

‘AU-ICC-Malawi’ conflict: An analysis of Malawi’s position and its implications

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Introduction

African Union (AU), International Criminal Court (ICC) and the Republic of Malawi (henceforth Malawi), have recently been involved in a conflict with respect to the application of ICC’s Warrants of Arrest of President Omar Hassan Ahmed Al Bashir of Sudan. The first warrant was offered on 4th March 2009 for crimes against humanity and war crimes, and the second in July 2010 for genocide (as indicated by the ICC’s Pre-Trial Chamber I). The crimes were committed against the people of Darfur in Sudan (see Schabas 2007:47ff.). These crimes have led to devastating consequences since 2003. In fact, 2.7 million people are reported to have fled their homes since the conflict began in 2003, and 300,000 have lost their lives according to the United Nations (BBC News, 4 May 2012). The Sudanese government sees this figure of the dead as exaggerated, and it estimated the dead to be 12,000.

Although the figures above are apparently enough to involve all the countries in arresting President Al Bashir, a number of countries including Malawi, Chad and Kenya have decided to go against this warrant of arrest. Interestingly they have allowed him to enter their territories and leave without any difficulty. Other African countries such as South Africa, Zambia, etc, have vowed to implement the warrant of arrest. The Republic of Malawi after changing its leadership due to the sudden death of President Bingu wa Mutharika, in April 2012, decided to revise its position by clearly indicating that it will comply with the ICC’s Warrants of Arrest. The above decisions indicate a divided Africa that does not have one position over the arrest of President Al Bashir. It is also an indication of a revolution of foundational principles of the Malawi government.

The focus of this paper is not offering an overall analysis of the decisions of various African countries, but it concentrates on the contradictory positions taken by Malawi under the leadership of President Bingu wa Mutharika in 2011 and President Joyce Banda in 2012. These positions have much to say about the

current status of this country, and its possible direction in future. In line with this objective, the paper is divided into three main sections: 'AU-ICC-Malawi conflict', presents the conflict following the Warrants of Arrest offered by the ICC. This is a foundation on which the AU-ICC-Malawi conflict will be discussed. 'Malawi's positions', discusses Malawi's two responses to the Warrant of Arrest and the backing arguments. 'Principles in Malawi's positions', develops two philosophical positions indicative of the political orientation of Malawi. These are deduced from the two-fold responses of Malawi indicated earlier. It further examines their consequences on the postcolonial socio-economic and political status of this country.

AU-ICC-Malawi conflict

The AU-ICC-Malawi conflict regards the application of the Warrant of Arrest issued by the ICC on the President of the Republic of Sudan, Omar Al Bashir. Below, there is first a discussion of the ICC's Warrants of Arrest relative to Darfur. Secondly, the paper considers the content of Al Bashir's Warrants of Arrest and, thirdly, it discusses some articles that oblige the member states to the Rome Statute¹ to comply with ICC's demands.

The ICC and Darfur Warrants of Arrest

The ICC has had a great interest in dealing with the situation in Darfur (indicated above) following the intervention of the United Nations Security Council (UNSC), which reported about the situation in Darfur on 31st March 2005. In UNSC resolution 1593,² countries and organisations were urged to cooperate with the ICC in dealing with this situation. Given that it was indicated earlier that the difficulties faced in Darfur started in 2003, it means that the UNSC waited for two years before this fundamental resolution (Schabas 2007:49 ff.). As is well-known, this decision followed the international outcry against the atrocities committed in Darfur. It is based on this indication that the ICC started issuing warrants of arrest to some Sudanese leaders involved in the Darfur situation. One of the first Warrants of Arrest was issued by the Pre-Trial Chamber 1 on 27th May 2007 against the Humanitarian Affairs Minister of Sudan, Ahmad Mohammad Harun, and Ali Mohammad Ali Abd-Al-Rahman (Ali Kushayb).³ They were both suspected of war crimes and crimes against humanity. Harun is allegedly accused of 42 counts⁴ due to his individual responsibility as indicated by articles 25(3)(b) and 25(3)(d) of the Rome Statute⁵, and Al Rahman has 50 counts⁶ based on articles 25(3)(a) and 25(3)(d)

