# UNIVERSITY OF NAIROBI

# SCHOOL OF LAW

**THE IMPACT OF A STATE'S SOVEREIGN RIGHT TO WITHDRAW FROM THE ROME STATUTE ON INTERNATIONAL CRIMINAL JUSTICE: A CASE OF KENYA**

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE MASTERS OF LAW (LL.M) COURSE**

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## DECLARATION

I **STEPHEN KALONZO MUSYOKA** do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

**SIGNED: …….**

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**DATED……**

This thesis has been submitted for examination with my approval as University of Nairobi supervisor.

**SIGNED: …….**

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**DATED……**

## DEDICATION

I dedicate this Research to all Kenyans and all men and women who subscribe to the rule of law and are able to stand up against impunity in all its forms. I also dedicate this study to all the victims of the post-election violence in Kenya following the 2007 general elections.

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## ABBREVIATIONS

**ACHR**- American Convention on Human Rights

**ANC**- Africa National Congress

**AU**- African Union

**CIPEV**- Commission of Inquiry into Post-Election Violence

**DPP**- Director of Public Prosecutions

**FAO**- Food and Agriculture Organization

**GoK**- Government of Kenya

**HRC**- Human Rights Committee

**ICA**- International Crimes Act

**ICC**- International Criminal Court

**ICD**- International Crimes Division

**ICTR**- International Criminal Tribunal for the former Rwanda

**ICTY**- International Criminal Tribunal for the former Yugoslavia

**ILC**-International Law Commission

**ILO**- International Labor Organization

**IMT**- International Military Tribunal

**JSC**- Judicial Service Commission

**NGOs**- Non-Governmental Organizations

**ODM**- Orange Democratic Movement

**OTP**- Office of the Prosecution

**PNU**- Party of National Unity

**PTC**- Pre-Trial Chamber

**SWAPO**- South West Africa People's Organization

**UK**- United Kingdom

**UN GA**- United Nations General Assembly

**UN SC**- UN Security Council

**UN**- United Nations

**USA**- United States of America

**USSR**- Union of Soviet Socialist Republics

**VCLT**- Vienna Convention on the Law of Treaties

## ABSTRACT

This study will analyze the legal, substantive and procedural framework on withdrawal from the Rome Statute. This analysis will build the already existing jurisprudence on the Rome Statute by explaining the steps that any withdrawing state from the Rome Statute must follow to successfully withdraw. After appreciating the process of withdrawal from the Rome Statute, this study will conceptualize the legal and diplomatic implications of any such withdrawal. The study will use Kenya as a case study by evaluating the legal and diplomatic implications on her if she successfully withdraws from the Rome Statute.

The general observation seen from this study is that any state party to the Rome Statute has a right to withdraw and thus cut ties with the ICC if it adheres strictly to article 127 of the Statute. However, this study finds out that despite this right, withdrawal is more detrimental to the interests of any withdrawing state even though the withdrawing state may have legitimate reason for its withdrawal. In this respect, this study recommends that if a state is aggrieved by the workings of the ICC, rather than leave the Statute in protest, it should build a consensus with other state parties and seek a way of rectifying the shortcomings of the court. Therefore, the study encourages cooperation with the ICC and with other state parties.

# CHAPTER 1: INTRODUCTION

## 1.1 BACKGROUND TO THE PROBLEM

The Rome Statute of the International Criminal Court (often referred to as the "International Criminal Court Statute" or the "Rome Statute") is the Treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17th July 1998 and was entered into force on 1st July 2002.[1] As of 2015, 123 countries were states parties to the Rome Statute.[2][3] Among other things, the Statute sets out the functions, jurisdiction and structure of the ICC. The Statute further provides for the prosecution of four core international crimes: genocide, crimes against humanity, war crimes and the crimes of aggression.[4] These crimes as provided for are not subject to any statute of limitations.[5] This means that any statute prescribing a period for which criminal legal actions may be brought against perpetrators of criminal acts would not apply with respect to the four core crimes.[6]

Under the Statute, the ICC is empowered to investigate and prosecute the four core international crimes in situations where states are unable or unwilling to do so themselves.[7] Jurisdiction of the ICC is exercised on the basis that these crimes are committed in the territory of a state party or if

[1] Michael P. Scharf, '*Results of the Rome Conference for an International Criminal Court. The American Society of International Law*', (August 1998).
[2]Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States and 25 are from Western European and other States.
[3]https://www.icc-cpi.int/en_menus/asp/statesparties/Pages/theromestatute.aspx
[4] Rome Statue, Article 5
[5] Ibid, Article 29 on Non-applicability of Statutes of Limitations.
[6] See for a discussion of this Ruth AlberdinaKok, "Statutory Limitations in International Criminal Law," University of Amsterdam (2007).
[7]Preambular paragraph 10 of the Rome Statute as well as Articles 1, 17 and 18 lay down the principle that the ICC is complementary to national criminal courts.

a national of a state party commits them.[8]An exception to this rule is that the ICC may exercise jurisdiction over these crimes if it is so authorized by the United Nations Security Council.[9]

The core crimes as set out under Article 5 of the Rome Statute are considered to be the heinous of crimes that demand the attention of an independent criminal court. The idea of an independent international criminal court was discussed under the London Charter of 1945[10] whereby it was admitted that the Nuremberg principles reflected a universal jurisdiction of international criminal law. The nexus between the Nuremberg principles and the Rome Statute of 1998 is that the core crimes are deemed to be of a universal character and beyond the sovereignty of the state. Under the London Charter it must be noted, however, that the idea of an international criminal court to deal with these crimes was intended to be absolute. This means that it was devoid of the sovereignty of the state and of the immunity of heads of state and government.[11]

Kenya has domesticated the Rome Statute by enacting the International Crimes Act (ICA), which came into force on 1 January 2009.[12] The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity[13], as it gives Kenyan courts jurisdiction to prosecute these crimes.[14] Further the Rome Statute applies in Kenya by virtue of Article 2 (5) in that the Statute provides for the prosecution of international

[8] Rome Statute, article 12 (2)
[9] Ibid, article 13 (b)
[10] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: http://www.refworld.org/docid/3ae6b39614.html [accessed 11 November 2016]
[11] Ibid
[12] Act No. 16 of 2008, section 1, available at https://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf accessed on 13th February 2016.
[13] See Rome Statute, Article 57 and 53. .
[14]Thomas Obel Hansen, "Prosecuting International Crimes in Kenyan Courts?" Paper presented at The Nuremberg Principles 70 Years Later: Contemporary Challenges, November 21, 2016, at 1.

crimes that have risen to the level of *jus cogens*[15] and thus constitute *obligation erga omnes*[16], *which* are inderogable.[17] It also applies by virtue of Article 2 (6) of the Constitution since Kenya has ratified it and additionally domesticated it in line with the requirements of the Treaty Making and Ratification Act.[18]

The December 2007 presidential election triggered serious political and civil strife in Kenya. Kenya witnessed a wave of violence (often referred to as 2007-2008 post-election violence) and serious human rights violations. Violence was mainly carried out along ethnic lines and led to many deaths, injuries and displacements to many persons. The types of violence witnessed included but were not limited to: uprisings of mobs protesting the flaws in the presidential elections; organized violence by militia in the Rift Valley that was aimed at perceived political opponents and retributive, largely organized counter-violence especially in Nakuru, Naivasha areas of the Rift Valley, and Nairobi; disproportionate and excessive use of force by the police against unarmed protesters mainly in opposition strongholds including Kisumu, Kakamega,

[15]A mandatory or peremptory (Imperative; final; absolute; conclusive; incontrovertible; not requiring any shown; arbitrary) norms of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. See for this definition Black's Law Dictionary, (18th ed., 2004), at 876 and 1172.

[16]In an *obiter dictum* in its 1970 judgment in the *Case Concerning the Barcelona Traction, Light and Power Ltd (Belgium v Spain)* 1970 ICJ Rep. 3, 32 (Feb 5) ("Barcelona Traction case"), the International Court of Justice identified a category of international obligations called *erga omnes*, namely obligations owed by states to the international community as a whole, intended to protect and promote the basic values and common interests of all. The ICJ at paragraph 33 and 34 in the Barcelona Traction case stated: *"An essential distinction should bedrawn between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations ergaomnes. Such obligations derive….from the outlawing of acts of aggression and of genocide as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law……; others are conferred by international instruments of a universal or quasi-universal character."*

[17]See generally, M. Cherif Bassiouni, *"International Crimes: Jus Cogens and Obligatio Erga Omnes,"* Law and Contemporary Problems, Vol. 59: No. 4. 1997; Rafael Nieto-Navia, "*International Peremptory Norms (Jus Cogens) and International Humanitarian Law,"* in Man's inhumanity to man/ed. by Lal Chand Vohrah... [et al ] pp. 595-640 (2003).

[18]No. 45 of 2012, Laws of Kenya.

Migori, and the low income settlements of Nairobi.[19] Policing was uneven in its implementation: in some strong opposition areas, the police were shooting to kill, while when confronted with some militia, they opted to negotiate with the groups.[20] However, in the Eldoret area, the police were bystanders as perceived opponents of the opposition were killed and their houses burnt.[21]Local militia in pro-government areas, on receiving internally displaced persons (IDPs) from the Rift Valley, mobilized in sympathy and turned on perceived opposition supporters, killing them, and burning their houses.[22]

As part of the political negotiations that brought the post-election crisis of 2007–08 to an end, The Kenya National Dialogue and Reconciliation Committee and all other stakeholders in the talks agreed to establish several commissions of inquiry. This included a Commission of Inquiry into Post-Election Violence (CIPEV) answerable to the African Union (AU) Panel of Eminent African Personalities. After drawing on existing documentation such as the Kenya National Human Rights Commission's Report on the Post-Election Violence[23] and conducting its own investigations, CIPEV concluded;

> "*While the post-election violence, was spontaneous in some geographic areas and a result of planning and organization in other areas, what started as a spontaneous violent*

[19]Kenya and the International Criminal Court: Questions and Answers International Federation of Human Rights & Kenya Human Rights Commission, available at https://www.fidh.org/IMG/pdf/Q_A_Kenya-ICC.pdf accessed on 15th February 2016.
[20] ibid
[21] ibid
[22]Ibid
[23]On the Brink of The Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence. Kenya National Human Rights Commission. August 2008.

*reaction to the perceived rigging of elections later evolved into well organized and coordinated attacks."*[24]

The Commission also found that Kenya's state security agencies had 'failed institutionally to anticipate, prepare for, and contain the violence and were themselves guilty of acts of violence and gross human rights violations.'[25]

CIPEV recommended that a special tribunal should be established with 'the mandate to prosecute crimes committed in order to overcome the circle of impunity, which it deemed to be at the heart of the post-election violence.'[26] Moreover, conscious of how successive governments in Kenya had failed to implement recommendations of commissions of inquiry in the past[27], the CIPEV's report included a safety clause stipulating that 'in default of setting up the Tribunal, consideration will be given by the AU Panel of Eminent African Personalities of forwarding the names of alleged perpetrators to the special prosecutor of the ICC.'[28] Following a number of attempts to establish a special tribunal through the Kenyan parliament, and the emergence of the popular political slogan, 'don't be vague, let's go to the Hague', the names of those alleged to be most responsible for the post-election violence were passed to the prosecutor of the ICC in July 2009.

On 26th November 2009, after analyzing the information handed over by CIPEV, the Office of the ICC Prosecutor used its powers to initiate an investigation on its own initiative (*proprio*

[24]Report of the Commission of Inquiry into Post-Election Violence, Republic of Kenya, 2008, at viii, available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf accessed on 15th February 2016.
[25]Ibid, at vii.
[26]Ibid, at ix.
[27]A Study of Commissions of Inquiries in Kenya, Africa Centre for Open Governance, 2007;Lest We Forget: The Faces of Impunity in Kenya, Kenya Human Rights Commission, 2011.
[28]Report of the Commission of Inquiry into Post-Election Violence (n 20), at 473.

*motu*). This marked the first time an ICC investigation was launched without a referral from a state that is party to the Rome Statute or the United Nations (UN) Security Council. On 31st March 2010, the prosecutor's request to proceed with an investigation was authorized by a majority decision of the Pre-Trial Chamber (PTC).[29]

In December 2010 the ICC Prosecutor at that time, Luis Moreno-Ocampo, announced that he was seeking summons for six people: Uhuru Kenyatta, Henry Kosgey, William Ruto, Francis Muthaura, Joshua Arap Sang, Mohammed Hussein- all accused of crimes against humanity.[30] The six who are often colloquially referred to as the "Ocampo six" were eventually indicted by the ICC's Pre-Trial Chamber II on 8th March 2011 and summoned to appear before the Court leading thereafter to the cases against each beginning.[31]

In the duration, the government of Kenya and the National Assembly have time and again both attempted to postpone or stop the ICC process. The government appealed to both the UN Security Council and the Court itself regarding the admissibility of the case. There was also the *'shuttle diplomacy'*[32] endeavors spearheaded by the then Kenya's Vice President, Stephen Kalonzo Musyoka, geared to win support from assembly of states to apply pressure on the security council of the UN to vote in favor of Kenya's application to have the cases deferred. Had the *shuttle diplomacy'* efforts succeeded then the cases would have been temporarily

[29]Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, March 31, 2010 and Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (the "March 31, 2010 Dissenting Opinion"); Gabrielle Lynch, "The ICC Intervention in Kenya", Africa/International Law February 2013 AFP/ILP 2013/01, at 5

[30]Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,ICC-01/09,December 15, 2010 and Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Original: ICC-01/09,December 15, 2010;

[31] Ibid

[32] Shuttle diplomacy is defined by the Black's Law Dictionary, 8th edition, at 490: "Diplomatic negotiations assisted by emissaries, who travel back and forth between negotiating countries."

suspended and/or postponed for 12 months with an option for further postponement on similar durations and conditions.[33] The intention of the shuttle diplomacy was to win support from individual heads of state, which would culminate in a joint position of the African Union and other western states in support of Kenya's request for deferral of the cases.[34]

The National Assembly on their part during a Special Sitting of the House passed a motion on 5th September 2013 moved by Hon Aden Bare Duale. This motion essentially authorized the government to withdraw from the Rome Statute and was also intended to lead to the repealing of the Kenyan International Crimes Act.[35] The motion was duly passed by parliament but no formal actions were taken to bring a substantive bill to formally withdraw from the Rome Statute or in the alternative to repeal the ICA. This study will for all intents and purposes be founded on the legal implication this motion has especially with regards to the pertinent issue of Kenya's withdrawal from the Rome Statute.

While the Rome statute provides for and allows for withdrawal under Article 127 (1), the same is subject to qualifying conditions. Article 127 (2) provides that a State shall not be discharged, because of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute. There was a widespread myth that when Kenya withdraws from the ICC, the then ongoing cases would be deferred automatically and be tried within the local mechanism. Indeed, the timing of moving the motion to withdraw would suggest any withdrawal is largely a symbolic political benefit to shield any Kenyan from being subjected to the jurisdiction of the ICC, either currently or in future. This when juxtaposed with the provisions of the Rome Statute

[33] Rome Statute, Article 16: Deferral of investigations or prosecutions.

[34] http://www.standardmedia.co.ke/article/2000095435/former-vp-kalonzo-musyoka-led-cabinet-ministers-in-worldwide-push-to-bring-icc-cases-to-kenya accessed on 15th February 2016.

[35] http://info.mzalendo.com/hansard/sitting/national_assembly/2013-09-05-14-30-00 accessed on 15th February 2016.

that makes it clear that obligations related to existing investigations continue even in the event of a withdrawal creates room for debate.

This study will thus seek to analyze the legal substantive and procedural framework on withdrawal from the Rome Statute. This analysis will help build to the already existing jurisprudence on the Rome Statute provision in that it will seek to explain the steps any withdrawing state from the Rome Statute must follow to successfully withdraw. Chiefly though and after appreciating the process of withdrawal from the Rome Statute this study will seek to conceptualize the legal and diplomatic implications of any such withdrawal from the Rome Statute. To this end the study will use Kenya as a case study by evaluating legal and diplomatic implications on Kenya if she withdraws from the Rome Statute.

## 1.2 STATEMENT OF THE PROBLEM

The Rome Statute by virtue of the core crimes is an example of a universal convention that has attained the character of *jus cogens* and consequently constituting *obligatio erga omnes*. It also provides a legal framework under Article 127 on the withdrawal of a member state. Whilst it is appreciated that every treaty in force has an exit clause, an exit from the Rome Statute may have far more ramifications as far as the primary intention of the institution of the ICC is concerned. This is to, inter alia, impute culpability on the perpetrators of international crimes and to secure justice for the victims. Under international law the core crimes have attained the character of *jus cogens* and are therefore considered to be *obligatio erga omnes*.

A withdrawal from the ICC as in the case of Kenya, will not auger well with the above position. This is because from the language of the London Charter and the Rome Statute the idea of an

independent International Criminal Court was envisaged to be absolute. Hence devoid of state influence which can plausibly provide a haven for impunity. The very reason why international criminal justice is existent in the first place. This study posits that the intention of the right of withdrawal from the Rome Statute can be converted into a veil that shields the criminal perpetrators from accountability. The diplomatic prerogative of the state has aided this above problem because of the sovereign nature of a state.

In the case of Kenya, the fact remains that there is a deficit in the accountability for crimes committed during PEV of 2007. Because of frustrated compliance with the ICC and consequently lack of prosecution of the cases, the victims of the PEV are still yet to get justice. This makes it clear that the whole operation of international law within the context of *obligatio erga omnes* has been limited by the sovereign right of a state. This study is therefore of the persuasion that the prerogative of a withdrawal from the ICC due to interests that serve impunity should be considered critically considering accountability of the core crimes committed. This study further provides that the accountability of crimes concerned is not at the behest of the state but exclusively within the operations of international law.

## 1.3 JUSTIFICATION OF STUDY

The attempts by Kenyan leaders to have Kenya withdraw from the Rome Statute have elicited debate from various quarters both within Kenya and without. More so within the African continent the issue of withdrawal became a live issue. This is because many other African nations have developed a perception that the ICC is targeting Africa in its prosecutions. The Democratic Republic of Congo, Central African Republic and Mali have referred situations to

the court in the past but dissatisfaction with the Court is now prevalent on the continent.[36] Indeed considering the Kenyan cases at the ICC, Kenya appears to be leading the charge urging African states to withdraw from the ICC. Indeed, the mover of the motion to withdraw from the ICC, Mr. Duale, suggested the perceived bias of the ICC towards African countries. He also justified this motion by averring that the ICC intervention in Kenya and in other countries has always been politically motivated. To this end thus Kenya's withdrawal from the ICC will not only have consequences in Kenya but may also be a precedent used by other African states to collectively withdraw from the ICC in masses. Therefore, it is important to thoroughly analyze the legal and diplomatic implication of withdrawal from the ICC. This will then provide a yardstick for any acts of withdrawal from the Rome Statute by any other state.

## 1.4 RESEARCH OBJECTIVES

### 1.4.1 Overall Objective

The overall objective of this study is to find out the legal and diplomatic implications of a State's withdrawal from the Rome Statute using Kenya as a Case Study.

### 1.4.2 Specific Objectives

(i) To analyze the history, significance and application of the Rome Statute with regards to withdrawal;

(ii) To examine the substantive and procedural legal framework relating to a state's withdrawal from the Rome Statute;

[36] See Olive Ederu, TJ Monitor: The ICC and Africa-Impunity v Self Interest. Justice and Reconciliation Project, June 28th 2013.

(iii) To explore the diplomatic and legal implications of withdrawal by Kenya from the Rome Statute;

(iv) To come up with conclusions and recommendations on withdrawal from the Rome Statute.

## 1.5 RESEARCH QUESTIONS

(i) What is the significance of the Rome Statute?

(ii) What is the substantive and procedural legal framework on withdrawal from the Rome Statute?

(iii) What are the diplomatic and legal implications of Kenya's withdrawal from the Rome Statute?

(iv) Will the ICC have jurisdiction with regards to matters concerning Kenya after she has effectively withdrawn from the Statute?

## 1.6 HYPOTHESIS

This study will proceed from the following hypothesis:

(a) There is limited legal framework which provides for the effective withdrawal by states from the Rome Statute

(b) That any withdrawal by a state has both legal and diplomatic implications.

## 1.7 THEORETICAL FRAMEWORK

This study will, however, be guided by the Consent Theory and the Natural law theory.

### 1.7.1 Consent Theory

The most commonly held rationale for the relevance of international law, and especially treaties, to a nation's conduct is based on the notion of consent.[37] The consent-based argument begins with the claim that sovereign states are not subject to any obligation unless they have consented to it.[38] For example, Louis Henkin states, "A state is not subject to any external authority unless it has voluntarily consented to such authority."[39] This claim is easily reconciled with the law of treaties, which includes detailed rules concerning the question of consent and whether it has been given.[40] The second, and more problematic, step in the consent-based theory invokes the often-repeated statement that treaties are to be obeyed.[41] Proponents of a consent-based view argue that consent to be bound generates a legal obligation and causes states to comply with those obligations.

