

A Critique of Kenya's Implementation of the Rome Statute

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I. Introduction

The period following World War I saw unsuccessful attempts aimed at establishing international criminal institutions.¹ On 17th July 1998, the Rome Statute of the International Criminal Court (Statute) was adopted by 120 votes to 7 (USA, Libya, Israel, Iraq, China, Syria, and Sudan, with 20 abstentions),² establishing the International Criminal Court (ICC).³ The Statute entered into force on 1 July 2002 and 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.⁴ The Statute places the duty of prosecuting these crimes on States and the ICC gains jurisdiction only when the domestic legal systems are unwilling or unable to carry out this mandate.⁵ In this regard, State parties are obligated to cooperate fully with the ICC when it gains jurisdiction.⁶

The Rome Statute does not provide the procedures for its implementation and enforcement, but simply directs State parties to comply with their obligations under the treaty.⁷ Kenya, as a State party to the Statute is, therefore, obligated to harmonise its laws and institutions so that it discharges its obligations under the Statute in good faith. It has attempted to do this through the provisions of the International Crimes Act,⁸ which *inter alia* facilitates implementation of the Statute on matters such as prosecution, arrest and cooperation with the ICC in the investigations and evidence in relation to international crimes. This article discusses whether Kenya's domestication in this regard, successfully discharges its primary obligations under the treaty. The first part provides an overview of the ICC and the obligations upon states flowing out of the Statute. This is followed by an outline of the International Crimes Act and how it seeks to discharge these obligations. Finally, the article explores various challenges that arise in implementing the Rome Statute.

2. Overview of the ICC

The ICC consists of four organs: the Presidency; the Judicial Divisions comprising of Appeals Division, Trial Division and Pre-Trial Division; the Office of the Prosecutor; and the Registry.⁹ It exercises jurisdiction over four crimes: genocide, war crimes, crimes against humanity and crimes of aggression.¹⁰ It is essentially a court of last resort where judicial proceedings arise if States are either unwilling or genuinely unable to exercise their jurisdiction.¹¹ The Court's jurisdiction may be invoked by three methods: referral

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¹ Cassese A, *International Criminal Law*, 2ed, Cambridge University Press, Cambridge, 2011, 317.

² UN Doc. A/CONF.183/SR.9 Report of the Conference, para 28,33 and 40.

³ UN Doc A/CONF. 183/9 ; 37ILM 1002(1998) ; 2187 UNTS 90.

⁴ Paragraph 4 of the Preamble to the Rome Statute of the International Criminal Court, (1998).

⁵ Article 17, Rome Statute.

⁶ Article 88, Rome Statute.

⁷ Article 88, Rome Statute.

⁸ International Crimes Act, (Act No. 16 of 2008).

⁹ Article 34, The Rome Statute.

¹⁰ Articles 6, 7, 8, 70, The Rome Statute.

¹¹ Article 17 – 18, The Rome Statute.

from a State party,¹² referral from United Nations Security Council acting under Chapter VII¹³ and, finally, the Prosecutor initiating an investigation *proprio motu*.¹⁴

States Parties under the Statute are obligated to prosecute international crimes and to cooperate with organs established under the Statute including the arrest and surrender of persons to the Court. In the first instance, states have a duty to exercise criminal jurisdiction over those responsible for international crimes.¹⁵ The national courts take precedence and the ICC only exercises complementary jurisdiction when the State is unable or unwilling to exercise this jurisdiction.¹⁶ This reaffirms the primary right of States to exercise criminal jurisdiction.¹⁷ It is in this spirit that States are to avail procedures to ensure the establishment of both legal and institutional frameworks to facilitate international criminal justice.

*The Rome Statute establishes a system under which the Court receives assistance and cooperation from States.*¹⁸ For example, Article 86 calls upon State parties to cooperate fully with the Court in its investigation, prosecution and arrest of suspects¹⁹ since the *Court does not have an enforcement mechanism to implement coercive measures in this regard*.²⁰ Generally, State Parties are obliged to accept and discharge requests for cooperation and failure to cooperate can lead to referral of the State to the Assembly of State Parties or to the Security Council which can take appropriate sanctions.²¹ Although the Assembly of State Parties cannot take specific measures for non-cooperation, its resolutions have an effect on the state, and thus influence state attitude towards co-operation with the Court.

