDPA and Rulers

Even if the YDPA or Rulers would ever commit an international crime, there is still a solution in order for such a case not to be brought to the ICC. Since “complementarity” is the underlying principle of the Rome Statute, Malaysian courts have primacy to exercise jurisdiction and the ICC shall not have any jurisdiction over Malay Rulers if their offences are effectively dealt with in accordance with Malaysian laws. According to Article 17 of the Rome Statute, so long as a State is willing and able to prosecute a criminal and in fact initiated investigation or prosecution, the case is inadmissible to the ICC⁶¹ and the ICC has no right to interfere with the domestic legal process. It means that the State only needs to genuinely initiate the process and the burden lies on the ICC to prove that the said State is unwilling or

⁵⁹ Antonio Cassese, “When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case,” *British Yearbook of International Law*, 13 (2002): 853-875.

⁶⁰ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Arrest Warrant case)*, 2002 ICJ Reports, 3, at para 61.

⁶¹ See Rome Statute, Article 17.

unable to investigate or prosecute. That is why the national implementing legislation that criminalises the Rome Statute Crimes and empowers the Malaysian courts with the jurisdiction to try these offences is crucial in order to show that the State is able to deal with the ICC crimes domestically.

In Malaysia, with respect to Rulers, we have our own domestic process of setting up of a Special Court under the Federal Constitution that will deal with such a situation. In reality, therefore, there is no need to fear succumbing to the jurisdiction of the ICC.

TAKING PRECAUTIONARY MEASURES BEFORE ACCESSION TO THE ROME STATUTE

Malaysia should take certain precautionary measures before embarking on accession to the Rome Statute.

Promoting noble aims and values of the Rome Statute

Taking lessons from the PH government's hasty decision to accede to the Rome Statute, the first and the most important task for the government of the day is to promote noble aims and values of the Rome Statute to all Malaysians to the extent that they are well convinced that accession is the right thing to do. This task should be spearheaded by the Ministry of Foreign Affairs, Office of the Minister of Law in the PM's Department, SUHAKAM, and the Malaysian Bar. In the first step, there should be successive open and fruitful dialogue and consultation sessions involving the AG's Chambers, MPs, civil society, academia, and all stakeholders. Those who opposed the Rome Statute should be specially invited and let them air out and share their views with those who support the Statute. There must be open and constructive academic dialogues instead of protests and vain quarrels.

The second step is a long-term approach. Noble aims and values of the Rome Statute should be disseminated to students in all schools, universities, and colleges by means of inclusion in their courses and conducting workshops, seminars, lectures and special talks. The Ministry of Higher Education should spearhead this task with the help of the other relevant agencies. The public should also be disseminated by means of roadshows and other activities. All Malaysians, in particular students who are our future leaders, should know what the meaning of human rights is, what the fundamental rights of human

beings are, and how serious the grave breaches of fundamental human rights which may amount to heinous atrocity crimes, such as genocide, war crimes, and crimes against humanity.

Establishing a Law Commission

Why did a strong tide to accede to the Rome Statute in the years 2010 and 2011 fail? One cannot put the blame on the AG's Chambers alone, which is tied up with enormous workload. If Malaysia had an independent Law Commission, it could have taken care of all the groundworks for research and preparation of the implementing legislation.

There have been Law Commissions in many other common law countries since a long time ago.⁶² It is long overdue for Malaysia to establish an independent Law Commission, which is a statutory body sponsored by the government but independent in the sense that it can freely conduct research and consultations in order to make recommendations to the government for reforming the law.

The best way is to create a statutory Law Commission in Malaysia for the improvement and updating of Malaysian laws in the long run. However, in the event that the government is not yet ready for an independent Law Commission, a short-term plan of a semi-governmental "Rome Statute Commission" can be set up under the Prime Minister's Department. The Commission should be chaired by the current Minister of Law and Institutional Reforms and consisted of members from AG's Chambers and Ministry of Foreign Affairs, bipartisan members of Parliament, the Judiciary, SUHAKAM Commissioners, the Malaysian Bar, academia, and representatives from the civil society.

Choosing the correct type of implementing Legislation for Malaysia

The relationship between international law and national law can be dichotomised into two main theories: the monist and the dualist.⁶³

⁶² See, for example, the Law Commission (of England & Wales) created by the Law Commissions Act 1965. See also Law Commissions or Law Reform Commissions in Australia, Canada, Ireland, India, Pakistan, South Africa, and Sri Lanka.

⁶³ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 5th edn (Sweet & Maxwell, 2023) 54.