Critics of the consent-based theory argue that the theory cannot explain why international law is binding because it fails to explain why it prevents nations from simply withdrawing their consent.[42] Treaties are of limited use if it is not possible for a nation to make an irrevocable commitment. Like domestic contracts, treaties are much more powerful if the law provides a

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[37] *See* John K. Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv Ind LJ 139, 174 (1996), at 156. Though most frequently discussed in the context of treaties, the use of consent as an explanation for the binding character of international law is also present in discussions of customary international law; M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry,* 39 VA. J. INT'L L. 1069, 1122 (1999).

[38] "The rules binding upon states therefore emanate from their own free will . . . . Restrictions upon the independence of states cannot therefore be presumed" *S.S. Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10, at 18.

[39] Louis Henkin, *International Law: Politics, Values and Functions,* 216 Recuel Des Coursd' Academie De Droit International 27 (1989).

[40] *See* Setear, *Iterative Perspective*, (n 37), at 156-157 James L. Brierly, "The Law of Nations: An Introduction to the International Law of Peace 51-54 ((6th ed., New York: Oxford University Press, 1963)

[41] *See* Vienna Convention, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); Abram Chayes & Antonia Chayes, *On Compliance*, 47 INT'L ORG.175, 185 (1993) ("It is often said that the fundamental norm of international law is *pacta sunt servanda* (treaties are to be obeyed).").

[42] This criticism is widespread, and will not be elaborated in detail here. More complete versions of the criticism can be found in Setear, *Iterative Perspective*, (n 40), at 160; See James L. Brierly, The Law of Nations: An Introduction to the International Law of Peace (6th ed., New York: Oxford University Press, 1963).

mechanism for such commitments. In the absence of an ability to commit, a nation could simply withdraw its consent from any treaty found to be inconvenient. A consent-based view, therefore, might lead one to conclude that, as a theoretical matter, treaties should have no effect because nations need only comply when they would comply in the absence of the treaty.[43] This criticism is itself unsatisfactory. If one can assert that consent is enough to bind states, why can it not be similarly asserted that it is possible to consent to irrevocable commitments?[44]

Ideally then, Kenya having voluntarily ratified the Rome Statute and thus becoming a member State to the Statute and to the ICC, it should also and always retain the right to withdraw the said consent by exercising her right to withdrawal under Article 127 of the Rome statute. This right is absolute and may be exercised at any time at its own unilateral act if it adheres strictly to the substantive and procedural rules under the statute concerning withdrawal.

### 1.7.2 Natural law Theory

The idea of the law of nature (*jus naturale*) exercised a great influence on the advancement of International Law. The law of nature indicated the perfect law founded on the way of man as a sensible being, for instance; the group of tenets which nature dictates to human reason. The embodiment and importance then is that states submitted to International Law in light of the fact that their relations were managed by the Higher law, the law of nature of which International Law was part.[45] The connection between natural law and International law figures in the works of Francisco de Vitoria, where international law is seen as universal law, which limits the

[43] This is a slight exaggeration because even a treaty that can be revoked at will is useful to resolve coordination games.

[44] Setear, *Iterative Perspectives*, (n 40), at 161 ("I see nothing casuistic in the argument that parties to a treaty consent not only to particular terms but also to the general notion that their consent must not be withdrawn.").

[45] *Alexander Orakhelashvili, "*Natural Law and Customary Law," Max-Planck-Institutfürausländischesöffentliches Recht und Völkerrecht, 2008. See also generally Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism," EJIL (2001), Vol. 12 No. 2, 269-307.

opportunity of activity of nations in relations with each other.[46] Then again with regards to the universal legitimate framework, Grotius conceptualizes natural law as secular law, which would be there regardless of the possibility that God did not exist.[47]

Other jurists in explaining why international law is obeyed have used the theory of natural law to put for their rationales. Puffendorf supposes that the absence of the central government far beyond States makes positive universal law outlandish.[48] Thus, Puffendorf does not acknowledge that there is any law of nations which is not natural law; particularly the willful law of nations.

Puffendorf proceeds from the assumption that the absence of the central government over and above States makes positive international law impossible. Consequently, Puffendorf does not accept that there is any law of nations which is not natural law; especially the voluntary law of nations.[49]

As for Wolff, the voluntary law of countries is not made through general assent of states whose existence is assumed, but because of the reason for the preeminent State which nature itself established. Threrefore, states will undoubtedly be bound and consent to that law.[50] Wolff proposes the idea of "the necessary law of nations which consists in the law of nature applied to nations".[51] This law of nature is immutable and hence "the necessary law of nations also is absolutely immutable". Consequently, "neither can any nation free itself nor can any nation free another from it".[52] For Vattel, "the law of nations is originally no other than the law of nature

[46]F. Vitoria, *De Indis*, in: F. Vitoria, Political Writings, Cambridge 1991, 233; A. Nussbaum, A Concise History of the Law of Nations, New York 1954, 80-81.
[47]Otto Gierke, "Natural Law and the Theory of Society: 1500 to 1800 (Boston: Beacon Press, 1950), at 36.
[48]*Alexander Orakhelashvili, "*Natural Law and Customary Law," (n 45), at 72
[49] Ibid.
[50]C. Wolff, The Law of Nations Treated According to a Scientific Method, Oxford/London 1934, at 6.
[51]Ibid, at 7.
[52]Ibid., at 10.

applied to nations".[53] This natural law of nations is, per Vattel, "necessary, because nations are absolutely bound to observe it"[54] because the necessary law of nations "is not subject to change".[55]

It is because of the above jurisprudence that the concept of the law of nature has had a tremendous influence on the development of International Law by generating respect for International Law and providing moral and ethical foundations. Thus, the morality of preventing international crimes from occurring played in the minds of states even prior to the Rome statute. To that end thus, it became customary international law which has since gained the status of a peremptory norms/jus cogen (norms of International Law that can't be derogated), they are binding to ensure that no state subverts the principles of human rights, engage, enable or leave unpunished international crimes.[56]

To this end thus any state perceived to be acting in any way perceived to undermine the prevention of the occurrence of crimes listed under the Rome Statute, such a State would be violating customary international law and negating its obligation *erga omnes* towards the universal will of the international community for the prevention and prosecution of these international crimes. In this respect, this study intends to argue that an act of withdrawal from the Rome Statute, even though legally permissible by dint of article 127 of the Rome Statute, a negative perception will be visited upon the withdrawing state to the effect that it either intends to undermine the concerted efforts to prevent and prosecute the fore core international crimes under the Rome Statute or that it does not give credence to such efforts. This would be a

[53]E. Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, in: J.B. Scott (ed.), Classics of International Law, Washington 1916, at 4.
[54] Ibid.
[55]Ibid, at 5.
[56]M. Cherif Bassiouni (n 17)

situation in which a state would be cited diplomatically to be derogating from its obligation *erga omnes*.

## 1.8 LITERATURE REVIEW

This study adopts a thematic approach which comprises of justifications for international criminal law on the one hand and the sovereign prerogative of the state. Within this thematic approach the study will also consider the relationship between the Rome Statute and Security Council as is extensively discussed in inter alia, Arsanjani's[57] article below. These areas of focus will give in depth insight into the issues that touch not only on the juridical nature of international crimes but also the sovereign right of the state and its diplomatic consequences under international law.

### 1.8.1 History and Significance of the ICC

The book "From Nuremburg to The Hague: The Future of International Criminal Justice,"[58] offers a series of papers that trace the history of the international community bid to establish an international criminal court. The History here is traced back as far as post World War that saw the establishment of the International Military Tribunal (Nuremberg Tribunal) and soon thereafter the International Military Tribunal of the Far East (Tokyo Tribunals). The book then proceeds to analyze the two special tribunals that were set up in Yugoslavia (International Criminal Tribunal for the former Yugoslavia-ICTY) and in Rwanda (International Criminal Tribunal for the former Rwanda-ICTR). The running theme in this discussion is overwhelmingly

[57] Statute, R., & Statute, T. (2002).Rome Statute of the International Criminal Court. Nordic Journal of International Law, 71(4), 497–521.

[58] Phillipe Sands, From Nuremburg to the Hague: The Future of International Criminal Justice," Cambridge University Press (2003)

eschewed towards showing the desire by the international community to set up a universal international criminal court that would have the mandate of prosecuting the most heinous international crimes. In this respect the book then concludes by detailing how finally the international community finally came to a consensus leading to the establishment of the International Criminal Court (ICC). This book is very essential to this study as it will be a valuable reference point upon with this study will draw from in respect to outlining the history of the enactment of the Rome Statute that established the ICC. However, the study will further focus not only on the nature and significance of the Rome Statute but also on the implications of withdrawal from the Rome Statute.

Benjamin N. Schiff in his book, "Building the International Criminal Court,"[59] examines the creation and operation of the International Criminal Court. He takes a hard look at the political past and future of this ICC, its working and the challenges it has faced in executing its mandate. In this regard then Schiff assesses the Rome Statute and how it has enabled the ICC perform its functions. This book assists this study in appreciating the intricacies of the origins, importance and challenges faced by the ICC. However, the book does not focus on the issues of withdrawal and the implications arising which this study will discuss.

Simmons, Beth and Danner also take the same approach in their book.[60] They recognize that creation of an International Criminal Court (ICC) to prosecute war crimes poses a real puzzle. They raise a question which is relevant to this research paper: Why was ICC created, and more importantly, why do states agree to join this institution? [61] Danner argues that social scientists are

[59] Benjamin N. Schiff, "Building the International Criminal Court," Cambridge University Press (2003)
[60]Simmons, Beth A., and Danner A 2010. "Credible Commitment and the International Criminal Court." International Organization 64, no. 2: 225–256.
[61] Ibid.

of hardly one mind about this institution, arguing that it is alternately dangerous or irrelevant to achieving its main purpose: justice, peace, and stability. They try to understand who commits to ICC; and they make similar observations as was made by Dutton in his book[62] adding that potentially vulnerable states with credible alternative means do not commit their leaders to the ICC.[63]

Borg Cardona Yvette in her study, "A critical analysis of the Rome Statute of the International Criminal Court,"[64] analyses the Rome Statute's provisions concerning jurisdiction, admissibility and State cooperation as these are the three factors which determine whether an individual accused of having committed a crime within the Court's jurisdiction will be prosecuted by the Court. This analysis is important because it will assist this study in analyzing the pertinent issues concerning the ICC so as to make the point that even when a states so withdraws from the Rome Statute the key principles for which the ICC exercises its mandate are still upheld as against that withdrawing state during its membership as a state-party to the Rome Statute and the ICC. For instances, it will be shown that the ICC may still exercise jurisdiction of a withdrawing state if its matter is referred to the ICC by the UN Security Council, this is because if that withdrawing states fails to prosecute the four core international crimes as at when they occur in its territory the ICC may exercise jurisdiction on the principle of complimentarily. Further, even after withdrawal, it will be shown that the withdrawing state must still cooperate with the international community in prosecuting and preventing the four core international crimes.

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[62]Dutton, Y. M. (2009). *Commitment to the International Criminal Court: Do States View Strong Enforcement Mechanisms as a Credible Threat?*. One Earth Foundation Working Paper, and Accessed August 10, 2015. http://www. oneearthfuture. org/siteadmin/images/files/file_43.pdf

[63]Simmons, Beth A., and Danner A 2010. "Credible Commitment and the International Criminal Court." International Organization 64, no. 2: 225–256.

[64] Borg Cardona Yvette, "A critical analysis of the Rome Statute of the International Criminal Court," available at https://www.um.edu.mt/library/oar/handle/123456789/8218

Antonio Cassese in his article "The Statute of the International Criminal Court: Some Preliminary Reflections,"[65] appraises the contribution of the International Criminal Court (ICC) to substantive and procedural international criminal law. He portrays it as a revolutionary innovation. He also posits to the fact that the Statute has set up a complex judicial body with detailed regulations governing all the stages in the criminal adjudication. He further discusses the prerequisites to the exercise of jurisdiction, however, depend greatly on the willingness of all states parties concerned in the prosecution to cooperate with the Court. In its present form, the author argues that the Statute is somewhat too deferential to the prerogatives of state sovereignty, a fact which could impair the ICC's effectiveness. This paper while going a long way in showing the significance of the ICC to the international community emphasizes on the need for the international community to assist the court in meeting its mandate. However, it does not analyze the provisions of the Rome Statute that deals which withdrawal for which this study will analyze in depth.

Schabas[66] provides an article-by-article analysis of the Rome Statute. Each of the 128 articles is presented accompanied by a bibliography of academic literature relevant to that provision, an overview of the drafting history of the provision and an analysis of the text. The analytical portion of each chapter draws upon relevant case law from the Court itself, as well as from other international and national criminal tribunals, academic commentary, and the related instruments such as the elements of crimes, the rules of procedure and evidence and the relationship agreement with the United Nations. In respect to withdrawal from the Rome Statute, Schabas offers a commentary of article 127 (general provision of withdrawal) and article 121 (6)

[65] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," EJIL 10 (1999), PP. 144–171

[66]Schabas, W. A., "The international criminal court: a commentary on the Rome statute," Oxford University Press The American Journal of International Law, Vol. 93. (2010).

(withdrawal following amendments of the Statute) of the Statute itself. Schabas in this commentary begins by discussing the process of drafting the withdrawal clause, that is, from its first introduction to the draft of provisions by the Preparatory Committee to the eventual refining and incorporation of this withdrawal clause in the final text of the Rome Statute as it exist today.[67] He then proceeds by offering an analysis and interpretation of article 127 of the Rome Statute and in this respect analyses the requirement for notification of withdrawal to the Secretary-General of the United Nation and when the notified withdrawal would take effect.[68] He also discusses the consequences of withdrawal as provided under paragraph 2 of article 127 of the Rome Statute.[69] He finalizes by offering an analysis of article 121 (6) of the Rome Statute that allows withdrawal pursuant to amendments of the Statute.[70] Indeed this study will borrow from Schabas analysis of the withdrawal clauses of the Rome Statute. However, the study will go a step further by analyzing not only the legal aspects of the clauses and the consequences of withdrawal but also offer implications of any acts of withdrawal. The study will seek to achieve this by using Kenya as a case study since it has shown an intention to exercise article 127.

### 1.8.2 International law on Withdrawal from Treaties

Kelley raises several questions: What do countries do when they have committed to a treaty, but then find that commitment challenged? Why did some states sign and others not? Kelley answers his questions by explaining that after the creation of the International Criminal Court, the United States tried to get countries, regardless of whether they were parties to the Court or not, to sign agreements not to surrender Americans to the Court. Given United States power and threats of

[67] Ibid, at 1206
[68] Ibid.
[69] Ibid, at 1207
[70] Ibid.

military sanctions, some states did sign. However, such factors tell only part of the story.[71] When refusing to sign, many states emphasized the moral value of the court. Further, states with a high domestic rule of law emphasized the importance of keeping their commitment. This article therefore advances two classic arguments that typically are difficult to substantiate; namely, state preferences are indeed partly normative, and international commitments do not just screen states; they also constrain.[72] Keller's work is important to this study in that it will help appreciate the opposition to the Statute and the ICC that existed even before its formal adopting in the conference of Rome. This is important because the same concerns that were used and advanced chiefly by the US in its opposition to the Rome Statute and the ICC are like the ones raised by Kenya in seeking to withdraw from the Statute. However, the study will also not just seek to analyze the aptness of these concerns as valid reasons for withdrawal but it will also offer a thorough analysis on the legal and diplomatic consequences of withdrawal.

LR Helfer in the article, "Terminating Treaties,"[73] provides an overview of the international law rules governing exit from multilateral and bilateral treaties, including key provisions of the Vienna Convention on the Law of Treaties (VCLT). He highlights the wide variations in the design and invocation of treaty termination, denunciation, and withdrawal clauses using illustrations from a range of subject areas. He sets forth a theory of treaty exit which argues that termination, denunciation, and withdrawal clauses are tools for managing risk—a pervasive feature of international affairs. Helfer has further in another article "Exiting Treaties,"[74] analyzed

[71] Ibid.

[72] Kelley, J. (2007). Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements. American Political Science Review, 101(3), 573–589. http://doi.org/10.1017/S0003055407070426

[73] LR Helfer, "Terminating Treaties," Duke Law Scholarship Repository available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=fac accessed on 26th June 2016.

[74] Laurence R. Helfer, "Exiting Treaties," Virginia Law Review, Vol. 91. 2005 pages 1579-1647, at 1582.

the phenomenon of unilateral exit from international agreements and intergovernmental organizations. This latter article draws upon new empirical evidence to provide a comprehensive interdisciplinary framework for understanding treaty exit. It examines when and why states abandon their treaty commitments and explains how exit helps to resolve certain theoretical and doctrinal puzzles that have long troubled scholars of international affairs. The study borrows from Helfer's works and particularly in respect to withdrawal provisions of the VCLT as the basic legal framework for withdrawal from bilateral and multilateral treaties. This study will however link this with the provisions of the Rome Statute on withdrawal as outline in article 127 thereof. Besides, the study will also offer a discussion on what implication withdrawal may have on the withdrawing state.

### 1.8.3 Kenya and the Rome Statute

Kanyinga seeks to trace the reasons and the underlying causes of the 2007 post-election violence in Kenya. In this regard, he argues that the reforms pursued through the settlement schemes and the land purchase program by successive governments ethicized the land question and established a ground for political conflict. It also shows that by looking at Kenya's politics of access to the former white highlands this violence becomes predictable. Kanyinga concludes the discussion that political leaders have not been keen to address the land question and it therefore remains a hot spot that, unless addressed in a democratic manner, may well ignite recurrence of violence.[75] This article by will be of great importance when analyzing the root causes of post-election violence in Kenya. Particularly so, the study will argue that since the land question has not been solved, Kenya is yet again susceptible to violence as witnessed during the 2007 post-

[75]Kanyinga, K. (2009). The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya. Journal of Contemporary African Studies, 27(3), 325–344. http://doi.org/10.1080/02589000903154834

election violence. Therefore, withdrawing from the Rome Statute will in any event put Kenya at a cross road and will show that Kenya would be unwilling to not only prevent but also prosecute the crimes provided for under the Rome Statute.

Brown, Stephen and Chandra have written a book[76]that examines the demand for criminal accountability for the atrocities committed after Kenya`s disputed presidential elections in 2007. The book explains why despite strong popular desire for accountability through prosecutions and the threat of and actual International Criminal Court (ICC) involvement, the government has failed to take concrete steps to try those believed primarily responsible. The article argues that the fundamental reason why the government has not initiated the systematic prosecutions in regular domestic courts or created as promised a hybrid national/ international tribunal is that those in charge of establishing these processes are in many cases those whom it would prosecute or their close allies. A hybrid tribunal now seems unlikely and credible national trials are an improbable alternative, though there are some reasons to be more optimistic following the new constitution of 2010. This article is of much relevance to this research project as it elaborates the failure by Kenya to set up a local mechanism through constitutional amendment for the trial of post-election violence perpetrators as was recommended by Justice Philip Wako; as well as evaluate and analyze attempts by Kenya to convince other African countries to set up an African Court equivalent to the ICC by amendment to the African Court of Human and People's rights charter. As much as the book has raised issues on post-election violence, it was published in 2012 which shows that a lot of developments have come up concerning the cases at the ICC

[76]Brown, Stephen, and Chandra Lekha Siram 2012."The Big Fish Won't Fry Themselves: Criminal Responsibility for Post-election Violence in Kenya." African Affairs 111, no. 443: 244–260.

which this book could not cover. This research paper therefore intends to bridge this knowledge gap provided in the book.

In Mueller Sussane's article[77], there are arguments about the interplay between politics and the law with regard to the ICC. She explains the importance of the 2013 Kenyan presidential elections in relation to the cases on crimes against humanity that were at the International Criminal Court (ICC) against Uhuru Kenyatta and William Ruto. She further explains that the run for the two as president and deputy president respectively was a key strategy to deflect the ICC and insulate themselves from its power once they won the election.[78] She further argues that the ICC has insisted, just like any other independent judicial body, that it is not influenced by politics in undertaking its mandate, but by the law. Mueller points out that both the Kenyan Government and the defendants` responses to the ICC led to politics intruding upon the law. The defendants used strategies of delay, mobilization of regional support, and alleged intimidation by supporters successfully to win the presidential election and to postpone their trials until they gained power.[79] However, in her article the discussion on Kenya`s withdrawal is missing. Mueller's rhetorical question; "Who is on trial? The ICC or the accused persons on crimes against humanity"[80] is a pertinent issue.

