

**TO WHAT EXTENT HAS KENYA DISCHARGED ITS LEGAL OBLIGATIONS  
UNDER THE ROME STATUTE?**

**BY**

**LILIAN AKINYI OKUMU**

**(G62/65350/2010)**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE MASTER OF LAWS (LLM) DEGREE  
OF THE UNIVERSITY OF NAIROBI**

**NAIROBI**

**OCTOBER, 2016**

**DECLARATION**

I do solemnly declare that this piece of work, in its present form and content, is the result of my own initiative through research and that the same has not been presented to any institution of higher learning for academic or any other purpose.

AUTHOR

SIGNATURE

LILIAN AKINYI OKUMU

.....

This work has been presented for examination with my approval as the university supervisor

SUPERVISOR

SIGNATURE

PROF. F.D. P. SITUMA

.....

## **ACKNOWLEDGEMENTS**

First and foremost, I would like to thank the Almighty God for enabling me complete this research paper.

I am greatly indebted to my supervisor, Prof. F.D.P Situma, for providing the leadership expertise, and knowledge to make this research paper a reality. I thank my husband, Martin, for all of the support throughout the research and writing of this paper. He has been my inspiration and motivation as I continue to improve my knowledge. I also thank my wonderful children, Nathan, David and Aviva, for always making me smile and for their patience and understanding while I was writing this research paper. I hope that one day they will read this paper and understand why I spent so much time in front of my computer.

My sincere appreciation goes to my family, friends and colleagues who supported and encouraged me. Without their encouragement and targets, I would not have completed this research paper on time. Finally, I take this opportunity to thank and appreciate the Director of Public Prosecutions, Kenya, Mr. Keriako Tobiko, CBS, SC, for giving me the opportunity to pursue my studies.

## **DEDICATION**

This thesis is dedicated to my husband, Martin and my children, Nathan, David and Aviva, without whose love and support this research paper would not have been completed.

To my late parents who taught me the spirit of resilience and hard work. I will keep the fire burning. Finally, I dedicate this thesis to my brothers and sisters for always holding my hand irrespective of the situation. To you all I say, may God bless you.

## **LIST OF CASES**

The Prosecutor vs. Jean Kambanda (Case No. ICTR 97-23)

The Prosecutor vs. Jean-Paul Akayesu (Case No. ICTR-96-4)

The Prosecutor vs. Tadic (Case No. IT-94-1-A).

The Prosecutor vs. Uhuru Muigai Kenyatta (Case No. ICC-01/09-02/11).

The Prosecutor vs. William Samoei Ruto (Case No. ICC-01/09-01/11).

The Prosecutor vs. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09).

The Prosecutor vs. Walter Osapiri Barasa (ICC-01/09-01/13).

The Dover Castle 16 AJIL 704 (1922).

The Llandovery Castle 16 AJL 708 (1922).

Walter Osapiri Barasa vs. The Cabinet Secretary, Ministry of Interior and National Coordination and 4 others, Constitutional Petition Number 488 of 2013.

Jackson Mwangi and Another vs. The Attorney General and Others, Petition Number 2 of 2011.

Republic vs. Paul Gicheru and Philip Kipkoech Bett HCT Misc Cr. App. No. 193/2015.

## **LIST OF STATUTES**

The Constitution of Kenya, 2010.

International Crimes Act, 2008, Chapter No. 60 Laws of Kenya.

Witness Protection Act, Cap. 79, Laws of Kenya.

Criminal Procedure Code, Cap. 75, Laws of Kenya.

Penal Code, Cap. 63, Laws of Kenya.

Office of the Director of Public Prosecutions Act, 2013 (Act No.2 of 2013)

Prisons Act, Cap. 90, Laws of Kenya.

Evidence Act, Cap. 80, Laws of Kenya.

Crimes against Humanity and War Crimes Act, S.C. 2000, c.24.

Federal Law on Co-operation with the International Criminal Court, FF 2000, 2748.

International Criminal Court Act 2001(Commencement) (Amendment) Order 2001 (S.I 2001/2304) (C.77).

## **ACRONYMS & ABBREVIATIONS**

<b>ICTR</b>	-	International Criminal Tribunal for Rwanda
<b>ICTY</b>	-	International Criminal Tribunal for the former Yugoslavia
<b>ICC</b>	-	International Criminal Court
<b>ODPP</b>	-	Office of the Director of Public Prosecutions
<b>OTP</b>	-	Office of the Prosecutor
<b>ACT</b>	-	International Crimes Act, 2008
<b>ASP</b>	-	Assembly of State Parties
<b>UNSC</b>	-	United nations Security Council
<b>UNMICT</b>	-	United nations Mechanisms for Criminal Tribunals
<b>WW1</b>	-	World War 1
<b>IMT</b>	-	International Military Tribunal
<b>UNMICT</b>	-	United Nations Mechanism for International Criminal Tribunals
<b>CIPEV</b>	-	Commission of Inquiry into the Post Election Violence

## LIST OF CONVENTIONS AND TREATIES

Rome Statute of the International Criminal Court: UN DoC A/CONF. 183/9; 371LM 1002(1998):2187 UNTS 90.

United Nations Charter, 26 June 1945, San Francisco; UKTS 67 (1946); Cmd. 7015; 1 UNTS XVI

Vienna Convention on the Law of Treaties, 22 May 1969; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875(1969).

Charter of the International Military Tribunal; 82 UNTS 280; entered into force Aug. 8, 1945.

Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946.

Treaty of Versailles, 225 Parry 188; 2 Bevans 235; AJIL Supp. 151, 385 (1919).

Convention on the Prevention and Punishment of the Crime of Genocide 1948; 78 UNTS 277; entered into force 12 January 1951.

Hague Convention IV, Declaration III- Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459.

Hague Convention IV - Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461.



Hague IV, Declaration III- Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459.

Geneva Convention I for the Amelioration of Conditions of Wounded and Sick in Armed in the field 1949, 75 UNTS 30.

Geneva Convention II for the Amelioration of Conditions of Wounded, Sick and Shipwrecked Members of in Armed at Sea 1949, 75 UNTS 84.

Geneva Convention III Relative to the Treatment of Prisoners of War 1949, 75 UNTS 134.

Geneva Convention III Relative to the Protection of Civilian Persons in Time of War Treatment of Prisoners of War 1949, 75 UNTS 147.

Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC/Res/827 1993, UN Doc S/25704.

Statute of the International Criminal Tribunal for Rwanda (ICTR) 1994, UNSC Res 955 (8 November 1994) UN Doc. S/RES/955.

Statute of the Mechanism for International Criminal Tribunals (the MICT) (adopted on 22<sup>nd</sup> December 2010 by UNSC Res 1966 (22 December 2010), UN Doc S / Res/1966).

## TABLE OF CONTENTS

DECLARATION .....	1
ACKNOWLEDGEMENTS .....	2
DEDICATION .....	3
LIST OF CASES .....	4
LIST OF STATUTES .....	5
ACRONYMS & ABBREVIATIONS .....	6
LIST OF CONVENTIONS AND TREATIES .....	7
TABLE OF CONTENTS .....	9
CHAPTER ONE .....	13
INTRODUCTION .....	13
1.1 BACKGROUND.....	13
1.2 THE STATEMENT OF THE PROBLEM .....	14
1.3 HYPOTHESES.....	15
1.4 RESEARCH QUESTIONS .....	15
1.5 OBJECTIVE OF THE STUDY .....	15
1.6 JUSTIFICATION .....	16
1.7 THEORETICAL FRAMEWORK.....	17
1.8 LITERATURE REVIEW .....	18
1.9 RESEARCH METHODOLOGY.....	22
1.10 LIMITATIONS.....	23
1.11 CHAPTER BREAKDOWN .....	23
CHAPTER TWO .....	26
INTERNATIONAL CRIMINAL LAW APPLICABLE TO KENYA.....	26

2.1 INTRODUCTION.....	26
2.2 STATUS OF INTERNATIONAL CRIMINAL LAW BEFORE THE ADOPTION OF THE ROME STATUTE .....	27
2.2.1 PRE-WORLD WARS .....	27
2.2.2 POST-WORLD WARS .....	28
2.2.2.1 LEIPZIG TRIALS .....	28
2.2.2.2 NUREMBERG AND TOKYO TRIALS .....	29
2.2.3 THE <i>AD HOC</i> UN ESTABLISHED TRIBUNALS .....	32
2.3 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.....	33
2.3.1. OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT .....	34
2.3.1.1. THE SCOPE OF THE JURISDICTION OF INTERNATIONAL CRIMINAL COURT .....	35
2.3.1.2 ICC TRIGGER MECHANISMS FOR THE PROCEEDINGS.....	36
2.3.2. OBLIGATIONS OF STATES UNDER THE ROME STATUTE .....	38
2.3.2.1. OBLIGATION OF THE STATE TO PROSECUTE INTERNATIONAL CRIMES.....	39
2.3.3.2. OBLIGATION TO AVAIL PROCEDURES UNDER NATIONAL LAWS .....	39
2.3.3.3. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE.....	40
2.3.3.4. ARREST AND SURRENDER OF PERSONS TO THE COURT .....	42
2.4 CONCLUSION .....	44
CHAPTER THREE.....	45
KENYA’S LEGAL AND INSTITUTIONAL FRAMEWORKS.....	45
3.1 INTRODUCTION.....	45
3.2 THE LEGAL FRAMEWORKS FOR THE IMPLEMENTATION OF ROME STATUTE.....	45
3.2.1 OBLIGATION TO AVAIL PROCEDURES UNDER NATIONAL LAWS .....	46
3.2.2 OBLIGATION OF THE STATES TO PROSECUTE INTERNATIONAL CRIMES.....	47
3.2.3 OBLIGATION TO COOPERATE WITH INTERNATIONAL CRIMINAL COURT.....	47

3.2.4 OBLIGATION TO ARREST AND SURRENDER OF PERSONS TO ICC .....	49
3.2.5 OBLIGATION FOR ENFORCEMENT OF PENALTIES .....	52
3.2.6 THE DOMESTIC PROCEDURES FOR OTHER TYPES OF COOPERATION .....	53
3.2.6.1 IDENTIFICATION OF PERSONS.....	53
3.2.6.2 TAKING OF EVIDENCE .....	54
3.2.6.3 QUESTIONING OF PERSONS.....	55
3.2.6.4 SERVICE OF DOCUMENTS AND WITNESS APPEARANCE.....	55
3.2.6.5 TEMPORARY TRANSFER OF PRISONERS .....	56
3.2.6.6 ASSISTANCE IN EXAMINING PLACES OR SITES .....	57
3.2.6.7 PERSONS IN TRANSIT TO ICC OR SERVING SENTENCE IMPOSED BY ICC .....	58
3.2.6.8 INVESTIGATIONS OR SITTINGS OF INTERNATIONAL CRIMINAL COURT IN KENYA .....	60
3.2.6.9 REQUESTS TO ICC FOR ASSISTANCE BY KENYA.....	60
3.2. THE INSTITUTIONAL FRAMEWORKS FOR THE IMPLEMENTATION OF THE ROME STATUTE .....	61
3.3.1 THE JUDICIARY.....	61
3.3.2 MINISTRY OF INTERIOR AND NATIONAL CO-ORDINATION .....	63
3.3.3 THE OFFICE OF THE ATTORNEY GENERAL.....	64
3.3.4 OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .....	65
3.3.5 WITNESS PROTECTION AGENCY .....	67
3.3.6 NATIONAL POLICE SERVICE.....	67
3.3.7 CIVIL SOCIETY .....	68
3.3.8 CONCLUSION .....	68
CHAPTER 4 .....	70
CHALLENGES IN IMPLEMENTING THE ROME STATUTE.....	70
4.1 INTRODUCTION.....	70

4.2 LEGAL CHALLENGES .....	70
4.2.1 ABSENCE OF SUPPORTING RULES AND REGULATIONS .....	71
4.2.2 COMPETING LEGAL OBLIGATIONS UNDERMINING IMPLEMENTATION .....	73
4.3. PRACTICAL CHALLENGES TO IMPLEMENTATION .....	76
4.3.1 LACK OF POLITICAL WILL AND COOPERATION .....	76
4.3.2 INSTITUTIONAL CAPACITY CONSTRAINTS .....	79
4.3.3 RESOURCE CONSTRAINTS .....	82
4.4 CONCLUSION .....	84
 CHAPTER FIVE .....	 85
 SUMMARY OF FINDINGS AND RECOMMENDATIONS .....	 85
5.1 SUMMARY OF FINDINGS .....	85
5.2 RECOMMENDATIONS .....	86
TEXTBOOKS.....	90
PUBLISHED ARTICLES .....	91

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

On July 17<sup>th</sup>, 1998, 120 States adopted the Rome Statute of the International Criminal Court, which established the International Criminal Court.<sup>1</sup> The Rome Statute entered into force on 1<sup>st</sup> July 2002.<sup>2</sup> The establishment of the International Criminal Court was premised on the fact that war crimes, crimes against humanity, the crime of aggression and genocide are a concern to the international community as a whole, and must not go unpunished.<sup>3</sup>

The Statute places the duty of prosecutions of those responsible for international crimes on the States.<sup>4</sup> Indeed, International Criminal Court gains jurisdiction to investigate and prosecute international crimes committed within the domestic sphere, only when the domestic legal systems are unwilling or unable genuinely to carry out their functions under the Statute.<sup>5</sup> The Statute explicitly requires the states to cooperate fully with the court and to ensure that national laws allow all specified forms of cooperation.<sup>6</sup>

An international treaty seldom stipulates how states should implement its provisions, how this is done depends on the constitution of each state.<sup>7</sup> Countries may choose to apply the theory of dualism in adopting legislation, or the theory of monism where international law automatically

---

<sup>1</sup> UN Doc A/CONF. 183/9 ; 37ILM 1002(1998) ; 2187 UNTS 90.

<sup>2</sup> Ibid.

<sup>3</sup> Paragraph 4 of the Preamble to Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

<sup>4</sup> Ibid., Paragraphs 5.

<sup>5</sup> Ibid., Article 17

<sup>6</sup> . Ibid., Article 88.

<sup>7</sup> Antony Aust, Handbook of International Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010) at p.75.

becomes part of the municipal law, in the implementation of a treaty or convention.<sup>8</sup> The Rome Statute, like other treaties, does not provide the procedures for its implementation and enforcement, but obligates the states which have ratified the Statute to commit themselves to meeting the obligations set out therein.<sup>9</sup>

States must make sure that national law allows them to comply with their obligations under the Statute.<sup>10</sup> Furthermore, the states that have ratified the Statute commit themselves to meeting the obligations therein without reservations.<sup>11</sup> Kenya is one such state, having ratified the Rome Statute of the International Criminal Court on 11<sup>th</sup> August, 1999, and subsequently, the Statute entered into force in Kenya on 1<sup>st</sup> June, 2005.<sup>12</sup>

## **1.2 The Statement of the Problem**

International law requires that states not only harmonize their national laws with their international obligations, but also that they discharge their treaty obligations in good faith.<sup>13</sup> Kenya, being a State Party to the Rome Statute is, therefore, under the obligation, not only to harmonize its laws and institutions with its obligations under the Statute, but also to discharge its obligations in good faith.

The question that this study discusses is whether Kenya has implemented the Statute within the confines of good faith. This arises from the fact that international law does not provide a procedure for the harmonization of a state's law with its international obligations, as this remains within the domestic sphere of the individual state. And because of that, arguably there are a set

---

<sup>8</sup> Ibid., p.75.

<sup>9</sup> Article 86 of the Rome Statute UN Doc A/CONF. 183/9 ; 37ILM 1002(1998) ; 2187 UNTS 90.

<sup>10</sup> Ibid., Article 88.

<sup>11</sup> Ibid., Article 120.

<sup>12</sup> <https://www.icc-cpi.int/kenya>, (accessed on 9 September 2016).

<sup>13</sup> Article 26 of Vienna Convention on the Law of Treaties; 1155 UNTS 331; 8 I.L.M. 679 (1969).

of criticisms leveled on Kenya's implementation of the Rome Statute especially by the Prosecutor of the International Criminal Court.<sup>14</sup>

### **1.3 Hypotheses**

This study proceeds on the following hypotheses, namely: Kenya has not fulfilled its obligations under Rome Statute in good faith.

### **1.4 Research Questions**

This research seeks to answer the following questions:

1. What obligations does the Rome Statute place on Kenya?
2. To what extent has Kenya complied with its obligations under the Rome Statute?
3. What additional legal, policy and institutional framework does Kenya require to comply with the obligations imposed upon it by the Rome Statute?

### **1.5 Objective of the study**

The objective of this study is to examine the extent to which Kenya has implemented and discharged its obligations under the Rome Statute. The basis for states meeting their obligations under international treaties is encapsulated in Article 26 of the Vienna Convention on the Law of Treaties,<sup>15</sup> which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.<sup>16</sup> The provision envisages the application of the principle of *pacta sunt servanda*, by states in complying with their international obligations. Furthermore, a party may not invoke the provisions of its internal law as justification for its failure to perform a

---

<sup>14</sup> Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute against the Government of Kenya, 29 November 2013, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 (ICC-01/09-02/11-866-Red) available at <http://www.icc-cpi.int>, (Accessed on 19<sup>th</sup> September, 2016.)

<sup>15</sup> Vienna Convention on the Law of Treaties; 1155 UNTS 331; 8 I.L.M. 679 (1969).

<sup>16</sup> Ibid., Article 26.



treaty.<sup>17</sup> The same principle applies to compliance with obligations arising from the Rome Statute.