3. Kenya's Implementation of the Rome Statute

As a party to the Statute, Kenya is under an obligation to harmonise its laws and institutions with the Statute. The domestication of these obligations has been done under the International Crimes Act (the Act). The Act defines international crimes by reference to Articles 6, 7 and 8 of Rome Statute. International crimes may be tried by the High Court.²² Consequently, the Act enables Kenya to exercise territorial jurisdiction over accused persons, whether such persons have Kenyan nationalities or not.²³ In addition, it puts in place a legal framework that avails procedures to investigate, arrest, prosecute, penalise and surrender persons to the ICC. At the same time the Act establishes various forms of assistance and cooperation with the ICC in this respect.²⁴ The next section is a brief discussion of Kenya's attempts to discharge its obligations pertaining to assistance (both pre-trial and during proceedings) as well as cooperation in relation to arrests and detention.

Kenya is obligated to assist the Court in pre-trial matters such as: investigations on its territory, identification/questioning of persons and securing evidence/search warrants.²⁵ This provision emphasises the primary responsibility of States to investigate and prosecute international crimes.²⁶ Where the ICC

¹² Article 14, The Rome Statute.

¹³ Article 13(b), The Rome Statute.

¹⁴ Article 13, 15, *The Rome Statute*.

¹⁵ para 6 of the Preamble of the Rome Statute.

¹⁶ Article 17(1) (b), The Rome Statute.

¹⁷ para 6 of the Preamble and Article I, The Rome Statute.

¹⁸ para 6 of the Preamble and Article I, The Rome Statute.

¹⁹ Article 89, 98(2), The Rome Statute.

²⁰ Lynn G, 'African Guide to International Criminal Justice', *Institute for Security Studies, Pretoria*, 2008, 117.

²¹ Article 87(7), The Rome Statute.

²² Section 8(2), International Crimes Act, no. 16 of 2008.

²³ Section 8 (1)(a), International Crimes Act.

²⁴ Section 20(1), section 21, section 22(1)(b), International Crimes Act.

²⁵ Part 9, The Rome Statute.

²⁶ Article 1, The Rome Statute.

requests for assistance for questioning²⁷ or locating a person or a thing, the Attorney General authorises this²⁸ by forwarding the request to the appropriate agency to undertake the same.²⁹ In terms of assistance in gathering of evidence and effecting search warrants,³⁰ where the AG gives the necessary authority, witness statements must be supported by oaths/affirmation before the High Court.³¹ Search requests directed by the AG to the relevant criminal justice actor will be dependent on subsequent applications for a search warrant by the High Court.³² In such cases, the applicable law – the Evidence Act - applies with any necessary modifications.³³ A criticism here is that the Evidence Act is, to a large extent outdated as it lacks procedures on how to deal with disclosure or confidentiality of material that may prejudice further investigations or the protection of witnesses and victims.³⁴

The Act provides for various forms of assistance once proceedings have commenced such as offering the Court assistance when it sits within the territory of a State Party, facilitating the service of documents, and enforcing penalties imposed by the Court. For example, even though the seat of the Court is at The Hague, the Court may sit elsewhere, whenever it considers it desirable.³⁵ While discharging these functions at any seat, orders made by the Court shall not be subject to review³⁶ as the Court remains independent of the domestic judiciary.

In terms of service of documents, section 86 of the Act provides for assistance in arranging the service of documents in Kenya.³⁷ In such instances, the Attorney General forwards the request to the relevant agency,³⁸ which transmits back a certificate confirming service or non-service with reasons thereof.³⁹ Assistance with regard to enforcement of penalties⁴⁰ includes using the criminal justice system to facilitate orders for victim reparation,⁴¹ fines⁴² and forfeiture orders.⁴³ In this case any money or property recovered is to be transferred to the ICC.⁴⁴ This has come under criticism from those who believe that monies recovered should be put in a local Victim Protection Trust Fund to facilitate the compensation and reparation in the localities that they reside.⁴⁵

By far one of the most important modes of assistance provided for under the Act is that in relation to arrest, surrender and transfer of prisoners.⁴⁶ Upon receipt of such a request, the Cabinet Secretary responsible for national security submits the same to the High Court to determine whether to issue a

²⁷Articles 19(8), 56, 64 or 93(1)(a), The Rome Statute.