[77]Mueller, S. D. (2014). Kenya and the International Criminal Court (ICC): politics, the election and the law. *Journal of Eastern African Studies*, *8*(1), 25-42.
[78]Mueller, S. D. (2014). Kenya and the International Criminal Court (ICC): politics, the election and the law. *Journal of Eastern African Studies*, *8*(1), 25-42
[79] Ibid.
[80]Mueller, S. D. (2014). Kenya and the International Criminal Court (ICC): politics, the election and the law. *Journal of Eastern African Studies*, *8*(1), 25-42

### 1.8.4 Implications of withdrawal from the Rome Statute

Bassiouni in "International Crimes: Jus cogens and Obligatio erga omnes,"[81] conceptualizes the Rome Statute as an international instrument that provides for prevention and prosecution of international crimes that have risen to the level of jus cogens and that the duty to prevent and prosecute these crimes is *obligatio erga omnes* which are inderogable. He thus analyses the legal obligations which arise from the higher status of such crimes including the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency," and universal jurisdiction over perpetrators of such crimes. In this regard, then, this study while adopting Bassiouni's conclusions with respect to the nature of the Rome Statute will seek to argue that when a state withdraws from the Rome Statue, it must do so with the knowledge that despite her withdrawal she will still be subject to the obligations as set out in the Rome Statute. Thus, such a state will still be called upon to cooperate with the ICC in executing its mandate and that if it fails in the prevention of the occurrence of the four core crimes and does not prosecute the perpetrators, it will have violated *jus cogen* and will still be subject to the jurisdiction of the court.

Olympia Bekou and Robert Cryer in their article, "The International Criminal Court and Universal Jurisdiction: A Close Encounter,'[82] provide an insight with respect to the universal

[81] Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," Law and Contemporary Problems, Vol 59, No. 4 (1991)

[82] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter' (2007) 56 (1) ICLQ 49

scope for which the ICC may Act. They posit that for the universal jurisdiction of the ICC to exist, the Court must work together with both member and non-member states. This study adopts this argument to show that cooperation with the Rome Statute is not dispensable with even by an act of withdrawal.

## 1.9 RESEARCH METHODOLGY

The study will mainly be conducted through a library research. The primary sources of data will include reference to books, articles, journals, theses and publications. The study will also refer to the Rome Statute, the 1980 Vienna Convention on the Law of Treaties, UN Resolutions directly impacting the Rome Statute, and the UN Charter.

The study will analyze the existing literature on the legal and diplomatic implications of withdrawal from the Rome Statute. It will then identify the gap in the existing literature in order to contribute to knowledge by coming up with findings and recommendations on the implications of withdrawal.

## 1.10 CHAPTER BREAKDOWN

This research will consist of five chapters as follows:

### CHAPTER ONE: INTRODUCTION

This chapter is an introduction to the study particularly providing the general scope to the issues to be discussed in this study. This chapter will entail the statement of the problem, justification of the study, research hypothesis, research questions, research objectives, theoretical framework,

conceptual framework, research methodology, literature review, limitation of the study and chapter break down.

## CHAPTER TWO: STATE WITHDRAWAL FROM INTERNATIONAL TREATIES AND ITS LEGAL AND DIPLOMATIC IMPLICATIONS: A HISTORICAL PERSPECTIVE

This chapter will examine the evolution of international criminal justice from its post Second World War origins at Nuremburg through to the concrete proliferation of the courts and tribunals with international criminal jurisdiction in Yugoslavia and with regards to Rwanda to the establishment of the ICC. In this endeavor, the study appreciates the significance of the Rome Statute to world order and human decency. The chapter will also provide the provisions of withdrawal as provided at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998.

## CHAPTER THREE: THE SUBSTANTIVE AND PROCEDURAL LEGAL FRAMEWORK ON WITHDRAWAL FROM THE ROME STATUTE

This chapter will offer an overview of the international law rules governing exit from multilateral and bilateral treaties, including key provisions of the 1969 Vienna Convention on the Law of Treaties. However, in consonance with the theme of this study, particular focus will be accorded to the legal substantive and procedural provisions on withdrawal from the Rome Statute and by extension denunciation of the exercise of the jurisdiction of the ICC. The chapter will also seek

to offer the basis for which Kenya and the entire African Union are justifying their intensions to withdraw from the Rome Statute.

## CHAPTER FOUR: LEGAL AND DIPLOMATIC IMPLICATIONS OF WITHDRAWAL FROM THE ROME STATUTE

This chapter will provide an analysis of the legal and diplomatic implications of withdrawal from the Rome Statute. The chapter will address this by using Kenya as a case study by demonstrating the consequences that may accrue to her should she proceed and successfully withdraw from the Rome Statute. The driving argument here will be that because of the significance of the Rome Statute and by extension the ICC, then any act of withdrawal will be detrimental to a States reputation in the international community.

## CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

This chapter aims to bring together the ideas, arguments and suggestions in the preceding chapters in a unified but coherent pattern and put forward cogent recommendations especially in putting forward arguments for Kenya to reconsider proposed withdrawal from the ICC.

# CHAPTER 2: STATE WITHDRAWAL FROM INTERNATIONAL TREATIES AND ITS LEGAL AND DIPLOMATIC IMPLICATIONS - A HISTORICAL PERSPECTIVE

## 2.1 **INTRODUCTION**

On 17th July 1998, at the headquarters of the United Nations Food and Agriculture Organization (FAO) in Rome, the United Nations Diplomatic Conference made up of 120 States voted to adopt the Statute for the International Criminal Court.[1] Thus the statute is popularly referred to as the Rome Statute. This was the culmination of a process that begun in Nuremburg in the aftermath of the Second World War and leading to the creation of a permanent international tribunal which would have jurisdiction over the most serious international crimes.[2]

This chapter seeks to trace history leading to the formulation of a convention that wholesomely provides on how international law ought to mete out justice to violators of human rights by committing heinous and despicable criminal acts to large masses. It will be examined here the evolution of international criminal justice from its post Second World War origins at Nuremburg through to the concrete proliferation of the courts and tribunals with international criminal jurisdiction in Yugoslavia and with regards to Rwanda all the way to the establishment of the ICC. In this endeavor, the study appreciates the significance of the Rome Statute to world order and human decency. This chapter also provides an overview of the International Criminal Court, including key documents, articles, and analysis on the Court's purpose, its principles, and

[1] William A Schabas, "The International Criminal Court: A Commentary on the Rome Statute," Oxford University Press, 2010, at ix

[2] Philippe Sands, "From Nuremburg to the Hague: The Future of International Criminal Justice," Cambridge University Press, 2003, at ix

jurisdiction**.** The discussion of the ICC's principles of jurisdiction, complementarity and State Corporation is advanced here to show that even though a state may successfully withdraw from the statute, these principles will still apply to them**.** Additionally, this chapter will also offer an analysis of how then after its adoption the Rome statue became applicable in various states. In this regard, we will offer the case of how the Kenyan state after assenting to the Rome Statute adopted and applied it within its legal framework.

The chief purpose of the Rome Statute was the creation of the International Criminal Court (ICC). The aim here was that the ICC was meant to soar with the loftiest of ideals in grappling with basest of human acts. The Rome Statute in this regard seeks to counter impunity by vesting authority on the ICC to prosecute perpetrators of genocide, crimes against humanity and war crimes. It seeks to deter depredators against citizens in violent conflicts and contributes to justice, peace, political transition and reconstruction.[3] This constitutes a benchmark in the progressive development of international human rights, whose beginnings date back more than sixty years, to the adoption on 10th December 1948 of the Universal Declaration of Human Rights by the third session of the United Nations General Assembly.[4] The previous day on 9thDecember 1948, the General Assembly had mandated the International Law Commission to begin work on the draft statute of an international criminal court,[5] in line with Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide.[6] Establishing this international criminal court took longer than was anticipated. At the inception of the Cold War,

[3] Benjamin N. Schiff, "Building the International Criminal Court," Cambridge University Press, 2003, at ix
[4]GA Res. 217 A (III), UN Doc. A/810.
[5]Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 216 B (III).
[6](1951) 78 UNTS 277.

in 1954, the General Assembly suspended work on this project.[7] Tension between the two blocs, Eastern bloc-Soviet Union (USSR) and the Western block-United States of America (USA), made progress impossible with both sides being afraid they might create a tool that could advantage the other. The General Assembly did not resume its consideration of the proposed international criminal court until 1989.[8] The end of the Cold War also heralds the turmoil that engulfed the former Yugoslavia which witnessed crimes against humanities of epic proportions. The events in the tiny African country of Rwanda further shook the world as there was witnessed incidents of genocide. These two events provided the laboratory for international justice that propelled the agenda forward.[9]

## 2.2 ORIGIN: INCEPTION AND DENIAL

The first real origins of the International Criminal Court (ICC) can be identified as early as the 1870's when Gustave Moynier proposed a permanent international court following the Franco-Prussian War.[10] His calls for a court were not seriously pursued by states due to the perceived threat on sovereignty—the ability of a nation to govern itself independently by making and enforcing its own laws—but it planted the seed in the minds of many. Nearly 60 years later, the world saw the next push for an international court.[11]

After the atrocities of World War I, the Allies, in connection with the Treaty of Versailles, established in 1919 an ad hoc commission to investigate war crimes that relied on the 1907

[7] GA Res. 897 (X) (1954)
[8] GA Res. 44/89
[9] Robert C. Johansen, "A turning Point in International Relations? Establishing a Permanent International Criminal Court," (1997) 13 Report No. 1, at 1. See also Joan B. Kroc Institute of International Peace Studies, 1997.
[10] Allison Naylor and Prof John Dietrich, "Unsigning the Rome Statute: Examining the Relationship Between the United States and the International Criminal Court," The Honors Program Senior Capstone Project (2012), at 3.
[11] Ibid

Hague Convention as the applicable law. In addition to war crimes committed by the Germans, the commission also found that Turkish officials committed "crimes against the laws of humanity" for killing Armenian nationals and residents during the period of the war.[12] Some framers of the 1919 Treaty of Versailles envisioned the creation of an ad hoc tribunal to try the German Kaiser and other German war criminals following World War I. British Prime Minister David Lloyd George proposed that the Allies should "hang the Kaiser."[13] This call for a court never came to fruition, as it was opposed by both President Woodrow Wilson of the United States and King George V of the United Kingdom.[14] Wilson strongly opposed the extradition of Kaiser Wilhelm II, and even though King George acknowledged that his cousin was "the greatest criminal in history"[15] he still opposed the Prime Minister's proposal. The main argument for opposing the measure was that it would destabilize the peace they had just won in the war.[16] The United States and Japan were also strongly opposed to the criminalization of such conduct because crimes against the laws of humanity were violations of moral and not positive law.[17]

Thus, at this stage there was largely a negative attitude against criminalizing any acts committed during the first world war in violation of human rights. The Allies by reason of being the principle victors and thus with the final say on the direction of world affairs were at the time seen to be led by the US. As it has already been noted here, the US was among the chief opposition to such criminalization. Perhaps then one may argue that this is the reason why the idea against criminalization was very persuasive. Again, though, the call to make the ad hoc commission a

[12] See generally, M. Cherif Bassiouni, "Introduction to International Criminal Law," Martinus Nijhoff Publishers (2013), at 542-547

[13]Ashton, Nigel J; Hellema, Duco "Hanging the Kaiser: Anglo-Dutch Relations and the Fate of Wilhelm II, 1918–1920."Diplomacy & Statecraft. 11 (2) (2000),at53–78.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

court never became a reality, it planted the foundation for the trials that would follow World War II.[18]

## 2.3 NUREMBERG TRIBUNALAND THE TOKYO TRIBUNAL

The criminalization of crimes against humanity and war crimes had its first appearance on the international court scene during the Nuremberg Tribunal—a category that was designed to cover the Nazi atrocities perpetrated by the German government on its own citizens—Jews and other disfavored groups as well as crimes inflicted on the peoples of occupied countries.[19] Thus Hannah Arendt described the Holocaust as "a crime against humanity perpetrated upon the body of the Jewish people."[20]

After World War II Allied Powers responded swiftly after the discovery of crimes committed by the Nazi regime and Axis Powers. They therefore created the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT).[21] The IMT Charter established the International Military Tribunal that had its sitting at Nuremberg.

Though the IMT accomplished its goal of indicting and trying many of Germany's top war criminals, many questioned the legitimacy of the tribunals. This doubt stemmed from the fact that the criminals were being tried for actions that were not defined as crimes until after the end of the war. This concept in domestic jurisdictions is known as *ex post facto* laws (laws made

[18]Allison Naylor and Prof John Dietrich, Unsigning the Rome Statute (n 10).
[19]Patricia M. Wald, Genocide and Crimes Against Humanity, 6 Wash. U. Global Stud. L. Rev. 621 (2007), at 622
[20]Barry Gewen, *The Everyman of Genocide*, N.Y. TIMES, May 14, 2006, at 10
[21] Both signed in London 8th August 1945.

after the fact). These trials were also referred to as "victors' justice," as the victors (in this case, the Allied forces) only tried the "losers" of the war (the Germans).[22]

Shortly after, a similar document was drafted in response to the crimes committed by the Far East Axis powers, namely Japan, labeled the International Military Tribunal for the Far East (Tokyo trials) of 1946 which incorporated the procedures and mandate as the IMT Charter. A similar challenge of the trials being victors' justice was also herald here in equal measure and thus the credibility of the Tokyo trials was also called into question. Their shortcomings notwithstanding, these two tribunals laid the groundwork for the prosecution and convictions of soldiers and commanders that committed crimes in World War II. The importance of these tribunals comes in its direct definition of crimes against humanity and war crimes, and the initial recognition for the need of a global criminal system.[23]

## 2.4 INTERNATIONAL LAW COMMISSION AND THE TRINIDAD & TOBAGO RESURRECTION

After the Nuremberg and Tokyo trials of 1945-1946, the next international tribunal with jurisdiction over crimes against humanity would not be established for another five decades. However, work continued developing the definition of crimes against humanity. In 1947, the International Law Commission (ILC) was charged by the United Nations General Assembly with the formulation of the principles of international law recognized and reinforced in the Nuremberg Charter and judgment, and with drafting a *'code of offenses against the peace and*

[22]Allison Naylor and Prof John Dietrich, Unsigning the Rome Statute (n 10), at 5-6

[23]Daniel Donovan, "International Criminal Court: Successes and Failure," International Policy Digest available at http://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future accessed on 4th July 2016..

*security of mankind'.* This code was however completed fifty years later in 1996 and thus for half a century it was but a Draft Code with no legal obligations flowing there from.[24]

The General Assembly also called for the ILC to identify, "…the desirability and the possibility of establishing an international judicial organ for the trials of persons charged with genocide."[25] The ILC began drafting this statute in the early 1950s. Simultaneously, the Cold War began, hindering the progress toward an international court. With two major superpowers at odds with each other, every issue became a political one and agreement to create an international court would never materialize. The UN General Assembly (UN GA) abandoned the idea until the definition of "crime of aggression" and an international Code of Crimes could be agreed upon.[26]

The next push for an international court came from an unlikely source. In June 1989, Trinidad and Tobago resurrected the notion of a court in response to the prevalence of drug trafficking. It resurrected the pre-existing proposal for the establishment of the court, and the General Assembly responded by continuing its working on the statute it had started and then abandoned.[27]

The ILC however presented the final draft of its statute to the UN GA in 1994. It also recommended the creation of a conference of plenipotentiaries, which would convene to negotiate a treaty and enact the statute that had just been drafted.[28]

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[24] http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity accessed on 4th July 2016.
[25] "Chronology of the International Criminal Court." ICC. International Criminal Court, available at http://www.icc-cpi.int/Menus/ICC/About the Court/ICC at a glance/Chronology of the ICC.htm accessed on 8th August 2016
[26] ibid.
[27] Allison Naylor and Prof John Dietrich, Unsigning the Rome Statute (n 10), at 5-6
[28] Ibid.

## 2.5 THE MODERN PERSPECTIVE: 20TH CENTURY AND BEYOND

Further in response to atrocities committed in the 1990s in Yugoslavia and Rwanda, multiple ad hoc tribunals were established with jurisdiction over crimes against humanity and genocide. These tribunals were the International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR).[29]

### 2.5.1 The Special Tribunals: ICTY and ICTR

In 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY), to investigate and prosecute genocide, war crimes and crimes against humanity, which had taken place in the former Yugoslavia. The definition of crimes against humanity employed by the ICTY revived the original 'Nuremberg' nexus with armed conflict, connecting crimes against humanity to both international and non-international armed conflict.[30] Bassiouni has argued that this definition was necessary as the conflict in the former Yugoslavia was considered a conflict of both an international and non-international nature.[31]

The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993. The creation of the ICTY marked the first time a court had been established to prosecute individuals who committed heinous crimes against their fellow man in a regional setting. This creation also ended a fifty-year system of having the laws and treaties in

[29]Burns, Peter, "Aspect of Crimes Against Humanity and the International Criminal Court" International Centre for Criminal Law Reform and Criminal Justice Policy, at 6.
[30]http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanityaccessed on 4th July 2016.
[31]CherifBassiouni, M. Crimes against Humanity: Historical Evolution and Contemporary Application. Cambridge: Cambridge University Press, 2011, at 186

place to govern the rules during warfare, but no real system to prosecute individuals who broke these laws.[32]

Shortly after the creation of the ICTY, another ad hoc court was being established in the wake of the horrific events that occurred in Rwanda in 1994. The shock that embodied the world after the discovery of such a systematic genocide was overwhelming, and the UN Security Council (UN SC) moved quickly to bring the leadership and perpetrators to justice. In November of 1994, through Security Council Resolution 955 the temporary ad hoc court became a reality. The court mirrored many of the same rules established through the ICTY, but the prosecution focused specifically on Rwandans that committed the act of genocide during the terrible and short-lived civil war.

These two courts laid the foundation that would later become the Rome Statute and the establishment of the ICC. Some other ad hoc tribunals have been created by the Security Council to deal with local issues, such as Sierra Leone, Cambodia and the Special Tribunal for Lebanon (STL).[33]

## 2.6 THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE

In 1998, a groundbreaking idea turned into reality, and the more than 50 years of debate ended as the first International Criminal Court (ICC) was established.[34] This was the highlight of the

[32] Ibid.
[33] Ibid.
[34] Ibid.

United Nations Diplomatic Conference of Plenipotentiaries in Rome, Italy which ended on 17th July 1998 with the adoption of the Rome Statute.[35]

In response to ILC's recommendation, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court. This committee would convene twice in 1995 to discuss major substantive issues in the draft statute. The committee then submitted a report to the General Assembly following its meetings.[36]

The General Assembly considered the committee's report, and created the Preparatory Committee on the Establishment of the ICC to prepare a consolidated draft text. Between 1996 and 1998, the Preparatory Committee convened for six sessions at the UN headquarters in New York. Contributing input to the discussion were many non-governmental organizations (NGOs). They attended the meetings under the umbrella of the NGO Coalition for an ICC (NICC). They submitted hundreds of documents to the Preparatory Committee for consideration during the six sessions.[37]

In January 1998, the Bureau and the coordinators of the Preparatory Committee convened in the Netherlands for an Inter-Sessional meeting to consolidate and edit the draft articles into a draft. The draft, known as the Zutphen draft and consisted of 99 articles, showed a clear lack of agreement, as it was heavily bracketed. The draft compiled at the Inter-Sessional meeting was submitted to the Preparatory Committee at their March-April 1998 session. The draft submitted here was the basis of the draft to be considered at the Rome Conference. Based on this draft, the

[35] Dominic McGoldrick, 'Criminal Trials before International Tribunals: Legality and Legitimacy' in Mark S Ellis and Richard J Goldstone (eds), The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century (IDebate Press 2008) 48.
[36]"Chronology of the International Criminal Court." ICC. International Criminal Court, available at http://www.icc-cpi.int/Menus/ICC/About the Court/ICC at a glance/Chronology of the ICC.htm accessed on 8th August 2016
[37] ibid.

UN GA held a convention at the United Nations Conference of Plenipotentiaries on the Establishment of an ICC to "finalize and adopt a convention on the establishment"[38] of an international criminal court.[39]

Between June 15 and July 17, 1998, delegations from 160 countries convened in Rome, Italy for the Rome Conference. The NGO Coalition was also in attendance, monitoring the discussions and negotiations, distributing information worldwide, and facilitating the participation of more than 200 NGOs. By the end of the conference, 5 weeks later, 120 nations voted favorably for the adoption of the Rome Statute.[40] Only 7 nations voted unfavorably for the Rome Statute: China, Israel, Iraq, Qatar, Libya, Yemen, and the USA. The biggest reasons the USA had for voting unfavorably towards the ICC was that it would violate state sovereignty, that citizens would be subject to laws created after an act had already been committed, and that the principle of complementarity, though seeming to allow states to retain domestic jurisdiction over its own citizens, allows the court to judge a nation's domestic court system in its decision whether to intervene.[41].

