IMPLEMENTATION OF THE ROME STATUTE IN KENYA: LEGAL AND INSTITUTIONAL CHALLENGES IN RELATION TO THE CHANGE FROM DUALISM TO MONISM

A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW

BY

TUMAINI REGINA WAFULA

3208326

PREPARED UNDER THE SUPERVISION OF

PROFESSOR GERHARD WERLE

AT THE FACULTY OF LAW, THE UNIVERSITYOF THE WESTERN CAPE

29th October 2012.

Table of Contents

Key Words

Domestic Courts

Domestication

Dualism

Implementation

International Criminal Court

Key challenges

Monism

Ratification

Rome Statute

Treaty

Abstract

The new Kenyan constitution has introduced an immediate monist approach of implementing international legal standards. Accordingly, the transformation from dual to monism will necessitate a discussion of theories of incorporation of international instruments into national laws. This will set the basis of what method Kenya should follow. This paper attempts to address potential procedural problems with implementing the Rome Statute in a new monist Kenya and will argue that as a precautionary measure during the country's transition any deviation, by the court, from national law will require articulation and justification under an international framework. It will include a review of the Kenyan International Crimes Act 2003 (ICA) and its adoption into the domestic law of Kenya. It will also include examination of previous situations where domestic courts have applied international law standards in domestic trials before and after the monist Constitution of 2010. This paper aims at assessing the key challenges to the effective implementation of the Rome Statute in Kenya both objectively and substantively. It examines the challenges facing the Kenyan courts in relation to the exercise of universal jurisdiction and the criminalization of international crimes. It will

seek to point out the weaknesses and conflict between the Kenyan constitution, The International Crimes Act and the Rome Statute. The ICA was silent on some aspects of the Rome Statute and the paper will attempt to discuss these issues and what they portend in the implementation of the Rome statute in monism. It will also discuss the effect of the new constitution on the practical operation of the Rome Statue. The operational capacity of institutions mandated with practical implementation of the Rome Statute will be examined. It will further seek to ascertain whether the laws and policies reflect Kenya's commitment to international criminal justice. By way of conclusion, the paper will create a possible inventory of issues, which might arise in Kenya's prosecution of International crimes under the Rome Statute, and suggestions on how such issues could best be addressed.

Dedication

Soli Deo Gloria. Tommy late Father, here it is.

Acknowledgements

I am deeply indebted to my supervisor, Professor Gerhard Werle, and Dr. Moritz Vormbaum, both of the Faculty of Law, Humboldt University, for their guidance during the writing of this thesis and their useful, critical and always informative comments on my drafts. To Professor Lovell Fernandez and Professor Raymond Koen of the Faculty of Law, University of the Western Cape, for shaping my writing skills. The team at the Transnational Criminal Justice and Crime Prevention – An International and African Perspective; Michaela, Frau Schepke, Frau Werle, Farida, Hazel and last but not least the child soldier Windell Nortje.

I am thankful to the German Academic Exchange Service (Deutscher Academischer Austausch Dienst, DAAD) without whom I would not have this opportunity

To All I say danke schön and dankie.

Abbreviations and Acronyms

AU African Union

DPP Director of Public Prosecutions

ICA International Crimes Act

ICC International Criminal Court

ICJ International Court Of Justice

ICTR International Criminal Tribunal for Rwanda

ICCPR International Convention for Civil and Political Rights

NGO Non-Governmental Organisation

ODPP Office of the Director of Public Prosecutions

UN United Nations

1.

1. INTRODUCTION AND OVERVIEW OF THE STUDY

II. Title.

Implementation of The Rome Statute in Kenya: Legal and Institutional Challenges in relation to the change from dualism to monism.

IV. Introduction.

Kenya signed the Rome Statute of the International Criminal Court (Rome Statute) on 11 August 1999, and ratified it on 15 March 2005.[1] The domesticating International Crimes Act came into force on 1 January 2009.There was a long period between signing, ratification, and domestication and the only logical explanation is that Kenya signed the treaty to please western donors, thus avoid sanctions. There was little interest in the treaty until after the post-election violence in 2007 that led to the passing of the domesticating Act in 2008. There had been a draft bill in place since 2005.[2]Guzman has a theory that best describes this proclivity, which he calls "a compliance based theory of International Law." This theory states that a States compliance to international obligations stems from self-interest.[3] A State wants to protect its reputation and avoid any sanction that comes with violation of that international obligation. Kenya is considered a regional economic and financial powerhouse in east and central Africa. It was also a peaceful country surrounded by unstable neighbours. Ergo, to protect this reputation, it signed the treaty with enthusiasm notwithstanding that the there was no clarity of its international obligations under the Rome Statute until after the 2007 post-

[1] Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (Rome Statute).

[2] Ford J. 2008, *'Country Study III: Kenya'*, in du Plessis M. & Ford J., *Unable or Unwilling? Case Studies on Domestic Implementation of The ICC Statute in Selected African Countries* (2008) 57. http://www.issafrica.org/uploads/MONO141FULL.PDF (accessed 2 March 2012).

[3] Guzman A. 'A Compliance-Based Theory of International Law,' (2002) 90 *California Law Review* 1823. Available at: http://scholarship.law.berkeley.edu/californialawreview/vol90/iss6/2. (accessed 5March 2012).

election violence. I submit that the shortcomings in the domesticating legislation are due to meditated reactions to the situation in 2007.

This Act domesticated international crimes not covered by national Kenyan laws, so that crimes against humanity, war crimes, and genocide can now be heard by any court in Kenya. Before coming into force of the ICA, Kenya had no domestic legislation on international crimes, and no domestic prosecutions of such crimes had taken place . Although Kenya is a signatory to the Geneva Conventions of 1949, it has not incorporated the Geneva Conventions into domestic law neither was there any other legislation to prosecute grave breaches.[4]Following dualistic practice, it was unlikely that a Kenyan court would hear a case concerning grave breaches of the Conventions in the absence of domestic legislation specifically making such conduct an offence. However, Kenya was undergoing a constitutional review and a new constitution was promulgated on 27th August 2010. The new Constitution in effect heralded change from the old dualist practice to monism by declaring in Art 2(6)

> 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'[5]

The approach of the new constitution moves Kenya from a dualist system to a monist system, allowing for the automatic domestic application of international law so long as it is not in clear violation of constitutional provisions. The aim of this research paper is to examine the effect of Kenya's new monist status on the implementation of the Rome Statute.

[4] Kenya ratified the Geneva conventions I-IV in 1966, Protocols I-II in 1999, signed Protocol III in 2005 but has yet to ratify.

[5] Constitution of the Republic of Kenya 2010.

The International Criminal Court (ICC) was conceived as a court of last resort. States Parties are bound by two important obligations, complementarity, and full cooperation. The ICC is an international court complimentary to national jurisdictions.[6]The Rome Statute does not place any obligation on a State to enact legislation or in what format the legislation should be. As long as the essence of the Rome Statute is maintained and the state is able to prosecute in national courts, complementarity is achieved. The Rome Statute serves as a model standard, which States can base their legislation on.[7]According to Werle[8], the test therefore is whether the State is willing and able to prosecute the Rome Statute crimes in domestic courts.