²⁸ Section 76(1), International Crimes Act.

²⁹ Section 84, section 85(1) (a), International Crimes Act.

³⁰ Article 93(b), The Rome Statute.

³¹ Section, 78(1) International Crimes Act.

³² Section 96(1), International Crimes Act.

³³ Section 80, Evidence Act, (1963).

³⁴ Rule 69 of Rules of Procedure and Evidence.

³⁵ Article 3, The Rome Statute.

³⁶ Section 165, International Crimes Act.

³⁷Article 93(1) (d), The Rome Statute; Section 85(3), section 86(2) and section 88(3)(a) & (b), The International Crimes Act.

³⁸ Section 86(1), International Crimes Act.

³⁹ Section 86(2), International Crimes Act.

⁴⁰ Sections 119 -130, International Crimes Act.

⁴¹ Section 119, International Crimes Act.

⁴² Section 120, International Crimes Act.

⁴³ Section 121-129, International Crimes Act.

⁴⁴ Section 130, International Crimes Act.

⁴⁵ Section 27, Victim Protection Act, (No. 17 of 2014).

⁴⁶ Sections 28 to 75, International Crimes Act; Article 89, The Rome Statute.

warrant of arrest.⁴⁷ If issued, the person is presented to the High Court⁴⁸ and if eligible for surrender, will be detained pending surrender to the ICC.⁴⁹ To allow the person an opportunity to appeal, the surrender may only occur after fifteen days of detention.⁵⁰ If the person is not surrendered to the ICC within two months, he/she may apply to the High Court for discharge.⁵¹

In terms of transfer to the ICC,⁵² the AG will make arrangements for the prisoner to travel to the ICC accompanied by the police or other authorised person.⁵³ Similarly, Kenya is expected to assist the ICC in the transit of persons from other countries to the Court to serve sentences.⁵⁴ The ICC makes the necessary request to Kenya⁵⁵ accompanied by various documents, including the description of the person being transferred, brief facts of the case,⁵⁶ and unless the transit through Kenya would impede the transfer to the ICC, the authorities are obligated to grant the request.⁵⁷ Finally, if Kenya is willing to host prisoners serving sentences imposed by ICC, the Cabinet Secretary responsible for national security will advise ICC accordingly⁵⁸ and the prisoner shall be transported to Kenya to serve his sentence in accordance with the Prisons Act of Kenya.⁵⁹

4. Institutional Frameworks for the Implementation

Kenya is equally under obligation to set up institutional frameworks for the prosecution of international crimes in the domestic courts. This institutional framework includes both the judicial and executive components of government. It is also important to consider how civil society in general is a critical part of this framework, and as such enhances the realisation of the country's obligations under the Rome Statute.

The Judiciary plays a critical role in the enforcement of Kenya's obligations under the Rome Statute. Jurisdiction over international crimes is conferred upon the High Court⁶⁰ and as earlier discussed this court has powers to issue arrest warrants,⁶¹ determine the eligibility of a person's surrender and order search and seizure. In addition to the courts, the Judicial Service Commission (JSC),⁶² whose mandate is to promote the efficient and effective administration of justice, appointed a Committee⁶³ which recommended to the Chief Justice the need for the establishment of an International Crimes Division (ICD) of the High Court, to prosecute international and transnational crimes.⁶⁴

⁴⁷ Sections 29(1), 30, 31,33, International Crimes Act.

⁴⁸Section 35(1), International Crimes Act.

⁴⁹ Section 42(2), Section 35(2) and (3), The Rome Statute; The Constitution of Kenya, 2010 Article 49(1)(h).

⁵⁰ Section 9(c), The Rome Statute.

⁵¹ Section 42(3), Section 52(1) (a), International Crimes Act; *Walter Osapiri Barasa vs. The Cabinet Secretary, Ministry of Interior and National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

⁵²Article 93(1) (f), The Rome Statute; Section 90, 91, The International Crimes Act.

⁵³ Section 95, International Crimes Act.

⁵⁴ Sections 131,132, 133,145 and 151, International Crimes Act; Article 89 or 93(7) The Rome Statute.

⁵⁵ Article 187, The Rome Statute.

⁵⁶ Article 187, The Rome Statute.

⁵⁷ Section 132(1), 132(4), International Crimes Act.

⁵⁸ Section 134(1) – (4), International Crimes Act.