The Preparatory Commission was given the task of finalizing the establishment of the court. It was always charged with overseeing the smooth function of the court by negotiating more documents, such as the Rules and Procedure of Evidence, the Financial Regulations, and the Agreement on the Privileges and Immunities of the court. July 17th is now known as

[38]"History of the ICC." International Criminal Court. Available at http://www.iccnow.org/?mod=icchistory accessed on 8th August 2016
[39] ibid
[40]21 states abstained from voting
[41]Chronology of the International Criminal Court." ICC. International Criminal Court, available at http://www.icc-cpi.int/Menus/ICC/About the Court/ICC at a glance/Chronology of the ICC.htm accessed on 8th August 2016

International Justice Day, to commemorate the anniversary of the adoption of the Rome Statute.[42]

The 60th ratification that was necessary to finalize the court was deposited by several states on April 11, 2002. The Assembly of State Parties, which was outlined in the Rome Statute as "each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers" and who are given the tasks of consideration and adoption of recommendations of the Preparatory Committee as well as providing oversight to the President, Prosecutor, and Registrar, met for the first time in September 2002.

The Rome Statute entered force on 1st July 2002 in accordance with its article 126.[43] As of June 2016, the Rome Statute has 139 signatories and 124 party states.[44] Based on the principle of complementarity, the ICC has jurisdiction over genocide, war crimes, and crimes against humanity when national courts are unable or unwilling to prosecute such crimes.[45]

William Schabas offers an apt description of the Rome Statue and the primary reason why its adoption was necessary as follows:

> *The Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty. Without any doubt its creation is the result of the*

[42] Ibid.
[43] United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court, available athttps://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en accessed on 25th June 2016.
[44] Ibid.
[45]Rome Statute of the International Criminal Court arts. 5, 12, 17 (setting forth crimes within jurisdiction of International Criminal Court ("ICC") in Article 5, preconditions to exercise of jurisdiction in Article 12, and issues of admissibility in Article 17).

*human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of its Charter proclaimed the promotion of human rights to be one of its purposes.*[46]

Antonio Cassese, in my view rightly maintained that the Rome Statute was laid down according to the will of the States Parties to the Treaty. It is marked by compromise between those States most committed to the fight against impunity and those whose responsibilities or interests compel greater caution with respect to a treaty creating obligations which limit their traditional judicial sovereignty.[47] The detailed and complex provisions in the Statute testify to such a compromise.[48]

The preamble of the Rome Statute states the purposes to which the Statute was adopted and which the ICC is established.[49] The reading of the preamble shows that the Rome statute was

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[46]William Schabas, "An Introduction to the International Criminal Court," 2nd Ed., Oxford University Press, 2004, at 25.

[47]Robert Badinter, 'International Criminal Justice: From Darkness to Light' in Mark S Ellis and Richard J Goldstone (eds), The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century (IDebate Press 2008), at 18.

[48]Borg Cardona Yvette, "A critical analysis of the Rome Statute of the International Criminal Court," available at https://www.um.edu.mt/library/oar/handle/123456789/8218

[49] The Preamble of the Rome Statute States: ***"The States Parties to this Statute, Conscious*** *that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time;* ***Mindful*** *that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity;* ***Recognizing*** *that such grave crimes threaten the peace, security and well-being of the world;* ***Affirming*** *that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;* ***Determined*** *to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes;* ***Recalling*** *that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;* ***Reaffirming*** *the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;* ***Emphasizing*** *in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State;* ***Determined*** *to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole;* ***Emphasizing*** *that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions;* ***Resolved*** *to guarantee lasting respect for and the enforcement of international justice…."*

adopted to institutionalize justice on the world plane in the interests of humanity. The punishments that the Court may give are depicted as the means to end impunity of the perpetrators of crimes affecting humanity and, through fear of punishment, to deter potential culprits.[50]

## 2.7 DRAFTING OF THE PROVISION ON WITHDRAWAL FROM THE ROME STATUTE

Some multilateral treaties in human rights do not provide for withdrawal and the absence of relevant provisions has led to the conclusion that this is impossible.[51] On the other hand, the absence of a withdrawal provision in the Charter of the United Nations has not meant that a State cannot leave the organization in 'exceptional circumstances'.[52] In the case of the Rome Statute, withdrawal from the treaty is specifically authorized. The provision provides useful reassurances to States hesitant about a commitment to the court. Article 127 follows a model that is common in many multilateral treaties.[53] Sometimes the term 'denunciation' is also used to describe withdrawal from a treat regime.[54] Withdrawal does not affect the State's other obligations under international treaties or customary international law.[55]

[50]Ibid, at 12.
[51] 'General Comment 26 (61), UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.18 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1, available at: http://www.refworld.org/docid/453883fde.html [accessed 8 September 2016]
[52] Wolfram Karl, Bernd Mutzelburg and Georg Witschel, 'Article 108', Bruno Simma et al., The Charter of the United Nation, A commentary, Oxford University Press, 2002, pp. 1341-1363, at 1355.
[53]Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UN Doc. A/RES/54/263, article 15
[54] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 331, article 56.
[55] Ibid, article 43.

The first draft provision on withdrawal from the Rome Statute appeared in the final clauses proposal from the United Nations Secretariat.[56] Consisting of two short paragraphs, the text was relatively succinct by comparison with the final version of article 127.[57] It allowed withdrawal by written notification to the Secretary-General of the United Nations, to take effect one year later. The withdrawal would not affect any existing obligations under the Statute.

The provisions governing withdrawal in the draft statute adopted by the Preparatory Committee comprised three paragraphs, the third of which was in square brackets. New ideas had been introduced during the final session of the Preparatory Committee.[58] The words 'unless the notification specifies a later date' were added. Detailed language concerning the consequences of withdrawal, now reflected in article 127 (2) was also introduced.[59] During the Rome Conference, debate focused on crafting a new provision that would incorporate the third paragraph of the Preparatory Committee draft in a logical manner.[60] The result of the discussions appears in the final text, which was only presented in the final draft prepared by the Bureau and issued on the last day of the Conference.[61]

[56] Draft Text Relating to Final Clauses, Final Act and Establishment of a Preparatory Commission, UN Doc. A/AC. 249/1008/L. 11, at 4. See also Zutphen Report, at 171.
[57] William Schabas, "The International Criminal Court: A Commentary on the Rome Statute," Oxford University Press, at 1206.
[58] Proposal submitted by the Republic of Korea, UN Doc. A/AC. 249/1998/DP.7.
[59]Preparatory Committee Final Draft, at 167.
[60] UN Doc. A/CONF.183/C.1/SR.19, para 19, 13 (Switzerland), 28 (Sweden), 34 (Hungary), 37 (United Kingdom), 35 (Greece), 39 (Spain), 41 (Chile), 43 (Slovenia), 46 (Iran), 47 (Oman), 49 (Australia), 51 (Portugal), 54 (Italy), 59 (Netherlands), 60 (Turkey), 63 (Democratic Republic of Congo); UN Doc.A/CONF.183/C.1/SR.20, paras 4 (Egypt), 8 (Gemerny), 12 (Mali); UN Doc.A/CONF.183/C.1/SR.33, para 57
[61] William Schabas (n 2)

## 2.8 PERTINENT ISSUES CONCERNING THE ICC

### 2.8.1 Jurisdiction

#### a) Preconditions to the exercise of jurisdiction

A general rule about the ICC exerting its jurisdiction on any state is established in Article 12 of the Rome Statute. The ICC may thus exercise jurisdiction over the four core international crimes of genocide, crimes against humanity, war crimes and crimes of aggression[62] committed on a State Party's territory (*ratione loci)*, extended to crimes committed on a sea vessel or aircraft registered in the country, and, furthermore, over crimes committed by its nationals based on personal *(ratione personae)* culpability anywhere. Jurisdiction may also be exercised by the Court if a non-party State has made a declaration stating that it accepts the ICC jurisdiction regarding the 'crime in question'.[63]

It is also paramount to note that the ICC does not have retroactive jurisdiction but only exercises jurisdiction *ratione temporis*- it can only hear cases alleging crimes that took place after July 1, 2002. Further if a State becomes a Party to the Rome Statute after its entry into force (after 1st July 2002), the ICC may exercise its jurisdiction only with respect to crimes committed after the

[62] Rome Statute, article 5. The ICC jurisdiction over crimes of aggression is yet to be activated. Said activation will only occur after at least 30 States Parties have ratified or accepted the amendments to the statute as were proposed at a Review Conference, held from 31st May to 11th June 2010 in Kampala, Uganda and at least two-thirds of States Parties decide to activate the jurisdiction at any time after 1st January 2017. See for this, David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 (4) LJIL 897; Resolution RC/Res6, The Crime of Aggression, Resolutions and Declarations adopted by the Review Conference, Annex 1, Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Articles 15*bis* and 15*ter* www.1cc-cpi.int/en_menus/asp/reviewconference/pages/review%20conference.aspx accessed 26th June 2016.

[63]Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) *277.*

entry into force of this Statute for that State, unless that State has made a declaration under consenting to the ICC's jurisdiction.[64]

**b) Exercise of jurisdiction**

Under Article 13, the Court may only exercise jurisdiction over the four core international crimes in three situations:

(i) Where a State Party refers a situation, in which crimes within the ICC's jurisdiction are alleged to have been committed, to the Prosecutor;

(ii) Where the UN Security Council, acting under Chapter VII of the United Nations Charter, refers such a situation to the Prosecutor;

(iii) The Prosecutor may commence an investigation *proprio motu* with regard to such crimes.

This implies that a situation referred to the Prosecutor may involve a non-party State's national. Furthermore, in the event of a Security Council referral no jurisdictional conditions exist as the 'Court is authorized by the Council to investigate a situation'.[65] It is claimed:

> *Since a Security Council resolution is binding over both the UN members and non-members, once the Council adopts a resolution authorising the Court to investigate the situation concerned, the Court is granted a universal jurisdiction over the crimes concerned'.*[66]

The upshot here is that even though a state may not be a member of the ICC as it may have successfully withdrawn from the Rome Statute, the ICC may still have power to exercise

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[65] Cenap Cakmak, 'The International Criminal Court in World Politics' (2006) 23 (1) IJWP 3.

[66] Ibid.

jurisdiction automatically over her if and when the crime of genocide, crimes against humanity and war crimes occur in her boundaries or perpetrated by its national provided that such a case is referred to the ICC by the UN Security Council. An act of withdrawal would not then prevent the ICC from exercising jurisdiction.

It is this respect that it can be said that the ICC has universal jurisdiction. This is because a general consensus exists that the Rome Statute establishes peremptory norms/ Jus Cogen.[67] Therefore, all nation states are obligated under customary international law to prevent the occurrences of the four core international crimes provided for by the Rome Statute. The ICC thus has authority to prosecute the occurrence of the four core international crimes committed anywhere, by any individual irrespective of whether or not that individual is a national of state party to the Rome Statute. Also in situations where these fore core crimes are witnessed in non-state party territory, the ICC still has authority to exercise its jurisdiction. The only qualifying condition is that in such instances, such cases are referred to the ICC by the UN Security Council.[68]

The perfect example that comes to mind in this respect is the Republic of Sudan, who even though not being a member of the Rome Statute, it became subject to the ICC jurisdiction following the referral of the situation in Dafur to the ICC.[69] A similar referral by the UN Security Council of a non-party state to the Rome Statute for investigation and prosecution in respect to the four core crimes occurred when the UN Security Council similarly referred Libya to the

[67]See generally, M. Cherif Bassiouni, *"International Crimes: Jus Cogens and Obligatio ErgaOmnes,"* Law and Contemporary Problems, Vol. 59: No. 4. 1997; Rafael Nieto-Navia, "*International Peremptory Norms (Jus Cogens) and International Humanitarian Law,"* in Man's inhumanity to man / ed. by Lal Chand Vohrah ... [et al.] pp. 595-640.2003.

[68] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter' (2007) 56 (1) ICLQ 49

[69] See UNSC Resolution 1593 of 31st march 2005

Prosecutor of the ICC for investigations into possible crimes committed against civilians by the then Muammar Gaddafi led government.[70]

### 2.8.2 The Principle of Complementarity

The principle of complementarity governs the exercise of the ICC's jurisdiction in that will only exercise its jurisdiction over a situation where there has occurred the four core international crimes when the for a state in which these crimes took place fail, or are unwilling or unable to act. The Rome Statute makes it clear that states' judicial authorities have the primary responsibility of prosecuting and punishing international crimes.[71] This should be their normal task, and the ICC can only deal with cases where national judicial systems do not prove to be up to this assignment.[72]

The rationale here is that it falls primarily to national prosecutors and courts to investigate, prosecute and try the numerous international crimes being perpetrated in within its territory. First of all, those national institutions are in the best position to do justice, for they normally constitute the *forum conveniens*, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so since the prevention and prosecution of these crimes is a peremptory norm. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behaviour. Were the ICC also to deal

[70] See UNSC Resolution 1970 of 2011

[71] The Preambular paragraph 10 of the Statute as well as Articles 1, 17 and 18 lay down the principle that the ICC is complementary to national criminal courts. These provisions create a presumption in favor of action at the level of states.

[72] A.Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', EJIL 1999, at 158.

with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload.

The sad reality is that national institutions have all too frequently proven unable or unwilling to address international crimes. The statement nonetheless usefully highlights that the Prosecutor's objective is not to "compete" with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity. The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their *obligation erga omnes* to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings. Such proceedings will provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future.[73]

However, complementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.[74]

[73] Informal expert paper: The principle of complementarity in practice, available at https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf accessed on 25th June 2016.
[74] Cassese (n 31), at 159.

To this end thus, if and when any of the four core crimes occur in a state that has thus successfully withdrawn from the Rome Statute, that state is still under obligation to investigate and prosecute the perpetrators thereof as the prevention and/or prosecution of these four core crimes is an *obligatio erga omnes* for which a state may not refuse to perform on the basis that it has withdrawn from the Rome Statute. If the State fails to investigate and prosecute these crimes, then as earlier noted the UN Security Council may take cognizance of this fact and refer them to the ICC.

### 2.8.3 State Cooperation with the ICC

When and after their arises a situation that is amenable to the ICC jurisdiction the question of how effective the ICC may act appropriately arises. It is for this reason that the Rome Statute recognizes the importance of State cooperation to the effective operation of the ICC thus an entire Part of the Rome Statute is dedicated to matters of international cooperation and judicial assistance.[75]The success of the ICC will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court,[76] collect evidence, and serve documents in their respective territories.[77] Without this assistance, the ICC will encounter great difficulty conducting its proceedings.[78]

The duty to cooperate with the ICC imposed on States Parties by the Rome Statute is twofold: a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court. Articles 86 and 88 form the foundation of the obligation on States

[75]Rome Statute of the International Criminal Court, Part IX.
[76] Ibid, article 89-92.
[77] Ibid, article 93.
[78]Valerie Oosterveld, Mike Perry, and John McManus, "The Cooperation of States with the International Criminal Court," *Fordham International Law Journal* Vol 25.2002 pages 767-839

Parties to cooperate with the ICC. According to Article 86, States Parties shall, in accordance with the provisions of the Rome Statute, cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court.

In the event of failure of states to cooperate, Article 87(7) of the Rome Statute provides for the means substantially enunciated by the ICTY in the Appeals Chamber decision in *Blaskic´ (subpoena)*[79], namely, 'the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. However, the ICC did not articulate the consequences of a Court's finding of non-cooperation by a state. The Rome Statute does not also specify what sought of countermeasures the Assembly of States Parties might agree upon, or authorize contracting states to adopt such countermeasures, or, in the event of disagreement, what countermeasures each contracting state might take. Cassese suggested that in addition, it would have been appropriate to provide for the possibility of the Security Council stepping in and adopting sanctions even in cases where the matter had not been previously referred by this body to the ICC: one fails to see why the Security Council should not act upon Chapter VII if a state refuses to cooperate and such refusal amounts to a threat to the peace, even in cases previously referred to the ICC by a state or initiated by the Prosecutor *proprio motu*. Of course, this possibility is not excluded by the Rome Statute, but it also would have been a good idea expressly to include it.[80]

As already alluded to earlier, the Rome Statute establishes *obligatio erga omnes*, as such to enable the ICC perform its mandate, as was emphasized in this part it needs all the help and corporation it requires both from member states and every other state in the world. It does not

[79]Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Appeals Chamber.
[80]Cassese (n 31), at 165-166

matter is you are non-party to the Rome Statute, you must corporate because failure to do so would constitute violation of *jus cogen*.

## 2.9 APPLICATION OF THE ROME STATUTE BY KENYA

Having signed the Rome Statute on 11th August 199 and thereafter depositing an instrument of ratification to the UN General Secretary on 15th March 2005, Kenya effectively became a member of the ICC. Kenya took a further step to this by domesticating the Rome Statute by enacting the International Crimes Act (ICA), which came into force on 1 January 2009.[81] The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity[82], as it gives Kenyan courts jurisdiction to prosecute these crimes; provides the foundation for Kenyan authorities to provide the International Criminal Court (ICC) with requested information, transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise cooperate with the ICC; and lays down provisions permitting the ICC to operate within the country.[83]

Further Article 2 of Constitution of Kenya 2010 provides for acceptance of international law as Kenya law. However, such application of international law has been qualified by the constitution to apply in two situations. Firstly, the general rules of international law form part of the law of Kenya.[84] The implication of this is that the Constitution empowers Kenyan courts to recognize

[81] Available at https://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf accessed on 13th February 2016.
[82] See Rome Statute, Article 57 and 53. This principle has the effect that states have jurisdiction and the primary obligation to investigate, punish and prevent genocide, crimes against humanity, war crimes and the crimes of aggression. Thus the ICC will only step in when national judicial systems fail and it can be demonstrated that the State is either unwilling or unable to bring perpetrators to justice.
[83]Thomas Obel Hansen, "Prosecuting International Crimes in Kenyan Courts?" Paper presented at The Nuremberg Principles 70 Years Later: Contemporary Challenges, November 21, 2016, at 1.
[84]Constitution of Kenya 2010, Article 2 (5).

universally accepted customary rules of international law without having to look for justification outside the Constitution. It has been argued by various scholars that the international crimes provided for under the Rome Statute have risen to the level of *jus cogens* and thus constitute *obligation erga omnes* which are inderogable.[85] For this reason then the Rome Statute in its prohibition of these crimes would automatically apply in Kenya by virtue of article 2 of the Constitution of Kenya. Secondly, any treaty or convention ratified by Kenya form part of the law of Kenya under the Constitution.[86] This means that when Kenya ratifies any treaty in accordance with the rules provided under the Treaty Making and Ratification Act[87], ratification will not only create legal relations between Kenya and other state parties of that treaty but it also and more significantly so binds Kenya at the domestic level. As already been alluded to, Kenya ratified and domesticated the Rome Statute and thus by the Constitution of Kenya, it is recognized as part of Kenyan law.

## 2.10 CONCLUSION

After 50 years of debate, the international community finally agreed on a Statute that paved way for the establishment of an international court, the ICC, for the persecution of the most heinous crimes namely; genocide, crimes against humanity, war crimes and the crimes of aggression.[88] The aim here was that the ICC was meant to soar with the loftiest of ideals in grappling with basest of human acts. This constituted a benchmark in the progressive development of

[85]See generally, M. Cherif Bassiouni, *"International Crimes: Jus Cogens and ObligatioErgaOmnes,"* Law and Contemporary Problems, Vol. 59: No. 4. 1997; Rafael Nieto-Navia, "*International Peremptory Norms (Jus Cogens) and International Humanitarian Law,"* in Man's inhumanity to man / ed. by Lal Chand Vohrah ... [et al.] pp. 595-640.2003.
[86]Constitution of Kenya, 2010, Article 2 (6).
[87]No. 45 of 2012, Laws of Kenya.
[88] Rome Statute, Article 5

international human rights. Ideally this is the essential purpose for which the Statute was adopted.