of the same Statute. Harun has twenty counts under crimes against humanity, while Rahman has 22 counts. The former has 22 counts of war crimes, while the later has 28 counts. While the above subjects are still indicated to be at large by the ICC, there are some members who are under arrest by the ICC. The first is Bahar Idriss Abu Garda, the Chairman and General Coordinator of Military Operations of the United Resistance Front, whose first appearance was on 18th May 2009. The second is Abdallah Banda Abakaer Nourain, Commander-in-Chief of Justice and Equality Movement Collective-Leadership, one of the components of the United Resistance Front, who first appeared in court on 17 June 2010. Similarly, Saleh Mohammed Jerbo Jamus, former Chief of Staff of SLA-Unity currently integrated into Justice and Equality Movement. The fourth is Abdel Raheem Muhammad Hussein, who is the current Minister of National Defence and former Minister of the Interior, and a former Sudanese President's Special Representative in Darfur. His warrant was issued on 1st March 2012. The purpose of this work is not to discuss further these personalities and their warrants of arrests, but Al Bashir's Warrants of Arrest which have drawn Malawi into the conundrum.

The most controversial of the warrants of arrests were issued against Omar Hassan Ahmed Al Bashir, the President of the Republic of Sudan (Mendes 2010:38-40, 86 ff.). As briefly indicated earlier, the first was issued on 4th March 2009 and the second on 12 July 2010. The requests of co-operation to all State Parties to the Rome Statute were forwarded on 6th March 2009 and 21st July 2010, respectively. The requests claimed that Al Bashir committed crimes against humanity in Darfur, Sudan. Generally, a warrant of arrest does not have exceptions; it is issued equally to any person who has committed crimes against humanity with an aim of prosecuting the targeted subject. Its main objective according to the Preamble of the Rome Statute is to make sure that Al Bashir, if found guilty, must be punished as a perpetrator of crimes against humanity. The issuing of the warrants of arrest implies that the government of Sudan failed to try him in view of his being the Head of State. Below is a further consideration of the content of the two ICC Warrants of Arrest.

Content of Al Bashir's warrant of arrest

In the official website of the ICC,⁷ the warrant of arrest is expressed in the following text: 'Mr Al Bashir is allegedly criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator...'. These ten counts include:

(a) The five counts that refer to crimes against humanity. He is held responsible for murder, extermination, forcible transfer, torture and rape. All these are part of Article 7(1) of the Rome Statute.

(b) The second set of accusations fall under the war crimes expressed in Article 8(2) of the same Statute. This implies that he intentionally directed his soldiers and other followers to attack the innocent people who were not concerned with the hostilities in his country. This further implies that he is accused of pillaging those citizens who according to him were against his rule.

(c) The third accusation regards genocide, which according to Article 6(a, b, and c) regards genocide killing of human subjects, genocide inflicting of serious bodily and mental harm and deliberately putting conditions on human beings that led to physical destruction of the inflicted subjects.

Warrant of arrest, binding on the signatories of the ICC

Part 9, of the Rome Statute, 'international co-operation and judicial assistance', calls for cooperation among the member states and other organizations. This implies that all signatories to the Rome Statute are expected to co-operate. The general obligation of co-operation to these states is indicated in article 86 of the statute. Building on article 87, ICC sent requests to State Parties to arrest and surrender President Al Bashir, following the above warrants. The first communiqué was on 6th March. The ICC's registry sent this request after being mandated by the Pre-Trial Chamber. A second request was forwarded to the interested parties on 26th July 2009. Based on this warrant, all the countries, more especially those that are signatories to the Rome Statute, were expected to collaborate in compliance with the articles of ICC, such as, articles 89 and 91. In principle, the demands of the ICC were quite clear to the States Parties, but the application of the warrants of arrest led to difficulties among some of the African countries due to other principles of the African Union and the rules of their countries to which they belong. Further difficulties came due to the fact that it is not an easy task to arrest a sitting Head of State due to the fear of conflicting with the government of Sudan. This feared conflict is seen in the decisions of countries like Kenya, Chad, Malawi, and others. Below are the responses of Malawi to the request of the ICC.