Article 86 of the Rome Statute provides that all states parties are obliged to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[9] The application of international treaties before domestic courts depends on the legal system of each particular country and the Constitutional order and structure of each. For this reason, review of the theories of monism and dualism will serve as background in understanding two differing views of the world legal order, which will affect in turn the application of international law by Kenyan courts. The papers primary focus will be on the shortcomings of the International Crimes Act and the method that Kenyan Courts will use to apply the Rome Statute in the new monistic legal order.

IV. Research Question.

In order to explore the best approach that Kenya should adopt to implement the Rome Statute in monism the following questions shall be deliberated:

---

[6] Rome Statute Article 1.

[7] Werle G. *Principles of International Criminal Law* 2ed (2009)118 marginal note no. 312-313.

[8] Werle (2009)118 marginal note no. 312-313.

[9]Rome Statute Article 86: General obligation to cooperate.

- What are the best practices for implementation of international treaties in dualist and monist states?
- What is the status of the implementation process in Kenya today?
- What other challenges do Kenyan courts face in the implementation of the Rome statute?
- What other substantive challenges face Kenyan courts in implementation of the Rome Statute?
- Is Kenya willing and able to prosecute international crimes under the International Crimes Act?

V. Significance of the Study.

Kenya is in a transitional state vis-à-vis the implementation of international treaties and its court system. The move towards monism spells a new way of interpreting international treaties ratified by Kenya. John Dugard in his book, International Law – A South African perspective expounds on the theory of harmonization.[10] This theory states that there is a limit to the application of international law in a monistic domestic system *toto jenere*, and where there is a conflict between the two; a Judge must apply his own interpretation. According to Dugard, this means conflicting domestic legislation may prevail over international law. The declarations of international law in domestic cases can be affected by local idiosyncrasies.[11] These can arise from the domestic statutes that are being evaluated or applied, from a court seeing international criminal law through national lens. This is especially crucial since a Judges inaccuracy in interpreting a treaty can lead to a country being seen as violating an international treaty and befouling the pacta sunt servanda principle. In the absence of any

[10]Dugard J. *International Law: A South African Perspective* 2ed (2006) 43-44.

[11] See Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of International Law* 289.

guidelines for implementation in Kenya, a treatise is needed to explore any options and challenges that may occur.

The new constitution is silent on the person or the process of signature of treaties on behalf of the country. By custom, the president being the Head of State is responsible for signing or any other officer delegated the responsibility.[12] In the absence of legislation governing signing of treaties, a lacuna for mischief is possible which may influence what treaties are signed. The study will be significant in exploring the need for research in the area of state changes from dualist to monist legal systems or vice versa.

VI. Scope of Research.

The purpose of this treatise is not to conduct an exhaustive analysis of Kenya's implementation of its obligations under the ICC Statute, but rather to analyse some aspects of this process in light of Kenya's change to monistic legal system and its international law obligations. This research is limited to implementation of the Rome Statue and its antecedent problems and will cover the Kenyan situation at the International Criminal Court (ICC) minimally only for illustrative purposes. The only bill that seeks to control or outline the procedure for ratifying treaties is the Ratification of Treaties Bill, 2011 and this bill will be discussed in passing.

VII. Hypothesis.

This study is based on the assumption that the application of treaties in the national legal system is subject to many theories and doctrines. The field of international criminal law is a complex and evolving one. National courts are relevant to the application of international treaties in the monist domestic legal structure. It is imperative that Judges receive adequate

[12] Constitution of Kenya 2010 Article 132 *(5)*. The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.

training in implementation as judicial enforcement by domestic courts is the main factor that influences governmental compliance treaties.

VIII. Research Methodology.

This study will adopt the desktop research methodology. It will therefore involve the reading and analysis of primary sources such as international conventions, treaties, memoranda of understanding, official reports, and national laws. The secondary resources will range from books, journal articles, conference papers up to electronic resources.

IX. Preliminary Structure of the Paper.

This paper comprises five chapters:

1. Chapter 1

   This is the introductory part, which includes the introduction to the research topic, general background, research problem, significance of study, and the methodology to be employed in the study.

2. Chapter 2

   This second chapter will deal with a theoretic discussion of monism and dualism.

3. Chapter 3

   This chapter gives an analysis of the International Crimes Act. It will focus on the Acts shortfalls and what options are available to rectify the anomaly, to put it in tandem with the Rome Statute. This will entail an examination of how Kenyan Courts have dealt with International instruments under monism.

4. Chapter 4

The practical challenges facing implementation are discussed. The focus will be on the procedural challenges facing cooperation with the ICC.

5. Chapter 5

   Includes the conclusions and recommendations.

2

2. THE IMPLICATION OF KENYA'S STATUS CHANGE FROM A DUALIST TO MONIST STATE AND THE ROME STATUTE.

2. 1. Introduction.

The efficacy and effectiveness of Kenya's implementation of the Rome Statue can be better understood by analysis of the surrounding political and judicial attitude towards international treaties. In order to place the discussion in its proper historical context, this chapter examines the pre-multiparty, post-multiparty and monism periods in Kenya in order to find out whether the legal position has undergone any fundamental changes and, therefore, has thereby been made clearer. The paper also examines the role of international law in Kenyan national legal sphere. Furthermore, the article investigates the extent to which the Kenyan Judiciary has given effect to the constitutional clause domestically incorporating international law. It is argued that assigning international law in the Constitution is just a single step in domestic incorporation. Thus, the Judiciary plays a major role not only in the application of international normative standards in national law, but also in their domestication. Given that the Judiciary will be central in interpretive implementation in a monism system, Kenya's historical adherence to international legal norms can serve as a predictive index of what challenges to expect. Legal concepts are moulded by a continuing practice of legality, which can destroy, maintain, or build the norm.[13] This chapter attempts to analyse the restraints placed on judicial application of un-domesticated international treaties in dualism in comparison with recent judgments in monism.

[13] See Brunnée J, Toope S. *Legitimacy and Legality in International Law: An Interactional Account*2010.

2.1. Implementation of International Instruments in National laws.

Whereas it is trite that that customary international law or jus cogens is part of domestic law, and is binding on all states, international law arising from treaty agreements is not immediately law, and it requires a defined procedure by states to make treaties, which a state has ratified binding domestically.[14]

This obligatory nature of treaties has strengthened substantially since the Second World War, mostly due to the way, the Nuremberg Tribunal treated German government officials who consistently violated treaty obligations, and in part on the simple principle that treaties clarified signatories' duties, and this meant enforcement was more likely than customary obligations. The value of treaties was fortified further by the general entry into force of the Vienna Convention on the Law of Treaties in 1980. Although the options of means by which a State may submit to international obligations arising from international treaties is set out, the question of how States implement treaties domestically is not addressed. The Convention appropriately leaves this issue to be settled by each State, in conformity with its legal system. Therefore, "domestication" of treaties is the concern of national law and is not dictated by international law

2.1.1. Monism and Dualism.

International law distinguishes two doctrines that govern the juxtaposition between international and municipal law. The monist school, argues that international law and domestic law are part of one all-encompassing legal system, and there is no conflicting objectives between them, thus treaties that a state has ratified are automatically part of domestic law and are binding in that domain. Monist proponents maintain that domestic law must correspond with international law; that both domestic law and

[14] Brownlie I., *Principles of Public International Law*. 4ed (1990) 50-51.

international law must defer to the principles of the one all-encompassing legal system which is founded on natural law. The monist school argues that not only do international legal rules and various domestic legal orders comprise a single global system, but also, in cases of conflict, domestic legal orders take a subsidiary position.[15]

Dualism, backed by legal positivists, states that the two systems of law (international and domestic) are diverse systems of law, each proficient in its own jurisdiction.