From the analysis of the history of the adoption of the Rome Statute, despite it being a human rights treaty the drafters and the nations participating in the negotiations intended it to have a withdrawal clause. A look at the discussions of the Preparatory Committee reveals that there was no much deliberation on the issue of withdrawal and this only shows a consensus position was predominately taken by all parties regarding the withdrawal clause. This is further demonstrated by the ease with which State parties adopted article 127 only but tinkering with the wording. However, the next chapters will shed more light with regards to the effect of article 127 both in terms of the substantive and procedural legal framework on withdrawal from the Statute as well as the impact of withdrawing from the Statute

# CHAPTER 3: THE LEGAL FRAMEWORK RELATING TO WITHDRAWAL FROM THE ROME STATUTE

## 3.1 INTRODUCTION

The international legal system is grounded on a fundamental principle: *pacta sunt servanda*, that is, treaties must be obeyed.[1] States, or more precisely the government officials who represent their interests at diplomatic negotiating conferences, are masters of their treaty commitments. No state can be forced to accept a treaty without its consent, nor can it be compelled to join an intergovernmental organization against its will. Once a state has assented to a treaty and has successfully shepherded it through its national approval process, it must observe its treaty commitments in good faith.[2]

An old adage saying that no one likes to talk about divorce before or during a wedding. Yet that is, in effect, precisely what States do when they negotiate new treaties. Embedded at the back of most modern international agreements are provisions that describe procedures for the parties in a treaty to end their relationship.[3] These provisions call into question international law's unequivocal command that states must either obey treaties or cooperate in abrogating or revising them. Such provisions are often referred to as denunciation or withdrawal clauses. In addition, not fewer than thirteen articles of the 1969 Vienna Convention on the Law of Treaties (VCLT) contain termination, denunciation, or withdrawal rules that apply when States do not negotiate

[1]See Vienna Convention on the Law of Treaties, article 26, May 23, 1969, 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").
[2]Laurence R. Helfer, "Exiting Treaties," Virginia Law Review, Vol. 91. 2005 at pages 1579-1647.
[3] LR Helfer, "Terminating Treaties," Duke Law Scholarship Repository available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=facaccessed on 26th June 2016.

treaty-specific rules on these topics.[4] Distilled to their essence, exit clauses create a lawful, public mechanism for a state to withdraw from a treaty. Withdrawal is fundamentally a unilateral act as it does not require the consent or approval of other states and may often be effectuated simply by providing notice to the other parties.[5]

This chapter seeks to offer an overview of the international law rules governing exit from multilateral and bilateral treaties, including key provisions of the 1969 Vienna Convention on the Law of Treaties. However, in consonance with the theme of this study, particular focus will be accorded to the legal substantive and procedural provisions on withdrawal from the Rome Statute and by extension denunciation of the exercise of the jurisdiction of the ICC. The chapter will also seek to offer the basis for which Kenya and the entire African Union are justifying their intensions to withdraw from the Rome Statute.

## 3.2 GENERAL INTERNATIONAL LAW PROVISIONS ON WITHDRAWAL

Denunciation and withdrawal are used interchangeably to refer to a unilateral act by which a nation that is currently a party to a treaty ends its membership in that treaty.[6] In the case of multilateral agreements, denunciation or withdrawal does not affect the treaty's continuation in force for the remaining parties.[7]For bilateral agreements, in contrast, denunciation or withdrawal

[4]Vienna Convention on the Law of Treaties, Articles 42–45, 54–56, 65–68, 70–71.

[5]Laurence R. Helfer, "Exiting Treaties," Virginia Law Review, Vol. 91. 2005 pages 1579-1647, at 1582.

[6]UN Office of Legal Affairs, Final Clauses of Multilateral Treaties Handbook (UN Sales No E04V3 2003) ('Final Clauses Handbook') 109 ('The words denunciation and withdrawal express the same legal concept'). Anthony Aust asserts that 'although the term denunciation is sometimes used in relation to a multilateral treaty, the better term is withdrawal, since if a party leaves a multilateral treaty that will not normally result in its termination'. A. Aust, Handbook of International Law (CUP, Cambridge 2010), at 93. Although there is much to recommend this view, in fact multilateral agreements use both terms interchangeably.

[7]There are a number of exceptions. If a multilateral agreement, such as the Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996, not yet in force) [1996] 35 ILM 1439, Art XIV(1), requires a particular State to join the agreement as a condition of its entry into force and that State subsequently withdraws from the treaty, 'it

by either party results in the termination of the treaty for both parties. The termination of a multilateral agreement occurs when the treaty ceases to exist for all States parties.[8]

As already noted, few treaties last forever and in order to prevent the law from being rigid, some provisions are made for the termination of treaties.[9] This is what informed the adoption of Part V of the 1969 Vienna Convention on the Law of Treaties (VCLT). Vide Article 42 the VCLT sought to protect the security of legal relations and provided that the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of that treaty or of the VCLT.

It is also useful to situate denunciation and withdrawal within the international framework for which they are chiefly regulated, this being the VCLT. A treaty, which contains no provision for denunciation or withdrawal, is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal; or a right of denunciation or withdrawal may be implied by the nature of the treaty.[10]In General Comments No. 26 of 1997, the UN Human Rights Committee, noting that the international Covenant on Civil and Political Rights had no provision for termination or denunciation, concluded on the basis of the Vienna Convention provisions, that the parties had not intended to admit of such a

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can be assumed that . . . the treaty would be terminated'. ME Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (MartinusNijhoff, Leiden 2009), at 694. Termination also occurs when a multilateral treaty specifies that it shall no longer be in force if denunciations reduce the parties to below a specified number. Eg Convention on the Political Rights of Women (adopted 20 December 1952, entered into force 7 July 1954) 193 UNTS 135, Art 8(2) (providing that the convention 'shall cease to be in force as from the date when the denunciation which reduces the number of Parties to less than six becomes effective'). However, the default rule in VCLT Art 55 allows the treaty to continue in force unless it specifies a minimum number of required parties.

[8]Villiger (n 3) 685.

[9] Prof Francis D. P. Situma, "Treaty-making and Enforcement," A presentation made for the Council of Legal Education/Kenya School of Law Training Programme on Treaty-Making. International State Obligation and Enforcement held at Kenya School of Law, Nairobi on September 6-10th 2010, at 29

[10]VCLT, Article 56. See examples given by J. Brierly, "The Law of Nations," 6thedn., Oxford , 1963, at 331: treaties of alliance and commerce. See also Nicaragua v US (1984) ICJ Reports, at 392, 429; 76 ILR, at 1, 131.

possibility. The Committee based itself on the fact that states parties could withdraw their acceptance of the right of inter-state complaint, while the First Optional Protocol, concerning the right of individual communication, provided in terms of denunciation. The Committee also emphasized that the Covenant, as an instrument codifying universal human rights, was not the type of treaty, which, by its nature, implies a right of denunciation.[11] In any event a party intending to denounce or withdraw from such a treaty must give not less than twelve months' notice of its intention.[12] However, under Article 56, a right to denunciation or withdrawal can never be implied if the treaty contains an express provision regarding denunciation, withdrawal or termination.[13]

When a treaty makes no provisions for termination or withdrawal it may be much more difficult for a party wishing to invoke denunciation or withdrawal. A party will not be able to withdraw from a treaty by transferring territory or establishing a boundary. The same may apply in the case of codification treaties, which, in many cases, reflect rules of customary law, and so withdrawal might make little or no legal difference.[14] Other treaties, which are unlikely to be capable of withdrawal, are treaties of peace and disarmament and those establishing permanent regimes. Besides, as already demonstrated the UN Human Rights Committee posited that most universal human rights treaties do not provide for withdrawal.

[11] A/53/40, annex VII

[12]VCLT Article 56(2). Whether these VCLT rules constitute customary international law is an open question, but at least one scholar insists they have such status. See eg Villiger (n 3), at 689 (discussing customary law basis of VCLT Article 54(b)); ibid 705 (noting it was 'doubtful' if Article 56 reflected customary international law at the time of the VCLT's adoption, but contending that it has since 'generated a new rule of customary law').

[13] Prof Francis D. P. Situma (n 1), at 30.

[14] One may arguethat the Rome Statute by its very nature and purpose falls under tis category

### 3.2.1 The Legal Effects of Withdrawal

In addition to providing default exit rules for treaties that lack express exit provisions, the VCLT sets forth important principles concerning the legal consequences of exit. Article 70 provides that 'the termination of a treaty under its provisions or in accordance with the present VCLT releases the parties from any obligation further to perform the treaty'.[15] Termination does not, however, 'affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to' the date that the termination takes effect.[16] Nor does it 'impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty' [17] — an implicit reference to customary international law. These limitations as contained in article 70 are equally applicable to a State that unilaterally withdraws from or denounces a multilateral treaty.[18]

These rules function as a deterrent to exit. As explained below, the overwhelming majority of denunciation and withdrawal clauses require prior notice to other parties to the treaty. Notice is also required when a State asserts a basis for terminating or withdrawing from a treaty pursuant to the VCLT.[19] During the notice period, the legal obligations of all States parties—including the

[15]VCLT Art 70(1)(a).
[16]Ibid Art 70(1)(b).
[17]Ibid Art 43.
[18]Ibid Arts 43, 70(2). A few multilateral human rights and humanitarian law conventions reiterate that an exiting State's obligations continue until the date that a denunciation or withdrawal takes effect. Eg American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 78(2). The drafters of other multilateral agreements, accepting Art 70's invitation to contract around the VCLT default rules, expressly indicate which obligations survive a State's unilateral exit. Eg UN Convention on the Law of the Sea (10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, Art 317(2) (providing that a denunciation does not affect the 'financial and contractual obligations' accrued while a State was a party).
[19]VCLT Art 65(1) ('A party which, under the provisions of the present Convention, invokes . . . a ground for . . . terminating [a treaty], withdrawing from it or suspending its operation, must notify the other parties of its claim'); see also ibid Art 67 (requiring that notices of withdrawal, denunciation, or termination be in writing and be made by officials with actual treaty-making powers or those possessing.

nation that seeks to withdraw from or terminate the agreement—continue unabated. States also remain responsible for any breaches that occur prior to or during the notice period, a responsibility that survives the State's withdrawal or the treaty's end.[20] Taken together, these provisions restrict States from using exit to avoid accountability for past violations of international law. They also discourage precipitous and opportunistic withdrawals in which a State seeks to exit and then immediately violate a rule that it previously accepted as binding.[21]

### 3.3 WITHDRAWING FROM THE ROME STATUTE

The substantive and procedural legal basis for withdrawal from the Rome Statute is provided for in its article 127 (1). Simply a State Party may, by written notification addressed to the depositary, the Secretary-General of the United Nations, withdraw from the Rome Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date. However it is important to note that the Rome Statute does not indicate whether a notice of withdrawal can itself be withdrawn after it has been issued and thus returning the State to ordinary status as a party.

Article 121 (6) of the Rome Statute contemplates immediate withdrawal by a State following any amendment to this statute that it does not accept. If an amendment is adopted under Article 121(4) a state may withdraw from the Statute at any time within one year after entry into force of

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full powers); ibid Art 68 (providing that notice of withdrawal, denunciation or termination may be revoked at any time before taking effect).

[20]Eg *Roodal v Trinidad and Tobago*, Case 12.342, Inter-Am Comm'n HR 89, OEA/ser L/V/II114, doc 5 rev (2001) http://cidh.org/annualrep/2001eng/TT12342.htm accessed on 18th August 2016(concluding that 'notwithstanding Trinidad and Tobago's denunciation of the Convention [on 26 May 1999], the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to' the date the denunciation became effective as well as over 'acts taken by the State prior to [that date] even if the effects of those acts continue or are not manifested until after that date').

[21]LR Helfer, 'Exiting Custom: Analogies to Treaty Withdrawals' (2010) 21 Duke J Comp & Intl L 65, 78–9.

such amendment. This provision is an exception from the general right to withdraw under Article 127 (1), which takes effect only after one year of the notification.[22] Article 121 (6) specifies that withdrawal pursuant to amendment of the Statute occur 'notwithstanding paragraph 1 of article 127, but subject to paragraph 2 of article 127, by giving notice not later than one year after the entry into force of such amendment.

The procedure for withdrawal from the Rome Statute is thus very state forward. All a withdrawing state needs to do is to ensure that they must first comply with their internal laws in respect withdrawing ratification from a treaty. For instance in the Kenyan context a motion such as the one that was moved by Mr. Duale[23] outlining an intention to introduce an amendment bill that would ideally be for the sole purpose of repealing the International Crimes Act.[24] Once the ICA is successfully repealed by Parliament through the amendment Bill fully metamorphosed as an Amendment Act following assent to it by the President, Kenya would fully have unincorporated the Rome Statute from her law.[25] It is only then that the government of Kenya may thus proceed to notify the UN Secretary General of Kenya's intention to withdraw from the Rome Statute.

Ideally the notification would contain the specific reasons why Kenya would seek said withdrawal. However, the statute is silent with regards to whether this is a mandatory requirement. However, from a reading of article 70 of the VCLT, since the Rome Statute

[22] Mark Klamberg, Case Matrix Network: Commentary Rome Statute-Part 13, available at http://www.casematrixnetwork.org/index.php?id=347#4040 accessed on 26th June 2016.
[23] See chapter 1, at 8.
[24] See National Assembly of Kenya Standing Order, 2013, Part XII.
[25] However, to say that the Rome Statute would not be able to apply in Kenya even after a successful repealing of the ICA would be a fallacy because as was discussed in chapter 2, the Rome Statute being an international instrument ascribing *jus cogen* in so far as the prevention and prosecution of the four core international crimes is concerned would still apply in Kenya by dint of article 5 of the Constitution of Kenya, 2010.

provides for a state right to unilaterally withdraw, it is immaterial what reason are provided for once a state submits its notification for withdrawal, said notification cannot be refused. Secondly the Notification should indicate the date of withdrawal if said date is later than one year after date of receipt, otherwise withdrawal effectively occurs one year of the UN Security Council receiving notification of withdrawal.

Concerning any existing obligations, a withdrawing state may have at the time of withdrawal, Article 127 (2) continues to provide that:

> *"A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."*

In this regard then article 127 (2) sets out the general principle that the obligations on the State that exists at the time of withdrawal remains in force and are unaffected. Specifically, three types of obligations are provided for under this paragraph. Firstly, this paragraph refers to 'financial obligations, which may have accrued'. These will consist of the regular assessments imposed upon State Parties by the Assembly of parties in accordance with article 115 (a) of the Rome Statute. Secondly, this paragraph indicates that withdrawal is without prejudice to cooperation with the ICC about criminal investigations and proceedings in relation to which the withdrawing

State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective'. Such obligations are set out in part IX of the Rome Statute. They include a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.[26] Further there is an obligation to arrest and surrender persons to the Court to whom warrants of arrest have been issued. This also includes a state's obligation to authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State.[27]

The effect of this provision with regards to existing obligations as at the time of withdrawal is that these obligations must be performed by a state having so withdrawn from the Statute as these obligations will remain outstanding until that states fully satisfies them. Additionally, this provision also covers obligations that arise after the State has formulated its declaration of withdrawal but before the declaration becomes effective, that is a year after receipt of that states notification of withdrawal by the United Nations Secretary-General.

Finally, article 127 (2) provides that withdrawal shall not 'prejudice in any way the continued consideration of any matter which was already under consideration by the ICC prior to the date on which the withdrawal becomes effective'. It might be contended that 'any matter' applies to

[26] Rome Statute, article 86. Specifically this these includes but not limited to, the identification and whereabouts of persons or the location of items that are relevant to an issue before the Court; the taking of evidence, including testimony under oath and the production of evidence, including expert opinions and reports necessary to the Court; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; facilitating the voluntary appearance of persons as witnesses or experts before the Court; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the provision of records and documents, including official records and documents; the protection of victims and witnesses and the preservation of evidence; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court. See for this ibid, article 93.

[27] Ibid, article 89

cases properly before the Chambers of the Court. Even more expansively it may mean that a matter is before the court simply because the Office of the Prosecution (OTP) has applied to the Pre-Trial Chamber for authorization to begin an investigation in accordance with article 15 of the Rome Statute.[28] As such once the court is properly seized with a matter, it is irrelevant that the state for which the crimes occurred has subsequently withdrawn from the State or that an accused or a person of interest who is under investigation by the OTP comes from a state that has withdrawn from the Statute, such states or persons will still be the subject of the court's jurisdiction.

The rationale here is simple; firstly criminal responsibility is bore in persona.[29] Therefore, it is the individual perpetrator of the any of the four core international crimes that is under trial before the ICC and not the State in which these crimes have been committed or the State to which that individual is a national.[30] Secondly and more importantly this provision is pursuant to the overriding aim of the Rome Statute that "the most serious crimes of concern to the international community as a whole must not go unpunished."[31] In this regard the ICC was created to realize the determination of the international community "to put an end to impunity for the perpetrators of these crimes, and thus to contribute to the prevention of such crimes."[32] If a state or person whose matter is before the court is allowed to escape liability on the basis that the state to in which the crimes took place or that that individual's state is no longer a party to the Statute, this would in the very least seen to be condoning impunity. It then leaves questions about subjects that are not mentioned. However, this study will not impose other obligations not provided for in

[28] William A Schabas, "The International Criminal Court: A Commentary on the Rome Statute (n 16), at 1207
[29] Rome Statute article 25
[30] See for a commentary on individual criminal responsibility; G. Werle and J. Bung, "International Criminal Responsibility in Article 25 ICC Statute," Journal of International Criminal Justice, Vol 5, Issue 4, pp. 953-975 (2007).
[31] Rome Statute, preamble paragraph 4
[32] Ibid, paragraph 5.

this paragraph and will leave any difficulties of interpretation raised by article 127 (2) to ventilation at a different forum.

However, it must be noted here that there may exist some possible issues concerning withdrawal that are not adequately addressed in article 127. For example, it is uncertain what would happen to a prisoner serving a sentence in a State Party that withdraws from the Rome Statute. Ideally this would be seen to be duly provided for under the principle that this obligation to house a prisoner arose during that states membership and thus continues until the prison term for which the convicted individual was sentenced ends, however the role of states in enforcement of sentences of imprisonment is based on the doctrine of consent. This is to say that prisoners will serve their sentences in states that have indicated their willingness to accept sentences persons.[33] However said consent may be accompanied by conditions, that is, at the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court.[34] Problems would then arise if said conditions do not include a reversal of the consent of the enforcement state when it withdraws from the Statute. If the enforcement state after it has successfully withdrawn from the statute is still mandated to house a sentenced person against its wishes, would this not be an impediment to principle of consent? I think it is.

Related to this is the question of what happens to a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar who hail from a withdrawing state. Does withdrawal from the Court by a State of which these officers are nationals render them unable to serve? [35] This is a legitimate question because the ICC officials including judges, the OTP and staff in the registries

[33] Ibid, article 103 (1) (a)
[34] Ibid, article 103 (1) (b)
[35] William A Schabas, "The International Criminal Court: A Commentary on the Rome Statute (n 16), at 1207

are chosen only from state parties to the Rome Statute.[36] The understanding would be that they would be allowed to serve their existing terms of service as withdrawal of a state for which these officers come from is not a valid ground for their removal from office as is enshrined by article 46 of the Rome Statute.[37]

## 3.4 WITHDRAWAL FROM THE ROME STATUTE BECAUSE BIAS AND UNFAVOURABLE RULES

Withdrawal might arise if a State loses confidence in the ICC and in this case, questions of the probable consequences of withdrawal will be of lesser importance. A State might also propose to withdraw because it finds itself or its leader, to have been targeted by prosecutions.[38] Obviously, the Rome Statute needs to protect the ICC from the possibility of withdrawal as a means of avoiding the jurisdiction.[39]

This study argues that Kenya's act of withdrawing from the Rome Statute is a means of stopping the ICC from exerting its jurisdiction in Kenya. This is because the motion that was introduced by Mr. Duale[40] was particularly worded to the effect that the result of any withdrawal by Kenya will end any form of cooperation with the ICC. Indeed, the effect of any withdrawal from the Rome Statute will free Kenya from any rights and obligations accruing to her vide the Rome Statute save for those obligations pre-existing any such withdrawal. It will also have the

[36] See ibid, articles 36 (3) (a), (4) (b); 42; 43; 44.

[37] A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office in cases where that person: (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or (b) Is unable to exercise the functions required by this Statute.

[38] William A Schabas, "The International Criminal Court: A Commentary on the Rome Statute (n 16), at 1207

[39] Ibid,

[40] See generally chapter 1 and for an indepth discussion in chapter 3.

principal effect of ending any rights of the ICC in terms of its exercise as regards the exercise of its jurisdiction in Kenya save for when after withdrawal Kenya consents to the exercise of the ICC's jurisdiction or a situation arises in Kenya that leads the UN Security Council to refer a issue concerning Kenya to the ICC.

Even before its existence, there was a nagging perception that the International Criminal Court would be selective, riddled with statutory limitations, and would potentially in majority of the time overreach its mandate.[41] In practice, critiques have arisen in relation to almost each situation.[42] The chief proponent of this criticism emanated from the USA. Among other concerns, U.S. Administrations have concluded that the Rome Statute created a seriously flawed institution that lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.[43] These concerns led President Bill Clinton to urge President George W. Bush not to submit the treaty to the Senate for advice and consent necessary for ratification.[44] U.S. criticism of the court has also focused on the fairness and even the quality of Judges. Apparently, the demand by the United States that judges have both criminal trial and international law experience as a minimum requirement was rejected by the delegates deliberating on the Rome Statute as too high a bar to meet and, therefore, the U.S. does not

[41] See more at: http://blog.oup.com/2015/11/criticisms-international-criminalcourt/#sthash.sOXWK1SL.dpuf accessed on 17th August 2017.
[42] Ibid.
[43] Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," (August 2009), available at http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court accessed on 16th August 2016.
[44] Ibid.

consider the court appropriately staffed with qualified judges.[45] As a result, the US declined to ratify the Rome Statute and formally President Bush felt it necessary to "un-sign" the Rome Statute by formally notifying the U.N. Secretary-General that the U.S. did not intend to ratify the treaty and was no longer bound under international law to avoid actions that would run counter to the intent and purpose of the treaty.