Whether a State is a monist or a dualist clearly affects the way the Rome Statute is domestically implemented.

The requirement of national legislation is the way the two theories can be distinguished in relation to the domestic application of treaties. A monist State may not require enabling legislation to implement a treaty domestically because the treaty normally has a direct legal effect in the national legal system without a legislative act.⁶⁴ On the contrary, in a dualist State, a treaty does not automatically become law domestically without the enabling statute adopted by the legislature.⁶⁵

A careful study of implementing legislation of both monist and dualist States⁶⁶ reveals that most dualist States adopt a single comprehensive legislation covering all areas of implementation of the Rome Statute.⁶⁷ Examples include Canada,⁶⁸ Ireland,⁶⁹ New Zealand,⁷⁰ Uganda,⁷¹ and the United Kingdom.⁷²

⁶⁴ Eileen Denza, "The Relationship between International and National Law," in *International Law*, ed. Malcolm Evans, 4th edn (Oxford University Press, 2014) 412. See also Olympia Bekou and S. Shah, "Realising the Potential of the International Criminal Court: The African Experience," *Human Rights Law Review*, 6(3) (2006): 503.

⁶⁵ James R. Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford University Press, 2008) 31-32.

⁶⁶ See also "Implementing the Rome Statute of the International Criminal Court," Case Matrix Network (CMN), Centre for International Law Research and Policy, September 2017, <https://www.legal-tools.org/doc/e05157/pdf/>, accessed October 1, 2023.

⁶⁷ See and cf. "Implementing the Rome Statute of the International Criminal Court," Case Matrix Network (CMN), Centre for International Law Research and Policy, September 2017, <https://www.legal-tools.org/doc/e05157/pdf/>, accessed October 1, 2023.

⁶⁸ The Crimes against Humanity and War Crimes Act, 2000 (Canada), adopted on June 24, 2000.

⁶⁹ International Criminal Court Act 2006 (Kingdom of Ireland), 31 October 2006.

⁷⁰ International Crimes and Criminal Court Act 2000 (New Zealand), 6 September 2000.

⁷¹ International Criminal Court Act, 2010 (Uganda), 25 June 2010.

⁷² The International Criminal Court Act (the ICCA) 2001 (UK), adopted on 11 May 2001.

Monist States such as Germany, the Netherlands, and Spain adopt two or more new enactments or amend the necessary criminal laws or criminal procedures for the implementation of the Rome Statute. Germany, for example, adopted four pieces of legislation for the entire process of implementation.⁷³

It is recommended that since Malaysia is a dualist State, it should adopt a single comprehensive enactment, like other common law countries such as the United Kingdom and Canada, encompassing all obligations under the Rome Statute in one piece of legislation. The advantages of such a single legislation are clarity and simplicity.

MALAYSIA'S PROPOSED IMPLEMENTING LEGISLATION

By perusing all the titles of implementing legislation of several States, it is submitted that Malaysia should choose the title of its enactment as "*the International Criminal Court Act*," which is the simplest and the shortest. Before the Parliament passes it as law, it should be referred to as the International Criminal Court Bill. The ICC Bill should have five Parts and three Schedules. The *Long Title* should read: "An Act to enable Malaysia to implement and give effect to its obligations under the Rome Statute of the International Criminal Court, and for related matters."

Part 1: Preliminary matters

It includes a Short Title: "This Act may be cited as the International Criminal Court Act...", and an interpretation section, which interprets the following terms, among others:

"Article" means an Article of the Statute;

"Court" means the High Court;

"Elements of Crimes" means Elements of Crimes (including any amendments thereto) adopted under Article 9;

"ICC offence" has the meaning given to it by section...;

⁷³ H. Kaul, "Germany: Methods and Techniques Used to Deal with Constitutional Sovereignty and Criminal Law Issues, in *States' Responses to Issues Arising from the ICC Statute*, ed. Roy S.K. Lee, (Brill, 2005) 65-81, at 73.

“Minister” means the Minister for Law and Institutional Reforms in the Prime Minister’s Department⁷⁴

“Appeal Chamber” means the Appeal Chamber of the International Criminal Court;

“Pre-Trial Chamber” means the Pre-Trial Chamber of the International Criminal Court;

“Prosecutor” means the Prosecutor of the International Criminal Court;

“Rules of Procedure and Evidence” means the Rules of Procedure and Evidence (including any amendments thereto) adopted under Article 51;

“Statute” means the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998;

“Surrender order” means an order of the High Court under section... for the surrender of a person.