Because of these differences, states should apply domestic law with no requirement to make it conform to international law. State sovereignty is paramount and international law is binding on a state only if the state acquiesces to it[16]. Dualists believe that international law and domestic law exist as parallel but separate legal systems. Positivism proponents like Triepel[17]andStrupp[18] argue that State sovereignty is Supreme and international law only operates in a State with consent of the State.

2.2. Implementation of International Treaty Law Obligations in Dualistic Kenya.

To better, expound on how Kenya adopts treaties and its attitude towards implementation of international treaty obligations, a discourse of the history of the principle separation of powers in Kenya. Kenya's implementation of treaty law is divisible into two distinct periods, before and after multi-party democracy. While the process of treaty practice did not change much after multi-party democracy, there was an emergence of a bolder Judiciary, with a trend toward interpretive incorporation of humanitarian treaties.

---

[15] See Brownlie I. (1990), Shaw M., *International Law* 6ed (2008) 131–133.

[16]Atkin J, *Modern Introduction to International Law* (1991) 45.

[17] Triepel H., *Volkerrecht und Landesrecht* as quoted in S. Malcolm International Law (2008) 131.

[18] Strupp K, *Les Règles Generals du Droit de la paix,*. As Quoted in Shaw M. International Law (2008)131.

2.2.1. Implementation of Treaty Law in Kenya from 1963 to 1992.

Following dualistic treaty practice, after singing and ratification of a treaty, it still required formal conversion into an Act of Parliament for it to take the force of law in Kenya. The other option was to implement the treaty as a government policy if it did not require any legal backing

From independence in 1963 from Britain, until the promulgation of the new constitution in 2010, Kenya did not have guiding case law precedents, legislation, or constitutional provisions as to procedures that had to be adhered to in treaty practice. This led to a lacuna, whereupon treaties were signed, ratified, and domesticated in an unregulated environment.

The signing and ratification of treaties was within the authority of the Executive in keeping with its prerogative powers, while the passing and amendment of law were within the authority of the Parliament, not the Executive.

Some treaties were signed by Ministers in the concerned ministry, some by the Attorney-General. With no central registry, it is not always possible to know which treaties Kenya has signed and ratified and which it has not.[19] It also means that some treaties although not domesticated as per dualist practice were considered binding on Kenya just because they had been ratified. On the other hand, some treaties gained the force of law in Kenya

[19] Bowry P. 'In international treaties lie the untapped law *'The Standard Newspaper* 10 October 2012. Available at http://www.standardmedia.co.ke/?articleID=2000068021&pageNo=1 (Accessed 10 October 2012).

because, they were first transformed into Kenyan municipal law following dualist practice.[20]

Kenya's practice of dualism exposed the blurring of the separation of powers between the legislature, the executive, and the Judiciary. This procedure was the preserve of the executive and not the legislature because some treaties underwent ratification before listing in parliament for domestication to make them conform to the Kenya national legal system.

From 1969, the Republic of Kenya was a *de facto* one-party state, until June 1982 when it became a *de jure* one-party state. It reverted to a multi-party state in 1992. During this period, democracy was stifled. The Judiciary was handpicked by the President and was known to give rulings according to the executive's political stance. The Judiciary was unable to provide checks and balances to the excessive powers of the legislature and executive.

In 1986 and 1988, parliament enacted the Constitution of Kenya (Amendment) Act No 14, and the Constitution of Kenya (Amendment) Act No.4, which imposed limits on the independence of the Judiciary, and herald unprecedented human rights violations. These constitutional amendments provided for the removal of security of tenure of the Attorney General, the Controller, and Auditor General, the Judges of the High Court and the Court of Appeal. Parliament, who's majority were parliamentarians from the ruling party, acquiesced to these amendments. The President had broad powers over appointments, including those of the Attorney General, the Chief Justice, and Appeal and High Court judges. Dismissal was upon the recommendations of special tribunal also appointed by the president. The Judicial Services Commissioners, who were appointed by the President,

[20]Mwagiru M. 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' (2011) *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No.1.

recommended to the president the appointees to the position the chief justice and puisne Judges respectively.[21] The control of parliament and the Judiciary meant that the office of the president was in a position to influence and dictate to the duties of the two branches of the government. Both Parliament and the Judiciary were not in a position to control the excesses of the executive. The separation of powers was blurred. Open criticisms and challenge to Government policies were associated insecurity and instability.[22]Apart from the few Judges who were employed under contract, the position of Judge had life tenure.

The President had authority over transfers and in previous years, Judges and government legal advisors who ruled against the Government sometimes subtly gagged by transfers to remote or so-called hardship areas of the country or by nonrenewal of their contracts.[23]

The judicial system did not apply human rights norms[24]. A former British expatriate judge in Kenya, Eugene Cotran, stated that in cases in which the president had interests, the government duress on the Judges to make rulings in favour of the state.[25] The foreign Judges were more independent as they were not under fear of reprisals from the

---

[21]Constitution of Kenya 1963 Sections 61*(1)* and *(2).*

[22]Widner, J. 1994. "Two Leadership styles and Patterns of Political Liberalization". *African Studies Review,* 37(1) (April):151-174.

[23] In a case in which an American marine was accused of murdering a Kenyan woman, a judge found the accused guilty and fined the marine only Kenyan shillings 500 (about $50) with one year probation. The issue was raised in parliament thereafter because of the light sentence imposed by the judge. The then Attorney General, James B. Karugu, as the chief legal advisor to the government, responded by criticising the decision of the judge. He was relieved of his position.

[24] Writnet, Kenya: Update to End July 1995, 1 August 1995, available at: http://www.unhcr.org/refworld/docid/3ae6a6b78.html (accessed 4 March 2012).

[25]See Human Rights Watch, Africa Watch Kenya: Taking Liberties(1991) 151. Hannan L., 'Bias and Judicial Outrage'. *New Law Journal*141(1991) 900-901 and Constitutional Law According to Mr. Justice Dugdale *Nairobi Law Monthly*, 34 (1991) 15-16.

Government. Justice Derek Schofield resigned citing inference from the executive while others were removed without due process.[26]

Indeed, the fact that a treaty was not domesticated was a reason given by the Judiciary not to give rise to obligation under the treaty notwithstanding the Bangalore Principles on the domestication of international Human Rights Norms.

This trend shows that security of tenure was used to shield human rights violators from facing justice, and in the process entrenching impunity and unaccountability.

2.2.2 Implementation of Treaty Law in Kenya from 1992 to 27th August 2010.

The ushering of multi-party democracy saw a gradual re-birth in judicial activism. In 2002, there was a change of Government with the defeat of President Moi's Kenya National Union Party. The new Government embarked on a process of strengthening the Judiciary by establishing the "Integrity and Anti-Corruption Committee of the Judiciary in Kenya". The Committee came up with a report 2003 implicating (the Ringera Report), five out of nine Court of Appeal justices, 18 out of 36 High Court justices and 82 out of 254 magistrates in corruption.[27]

There were treaties, which Kenya had signed and ratified but which did not specifically have binding effect within the country because the provisions of the treaty had yet to be domesticated by Parliament. There emerged a judicial inclination toward interpretive

---

[26]'Secure From Public Scrutiny? A Critical Analysis of Security of Tenure in Kenya' *Transparency International Kenya Publications Adili newsletter 2009*.http://www.tikenya.org/index.php?option=com_docman&task=cat_view&gid=108&Itemid=146&limitstart=20 (accessed on 3 March 2012).