Reading through various documents on ICC, especially the 1998 Senate subcommittee hearing,[46] one gets the impression of clear disdain by U.S. policymakers of the possibility that Americans would subjected to judges from countries possibly biased against American citizens and possibly not fully qualified. There is also concern about the wide-ranging powers endowed on the prosecutor who is "not accountable to any government or institution." Another good example of a country that is concerned about the politicization of ICC is Israel. After initially agreeing to be a party to ICC for a short time, Israel withdrew its support for the Rome Statute because of concerns that "political pressure on the court would lead it to reinterpret international law or to "invent new crimes."[47] Like the United States, Israel considers the "powers given to the prosecutor as excessive and the geographical appointment of judges as disadvantaging Israel."[48] Similarly, China and India have categorically refused to cede to the Rome Statute and have expressed concern over various issues, including powers of the prosecutor and the court's jurisdiction, among others. Both of these countries fear that the powers granted to the prosecutor

[45] **https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa** accessed on 16th August 2016.

[46]Report of the Hearing of the Subcommittee on International Operations of the Committee on Foreign Relations United States Senate, 115th Congress, "S A U.N. International Criminal Court in the U.S. national interest?" available at https://www.gpo.gov/fdsys/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdfaccessed on 16th August 2016.

[47] https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa accessed on 16th August 2016

[48] Ibid

are too broad and may lead to subjectivity and arbitrariness in the way that investigations and prosecutions are conducted. India has also expressed concern that the Rome Statute made the ICC subordinate to the U.N. Security Council and "thus, in effect to its permanent members and their political interference, by providing it the power to refer cases to the ICC and the power to block ICC proceedings."[49]

As of today, African countries make the biggest block of state members to the Rome Statute. 124 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.[50]The ideal expectation is that the high numbers of African State members of the Rome Statute automatically translate into tremendous support for the ICC in Africa. The reality, however, is that there is an escalating trend of discord between Africa and the ICC, and, therefore, the high number of Rome Statute ratifications from the African States point to quantitative rather than qualitative support for the Court particularly within the African political circles.[51] The current turbulent relationship between the International Criminal Court and Africa was sparked off in July 2008 when the Prosecutor applied for a warrant of arrest for Omar Al Bashir, the sitting President of the Republic of the Sudan.[52] Al Bashir was charged on the basis of individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan.[53] Indeed this intensified the perception of bias in

[49]Ibid.

[50] https://asp.icccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspxaccessed on 16th August 2016

[51]Africa and the International Criminal Court: Mending Fence, Avocats Sans Frontières (July 2012), at 7.

[52]

[53]*The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09: The first warrant for arrest for Omar Hassan Ahmad Al Bashir was issued on 4 March 2009, the second on 12 July 2010. The suspect is still at large, see

the practice of the Court such that the repercussions of the issuance of the Bashir arrest warrant continue to reverberate throughout the African leadership circles to date. This is majorly because this move challenged the notion of presidential immunity which hitherto formed the core of political discourse and was viewed by many as unchallengeable. This was further undermined with the current sitting President of Kenya and his Deputy having to appear at the ICC for their respective trials.

There has also been accusation by African States that the ICC has only targeted exclusively African states and national despite the four core international crimes being witnessed in other areas of the world. So far, the International Criminal Court opened investigations into ten situations: the Democratic Republic of the Congo; Uganda; Central African Republic I and II; Darfur, Sudan; Kenya; Libya; Côte d'Ivoire; Mali; and Georgia.[54] The Office of the Prosecutor (OTP) is conducting preliminary examinations in nine matters in Afghanistan, Burundi, Colombia, Guinea, Iraq, Nigeria, Palestine, Registered vessels of Comoros, Greece & Cambodia and Ukraine.[55] Additionally, the OTP also conducted preliminary examinations in three other countries and closed those examinations with a decision not to investigate: Honduras, Republic of Korea and Venezuela.[56]

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https://www.icc-cpi.int/darfur/albashir accessed on 16th August 2016: of these, the ICC's Pre-Trial Chambers publicly indicted 39 people. The ICC has issued arrest warrants for 31 individuals and summonses to eight others. Seven persons are in detention. Proceedings against 25 are ongoing: nine are at large as fugitives, four are under arrest but not in the Court's custody, two are in the pre-trial phase, seven are at trial, and three have been convicted (all Africans- Jean-Pierre Bemba, Germain Katanga, Thomas Lubanga Dyilo). One has been acquitted **(**Mathieu Ngudjolo Chui), four have had the charges against them dismissed (Callixte Mbarushimana, Bahr Idriss Abu Garda, Henry Kosgei, Mohammed Hussein Ali); one has had the charges against them withdrawn before trial (Francis Muthaura), one has had his case declared inadmissible (Abdullah Senussi), three have had proceeding against them terminated with no prejudice to the right of OTP to re-prosecute (Uhuru Kenyatta, William Ruto, Joshua Sang) four have died before trial (Selah Jerbo, Muammar Gaddafi, Okot Odhiambo, RaskaLukwiya).

[54] https://www.icc-cpi.int/pages/situations.aspx accessed on 16th August 2016

[55] https://www.icc-cpi.int/pages/preliminary-examinations.aspxaccessed on 16th August 2016

[56] Ibid.

It is on this basis of the fore-going that Kenya seeks to justify their withdrawal from the Rome Statute and effectively cut ties with the courts. However, since no other member state has ever successfully exercised the withdrawal clause under article 127 of the Rome Statue it is seen in many quarters that any such withdrawal by Kenya if successfully executed will offer not only a case study on how countries can withdraw from the Rome Statute but also be used by other African states to collectively withdraw from the ICC in masses.

## 3.5 CONCLUSION

No matter the reason Kenya or any state might have before exiting the Rome Statute, it is paramount to strictly adhere to the substantive and procedural rules provided under the statute for withdrawal. Averments and the passage of motions in parliament showing an intension to withdraw from the Rome Statute are not substantive withdrawal measures. They are as I may say the threats of a blunt knife and cannot in any way severe Kenya's obligations under the Rome Statue or its obligations to the ICC.

Ideally also as already alluded to and will be shown in the next chapter, even though the Rome Statute contains a provision for the exit of member states, such withdrawal will not affect any pre-existing obligations the withdrawing state has in respect to the court. Further it withdrawal is further diminished because the purposes for which the Rome Statute were adopted have grown to achieve the status of *jus cogen* and as such even when a state withdraws as such, the obligations enshrined in the Rome Statute for the prevention and prosecution of the four-core international heinous crimes of Genocide, crimes against humanity, war crimes, and the crime of aggression would still subsist. This situation will persist in the event Kenya or any other country withdraws from the Rome Statute.

# CHAPTER FOUR: LEGAL AND DIPLOMATIC IMPLICATIONS OF WITHDRAWAL FROM THE ROME STATUTE: A CASE OF KENYA

## 4.1 INTRODUCTION

This chapter provides an analysis of the legal and diplomatic implications of withdrawal from the Rome Statute by using Kenya as a case study. It also demonstrates the consequences that may accrue to Kenya should she proceed and successfully withdraw from the Rome Statute. In analyzing any such consequences, the chapter will draw historical lesson from other countries that withdrew from other treaties (human rights treaties), which like the Rome Statute provide for *obligatio erga omnes*. The driving argument here will be that because of the significance of the Rome Statute and by extension the ICC, any act of withdrawal will be detrimental to a State's reputation in the international community.

## 4.2 KENYA'S RELATIONSHIP WITH THE ICC

Before we proceed to the issues of the consequences of withdrawal from the Rome Statute, it is prudent to first analyze the nature of Kenya's relationship with the ICC and the effect the Rome Statute has had in Kenya. This is important because the study intends to discuss the issues of the legal and diplomatic consequences of withdrawal using Kenya as a case study.

In the previous chapter it was shown that Kenya ratified the Rome Statute on 15 March 2005.[1] There was a further attempt by Kenya to formalize this ratification when she domesticated the Rome Statute by adopting the International Crimes Act (ICA), which came into force on

[1] https://www.icc-cpi.int/kenya accessed on 11th September 2016.

1st January 2009.[2] The ICA provides the foundation which gives effect to the Rome Statute within Kenyan law, including the principle of complementarity[3], as it gives Kenyan courts jurisdiction to prosecute these crimes; provides the foundation for Kenyan authorities to provide the International Criminal Court (ICC) with requested information, transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise cooperate with the ICC; and lays down provisions permitting the ICC to operate within the country.[4]

Perhaps at the time of ratification it was never envisioned that the provisions of the Rome Statute would affect Kenya soon thereafter. At the time of ratification, Kenya was protected by the Statute's complementarity rule: it made the ICC a court of last resort able to intervene in a state's internal affairs only if that state was "unable or unwilling" to prosecute genocide, war crimes or crimes against humanity.[5] Furthermore, the Statute could not be applied retroactively to times before ratification. Hence there were no worries that the ICC would prosecute the then President Moi and his supporters for instigating the violent "tribal clashes" during the earlier 1992 and 1997 elections.[6]

In the parliamentary debates of the time and among civil society activists, one finds no concern that any Kenyan would ever be hauled before the ICC.[7] Instead, the focus was on delays in ratification and on reconciling the parts of the Kenyan constitution that gave immunity to the

[2] Act No. 16 of 2008, section 1

[3] See Rome Statute, Article 57 and 53. This principle has the effect that states have jurisdiction and the primary obligation to investigate, punish and prevent genocide, crimes against humanity, war crimes and the crimes of aggression. Thus the ICC will only step in when national judicial systems fail and it can be demonstrated that the State is either unwilling or unable to bring perpetrators to justice.

[4] Thomas Obel Hansen, "Prosecuting International Crimes in Kenyan Courts?" Paper presented at The Nuremberg Principles 70 Years Later: Contemporary Challenges, November 21, 2016, at 1.

[5] Rome Statute of the International Criminal Court, Articles 17, 18.

[6] Susanne D. Mueller Kenya and the International Criminal Court (ICC): politics, the election and the law, Journal of Eastern African Studies, 8:1, 25-42, DOI:10.1080/17531055.2013.874142 (2014), at 29

[7] Republic of Kenya, National Assembly Debates, 4 November 2001, 3093–4; 20 November 2001, 3198; 1 October 2003, 2703–5.

President, something the Rome Statute prohibited.[8] Thus, ratifying the Rome Statute seemed unthreatening to the political elite of the time. The 2002 Elections in which Mr. Mwai Kibaki was elected overwhelmingly, appeared to signal a new era in which human rights would be respected, while Kenyan human rights groups and parts of the Government of Kenya (GoK) sought to counter the American Service Members Protection Act of 2002, which threatened countries that ratified the Rome Statute with a withdrawal of military and other US aid.[9]

Just 3 years following the ratification of the Rome Statute by Kenya, violence broke following the disputed elections that were held in December 2007 precipitating in serious human rights violations. There were failed attempts to set up a local mechanism to prosecute those responsible for the violation of human rights to prevent the situation being referred to the ICC.

Indeed, Kenyan Parliament tried but failed on several occasions to pass a law establishing a Special Tribunal to try the supposed suspects of post-election violence. This culminated in the shooting down of both the Special Statute Tribunal for Kenya Bill, 2009 and the Statute Bill, Constitution of Kenya (Amendment Bill) 2009 on 12th February 2009.[10] The situation was further worsened by a group of hard-line members of parliament who only wanted the Kenya situation to be taken to the ICC. This culminated in the famous quote by William Ruto, then a Member of Parliament-*Don't be vague, go to the Hague*.

[8]Hansen, Thomas Obel. "The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and their Implications for the Future of International Justice." Australian Journal of Human Rights 18, no. 2 (2012): 187–217.

[9]Mokaya, Julius. "Kenya: Ratify Hague Court Treaty Kenya Urged." The Standard January 21, 2005.

[10]http://www.standardmedia.co.ke/article/1144006487/parliament-shoots-down-special-tribunal-bill accessed on 11th September 2016; Kenya seeks options over trial of post-election suspects, 31st January 2009, available at http://en.people.cn/90001/90777/90855/6582379.pdfaccessed on 11th September 2016. The Special Statute Tribunal for Kenya Bill, 2009 sought to establish the Special Tribunal while the Constitutional of Kenya (Amendment Bill) 2009 was meant to anchor it in the Kenyan Constitution

Eventually six Kenyans were paraded in front of the ICC to answer charges of perpetrating crimes against humanity. These six were quickly tagged as the *"Ocampo Six"* by the local media.[11] Those named were: Uhuru Muigai Kenyatta (then the Deputy Prime Minister and Minister of finance), Francis Kirimi Muthaura (then the head of public service and cabinet secretary) and Major General Mohammed Hussein Ali (then the commissioner of the Kenya Police) on one side; William Samoei Ruto (then the minister for higher education, science and technology) Henry Kiprono Kosgey (then the minister for industrialization) and Joshua Arap Sang (a former radio presenter at KASS FM) on the other.[12] The Pre-Trial Chamber II on 23rd January 2012 confirmed charges for four suspects but declined to confirm the charges against Mr. Ali and Mr. Kosgey. Specifically, in regards to Mr. Kosgey, the Chamber found that the Prosecutor relied on one anonymous and insufficiently corroborated witness. With regards to Mr. Ali, the Chamber found that there was not sufficient evidence to connect the Kenya Police (and thus Ali as former Commissioner of it) to attacks carried out in the areas where perceived Orange Democratic Movement supporters resided.[13]

In brief, the Kenyan cases involved two members of the Orange Democratic Movement (ODM), the opposition party at the time of the elections, and case two involved two members of the Party of National Unity (PNU), then the incumbent party. The charges were that Mr. Ruto of the ODM was alleged to be an indirect co-perpetrator of crimes against humanity of murder, forcible transfer, and persecution, allegedly committed against supporters of the PNU. Mr. Sang of the

[11] ICC prosecutor names the "Ocampo Six available at https://thehaguetrials.co.ke/timeline/icc-prosecutor-names-ocampo-six accessed on 11th September 2016

[12] Ibid

[13] ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11; ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya in the Case of the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11

ODM was alleged to have contributed to the commission of the crimes. Mr. Muthaura and Mr. Kenyatta of the PNU were alleged to be indirect co-perpetrators of the crimes against humanity of murder, forcible transfer, rape, persecution, and other inhumane acts, allegedly committed against ODM supporters, partly in retaliation against attacks against the PNU supporters.

The particulars of the charges were that Mr. Ruto provided essential contributions to the implementation of the common plan by way of organizing and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity, in the absence of which the plan would have been frustrated. Mr. Ruto allegedly: "planned and was responsible for the implementation of the common plan in the entire Rift Valley; created a network of perpetrators to support the implementation of the common plan; directly negotiated or supervised the purchase of guns and crude weapons; gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy; and established a rewarding mechanism with fixed amounts of money to be paid to the perpetrators upon the successful murder of PNU supporters or destruction of their properties." Mr. Sang, by virtue of his influence in his capacity as a key Kass FM radio broadcaster, allegedly "contributed in implementation of the common plan by placing his show Lee Nee Eme at the disposal of the organization; advertising the organization's meetings; fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere."[14]

In the second case, it was alleged that between, at least, November 2007 and January 2008, *inter alia*, Mr. Muthaura, Mr. Kenyatta and members of the Mungiki, allegedly "created a common

[14]*Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11

plan to commit widespread and systematic attack against the non-Kikuyu population perceived to be supporting ODM." According to the alleged plan, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the Party of National Unity (PNU) in power, in exchange for an end to government repression and protection of the Mungiki's interests. The contribution of Uhuru Muigai Kenyatta to the implementation of the common plan was allegedly essential. More specifically, Mr Kenyatta's contribution allegedly consisted of "providing institutional support, on behalf of the PNU Coalition, to secure the agreement with the Mungiki for the purpose of the commission of the crimes; and the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha." Mr Muthaura's contribution consisted of "establishing links, through intermediaries, between the PNU Coalition and the Mungiki for the purposes of the commission of the crimes; contributing funds to local politicians and Mungiki leaders towards the organization of the crimes on the ground; mobilizing, through mid-level perpetrators, Mungiki members to carry out the attack in Nakuru and Naivasha; and placing the Mungiki members under the operational command of local politicians for the time and for the purposes of the commission of the crimes."[15]

The case against Mr. Muthaura also crumbled. The new ICC chief prosecutor Fatou Bensouda on March 11th 2013 announced her decision to withdraw the charges against Mr. Muthaura citing limited support from the government after key witnesses either died or received bribes. Subsequently Trial Chamber V withdrew the charges against Mr. Muthaura on 18th March 2013.[16] The remaining cases however have continued ever since despite the status of Mr. Kenyatta and Mr. Ruto having changed. This status maintained until recently. On 3rd December

[15]*Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11

[16]Trial Chamber V Decision on the withdrawal of charges against Mr Muthaura ICC-01/09-02/11-696

2014, ICC Trial Chamber V (b) rejected the Prosecution's request for further adjournment and directed the Prosecution to indicate either its withdrawal of charges or readiness to proceed to trial.[17] On 5th December 2014, the Prosecutor filed a notice to withdraw charges against Mr. Kenyatta.[18] The Prosecutor stated it had no alternative but to withdraw the charges against Mr. Kenyatta, given the state of the evidence in this case.[19] The Prosecutor indicated it was doing so without prejudice to the possibility of bringing a new case should additional evidence become available. On 13thMarch 2015, Trial Chamber V(B), noting the Prosecution's withdrawal of charges against Mr. Kenyatta, decided to terminate the proceedings in this case and to vacate the summons to appear against him.[20]

Even more recently, On 5th April 2016, Trial Chamber V(A) decided, by majority, that the case against William Samoei Ruto and Joshua Arap Sang was to be terminated. This decision does not preclude new prosecution in the future either at the ICC or in a national jurisdiction.[21]This decision was taken after considering the requests of Mr. Ruto and Mr. Sang for the Chamber to find 'no case to answer' dismiss the charges against both accused and enter a judgment of acquittal. The Chamber also considered the opposing submissions of the Prosecutor and the Legal Representative of the Victims, and received further submissions during hearings held from 12th to 15th January 2016. Based on the evidence and arguments submitted to the Chamber, Presiding Judge Chile Eboe-Osuji and Judge Robert Fremr, as the majority, agreed that the

[17]Trial Chamber V(b) Decision on Prosecution's application for further adjournment ICC-01/09-02/11-981
[18] Notice of withdrawal of the charges against Uhuru Muigai Kenyatta ICC-01/09-02/11-983.
[19] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta (5th December 2014), available at https://www.icc-cpi.int//Pages/item.aspx?name=otp-statement-05-12-2014-2 accessed on 11th September 2016.
[20]Trial Chamber V(B) Decision on the withdrawal of charges against Mr. Kenyatta ICC-01/09-02/11-1005, *The Prosecutor v UhuruMuigai Kenyatta* ICC-01/09-02/11: Case Information Sheet ICC-PIDS-KEN-02-014/15, available at https://www.icc-cpi.int/kenya/kenyatta accessed on 11th September 2016.
[21]*The Prosecutor v William SamoeiRuto and Joshua Arap Sang*ICC-01/09-01/11: Case Information Sheet ICC-PIDS-KEN-01-012/14, available at https://www.icc-cpi.int/kenya/rutosang accessed on 11th September 2016

charges were to be vacated and the accused were to be discharged. The majority of the Chamber, having concluded that the Prosecution did not present sufficient evidence on which a reasonable Trial Chamber could convict the accused, also concluded that a judgment of acquittal was not the right outcome, but only vacation of the charges and discharge of the accused. The majority also agreed that there is no reason to re-characterize the charges.[22]

## 4.3 LEGAL CONSEQUENCES OF WITHDRAWAL

The legal implications of withdrawal are provided under article 127 (2) of the Rome Statute to the effect that the obligations on the State that exists at the time of withdrawal remain in force and are unaffected. As was noted in the preceding chapter, these obligations are two-fold as was noted by Schabas[23]: financial obligations and cooperation with the ICC. Further, withdrawal shall not 'prejudice in any way the continued consideration of any matter which was already under consideration by the ICC prior to the date on which the withdrawal becomes effective'.