Malawi's positions

Malawi was given two opportunities to show its royalty to the ICC through the implementation of the Warrant of Arrest noted earlier. This happened in October

2011 and in July 2012. The first subsection below, ‘Response (1): Against ICC’s Warrant of Arrest’, presents Malawi’s defiance and its supporting arguments in the implementation of this warrant. The second subsection, ‘Response (2): ‘Pro ICC’s Warrant of Arrest’, presents Malawi’s compliance with the demands set by the Warrants of Arrest, including its backing arguments. The third subsection 2.3, ‘The Clash of Principles’, will indicate some conflicting principles relative to the interested parties.

Response (1): against ICC’s warrant of arrest

In President Bingu wa Mutharika’s epoch on 14th October 2011, Malawi offered a categorical no to the ICC’s Warrants of Arrest by deciding to allow President Omar Al Bashir to attend the Common Market for Eastern and Southern Africa (COMESA) meeting which was held in Lilongwe from 14th to 15th October 2011. This decision was a firm defiance of the ICC’s Statute. It was, further, a move against the UNSC which urged countries to collaborate in Resolution 1593 (2005). Was Malawi justified in its decision to go against the ICC’s Warrants of Arrest? The AU and Malawi felt that this position was justifiable while ICC felt that it was not.

The arguments in favour of Malawi’s decision as forwarded by both the Republic of Malawi and AU can be summarised by the following argument:⁸

- (a) ‘Al Bashir is a sitting Head of State’.
- (b) ‘Any subject satisfying (a) has immunities and privileges, including the freedom of arrest and persecution within the territories of Malawi’
- (c) Therefore Malawi cannot arrest Al Bashir given (a) and (b).

What is the justification of this thinking? Firstly, Malawi argued that the (i) International law and (ii) the Immunities and Privileges Act of Malawi, support granting Al Bashir immunity, based on his privilege as a sitting Head of State.

- (i) The issue regarding the International law is presented by the Pre-Trial Chamber 1 (No.: ICC-02/05-01/09; 12 December 2011) as contained in the Rome Statute (98(1)) as follows⁹:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or

property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.

The Statute suggests that it requires the involvement of Sudan to co-operate before Malawi applies the directives given by the ICC. The situation becomes difficult based on the grounds that Sudan is not a signatory to the ICC's Rome Statute, therefore the issue of co-operation is out of question. This argument would have been very strong in favour of Malawi's position, because there is further evidence with reference to the pronouncement of the International Court of Justice (ICJ) regarding the arrest warrant case of Democratic Republic of Congo V. Belgium as quoted by the African Union:

The ICJ stated that "it has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."

Contrary to this position of the ICJ, AU and Malawi as supported by the International Law, the ICC clearly indicates that it does not give immunity to those who have committed crimes against humanity, whether they are Heads of States or not. The explanation of ICJ position is that the immunity referred to concerns only national jurisdiction and not International courts.

- (ii) The issue of Immunities and Privileges Act of Malawi justifies the position above, given that the president is supposed to respect the rule of law in his country if he is to continue existing.