The research will specifically address the following objectives:

1. Review Rome Statute to establish the obligations therein.
2. Review Kenya's legal and institutional frameworks to establish whether they adequately provide for effective implementation of the obligations under the Rome Statute.
3. Make recommendations for effective implementation and discharge of Kenya's obligations under the Rome Statute

## **1.6 Justification**

As discussed above, Kenya is a state party to the Rome Statute of the International Criminal and has domesticated the Rome Statute by enacting International Crimes Act, No. 16 of 2008 without making any reservations thereto.<sup>18</sup> It is therefore important to examine Kenya's legal frameworks with regards to discharge of its obligations under the Statute. Particularly, the provisions of International Crimes Act, 2008,<sup>19</sup> that facilitates cooperation with ICC in the investigations and prosecutions of international crimes. This research will identify specific obligations and challenges if any, encountered, in the enforcement of these obligations. Thus, the research will contribute to improved awareness and understanding of the obligations and the procedures required for discharge of these obligations, hence facilitate the understanding of Kenya's obligations. More importantly, the research will recommend efficient and effective models to implement and discharge the obligations under the Rome statute. In addition the research will contribute to the scarce information available nationally on the implementation of Kenya's obligations under the Rome Statute.

---

<sup>17</sup> Supra, note 13, Article 27.

<sup>18</sup> Article 120 of the Rome Statute provides that there shall be no reservations on the Statute.

<sup>19</sup> International Crimes Act, Act No. 16 of 2008

## 1.7 Theoretical Framework

International criminal law can be discussed and reviewed using various legal theories. This research adopts the positive law theory and critical legal studies. The main proponents of positive law theory, Jeremy Bentham<sup>20</sup> and John Austin<sup>21</sup>, positive law as a command originating from a sovereign.<sup>22</sup> According to John Austin, there has to be a sovereign from whom the command emanates, that is, an identifiable political superior.<sup>23</sup> Positivist law theory looks at the law as it is, and not as it ought to be.<sup>24</sup> This study will, in addition to positive law theory, make reference to Critical Legal Study (CLS). The proponents,<sup>25</sup> of this theory argue that the law promotes interests of powerful and legitimates injustice.<sup>26</sup>

Positive law is ascertainable and valid without subjective considerations.<sup>27</sup> In international law, positivism arguably, assumes that the law only deals with the rules of law, which are found in treaties and conventions agreed upon by states. The criterion for the validity of legal rules of international law would, therefore, be those, which are revealed by the decisions of international courts and treaties, which have been duly ratified.<sup>28</sup> This theory is pertinent in discussing the interface between international criminal law and domestic law obligations of states within the realm of the Rome Statute. Kenya, being a state party to the Rome Statute, must adhere to the obligations created therein in good faith. It is against this backdrop that this theory is relevant to

---

<sup>20</sup> 1748-1832

<sup>21</sup> 1790-1859

<sup>22</sup> John Austin, The Province of Jurisprudence Determine (1954) lectures 1, 5-6 at p. 13. Confirm citation.( W. Rumble ed.,Cambridge University Press, Cambridge, 1995)

<sup>23</sup> Ibid., p. 193.

<sup>24</sup> M.D.A Freeman, Introduction to Jurisprudence, 8<sup>th</sup> ed. (sweet & Maxwell, London, 2008), at p. 255.

<sup>25</sup> Among noted CLS theorists are Roberto Mangabeira Unger, Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, and Katharine A. MacKinnon.

<sup>26</sup> Brian Bix, Jurisprudence: Theory and Context,5<sup>th</sup> ed. (Sweet & Maxwell,(2009), p. 232.

<sup>27</sup> Ibid., at p. 248.

<sup>28</sup> Mark W. Janis, an Introduction to International Law, (Little, Brown & Company, Boston 1988), p. 265.

this study which seeks to examine Kenya's legal and institutional frameworks for the enforcement of international law with special reference to the Rome Statute.

According to the CLS, the law is a tool used by the establishment to contain its power and domination for equal status quo. The wealthy and the powerful individuals use the law as an instrument for oppression in order to maintain their place in hierarchy. CLS looks at the political nature of the law that is law as an ideology.<sup>29</sup> The law serves to legitimate existing power structures.<sup>30</sup> Thus it is an instrument to advance political goals and objectives that protects and preserves unjust status quo. CLS is relevant to the discussion with regards to examination of the history of international criminal prosecutions and development of principles of international criminal law principles. This is particularly so with regard to the trials before Nuremberg and Tokyo International Tribunals which were perceived as 'victor's' justice as they were established by the victors of the war.<sup>31</sup> More importantly, CLS is useful in the assessment Kenya's legal and institutional mechanisms for the implementation of Rome Statute.

## **1.8 Literature Review**

A number of authors have published works on international criminal law generally and the International Criminal Court, in particular. For the purposes of this section, the writings of these authors can be broadly categorized as follows: those that discuss the evolution of international criminal law; those that discuss developments associated with the development of the Rome Statute, the obligations it places upon states; and those that explore municipal rules under international criminal law and the nature of the enforcement regime required under the

---

<sup>29</sup> Lewis Kornhauser, The Great Image of Authority, 36 Stanford Law Review,( 1987), p. 676-701

<sup>30</sup> J.W Harris, Legal Philosophies, 2<sup>nd</sup> ed. (Oxford University Press inc., New York, ( 2004), p. 109.

<sup>31</sup> Robert Cryer, Hakan Friman, Darrl Robinson & Elizabeth Wilmshurst, An introduction to International Criminal Law and Procedure, 2<sup>nd</sup> ed.( Cambridge University Press, Cambridge, 2010) at p.118.

international criminal law (including the nature of state cooperation anticipated by the Rome Statute). The discussions hereunder seek to highlight how this literature informs, complements or is distinct from the approach taken in the present study.

William A Schabas discusses the drafting of the Rome Statute, its jurisdiction and how State Parties cooperate with it to enforce its decisions.<sup>32</sup> Of importance to this study is Schabas' discussion on the 2007-2008 Post-election Violence<sup>33</sup> where the Prosecutor filed an application to the Pre-Trial Chamber for authorization to initiate investigations in accordance with Article 15 of the Statute.<sup>34</sup> The application filed in November 2009, was the first exercise of the *proprio motu* power of the Prosecutor since the beginning of the Court.<sup>35</sup> Shaba's work addresses prosecution of international crimes at the International Criminal Court and International Tribunals. However, it does not address legal and institutional frameworks for the prosecutions of such crimes at the municipal level. This gap is addressed in this research.

Malcolm N. Shaw explores the role of municipal rules in international law.<sup>36</sup> He notes that, the position of municipal law within the international sphere is that a state cannot justify itself for failure to perform its treaty obligations by referring to its domestic legal situation.<sup>37</sup> Shaw points out that the jurisdiction of the ICC is not universal, but territorial or personal in nature.<sup>38</sup> Where a national of a non-party state commits the crime being prosecuted, he or she will still be

---

<sup>32</sup> William A. Schabas, An introduction to the International Criminal Court, 4<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2011) at p. 62-88.

<sup>33</sup> <https://www.icc-cpi.int/kenya> (assessed on 5 September 2016.)

<sup>34</sup> Article 15(1) of Rome Statute provides that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

<sup>35</sup> <https://www.icc-cpi.int/kenya> (assessed on 5 September 2016.)

<sup>36</sup> Malcolm N. Shaw, International Law, 6<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2008), at p. 133.

<sup>37</sup> Article 27 of Vienna Convention on the Law of Treaties

<sup>38</sup> Malcolm N. Shaw, International Law, 6<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2008), at p. 412.

prosecuted where the crime was committed in the territory of state party to the Rome Statute.<sup>39</sup> Shaw's work will be useful in unpacking the relationship between international law and the municipal law. In particular, it is useful in examining obligations under the Rome Statute and determining whether, Kenya has fulfilled its obligations in good faith. Shaw does not address procedures of enforcement of the Rome Statute by the states, which the study feels is important in discussing implementation and discharge of under the Statute.

Antonio Cassese discusses the nature of International Criminal Law and its evolution.<sup>40</sup> According to the author, international criminal law is a body of international rules designed both to proscribe certain categories of conduct and to make those persons who engage in such conduct criminally liable.<sup>41</sup> They impose upon the Party State an obligation to prosecute and punish such criminal conduct and regulate proceedings before the international courts and tribunals, for the prosecution and trying of persons accused of such crimes.<sup>42</sup> Cassese's work enables this study to understand institutional mechanism for prosecution of international crimes. Additionally, this will help assess whether Kenya has established efficient and effective legal and institutional frameworks in the light of best practices adopted by international criminal tribunals. It is important to point out that, just like Schabas, Cassese has not addressed prosecution of international crimes how the States can enforce the obligations under the Statute at the municipal level. This is a gap in the literature review, which this study addresses.

---

<sup>39</sup>Ibid.

<sup>40</sup> Antonio Cassese, International Criminal Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011).

<sup>41</sup> Ibid., at p.3.

<sup>42</sup>Ibid.

Oosterveld et al, discuss the various cooperation obligations, which states have within the realm of the Rome Statute.<sup>43</sup> These obligations relate to investigations, arrests and surrender, witness protection, the enforcement of the Court's sentences and fines, as well as privileges and immunities of court officials.<sup>44</sup> The authors point out that the court lacks a police force or military of its own and relies on the states to discharge its mandate; hence, the success of the Court would be determined by states cooperation.<sup>45</sup> The authors look at legislation by the United Kingdom, Canada and Switzerland, in light of this cooperation. Their paper helps explore whether Kenya's statutory framework enables the enforcement of its obligations under the Rome Statute. In addition, the legislative experience of each of the three countries provides guidance to the unique context of Kenya.

Abtahi and Koh look at the dual nature of the enforcement regime of the International Criminal Court.<sup>46</sup> They argue that the enforcement pillar belongs to the States while the Court is a judicial pillar. They bring out the relationship between the Court and the State in the enforcement of sentences and argue that the Court depends on the cooperation of States Parties.<sup>47</sup> Similarly, Oosterveld, Abtahi and Koh consider the importance of the cooperation of states to the successful functioning of the Court. Their paper is relevant this study as it discusses the best

---

<sup>43</sup> Valerie Oosterveld et al, "The Cooperation of States with the International Criminal Court," 25 Fordham International Law Journal 3 (2001).

<sup>44</sup> Part 9 and 10 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

<sup>45</sup> Supra Note 47, p. 767.

<sup>46</sup> Hiram Abtahi & Steven Arrigg Koh, "The Emerging Enforcement Practice of the International Criminal Court," 1 Cornell International Law Journal 45 (2012).

<sup>47</sup> Judge Philippe Kirsch, President of the International Criminal Court, Opening Remarks at the Fifth Session of the Assembly of States Parties (Nov. 23, 2006). Also available at: <http://www.iccpi.int>. (Accessed on 13<sup>th</sup> June, 2015). ("In establishing the ICC, States set up a system designed on two pillars. The Court itself is the judicial pillar. The enforcement pillar belongs to States. In national systems, the two pillars are intertwined. Courts rely automatically on the enforcement powers of the State. In the case of the ICC, the two have been separated. The Court depends on the cooperation of States Parties. With the support and cooperation of States Parties, the Court will continue to be a strong, credible judicial institution.")

practices in the implementation of the Sentences. It is relevant in examining Kenya's willingness and practices with regards to the enforcement of imprisonment sentences.

Maluwa et al, look at the International Criminal Court operations in Africa.<sup>48</sup> The authors focus on the Kenyan experience with the International Criminal Court, in relation to the cases before the Court. They also discuss how, in 2013, the Kenyan government managed to lobby the African Union members to adopt a resolution which called for the cases before the Court to be referred back to the national courts for consideration.<sup>49</sup> The authors point out that Kenya has not put in place the necessary legal framework to enable it to prosecute the cases in its national courts. Mulwa et al. paper is beneficial to this discussion as it has examined Kenya's cooperation with the ICC. It differs from this research as it focuses on the cases before the ICC and does not provide a comprehensive examination of Kenya's legal and institutional frameworks.

## **1.9 Research Methodology**

This research is based on literature review of both primary and secondary sources of information. This is because of the confidential nature of the subject in light of the senior government officers charged at ICC. Primary sources include the Rome Statute of the International Criminal Court (Statute), the Rules of Procedure and Evidence, the Elements of Crimes, Statute for International Criminal Tribunal for the Former Yugoslavia and Rwanda respectively, International Instruments on international Humanitarian Law such as Hague Convention 1899 and 1907, Geneva Conventions, 1949 and additional Protocol 1977 and International Crimes Act, 2008. Special reference was paid to the Rome Statute and International Crimes Act, 2008.

---

<sup>48</sup> Tiyanjana Maluwa et al, "Africa and the International Criminal Court," Cornell International Law Journal Vol. 45.

<sup>49</sup> Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Doc. Assembly/AU/13(XXI), Also available at: [http://iccnow.org/documents/AU\\_decisions\\_21st\\_summit\\_May\\_2013.pdf](http://iccnow.org/documents/AU_decisions_21st_summit_May_2013.pdf) (accessed on June 14, 2015).

The research also utilized secondary sources such as text books by local and international law authors, published international law journals and articles through law libraries and the electronic searches.

## **1.10 Limitations**

Article 87(3) of the Rome Statute read alongside section 25(1) of the International Crimes Act provides for the confidentiality of requests, except to the extent that the disclosure is necessary for execution of the request. The criminal justice agencies officials are therefore reluctant to divulge information due to this confidentiality and this research has had to rely mainly upon material in the public domain. Furthermore, the absence of evidence-based evaluations on a state's implementation and whether this should be appraised based on local prosecutions or ICC prosecutions make it difficult to quantify the enforcement of a given state's obligations. To address this gap, this research has attempted to engage in a comparative study of the countries with legal frameworks on domestic prosecutions of international crimes. This study examined both international and regional instruments and the best practices developed in various jurisdictions including International Criminal Court and International Tribunal.

## **1.11 Chapter Breakdown**

### **Chapter One: Introduction**

- Background
- Statement of the Problem



- Hypotheses
- Research Questions
- Theoretical Framework
- Literature Review
- Research Methodology
- Chapter Breakdown

## **Chapter Two: International Criminal Law**

- Introduction
- Status of International Criminal Law before the Adoption of the Rome Statute
- Obligations of State Parties to the Statute

## **Chapter Three: Kenya's Legal and Institutional Frameworks**

- Introduction
- Legal Frameworks
- Institutional Frameworks

## **Chapter Four: Strengths and Weaknesses of Kenya's Frameworks**

- Introduction
- Legal Frameworks
- Institutional Frameworks

## **Chapter Five: Summary of Findings and Recommendations**

- Conclusion
- Recommendations

## CHAPTER TWO

### INTERNATIONAL CRIMINAL LAW APPLICABLE TO KENYA

#### 2.1 Introduction

International criminal law is probably one of the greatest achievements in public international law.<sup>50</sup> War crimes, crimes against humanity, crimes of aggression and genocide have all affected the international community, directly or indirectly. The effort to intervene and bring justice involves two distinct areas of law: international and criminal law. International law is based on the willingness between equal and sovereign states to accept rules and practices.<sup>51</sup> Criminal law, on the other hand, is supposed to be the local interpreter of the commonly accepted rules and practices by these states.<sup>52</sup>

International criminal law obligates States to prosecute and punish criminal conduct, and regulates proceedings before the international courts and tribunals for the prosecution of persons accused of such crimes.<sup>53</sup> International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned.<sup>54</sup> With the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecutions for

---

<sup>50</sup> Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences," 20 The European Journal of International Law 2 (2009) p.331.

<sup>51</sup> Antony Aust, Handbook of International Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010) at p.255.

<sup>52</sup> Immi Talgren, "The Sense and Sensibility of International Criminal Law, 13 European Journal of International Law 3, (2002).

<sup>53</sup> Antonio Cassese, International Criminal Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011).p. 3.

<sup>54</sup> *Ibid.*, p.11.

humanitarian abuses slowly began to emerge.<sup>55</sup> The emergence and development of international criminal law has seen the establishment of substantive law in the area.<sup>56</sup>

This chapter explores the history of international criminal prosecutions and examines the international tribunals and courts that have had, and continue, to prosecute international crimes. The chapter discusses the Pre-World War I, Post World War 1 and World War 11 prosecutions of international crimes, the Nuremberg and Tokyo Tribunals. This is followed by a look at the United Nations *ad hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). In addition, the chapter looks at the Rome Statute for the International Criminal Court and the obligations imposed on the States Parties thereto.

## **2.2 Status of International Criminal Law before the Adoption of the Rome Statute**

### **2.2.1 Pre-World Wars**

For a long time, the international community has sought ways of addressing serious crimes. As early as 405 B.C, the Greek had already started forming tribunals to try individuals who had committed war crimes.<sup>57</sup> The desire by the international community to have a body that would try serious crimes can be traced to as early as the 13<sup>th</sup> Century. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army.<sup>58</sup>

---

<sup>55</sup> Hague Convention II with respect to the Laws and Customs of War by Land of 1899, 27<sup>th</sup> July; Hague Convention (IV) Concerning the Laws and Customs of War on Land, 18 Oct, 1907, 2015 Consol. T.S

<sup>56</sup> William A. Schabas, An introduction to the International Criminal Court, 4<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2011), p. 2.

<sup>57</sup> Ibid.

<sup>58</sup> Supra Note 7, p.1.

The first genuine international trial was that of Peter Von Hagenbach, who was tried in 1474 for the perpetration of atrocities committed during the occupation of Breisach.<sup>59</sup> The troops of Peter Von Hagenbach, a Burgundian governor, raped and killed innocent civilians and pillaged their property during the occupation of Breisach, Germany. He was tried and convicted and beheaded after his trial.<sup>60</sup> Another attempt by the international community to create international criminal rules was in relation to the Hague Conventions of 1899<sup>61</sup> and 1907,<sup>62</sup> which saw the first significant codification of the laws of war in an international treaty.<sup>63</sup> The Hague Conventions of 1899 and 1907, as international treaties, were meant to impose obligations and duties upon States.<sup>64</sup>

## **2.2.2 Post-World Wars**

### **2.2.2.1 Leipzig Trials**

The seeds for the modern international criminal justice were planted just after World War 1, through the efforts of the victorious Allied Powers to prosecute the officials of the vanquished Germany.<sup>65</sup> The Allied Powers set up the Commission on the Responsibility of Authors of War and on Enforcement of Penalties, comprising fifteen members, which recommended the prosecution of the Kaiser William II of Hohenzollern, formerly German Emperor,<sup>66</sup> and other

---

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Hague Convention IV, Declaration III- Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459.