⁵⁹ Prisons Act, Cap. 90, Laws of Kenya.

⁶⁰ Section 8 (2), International Crimes Act.

⁶¹ Section 39, International Crimes Act.

⁶²Article 171(1), The Constitution of Kenya.

⁶³ Betty W, 'Can the international crimes division prosecute Kenya's PEV cases?' Daily Nation 8 February 2014- <<https://www.nation.co.ke/oped/blogs/dot9/International-Crimes-Division-bring-accountability/1959700-2197978-8fuaa9z/index.html>> 22 June 2019.

⁶⁴ Judicial Service Commission, *Report of the Committee on the establishment of an International Crimes Division in the High Court of Kenya*, 30 October, 2012, 32, 146.

Prior to the establishment of the ICD, such international crimes were prosecuted as ordinary crimes under the Penal Code and not under International Crimes Act, which came into force on 1 January 2009. This is in line with the principle of *nullem crimen sine lege* and *nulla poena sine lege* as articulated under Article 50(2) (n) of the Constitution of Kenya. Once established, the ICD will contribute towards effective and efficient discharge of Kenya's obligations under the Statute.

The Executive components at the heart of implementing the Rome Statute include: the Ministry of Interior and Coordination of National Government, the Attorney General, the Office of the Director of Public Prosecution and the Witness Protection Agency. As earlier noted, the Cabinet Secretary for Interior and Coordination of National Government executes the request for arrest and surrender of persons to ICC⁶⁵ and is mandated to make regulations to prescribe the procedure for implementation of the Act – although he has yet to make the said regulations.⁶⁶

In addition to his role under Part Nine of the Rome Statute, the Attorney General⁶⁷ may appear as *Amicus Curiae* before the Court⁶⁸ and has done so in order to demonstrate the extent that Kenya has discharged its obligations under the Statute.⁶⁹ Jointly, the Office of the Director of Public Prosecutions (ODPP),⁷⁰ which undertakes criminal proceedings and the Inspector General of the National Police Service (which conducts the actual investigation of crimes)⁷¹ discharge Kenya's obligations to investigate and prosecute international crimes. To this end, the ODPP has established task forces⁷² and specialised units such as the War Crimes, Crimes against Humanity and Genocide Division to develop policies and strategies relating to international crimes.⁷³ Lastly, the Witness Protection Agency⁷⁴ provides the framework and procedures for protecting persons at risk of intimidation due to their co-operation with law enforcement agencies.⁷⁵

It is worth mentioning the important role played by civil society organisations (CSOs) in the implementation of the country's obligations under the Rome Statute. Examples from the activities of two CSOs highlight this role. The Kenya Section of the International Commission of Jurists filed an application dated 18 November 2010 and obtained orders for provisional warrant of arrest against Omar Ahmad Hassan Al Bashir, the President of Sudan, in the event that he was present in the Republic of Kenya.⁷⁶ Another CSO, the Africa Centre for Open Governance, pursuant to Rule 103 of the Rules of Procedure and Evidence,⁷⁷ applied for leave to submit observations as *Amicus Curiae* in the case of *Prosecutor v Uhuru Muigai Kenyatta* in the context of non-cooperation by Kenya. Specifically, AfriCoG detailed the various instances of non-cooperation, including the failure to freeze the assets of Kenyatta to allow the Appeals

⁶⁵ Section 168, the International Crimes Act; Article 93 (10), the Rome Statute.

⁶⁶ Section 172, The International Crimes Act; *Walter Osapiri Barasa V the Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

⁶⁷ Article 156(4) (c) The Constitution of Kenya.

⁶⁸ Rule 103 (1) of the ICC Rules of Procedure and Evidence.

⁶⁹ *The Prosecutor V. Uhuru Muigai Kenyatta*, ICC-01/09-01/11-1987 12-10-2015 1/10 EC T OA10, e

⁷⁰ **Article 157, The Constitution of Kenya**; Section 5(3) of the ODPP Act, 2013.

⁷¹ Article 157(4), The Constitution of Kenya.

⁷² Gazette notice no. 5417, *Multi-agency task force on the 2007/2008. post-election violence cases*, 20 April, 2012.

⁷³ The Office of the Director of Public Prosecutions (ODPP), *Strategic Plan, 2011-2015*, Nairobi, 44.