[27]The Kenyan Section of the International Commission of Jurists Publication Kenya: 'Judicial Independence, Corruption And Reform' 2005 available at http://www.icj.org/dwn/database/Kenya-JudicialIndpCorruption&reform-April2005report.pdf (Accessed May 5th 2012).

incorporation of human rights treaties. No longer did they treat unincorporated human rights treaties as having no domestic legal effect. Instead, they developed a wide range of interpretive incorporation techniques that enabled them to apply treaties in their reasoning despite the absence of implementing legislation giving formal domestic legal effect to the treaties. In short, like courts in monist-oriented legal systems, these Judges were citing and discussing human rights treaties alongside domestic texts, in effect, judicially incorporating and enforcing many of the rights guaranteed by those treaties. They were also using interpretive incorporation to overcome the traditional dominance of the executive.

In the case of *Rono vs. Rono and another*, the Court of Appeal asked itself whether international law was relevant in its consideration of the unequal allocation of property among male and female heirs. The Court stated that although the traditional view had been that international obligations are applied domestically only when they had been incorporated into domestic law, " the current thinking on the common law theory is that both international customary law and treaty law can be applied by State courts where there is no conflict with existing State law, even in the absence of implementing legislation ." The Court then listed the numerous human rights treaties that Kenya has ratified but not domesticated, going on to state that these would inform the Court's decision[28].

[28]*Rono v. Rono & another*, [2008] KLR, (citing Bangalore Principle No. 7). See also *Republic vs. Minister for home affairs and two others Ex-parte Leonard Sitamze* [2008], available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=810836047490385154082 78. The court, following the decision in *Rono vs. Rono*, applied provisions of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on the basis that Kenya, as a signatory to the Convention could not just wish it away.

In imperceptibly adopting a more monistic approach to treaty incorporation, Kenyan Judges are also engaging in transnational judicial dialogue. They are relying on foreign court judgements to both advance and rationalise, their own use of monist-oriented interpretive incorporation techniques.

However, the case of *Peter Mburu Echaria v Priscilla Njeri Echaria*[29]demonstrates there was lack of uniformity in acknowledging and applying international law, for while some courts started moving towards application of international law, others enforced dualism strictly and would not apply provisions of a treaty, which had yet to be domesticated.[30]

The newfound judicial independence did come with some undesired and unforeseen effects. There was zeal to strike down human rights violations and in doing so absurdities in judicial decisions emerged. This was mostly due to lack of expertise and familiarity of international law norms resulting in misapplication of the law. In 2000, one *Abanus Mwasi Mutua*[31]charges were dismissed against the accused after the defence raised an objection that the accused had been detained in police custody for a period longer than the constitutional pre-trial detention mandated 14 days for offences punishable by death. The defence counsel relied on the persuasive authority of the case of *Jean-Bosco*

[29][2007] eKLR.

[30]The Court disqualified a wife's non-monetary contributions in a divorce matter. The court acknowledged the ratification of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights adopted in 1966 and came into force in 1976; the Convention on the Elimination of All Forms of Discrimination against Women, which came into force in 1981; and the African Charter on Human & People Rights adopted in 1981. The court however ruled that since the conventions were not domesticated they were not applicable in Kenya legal system. http://www.kenyalaw.org/CaseSearch/print.php?link=43831, last accessed on 28 May, 2012In addition Kenya has ratified 49 ILO Conventions.

[31] Albanus Mwasia Mutua Vs. Republic of (Kenya) Criminal Appeal no.120 of 2004.

Barayagwiza[32]notwithstanding that the decision had been reversed at the International Criminal Tribunal for Rwanda (ICTR). *Barayagwiza* had raised the issue of pre-trial detention at the ICTR where the Appeals Chamber found that the pre-trial detention of *Jean-Bosco Barayagwiza*, violated his human rights, and the thus decline jurisdiction over him. After an outcry by the Government of Rwanda and further submissions by the Prosecutor, this decision was reversed.[33] The Kenyan court of appeal decision led to approximately 200 persons acquitted and is still precedent today albeit with two conflicting rulings from the court of appeal.

2.2.3. The Bangalore Principles: Application in Kenya.

The judicial application of international treaties in dualist countries is summarised into what is commonly referred to as the Bangalore principles.[34] Through the Bangalore Conferences, (a sequence of judicial symposiums held over the 1990's), participants at these symposiums addressed the issue of how (if at all) common law Judges can apply treaties that have not been legislatively domesticated into their own legal systems. They encapsulated their findings on this problem into concluding statements that are now known as the Bangalore Principles. The most pertinent one for interpretive incorporation are principles 6, 7, and 8.

- "6.While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this

[32]*Prosecutor v. Barayagwiza*, (Case No. ICTR-97-19) 3.11.1999 Available at http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991 Accessed 17 July 2012.

[33]*Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, Case No. ICTR-97-19-AR72, ICTR A. Ch., 31 Mar. 2000.

[34]Bangalore Principles of 1989 reprinted in Commonwealth Secretariat, *Developing Human Rights Jurisprudence* Volume 3, 15.

process must take fully into account local laws, traditions, circumstances, and needs.

- 7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations, which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common law.
- 8. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country."[35]

The Bangalore principles recognise the importance of norms contained in international human rights instruments be applied widely in national courts but at the same time, the process must allow that domestic laws, traditions, circumstances, and needs of the country should be acknowledged.

In essence, the Bangalore principles articulate that domestic courts regard to international obligations is within judicial process and judicial functions, regardless of whether or not they have been incorporated into domestic law. This is desirable for removing vagueness from constitutions, legislation, or common law as well as if the law is imperfect or there is a lacuna. However, where the national law is clear but inconsistent with international

[35]Bangalore Principles of 1989 Principles 6-8.

obligations, the national court has an obligation to give effect to the national law. [36] In the case of *R.M. and Cradle v. Attorney General*, the court declined to enlarge on the discrimination categories set out in Section 82 of the old constitution and held that the Kenyan Constitution's provisions on non-discrimination and equal protection also do not cover discrimination against children born out of wedlock.[37] The court in reaching its decision wholly relied on principle 8 and disregarded principle 7, which states that:

> ''It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations, which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law''

The essence of the Bangalore principles was to obligate national jurisdictions on their commitments to international human rights norms over national norms. Conservative jurisdictions like Australia[38] and the United Kingdom[39] have used the Bangalore principles in interpretive incorporation. In this case, the court chose to ignore this and follow a pure dualist approach to interpretation. The Bangalore principles though helpful were

---

[36] Bangalore Principles 8.

[37] *[2010] eKLR.* The Court held that the Kenyan Constitution's provisions on non-discrimination and equal protection also do not cover discrimination against children born out of wedlock. Available at http://www.kenyalawreports.or.ke/family/case_download.php?go=29580681357590819795393 (Accessed 20 March 2012).