Both arguments were refuted by the ICC. The argument based on Malawi's act is denied with the help of International Law article 23 of the Vienna Convention of the law of treatise held on 23rd May 1969. This denies the use of internal law as a justification of a country's failure to perform a treaty. ICC further argued with examples that the international law does not give any immunity to a head of state who has committed crimes

against humanity in view of his position (ICC, No. 02/05-01/09, 12 December 2011).¹⁰ ICC went ahead in applying article 87(7) and related articles as punishment to Malawi for willingly defying its indication and failing to keep its obligations (Articles 86, 87(7)¹¹, 89, 109(2) and 109(3)). This move was justified further by the fact that Malawi did not want to apply article 97 of the Rome Statute, which provided a chance for consulting with the ICC in case there was a problem in the application of its directives. It further indicated that Malawi did not respect the sole authority of the court with respect to article 119(1) of the Statute.

Response (2): pro-ICC's warrant of arrest

In the epoch of President Joyce Banda, President Al Bashir was expected back to Malawi in July 2012 for the heads of state summit of the AU. Contrary to his predecessor's decision, she decided to offer a positive response to ICC's warrant of arrest by indicating that Al Bashir will be arrested if he lands on the soil of Malawi. This decision was arrived at after Malawi's failed attempts to convince the AU to allow only a representative of Sudan to attend the meeting and not the president. AU responded by giving Malawi an out-out situation. It was either supposed to accept his arrival in Malawi hence ignore ICC's demands or the meeting was expected to be shifted to Ethiopia, which is the headquarters of the Union. Malawi's argument was that the nation was afraid of the economic implications that the decision to accept him was going to cause. The country was already in serious economic difficulties which were inherited from the previous government of President Bingu wa Mutharika.

Malawi's responses as a consequence of a clash of principles

In both responses, it is clear that Malawi was implicated in a conflict of principles. The first clash of principles is clearly seen with respect to the Immunities and Privileges Act of the Republic of Malawi (Chilenga, 2011: 26) which is contrary to the arrest of a Head of State on Malawian soil and the ICC's obligations to comply with the court as indicated by articles, 86, 87, 88, 89. The articles became binding on Malawi since 1st December 2002 when it became part of the court under the leadership of President Bakili Muluzi. Failing to comply with the request, the court has the authority to open a disciplinary finding of non-co-operation and refer the country to the UN Security Council for further

action as indicated by 87(7) and 91 of the Rome Statute. Malawi's dilemma here is whether it must follow its national obligations as set by the Immunities and Privileges Act or to follow the ICC co-operation-obligation as a member state. A similar principle that forbids co-operation of African countries to apply the demands of the ICC with respect to the arrest of Al Bashir was set by the AU. The main reason of this decision is due to the article 98 of the Rome Statute.¹² In its 13th Ordinary Session of the Assembly of Heads of State and Government it indicated clearly that, 'in view of the fact that the request by the African Union has never been acted upon (by UN Security Council), the AU Member States shall not co-operate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of the Sudan'. Aggravating the conflict is Malawi's obligations to the principles set by the AU. In fact, African Union demands its member states 'to comply with the decisions and policies of the Union' as indicated by Article 23(2) of the Constitutive Act. In this line of thought, it is expected of all the African countries who are members to comply. Malawi is obliged by the provisions of Rule 33 of the Assembly to comply. A further dilemma for Malawi here consists in whether it must fulfil its obligations to the ICC or the African Union. Regardless of the decisions above and their motivation, the question still remains: Is Malawi supposed to follow its principles, or ICC's or AU's demands? If the answer is in favour of Malawi, then ICC and AU must modify their principles with respect to the issue of immunities of the sitting Heads of States. If the answer is not in favour of Malawi, then Malawi must modify its laws with reference to immunities.

Principles from Malawi's positions

I argue that the AU-ICC-Malawi conflict above is indicative of the principles that were motivating President Bingu wa Mutharika and later President Joyce Banda in her current position towards Al Bashir. In line with this argument, the first section below, argues that the decision not to arrest him is highly motivated by Malawi's orientation towards Pan-African principles. The term 'Pan-Africanism' is utilised to stand for a movement that promotes the aspect of solidarity among all blacks in world. In Africa this movement developed more as a movement that was fighting for the liberation of the blacks from the colonial rule (see also Murithi 2005:7-38). The second section indicates that Malawi's directive to arrest him, is guided by Utilitarian principles. The term 'Utilitarianism' is an ethical theory which underlines the understanding of

human actions and choices based on their capacity for achieving various goals in the society (usefulness). The third section suggests some implications of Pan-Africanism and Utilitarianism on Malawi.