⁷⁴ Section 3A of the Witness Protection Act 2006, Chapter 79, Laws of Kenya.

⁷⁵ Article 93(1)(j), International Crimes Act.

⁷⁶ Miscellaneous Criminal Application Number 685 of 2010, of Kenya Section of the International Commission of Jurists V Attorney General & Another, 2011 eKlr..

⁷⁷ Rules of Procedure and Evidence, ICC-ASP/1/3, 10, and Corr. I (2002), U.N. Doc. PCNICC/2000/1/Add.1, (2000).

Chamber to grasp the context in which these actions have taken place.⁷⁸ Each of these examples highlight the complementary role that CSOs can play in enhancing compliance, oversight and effective implementation of the country's obligations under the Rome Statute.

5. Implementation Challenges

It is clear that Kenya has an elaborate legal and institutional framework in place to implement its obligations under the Rome Statute. Despite this, challenges subsist, which impede the discharge of these obligations. These challenges can broadly be categorized into two: those relating to the legal framework and those that are of a practical nature. The former is tied to the gaps in the law (such as the absence of regulations to support the relevant statutory framework) or conflicts within the law (such as tensions arising from conflicts between different sets of legal obligations owed by the country).⁷⁹ The latter relates to practical aspects such as the resources, capacity constraints and political will.

The current legal framework lacks rules and procedures necessary for the implementation of the International Crimes Act 2008. As noted, the Cabinet Secretary for the Ministry of Interior, is yet to make regulations on the procedure dealing with requests made by the ICC and the rules of evidence to be followed.⁸⁰ The absence of such rules has resulted in unstructured execution of requests by ICC. For instance, in *The Prosecutor v Paul Gicheru and Philip Kipkoech Bett*⁸¹ Justice Luka Kimaru stayed the warrant of arrest pending the hearing of an application to quash the said warrants, until the Cabinet Secretary of Interior and Coordination of Government made regulations as provided by section 172 and 173 of the International Crimes Act.⁸² 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*,⁸³ was forced to direct the Cabinet Secretary to file a formal application for such execution as there were no guidelines to move the court. Although in these cases one could resort to the procedures under the Evident Act and Criminal Procedure Code, these procedures are inefficient and ineffective, as they do not accommodate many of the realities of international crimes.⁸⁴

The challenges inherent in conflicting legal obligations are evident when one examines the tensions created by the provisions relating to the immunity of heads of state under customary international law and national law and that under the Rome Statute. These tensions have been exploited to undermine the implementation of the State's obligations. For instance, Article 27 of the Statute provides that immunities attaching to the official capacity of a person are not barred from the jurisdiction of the Court.⁸⁵

This is in contrast to international customary law. For instance, 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 International Criminal Tribunal for Rwanda's conviction of former Rwandan Prime Minister, Jean Kambanda ⁸⁶ and more recently the conviction of

⁷⁸ The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11-1017 29-04-2015 1/13 EK T OA5, 10, - <https://www.icc-cpi.int>, -on 15 September 2016.

⁸⁰ Section 173 of International Crimes Act.

⁸¹ *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15.

⁸² *Paul Gicheru & Another, Misc. Criminal Application No. 193 of 2015*.

⁸³ *Walter Osapiri Barasa Vs. The Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

⁸⁴ Office of the Director of the Director of Public Prosecutions, *Second Progress Report*, 2013/2014, 52.

⁸⁵ Article 27 (2), The Rome Statute.

⁸⁶ *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (4 September 1998).

former Liberian President, Charles Taylor, where a challenge on the grounds of immunity was dismissed.⁸⁷ Further, the Constitution of Kenya, shields a sitting President from criminal proceedings.⁸⁸

Additionally, there is tension between Article 27 and 98 of the Rome Statute. Under Article 98(1) the Court may not proceed with a request for surrender or assistance, which would require a State to act inconsistently with its obligations under international law (with respect to immunity of a person or property belonging to a Third State) unless the Court can first obtain a waiver of immunity from the relevant State. Thus, Article 98(1) renders the provisions of Article 27 ineffective and mirrors other situations where the provisions of immunity as addressed under the Rome Statute present visible tensions with obligations owed under regional treaty arrangements.⁸⁹ While Article 27 of the Rome Statute provides that official capacity is irrelevant, these other international obligations suggest that individuals who enjoy international immunity may only appear voluntarily before the ICC.