[38] Kirby M. 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol-a View from the Antipodes' (1993) 16 *University of New South Wales Law Review* 363-393 (accessed on 5 June 2012).

[39] Higgins H. 'The Relationship between International and Regional Human Rights Norms and Domestic Law (focus on the United Kingdom)' 1992) 18(4) *Commonwealth Law Bulletin*, 1268.

inadequate in compelling courts to follow international norms where there was no domestication.

2.3. Implementation of Treaty Law Obligations in Monistic Kenya.

On the 4 March 2009 and 12 July 2010, the ICC issued warrants of arrest against President Al Bashir.[40] The court also issued two requests for co-operation in the arrest and surrender of President Al Bashir on 6 March 2009 and 21July 2010 to States that are parties to the Rome Statute.[41]

On 27 August 2010, Kenya invited President Omar Al Bashir for a ceremony marking the adoption of the new constitution. Thereafter, the Kenyan Section of the international Commission of Jurists, (ICJ Kenya), filed an application for issuance of a provisional warrant of arrest against President Omar al Bashir enjoining both the Attorney General and the Minister for Internal Security as the Respondents. Justice Ombija allowed the application.[42]

The Attorney-General challenged the ruling and sought interim orders seeking to stay the warrant until the government's intended appeal was determined. The three bench Court of

---

[40] Situation in Darfur, Sudan. *In the case of the Prosecutor v. Omar Hassan Ahmad al Bashir ("Omar al Bashir'') ICC-02/05-01/09* Available at *http://www.icccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/Court+Records/Chambers/PTCI/1.htm*(accessed 4 May 2012), Situation in Darfur, Sudan *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar al Bashir'') ICC-02/05-01/09* Available at *http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/95?lan=en-GB* (accessed 4 May 2012).

[41] See Request to all States Parties to the Rome Statute for Arrest and Surrender of Omar Al Bashir ICC-02/05-01/09-7 and ICC-02/05-01/09-96. Available at *http://212.159.242.180/NR/exeres/DFFD4FA1-38F6-4CBC-8189-661104F9DA56.htm* (accessed 4 May 2012).

[42] *Kenya Section of The International Commission of Jurists v Attorney General & another [2011] eKLR.*

Appeal maintained the warrant pending a full Appeal. The Court of Appeal went on to uphold the arrest warrant and Justice Ombija issued a provisional arrest warrant for President Bashir on 28 November 2011.

This case highlighted a different approach from the executive to influence the Judiciary. The executive relied on foreign policy and national security implications, much favoured by the United States Government in invoking the political question doctrine.[43]Arguing that the arrest warrant had created international anxiety threatening Kenya-Sudan bilateral relations, the Deputy solicitor-general, backed by the foreign affairs permanent secretary, gave examples of Sudan being Kenya's biggest tea importer and the fact that international flights passed through Sudan to Kenya. [44]

In Koigi *wa Wamere Vs. Attorney-General*[45], the petitioner sought to have two instances of detention; his incarceration at Nyayo House[46]in 1983 and the trial for treason and attempted robbery in 1997, declared violation of his rights under the old Constitution. He claimed to have been tortured in Nyayo house for 11 days. On the attempted robbery charges, he said pending trial and until his acquittal on appeal, he suffered in prison by being exposed to mosquitoes, not being allowed to see his children, to read newspapers or listen to radio, and was denied medical treatment. Despite Kenya not having ratified the torture convention, the Judge awarded the petitioner KSh2.5million (approximately

[43] United States Federal courts will refuse to hear a case if in their opinion it raises a political question. This includes foreign policy matters. The doctrine states that an issue raised about the conduct of public business is a "political" issue under the preserve of the legislature or the executive branch and the courts. See Baker v. Carr 369 U.S. 186(1962).

[44] Kwamboka E. 'The Race To Please Bashir' 8 December 2011. *The Standard*, *http://www.standardmedia.co.ke/?articleID=2000047976&pageNo=2* (accessed on 5June 2012).

[45] HCC 737 of 2009 Unreported (6th April 2012).

[46] Nyayo house was a building used for torture of persons perceived as dissidents by the previous Government.

US$30,000) damages for the Nyayo house torture. She however declined to award damages for his experiences in prison saying that she did not find any acts of torture as recognized by law, but the same deplorable conditions undergone by every Kenyan in the Kenyan prison system. This case illustrates that Judges under monistic Kenya are applying international instruments in human rights violations. However, the vestiges of Bangalore principle no.6 relating to taking "fully into account local laws, traditions, circumstances, and needs" will factor into judicial interpretive implementation of international treaties for some time to come. This may not always be a negative aspect because however much the universality of the core grave crimes must be upheld; there are intricate details in domestic prosecutions that will entail regard to domestic customs, traditions and needs.

2.4. The Ratification of Treaties Bill.

Whereas the Constitution stipulates that all treaties signed by Kenya are law, Article 94*(5)* states that only parliament has powers to enact laws in Kenya. The bill was introduced to give effect to Article 2*(6)* of the Constitution as read together with Article 94*(5)* thus providing a procedure for ratification of international treaties and related matters.[47]Article 94*(5)* of the Constitution states as follows:

> ''No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation''[48]

The bill merges the two constitutional requirements.

[47] The Treaties Bill 2010 Section 3.

[48]Constitution of Kenya 2010 Article 94*(5).*

For the purposes of the Rome statute, the relevant section of the bill is that on transition which states that:

> ‘‘Treaties signed and ratified by Kenya before the 27th August 2010 shall be deemed to have been ratified in accordance with the provisions of this Act.’’

Therefore, the Rome statue is duly ratified and law in Kenya.

There have been attempts by Parliament to withdraw Kenya from the Rome statute following the ICC prosecutor’s initiation of investigation and confirmation of charges by the trial chamber against a section of politicians following the post-election violence of 2007.[49] The relevant Sections 9*(1)* and *(2)* on withdrawals and denunciation are as follows:

> (1) Where Kenya wishes to withdraw from or denounce a treaty with sufficient reasons, the Cabinet Secretaries for the lead Ministry and the Ministry responsible for Treaties shall follow procedures similar to those set out in Sections (5), (6) (7) and (8) with the necessary modifications .
>
> (2) The State shall not withdraw or denounce a treaty in contravention of its constitutional and international obligations.[50]

The procedures set forth are approval by cabinet, followed by public participation and finally parliamentary approval before there is withdrawal from the Rome treaty. Any attempt to withdraw or denounce the treaty in a manner other than that set out in this bill is

---

[49] ‘Kenya MPs vote to leave ICC over poll violence claims’ *BBC News Africa* 23 December 2010 available at http://www.bbc.co.uk/news/world-africa-12066667 (Accessed on 20 May 2012).

[50] Treaties Bill Sections 9*(1)* and *(2).*

an offence with a prison term not exceeding ten years or to a fine not exceeding ten million shillings (or both).

2.5. Conclusions.

Under monism, treaty practise will encourage the separation of powers in Kenya, which has been the biggest obstacle to implementation of treaties, and their application in the Kenyan legal system. Should the Treaties bill pass unchallenged and unaltered, the executive duties will be to negotiate treaties, after which parliament will debate them, and make voting decisions about whether they should be ratified. Following that decision making, the executive will ratify the treaties, as it is required to do by the laws and practices of treaty law and diplomacy. The implications for the Rome Statute are that with an embolden Judiciary will be ready to discourage any political or legal obstacles that can emerge in Kenya's obligation to complementarity. As the judicial process is now separate from the other branches of government, bad faith on behalf of state actors in a position to influence the judicial process will not succeed.