Pan-African Principles-Malawi

It can be deduced from Bingu wa Mutharika's decision that Malawi during his rule was run based on Pan-African philosophical principles. The principles are explicative of the negative response to ICC in spite of the obligations following its being a signatory to the ICC Rome Statute.

Firstly, the core principle that president Bingu wa Mutharika embraced is the world-wide *Unity and Solidarity* of the Africans. The term 'African' for him was applied to all citizens of African origin regardless of their colour or appearance. It may be argued that Malawi was acting in favour of the unity and solidarity towards Sudan as one of the countries in Africa. The ICC's request is seen as challenging this solidarity. Malawi is, therefore, caught in a dilemma whether to sacrifice its solidarity by betraying a fellow African leader or to ignore ICC's demand.

The second Pan-African principle is clearly deducible from the justification of Malawi's action based on the Immunities and Privileges Act of Malawi. I argue that this was invoking Pan-African principle of the *sovereignty of an African State*.¹³ A sovereign state requires *self-reliance* in dealing with most of the issues that arise within its territories. Consequently, this suggests that Malawi as a sovereign African state has authority to decide what is right for the country based on its internal law. Although it was not explicitly said by the president, it may be argued that the ICC, although it is an international body, is generally founded on the Western world principles. This increases suspicion that the ICC is intervening too much in the African affairs, violating the fact that African countries are sovereign states.

The third principle is ridding the African continent of the remaining vestiges of colonization and apartheid.¹⁴ The African States vowed during the development of the Organisation of the African Union (the predecessor of the AU) that they will support each other so that all members may be liberated from colonial rule. The trial of a sitting African Head of State in this context would imply a new form of colonialism, whereby the African leaders are still being subjected to the Western-based organisations. A Pan-African adherer may further look with suspicion at the fact that important countries like United States¹⁵ and

Israel decided to withdraw their being States Parties of the ICC's Rome Statute. The question is, If ICC is important, why did USA decide to withdraw? This withdrawal leads to questioning the universality of the ICC's jurisdiction.

The principles above were originally embraced by the Organisation of African Union, which was founded on Pan-Africanism. The current African Union which replaced it maintained some of the principles, but there are still nostalgic tendencies to continue with most of the principles of the old organisation. A Pan-Africanist shows sympathy towards the AU and is ready to follow its directives. The Republic of Malawi had no choice during the last part of office of President Bingu wa Mutharika who was once a Chair of the AU and a strong Pan-Africanist.

Utilitarian principles-Malawi

The response of President Joyce Banda above may be considered as based on the utilitarian principles. The basic principle guiding her may be formulated as follows:

Malawi's action is good if it maximises a pleasurable outcome and diminishes pain.¹⁶

Malawi's pain here consists in the economic crisis which followed the death of President Bingu wa Mutharika. President Joyce Banda's administration captures the pain of Malawi in the following words:

The new administration inherited a very difficult economic situation, marked by a severe shortage of foreign exchange which led to shortages of critical imports including fuel, inputs for production and medicines. Delays in making payments abroad led to the loss of credit lines for several businesses, resulting in scaled down operations and the laying off of workers. Malawi's long standing foreign exchange problems intensified in 2011 because of lower tobacco export earnings and the interruption of the ECF-supported program with the IMF which led several donors to cut their general budget support grants to Malawi (IMF, 2012, 3).