### 4.3.1 Financial Obligations

Part XII of the Rome Statute provides the way the ICC is financed. These provisions not only provide on how funds to aid the working of the Court are raised and collected but also how they are managed. For our purposes, here, the relevant provision is article 117 of the Rome Statute that provides that State parties to the Rome Statute are required to contribute to the funds of the ICC. This contribution is assessed in accordance with an agreed scale of assessment, based on

[22] Trial Chamber V(A) Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions ICC-01/09-01/11-1334.

[23] William Schabas, "The International Criminal Court: A Commentary on the Rome Statute," Oxford University Press, at 1207.

the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

This is a mandatory requirement for all state parties and thus not subject to any negotiations, reservations or discretion on the part of any given member state. Once an assessment has been made in line with article 117 of the Rome Statute, the State is obligated to contribute the equivalent of the said amount. In this regard, then, it also happens that if at the time of withdrawing, a state has not satisfied or met or contributed the required amount for which an assessment has been made, then the fact that such a State has withdrawn does not preclude it from transmitting said contributions. Its financial obligations remain outstanding up until it fully settles its due outstanding contribution that accrued during the continuation of its membership as a State Party to the Rome Statute.

### 4.3.2 Co-operation with the ICC

Article 86 of the Rome Statute mandates a general obligation to cooperate in the terms that States Parties shall, in accordance with the provisions of the Statute, cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction.

Basically, the core function of the ICC is the prevention of and in event of occurrence, the prosecution of the four core international crimes as provided for under the Rome Statute. In executing this mandate, the Court relies on member states of the Rome Statute to assist it achieve its objective. This includes not only member state of the Rome Statute offering financial support but also actively participating in chiefly preventing and reporting the occurrence of the four core international crimes. This obligation also includes providing the Court and the Office of the Prosecutor with the relevant documents they require for investigation and prosecution of the four

core international crimes[24]. Further, member states assist the ICC execute arrest warrants since the ICC does not have its own police force, forwarding accused persons to the court for prosecution[25] and lastly providing penitentiaries where convicted persons may serve their terms after judgment is issued by the ICC.

Other forms of cooperation include but are not limited to: "The identification and whereabouts of persons or the location of items; the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; facilitating the voluntary appearance of persons as witnesses or experts before the Court; the temporary transfer of persons in the custody of a state for purposes of identification or for obtaining testimony or other assistance; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the protection of victims and witnesses and the preservation of evidence; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court."[26]

Where a State Party fails to comply with a request to cooperate with the ICC contrary to the provisions of the Rome Statute, thereby preventing the ICC from exercising its functions and powers under the Statute, the ICC may make a finding to that effect and refer the matter to the

[24] See article 87 and 93 (1) (h) as read together with article 72 and 73 of the Rome Statute
[25] Article 89 and 91 of the Rome Statute
[26] Article 93 (1) of the Rome Statute

Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.[27]

Already even before the intention of withdrawing from the Rome Statute were apparent, Kenya already had a history of non-cooperation with the ICC. At the beginning of 2009, Kenya's relationship with the ICC was perhaps at its best. Indeed, there was a vigor and commitment to cooperate fully. Perhaps this informed the enacting into law the International Crimes Act (ICA).[28] However, immediately the Office of the Prosecutor made public the names of the six persons alleged to be the principal perpetrators of the crimes witness during the post-election violence, the nature of cooperation to the ICC changed. It was no longer "don't be vague, lets go to Hague". Now the slogan and the overriding feeling was that the ICC was interfering with the internal affairs of Kenya and thus undermining her sovereignty.

In the duration of the case, both the Government and the National Assembly have time and again attempted to stop the ICC process. The first of such attempts was witnessed when on 22nd December 2010, Kenyan MPs passed a motion to withdraw from the ICC, which however the then President, Mr. Kibaki did not sign into law. Soon after on March 31st 2011, the government in a failed attempted trial to move the ICC to declare that it did not have jurisdiction in the Kenya situation.[29]However, the Pre-Trial Chamber II dismissed the challenge to admissibility and said the cases can continue.[30] An appeal was quickly dispatched[31] but this was similarly

[27] Article 87 (7) of the Rome Statute
[28] (n 2)
[29]Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute ICC-01/09-01/11-19
[30] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-01/11-101
[31] Appeal of the Government of Kenya against the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" ICC-01/09-01/11-109

dismissed by the Appeals Chamber.[32]The government of Kenya appealed also to the UN Security Council regarding the admissibility of the case but with no success.

There was also the *'shuttle diplomacy'* geared towards winning support from Assembly of States Parties and the UN Security Council to have the cases deferred. The essence of this diplomacy drive was meant to transfer cases from the ICC back to Kenya by ensuring establishment of a local mechanism within one year to prosecute the perpetrators.[33] In a desperate attempt and following their dissolution at the failure of all these attempts, the National Assembly on their part during a Special Sitting of the House passed a motion on 5th September 2013 moved by Hon Aden Bare Duale. This motion essentially authorized the government to withdraw from the Rome statute and would also lead to the repealing of the Kenya's International Crimes Act.[34]

Additionally, before commencement of the trial, the Office of the Prosecution repeatedly sought information and appropriate documents to enable it strengthen its case.[35] This was chiefly with regards to financial and other records of Mr. Kenyatta.[36] These records were relevant to critical issues in Mr. Kenyatta's case, as they would have shed light on the scope of his conduct, including the allegation that the financed the crimes with which he was charged. However as was largely anticipated within the Kenyan circles, for 19 months, the Office of the Prosecutor's repeated requests had been met with obfuscation and intransigence.[37] With just two months

[32] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-01/11-307.

[33] http://www.standardmedia.co.ke/article/2000095435/former-vp-kalonzo-musyoka-led-cabinet-ministers-in-worldwide-push-to-bring-icc-cases-to-kenya accessed on 11th September 2016.

[34] http://info.mzalendo.com/hansard/sitting/national_assembly/2013-09-05-14-30-00 accessed on 11th September 2016.

[35] Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya ICC-01/09-02/11-866, at 1-2

[36] Ibid

[37] Ibid, at 1

before the start of trial, Mr. Kenyatta financial records remained outstanding. The net effect of this was that the unwillingness to cooperate by the government of Kenya had been to limit the body of evidence available to the Trial Chamber, hindering its fact-finding function and ability to determine the truth. It also limited the Prosecutor's ability to investigate all the facts in this case. It was this situation that prompted the Prosecutor to make an application for a finding of non-compliance pursuant to article 87 (7) 0f the Rome Statute against the government of Kenya.[38]

Trial Chamber V (b) indeed on 3rd December 2014 cited Kenya for non-compliance in the sense of article 87 (7) of the Rome Statute but however refused to refer the matter of non-compliance to the Assembly of Parties or the Security Council.[39] It was on the latter basis that the prosecution successfully appealed to have Kenya not only cited for non-compliance but that the matter be referred to the Assembly of Parties or the Security Council. Thus, the Appeals Chamber on 19th August 2015 reversed the decision on Kenya's cooperation and remanded the issue to the trial chamber for new determination.[40]

Indeed, recently Uganda and Djibouti were referred to the Security Council for what Trial Chamber II considered non-cooperation on their part for failing to arrest and surrender Mr. Al Bashir to the ICC to face charges of crimes against humanity.

Notwithstanding Kenya's history of a perceived disregard to cooperating with the ICC, were it to successfully withdraw from the ICC, it must still fulfil all its outstanding obligations to the court, whether having accrued in the duration it is still a member state or during the period of its notice

[38] Ibid

[39] See generally, Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute ICC=01/09-02/11-982

[40] See Appeals Chamber Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" ICC-01/09-02/11-1032

of intension to withdraw. It will not matter that Kenya would have withdrawn, if it has outstanding obligations under the Rome Statute, it will still be obliged to satisfy those obligations.

### 4.3.3 Effect of withdrawal on continuing cases before the ICC

Withdrawal from the Rome Statute does not affect the conduct of active trials for which the court has been seized. As was argued by Schabas a matter is before the court simply because the Prosecution has applied to the Pre-Trial Chamber for authorization to begin an investigation in accordance with article 15 of the Rome Statute.[41] Thus even when a state withdraws from the Rome Statute and the Office of the Prosecution has obtained authorization to commence investigations, those investigations would not end simply because the given state has withdrawn from the Statute.

For avoidance of doubt, the Kenyan cases at the ICC against Mr. Kenyatta, Mr. Ruto and Mr. Sang were not dismissed or terminated permanently. On the contrary each of these cases was terminated "without prejudice" as was already indicated above. What this means is that the Prosecution may at any time when it deems necessary and armed with new and additional evidence move the court to re-open the cases against each of these individuals. Even if this would happen after Kenya has successfully withdrawn from the Rome Statute, the fact remains that these matters irrespective of their termination albeit "without prejudice", remain matters before the Court.

[41] William A Schabas, "The International Criminal Court: A Commentary on the Rome Statute (n 16), at 1207

The rationale for this is that just like in any criminal case, under the Rome Statute, the crimes within the jurisdiction of the ICC are not subject to any statute of limitations.[42] Further, under the Rome Statute the prosecution of the four core international crimes is based on the principle of individual criminal responsibility. The ICC has jurisdiction over natural persons. Thus, a person who commits a crime within the jurisdiction of the ICC shall be individually responsible and liable for punishment[43] in accordance with the Statute.[44] It matters not that the accused person hails from a non-State member of the Rome Statute, once he/she has been brought to face charges before the court, he/she will be prosecuted and either acquitted or convicted at the end of the trial.

Additionally, by dint of Article 13 (b), the Security Council acting under Chapter VII of the Charter of the United Nations may refer to the Prosecutor a situation in which one or more of the four core international crimes under the statute appears to have been committed in any state even though not a member of the Rome Statute. Thus, if any of the four core international crimes

[42] Article 29 of the Rome Statute

[43]These punishments include: Imprisonment for a term of years not exceeding 30 years, A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, a fine, forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties. See for this article 77 as read together with article 110 of the Rome Statute.

[44] Article 25 of the Rome Statute: A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i)Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii)Be made in the knowledge of the intention of the group to commit the crime; (e)In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f)Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

under the statute occur, in a withdrawing state, the Security Council acting on its own motion may refer such a situation to the Prosecutor for investigation and for further prosecution. It must however be noted that such instances have never occurred and thus this is but a theoretical interpretation of Article 13 (b).

As it was shown in the first chapter of this study, statute of limitation does not apply under the Rome Statute. Further because criminal responsibility is ascribed individually the change in the status of accused persons whose cases were before the court before withdrawal will not affect any of their cases. For example, if an ICC inductee becomes a Head of State, he or she cannot plead immunity based on their capacity as high-ranking state officials to oust the jurisdiction of the ICC. Article 27 is instructive in this regard as it provides that the Rome Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[45] Further, immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person.[46] Indeed in the Kenyan cases, when Mr. Kenyatta and Mr. Ruto were declared elected as President and Deputy President of Kenya, they still had to submit to the jurisdiction of the ICC and their cases continued as they were viewed as individual accused persons and without regard to their capacity in government.

[45] Article 27 (1) of the Rome Statute
[46] Article 27 (2) of the Rome Statute

This therefore negated any possible misconceptions that upon clinching power the two would seek immunity. Nonetheless, attempts to use their official positions to get a deferral of their respective cases as well as a complete withdrawal from the Rome statute presented yet another opportunity as already illustrated above.

## 4.4 DIPLOMATIC CONSEQUENCES OF WITHDRAWAL

The reasons espoused by Kenya to justify its withdrawal from the Rome Statute were political at best and served to benefit two accused persons who had now ascended to power and did not represent an overriding majority will of the people of Kenya. This is evident from the wording of the motion that sought to show a clear and an unequivocal intention to withdraw:

> "THAT, aware that the Republic of Kenya promulgated a new Constitution on 27th August, 2010 which has fundamental changes in the circumstances relating to the governance of the Republic; aware that the Republic conducted its general election on the 4th of March 2013, at which the President and Deputy President were lawfully elected in accordance with the Constitution of Kenya; further aware of a resolution of the National Assembly in the Tenth Parliament to repeal the International Crimes Act, and suspend any links, cooperation and assistance to the International Criminal Court, this House resolves to introduce a Bill within the next thirty days to repeal the International Crimes Act (No 16 of 2008), and that the Government urgently undertakes measures to immediately withdraw from the Rome Statute and the International Criminal Court, as

adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17th July, 1998.[47]"

From the wording of the motion, it is evidently clear that the intention of the Legislature was to "suspend any links, co-operation and assistance" with the ICC. As already explained, this is a misconception since even after withdrawal Kenya would still be bound to meet all her accruing obligations under the statute. This includes cooperating and assisting the ICC not just with the matters for which Kenya is an active member but also in matters that are pertinent to the court in which Kenya would be called upon to assist the Court by virtue of the principles of complementarity. In this regard any notion of permanently suspending links with the ICC is a fallacy at the very least. Should Kenya succeed in her efforts to withdraw from the Rome Statute and subsequently decline to meet its obligations under the said Statute, she would be at risk of being cited for non-cooperation.

As already demonstrated, the drafters of the Rome Statute also anticipated what the court could do if a withdrawing state fails to abide by its legal undertakings. Thus, where it fails to comply with a request to cooperate by the Court contrary to the statute, thereby preventing the Court from exercising its functions and powers, the court, either of its own motion or at the Prosecution's request, "may make a finding to that effect and refer the matter to the Assembly of States Parties," the guardian angel of the ICC.[48]

[47] Motion moved by Aden Duale, Leader of Majority, available at http://info.mzalendo.com/hansard/sitting/national_assembly/2013-09-05-14-30-00 accessed on 10th September 2013.

[48] Kenya Should Reconsider Proposed Withdrawal from the ICC, available at http://www.jurist.org/forum/2013/09/charles-jalloh-kenya-icc.phpaccessed on 10th September 2013.

Plainly, international law skeptics might counter that a finding of non-cooperation and reporting a matter to the Assembly of States Parties is hardly a robust sanction but the reasons why states obey international law, a horizontal legal system wherein reciprocity and good reputation play a strong role in inducing compliance, generally differ from the sheriff at the door logic some associate with individual compliance with laws in vertical domestic legal systems. In any case, the full ICC membership is represented in the ASP, along with other powerful and presumably interested observers such as the US, which now refreshingly plays a more constructive support role for the ICC.[49]

Viewed against this backdrop, the Rome Statute empowers the Assembly of States Parties to prescribe measures against a recalcitrant state. Article 112 (2) (g) mandates it to "perform any other function consistent with" the Statute. Presumably, this would enable it to goad a non-cooperating state to act, and by analogy to Article 33 of the UN Charter, to even seek creative solutions through negotiation, enquiry, mediation, conciliation, arbitration, resort to international agencies or regional arrangements or other peaceful means of its choice. For her part, assuming she follows through with her withdrawal, Kenya as the anchor finance and trade hub for the East African region, would risk assuming "impunity friendly" haven status among the community of nations - a status that would also be inconsistent with its long-term interests as a largely agriculture and tourism based economy.[50]

Withdrawal from the statute may make Kenya an outcast of the community of nations and may result to diplomatic, political and economic consequences that may undermine the development

[49] Ibid.
[50] Ibid.

of Kenya as state. This may include cut of foreign aid, setting up of trade barriers, restrictions of flying zones, from international bodies that support the Court, amongst other things.

This can be clearly elucidated in the Sudan Case: *Prosecutor v Omar Hassan Ahmed Al Bashir*[51] as Sudan was slapped with numerous barriers from a majority of nations and living those who would like to work with them to do so cautiously or hold back with fear of being condemned as allies.

Many universal human rights treaties have been adopted under the auspices of the United Nations (UN) or the International Labor Organization (ILO). The Rome Statute is one of these as was noted by Gino J. Naldi and Konstantinos D. Magliveras.[52] In its ongoing tussle with the ICC over the indictment of Sudanese President al-Bashir and other African leaders, the African Union Assembly met in Extraordinary Summit in October 2013 to reflect on Africa's continued relationship with the ICC, but proposals for *en masse* withdrawal from the Rome Statute lacked the required support.[53] This came hot in the heels following Kenya's motion to withdraw from the Rome Statute. It may be argued that the AU would be willing to play a wait game to see how the Kenyan situation evolves in respect to any act of withdrawal before making any decision on withdrawal of African States en masse. In this regard, then, a successful withdrawal by Kenya from the Rome Statute will not have ramifications in Kenya only but also for African States who make the largest block of member States to the Statute. This became manifest even recently in 2015 when the Namibian government approved a recommendation by the ruling Swapo Party for

[51] ICC-02/05-01/09

[52]Gino J. Naldi and Konstantinos D. Magliveras, "Human Rights and the Denunciation of Treaties and withdrawal from international Organizations," in XXXIII Polish YearBook of International Law (2013), at 99

[53]*Decision on Africa's Relationship with theInternational Criminal Court (ICC)*, AU Doc. Ext/Assembly/AU/Dec. 1 (12 October 2013).

the country to withdraw from the ICC.[54] Two months earlier before the Namibian resolution, South Africa's ruling Africa National Congress (ANC) had also recommended that South Africa withdraw from the Court and subsequently gave formal notice of withdrawal to the UN Secretary General.[55]

Since the 1990s the international community has witnessed an almost discernible trend – the withdrawal from and denunciation of human rights treaties by an increasing number of States, which includes excluding themselves from supervision by international monitoring mechanisms such as the Human Rights Committee (HRC).[56] The latter has particularly been the case with respect to the Optional Protocol to the International Covenant on Civil and Political Rights,[57] Jamaica was the first to do so in 1997.[58] But it has also occurred with respect to the American Convention on Human Rights (ACHR).[59] More recently, in September 2013, Venezuela's

[54] Namibia's International Relations and Cooperation Minister, Netumbo Nandi-Ndaitwah has explained government's reasons for withdrawing from the International Criminal Court (ICC) as a signatory, saying Namibia joined the ICC immediately after Independence due to the weakness of internal institutions at the time. She said government in 1990 inherited weak institutions from the architects of apartheid, hence the decision at the time to look abroad for interim assistance. http://www.africareview.com/news/Namibia-considering-quitting-Rome-Statute/979180-2971364-7nmymvz/index.htmlaccessed on 12th September 2016

[55] https://www.jus.uio.no/pluricourts/english/news-and-events/events/2016/2016-08-29-validity-icts.html accessed on 12th September 2016

[56] Gino J. Naldi and Konstantinos D. Magliveras (n 49), at 95

[57] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[58] On 23 October 1997, with effect from 23 January 1998, UNCHR, Report of the Human Rights Committee, UN Doc. A/57/40, vol. 1, at 146.*See* N. Schiffrin, *Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights*, 92 American Journal of International Law 563 (1998). Jamaica was followed by Trinidad and Tobago, twice, on 26 May 1998 with effect from 26 August 1998, when a new instrument of accession was deposited, including a reservation on death penalty cases, and on 27 March 2000, with effect from 27 June 2000, UNCHR, Report of the Human Rights Committee, *ibid*, and by Guyana, on 5 January 1999, with effect from 5 April 1999, although it re-acceded on the same date with a reservation, UNCHR, Report of the Human Rights Committee, *ibid.*

[59] Art. 78(1) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Trinidad and Tobago gave notice of their withdrawal on 26 May 1998, with effect from 26 May 1999, www.cidh.org/Comunicados/English/1998/Press10-14.htm. *See* N. Parassram Concepcion, *The Legal Implications of Trinidad and Tobago's Withdrawal from the American Convention on Human Rights*, 16 American University International Law Review 847 (2001).

withdrawal from the ACHR took effect.[60] Similarly, the issue has also arisen of terminating membership in international organizations in order to dispense with the sometimes-stringent restraints imposed by human rights obligations accompanying membership. There had been speculation that the United Kingdom might withdraw from the Council of Europe in response to the London terrorist bombings in July 2005.[61] In light of the object and nature of human rights treaties, such drastic steps, seemingly motivated by a desire to evade the strictures imposed by international legal obligations or to avoid embarrassing litigation, while still relatively rare, have negative connotations for the effective protection of human rights and arguably constitute a direct challenge to the international protection systems.[62]

## 4.5 CONCLUSION

In the event Kenya or any other country successfully withdraws from the Rome Statute they would still be enjoined by article 127 (2) of the Statute regarding fulfilling any of their already accrued obligations under the Statute at the time of withdrawal. This includes; financial

[60]*See* www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Venezuela; Inter-American Commission on Human Rights, *IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention*, Press Release No. 64/13, 10 September 2013, available at: https://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp, both accessed on 12th September 2016; D.G. Mejia-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17(1) ASIL Insights (2013).