3

3. STATUS OF THE ROME STATUTE IN NATIONAL LAW.

3.1. Introduction.

To incorporate the Rome Statute into the domestic legal order, Kenya chose the combination approach. This approach entails non-incorporation, complete incorporation, and modified incorporation.[51] Non-incorporation occurs when a state chooses to rely on domestic law to prosecute crimes under international law. In the International Crimes Act (ICA), Section 7*(2)(a)* states that the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply. There are elements of complete incorporation in the ICA. The Act adopts verbatim the definition of war crimes and genocide as those of the Rome statute. There are also elements of modified incorporation in the definition of crimes against humanity, which while adopting the Rome Statute definition, widens the definition to include conventional international law or customary international definitions. This chapter will address the status of the Rome Statute in the domestic legal order after the change to a monist legal regime. This will entail a discussion of the domesticating international crimes Act and any shortcoming and obstacles that may be faced.

3.2. The Rome statute in the domestic legal order.

In Kenya, the Constitution is the Supreme law of the land. Prior to the 2010 Constitution, the Judicature Act Section 3set out the hierarchy of laws as follows:

> "1. The Constitution

[51] Werle G.(2009) marginal note no. 323 121.

2. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

3. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August,1897, and the procedure and practice observed in courts of justice in England at that date;

4. Customary law."[52]

The 2010 Constitution introduced the general rules of international law (which are to be interpreted as rules of international customary law) and ratified treaties as part of the laws of Kenya.

It is arguable that treaties and international agreements have the same status as the law, since they are incorporated into domestic law by means of legislative ratification. Accordingly, in cases of conflict between domestic law and an international text incorporated by a ratification law, one should apply the temporal rules of conflicts law, the new law abrogating the earlier, incompatible law.

However, as regards human rights, such reasoning cannot apply. Art 21(1) (4) of the Constitution states that:

"The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms".

[52] Judicature Act of Kenya Section 3.

Indeed, all international conventions on this subject have constitutional status under Articles 2*(4)*, 2*(6)* and 21*(1) (4)* of the Constitution. Consequently, in this area, when a later law is incompatible with the ratification law for an international convention, the law having constitutional status will prevail, and the later law is unconstitutional. In

Namibia, which has a monist constitution, international law is directly applicable. The Namibian Supreme Court has held that ICCPR took precedence over conflicting provisions in the Legal Aid Act.[53]

The Rome Statute has elements of supranational character.[54] This means there may be resolutions made by the ICC concerning a States Party, which bind the State even in situations where that State disagrees. By virtue of these aspects, it therefore stands above national law but below the constitution. By becoming a signatory, Kenya explicitly submitted her right to make judicial decisions to the I.C.C. and is preclude from legislating contrary to the Rome Statute, in situations where Kenya is unwilling or unable to exercise national jurisdiction. In case a national law is in direct conflict with a provision of the Statute, the national law in question will be declared inapplicable.

---

[53] *Government of the Republic of Namibia & Others v Mwilima & Others*, Supreme Court Decision, SA 29/01; ILDC 162 (NA 2002), [2002] NASC 8, 7 June 2002. In reference to article 14*(3)(d)* of the ICCPR.

[54] Rome Statute Articles 53, 54.The powers of a prosecutor to Initiate investigations *propel motu* and Duties and Powers of the Prosecutor with respect to investigations;
Article 36,40Independence of Judges from State Party influences;
Article 42, Independence of the Prosecutor;
Article 25,The Court has jurisdiction over natural persons who are accused of crimes under the Rome Statute;
Article 58,Issuance by the Pre-Trial Chamber of a warrant of arrest or summons to appear;
Article 59,States Parties are bound by Arrest Warrants issued by the ICC and State Party concerned is obligated to facilitate the suspects arrest,
Article 157, withdrawal not affecting existing obligations and matters before the court.

There is scant academic commentary on the issue of Constitutional sovereignty vis-à-vis the incorporation of supranational rules into the domestic legal order. Most of the research on this issue has focused on the European Union. With regard to the supranational aspects of the Rome statute and Constitutional supremacy, three arguments can be made:

1. These sections do not conflict with fundamental principles of the Constitution.

2. The Constitution obligates harmonisation of human rights and fundamental freedoms legislation under Article 21*(1)(4)* thus legitimatising the application of the Rome Statute.

3. Kenya is bound by the Rome Statute on its own volition.

Shaw describes the role of treaties as contracts "whereby the states participating bind themselves legally to act in a particular way or set up particular relations between themselves.''[55]

The Kenyan Courts have had chance to examine this issue of constitutional supremacy in the case of *Re The Matter of Zipporah Wambui Mathara*.[56] It was found that civil jail for bankruptcy as provided for Kenyan Civil Procedure Act and Rules, was in contravention of the provisions of the International Covenant on Civil and Political Rights (ICCPR) and that the ICCPR was the superior law. Thus, under this approach, any inconsistency existing between domestic written statute law and international law in form of either general rules of international law or treaties renders the statutory provision void to the extent of the inconsistency.

Under the 2010 constitution, the hierarchy of laws can be summarised as follows:

[55] Shaw M. 6ed.(2008) 93.

[56][2010] eKLR.

1. The Constitution of Kenya;
2. Rules of international law and ratified treaties;
3. Acts of parliament;
4. Common law/, of equity and statutes of general application;
5. Customary law.

Considering the fact that the Treaties Bill is still pending approval from Parliament, in the interim the International Crimes Act must be interpreted in the light of the transitional clause 7(1) in the sixth schedule of the Constitution, which stipulates:

> " All the law in force immediately before the effective date continues in force and should be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution"

3.2.1. Conflict of Treaty Obligations.

Under the monist regime, both the Rome Statue and AU treaty are law in Kenya. When it comes to priority between treaties, the Constitution is silent makes it difficult to determine which treaty will be given precedence when two bodies created by these treaties, such as the ICC and AU, issue conflicting instructions. Under Article 86 of the Rome Statute, obliges States Parties cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. The Assembly of Heads of State and Government of the AU has issued a resolution stating that AU Member States, "shall not cooperate" with the ICC in relation to the warrant for the arrest of President al-Bashir.

Kenya is signatory to the AU's Constitutive Act and thus is required to comply with the decisions made by the AU.[57]

There is a hierarchy between different legal systems for example, between the UN system and the AU system, and further hierarchy between various human rights provisions that is between Jus Cogens and other derogable human rights. The European Court of Justice decision in the Kadi *Case*,[58] has set the yardstick for the relationship between international law and Community law. This case concerned regulations on the freezing of assets belonging to persons found by the Sanctions committee to have ties with Bin Ladin following a UN Security council resolution.[59] Kadi one of the persons on the list, filed a petition, seeking the annulment of the regulations in all respects pertaining to him. He claimed that the regulations were in breach of his rights, specifically the right to property, and the right to a fair hearing. The European Court of Justice (ECJ) found that political bodies must abide by respect of fundamental rights notwithstanding that body being the UN Security Council. It can be said that *Kadi* represents a new approach whereby a regional court pressures the UN Security Council to change its policy towards fundamental rights.[60] The ECJ applied the argument that international law has primacy as long as it complies with fundamental Community norms, which were enunciated in the German

---

[57] See du Plessis M., Gevers C. 'Balancing Competing Obligations: The Rome Statute and AU decisions' (2011) *ISS Paper 225*. Available at www.iss.co.za/uploads/Paper225.pdf (Accessed 15 June 2012)

[58] Joined Cases C-402/05 P and C-415/05 P *Cassin Abdullah Kadi and Al Barakaat International Foundation*
Vs. Council of the European Union and Commission of the European Communities.