<sup>62</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, 187 CTS 227; 1 Bevans, 631.

<sup>63</sup> Ibid., Preamble.

<sup>64</sup> Supra Note 13, Articles 1- 2.

<sup>65</sup> Robert J Currie & Dr. Joseph Rikhof, International and Transnational Criminal Law, 2<sup>nd</sup>ed. (Irwin Law, Inc, Toronto, 2013), p.168.

<sup>66</sup> The Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 American Journal of International Law, (1920) p. 95.

high officials, on the basis of command responsibility.<sup>67</sup> The Commission further suggested the establishment of an Allied High Tribunal to try the violations of laws and customs of war as well as the laws of humanity.<sup>68</sup>

The trials against central powers officials were carried out in Leipzig, in German courts, despite the Netherlands' refusal to hand over the Kaiser.<sup>69</sup> The trials resulted in 6 acquittals.<sup>70</sup> Of the judgments given by the Leipzig Court, two involved the sinking of the hospital ships *Dover Castle* and *Llandoverly Castle*,<sup>71</sup> and the murder of the survivors, mainly Canadian wounded and medical personnel. These judgments are still cited to this day as precedents on the scope of the defence of superior orders.<sup>72</sup>

#### **2.2.2.2 Nuremberg and Tokyo Trials**

The first true starting point for international criminal law was the Nuremberg Tribunal. The Tribunal was established under the Charter annexed to the agreement for the Prosecution and Punishment of the Major War Criminals, 1945,<sup>73</sup> and provided specifically for individual responsibility for crimes against peace, war crimes and crimes against humanity.<sup>74</sup> The trial of

---

<sup>67</sup> Ibid., p. 116-7,121.

<sup>68</sup> Report of the Commission to the Preliminary Peace Conference, 14 American Journal of International Law, (1920) p. 122. Also T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', 100 AJIL, 551 (2006).

<sup>69</sup> C.Mullins, The Leipzig Trials, An Account of the Criminals' Trials and Study of German Mentality, H. F & G Witherby, London, 1921.

<sup>70</sup> Ibid.

<sup>71</sup> The Dover Castle 16AJIL 704 (1922); The Llandoverly Castle 16 AJL708 (1922).

<sup>72</sup> Supra, note 7, at p .4.

<sup>73</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal; 82 U.N.T.S. 280; entered into force Aug. 8, 1945.

<sup>74</sup> Ibid, Article 6.

the major Nazi war criminals, Herman Goering, Rudolf Hess, and Alfred Rosenberg, as well as seven criminal organizations took place over ten months between 1945 and 1946.<sup>75</sup>

The Nuremberg Tribunal is of great significance to the development of international criminal law as it marked the establishment of principles that underpin current international criminal justice efforts.<sup>76</sup> The Tribunal ruled that, contrary to the historical *Westphalian* construct of international law, individuals incur legal obligations under international law and could be held liable for breaches of such obligations.<sup>77</sup> The Tribunal was an expression of the notion of individual criminal responsibility with the realization that individuals, and not abstract entities, commit crime.<sup>78</sup>

The Tribunal is remembered for having stated that, “international law imposes duties and liabilities upon individuals as well as states and that crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>79</sup> The Tribunal further validated Article 7 of International Military Tribunal Charter which purported to strip away any state immunity from prosecution or mitigation of sentences that extended from the perpetrator being a state official.<sup>80</sup> The principle of state immunity which, under certain circumstances, protects the representatives of a State could not be applied to acts which are condemned as criminal by international law.<sup>81</sup> The very essence of the International Military Tribunal Charter was that

---

<sup>75</sup> France et al v Goering et al, reprinted in ( 1947), 41 AJIL 172 ( Goering).

<sup>76</sup> Robert J Currie & Dr. Joseph Rikhof, International and Transnational Criminal Law, 2<sup>nd</sup>ed. (Irwin Law, Inc, Toronto, 2013), p.170.

<sup>77</sup> Ibid.

<sup>78</sup> Supra Note 27, Article 6.

<sup>79</sup> Supra Note 29 at paragraph,220-21.

<sup>80</sup> Article 7 of International Military Tribunal Charter, 82 UNTS, 280.

<sup>81</sup> Ibid.

individuals had international duties which transcended their national obligations of obedience imposed by the individual state.<sup>82</sup>

In addition to the Nuremberg International Military Tribunal, the Control Council Law No. 10 provided for the domestic prosecutions of war crimes, crimes against humanity and crimes against peace.<sup>83</sup> These trials were subsequent proceedings conducted after the conclusion of the Nuremberg International Military Tribunal. These included trials of the Nazi doctors and judges, and military leaders.<sup>84</sup>

In January 1946, the Major Allied Powers issued the “Potsdam Declaration” which declared their determination to prosecute high ranking Japanese officials for crimes committed during the occupation of parts of Asia.<sup>85</sup> General Douglas MacArthur, the supreme commander of the Allied forces in Japan, approved the *Tokyo Charter*, which established the International Military Tribunal for the Far East, to prosecute persons charged individually, or as members of organizations, or both, with offenses which included crimes against peace.<sup>86</sup> The tribunal adopted Nuremberg IMT, findings that aggression existed at the time hence; the principle of *nullum crimen lege* was not violated and abolished the defence of superior orders.<sup>87</sup> The Nuremberg and Tokyo Trials were almost similar, although the Tokyo IMT went further to discuss in greater detail the principle of command responsibility with regard to civilian and

---

<sup>82</sup> Supra Note 36, Article 6

<sup>83</sup> Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, pp 50-5.

<sup>84</sup> Robert Cryer, Hakan Friman, Darl Robinson & Elizabeth Wilmshurst, An introduction to International Criminal Law and Procedure, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010) at p.119-120.

<sup>85</sup> Robert J Currie & Dr. Joseph Rikhof, International and Transnational Criminal Law, 2<sup>nd</sup>ed. (Irwin Law, Inc, Toronto, 2013), p. 171.

<sup>86</sup> Special Proclamation Establishment of an International Military Tribunal for far East, 19 January 1946, TIAS NO.1589, at 3.

<sup>87</sup> Tokyo IMT Judgment, 48, 437-9



military defendants.<sup>88</sup> The two Tribunals have been lauded for establishing important international law principles but criticized as tools for establishing ‘victors justice’.<sup>89</sup>

### 2.2.3 The *Ad Hoc* UN Established Tribunals

Heightened conflicts and gross violations of human rights which erupted in former Yugoslavia and Rwanda served to rekindle the sense of outrage felt at the close of the Second World War.<sup>90</sup> Thus, the United Nations Security Council, exercising its powers under the Charter of the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>91</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>92</sup> The ICTY had jurisdiction over serious violations of international humanitarian law (IHL) committed in the former Yugoslavia,<sup>93</sup> while the ICTR had jurisdiction over genocide, crimes against humanity and serious violations of IHL<sup>94</sup> in Rwanda.<sup>95</sup> The *ad hoc* tribunals had concurrent jurisdiction with national courts, but with primacy over the national courts,<sup>96</sup> and at any stage of the procedure, the Tribunal could formally request national courts to defer to its competence.<sup>97</sup>

---

<sup>88</sup> Tokyo IMT Judgment, 48, 442-7.

<sup>89</sup> Robert Cryer, Hakan Friman, Darl Robinson & Elizabeth Wilmschurst, An introduction to International Criminal Law and Procedure, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010) at p.118.

<sup>90</sup> Antonio Cassese International Criminal Law 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011), at p.325.

<sup>91</sup> United Nations Security Council Resolution 827 formally establishing the International Criminal Tribunal for the former Yugoslavia; UNSC/Res/827 (1993).

<sup>92</sup> Statute of the International Criminal Tribunal for Rwanda (ICTR) 1994, UNSC Res 955 ( 8 November 1994) UN Doc. S/RES/955.

<sup>93</sup> Article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia. (Adopted 25<sup>th</sup> May 1993 by Resolution 827), UN Doc S/25704.

<sup>94</sup> Ibid. Articles 2, 3 and 4.

<sup>95</sup> Article 7 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) 1994, UNSC Res 955 ( 8 November 1994) UN Doc. S/RES/955.

<sup>96</sup> Article 9(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia. (Adopted 25<sup>th</sup> May 1993 by Resolution 827), see also Article 8 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) 1994, UNSC Res 955 ( 8 November 1994) UN Doc. S/RES/955.

<sup>97</sup> Statute of the Mechanism for International Criminal Tribunals (the MICT)( adopted on 22<sup>nd</sup> December 2010 by UNSC Res 1966 ( 22 December 2010), UN Doc S / Res/1966); In the preparation for the winding up of the *ad hoc tribunals*, the Security Council established, United Nations Mechanism for Criminal Tribunals (UNMICT) to deal with outstanding issues arising from the two *ad hoc* tribunals.

The jurisprudence of the ICTY and ICTR has contributed enormously to the development of international criminal law. They have developed legal tools, such as the concept of “joint criminal enterprise,” first set out in the case of *Tadic*.<sup>98</sup> Additionally, findings that genocide can be committed by way of rape and sexual violence are major contributions of ICTR jurisprudence.<sup>99</sup> The Rome Statute has built upon this jurisprudence.<sup>100</sup> It however differs with the ad hoc tribunals in two principal ways. First, it is a treaty established mechanism and not based on a UN resolution.<sup>101</sup> Second, its scope is wider than the ad hoc tribunals both in content and application.<sup>102</sup> Thus, it provides jurisdiction to try international cases and goes beyond geographical and time limited jurisdiction of the ad hoc tribunals.<sup>103</sup>

### **2.3 Rome Statute of the International Criminal Court**

The period following World War I saw numerous unsuccessful attempts aimed at establishing international criminal institutions.<sup>104</sup> For example, the International Law Commission’s (ILC) was charged with preparing the draft statute for establishing an international court.<sup>105</sup> The Draft Statute was adopted by the International Law Commission in 1994.<sup>106</sup> The Draft Statute proposed that an international criminal court should be created with jurisdiction to try genocide cases, war crimes, crimes of aggression and crimes against humanity but was not adopted.<sup>107</sup> It only until 1996, that the General Assembly established a Preparatory Committee on the

---

<sup>98</sup> *Tadic* (IT-94-1-A), Judgment, 15 July 1999 at para.220.

<sup>99</sup> Akayesu, Jean Paul (ICTR-96-4); 71.

<sup>100</sup> Article 6 of the Rome Statute, 2187 UNTS 3.

<sup>101</sup> Rome Statute of International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

<sup>102</sup> *Ibid.*, Article 1, 2187 UNTS 3.

<sup>103</sup> Article 5 of the Rome Statute contrasted Article 1 of the Statute of International Tribunal for the Former Yugoslavia and Statute of International Tribunal for Rwanda respectively.

<sup>104</sup> Antonio Cassese *International Criminal Law* 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011) at p. 317

<sup>105</sup> *Ibid.*, at p.342.

<sup>106</sup> Report of the International Law Commission on the Work of its 46<sup>th</sup> Session, UN Doc. A/49/10 (1994).

<sup>107</sup> Report of the ILC on the Work of its 46th Session, A/49/10, pp. 43 ff. See in particular J. Crawford, ‘The ILC’s Draft Statute for an International Criminal Court’, 88 AJIL, 1994, p. 140.

Establishment of the International Criminal Court.<sup>108</sup> On 17 July, 1998, the Rome Statute of the International Criminal Court was adopted by 120 votes to 7 (USA, Libya, Israel, Iraq, China, Syria, and Sudan, with 20 abstentions.<sup>109</sup> For the Rome Statute to come into force there was a requirement that at least 60 states ratified it.<sup>110</sup> The Statute came into force on 1<sup>st</sup> July, 2002.<sup>111</sup>

This section discusses the drafting and adoption of Rome Statute for International Criminal Court. It starts by providing a background to the ICC before proceeding to provide an overview under the following heads: the scope of its jurisdiction and its trigger mechanism. It finally, concludes with a discussion around the obligations imposed by the treaty upon party states. In summary this include the obligation to prosecute international crimes, avail procedures at national level, render appropriate cooperation and arrest/surrender of persons to the ICC.

### **2.3.1. Overview of the International Criminal Court**

The ICC consists of four organs: the Presidency, Appeals Division, Trial Division and Pre-Trial Division, the Office of the Prosecutor, and the Registry.<sup>112</sup> Article 1 of the Rome Statute establishes a permanent International Criminal Court (ICC) with the power to exercise its jurisdiction over persons for the most serious crimes of international concern.<sup>113</sup> ICC is complementary to national criminal jurisdictions.<sup>114</sup> Complementarity entails that judicial proceedings before the ICC are only permissible if the states with jurisdiction are either

---

<sup>108</sup> Report of the Preparatory Committee on the Establishment of International Criminal Court, UN Doc. A/51/22.

<sup>109</sup> Report of the Conference, UN Doc. A/CONF.183/SR.9, paras 28,33 and 40.

<sup>110</sup> Article 126 of the Rome Statute, 2187 UNTS 3.

<sup>111</sup> <https://www.icc-cpi.int/>, ( accessed on 13 September 2016).

<sup>112</sup> Ibid., Article 34.

<sup>113</sup> Article 1 of the Rome Statute, 2187 UNTS 90.

<sup>114</sup> Ibid., Article 1.

unwilling or genuinely unable to exercise their jurisdiction.<sup>115</sup> Moreover, once an investigation is begun, the State having territorial or nationality jurisdiction are to be afforded the opportunity to exercise jurisdiction.<sup>116</sup> Therefore, the Rome Statute recognizes the primacy of national prosecutions. ICC is essentially a court of last resort and only prosecutes if the state with jurisdiction fails to exercise the jurisdiction. It means that the State Party assumes a significant role in the regime for the prosecution of international crimes, and should develop legal and institutional frameworks to discharge these obligations.<sup>117</sup>

### **2.3.1.1. The scope of the Jurisdiction of International Criminal Court**

The Court exercises jurisdiction over crimes committed after the entry into force of the Statute.<sup>118</sup> Its jurisdiction extends to four crimes: genocide, war crimes, and crimes against humanity and crimes of aggression.<sup>119</sup> Additionally, Article 70 of the Statute gives the ICC jurisdiction over offences against administration of justice, such as perjury and interfering with witnesses. Currently, twenty-two cases in nine situations have been brought before the International Criminal Court.<sup>120</sup>

ICC does not exercise universal jurisdiction.<sup>121</sup> The jurisdiction of the Court is limited by Article 17, which provides for complementarity. The primary jurisdiction to prosecute international crimes lies with the states; hence the ICC can only prosecute international crimes when a state is

---

<sup>115</sup> Ibid., Article 17.

<sup>116</sup> Ibid., Article 18.

<sup>117</sup> Ibid., Article 88.

<sup>118</sup> Ibid., Article 11.

<sup>119</sup> Ibid., Articles 6, 7, and 8.

<sup>120</sup> <https://www.icc-cpi.int/kenya>, (Accessed on 2 July, 2015).

<sup>121</sup> Articles 11-13 of the Rome Statute, 2187 UNTS 90.

genuinely unwilling or unable to carry out the investigation or prosecutions.<sup>122</sup> The ICC has jurisdiction only with respect to crimes committed after the Statute came into force.<sup>123</sup> For the States that became members to the Statute after 1 July 2002, the Court has jurisdiction over crimes committed after the entry into force of the Statute in that State.<sup>124</sup> Therefore, the ICC cannot investigate and prosecute crimes committed before its entry into force. The national authorities must prosecute such crimes.

### **2.3.1.2 ICC Trigger Mechanisms for the Proceedings**

The Court's jurisdiction may be invoked by three methods: referral from a state party, referral from United Nations Security Council acting under Chapter VII and, finally, the Prosecutor initiating an investigation *proprio motu*.<sup>125</sup> With regard to the first of these, States, which are parties to the Statute, may refer situations to the ICC.<sup>126</sup> So far, Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali, have referred situations occurring on their territories to the Court.<sup>127</sup> However, concerns have been raised that States will use this mode of referral as a way of targeting rebel or opposing political groups.<sup>128</sup>

The Security Council has the primary responsibility of maintenance of international peace and security and the members agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.<sup>129</sup> Security Council may make referrals to the Court,

---

<sup>122</sup>Ibid., Article 17.

<sup>123</sup> Ibid., Article 11.

<sup>124</sup> Ibid., Article 11.

<sup>125</sup> Ibid., Article 13.

<sup>126</sup> Ibid., Article 14.

<sup>127</sup><http://www.icc-cpi.int>, (Accessed on 2 July, 2015).

<sup>128</sup> Robert J Currie & Dr. Joseph Rikhof, International and Transnational Criminal, Law 2<sup>nd</sup> ed. (Irwin Law Inc, Toronto, 2013.) at p.202.

<sup>129</sup> Article 24(1) of the Charter of the United Nations UNTS XVI.

pursuant to its powers to Chapter VII powers.<sup>130</sup> This mechanism is significant as it confers jurisdiction to ICC's over non State Parties. The Court is accorded mandate to exercise jurisdiction over crimes committed in that country, even though the State is not a party to the Statute.<sup>131</sup> The referral bears the imprimatur on UNSC, whose resolutions are binding on all member states, regardless of whether they are parties to the Rome Statute or not.<sup>132</sup>

The situation in Dafur, Sudan, was referred by Security Council under Resolution 1593.<sup>133</sup> This was the first time for the Security Council to exercise these powers. The indictment of President Al Bashir provoked resistance from his government. The Sudanese Government insisted it would not allow any Sudanese national to be tried before a foreign court.<sup>134</sup> Moreover, AU passed a resolution, urging its member states not to cooperate with the ICC.<sup>135</sup> Furthermore, Sudan is not a State Party to the Statute hence has no treaty obligations to cooperate with the ICC. The Sudan situation demonstrates challenges experienced by ICC on referrals of situations involving a non-State Party because it extends the court's jurisdiction beyond the parameters of the Statute, but does not extend the Courts power to enforce that jurisdiction.<sup>136</sup>

Article 16 of the Statute provides for a deferral of the investigations or prosecution for a period of twelve months pursuant to a request by the Security Council, in a resolution adopted under Chapter VII of the Charter. Such request may be renewed by the Council under the same

---

<sup>130</sup> Article 13(b) of the Rome Statute, 2187 UNTS 90.