[61]The then-Lord Chancellor and now Shadow justice secretary, Lord Falconer, nevertheless made it plain that the UK would not denounce the European Convention on Human Rights (ECHR), BBC News, *Human rights law 'may be changed'* (14 May 2006) http://news.bbc.co.uk/1/hi/uk_politics/4768259.stm, accessed on 12th September 2016. With the UK exiting from the European Union recently in June 2016, there has arisen a new debate of whether UK should withdraw from the ECHR, http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendumaccessed on 12th September 2016

[62]*See* the correspondence of the Inter-American Court of Human Rights and the European Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1999, Appendix XXXVIII, XXXIX and XL, OEA Series L/V/III 47, Doc. 6. The HRC expressed its 'profound regret' at Trinidad and Tobago's OPT denunciation, UNCHR, Report of the Human Rights Committee, UN Doc. A/56/40, vol. 1, p. 31 para.7 (26-10-2001).*See also* Y. Tyagi, *The Denunciation of Human Rights Treaties*, 79 British Yearbook of International Law 86 (2008), pp. 184-85. Under customary international law denunciation does not free a State from parallel obligations, *see* Art. 43 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.*See* International Law Commission, *Law of Treaties*, A/CN.4/143, YILC, 1966, vol. II p. 237 (ILC).

obligations and co-operation with the ICC. Also, cases that the ICC has been properly seized with will not terminate by withdrawal of the state from which the accused person originates.

Just as was the case of Trinidad and Tobago and Jamaica, successful withdrawal by Kenya from the Rome Statute will be viewed as an affront on the protection of human rights. In this regard and as was held in the *Barcelona Traction Case*,[63] Kenya would be in direct violation of its *obligatio erga omnes*.[64] Often countries seen to be consistent violators of human rights and those in which there is a high propensity of violation of human rights and the government turns a blind eye are often shunned in the international community. Other states may cut diplomatic ties with such countries so as not to be seen to condoning such violations. As it has often been said, in international politics and economics, no country is an island.[65] We live in an interdependent world where all States depend on one another on trade, foreign relationship and cooperation in undertaking development. Kenya would be in a more precarious position should it be shunned by the international community.[66] In the premise then any act of withdrawal from the Rome Statute is more detrimental to the interests of any withdrawing country and as such withdrawal ought to be discouraged in the strongest possible terms

[63] Case Concerning Barcelona Traction, Light, and Power Company, Ltd (*Belgium v Spain*) [1970] ICJ 1

[64] L.-C. Chen, *An Introduction to Contemporary International Law*, (2nd ed.), Yale University Press, New Haven: 2000, at 369

[65] UN Secretay-General, Ban Ki Moon's statement at the 36th Meeting of conference of Heads of Government of the Caribbean Community (CARICOM) in Bridgetown, Barbados, SG/SM/16908, 2nd July 2015, available at http://www.un.org/press/en/2015/sgsm16908.doc.htm accessed on 12th September 2016

[66] See generally, The Economist Intelligence Unit, *Country Profile. Kenya*, The Unit:London, (1998), at 10; Kurian, George Thomas, *Encyclopedia of the Third World*, fourth edition, volume III, Facts on File: New York, N.Y. (1992), at 976

# CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

## 5.1 INTRODUCTION

This chapter brings together the ideas, arguments and suggestions in the preceding chapters and puts forward cogent recommendations in arguing that Kenya should reconsider her proposed withdrawal from the ICC.

## 5.2 SUMMARY OF STUDY

This study sought to clarify issues of how to effectively withdraw from the Rome statute by analyzing the substantive and procedural law on how to effectively and legally withdraw from the Rome Statute. It also sought to give an interpretation of the provisions of the Rome statute regarding the diplomatic and legal impact of withdrawal from the Statute. This is essentially because Kenya became the first country to show an intention to withdraw from the Rome Statute when the Kenyan Parliament passed a motion in September 2013 authorizing the Kenyan Government to withdraw from the Rome Statute through the repealing of the Kenyan International Crimes Act.[1]

The study began by providing a background to the adoption of the said motion to withdraw from the Statute and it proved that this was a political move to prevent the current sitting President and his Deputy from facing the ICC for charges of crimes against humanity for which they had been indicted long before they were elected. However, the intentions of Kenyan political leaders aside, the intention to withdraw from Statute, raise serious questions on the implications of withdrawal on two fronts. First, was the question of how any act of withdrawal would affect Kenya's

[1]Supra Chapter 1. http://info.mzalendo.com/hansard/sitting/national_assembly/2013-09-05-14-30-00 accessed on 15th February 2016.

responsibility in respecting its international obligations. Secondly was the question of what would be the legal and diplomatic impact of withdrawal from the Rome Statute. The study was guided by two theories namely; the consent theory and the Natural law theory. Under the consent theory this study argued that all the provisions of the Rome Statute would bind Kenya because Kenya voluntarily ratified the Statute. However, Kenya would have the right to withdraw from the Statute pursuant to article 127 of the Rome Statute at any time it so wished provided it adhered to the legal, substantive and procedural rules under article.

Natural law theory was also relied upon to show that since the Rome Statute provided for the prosecution of international crimes that had risen to the level of *jus cogen*, any state perceived to be acting in any way to undermine the prevention of the occurrence of the crimes listed under the Rome Statute would be violating customary international law and negating its obligation *erga omnes* towards the universal will of the international community for the prevention and prosecution of these international crimes. In this respect the study argued that any act of withdrawal albeit legally allowed under Article 127, a negative perception will befall any withdrawing state to the effect that it undermines efforts to prevent and prosecute the four core international crimes.

Chapter Two of this study traced the history leading to the adoption of the Rome Statute. It analyzed the evolution of international criminal justice from its post Second World War origins at Nuremburg,[2] the workings of the International Law Commission to drafting of code of

[2] Supra Chaprter 2: Treaty of Versailles, established in 1919 an ad hoc commission to investigate war crimes that relied on the 1907 Hague Convention as the applicable law. In addition to war crimes committed by the Germans, the commission also found that Turkish officials committed "crimes against the laws of humanity" for killing Armenian nationals and residents during the period of the war. This eventually led to the creation of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT)-popularly called the Nuremberg Tribunal. A similar document was drafted in response to the crimes committed by the Far East Axis powers, namely Japan, labeled the International

offenses against the peace and security of mankind, the resurrection of Debate to establish an international criminal court by Trinidad and Tobago in 1989,[3] through to the proliferation of the courts and tribunals with international criminal jurisdiction in Yugoslavia[4] and Rwanda[5] all the way to the establishment of the ICC.[6] It also appreciated the significance of the Rome Statute to world order and human decency.[7] This chapter also provided a general overview of the salient issues surrounding the ICC including an analysis of key documents, articles and the Court's purpose and its principles.[8] It was noted that the chief purpose of the Rome Statute was the creation of the International Criminal Court (ICC). The Rome Statute in this regard seeks to counter impunity by vesting authority on the ICC to prosecute perpetrators of genocide, crimes against humanity and war crimes. The chapter also considered the work of the Preparatory Committee to ascertain the deliberation regarding the discussion on the withdrawal clause. It was noted that there was no much deliberation on the issue of withdrawal and this study only shows a consensus position that was predominately taken by all parties regarding the withdrawal clause. This is further shown by the ease with which State parties adopted article 127 only but tinkering with the wording.

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Military Tribunal for the Far East (Tokyo trials) of 1946 which incorporated the procedures and mandate as the IMT Charter

[33]"Chronology of the International Criminal Court." ICC. International Criminal Court, available at http://www.icc-cpi.int/Menus/ICC/About the Court/ICC at a glance/Chronology of the ICC.htm accessed on 8th August 2016

[4]International Criminal Tribunal for the former Yugoslavia (ICTY). The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993

[5]International Criminal Tribunal for Rwanda (ICTR). The Court was established by Resolution 955 of the United Nations Security Council, which was passed on November 1994

[6] Established through the adoption of the Rome Statute by the United Nations Diplomatic Conference of Plenipotentiaries in Rome, Italy which ended on 17th July 1998

[7] See generally the Preamble of the Rome Statute

[8] Principles of Jurisdiction (articles 12 and 13 of the Rome Statute); Complimentarity (Preambular paragraph 10 of the Statute as well as Articles 1, 17 and 18 of the Rome Statute); State cooperation with the ICC (Articles 89-92 of the Rome Statute).

Chapter 3 of this study offered an overview of the international law rules governing the exit from multilateral and bilateral treaties, including the key provisions of the 1969 Vienna Convention on the Law of treaties.[9] However, focus was accorded to the legal, substantive and procedural provisions on withdrawal from the Rome Statute as provided under article 127 of the Statute. It was observed that pursuant to article 127 (1) of the Rome Statute a party to the Statute would, by written notification addressed to the depositary, the Secretary-General of the United Nations, withdraw from the Rome Statute. The withdrawal would only take effect one year after the date of receipt of the notification, unless the notification specifies a later date. Article 121 (6) of the Rome Statute contemplated another way in which a state party may withdraw from the Statute. Under this article, a state party may withdraw from the Statute immediately following any amendment to this statute that it does not accept. If an amendment is adopted under Article 121(4) a state may withdraw from the Statute at any time within one year after entry into force of such amendment. Under the latter two provisions the withdrawing state need not issue a notification for withdrawal. Further it was noted that article 127 (2) of the Rome Statute provides that some obligations on the State which exists at the time of withdrawal remain in force and are unaffected. Three types of obligation are provided for under this paragraph. Firstly, this paragraph refers to 'financial obligations which may have accrued in accordance with article 115 (a) of the Rome Statute. Secondly, this paragraph indicates that withdrawal is without prejudice to cooperation with the ICC 'in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective'. Thirdly, withdrawal shall not 'prejudice in any way the continued consideration of any matter which was already under consideration by the ICC prior to the date on which the withdrawal becomes effective'.

[9] Article 55, 59, 60, 61 and 70 of the 1969 Vienna Convention on the Law of Treaties (VCLT)

Chapter three also discussed the justification given by Kenya regarding its intentions to withdraw from the ICC. It was noted that the political establishment in Kenya only sought to withdraw to stop the ICC from exercising its jurisdiction against the current sitting President and his Deputy. In that regard the reasons for withdrawal by Kenya are largely political. However, it was also shown that the intention by Kenya to withdraw has also precipitated in other African countries seeking to withdraw from the Rome Statute because of the general feeling that the ICC is exclusively targeting African States and nationals. Except South Africa, Namibia and Burundi who gave formal notices of withdrawal, no other member state has ever attempted to exercise the withdrawal clause under article 127 of the Rome Statue, it is seen in many quarters that any such withdrawal by Kenya if successfully executed will offer not only a case study on how countries can withdraw from the Rome Statute but also be used by other African states to collectively withdraw from the ICC en masse.

Chapter Four of this study provided an analysis of the legal and diplomatic implications of withdrawal from the Rome Statute. Using Kenya as the case study and drawing from the examples of other states that had withdrawn from other human rights treaties, this chapter sought to demonstrate the effect of withdrawal from the Rome Statute. As was noted in chapter three, this chapter emphasized that under article 12 (2) of the Rome Statute the withdrawing state obligations at the time of withdrawal remain in force and are unaffected. The country is still bound by its financial obligations as enshrined under article 115 of the Rome Statute.[10] The withdrawing state is also obliged to continue co-operating with the ICC. Cooperation in this case is not only restricted to active relationships with the ICC already existing at the time of withdrawal but even after withdrawal. The co-operation in this sense includes the following: The

[10] See also article 117 of the Rome Statute.

identification and whereabouts of persons or the location of items; the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; facilitating the voluntary appearance of persons as witnesses or experts before the Court; the temporary transfer of persons in the custody of a state for purposes of identification or for obtaining testimony or other assistance; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the protection of victims and witnesses and the preservation of evidence; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.[11]

It was noted that where state parties fail, refuse and or neglect to co-operate with the ICC and thus prevent and or obstruct the ICC from executing its mandate, the ICC has the mandate of making a finding of non-compliance and refer that state to the Assembly of State parties or the Security Council.[12] The chapter also noted that for any Kenyan cases still pending before the ICC, the same would not terminate just because Kenya withdraws from the ICC.

[11] Article 93 (1) of the Rome Statute

[12] Article 87 (7) of the Rome Statute. Indeed recently Uganda and Djibouti were referred to the Security Council for what Trial Chamber II considered non-cooperation on their part for failing to arrest and surrender Mr. Al Bashir to the ICC to face charges of crimes against humanity. Kenya also suffered a similar fate when it was cited for non-compliance and referred to the Assembly of State Parties for further action on 19th September 2016, see Trial Chamber V (B)Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute ICC-01/09-02/11-1037

As was noted in this chapter, the Kenyan cases at the ICC against President Kenyatta, Deputy President Ruto and Mr. Sang were neither dismissed nor terminated permanently. The cases were terminated without prejudice and thus the Prosecution if armed with new and additional evidence may move to re-open the cases against these individuals even when at that time Kenya will have successfully withdrawn from Rome Statute. It then follows that if the prosecution had opened investigations in a withdrawing state, the prosecution is not compelled to terminate such investigations by either the intentions to withdraw or that the state has successfully withdrawn from the Rome statute.

As far as diplomatic consequences are concerned, it was noted that withdrawing from the statute may make Kenya an outcast within the community of nations and may result to diplomatic, political and economic consequences that may undermine the development of Kenya as a state. Some sanctions were imposed on Sudan and other countries that backed it following the indictment of President Omar Al-Bashir[13] and the refusal of Sudan to co-operate with the ICC. In the end then, Kenya would be in a more precarious position should it be shunned by the international community. Kenya's foreign policy would be best served by positioning the country as a champion against impunity and as a country that is committed to international treaty obligations that uphold human rights.[14]

[13]*Prosecutor v Omar Hassan Ahmed Al Bashir*ICC-02/05-01/09

[14] See generally, The Economist Intelligence Unit, *Country Profile. Kenya*, The Unit: London, (1998), at 10; Kurian, George Thomas, *Encyclopedia of the Third World*, fourth edition, volume III, Facts on File: New York, N.Y. (1992*)*, at 976

## 5.3 FINDINGS

The general observation seen from this study is that Kenya may well be within her right to withdraw from the Rome Statute and thus cut ties with the ICC if she adheres strictly to article 127 of the Statute. Regarding its obligations at the time of notification and any eventuality concerning successful withdrawal from the Rome Statute, Article 127 is emphatic that Kenya still has to fulfill all its accruing obligations, regardless of its status if she so withdraws.

However, the future of Kenya in a post withdrawal era depicts a bleak situation. While the prospects of African states withdrawing en masse may shield Kenya from the negative effects of withdrawal from the Rome Statute, the predominant position is that withdrawal is more detrimental to the interests of any withdrawing state. As was noted in this study we live in a globalized world where all States depend on one another for trade, foreign relations and cooperation in undertaking development.

## 5.4 RECOMMENDATION

In the premise and taking into consideration the above observations, this study recommends the following:

### (a) Encourage cooperation with the ICC

The underlying need for the ICC has not changed. The world, Africa, and in particular Kenya clamored for a court to ensure that those who commit the gravest crimes – genocide, crimes against humanity and war crimes – should not go unpunished. The likelihood of such perpetrators going unpunished is great, because they often operate in contexts where the criminal

justice system has broken down, and where their prosecution and conviction under the national legal system is quite unlikely. This was the lesson from Rwanda, and the events in the former Yugoslavia. In those two instances, special ad hoc courts were set up. It was accepted that it is too costly to keep setting up courts for every situation that merits it: the idea became accepted that the world should have a world criminal court.

Clearly, there are some situations of gross human rights violations and perpetrators in other parts of the world, including the United States and the United Kingdom but the existence of a problem elsewhere does not make it disappear at home. Viewed from the perspective of victims, it does not matter that impunity reigns elsewhere. Victims want an end to impunity in the situation where their families and loved ones have been killed and /or maimed.

However, for the ICC to be effective it must receive support of the entire international community. When we deal with human rights issues politics should not rein with impunity rather the life and welfare of human beings should always be the supreme drive that requires protection. In this regard, the international community must play its part and co-operate with the ICC and to enable it to achieve its mandate. Kenya having played an active role in the establishment of the ICC must also strive to actively guard this court from not only abuses but also ensures its effective operations. Abandoning the court because of the ICC shortcomings may be justified but that will create another problem all together.

**(b) Shelve Any Attempts for Withdrawal**

This study has shown that even upon withdrawal Kenya will still be obligated to respect and meet her obligations as having accrued prior to withdrawal and which may continue prior to successful withdrawal including any Kenyan cases still pending before the court. As already

explained, the focus of the international community and particularly Africa is rested on Kenya and its attempt to withdrawal from the ICC. Kenya's withdrawal if successfully executed may be a catalyst for withdrawal in masses of the African block. The result is that the international community will go back where we were prior to 1998 with no court which is popularly accepted and which can legitimately, effectively and authoritatively offer a forum for which the most heinous crimes may be prosecuted. In the circumstances, it is better to reform the court from within than from without.

Further, it has been shown, that the consequences of withdrawal may result in negative consequences, which will be detrimental to the interest of Kenya. In the premise, Kenya should shelve any intension to withdraw from the Rome Statute. Where there maybe contentious provisions in the Statute the country should spearhead amendments of the same under the auspice of the Assembly of States Parties.

**(c) Establish a local mechanism for the prosecution of the four core international crimes**

While it is an important feature of the global architecture of the fight against impunity, the International Criminal Court is a court of last resort, which exists to complement national criminal jurisdictions under the principle of complementarity. It therefore steps in to prosecute international crimes only when a member state is unable or unwilling to investigate and prosecute. Even then, the ICC's prosecutorial policy mandates it to prosecute only those who allegedly bear the greatest responsibility for the crimes. In Kenya's case, only six individuals appeared before the Court and the number had eventually been reduced to three. In a situation of such widespread violence, implicating hundreds-and possibly thousands – of mid-level and

lower-level perpetrators, domestic prosecutions are necessary to close the resulting gap in accountability. However, in the case of Kenya, there have been only a handful of such prosecutions and even fewer convictions.

The remaining impunity gap must be addressed by the State in question if the rule of law is to be properly re- established in the country. Thus, there is the need to set up a local mechanism for the prosecution of the four core international crimes. It is on this basis that the Judicial Service Commission (JSC) set up a working committee mandated to study and make recommendations on the viability of establishing an International Crimes Division (ICD) in the High Court of Kenya. After visiting several countries to study various approaches to domestic prosecution of international crimes, the committee produced its first report in October 2012.

The legal framework proposed for the formation of the ICD includes the Constitution, which establishes the High Court of Kenya with unlimited original jurisdiction on civil and criminal matters; the International Crimes Act, No. 16 of 2008 which, under Section 8 (2), provides that the crimes prescribed in the Act shall be tried in the High Court of Kenya; and the Judicial Service Act, Section5 which gives the Chief Justice administrative power to exercise general direction and control over the Judiciary and under which, presumably, the Chief Justice would create the ICD through a Gazette Notice. The JSC report also provides that the ICD shall apply special rules of procedure, practice and evidence in its operations and conduct of trials.

Although the initial discussion of the JSC was on the possibility of operationalizing the International Criminal Act, 2008 in order to address pending post-election violence cases, the report proposes that the ICD should now have jurisdiction to prosecute not only crimes under Section 6 of the International Crimes Act – that is, genocide, war crimes and crimes against

humanity – but also transnational crimes including drug trafficking, human trafficking, money laundering, cybercrime, terrorism and piracy, and any other international crimes as may be prescribed under any international instrument that Kenya is a party to.

The report proposes that the ICD should be modeled on the standards of the ICC at The Hague, with the same rules, practices and procedures being adopted. Seven judges would be appointed to sit in the ICD in panels of three, with one extra judge in case one of the judges cannot sit. Once the judges for this Division have been identified, they would undergo rigorous training in international criminal law and related subjects, through long-term and short-term courses. The seat of the proposed Division will be in Nairobi but it can also operate by circuit and may sit and conduct proceedings in any other place in Kenya as the Chief Justice may direct.

The JSC report recommends that there should be established a well-equipped independent prosecution unit within the office of the Director of Public Prosecutions (DPP) to deal exclusively with international crimes. At the same time, it also says that Parliament should enact legislation to provide for the appointment of a Special Prosecutor who shall be responsible for the prosecution of cases that fall within the jurisdiction of the ICD under Article 157(12) of the Constitution of Kenya. These two recommendations are confusing as they are contradictory. If an independent prosecution unit were to be established within the DPP's office, then it would not be necessary or feasible to appoint a special prosecutor under Article 157(12). The DPP, who has publicly stated that he regards post-election violence cases as not prosecutable, has made clear his reservations to what would amount to taking away some of his powers and vesting them in an independent prosecutor. On the other hand, the appointment of a Special Prosecutor under Article 157(12) would require new legislation by Parliament and it is highly doubtful that the

necessary political will would be forthcoming. For Kenya to show its commitment to prosecuting the four core crimes and ensure that impunity does not rein, then it is high time that we implement ICD. This will go a long way to instill confidence that Kenya is committed to the principles of the rules of law and protection of human rights.

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