Following this situation, any good action or decision must lead to the improvement of Malawi's economic situation. The interest is, therefore, not necessarily doing what was morally right in the conflict above, but acting in such a way that Malawi's interest is met. In this context the action or decision

is meant at pleasing international donors. The fact is that, by pleasing the ICC, which is an international organisation, Malawi has a wider chance of bringing back donors at a larger scale. AU was therefore left aside by Malawi, given that most of the donors are from the Western world. It may be argued that if most of the donors were coming from the AU, Malawi was ready to support AU's directive not to co-operate with the Warrants of Arrest of Al Bashir.

Utilitarianism is not only practiced by President Joyce Banda, it was primarily present in President Hastings Kamuzu Banda who underlined the fact that decision-making with respect to international relations must be based on what is right for Malawians. This form of Utilitarianism is different from Joyce Banda's in the sense that Kamuzu underlined the aspect of pleasing Malawians (Short, P. 1974: 175), while the latter underlines the aspect of what is pleasing to the donors. Her form of Utilitarianism wants to avoid any possible conflict with donors, while the one of Kamuzu has a fair chance of not pleasing donors, that is, if the demands are not in line with what is best for Malawians. In this explanation, Kamuzu was a strong nationalist, not ready to compromise or sacrifice Malawi's pleasurable ends for the good of the foreign powers.

Implications of the principles

Implications of Pan-African principles:

President Bingu wa Mutharika's decisions based on Pan-African principles were problematic to ICC and other international bodies to the point that Malawi was considered negatively by such bodies.

The first implication is that it affected the donations that Malawi was receiving. It immediately led to the interruption of funds from different international organisations. For instance, the Extended Credit Fund of the IMF was interrupted in 2011. The president was, however, not ready to give in to the demands of the Western donor countries. Bingu wa Mutharika was seen as a president who does not want to listen to others, more especially to the demands of the international community. This was supported by the fact that he failed to collaborate with the ICC, and showed no interest to explain that there was a problem on whether Malawi must follow the IMF directives or not.¹⁷

There are some positive implications that may be drawn from Bingu's emphasis on Pan-African principles.

The first important aspect is that it may lead to the development of black-consciousness. This indicates the fact that being black is not a disability. Blacks must see themselves in a positive way, and acknowledge the fact that they have the potential to change Africa from poverty to prosperity (wa Mutharika 1995: 1-26).

Secondly, there is the patriotic or nationalistic spirit behind the actions of Mutharika. Africans must be proud of their identity and love their nations with the laws utilised in their countries.

Thirdly, African leaders must be courageous enough to question certain Western principles, if they feel that they are not helpful or ethical in nature. There is no way that those laws will continue to oppress Africa for the benefit of the Western world.

In spite of the above positive elements, President Bingu wa Mutharika's decision still remains problematic. The question remains, Why did Malawi choose to be a signatory of the ICC when it knew that it will not accept some of its demands?¹⁸

Implication of utilitarianism:

The first implication is that utilitarian mentality led Malawi to start acquiring most of its interests, such as, the economic needs. The country started creating a better image world-wide, which meant the coming back of donors. IMF showed its readiness to support Malawi with the Extended Credit Fund, the USA showed interest to revisit the Millennium Goals Fund and give Malawi the funds it decided to withdraw earlier. As of now, utilitarian principles seem to be working for the government of President Joyce Banda.

In spite of the apparent positive economic implications, the danger is that Utilitarianism can make Malawi sacrifice most of its ethical principles at the cost of obtaining pleasurable results from the donors. For instance, Malawi risks accepting some Western practices such as homosexuality, lesbian practices, etc, as normal for the country. The only condition for accepting them is the donors continued support to Malawi.

Although supporting the interests of donors is pleasurable for Malawi, the president risks losing popularity from Malawians who are traditionally oriented. This category of traditionalists is not ready to sacrifice some of the traditions at any cost. The other possible problem is that Malawi will lose its national and, possibly, cultural identity given that most of its decisions are based on

what the Western world says is acceptable. Finally, it may be argued that, although Utilitarianism has helped this country to start gaining popularity in the Western world, it has started losing it in the AU due to its refusal to comply with the directives of the union. It is possible that Malawi may become strong economically with the help of the Western nations, but very weak in the context of Pan-Africanism, nationalism, morality and cultural identity.