Part 2: Criminalisation of ICC Crimes and jurisdiction

This part is of paramount importance as it will trigger the principle of complementarity. Complementarity means the primacy of States over the ICC to prosecute ICC crimes. It is the foundation stone of the Statute, which guarantees keeping intact sovereignty of States. To achieve complementarity, States need to ensure that their implementing legislation encompasses, among others, the definition of crimes, the jurisdictional scope, the general principles of criminal law, and offences affecting the administration of justice.

The Bill must first of all criminalise all four crimes of international concern as enshrined in Article 5 of the Rome Statute. After that, it should define the four crimes, ‘genocide,’ ‘crime against humanity,’ ‘war crime,’ and ‘crime of aggression,’ by applying the

⁷⁴ This is important as the Minister designated here is the main contact authority with the ICC and responsible for all matters relating to cooperation with the ICC. This position depends very much on the current government structure and the decision of the Cabinet of who should take this responsibility. In some States, it may be the Minister for Foreign Affairs or the Minister of Justice.

*“reference method,”*⁷⁵ by directly referring to Article numbers 6, 7, 8 (2), and 8A of the Rome Statute. For example, “In this Part, ‘genocide’ means an act of genocide as defined in Article 6, ‘crime against humanity’ means a crime against humanity as defined in Article 7, ‘war crime’ means a war crime as defined in Article 8(2), and ‘crime of aggression’ means a crime of aggression as defined in Article 8A.” Penalty for these ICC crimes should be: (i) imprisonment for life if the offence involves murder or is of extreme gravity, or (ii) imprisonment for a term not exceeding 30 years in any other case.

In fact, Malaysia has already criminalised one of the Rome Statute crimes (war crimes) in its domestic law. In section 3(1) of the Geneva Conventions Act, 1962, the punishment for grave breach of the Geneva Conventions (war crimes) is life imprisonment if there is willful killing and if no willful killing is involved, imprisonment not exceeding 14 years.⁷⁶ There is no death penalty to be imposed on war crimes. The proposed implementing legislation takes this as a precedent and makes an adjustment of imposing the maximum 30 years imprisonment for crimes which do not involve murder or are not of extreme gravity.

Although the death penalty is not proposed for punishment of Rome Statute’s crimes, it has no bearing on the fact that the death penalty can still be imposed on some serious crimes under the Penal Code. The Rome Statute crimes are special crimes which are not at all related to the offences in the Penal Code. The Rome Statute implementing legislation would be a special criminal law as distinct from the Penal Code, which is merely a general criminal law.

However, to be fair to those who feel that the death penalty should be imposed on Rome Statute crimes, this issue can be discussed among various stakeholders and civil society during the consultation sessions of the drafting of the implementing legislation.

⁷⁵ There are two different methods of defining the ICC crimes. The first one is the “replication method,” by reproducing definition of crimes of the Rome Statute verbatim in their national legislation. The second one is the “reference method,” by making direct reference to the relevant article number of the Statute. For clarity and brevity purposes, it is submitted that the reference method should be applied in the Malaysian legislation

⁷⁶ Geneva Conventions Act, 16 April 1962, Laws of Malaysia, Act 512, section 3(1).

There are six punishable offences against the administration of justice under Article 70(1) of the Rome Statute, namely “giving false testimony, presenting false evidence, influencing a witness, impeding or intimidating an official of the Court, retaliating against an official of the Court, and soliciting or accepting a bribe as an official of the Court.”⁷⁷ The Bill must also criminalise these offences by directly referring to Article 70(1). Punishment for the offences is a fine or imprisonment not exceeding 5 years.

With regard to jurisdiction, States should be assertive in the sense that they should emphasise in their implementing legislation the primacy of their domestic courts over the ICC crimes.⁷⁸ It is better in the Malaysian ICC Bill to include a provision to the effect that “...this Act does not affect the primacy of Malaysia’s right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.”⁷⁹ It clearly shows the readiness and commitment of the Malaysian courts to investigate and prosecute any core international crime.

In the implementing legislation, States as a general rule rely on jurisdictional principles that are well-established in international law, such as the territoriality principle, the nationality principle, and the passive personality principle.⁸⁰ Malaysia should also follow this as all these three jurisdictional principles are in accord with the Courts of Judicature Act, 1964, of Malaysia.⁸¹ With regard to jurisdiction, the ICC Bill should read as follows: “Crimes committed in Malaysia, crimes committed by the Malaysian nationals and the crimes the victims of which are the Malaysian nationals shall be prosecuted in Malaysia and brought before a competent Malaysian court.” The Bill

⁷⁷ Rome Statute, Article 70(1).