<sup>131</sup> Article 13(b) of the Rome Statute, 2187 UNTS 90.

<sup>132</sup> Charter of the United Nations, 26 June 1945, San Francisco 1 UNTS XVI.

<sup>133</sup> UN Doc. S/Res/1593(2005).

<sup>134</sup> Max Du Plessis, African Guide to International Criminal Justice, (Institute for Security Studies, Pretoria, 2008) p. 131.

<sup>135</sup> Assembly of the African Union, "Decision of the Meeting of the African States parties to the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.245(xiii), Sirte, 3 July 2009, Para 10, available at <http://www.au.int/en/decisions/assembly>.

<sup>136</sup> Max Du Plessis, African Guide to International Criminal Justice, (Institute for Security Studies, Pretoria, 2008), p. 132.

conditions. According to Article 15 of the Statute, the Prosecutor may initiate investigations *proprio motu*. This power of the Prosecutor was hotly contested by major powers, including the United States and China, at the Rome Conference.<sup>137</sup> There were concerns that if a provision for *proprio motu* powers were included in the Statute, the Prosecutor might institute politically motivated investigations and would not be subject to same oversight, which national authorities have over their own prosecutors.<sup>138</sup> The Prosecutor initiated investigations for Post-election Violence in Kenya 2007/08 *proprio motu*.<sup>139</sup>

### **2.3.2. Obligations of States under the Rome Statute**

This section discusses the obligations of the States Parties under the Rome Statute. These are encapsulated in Part 9 of the Statute, which deals with international cooperation and judicial assistance.<sup>140</sup> As earlier mentioned, these relate to the State's obligation to prosecute international crimes, its obligation to put in place procedures under national law that ensure the full implementation of the Rome Statute, its obligation to cooperate with organs established under the Rome Statute as well as other Party States, and finally, obligations relating to arrest and surrender of persons to the Court.

---

<sup>137</sup> Robert J Currie & Dr. Joseph Rikhof, International and Transnational Criminal, Law 2<sup>nd</sup> ed. (Irwin Law Inc, Toronto, 2013.) at p.205.

<sup>138</sup> Robert Cryer, Hakan Friman, Darrl Robinson & Elizabeth Wilmshurst, An introduction to International Criminal Law and Procedure, 2<sup>nd</sup> ed.( Cambridge University Press, Cambridge, 2010) at p.164.

<sup>139</sup> Situation in Kenya request for authorization of an investigation pursuant to Article 15, 26 November, 2009 available at <http://www.icc-cpi.int> (accessed on 2 July 2015).

<sup>140</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 2187 UNTS 90.

### **2.3.2.1. Obligation of the State to Prosecute International Crimes**

States have a duty to exercise criminal jurisdiction over those responsible for international crimes.<sup>141</sup> The national courts take precedence and the ICC jurisdiction is complementary being barred from exercising its jurisdiction whenever a national court asserts its jurisdiction.<sup>142</sup> The ICC exercises jurisdiction only when the state is unable or unwilling genuinely to carry out investigations,<sup>143</sup> or its decision not to prosecute has resulted from the unwillingness or inability of the State genuinely to prosecute,<sup>144</sup> or the case is of sufficient gravity to justify further action by the Court.<sup>145</sup> This is a principle that endorses state sovereignty and reaffirms primary right of states to exercise criminal jurisdiction.<sup>146</sup> Additionally, Article 70 of the Rome Statute mandates the Court to have jurisdiction over offenses against the administration of justice such as giving false testimony, corruptly influencing a witness or court officials.<sup>147</sup>

### **2.3.3.2. Obligation to Avail Procedures under National Laws**

The International Criminal Court largely relies on the national jurisdictions of States to discharge to realise international criminal justice. This depends on ratification and domestication of the Rome Statute by States. Thus, the Rome Statute calls upon States to avail procedures under their national laws to facilitate the effective functioning of the Court.<sup>148</sup> States Parties must ensure establishment of both legal and institutional frameworks to facilitate international criminal justice. In this regard, Kenya domesticated Rome statute by enacting the International Crimes

---

<sup>141</sup> Ibid., Paragraph 6 of the Preamble of the Rome Statute,.

<sup>142</sup> Antonio Cassese International Criminal Law 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011), p. 343.

<sup>143</sup> Article 17 (1) (a) of the Rome Statute.

<sup>144</sup> Ibid., Article 17(1) (b).

<sup>145</sup> Ibid., Article 17(1) (d).

<sup>146</sup> Paragraph 6 of the Preamble and Article 1 of the Rome Statute.

<sup>147</sup> Article 70 of the Rome Statute, 2187 UNTS 90.

<sup>148</sup> Ibid., Article 88.



Act, 2008, which came into force on 1 January 2009.<sup>149</sup> The Act enables Kenya to prosecute international crimes and to cooperate with the ICC. Uganda, on the other hand, has enacted International Criminal Court Act (ICC Act),<sup>150</sup> to ensure its ability to cooperate with the Court.<sup>151</sup>

### **2.3.3.3. International Cooperation and Judicial Assistance**

The Rome Statute establishes a system under which the Court receives assistance and cooperation from States to facilitate its work under Part 9.<sup>152</sup> In particular, Article 86 calls upon state parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Article 86 of the Statute is a general obligation to cooperate however the Statute lists the specific of the State Parties exhaustively.<sup>153</sup> This specific enumeration is intended to restrict as much as possible the judicial power of interpretation of the duty to cooperate and by the same token lay down extensive legislative safeguards for States.<sup>154</sup>

The significant difference between the ICC and national prosecuting authorities is that the Court does not have an enforcement mechanism to implement coercive or other measures in furtherance of investigations or prosecutions.<sup>155</sup> The Court has no executive powers and no police force of its own. It is totally dependent on full, effective and timely cooperation from states parties.<sup>156</sup> Without the assistance of the national authorities, the Court cannot seize

---

<sup>149</sup> Chapter No. 60 Laws of Kenya available at <http://www.kenyalaw.org> (accessed on 13 September 2016).

<sup>150</sup> Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010.

<sup>151</sup> Ibid., p. 769.

<sup>152</sup> Ibid.

<sup>153</sup> Antonio Cassese International Criminal Law 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011), at p.349.

<sup>154</sup> Ibid.

<sup>155</sup> Lynn Gentile, African Guide to International Criminal Justice, (Institute for Security Studies, Pretoria, 2008) p. 117.

<sup>156</sup> Hans-Peter Kaul, "The International Criminal Court: Current Challenges and Perspectives," (Washington University Global Studies Law Review Vol. 6, (2007) p. 575.

evidentiary material, execute arrest warrants and search crime scenes. Accordingly, State cooperation is crucial to the effectiveness of the judicial process of the ICC.<sup>157</sup>

The Statute does not specify whether the execution of requests, such as taking of evidence, the execution of summons and warrants, is to be undertaken by the ICC officials with the assistance of national authorities or it is the national authorities to execute those acts at the request of the Prosecutor.<sup>158</sup> Furthermore, in cases of competing requests for surrender of a person from the Court and a non-State Party under Article 90(6) and (7) of the Statute, a State Party may decide, to comply with request from the ICC or non-State Party. This seems odd, for one would have thought that the obligations from the ICC should have taken precedence over those flowing from other treaties.<sup>159</sup>

Generally, States Parties are obliged to accept and discharge requests for cooperation and judicial assistance made by ICC. Failure to cooperate can lead to referral of the State to Assembly of States Parties or to the Security Council.<sup>160</sup> While the Security Council may take appropriate sanctions against the State, there are no specific measures for the Assembly of States Parties to take upon receipt of a referral of a State.<sup>161</sup> Referral to the Assembly of States Parties hardly ensures any practical outcome either, for the Assembly does not enjoy the same authority as the UN Security Council, and has no authority to impose sanctions on sovereign states for non-compliance.<sup>162</sup> However, the Assembly of States Parties is a *sui generis* entity. Resolutions by

---

<sup>157</sup> Antonio Cassese International Criminal Law 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011), at p. 346.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, p. 350.

<sup>160</sup> Article 87(7).

<sup>161</sup> Article 112(2) (f).

<sup>162</sup> Zhu Wenqi, "On co-operation by states not party to the International Criminal Court," Vol. 88 International Review of Red Cross 861 (2006).

the Assembly, therefore, do have an effect on state, and thus influence state attitude towards co-operation with the Court.<sup>163</sup>

#### **2.3.3.4. Arrest and Surrender of Persons to the Court**

States may also be called upon to arrest and surrender an individual to the Court.<sup>164</sup> For instance, the issuance of arrest warrant on 2 August 2013 against Walter Osapiri Barasa and for allegedly committing offences against the administration of justice.<sup>165</sup> In addition ICC issued warrant of arrest and surrender of Paul Gicheru and Philip Kipkoech Bett.<sup>166</sup> These cases are still pending in the court of Appeal and High Court respectively.<sup>167</sup> Another instance of a request for arrest and surrender relates to the warrant of issued by the Pre-Trial Chamber I on 4 March 2009, and 12 July 2010, against Omar Al Bashir, the President of Sudan in connection with crimes against humanity, war crimes and genocide.<sup>168</sup> Despite the warrants, Al Bashir has visited various States, which have ratified the Rome Statute, including Kenya,<sup>169</sup> Malawi,<sup>170</sup> and South Africa,<sup>171</sup> without being arrested.

The case of Bashir points out the difficulties that may emerge in enforcing arrests and warrants. In that case, a resolution by the AU Assembly asked African states not to cooperate with the ICC

---

<sup>163</sup> Ibid.

<sup>164</sup> Article 89.

<sup>165</sup> <https://www.icc-cpi.int/kenya>, (accessed on 2 July, 2015).

<sup>166</sup> <https://www.icc-cpi.int/kenya>, (accessed on 2 July, 2015).

<sup>167</sup> Walter Barasa, Civil Appeal No. 136 of 2014 is scheduled for hearing on 23 November 2016 while Paul Gicheru & Another, Misc. Appl. No 193 of 2015 is scheduled for hearing on 13 October, 2016.

<sup>168</sup> <http://www.icccpi.int> (Accessed on 2 July, 2015)

<sup>169</sup> Al Bashir visited Kenya on 27 August 2010, during the promulgation of the Constitution of Kenya, 2010.

<sup>170</sup> Al Bashir visited Malawi on October 2011, to attend the Common market for eastern and Southern African States Summit.

<sup>171</sup> Al Bashir visited South Africa, Sandton, to attend the African Union Summit on 13 June 2015.

pursuant to the provisions of Article 98 of the Rome Statute relating to immunities.<sup>172</sup> According to Article 98(2) provides that the Court may not proceed with a request for surrender, which would require the requested state to act inconsistently with its obligations under international agreements.<sup>173</sup> The provision was intended to deal with conflicting obligations, such as the position of American soldiers stationed overseas under Forces Agreements, which allow the sending state to exercise criminal jurisdiction with regard to its soldiers. This has been used by the US for a much broader purpose.<sup>174</sup> This tactic has been widely criticized and is highly controversial as it shields the American national, officials and military personnel from prosecutions.<sup>175</sup>

In addition, warrants of arrest can be challenged on various grounds (based on treaty provisions and mechanism outside the treaty provision). For example, Al Bashir relied on the fact that a head-of-state enjoys immunity under customary international law and furthermore, that Sudan is not a party to the Rome Statute and could not bound by the suspension of immunity provisions within the Rome Statute. In addition, it is important to note that an individual may challenge his or her arrest and surrender on the principle of *ne bis in idem*<sup>176</sup> i.e. no person shall appear before the court with respect to the conduct which formed the basis of the crime for which he has been

---

<sup>172</sup> Assembly of the African Union, “Decision of the Meeting of the African States parties to the Rome Statute of the International Criminal Court (ICC),” Assembly/AU/Dec.245(xiii), Sirte, 3 July 2009, Para 10, available at <http://www.au.int/en/decisions/assembly>.

<sup>173</sup> Ibid., Article 98(2).

<sup>174</sup> Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge University Press, Cambridge, 2008) at p. 414.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid., Article 20.

convicted or acquitted.<sup>177</sup> If this happens, the State requested to arrest and surrender the individual shall consult with the Court on the question of admissibility.<sup>178</sup>

Finally, the constitution and laws of many civil law countries, such as Brazil and Germany, lay down the principle that their nationals may not be extradited to be prosecuted abroad.<sup>179</sup> Hence, these States take refuge behind constitutional provisions forbidding extradition.<sup>180</sup> Notwithstanding, the well-established principle of international law, that States may not invoke their national laws, even of constitutional rank, to evade an international obligation.<sup>181</sup>

## **2.4 Conclusion**

This chapter has provided a background to the evolution of international criminal law and its culmination in the establishment of the Rome Statute. It has discussed the scope of International Criminal Court, and the obligations placed upon member states by the Rome Statute. These obligations aim at facilitating investigations and prosecutions of individuals responsible for commission of international crimes. As pointed out however, unless these obligations are domesticated within the national legal frameworks, the provisions of the statute are not capable of being implemented at the local level. Chapter three examines how far Kenya has incorporated its obligations under the Rome Statute in the domestic laws.

---

<sup>177</sup> Ibid.,

<sup>178</sup> Ibid., Article 89(2).

<sup>179</sup> Antonio Cassese International Criminal Law 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011), at p. 351.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

## **CHAPTER THREE**

### **KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORKS**

#### **3.1 Introduction**

The Rome Statute for the International Criminal Court obligates every State to exercise criminal jurisdiction over those responsible for international crimes,<sup>1</sup> and to put in place procedures for all forms of cooperation, stipulated in the Statute, under their national laws.<sup>2</sup> As a State Party to the Rome Statute, Kenya is under an obligation, not only to harmonize its laws and institutions with its obligations under the Statute, but also to discharge its obligations in good faith. This chapter discusses legal and institutional frameworks for the implementation and discharge of Kenya's obligations under the Rome Statute. The chapter identifies obligations under the Statute and thereafter examines the laws and procedures in place for their fulfillment. Additionally, the chapter examines various institutions that facilitate discharge and implementation of the obligations imposed by the Statute.

#### **3.2 The Legal Frameworks for the Implementation of Rome Statute**

This section identifies different obligations imposed on Kenya by the Statute and outlines the laws and procedures necessary for the implementation and discharge of the same. This includes the legal framework in relation to the obligation to; avail procedure necessary to implement the Statute and prosecute international crimes, arrest and surrender persons to the ICC, enforce penalties and further a range of other aspects of cooperation with the Court (such as identifying persons, taking evidence and facilitate investigations by the Court). The latter part of the section discusses institutional arrangements

---

<sup>1</sup> Paragraph 7 of the Preamble of the Rome Statute for International Criminal Court, 2187 UNTS 90.

<sup>2</sup> Ibid., Article 88 of the Preamble of the Rome Statute for International Criminal Court, 2187 UNTS 90.

established by the International Criminals Act to support the implementation of this important piece of legislation.

### **3.2.1 Obligation to Avail Procedures under National Laws**

The International Crimes Act 2008 came into force on 1<sup>st</sup> January of 2009 and makes provision for punishment of genocide, crimes against humanity, war crimes,<sup>3</sup> and offences against the administration of justice such as bribery, perjury and intimidation of witnesses.<sup>4</sup> It also enables Kenya to cooperate with the International Criminal Court.<sup>5</sup> The Act does not define what international crimes are but instead it refers to the Articles 6, 7 and 8 of the Rome Statute. For instance, crime against humanity has the meaning ascribed to it in article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute.<sup>6</sup> The cross referencing causes vagueness in the description and definitions of these offences, which is against the right of the accused person to be informed of the charge against him with sufficient detail.<sup>7</sup>

Although, the Act is binding on the government,<sup>8</sup> it does not specify how this provision can be enforced should the government fail to abide by it such as resort to Article 87(7) of the Rome Statute to refer the matter to the Assembly of States Parties or the Security Council (within the context of the Kenya's sovereign prerogative). It is also worth noting that the Act further specifies that the Rome Statute shall have force of law in Kenya in the making of requests for

---

<sup>3</sup> Ibid., Preamble and section 6.

<sup>4</sup> Ibid., sections 9-17.

<sup>5</sup> Ibid., the Preamble.

<sup>6</sup> Section 6 (4) of the International Crimes Act, 2008, No. 16 of 2008, Chapter No. 60, Laws of Kenya; Section 6 of the International Crimes Act, 2008, No. 16 of 2008, Chapter No. 60, Laws of Kenya. While genocide has the meaning ascribed to it in article 6 of the Rome Statute, more so, war crime has the meaning ascribed to it in paragraph 2 of article 8 of the Rome Statute.

<sup>7</sup> Article 50 (2) (b) of the Constitution, 2010.

<sup>8</sup> Ibid., section 3.

assistance by either the International Criminal Court (ICC) to Kenya or a request by Kenya to the ICC.<sup>9</sup> This is significant in the discharge of Kenya's obligations to the ICC, especially since Article 2(6) of the Constitution recognizes a treaty or convention ratified by Kenya.

### **3.2.2 Obligation of the States to Prosecute International Crimes**

International crimes may be tried and punished in Kenya.<sup>10</sup> Such trials are to be conducted by the High Court.<sup>11</sup> Consequently, the Act enables Kenya to exercise territorial jurisdiction over the persons who have committed international crimes in Kenya, whether such persons have Kenyan nationalities or not.<sup>12</sup> Moreover, Kenya may assert jurisdiction if the accused or the victim of the offence is a Kenyan national.<sup>13</sup> Furthermore, Kenya may exercise universal jurisdiction over persons present in Kenya after the commission of international crimes.<sup>14</sup> Accordingly, the Act facilitates Kenya to exercise its criminal jurisdiction over those responsible for international crimes which one of the obligations under Rome Statute.<sup>15</sup>

### **3.2.3 Obligation to Cooperate with International Criminal Court**

The general obligations of states to cooperate under the Rome Statute are encapsulated in Part 9 of the Statute, which deals with international cooperation and judicial assistance. Article 86 calls upon States Parties to the Rome Statute to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.<sup>16</sup> Part III of the Act, which contains sections 20 to 27 relates to requests by ICC for assistance. Section 20 of the Act, is in respect of

---

<sup>9</sup>Ibid., section 4(1) (a).