The implications above indicate that: Firstly, for Malawi to be on a safer side, it needs to opt for a system that takes into consideration various elements from Pan-Africanism and Utilitarianism. This implies that the current government is invited to take courage and be ready to sacrifice Utilitarianism in some circumstances and promote some nationalistic aspects, hence create a personality for Malawi. Secondly, the conflict above shows that Malawian politics is still conditioned by new forms of neo-colonialism that are still ruling the country in the guise of the “Donor Community”. The issue is that some of the so-called donors such as World Bank, IMF, etc, suggest some policies that Malawi has to fulfil if it wants to be helped. The country is put in a situation whereby there is no better alternative rather than accept those policies, hence allowing the foreigners to indirectly rule this country. Thirdly, it may be argued from the conflict that the postcolonial political leaders, apparently have no clear political vision that is shared by a good number of the leading politicians. Unfortunately, for almost four decades after the British colonial rule, politics in Malawi is still an activity that is meant to answer problems related to the basic needs of the citizens. Although this is important, it makes it difficult for politicians to come up with new and constructive ideas. Fourthly, Malawian politics leaves a continuous identity crisis, whether the country has to keep and follow African Union-based identity or Global Unions-based identity. In fact, for Bingu wa Mutharika the former is better and for Joyce Banda, the later seems to be a better option.

Conclusion

The paper presents the AU-ICC-MALAWI conflict and underlines that it constitutes a clash of principles due to conflicting philosophical orientations. It further indicates that the negative response of Malawi not to arrest Al Bashir was influenced by the Pan-African principles that were dear to President Bingu wa Mutharika. It deduces that President Joyce Banda is influenced by Utilitarianism whereby all actions are done by augmenting pleasurable ends

and diminishing pain or loss. Here is a Malawi that wants to diminish economic loss that was registered towards the end of Bingu wa Mutharika's regime. The paper concludes by providing the possible consequences of these philosophical positions.

Notes

1. Rome Statute, also known as the International Criminal Court Statute, is a treaty that was signed during a Conference held in Rome on 17th July, 1998. The statute became operative on 2nd July, 2002. In February 2012, the court registered that it had 121 member states (for a further survey see Lee 1999:1-40)
2. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.
3. He is thought to be the leader of the Janjaweed militia of Sudan.
4. Harun's twenty counts include the following elements of article 7 of the Rome Statute-article 7(1)(a) murder, 7(1)(h) persecution, 7(1)(d) forcible transfer of population, 7(1)(g) rape, 7(1)(k) inhumane acts, 7(1) imprisonment or severe deprivation of liberty, 7(1)(f) torture. His war crimes are indicated by article 8(2) of the Rome Statute: 8(2)(c)(1) murder, 8(2)(e)(i) attacks against the civilian population, 8(2)(e)(v) pillaging, 8(2)(e)(vi) rape, 8(2)(e)(xii) destruction of property, and 8(2)(c)(ii) outrage upon person dignity.
5. <http://untreaty.un.org/cod/icc/statute/rome fra.htm>
6. The ICC explains the counts as follows: 'Twenty-two counts of crimes against humanity: murder (article 7(1)(a)); deportation or forcible transfer of population (article 7(1)(d)); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (article 7(1)(e)); torture (article 7(1)(f)); persecution (article 7(1)(h)); and inhumane acts of inflicting serious bodily injury and suffering (article 7(1)(k)). Twenty-eight counts of war crimes: violence to life and person (article 8(2)(c)(i)); outrage upon personal dignity in particular humiliating and degrading treatment (article 8(2)(c)(ii)); intentionally directing an attack against a civilian population (article 8(2)(e)(i)); pillaging (article 8(2)(e)(v)); rape (article 8(2)(e)(vi)); and destroying or seizing the property (article 8(2)(e)(xii))'.