[59]United Nations Resolution 1333 adopted December 19, 2000.

[60] See Hilpold P., 'The EU Law, And UN Law In Conflict'. In von Bogdandy A. & Wolfram R eds. *Max Planck Yearbook of United Nations Law* Volume 13 (2009) 141-182.

Solange[61] cases in 1970's and 1980's. Conversely, to apply the decision to the African situation, it can be argued that the AU by giving Bashir a free pass has failed to comply with fundamental community norms and jus cogens as required by the Kenyan Constitution. Ultimately, the Kadi decision must be viewed in a political light. It can be argued that the ECJ was in effect reacting to growing concern over politicisation of UN Security Council decisions by the five permanent members.

In an application filed by the Attorney-General of Kenya seeking to stop execution of the warrant of arrest against Bashir, The Attorney-General raised the argument of conflict of treaty obligations. The Kenyan Court of Appeal did not address this matter.

William A. Schabas contends that the two conflicting obligations cannot be reconciled and there is a lacuna as to establishing a hierarchy as to which one prevails over the other. He surmises that this conflict of legal norms requires a political solution.[62]In the European Union, Member States have different approaches when a conflict arises between the EU law and national law. The principle is that Member states remain the master of the treaties. The basis for EU law's effect has been the reasoning behind many countries' highest courts stating that Union law takes precedence provided that it continues to respect fundamental constitutional principles of the Member State.

The Malawi situation with Bashir portrays this political angle. In its observations on the visit of Al Bashir to Malawi in October 2011, Malawi stated, "as a member of the African

---

[61]Solange IBVerfGE 37, 271 2 BvL 52/71 -Beschluß and Solange II (Re Wuensche Handelsgesellschaft, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225,265).

[62] Schabas W. African Union Amendment to Article 16 of Rome Statute Analysed PhD studies in human rights weblog
31 October 2010 Available at http://humanrightsdoctorate.blogspot.com/2010/10/african-union-amendment-to-article-16.html (Accessed 18 July 2012).

Union, it fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not state parties to the Rome Statute".[63]A year later, with a change of administration, Bashir is not welcome in Malawi.[64]

Intra-institutional hierarchy, in which many states are involved, cannot be resolved by the AU alone because of the underlying political questions. The question of the ICC and AU supremacy is more a political one than a technical-legal one and ultimately will be decided by the political stance Kenya takes.

3.3. Content of the Legislation Implementing the Rome Statute.

As stated in the Introduction, the purpose of this paper is not to conduct comprehensive analysis of Kenya's implementation of its obligations under the ICC Statute, but rather to analyse some aspects of this process in light of Kenya's change from dualism to monism. The International Criminal Court Act 2002 (ICC Act) is introduced as 'An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions." The inclusion of International crimes is a misnomer because apart from crimes against humanity, the international crimes covered by the act are limited to the core international crimes as defined by the Rome Statute. The definitions do not cover other

[63] Gillett M. 'The Call Of Justice: Obligations Under The Genocide Convention To Cooperate With The International Criminal Court' *Criminal Law Forum* (2012) 23:86.

[64] *Sudan's Omar al-Bashir not welcome for Malawi's Banda* BBC News 4 May 2012. Available at http://www.bbc.co.uk/news/world-africa-17963368 (Accessed 26 June 2012).

crimes under international law.[65] It is a very broad and comprehensive legislation. The functions, powers, and duties to be carried out on behalf of the Republic of Kenya are shared between the Attorney-General and the 'Minister'. The specific Ministry is not specified but in Kenya matters of security and crime are usually under the docket of the Minister of State for Provincial Administration and Internal Security.

3.3.1. Complementarity.

3.3.1.1. Definition of Crimes; Genocide, War Crimes and Crimes against Humanity.

The Law incorporates all crimes described in Articles 6, 7 and 8 of the Rome Statute, thus avoiding any unilateral definition of a crime. However, for the crimes against humanity, the ICA widens the scope to include 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 or in this Act." This definition includes crimes against humanity, which are not committed on a widespread or systematic basis for example executions, torture, extra judicial killings and enforced disappearances. However, referring to rules of "conventional international law or customary international law" provides a challenge; the principle of specificity requires that criminal provisions be as detailed as possible and clearly indicate the conduct they prohibit.

Section 7*(2)(a)* states that the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply thereby negating the need for specialized training to prosecute the core crimes. This also means the procedure for

[65] These are war crimes not listed in the Statute for example grave breaches and other serious violations of the Geneva Conventions of 12 August 1949 Additional Protocol I, and relating to the Protection of Victims of International Armed Conflict (Protocol I) and certain violations of international humanitarian law in non-international armed conflict.

instituting domestic prosecution will be the same as any crime in Kenya with the DPP having constitutional mandate to initiate. Where there is a conflict, the principles of the ICC statute take precedence. In domestic proceedings, the Rules of Procedure and Evidence of the ICC do not affect the procedural rules for any domestic court or legal system.[66]

3.3.1.2. Principles of criminal responsibility.

Under Section 7, certain provisions of the Rome statute are directly applicable for proceedings in certain circumstances that are not covered in Kenyan law. These include proceedings relating to superior commanders Article 26*(f)* (which relates to the exclusion of jurisdiction over persons less than eighteen years), Article 28 (which relates to the responsibility of commanders and other superiors), Article 29 (which excludes any statute of limitations), Article 33 (which relates to superior orders and prescription of law). These provisions mean there will be minimal need to amend the Kenyan criminal procedure Code or other laws to include the provisions. However, in Kenya the minimum age of criminal responsibility is eight years. The provisions will have to be reconciled.

3.3.1.3. Jurisdiction.

The Law varies the courts' criminal jurisdiction over the crimes falling within the preview of the ICC by introducing new jurisdictional grounds. It provides for the active personality jurisdiction in Section 8*(b)(i)* and, according to which the courts' jurisdiction extends to crimes committed outside of the country by Kenyan nationals. This jurisdiction also interestingly stretches to persons employed by the Kenyan government either as civilians or in the military. Since Section 8*(b)(i)* already lists Kenyan citizens, this can be taken to

---

[66] Explanatory note, International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

mean that citizens of other countries employed in a civilian or military capacity also fall under the jurisdiction of this act. The passive personality jurisdiction (victim is a Kenyan national Section (8) *(b)(iii*)), is extended to victims of an allied state in situations of armed conflict. The section also covers protective jurisdiction 8*(b)(ii)* and lastly a curtailed universality principle 8*(b)(c)* where the person after committing the offence is found in Kenya).

The High Court of Kenya is the designated court for trials authorised by this Section S8*(2).*No particular specialised court is designated but given the relative complexity in prosecution of genocide, crimes against humanity or war crimes, it is would be advisable to have such a specialised court on ad hoc basis.