<sup>10</sup> Ibid., section 8(a).

<sup>11</sup> Ibid., section 8(2).

<sup>12</sup> Ibid., Section 8 ( 1)(a)

<sup>13</sup> Ibid., Section 8 (1) (b)

<sup>14</sup> Ibid., Section 8 (1) ( c)

<sup>15</sup> Paragraph 6 of the Preamble of the Rome statute of International Criminal Court,2187 UNTS 90.

<sup>16</sup> Article 86 of the Rome Statute for International Criminal Court, 2187 UNTS 90.



request by the ICC for the taking and the production of evidence, the questioning of a person under investigation or prosecution, service of documents, facilitation of the voluntary appearance of persons as witnesses or experts before the Court, temporary transfer of persons, examination of places or sites, execution of searches and seizures, the provision of records and documents, protection of victims and witnesses and the preservation of evidence, identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.<sup>17</sup>

Furthermore, Section 21 of the Act stipulates that the request for assistance shall be made through the Cabinet Secretary for the Foreign Affairs and transmitted to the Cabinet Secretary, Ministry of Interior and National Coordination or the Attorney General.<sup>18</sup> This is according to Article 87 of the Rome Statute, which specifies that the ICC shall use diplomatic channels in making their requests to states.<sup>19</sup> Furthermore, in keeping with the Rome Statute, urgent requests, such as the provisional arrest, may be made through any medium, which is capable of delivering a written record.<sup>20</sup> The Act also provides that urgent requests by the ICC may be transmitted to the State through the International Criminal Police Organization or other regional organizations, whichever is practicable.<sup>21</sup>

---

<sup>17</sup> Supra, note 7, section 20(1) of the International Crimes Act No. 16 of 2008, Chapter No. 60, and Laws of Kenya.

<sup>18</sup> Ibid., section 21.

<sup>19</sup> Supra, note 1, Article 87 of the Rome Statute for International Criminal Court, 2187 UNTS 90.

<sup>20</sup> Supra, note 7, Section 22 of the International Crimes Act No. 16 of 2008, Chapter No. 60, Laws of Kenya.

<sup>21</sup> Ibid., section 22(1)(b)

### 3.2.4 Obligation to Arrest and Surrender of Persons to ICC

The provision of arrest and surrender for a person to ICC is contained in Part IV of the Act,<sup>22</sup> which facilitates the discharge of the obligation to Arrest and surrender contained in Article 89 of the Statute.<sup>23</sup> When Kenya receives a request for the arrest and surrender of a person, the Cabinet Secretary shall certify that the request is supported by the required documents and information before notifying a judge of the High Court to issue a warrant for the arrest of the person.<sup>24</sup> Along with the notice, the judge shall receive a copy of the request received from the ICC by the Cabinet Secretary as well as any supporting documents.<sup>25</sup> The judge of the High Court may issue or refuse to issue the warrant.<sup>26</sup> Additionally, the judge may order the cancellation of an arrest warrant upon the application of the Cabinet Secretary, the effect of which will be that the person arrested shall be released.<sup>27</sup>

The procedure undertaken in cases of provisional arrest is slightly different. In this case, the judge may issue the provisional arrest of a person upon the application.<sup>28</sup> The applicant for the warrant is required to report the application and the issue of the warrant to the Cabinet Secretary as soon as possible.<sup>29</sup> In his/her report to the Cabinet Secretary, the applicant for the warrant shall attach copies of the request for the provisional arrest as received from the International

---

<sup>22</sup> Ibid., sections 28 to 75.

<sup>23</sup> Supra, note 1, Article 89.

<sup>24</sup> Supra, note 7, section 29(1).

<sup>25</sup> Ibid., section 29(2).

<sup>26</sup> Ibid., section 30.

<sup>27</sup> Ibid., section 31.

<sup>28</sup> Ibid., section 33.

<sup>29</sup> Ibid., section 33(1).

Criminal Court, as well as any documentary evidence that was produced before the judge of the High Court to support the arrest.<sup>30</sup>

Upon being arrested, the person shall appear before the High Court as soon as possible.<sup>31</sup> While the person is not entitled to bail he/she may be remanded on bail.<sup>32</sup> This contravenes Article of 49 (1) (h) of the Constitution of Kenya, 2010 that provides that bail is a right unless there are compelling reasons.<sup>33</sup> Under the Constitution all the offences are bailable including international crimes. In line with this, Justice Justice F.A Ochieng while granting bail to Aboud Rogo Mohamed and Abubakar Sharif Ahmed Abubakar for offence in connection with engaging in an organized criminal activity stated that the Constitution must be interpreted in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right.<sup>34</sup> Accordingly, the paper argues that all offences including international crimes are bailable unless there are compelling reasons.

Arrested persons are eligible for surrender by a State to the ICC. It is the mandate of the High Court of Kenya to determine the eligibility of a person's surrender to the International Criminal Court.<sup>35</sup> To determine eligibility, the High Court considers whether, the warrant of arrest issued by ICC relates to the person arrested and whether the rights of the arrested person were respected in the process of arrest.<sup>36</sup> Under this Part, the person who is to be surrendered to the International Criminal Court shall not be required to adduce evidence before the High Court, nor

---

<sup>30</sup> Ibid., section 33(2).

<sup>31</sup> Ibid., section 35(1).

<sup>32</sup> Ibid., section 35(2) and (3).

<sup>33</sup> Republic Vs Oby Tylene Oyugi & 11 Others (Nyeri) H.C. Cr. C. No. 38 of 2010, see also Republic v Cyrus mwangi Kimunya ( 2016) eKLR available at <http://www.kenyalaw.org>, (accessed on 13 September 2016). No clarification of what grounds make up compelling reasons...

<sup>34</sup> Aboud Rogo Mohamed & another v. Republic (2011) at p. 19, <http://www.kenyalaw.org> (accessed on 13 September 2016).

<sup>35</sup> Ibid., section 39.

<sup>36</sup> Ibid., section 39 (3).

is the High Court entitled to receive evidence, to determine whether his trial will be justified if the offence had occurred within Kenya's jurisdiction.<sup>37</sup> The Act also envisions a case where the person may consent to being surrendered to the International Criminal Court, in which case he shall notify the High Court.<sup>38</sup>

After the High Court determines the person's eligibility for surrender, the Court will issue a warrant that the person be detained in prison or other authorized place, awaiting his surrender to the International Criminal Court or discharge according to law.<sup>39</sup> The surrender shall not take effect until the expiration of fifteen days after the warrant of detention is issued.<sup>40</sup> Within those fifteen days, the person may appeal the decision of the High Court or make an application for a writ of *habeas corpus*.<sup>41</sup> If the person is not surrendered to the International Criminal Court within two months, he/she may apply to the High Court for discharge.<sup>42</sup>

Surrender of an accused may be refused on certain grounds. For start, under sections 51 and 52 the Cabinet Secretary may refuse to surrender a person to the International Criminal Court in situations where the International Criminal Court has yet to make a ruling on admissibility.<sup>43</sup> Where the Court rules that the case is admissible, Kenya cannot refuse a request for surrender on the grounds that previous proceedings exist against the person sought to be surrendered.<sup>44</sup> In addition, surrender will not be effected following an appeal against the High Court determination

---

<sup>37</sup> Ibid., section 39(6).

<sup>38</sup> Ibid., section 41.

<sup>39</sup> Ibid., section 42(2).

<sup>40</sup> Ibid., section 9(c).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., section 42(3).

<sup>43</sup> Ibid., section 52(1) (a).

<sup>44</sup> Ibid., section 53(2).

of eligibility for surrender.<sup>45</sup> Accordingly, appeals shall only be on a question of law, and following a prescribed form, within fifteen days after the determination by the High Court.<sup>46</sup> The Court of Appeal, upon hearing the appeal, may confirm, reverse or amend the determination of the High Court, or remit the same for the High Court to reconsider.<sup>47</sup>

The case of Walter Barasa illustrates recent contentions around the issue of surrender.<sup>48</sup> In that case, the ICC issued a warrant against Walter Osapiri Barasa in connection with offences against administration of justice<sup>49</sup> where he is alleged corruptly influencing a witness by offering million in order to influence him to withdraw as a prosecution witness.<sup>50</sup> The ICC transmitted the arrest warrant for execution in Kenya. The then Cabinet Secretary, Joseph Ole Lenku, forwarded the arrest warrant through a letter dated 4th October 2013, to the Principal Judge of High Court, Justice Richard Mwangi for the execution. The learned Judge was satisfied that Mr. Barasa is present in Kenya and is the person being sought by the ICC. Consequently, the learned judge a warrant of arrest on 15<sup>th</sup> May 2014. However, he has since appealed at the Court of Appeal. The appeal is still pending in the Court of Appeal. Furthermore, the Court of Appeal has suspended the arrest warrant pending the determination of the appeal.

### **3.2.5 Obligation for Enforcement of Penalties**

Another area in which Kenya has the obligation to cooperate with the International Criminal Court is with regard to the enforcement of penalties, which is provided for as envisaged in Part

---

<sup>45</sup> Ibid., section 63.

<sup>46</sup> Ibid., section 63.

<sup>47</sup> Supra, note 7, section 66.

<sup>48</sup> Walter Osapiri Barasa vs. The Cabinet Secretary, Ministry of Interior and National Co-Ordination and 4 others, Constitutional Petition Number 488 of 2013.

<sup>49</sup> <https://www.icc-cpi.int/kenya/barasa>, (accessed on 29 August, 2015.)

<sup>50</sup> The Prosecutor v. Walter Osapiri Barasa, ICC-01/09-01/13 available at <https://www.icc-cpi.int/kenya/barasa>, (accessed on 15 September 2016).

VI of the Act.<sup>51</sup> Such assistance will be in the form of enforcement of orders for victim reparation,<sup>52</sup> enforcement of fines,<sup>53</sup> and the enforcement of forfeiture orders.<sup>54</sup> The Act also specifies that any money or property recovered shall be transferred to the International Criminal Court.<sup>55</sup> However, the paper argues that this is not in the best interest of the victims of crimes committed in Kenya for the money to be taken to the International Criminal Court. On the contrary, monies recovered should be put in the Victim Protection Trust Fund to facilitate the victims' compensation and reparation.<sup>56</sup>

### **3.2.6 The Domestic Procedures for other Types of Cooperation**

The domestic procedures contained in Part V of the Act,<sup>57</sup> are discussed herein below.

#### **3.2.6.1 Identification of Persons**

Where the ICC requests for assistance under Articles 19(8), 56, 64 or 93(1)(a) of the Rome Statute, for identification and location of a person or a thing believed to be in Kenya, the Attorney-General shall give authority for the request to proceed, if he is satisfied that the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC and the person to whom or thing to which the request relates is or may be in Kenya.<sup>58</sup> In authorizing the request to proceed, he shall forward the request to the appropriate agency, to

---

<sup>51</sup> Ibid., sections 119 -130.

<sup>52</sup> Ibid., section 119.

<sup>53</sup> Ibid., section 120.

<sup>54</sup> Ibid., section 121-129.

<sup>55</sup> Ibid., section 130.

<sup>56</sup> Section 27 of Victim Protection Act, No. 17 of 2014.

<sup>57</sup> Supra, note 7, sections 76 to 118.

<sup>58</sup> Ibid., 76(1).

locate and identify the person or thing in question.<sup>59</sup> The agency is also expected to advise the Attorney General upon execution of the request.<sup>60</sup>

### **3.2.6.2 Taking of Evidence**

International Criminal Court may request assistance for gathering and taking of evidence.<sup>61</sup> Under the International Crimes Act, if the Attorney General gives authority for taking of evidence, the statement of the witness will be taken in writing on oath or affirmation by a judge of the High Court.<sup>62</sup> The evidence taken by the judge shall then be certified and sent to the Attorney General.<sup>63</sup> The applicable law with respect to compelling a person to appear before a judge to give evidence or answer questions, or to produce documents or other articles, shall apply with any necessary modifications.<sup>64</sup> Hence, the Evidence Act is applicable. However, the Evidence Act is, to a large extent, outdated especially with regard to the disclosure of evidence on the accused person.<sup>65</sup> There are no rules and procedures under the Evidence Act on how to deal with disclosure of material that may prejudice further investigations or what steps to be taken to ensure the confidentiality of information to protect the safety of witnesses, victims and members of their families. Furthermore, agreements regarding the evidence, which is allowed under Rule 69 of Rules of Procedure and Evidence, are not permissible under the Evidence Act. The agreements between the prosecutor and the defence on alleged fact or evidence that is not contested promote speedy trials.

---

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Supra, note 1 Article 93(b).

<sup>62</sup> Supra, note 7, section, 78(1).

<sup>63</sup> Ibid., section 78(2).

<sup>64</sup> Ibid., section 80.

<sup>65</sup> Article 50(2) (j) of the Constitution of Kenya, 2010.

### **3.2.6.3 Questioning of Persons**

The procedure undertaken by the Attorney General to assist the International Criminal Court in questioning persons is the same one adopted in finding and locating persons and things. The Attorney General shall forward the request to the relevant agency, which will give advice to the Attorney General concerning the outcome of their endeavors without delay.<sup>66</sup> The Act also outlines the procedure, which the agency shall follow in questioning persons.<sup>67</sup> For instance, the person shall not be compelled to give evidence that will incriminate him, or confess his guilt.<sup>68</sup> Additionally, the person being questioned shall not be subjected to coercion, threat or any form of duress, torture and inhuman treatment or punishment.<sup>69</sup> This is in line with the requirements for fair trial as provided for under Article 50 of the Constitution of Kenya, 2010.<sup>70</sup>

### **3.2.6.4 Service of Documents and Witness Appearance**

Section 86 of the Act provides for assistance in arranging the service of documents in Kenya in relation to Article 93(1) (d) of the Rome Statute. The Attorney General shall forward the request to the relevant agency, which will subsequently advise him concerning the outcomes of their endeavors.<sup>71</sup> The agency shall transmit to the Attorney General a certificate as to service where the particular document is served, and where the document was not served, a statement of the reason that prevented the service will be submitted.<sup>72</sup> Under the Act, service of documents refers

---

<sup>66</sup> Supra, note 7, section 84.

<sup>67</sup> Ibid., section 85.

<sup>68</sup> Ibid., section 85(1) (a).

<sup>69</sup> Ibid., section 85(1) (b).

<sup>70</sup> Article 50 (2) of the Constitution, 2010.

<sup>71</sup> Ibid., section 86(1).

<sup>72</sup> Ibid., section 86(2).



to the services of summons for a person to appear before the High Court as a witness, or a summons for the accused person.<sup>73</sup>

For the purposes of witness appearance, section 86 specifies the persons who can be called upon to appear as a witness.<sup>74</sup> The category includes voluntary appearances and persons who are called upon to give expert evidence, but excludes the accused person to whom the request relates.<sup>75</sup> The Attorney General, in ordering the voluntary appearance of witnesses, shall seek assurance from the International Criminal Court that the witnesses shall not be prosecuted or detained by the Court in respect of acts or omissions occurring before the person's departure from Kenya.<sup>76</sup> The Attorney General may also seek the assurance that the witness shall return to Kenya as soon as possible.<sup>77</sup> These assurances are important as they ensure that the rights of the witnesses are protected and they are not detained or prosecuted while in ICC for acts or omissions before their departure.

### **3.2.6.5 Temporary Transfer of Prisoners**

Under Article 93(1) (f) of the Rome Statute, the International Criminal Court may request the temporary transfer of a Kenyan prisoner to the Court, to which the Attorney General shall give authorisation.<sup>78</sup> The Attorney General shall forward this request to the relevant agency to facilitate the transfer, but will also seek several assurances from the International Criminal Court in relation to the arrest and the person.<sup>79</sup> It is the Attorney General who is mandated to arrange

---

<sup>73</sup> Ibid., Section 85(3).

<sup>74</sup> Ibid., Section 86(2).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., section 88(3) (a).

<sup>77</sup> Ibid., section 88(3) (b).

<sup>78</sup> Ibid., section 90.

<sup>79</sup> Ibid., section 91.

for the transfer and, in doing so, he shall authorize that the prisoner in Kenya be released from detention for the purposes of the transfer.<sup>80</sup> In making the arrangements for the Kenyan prisoner to travel to the International Criminal Court, the Attorney General shall also make arrangements for him to be accompanied by a member of the police force, a prisons officer or any other person as authorised by the International Criminal Court. While the prisoner is transferred to the International Criminal Court, his sentence back in Kenya will still run.<sup>81</sup>

### **3.2.6.6 Assistance in Examining Places or Sites**

Under Article 93(1) (g) of the Rome Statute, States are called upon to assist the International Criminal Court to collect evidence. The International Crimes Act provides that the state shall assist the Court in examining places and sites.<sup>82</sup> This shall be facilitated by the Attorney General who shall forward the ICC's request to the relevant Kenyan agency.<sup>83</sup> The agency shall thereafter, forward their findings to the Attorney General in form of a report.<sup>84</sup>

In collecting evidence, there may be need to search and seize. This request is made by the International Criminal Court under Article 93(1) (h) of the Statute, and the Attorney General shall facilitate it by appointing the appropriate Kenyan agency.<sup>85</sup> The appropriate agency would be the police, which will be authorised by the Attorney General to apply to the High Court for the issuance of a search warrant.<sup>86</sup> The judge may order or deny the issue of a search warrant

---

<sup>80</sup> Ibid., section 92.

<sup>81</sup> Ibid., section 95.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., section 96(1).

<sup>86</sup> Ibid., section 96(2).

after considering the grounds of the search.<sup>87</sup> This power of onsite investigations is crucial to the investigations as there is direct access to witnesses and the victims who can actually facilitate effective investigations. Indeed, a case is as good as it is investigated, and having the witnesses or the victims tell the story as it is can be useful in the prosecutions of international crimes.