Beyond the legal challenges, certain practical constraints hinder the realisation of Kenya's obligations under the Rome Statute. This includes, amongst others, the lack of political will, capacity constraints and the inadequate allocation of resources for the implementation of the Act. Each of these factors deserves attention as they ultimately impact the translation of the law into reality.

The lack of political will negatively impacts the effective discharge of Kenya's obligations under the Statute. Top government officials have been implicated in crimes that fall under the jurisdiction of the Court, compromising their ability to deliver justice.⁹⁰ Other government officials are reluctant to investigate/prosecute their political allies⁹¹ since attempts to do so often elicit accusations of using the machinery of justice to intimidate and settle old scores.⁹² This environment has impacted the investigations by the former Prosecutor, Luis Moreno-Ocampo and his successor Fatou Bensouda, into the crimes committed during the post-election violence 2007/2008.⁹³ Both prosecutors have had serious difficulties in securing full cooperation from the Executive.⁹⁴ The reluctance to cooperate is further evident in the conduct of the legislature, which voted for the country to withdraw from the ICC.⁹⁵ In the debates leading to this decision, the Leader of the Majority stated the Kenyan cases were political. The effect of this anti-ICC climate fostered by public officials has not only had a chilling effect on the willingness of witnesses to

⁸⁷ *Prosecutor V. Charles Ghankay Taylor*, Case No. Scsl-03-0, (2012).

⁸⁸ Article 143(1), The Constitution of Kenya, 2010.

⁸⁹ Makau M, 'The International Criminal Court in Africa: challenges and opportunities', The Norwegian Peace Building Centre, Noref Working Paper, September, 2010.

⁹⁰ Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 31 *Fordham International Law Journal*, 2007, 360.

⁹¹ Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 359.

⁹² Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 359.

⁹³ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya, ICC-01/09, 31 March 2010 -<https://www.icc-cpi.int/kenya>- on accessed on 15 September 2016.)

⁹⁴ *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>- on 15 September 2016.

⁹⁵ Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', Aljazeera, 6 September 2013 - <http://www.aljazeera.com/news/Africa/2013/09/201395151027359326.html>- on 10 August, 2015

cooperate with the Prosecutor⁹⁶ but underlies a government, which projects an outward appearance of cooperation, while sabotaging the same at every stage of requests made by the Court.⁹⁷

As discussed earlier, various government agencies provide significant strengths in the implementation of Kenya's obligations under the Rome Statute such as the Attorney General, the Director of Public Prosecutions, the Witness Protection Agency, the Police and the Judiciary.⁹⁸ Most notable in this regard is the intention to establish a specialised division of the High Court to handle international crimes promises the expeditious disposal of cases.⁹⁹ Notwithstanding this effort, capacity constraints continue to hamper the fulfillment of the country's obligations under the Rome Statute. For example, the specialised division of the High Court is yet to be established and pertinent cases continue to be determined in the Criminal Division of the High Court with resultant delays.¹⁰⁰ Furthermore, there is a dearth of national jurisprudence in international crimes leading to an overreliance on the international jurisprudence where different rules of procedure and evidence are applied.¹⁰¹ To compound this, local judicial officers and prosecutors are not fully aware of obligations under the Rome Statute and the Act.¹⁰² More could also be done to guarantee the protection of witnesses e.g. making provision for the concealment of their identity from accusers and raising greater awareness of the Witness Protection Act 2006.¹⁰³

Finally, there are no structured ways of engagements and sharing information on investigations and prosecutions of international crimes. 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. This may cause delay of the execution of requests for cooperation by the ICC and impede timely discharge of the obligations to a large.

In light of the approval by Parliament to withdraw from the Statute and repeal International Crimes Act 2008, it is unlikely that Parliament will allocate adequate funds to agencies to discharge the obligations under the Statute. Inadequate funds have proven to be the most critical weakness so far in the discharge of Kenya's obligations. Key agencies within the criminal justice system such as the National Police Service and the Government Chemist suffer acute capacity due to financial constraints, which inevitably affect the efficient delivery of services by the entire system.¹⁰⁴ Despite the enormous mandate bestowed upon agencies such as Judiciary, ODPP, Office of the Attorney General, and Witness Protection Agency, limited

⁹⁶ Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', para 1.