7. For further information see, <http://www.icc-cpi.int/Menu/ICC>.
8. For a further survey see the report of African Union of 9th January 2012 titled: “On the decisions of Pre-Trial Chamber 1 of the ICC pursuant to article 87(7) of the Rome statute on the alleged failure by the Republic of Chad and Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the republic of the SUDAN,” <http://www.African-Union.org>.
9. For a further survey, see, <http://www.icc-cpi.int/iccdocs/doc/doc1248398.pdf>.
10. For a further survey on immunities see also Fox, H. (2008), Evans, M. D., (2006), Roberts, I. (2009), and Chilenga, M. (2011).
11. See, <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf>.
12. The ICC indicates the following meetings of the AU as responsible for the declaration of non-cooperation to its warrant of arrest: African Union, Assembly, “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)”, 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1 (“3 July 2009 AU Decision”), para. 10; African Union, Assembly, “Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)”, 27 July 2010, Assembly/AU/Dec.296(XV), paras. 5-6; African Union, Assembly, “Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)”, 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; African Union, Assembly, “Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)”, 30 June-1 July 2011, Assembly/AU/Dec.366(XVII) (“30 June-1 July 2011 AU Decision”), para 5.
13. This principle lies under the second principle of the African Union which takes as one of its objectives: To defend the sovereignty, territorial integrity and independence of its Member States as is indicated on its official site (<http://www.au.int/en/about/nutshell>, retrieved on 30th October, 2012).
14. This was one of the main objectives of the African Union.

15. The United States of America decided to withdraw under the leadership of President Bush junior. Speculation has it that he was a man who fought wars with Iraq, Afghanistan, and other countries and was afraid of being questioned by the court.
16. The utilitarian principle similar to this was developed by Jeremy Bentham who is regarded as the father of utilitarianism. It was also elaborated by John S. Mill.
17. Note that there are other human rights-related problems that Mutharika was accused of. They all contributed towards the suspension of funds by the donors.
18. Note that Malawi joined ICC under the leadership of President Bakili Muluzi and not Present Mutharika.

References

- Chilenga, M. 2011. *Civil Procedure in Malawi*. The Netherlands: Kluwer Law International.
- Evans, M. D. 2006. *International Law*. New York: Oxford University Press.
- Fox, H. 2008. *Law of State Immunity*. New York: Oxford University Press.
- International Monetary Fund. 2012. *Malawi: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding*, Washington, USA.
- Lee Roy, S. 1999. *The International Criminal Court: The Making of the Rome Statute*. Hague: Kluwer.
- Mendes, E. 2010. *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Edward Elgar, Cheltenham Glos.
- Murithi, T. 2005. *The African Union: Pan-Africanism, Peace Building and Development*. Hampshire: Ashgate.
- Murungu, C. and Japhet, G. 2011. *Prosecuting International Crimes in Africa*: Pretoria: Pretoria University Law Press.
- Mutharika, B. 1995. *One Africa, One Destiny: Towards Democracy, Good Governance and Development*: Harare: SAPES.

Mutharika, B. 2010. *The African Dream: From Poverty to Prosperity*. Urbana: University of Illinois.

Roberts, I. 2009. *Stow's Diplomatic Practices*. New York: Oxford University Press.

Schabas, W. 2007. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press

Short, P. 1974. *Banda*. London: Routledge and Kegan Paul Ltd.

Internet Sources

<http://untreaty.un.org/cod/icc/statute/romefra.htm>, retrieved on 15th October, 2012.

<http://www.African-Union.org>

<http://www.bbc.co.uk/news/world-africa-17963368>, retrieved on 15th October, 2012.

http://www.icc-cpi.int/EN_Menu, retrieved on 15th October, 2012.

<http://www.icc-cpi.int/iccdocs/doc/doc1248398.pdf>, retrieved on 15th October, 2012.

<http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf>, retrieved on 15th October, 2012.

<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>, retrieved on 15th October, 2012.

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