### **3.2.6.7 Persons in Transit to ICC or Serving Sentence Imposed by ICC**

Kenya shall also provide the International Criminal Court with assistance concerning the transit of persons to the Court or persons serving sentences imposed by the Court as provided for under Part VII of the Act.<sup>88</sup> Sections 131,132, 133,145 and 151 of the Act are applicable to a person who is being surrendered to the ICC by another State or being transferred to the ICC under Article 89 or 93(7) of the Rome Statute or a person sentenced to imprisonment by the ICC and who is being transferred to or from the ICC, or between States, in connection with that sentence. Kenya shall allow the transit of a person through its territory for the purposes of being surrendered or transferred to the International Criminal Court or another state.<sup>89</sup>

Before the transit, the International Criminal Court shall make a formal request to Kenya in accordance with Article 187 of the Rome Statute.<sup>90</sup> The request shall be accompanied by various documents, including the description of the person being transferred, brief facts of the case, and any other information which the Cabinet Secretary shall request the International Criminal Court to provide.<sup>91</sup> Unless the transit through Kenya shall cause a delay or impede the transfer, the

---

<sup>87</sup> Ibid., Section 97.

<sup>88</sup> Ibid., section 131 - 151.

<sup>89</sup> Ibid., section 131.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

Cabinet Secretary shall not refuse the request to assist in transit.<sup>92</sup> Part of facilitating the transit includes holding the person in custody during the period of transit.<sup>93</sup> The detention period shall not extend beyond 96 hours after landing.<sup>94</sup>

If Kenya is willing to be a state of enforcement of sentences imposed by ICC, the Cabinet Secretary will advise ICC accordingly.<sup>95</sup> The effect of this is that Kenya will allow prisoners of the International Criminal Court to serve their sentences on Kenya's territory.<sup>96</sup> This willingness by Kenya shall be accompanied with conditions in relation to the serving of the said sentences.<sup>97</sup> Before expressing Kenya's willingness to take on prisoners of the ICC, the Cabinet Secretary shall consult with the Inspector General of Police, and the Principal Secretary responsible for labour and prisons.<sup>98</sup> At any time after consulting with the relevant officials, the Cabinet Secretary may communicate Kenya's unwillingness to act as an enforcement state.<sup>99</sup> Where Kenya accepts the International Criminal Court's designation, the prisoner shall be transported to Kenya to serve his sentence, and he shall be held in custody in accordance with the Prisons Act of Kenya.<sup>100</sup> Where the person in custody has to be transported to the International Criminal Court for a review of the sentence he is serving,<sup>101</sup> or for any other purpose,<sup>102</sup> the Cabinet Secretary shall facilitate his transfer.

---

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., section 132(1).

<sup>94</sup> Ibid., section 132(4).

<sup>95</sup> Ibid., section 134(1).

<sup>96</sup> Ibid., section 134(2).

<sup>97</sup> Ibid.

<sup>98</sup> Ibid., section 134(3).

<sup>99</sup> Ibid., section 134(4).

<sup>100</sup> Prisons Act, Cap. 90, Laws of Kenya.

<sup>101</sup> Ibid., section 139.

<sup>102</sup> Ibid., section 140.

### **3.2.6.8 Investigations or Sittings of International Criminal Court in Kenya**

In accordance with Part 9 of the Rome Statute, the Prosecutor of the Court may carry out investigations in the territory of a state party. Furthermore, even though the seat of the Court is at The Hague in the Netherlands, the Court may sit elsewhere, whenever it considers it desirable.<sup>103</sup> In Kenya, the Court may have sittings for the main purpose of collecting and taking evidence, conducting or continuing with proceedings, giving judgment in proceedings or reviewing sentences.<sup>104</sup> While discharging these functions under the Rome Statute, the Court shall at any sitting, be free to administer oaths or affirmations in accordance with the practice and procedure of the Court.<sup>105</sup> While holding its proceedings and sittings in Kenya, the orders made by the Court shall not be subject to review.<sup>106</sup> This is because the Court is independent of the domestic courts in the exercise of its powers and functions.

### **3.2.6.9 Requests to ICC for Assistance by Kenya**

The Attorney General or the Cabinet Secretary, as the case may be, may make a request to the ICC for assistance in the investigations of a conduct that may constitute a crime within the jurisdiction of the ICC or a crime for which the maximum penalty is a term of imprisonment of not less than five years in Kenya.<sup>107</sup> The request may be for the transmission of statements, documents, or other types of evidence obtained in the course of an investigation or a trial conducted by the ICC and the questioning of any person detained by order of the ICC.<sup>108</sup> The procedure for the execution of the request is not provided for in the Act. This provision is

---

<sup>103</sup> Supra, note 1 Article 3.

<sup>104</sup> Supra, note 7 Section 162.

<sup>105</sup> Ibid., Section 164.

<sup>106</sup> Ibid., Section 165.

<sup>107</sup> Ibid., section 168.

<sup>108</sup> Ibid., section 170.

important because the State Parties have the primary responsibility to investigate and prosecute international crimes.<sup>109</sup> ICC should therefore shift from a vertical mode of cooperation towards a more horizontal cooperation relationship with national jurisdictions to strengthen and build capacities to facilitate both national and international crimes prosecution. Cooperation with national jurisdictions in the investigation enhances effective prosecution of perpetrators of international crimes.

### **3.2. The Institutional Frameworks for the implementation of the Rome Statute**

It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.<sup>110</sup> Kenya, being a state party to the Rome Statute, is equally under obligation to set up institutional frameworks for the prosecution of international crimes in the domestic courts. This section discusses the institutional frameworks for the implementation and discharge of Kenya's obligations under the Rome Statute.

#### **3.3.1 The Judiciary**

The Judiciary plays a critical role in the enforcement of Kenya's obligations under the Rome Statute. The High Court, in particular, plays a critical role in the enforcement of Kenya's obligations under the Rome Statute. Indeed, the jurisdiction to try international crimes is conferred on the High Court.<sup>111</sup> Furthermore, the High Court of Kenya is very significant in the execution of requests made to Kenya by the International Criminal Court. As discussed earlier, it is the high court that has powers to issue arrest warrants with regard to request for arrest and

---

<sup>109</sup> Article 1 of the Rome statute of International Criminal Court, 2187 UNTS 90.

<sup>110</sup> Supra, note 1 Paragraph 6 of the Preamble.

<sup>111</sup> Supra, note 7, section 8 (2).

surrender by ICC.<sup>112</sup> The High Court also determines the eligibility of a person's surrender to the International Criminal Court<sup>113</sup> and may also issue an order of search and seizure. Apart from the High Court, the Court of Appeal is also significant as it hears and determines the appeals before it.<sup>114</sup>

Moreover, the Judicial Service Commission (JSC), which is a constitutional body established under Article 171(1) of the Constitution of Kenya plays a significant role in the discharge of obligations under the Statute. The mandate of the JSC is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. Consequently, the JSC appointed a Committee on 9<sup>th</sup> May, 2012 to look into modalities of establishing an international crimes division in the High Court, to hear and make determination on the pending post-election violence cases and deal with other international and transnational crimes.<sup>115</sup> The Committee recommended to the Chief Justice to establish International Crimes Division as a division of the High Court, to prosecute the pending post-election violence cases, international and transnational crimes.<sup>116</sup> The ICD shall apply special rules of procedure, practice and evidence in its operations and conduct of the trials. This Division, once established, will contribute towards effective and efficient discharge of Kenya's obligations under the Statute.

At present and prior to the establishment of the ICD, it is submitted that the PEV 2007/08 should be prosecuted as ordinary crimes under the Penal Code and not under International Crimes Act,

---

<sup>112</sup> Ibid., section 30.

<sup>113</sup> Ibid., section 39.

<sup>114</sup> Ibid., section 66.

<sup>115</sup> Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya, (30 October, 2012), at p.32.

<sup>116</sup> Ibid., p.146.

which came into force on 1<sup>st</sup> January, 2009. Indeed, Article 50(2) (n) of the Constitution of Kenya provides that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law. Furthermore, Section 77(4) of the repealed Constitution, 1963 provided that that no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed. Hence the principle of *nullem crimen sine lege* and *nulla poena sine lege* are applicable with regards to prosecution of PEV 2007/08 cases under International Crimes Act, 2008.

### **3.3.2 Ministry of Interior and National Co-ordination**

The Ministry of Interior and Coordination of National Government is in charge of public administration and internal security and prison services. The Cabinet Secretary plays a significant role in ensuring that Kenya discharges her obligations under the Rome Statute. As discussed earlier, s/he is the one that executes the request for arrest and surrender of persons to ICC. The Cabinet Secretary may also make a request to the ICC for assistance, on investigations into a conduct that constitutes a crime within the jurisdiction of the ICC, or constitutes a crime with a maximum penalty of a term of imprisonment of not less than five years under Kenyan



laws.<sup>117</sup> This is important as it enables ICC to cooperate and provide assistance to Kenya with regard to investigations on conduct, which constitute crimes.<sup>118</sup>

Further, the Cabinet Secretary is mandated to make regulations to prescribe the procedure for effective implementation of the Act; however, the Cabinet Secretary does not make the regulations.<sup>119</sup> More so, in the case of *Walter Osapiri Barasa*,<sup>120</sup> Justice R.M. Mwango directed the Cabinet Secretary to file a formal miscellaneous application or notification to institute proceedings for the execution of an arrest warrant, for good order and administrative convenience.<sup>121</sup> The notification was to be substantially in the form of a complaint under section 89 of the Criminal Procedure Code,<sup>122</sup> with necessary alterations to contain the statutory matters under section 29 of the Act. The ruling of Justice Mwango demonstrates the importance of having rules and regulations in place for proper implementation of the Act.

### **3.3.3 The Office of the Attorney General**

The Office of the Attorney General is established under Article 156 of the Kenya Constitution, 2010. The Attorney General is the principal legal adviser to the Government.<sup>123</sup> The power, function or duty imposed by the Rome Statute or ICC Rules may be exercised by the Attorney General.<sup>124</sup> Just as discussed above, the Attorney General plays a vital role with regard to requests for assistance made under Part Nine of the Rome Statute, regarding international cooperation and judicial assistance.

---

<sup>117</sup> Ibid., section 168.

<sup>118</sup> Article 93 (10) of the Rome Statute of International Court, 2187UNTS 90.

<sup>119</sup> Supra, note 7, section 172.

<sup>120</sup> *Walter Osapiri Barasa V The Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

<sup>121</sup> Ruling of Petition No. 488 of 2013, delivered by Justice R.M. Mwango, Principal Judge (18 October,2013)

<sup>122</sup> The Kenya Criminal Procedure Code, Chapter 75, Laws of Kenya.

<sup>123</sup> Article 156(4) (c) of the Constitution, 2010.

<sup>124</sup>Section 5 of International Crimes Act, 2008.

The Attorney General represented Kenya as *amicus curie* in the case of the Uhuru Muigai Kenyatta.<sup>125</sup> On 4<sup>th</sup> February, 2014, the Kenyan Government filed a request for leave pursuant to Rule 103 of the Rules of Procedure and Evidence,<sup>126</sup> to make submissions in relation to the following issues (i) 'the issue of non-cooperation raised by the Prosecutor in the context of the current proceedings'; (ii) 'the Role of the President and Head of State in Kenya vis-à-vis other constitutional bodies as may be relevant to the issue of cooperation with the Court'; and (iii) 'the Separation of Powers and Independence of various Organs of Government under the Kenyan Constitution and other relevant Kenyan laws as they relate to the issue of cooperation with the Court' under the Statute.<sup>127</sup> The Application by the Attorney General *Amicus Curiae* pursuant to Rule 103 (1) of the ICC Rules of Procedure and Evidence gives Kenya an opportunity to demonstrate before the ICC to what extent Kenya has discharged its obligations under the Statute.

### **3.3.4 Office of the Director of Public Prosecutions**

The Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the Kenya Constitution, 2010, with the mandate to institute, undertake, take over and or control criminal proceedings.<sup>128</sup> The Director of Public Prosecutions is empowered to direct the Inspector General of the National Police Service to investigate any criminal matter.<sup>129</sup> Office of the Director of Public Prosecution Act<sup>130</sup> was enacted to give effect to Articles 157 and 158 of the Constitution.

---

<sup>125</sup> Submissions available at <http://www.icc-cpi.int>, (accessed on 29 August, 2015).

<sup>126</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1, (2000), available at <http://www.icc-cpi.int>.

<sup>127</sup> The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-01/11-1987 12-10-2015 1/10 EC T OA10, available at <https://www.icc-cpi.int>, accessed on 15 September 2016.

<sup>128</sup> Article 157(6) of the Constitution of Kenya, 2010.

<sup>129</sup> Ibid. Article 157(4).

<sup>130</sup> Office of the Director of Public Prosecution Act, No. 2 of 2013, Laws of Kenya.

The Act was assented to on 14<sup>th</sup> January 2013 and commenced on 16 January 2013. Section 5(3) of the ODPP Act empowers the Director of Public Prosecutions to assign an officer subordinate to him to assist or guide in the investigation of a crime.

The Director of Public Prosecutions has established specialized units, sections and divisions for efficient and effective prosecution of criminal offences.<sup>131</sup> One of such specialized divisions is War Crimes, Crimes against Humanity and Genocide Division.<sup>132</sup> The mandate and functions of the specialized Division include handling all matters relating to war crimes, genocide and crimes against humanity. In addition, the division is responsible for developing policies and strategies in matters relating to international crimes.<sup>133</sup>

The ODPP, therefore, plays a critical role in the discharge of Kenya's obligations under the Statute. In particular, the Director of Public Prosecutions established a Multi-Agency Task Force to undertake a countrywide review, re-evaluation and re-examination of all the cases arising out of the 2007/2008 Post-election Violence and make the appropriate recommendations.<sup>134</sup> According to the Multi-Agency Task Force report, some of the individuals who committed offences during the 2007/08 Post Election Violence were prosecuted under the Penal Code and the Sexual Offences Act, 2006.<sup>135</sup> Additionally, the ODPP is handling the case of Walter Osapiri Barasa and Paul Gicheru and Philip Kipkoech Bett who are being sought by ICC for the offence

---

<sup>131</sup> The Office of the Director of Public Prosecutions (ODPP) Strategic Plan 2011-2015, Nairobi, at p. 44.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Gazette Notice No. 5417 of 20<sup>th</sup> April, 2012.

<sup>135</sup> Report on the 2007/2008 Post Election Violence Related Case presented By: The Multi-Agency Task Force on the 2007/2008 Post Election Violence, Nairobi, at p. 20.

against the administration of justice. As discussed above, the ODPP is responsible for discharging the duty to prosecute international crimes.<sup>136</sup>

### **3.3.5 Witness Protection Agency**

The Witness Protection Agency is established under section 3A of the Witness Protection Act, 2006.<sup>137</sup> The object and purpose of the Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.<sup>138</sup> In addition, the Agency has the mandate to establish and maintain a witness protection programme.<sup>139</sup> The Witness Protection Agency plays a significant role in the discharge of Kenya's obligations under the Statute, in particular, Article 93(1) (j) which calls upon the states to protect witnesses and victims of international crimes.

### **3.3.6 National Police Service**

The National Police Service consists of the Kenya Police Service and the Administration Police Service.<sup>140</sup> Kenya Police Service is charged with investigations of criminal offences, including international crimes. Along with other criminal justice agencies, the National Police Service facilitates the discharge of Kenya's obligations by investigating international crimes.

---

<sup>136</sup> Paragraph 6 of the Preamble of the Rome Statute, 2187 UNTS 90.

<sup>137</sup> Witness Protection Act, Chapter 79, Laws of Kenya.

<sup>138</sup> Ibid., section 3B.

<sup>139</sup> Ibid., section 3C (1) (a).

<sup>140</sup> Article 243 of the Constitution of Kenya, 2010.

### 3.3.7 Civil Society

Civil society organizations play a key role in the implementation of the obligations under the Rome Statute. For instance, Kenya Section of the International Commission of Jurists, filed an application dated 18<sup>th</sup> November 2010, and obtained orders for provisional warrant of arrest against one Omar Ahmad Hassan Al Bashir [Omar Al Bashir] the President of Sudan, if and when, the said President Omar Ahmad Hassan Al Bashir (Omar Al Bashir) sets foot within the territory of the Republic of Kenya.<sup>141</sup> Furthermore, on 3<sup>rd</sup> December 2014, the Trial Chamber rejected Prosecution's application on Article 87(7).<sup>142</sup> Pursuant to Rule 103 of the Rules of Procedure and Evidence,<sup>143</sup> the Africa Centre for Open Governance applied for leave to submit observations as *Amicus Curiae* in the case of the *Prosecutor v. Uhuru Muigai Kenyatta* in the context of non-cooperation by Kenya.<sup>144</sup> Specifically to detail the various instances of non-cooperation, including the failure to freeze the assets of Mr. Kenyatta to allow the Appeals Chamber to grasp the context in which these actions have taken place.<sup>145</sup>

### 3.3.8 Conclusion

The chapter identified the obligations imposed on Kenya by the Statute. Additionally, the chapter examined legal and institutional frameworks that facilitate the discharge of obligations under the

---

<sup>141</sup> Miscellaneous Criminal Application Number 685 of 2010, of Kenya Section of the International Commission of Jurists V Attorney General & Another, 2011Eklr

<sup>142</sup> Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', Trial Chamber V(B), ICC-01/09-02/11-982, 3 December 2014, available at <https://www.icc-cpi.int>, accessed on 15 September 2016.

<sup>143</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1, (2000), available at <http://www.icc-cpi.int>.

<sup>144</sup> The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11-1017 29-04-2015 1/13 EK T OA5, available at <https://www.icc-cpi.int>, accessed on 15 September 2016.

<sup>145</sup> The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11-1017 29-04-2015 1/13 EK T OA5, at p. 10, available at <https://www.icc-cpi.int>, accessed on 15 September 2016.