⁹⁷ Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', para 4.

⁹⁸ Article 160(1), Article 156 and 245(2)(b), The Constitution of Kenya.

⁹⁹ Judicial Service Commission, *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*, 30 October 2012. - [http://www.judiciary.go.ke/portal/page/speeches-](http://www.judiciary.go.ke/portal/page/speeches) on 22 September 2016.

¹⁰⁰ *Republic (through Cabinet Secretary, Ministry of Interior and Coordination of National Government) v Paul Gicheru & another* [2017] eKLR.

¹⁰¹ Article 64, Rome Statute of International Criminal Court.

¹⁰² Office of the Director of Public Prosecutions, *Second Progress Report, 2013/2014*, 50; Judiciary, *State of Judiciary and the Administration of Justice Report, 2014-2015*, 96. –

www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pd-on 24 September 2016.

¹⁰³ Judiciary, *State of Judiciary and Administration of Justice Annual Report, 2014-2015*, 114.

¹⁰⁴ Judiciary, *State of Judiciary and the Administration of Justice Report*, 97.

funding has resulted in institutions that are understaffed and lack adequate infrastructure, including facilities and equipment, necessary for the optimum discharge of the country's obligation.¹⁰⁵

6. Conclusion

In light of the above challenges, there are a number of recommendations that may enable Kenya efficiently and effectively discharge its obligations under the Rome Statute. Firstly, the government should develop and promulgate rules and regulations of Evidence and Procedure to support the Act.¹⁰⁶ In this regard, Rwanda may offer a useful approach. Rwanda enacted the Transfer Law to govern the transfer of cases from ICTR and other states to Rwanda.¹⁰⁷ This law incorporates Rules of Procedures and Evidence from ICTR,¹⁰⁸ as well as guarantees of the accused persons (and persons in detention)¹⁰⁹ and the protection of witnesses.¹¹⁰ In the same breadth, the Attorney General could extrapolate **rules** and regulations under sections 172 and 173 of the International Crimes Act to facilitate effective implementation of the Kenya's obligations under the Rome Statute.

Secondly, the Government should develop strong institutions to facilitate efficient and effective discharge by adopting measures that target the entire criminal justice systems including the judiciary, the ODP, 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. In addition, the government should build capacity of criminal justice agencies so as to improve the quality of investigations and prosecution, such as providing specialized training for the police, prosecutors, judges and magistrates on international criminal law, international humanitarian law and international human rights law.¹¹¹ It may also be beneficial to conduct exchange and mentorship programme at the international plane to share experiences of international best practices in the investigations and prosecutions of international crimes.

The lack of political will at the top echelons of government may be countered through an aggressive campaign targeting society at its grassroots with the intention of using public opinion to pressure the political leadership. Civil society could 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 the public to engage with the contextual background that has necessitated the emergence of international criminal law such as atrocities committed in the past. As these programmes spread and gain the support of the local population, government and politicians are likely to bend to public opinion and provide the necessary support to the ICC. This is likely to translate to improved budgetary allocation to the criminal justice agencies in order to improve their execution of their obligations under the Statute by inter alia providing for their training, building of the necessary infrastructure for witness protection, and facilities such as forensic laboratories, case management system and infrastructure to implement witness protection measures.

¹⁰⁵ Judiciary, *Progress Report on the Transformation of the Judiciary, The First Hundred And Twenty Days*, 19th October, 2011, 6. - <http://www.judiciary.go.ke/portal/page/speeches-> on 22 September 2016.

¹⁰⁶ Section 172, 173, The International Crimes Act.

¹⁰⁷ Rwanda's Organic Law No. 11/2007; Organic Law No. 03/2009/OL; Organic Law No. 47/2013 (2013 Transfer Law), (together, the "Transfer Law").

¹⁰⁸ Transfer Law, Articles 7- 11.

¹⁰⁹ Transfer Law, Article 23.

¹¹⁰ Transfer Law, Articles 13-14.

¹¹¹ The Judiciary, *State of Judiciary and Administration of Justice Report, 2015-2015*, 97 -

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Finally, the effective discharge of Kenya's obligations depends on coordination and cooperation between criminal justice actors. Such cooperation could be rooted in developing memorandum of understanding among actors or approving standard operating procedures upon which inter-agency cooperation could be founded.

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