⁷⁸ Olympia Bekou, “In the hands of the State: Implementing legislation and complementarity,” in *The International Criminal Court and Complementarity: From Theory to Practice*, ed. C. Stahn, and Mohamed M. El Zeidy, (Cambridge University Press, 2011) 830.

⁷⁹ Taken the example of the International Criminal Court Act 2002 of Australia, 28 June 2002, section 3.

⁸⁰ Implementing the Rome Statute of the International Criminal Court, Case Matrix Network (CMN) 51. See, for example, Law on the Implementation of the Statute of the ICC and the Prosecution of Crimes against International Law of War and Humanitarian law (Croatia), 24 October 2003, Article 10 (1).

⁸¹ See the Courts of Judicature Act, 1964, section 22.

also needs to provide for extra-territorial jurisdiction for the above offences on the basis of the established principles of international law. The second option is that the ICC Bill could rely on the universality principle and adopt that Malaysia could exercise jurisdiction on Rome Statute Crimes without regard to whoever committed these crimes and wherever they were committed.

General principles of criminal law are enshrined in Part 3 of the Rome Statute.⁸² Key factors that Malaysia should incorporate in the implementing legislation are: individual criminal responsibility,⁸³ the responsibility of commanders and other superiors,⁸⁴ the irrelevance of official capacity,⁸⁵ non-applicability of statute of limitation,⁸⁶ and grounds for excluding responsibility (defences).⁸⁷

Part 3: Request for Arrest and Surrender of Persons

The Rome Statute in its Part 9 has created a “detailed cooperation regime” between States parties and the Court. The Statute unequivocally imposes on States parties the general obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁸⁸ The cooperation regime needs the adoption of domestic laws as the Statute clearly imposes on States “to ensure that there are procedures available under their national law for all of the forms of cooperation.”⁸⁹

Due to a lack of police force and territory of its own, the Court is entirely dependent on the full cooperation of State parties for arrest and surrender. Article 89 (1) of the Statute enunciates that “States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”⁹⁰ Malaysia needs to incorporate the relevant procedures for arrest and surrender in the implementing legislation and if it requires

⁸² Rome Statute, Articles 22-33.

⁸³ Article 25.

⁸⁴ Article 28.

⁸⁵ Article 27.

⁸⁶ Article 29.

⁸⁷ Articles 31-33.

⁸⁸ Article 86.

⁸⁹ Article 88.

⁹⁰ Article 89(1).

any amendments to its procedural laws, the amendments should be included in the “consequential amendments” in the legislation.

Part 4: Requests to Freeze Assets and Enforce Orders of International Criminal Court

The ICC may request the Minister under Article 93(1) for “freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.” In that case, the Minister may require police to apply to the High Court to get a freezing order. Under Article 103, “a sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.”⁹¹ However, it is at the discretion of Malaysia to give such consent to accept convicted persons.

Part 5: Other requests

Under Article 93, other requests for judicial assistance include “identification evidence (bodily samples such as a sample of blood, hair, urine, or saliva), locating persons or identifying or locating property, taking of evidence, questioning, and service of documents.”⁹² The implementing legislation should include clear procedures for these purposes.

Part 6: Miscellaneous

This Part first of all should deal with matters relating to privileges and immunities of the ICC judges, prosecutor and other officials. The Agreement on the Privileges and Immunities of the International Criminal Court was adopted by the Assembly of States Parties on 10 September 2002.⁹³ It is better to clearly state that the agreement shall have the legal effect in Malaysia and should attach the agreement verbatim in the Schedule. Secondly, it must be provided that to be in accord with Article 27, any immunity (whether diplomatic or State) attached to a person shall not be a bar to criminal proceedings under this Act. Thirdly, there must be a provision for “consequential

⁹¹ Article 103(1)(a).

⁹² Article 93(1).

⁹³ Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, entered into force on 22 July 2004. Currently there are 79 States parties to the Agreement.

amendments” affirming that all the consequential amendments as stated in the Schedule shall have the legal effect in Malaysia.

Schedules

The following are the three Schedules to be appended to the Bill:

Schedule 1: Statute of the International Criminal Court, done at Rome on 17 July 1998;

Schedule 2: Agreement on the Privileges and Immunities of the International Criminal Court, 2002; and

Schedule 3: Consequential Amendments.

Consequential amendments mean amendments of the Malaysian domestic laws that are rendered necessary to amend in consequence of the accession to the Rome Statute. These amendments are not necessary to be submitted to the Parliament one by one but they are put together in the International Criminal Court Bill and submitted as a package deal to the Parliament for approval. This is the advantage of the single comprehensive enactment method of implementing legislation. It is submitted that the following Malaysian laws should be amended as consequential amendments.