Rome Statute in good faith. This chapter is an important precursor to the next chapter, which seeks to explore the challenges that face Kenya in meeting these obligations. In line with the hypothesis of this study, it is submitted that local context exhibits unique challenges that have resulted in a failure by Kenya to meet its obligations under the Rome Statute. Chapter four is dedicated to discussing these challenges.

## **CHAPTER 4**

### **CHALLENGES IN IMPLEMENTING THE ROME STATUTE**

#### **4.1 Introduction**

The previous chapter has provided an overview of the legal and institutional framework that has been put in place to implement Kenya's obligations under the Rome Statute. This chapter discusses key challenges facing the discharge of these obligations under the Rome Statute. Some of these challenges underlie gaps or conflicts in the legal framework such as the absence of rules and regulations to support the relevant statutory framework and the tensions posed by conflicting legal obligations owed to the Rome Statute and regional organizations such as the Africa Union. Other challenges, relate to practical aspects such as the resources, capacity constraints and political will, the absence of which currently impedes the fulfillment by key institutions of Kenya's obligations with respect to the Rome Statute.

#### **4.2 Legal Challenges**

When speaking of legal challenges, the primary focus is towards identifying two key areas where the legal framework is either lacking key ingredients to operationalize the relevant domestic provisions or, where competing commitments to concurrent legal obligations present difficulties in the discharge of the State's obligations under the Rome Statute. This section looks at two main areas. The first is the absence of rules and procedures necessary for the implementation of the International Crimes Act 2008. These rules are necessary to provide relevant procedures that are

key to cooperation between States and the International Criminal Court. The second set of discussions under this section focuses on the contradictions that have been used by the State in terms of its national and international obligations in order to circumvent its commitments to the Rome Statute. This is particularly inherent in the arguments that have been used by government officials to further arguments relating to immunity of heads of state on the basis of regional and constitutional obligations.

#### **4.2.1 Absence of Supporting Rules and Regulations**

Sections 172 of the International Crimes Act, 2008 provides that the Cabinet Secretary may make regulations prescribing the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the results of action taken in accordance with any such request.<sup>146</sup> Furthermore, section 173 of the International Crimes Act, provides that the Cabinet Secretary, may make regulations to implement rules of Evidence and Procedure of the ICC.<sup>147</sup> However, the Cabinet Secretary of Kenya has not developed rules and procedures for the implementation of the Act.<sup>148</sup>

The absence of rules and regulations has resulted in fragmented and unstructured ways of execution of requests by ICC. For instance, the ICC issued a warrant of arrest against Paul Gicheru and Philip Kipkoech Bett on 10<sup>th</sup> March 2015,<sup>149</sup> for corruptly influencing witnesses contrary to Article 70 (1) (c) of the Rome Statute and submitted a request for assistance.<sup>150</sup> In

---

<sup>146</sup> Section 172 of International Crimes Act, 2008.

<sup>147</sup> Section 173 of International Crimes Act, 2008.

<sup>148</sup> Ibid.

<sup>149</sup> ICC-01/09-01/15, The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett, available at <https://www.icc-cpi.int/kenya/gicheru-bett>, (accessed on 26 September 2016).

<sup>150</sup> ICC-01/09-01/15, The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett, available at <https://www.icc-cpi.int/kenya/gicheru-bett>, (accessed on 26 September 2016).



this regard, Justice Lesit J, was satisfied that the request was in accordance to Article 91 of the Statute as read alongside section 29 of the International Crimes Act and issued a warrant of arrest on 28<sup>th</sup> May 2015. On 1 October 2015, Justice Luka Kimaru stayed the warrant of arrest pending the hearing of an application to quash the warrant of arrest until the Cabinet Secretary, Ministry of Interior and Coordination makes Regulations under section 172 and 173 of the International Crimes Act.<sup>151</sup> Similarly, in the absence of rules and regulations with respect to the execution of a request by the ICC for arrest and surrender, the principal judge in the case of Walter Osapiri Barasa,<sup>152</sup> was forced to direct the Cabinet Secretary to file a formal application for such execution as there were no guidelines to move the court.

The above cases are still pending in court despite warrant of arrest being issued against Walter Barasa and Paul Gicheru. This clearly illustrates how the absence of rules and procedures occasions delays in the discharge of a country's obligations. Even though one could resort to the procedures under the Evident Act and Criminal Procedure Code, it is submitted that these procedures constrict efficient and effective implementation in the discharge of obligations for two main reasons. First, as mentioned in chapter three, these procedures are to a large extent, outdated and would need to be amended to accommodate many of the emerging realities of international and transnational crime. Secondly, it is the author's opinion that these procedures

---

<sup>151</sup> Paul Gicheru & Another, Misc. Criminal Application No. 193 Of 2015, the matter was mentioned in Court on 1 October, 2015

<sup>152</sup>Walter Osapiri Barasa Vs. The Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others, Constitutional Petition Number 488 of 2013. ICC requested for arrest of Mr. Barasa has been indicted for the offence of Administration of Justice under article 70 of the Rome Statute. The Cabinet Secretary, Ministry of Interior And National Co-ordination wrote a letter to the Principal judge to issue warrant of arrest against Mr. Walter Barasa.

cannot be effectively applied to the emerging complex crimes, including international crimes and would that are the subject of Kenya's obligations under the Statute.<sup>153</sup>

#### **4.2.2 Competing Legal Obligations Undermining Implementation**

The Immunity of heads of state and government and senior government officials under customary international law and recognized under national law create tensions with Kenya's obligations under the Rome Statute. These tensions have been exploited to undermine the implementation of the State's obligations under the latter. For instance, Article 27 provides that 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 Court from exercising its jurisdiction over such a person.<sup>154</sup> On the other hand, and in line with customary law, Article 143 (1) of the Constitution of Kenya, 2010, provides that criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.<sup>155</sup>

The reliance on immunity for heads of states continues to be the subject of emerging international jurisprudence. On the one hand, there have been significant achievements in international criminal prosecutions towards the erosion of the concept of head-of-state immunity. This is demonstrated by the ICTR's conviction of former Rwandan Prime Minister, Jean Kambanda,<sup>156</sup> and more recently the conviction of Charles Taylor, former Liberian President,<sup>157</sup>

---

<sup>153</sup> Office of the Director of the Director of Public Prosecutions, Second Progress Report 2013/2014 at p. 52.

<sup>154</sup> Article 27 (2) of the Rome statute of International Criminal Court, 2187 UNTS 90.

<sup>155</sup> Article 143(1) of the Constitution of Kenya, 2010.

<sup>156</sup> Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998). This judgment was upheld by the ICTR Appeals Chambers. Jean Kambanda v Prosecutor, Case No. ICTR 97-23-A, Judgment (Oct. 19, 2000).

where a challenge on the grounds of immunity was dismissed.<sup>158</sup> On the other hand, despite these achievements, there are a few cases that still hold that heads of state and other officials enjoy immunity under customary international law. For instance in the case of *Congo v Belgium* 2002, the International Court of Justice (ICJ) held that the issue of warrant of arrest of a foreign minister for war crimes and crimes against humanity violated his inviolability and absolute immunity from criminal jurisdiction under customary international law for all acts committed while in office.<sup>159</sup>

Additionally, there is also tension between Article 27 and 98 of the Rome Statute with regards to Cooperation with respect to waiver of immunity and consent to surrender. By virtue of Article 27 of the Statute, the immunities of State Party officials under national and international law will not bar the Court from exercising its jurisdiction. Conversely, Article 98(1) of the statute, “provides that the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” Thus, Article 98(1) preserves international law immunities between State Parties and renders the provisions Article 27 ineffective. Accordingly, individuals who enjoy international immunity may only appear voluntarily before the ICC.

---

<sup>157</sup>Prosecutor V. Charles Ghankay Taylor, Case No. SCSL-03-0, Available at <http://www.rscsl.org>, (accessed on 19 September 2016.)

<sup>158</sup> Prosecutor V. Charles Ghankay Taylor, Case No. SCSL-03-01-A, (Decision on Immunity from Jurisdiction) (31 May 2004) SCSL200301I (Appeals Chamber, Special Court for Sierra Leone) Available at <http://www.rscsl.org>, (accessed on 19 September 2016.)

<sup>159</sup> *Congo v. Belgium*, ICJ reports (2002), p.3:ILM (2002)536; 128 ILR and 60.

The provisions of immunity as addressed under the Rome Statute present visible tensions with obligations owed under regional treaty arrangements. For example, Article 27 of the Rome Statute provides for irrelevance of official capacity. In contradistinction, the Protocol on the Statute of the African Court of Justice and Human and People's Rights (hereinafter the ACJHPR), provides for immunity from prosecution for serving heads of state, government, or anybody acting or entitled to act in such capacity.<sup>160</sup>

The stance by the ACJHPR finds support in the views that the Africa Union has adopted towards the ICC's attempts to prosecute heads of states. Using arguments related to the immunity of sitting heads of states, the African Union Assembly of Heads of State and Government at the 16th Ordinary Session endorsed Kenya's request for a deferral of the ICC investigations.<sup>161</sup> On a similar basis, The AU has also instructed its members not to cooperate with the ICC with respect to warrants issued for the arrest for Sudanese Head of State, Omar Bashir. Under Article 23 of the AU's Constitutive Act, such decisions are binding on member states. President Bashir visited to Kenya on 27 August 2010.<sup>162</sup> The Kenyan authorities failed to arrest and surrender him to ICC. Consequently, the ICC reported Kenya to the UN Security Council, but the African Union came to Kenya's defence.<sup>163</sup>

---

<sup>160</sup> Article 46A *bis* of the Protocol on Amendments to the [Protocol on the Statute of the African Court of Justice and Human Rights](#) ("the Protocol on Amendments") provides: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office. The Protocol which, was adopted by the African Union, in June, 2104 at its 23<sup>rd</sup> Ordinary Session Summit in Malabo, Equatorial Guinea, extends the jurisdiction of the African Court of Justice and Human Rights to cover individual criminal liability for serious crimes committed in violations of international law.

<sup>161</sup> Assembly/AU/ Dec.334 (XVI), 30–31 January 2011, paragraphs 3 & 6.

<sup>162</sup> Arrests warrant was issued on 4 March 2009 and 12 July 2010 by ICC for in relation to the alleged atrocities committed in Darfur. President Bashir visited to Kenya to witness the promulgation of the Constitution Kenya, 2010.

<sup>163</sup> Makau Mutua, "The International Criminal Court in Africa: challenges and opportunities," (Noref Working Paper, the Norwegian Peace building Centre September,( 2010).

### **4.3. Practical Challenges to Implementation**

The discussions under this section explore challenges that hinder the practical realization of Kenya's obligations under the Rome Statute. This include amongst others the general lack of political will within the government, various institutional capacity constraints and the general challenges that arise due to the inadequate allocation of resources required to effectively implement the International Crimes Act 2008. It is submitted that without addressing these challenges, the law will remain only as good as it is on paper.

#### **4.3.1 Lack of Political Will and Cooperation**

Lack of political will has had a domino effect on the establishment of effective institutional frameworks to discharge the obligations under the Statute. According to Okechukwu, top government officials bear complicity in the violence and that compromise their ability to fairly and objectively deliver justice to the society.<sup>164</sup> What is more, government officials are reluctant to investigate and prosecute their friends and supporters.<sup>165</sup> Moreover, attempts by government officials to prosecute perpetrators often elicit complaints and criticisms, especially from suspects and their supporters, who accuse the government of using the machinery of justice to settle old scores, and to intimidate political opponents.<sup>166</sup> The aspects raised by Okechukwu have specific

---

<sup>164</sup>Okechukwu Oko, "The Challenges of International Criminal Prosecutions in Africa," Fordham International Law Journal, 31 (2007) p.360.

<sup>165</sup>Ibid. p.359.

<sup>166</sup>Ibid.

relevance to the investigations by the former Prosecutor, Mr. Luis Moreno-Ocampo *prorio motu* investigations into the crimes committed during post-election violence 2007/2008.<sup>167</sup>

In 2010, the former Prosecutor of the ICC, Luis Moreno Ocampo, sought summonses against senior government officials with regard to Post-Election Violence, 2007/2008.<sup>168</sup> On 5<sup>th</sup> November, 2009, Luis Moreno-Ocampo, the former Prosecutor met with former President Mwai Kibaki and the then Prime Minister Raila Odinga in Nairobi, Kenya,<sup>169</sup> and the two Principals indicated that government remained fully committed to cooperating with the Court.<sup>170</sup> However, after the Pre-Trial Chamber issued summonses to appear on 8<sup>th</sup> March, 2011 for senior members of the Kenyan political establishment, the Government became increasingly unhelpful.<sup>171</sup> According to the ICC Prosecutor, Fatou Bensouda, the Office of the Prosecutor (OTP) encountered serious difficulties in securing full and timely cooperation from the Government of Kenya.<sup>172</sup> Furthermore, the actions and inactions of the government compromised the ability of

---

<sup>167</sup> ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, Available at <https://www.icc-cpi.int/kenya>, (accessed on 15 September 2016.)

<sup>168</sup> ICC-01/09-02/11-1, (Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali), see also ICC-01/09-01/11, <https://www.icc-cpi.int>, (Accessed on 26 September 2016).

<sup>169</sup> *Ibid.*, paragraph 8.

<sup>170</sup> *Ibid.*

<sup>171</sup> Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1 ("First Summonses Decision"), Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhiirri Muigai Kenyatta and Mohammed Hussein Ah, ICC-01/09-02/11-01 ("Second Summonses Decision"), Available at <https://www.icc-cpi.int/kenya>, (accessed on 15 September 2016.)

<sup>172</sup> The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11-733-Red 13-05-2013 18/18 RHT, Public redacted version of the 8 May 2013 Prosecution response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" (ICC-01/09-02/11-713) <https://www.icc-cpi.int/kenya>, (accessed on 15 September 2016.)

the Prosecutor to investigate the crimes in those cases, and limited the evidence available to assist the Chamber to adjudicate the crimes charged.<sup>173</sup>

This lack of political will and reluctance to cooperate is further evident in the conduct of the legislature. In response to the trials, the Kenyan parliamentarians voted for the country to withdraw from the jurisdiction of ICC.<sup>174</sup> Note that a State Party may withdraw from the Statute; however, a State is not discharged from its obligations that arose while it was a Party to the Statute.<sup>175</sup> The motion to suspend withdraw to the ICC was approved by the National Assembly on 5<sup>th</sup> September 2013.<sup>176</sup> Moreover, the Leader of the Majority, Aden Duale stated during the debate of the motion that, the Kenyan cases are political<sup>177</sup> pointing out that the former Prosecutor Luis Moreno-Ocampo had made it clear that the case was not about militias but about politicians.<sup>178</sup>

Additionally, some public officials in Kenya fostered an anti-ICC climate in the country, which had a chilling effect on the willingness of potential witnesses and partners to cooperate with the prosecutor.<sup>179</sup> The Prosecutor further argues that since the beginning of the investigations in April 2010, the Government constructed an outward appearance of cooperation, while failing to execute fully the most important requests.<sup>180</sup> Lack of political will and the cases before the Court have to a great extent impeded the discharge of the obligations under the Rome statute. Indeed parliamentarians

---

<sup>173</sup>Ibid., Paragraph 1.

<sup>174</sup><http://www.aljazeera.com/news/Africa/2013/09/201395151027359326.html>. (Accessed on 10 August, 2015)

<sup>175</sup> Supra, note 1 Article 127 (2).

<sup>176</sup> Motion 144 in Kenya National Assembly, Motions 2010 (Dec. 22, 2010).

<sup>177</sup> Ibid.

<sup>178</sup> <http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html>, (accessed on 19 September 2016.)

<sup>179</sup> Ibid. paragraph 1.

<sup>180</sup> Ibid., paragraph 4.

such as Hon. Moses Kuria, Member of Parliament for Gatundu South, stated that he procured at least five witnesses to give false testimony against Deputy President William Ruto and Sang in the ICC case.<sup>181</sup>

#### 4.3.2 Institutional Capacity Constraints

As discussed in Chapter 3, various government agencies such as the Attorney General, the Director of Public Prosecutions, the Witness Protection Agency, the Police and the Judiciary are responsible for the discharge of Kenya's obligations under Rome Statute. These institutions provide significant strengths in the implementation of Kenya's obligations under the Rome Statute. For starters, various constitutional provisions in respect of either their independence, security of tenure<sup>182</sup> or immunity facilitate the discharge of their functions,<sup>183</sup> and consequently the State's obligations towards the ICC.<sup>184</sup> Furthermore, the discussion on the establishment of a specialized division of the High Court to handle international crimes promises the expeditious disposal of cases.<sup>185</sup> The Specialized Division of the High Court will determine matters related to International Crimes Act. Hence, facilitate timely discharge of Kenya's obligations such as the execution of a request for arrest and surrender of persons to ICC and determination of matters related to international crimes.<sup>186</sup>

Despite the above strengths, various capacity constraints hamper the full implementation of the State of its obligations under the Rome Statute. For starters, and with regard to the judiciary, the

---

<sup>181</sup> Joseph Thiongo, <http://www.standardmedia.co.ke/mobile> (accessed on 17 October, 2015).

<sup>182</sup> Article 160 (1) of the Constitution of Kenya, 2010.

<sup>183</sup> Article 156 & Article 245(2)(b) of the Constitution, 2010.

<sup>184</sup> Australian Bar Association, 'The Independence of the Judiciary' [1991] (Winter) Victorian Bar News 17, 18 (2.2). Furthermore, the Australian Bar Association described an independent judiciary as 'a keystone in the democratic arch' and if it crumbles, democracy falls with it'

<sup>185</sup> Report of the Committee of progress report the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya, Nairobi, dated 30 October 2012.

<sup>186</sup> Speech of The Hon. Chief Justice on the Critical Updates on the Establishment of an International Crimes Court In Kenya, April 30, 2013, <http://www.judiciary.go.ke/portal/page/speeches>, (accessed 22 September 2016.)



Specialized Division of the High Court is yet to be established. The present cases therefore continue to be determined in the Criminal Division of the High Court with resultant delays in the disposal of cases.<sup>187</sup> Furthermore, there is a dearth of national jurisprudence in international crimes.<sup>188</sup> Indeed, although the Act has been in force from 1 January 2009, there are no significant investigations and prosecutions under it.<sup>189</sup> This leads to overreliance on the international jurisprudence where different rules of procedure and evidence are applied.<sup>190</sup> To compound this, local judicial officers are not fully aware of obligations under the Rome Statute and International Crimes Act, 2008.<sup>191</sup>

As mentioned above the Office of the Director of Public Prosecutions (ODPP) is an independent office under the Constitution, 2010 and has the mandate to prosecute criminal cases including international crimes. The complex nature of international crimes requires specialized skills and expertise to detect, prevent, investigate and prosecute.<sup>192</sup> The prosecutor must distinguish between these crimes and crimes under the Penal Code. To do this, prosecutors must

---

<sup>187</sup> Paul Gicheru & Another, Misc. Appl. No 193 of 2015 was filed in May, 2015 and is scheduled for hearing on 13 October, 2016. For instance, as discussed in chapter 3 the case of Paul Gicheru and Another was filed on 28<sup>th</sup> May, 2015 and is still pending one year later.

<sup>188</sup> State of Judiciary and the Administration of Justice Report, 2014-2015 p.97 available at [www.judiciary.go.ke](http://www.judiciary.go.ke). (accessed 22 September 2016.)

<sup>189</sup> Ibid., p.50.

<sup>190</sup> Article 64 Rome Statute of International Criminal Court, 2187 UNTS 90 see also Rule 63 Rules of Procedure and Evidence, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1, (2000), available at <http://www.icc-cpi.int>. For instance, at the International Criminal Court, hearsay evidence, such as reports from non-governmental organizations is admissible. This is not the case in the domestic prosecutions as hearsay evidence is inadmissible. This is further highlighted in the case of the *William Samoei Ruto and Joshua Arap Sang* where the Prosecutor sought to admit out of court statements of witnesses which are not admissible under Kenya law.

<sup>191</sup> Jackson Mwangi and Another. v. The Attorney General and Others, Petition Number 2 of This case concerned 78(2) of the Act which makes provision for taking of evidence in the execution of a request of the Prosecutor of the ICC as such the Prosecutor requested for evidence to be taken from government officials. Accordingly, Lady Justice Kalpana Rawal was appointed on 5<sup>th</sup> October, 2010, to take evidence from government officials. Justice Daniel Musinga who issued a preliminary injunction, prohibiting Justice Rawal from taking or recording evidence not only from the police officers, but from any Kenyan for the purpose of the International Criminal Court process.

<sup>192</sup> Opening Remarks of Keriako Tobiko, CBS, S.C., The Director of Public Prosecutions at The 2<sup>nd</sup> Stakeholders' Workshop on the Establishment Of An International Crimes Division of the High Court of Kenya held at Sawela Lodge, Naivasha, Between 4<sup>th</sup> – 7<sup>th</sup> February, 2014, p.6.

comprehend the contextual elements of genocide, crimes against humanity and war crimes and key concepts, such as modes of liability, individual criminal responsibility, joint criminal enterprise, command responsibility and superior responsibility. These concepts are to a large extent new in the domestic criminal prosecutions and the ODPP is faced with inadequate specialized skills and knowledge to handle emerging and complex forms of crime.<sup>193</sup> Furthermore, attempts to acquire expertise in these areas is often hampered by financial constraints due to inadequate budgetary allocation.<sup>194</sup>

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law.<sup>195</sup> However, the ability of Witness Protection Agency (WPA) to effectively protect witnesses has been hampered due to inadequate budgetary allocation.<sup>196</sup> Consequently, there is insufficient facilities and equipment to implement witness protection measures.<sup>197</sup> Furthermore, there is lack of formal judicial protection measures in court.<sup>198</sup> For instance, the witnesses and accused persons use the same to court, this may expose the witnesses to the danger of being identified by the accused persons. Moreover, there is lack of sensitization on Witness Protection

---

<sup>193</sup> Office of the Director of Public Prosecutions, Second Progress Report, 2013/2014 at p.50, see also State of Judiciary and the Administration of Justice Report, 2014-2015 p.96 available at [www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf](http://www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf).

<sup>194</sup> Office of the Director of Public Prosecutions, Second Progress Report, 2013/2014 at p.53.

<sup>195</sup> United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime United Nations, New York, 2008, p.1

<sup>196</sup> State of Judiciary and Administration of Justice Annual Report, 2014-2015 at p. 113, available at <http://www.judiciary.go.ke/portal/blog/post/chief-justices-state-of-the-judiciary-address>, (accessed on 24 September 2016)

<sup>197</sup> State of Judiciary and Administration of Justice Annual Report, 2014-2015 at p. 113, available at <http://www.judiciary.go.ke/portal/blog/post/chief-justices-state-of-the-judiciary-address>, (accessed on 24 September 2016)

<sup>198</sup> State of Judiciary and Administration of Justice Annual Report, 2014-2015 at p. 114, available at <http://www.judiciary.go.ke/portal/blog/post/chief-justices-state-of-the-judiciary-address>, (accessed on 24 September 2016)

Act, 2006 and as a result, the criminal justice actors are not aware of the witness protection measures available under the Witness Protection Act, 2006.<sup>199</sup>

Finally, various criminal justice agencies and institutions have different functions and responsibilities, in the implementation and discharge of Kenya's obligations under International Crimes Act. These agencies include Police, Office of the Director of Public Prosecutions, Attorney General, the Judiciary and Witness Protection Agency. Effective discharge of Kenya's obligations under the statute depends on the consolidated and enhanced partnership and coordination between criminal justice actors. However, there are no structured ways of engagements and sharing information on investigations and prosecutions of international crimes. This may cause delay of the execution of requests for cooperation by the ICC. Inadequate coordination and cooperation mechanisms impede timely discharge of the obligations to a large.

#### **4.3.3 Resource constraints**

The approval by the members of parliament to withdraw from the Statute and repeal International Crimes Act, 2008, discussed in the previous section, demonstrates that the Legislature, which is one of the arms of the Government, does not support the enforcement of the International Crimes Act, 2008. Indeed, if the members of parliament who are charged with budget allocation have denounced the Rome Statute, it is unlikely that Parliament will allocate adequate funds to agencies to discharge the obligations under the Statute. Inadequate funds constrict discharge of obligations hence, impact negatively on the discharge of Kenya's obligations.

---

<sup>199</sup> State of Judiciary and Administration of Justice Annual Report, 2014-2015 at p. 114, available at <http://www.judiciary.go.ke/portal/blog/post/chief-justices-state-of-the-judiciary-address>, (accessed on 24 September 2016)

Inadequate resources, which encompass both human and financial, have proven to be the most critical weakness so far in the discharge of Kenya's obligations. There are capacity constraints within other criminal justice agencies. For example, a number of key agencies within the criminal justice system such as the National Police Service and the Government Chemist suffer acute capacity constraints, which inevitably affect the efficient delivery of services by the entire system.<sup>200</sup> For instance, insufficient use of modern investigation techniques due to the lack of a modern National Forensic Crime Laboratory and inadequate forensic investigation skills have greatly hampered the ability of the investigative agencies to investigate complex and emerging crimes.<sup>201</sup>

Furthermore, agencies such as Judiciary, ODPP, Office of the Attorney General, and Witness Protection Agency have an enormous mandate with regards to the implantations and discharge of Kenya's obligations, without receiving sufficient funding to carry out that mandate. For instance, Dr. Willy Mutunga, the former Chief Justice stated with regards to the resources of judiciary "We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic."<sup>202</sup> The former Chief justice further alluded to the understaffed prosecution departments and lack of courtrooms at the launch of the national case audit and institutional capacity survey.<sup>203</sup>

---

<sup>200</sup> State of Judiciary and the Administration of Justice Report, 2014-2015 p.97 available at [www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf](http://www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf).

<sup>201</sup> State of Judiciary and the Administration of Justice Report, 2014-2015 p.97 available at [www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf](http://www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf).

<sup>202</sup> Progress Report on the Transformation of the Judiciary, The First Hundred And Twenty Days 19th October, 2011 at p. 6. Available at <http://www.judiciary.go.ke/portal/page/speeches>, (accessed 22 September 2016.)

<sup>203</sup> Hon. Chief Justice's remarks at the launch of the National Case Audit and Institutional Capacity Survey at Milimani Law Courts Ceremonial hall on February 20, 2015 at P. 6. Available at <http://www.judiciary.go.ke/portal/page/speeches>, (accessed 22 September 2016.)

#### **4.4 Conclusion**

This chapter has highlighted two predominant challenges that hinder the effective discharge of Kenya's obligations under the Rome Statute. First, legal challenges flowing out of the failure to establish prerequisite rules and regulations or arising out of the use of competing regional commitments in order to circumvent obligations under the Rome Statute. Secondly, and of equal importance is the range of practical concerns that potentially vitiate the noble ideals present in the legal framework such as the political will as well as capacity and resource constraints. It is with this in mind that Chapter five proceed to discuss recommendations that may assist Kenya in the discharge of its obligations under the Rome Statute.

## CHAPTER FIVE

### SUMMARY OF FINDINGS AND RECOMMENDATIONS

#### 5.1 Summary of Findings

Kenya, as a State Party to the Rome Statute, is under the obligation not only to harmonize its laws and institutions with its obligations under the Statute, but also to discharge its obligations in good faith.<sup>204</sup> In this regard, chapter one set the perimeters of the research focus i.e. to discuss the extent to which Kenya's legal and institutional frameworks have facilitated the implementation and discharge of its obligations under the Rome Statute. This arises from the fact that international law does not provide a procedure for the harmonization of a State's law with its international obligations, as the responsibility remains within the domestic sphere of the individual State.<sup>205</sup>

The guiding hypothesis of the study was that Kenya has not harmonized her national laws with Rome Statute to enable her fulfill her obligations and, hence, has not discharged her obligations in the Rome Statute in good faith. In order to establish or refute this proposition, the study posed the following questions: what obligations does the Rome Statute place on Kenya and to what extent has Kenya complied with these obligations. The study also sought to answer whether Kenya needed additional legal, policy and institutional frameworks to implement the Rome Statute.

The research found out that in addition to the Constitution which is the supreme law, Kenya has adopted a range of legislative measures to discharge its obligations under the Statute as discussed in chapters three and four. Of importance is the enactment of the International Crimes Act, 2008,

---

<sup>204</sup> Paragraph 4 of The Rome Statute

<sup>205</sup> See Chapter Two

which is the substantive law that defines and provides the framework for discharge of the obligations under the Statute. In addition, Kenya has enacted other statutes such as Witness Protection Act, 2006 and Victim Protection Act 2014<sup>206</sup> and has established institutions (such as the Office of the Attorney General, Office of the Director of Public Prosecutions, Witness Protection Agency, the Police and the Judiciary) to implement the International Crimes Act, 2008 and thus facilitate its obligations under Rome Statute.

Finally, chapter highlighted two predominant challenges that hinder the effective discharge of Kenya's obligations under the Rome Statute. First, legal challenges flowing out of the failure to establish prerequisite rules and regulations or arising out of the use of competing regional commitments in order to circumvent obligations under the Rome Statute. Secondly, and of equal importance is the range of practical concerns that potentially vitiate the noble ideals present in the legal framework such as the political will as well as capacity and resource constraints.

## **5.2 Recommendations**

In light of the findings above, the study proposes a number of recommendations to enable Kenya discharge its obligations under the Rome Statute efficiently and effectively. Firstly, the government should develop and promulgate comprehensive rules and regulations for the effective implementation of International Crimes Act and implement rules of Evidence and Procedure of the ICC.<sup>207</sup> For instance, Rwanda enacted the Transfer Law that governs the transfer of cases from ICTR and MICT and other states to Rwanda.<sup>208</sup> This law incorporates

---

<sup>206</sup> Victim Protection Act, No. 17 of 2014, available at, <http://www.kenyalaw.org>, (accessed on 19 September 2016.)

<sup>207</sup> Section 172 -173 of International Crimes Act, 2008.

<sup>208</sup> Rwanda's Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda, Official Gazette of the Republic of Rwanda, 19 March 2007 (2007 Transfer Law), amended in 2009 by Organic Law No. 03/2009/OL modifying and complementing the

Rules of Procedures and Evidence from ICTR.<sup>209</sup> It further guarantees the rights of the accused to fair trial and protection and assistance to witnesses.<sup>210</sup> Furthermore, the Transfer Law guarantees persons transferred to Rwanda by the ICTR for trial detention in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of all persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December, 1998.<sup>211</sup> It may be possible under the same breadth, for the Attorney General to extrapolate rules and regulations under sections 172 and 173 of the International Crimes Act in a similar manner and thus facilitate effective implementation of the Kenya's obligations under the Rome Statute.

Secondly, the Government should put in place measures for building strong institutions to facilitate efficient and effective discharge of its obligations under the Rome Statute. These measures should target the entire criminal justice systems including the judiciary, the DPP, the AG and the police. The measures amongst others could include the establishment of a specialized Division of the High Court to hear and determine international crimes and matters attendant thereto. In addition, the government should build capacity of criminal justice agencies so as to improve the quality of investigations and prosecutions, such through specialized training for the police, prosecutors, judges and magistrates on international criminal law, international humanitarian law and international human rights law.<sup>212</sup> It may also be beneficial to conduct

---

Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, 26 May 2009 ("2009 Amendment"). The 2007 Transfer Law, as amended, was replaced in 2013 by Law No. 47/2013 of 16 June 2013 relating Transfer of Cases to Republic of Rwanda, Official Gazette of the Republic of Rwanda, 16 June 2013 (2013 Transfer Law), (together, the "Transfer Law")

<sup>209</sup> Ibid., Articles 7- 11.

<sup>210</sup> Ibid., Articles 13-14.

<sup>211</sup> Ibid., Article 23



exchange and mentorship programme at the international plane to share experiences of international best practices in the investigations and prosecutions of international crimes.

In relation to challenges relating to the lack of political will, it may be necessary for criminal justice agencies as well as members of civil society to conduct sensitization workshops and outreach programmes targeting key stakeholders in the public sector in order to demystify Kenya's obligations under the Rome Statute and International Crimes Act 2008. Such sessions could enable public officials to engage with the contextual background that has necessitated the emergence of international criminal law such as various atrocities that have been committed across the globe in times past and the noble idea behind the establishment of an international criminal court. These programmes should also be spread to the local population as part of the efforts to seek their support and pressure the leadership through public opinion.

As mentioned in the previous chapter, the obligations under the Statute require financial resources and budgetary provision for their implementation. As such, there is need to improve budgetary allocation and funding to the criminal justice agencies discussed in this study in order to facilitate improved execution of their obligations under the Statute. In addition, the government should allocate adequate funds to criminal justice actors to build capacity and train criminal justice actors on international crimes, international humanitarian law and international human rights. More so, the government should allocate adequate funds to build infrastructure for witness protection. Furthermore, the government should develop and equip facilities such as forensic laboratories, case management system and infrastructure to implement witness protection measures.

---

<sup>212</sup> State of Judiciary and Administration of Justice Report, 2015-2015, p.97, available at [www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf](http://www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf), (assessed on 24 September 2016)

Finally, the effective discharge of Kenya's obligations under the Statute depends on the consolidated and enhanced partnership and coordination between criminal justice actors. It is critical for the criminal justice actors to develop structured ways of cooperation and collaboration. Such mechanisms could be rooted in developing memorandum of understanding among actors or approving standard operating procedures upon which inter-agency cooperation could be founded.

## BIBLIOGRAPHY

### Textbooks

1. William A. Schabas, An Introduction to the International Criminal Court, 4<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2012).
2. Antonio Cassese, International Criminal Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2011).
3. Antony Aust, Handbook of International Law, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010)
4. Malcolm N. Shaw, International Law, 6<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2008).
5. Robert J Currie & Joseph Rikhof, International and Transnational Criminal Law, 2<sup>nd</sup> ed. (Irwin Law Inc, Toronto, 2013.)
6. Brownlie, I., Principles of Public International Law, 7<sup>th</sup> ed. (Oxford University Press, Oxford, 2008).
7. Robert Cryer, Hakan Friman, Darri Robinson & Elizabeth Wilmshurst, An introduction to International Criminal Law and Procedure, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2010).

8. Max du Plessis, African Guide to international Criminal Justice, (Institute for Security Studies, Pretoria, 2008).
9. United Nations Office for Drug Control and Crime Prevention Centre for International Crime Prevention, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, (United Nations, New York, 2008).

### **Published Articles**

1. Cedric Ryngaert, “Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations,” (FICHL, Publications Series No.7, 2010).
2. C. Odiankolu, “Back to the Future:\_The Imperative of Prioritizing for the protection if Human Rights in Africa,” Vol. 47 Journal of African Law 1(2003).
3. Hiram Abtahi & Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court,” 1 Cornell International Law Journal 45 (2012).
4. Lee Stone & Max du Plessis, “The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries,” (Institute for Security Studies, Pretoria, 2008).
5. Valerie Oosterveld et al, “The Cooperation of States with the International Criminal Court,” 25 Fordham International Law Journal 3, (2001).
6. Okechukwu Oko, “The Challenges of International Criminal Prosecutions in Africa,” Fordham International Law Journal, Volume 31, Issue 2, (2007).

7. Makau Mutua, "The International Criminal Court in Africa: challenges and opportunities," (Noref Working Paper, the Norwegian Peace building Centre September, (2010).
8. Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences," 20, the European Journal of International Law 2 (2009).
9. Immi Talgren, "The Sense and Sensibility of International Criminal Law," 13 European Journal of International Law 3, (2002).
10. Hans-Peter Kaul, "The International Criminal Court: Current Challenges and Perspectives," Vol. 6, Washington University Global Studies Law Review (2007).
11. Lynn Gentile, "understanding the International Criminal Court" African Guide to International Criminal Justice, Institute for Security Studies, Pretoria, (2008).
12. Zhu Wenqi, "On co-operation by states not party to the International Criminal Court," International Review of Red Cross, Vol. 88, No. 861, (2006).