(1) The Geneva Conventions Act 1962 (revised 1993)⁹⁴

Malaysia, as a party to the four Geneva Conventions on the protection of victims of armed conflict of 1949, adopted the Geneva Conventions Act 1962. The four Geneva Conventions are appended to the Act as four Schedules and the Act gives legal effect to the four Geneva Conventions. Section 3 of the Act criminalises *grave breaches* of the Conventions (grave breaches of the Geneva Conventions are known as “*war crimes*”) and also imposes punishments.

Two provisions of the Geneva Conventions Act should be amended.

- 1) Section 3 (1), punishment for grave breaches of the conventions should be replaced by the following:
 - i. A person convicted of an offence is liable to imprisonment for life if the offence involves murder or is of extreme gravity; and

⁹⁴ The Geneva Conventions Act 1962 (revised 1993), Laws of Malaysia, Act 512.

- ii. In any other case, a person convicted of an offence is liable to imprisonment for a term not exceeding 30 years.⁹⁵
- 2) Section 3(4) should be replaced with the following sentence: “Proceedings for an offence under this section shall not be instituted except by or on behalf of the Attorney General.”⁹⁶

(2) The Extradition Act 1992⁹⁷

The following Section 49(1) of the Extradition should be amended in order that the Malaysian citizens, who committed ICC crimes, could be extradited or surrendered.

“49. (1) The Minister may, in his discretion, refuse the surrender or the return of a fugitive criminal if— (a) the fugitive criminal is a citizen of Malaysia;...”

(3) The Courts of Judicature Act 1964⁹⁸

The Courts of Judicature Act entrusts the High Court with extra-territorial jurisdiction only in limited offences provided in section 22(1)(b) (mainly offences against the State, terrorist offences, and those related to national security). The extra-territorial jurisdiction of the High Court should be extended to include ICC crimes. In Section 22(1) of the Courts of Judicature Act, a new sub-section 22(1)(c) should be added which reads: “Offences under the International Criminal Court Act.”

CONCLUSION

The most crucial question is why Malaysia should accede to the Rome Statute of the ICC. First of all, the research finds that to accede to the Rome Statute is the right thing to do as it is not contrary to Shari’ah, does not infringe sovereignty, violate the Federal Constitution, and

⁹⁵ This is to be in line with the penalty policy of the ICC as stated in Article 77.

⁹⁶ This is in line with the practice of common law countries. See for example, section 22 of the International Crimes and International Criminal Court Act 2000 (New Zealand).

⁹⁷ The Extradition Act 1992, Laws of Malaysia, Act 479, 30 January 1992.

⁹⁸ The Courts of Judicature Act 1964, Laws of Malaysia, Act 91, 16 March 1964.

affect the status or immunity of the Rulers. It is true that the Rome Statute cannot bring any concrete material benefits to Malaysia, like a treaty of commerce and trade or a free trade agreement (FTA) that will help improve economy of Malaysia. Nevertheless, the Rome Statute is a kind of treaty that goes beyond economic or other interests of a State and strives for achieving the higher value of protecting humanity, by ending impunity and prosecute and punish perpetrators of atrocity crimes that shock the conscience of the entire humankind.

The second finding is that after taking lessons from the disappointing story of Malaysia and the Rome Statute in the past, precautionary measures should be in place before embarking on accession to the Rome Statute. First, the government of the day should promote the noble aims and core values of the Rome Statute to all Malaysian, including students and people from all walks of life. Secondly, the government needs to establish a Law Commission or at least a Rome Statute Commission to do all the groundworks of preparing the national implementing legislation. Thirdly, the government should also choose the correct type of implementing legislation for Malaysia. It is recommended that Malaysia, as a dualist State, should adopt a single comprehensive enactment, covering all obligations under the Rome Statute and consequential amendments to local laws.

Finally, the draft of the proposed International Criminal Court Bill, comprising of six Parts and three Schedules, has been produced. The draft was prepared by taking ideas from the implementing legislation of common law counterparts, such as Australia, New Zealand, the United Kingdom, Ireland, Samoa, and South Africa. However, there may be shortcomings in the draft as it is not the result of the collective endeavor of a sophisticated research team. It is hoped that in the future when the time is ripe, the government-appointed Law Commission should develop a proper International Criminal Court Bill. In this way, Malaysia could play a crucial role in creating a world that is free from atrocity crimes and injustice, and value humanity and equality before the law without any distinction.

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