3.3.1.4. Defences.

A person charged with the offence may rely on any justification, excuse, or defence available under the laws of Kenya or under international law.[67] The Rome Statute allows for defences from domestic laws.[68] In the event of any inconsistencies between the Rome Statute and domestic law, the provisions of the Rome statute take precedence.[69]

Part II also deals at length with offences relating to obstruction of justice. Offences related to administration of justice (bribery, obstruction of the course of justice, perjury, intimidation of witnesses, etc.) are covered in this part.

3.3.1.5. Death Penalty.

Section 6*(3)(a)* of the ICA states as follows:

---

[67] ICA Section 7*(2)(a)(b).*

[68] Rome Statute Art. 31 and 21.

[69] ICA Section 7*(2)(b)(i).*

(3) A person who commits an offence under subsection *(1)*

or *(2)* shall on conviction be liable—

(a) to be punished as for murder, if an intentional killing forms the basis of the offence.

The offences referred to in this section are genocide, crimes against humanity and war crimes. This punishment encompasses conspiracy or attempts to commit, or being an accessory after the fact, or counselling in relation to the three offences.[70] The punishment for murder under the Kenyan Penal Code is death.[71]

This is more severe than the punishment under the Rome Statute. Article 77 in Part 7 of the Rome Statute provides that the maximum penalty of the ICC is life imprisonment. Although State Parties not prohibited from applying their own prescribed penalties,[72] this could be challenged. Under a monist constitution, the interpretation of the conflict will adhere to what gives the best meaning to the parent treaty.

3.3.2. Cooperation.

3.3.2.1. General Provisions Relating To Requests For Assistance.

Part III of the ICA makes provisions for which Kenya is obliged to comply with requests for assistance from the ICC. Section 20*(2)(2)* has a qualification in that there is no limitation to the type of request from the ICC under the Rome statue and secondly, assistance may be granted otherwise than the procedure laid out in the act including informal methods of assistance. This could be a redeeming feature against the bureaucratic procedures laid out in the Act but it would be difficult for an individual or Government

[70] ICA Section 6*(2)(a).*

[71] Penal Code Cap 63 Section 204.

[72] Rome Statute Article 80.

agency to go against official policy. However, the section could be of assistance to NGO's where the Government has not been forthcoming in tandem with Art 87*(1) (b)* of the Rome Statute which talks of transmission of requests through "any appropriate regional organisation." Section 22(1)(b) is in tandem with Art 87(1)(b). It states that urgent requests be transmitted through the International Criminal Police Organisation or any other appropriate regional organisation, but this request must be followed by another formal request through authorized channels.

Section 21 sets out the channels authorised to receive requests, these being, the Minister, the Attorney-General or his designate and the diplomatic channel to the Minister responsible for foreign affairs. This opens a gap for mischief, as there are too many offices authorised to receive requests. It could lead to bureaucratic tangle and delays.

3.3.2.2. Arrest and surrender of persons to ICC.

Where a request for surrender is received other than a provisional request, the Minister may apply for an arrest warrant from a Judge. Nevertheless, the Minister may decline to notify a Judge of a request which in effect will be disregarding the warrant of arrest, or conversely and highly unlikely, in contemplation of extra-ordinary rendition.[73]Under Section 31*(1),* the Minister may at any time, by notice in writing, order the cancellation of the warrant. This is ultra-vires the powers of the Minister because by law, an arrest warrant remains valid, unless it is executed or cancelled by the Court, which originally issued it.[74]After arrest, the High Court determines if a person is eligible for surrender to the ICC.[75] Where the High Court finds the person eligible it may order for his detention

---

[73] ICA Section 29*(1).* Cf. Rome Statute, article 59 *(1).*

[74] Kenyan Criminal Procedure Code Section 102*(3).*

[75] ICA Section 4.

pending surrender to the ICC.[76] Once again, the Minister may refuse to surrender the person to the ICC.[77]

The minister has the mandate for requesting issue of an arrest warrant. Section 32 envisages situations that require a provisional arrest (urgent request to arrest a person pending receipt of an ICC request). Section 33 states that once the high court Judge issues such a warrant, the applicant should give notice to the Minister. This can be construed to mean any person can apply for a provisional arrest. The provisional warrant can be pre-emptive covering situations where there is anticipation that the person may come to Kenya. This is an important provision as it gives mandate to any Kenyan to apply for an arrest warrant should the Government be unwilling to follow through with its obligations. This section goes even further and allows for issuance of a warrant though no request for surrender has yet been made or received from the ICC.

The High court determines whether the person is eligible for surrender under the core crimes. Part IV also deals with voluntary surrender. The Minister may refuse a surrender under the non bis in idem rule, or where the ICC determines that the case is inadmissible, or the ICC advises that it does not intend to proceed with the request or where Kenya is under an existing obligation to extradite the person to another state, there are competing requests from the ICC and a State that is not a party to the Rome Statute.

The Procedure for Extradition in Kenya follows the Extradition Act (Extradition (Common Wealth Countries) Act 1966 and the Extradition (Contiguous and Foreign Countries) Act. Kenyan law does not have general powers of extradition. Extradition applies only where specific bilateral agreements have been made with a country. ICA Section 57(1) makes it

[76] ICA Section 42*(2).*

[77] ICA Section 43*(1).*

clear that the Extradition (Commonwealth Countries) Act and Extradition (Contiguous and Foreign Countries) Act are to be disregarded and the extradition process in the Rome Statute will suffice.

The Rome Statute states that once the Pre-trial chamber issues an arrest warrant it "shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly."[78] The ICA is saturated with Ministerial powers to interrogate the obligations of arrest and surrender.

3.3.2.3. Domestic Procedures for Other Types of Co-operation.

Part V deals with procedural measures that pertain to the request from the ICC such as search and seizure, taking of evidence and service of summons. It is an administrative part of the Act. Assistance in locating or identifying persons or things,[79]assistance in gathering evidence,[80]taking evidence[81],producing documents or other articles[82], all require the consent of the Attorney-General.

3.3.2.4. Enforcement of Penalties.

Part VI sets out procedures for assistance with enforcement of orders for victim reparation[83]. It also covers enforcement of fines from the ICC and request for forfeiture of property.[84] The procedure for such applications is set out. Any moneys so obtained are to be transferred to the ICC. Victim reparations is a new concept in Kenya.

---

[78] Rome Statute Article 59*(4).*

[79] ICA Section 77*(1).Cf.* Rome Statute, Articles 19 *(8),* 56, 64, 93*(1)(a).*

[80] ICA Section 77*(1).Cf.* Rome Statute, Articles 19*(8),* 56, 64, 93 *(1)(a).*

[81] ICA Section 78*(1).*

[82] ICA Section 79*(1).*

[83] ICA Section 119.

[84] ICA Section 121-129.

3.3.2.5. Persons in transit to ICC or serving sentences imposed by ICC.

The transferee may be transported through Kenya for the purpose of being surrendered or transferred to the ICC or to another State. A transferee is described as a person being surrendered or temporarily transferred to the ICC by another State, or is already sentenced in transit. It sets out the procedure to be followed in such circumstances.[85]

3.3.2.6. Protection of National Security or Third Party Information.

Part VIII is applicable when a State declines to disclose information due to national security concerns or objects to a third party disclosing such information. The Act once again defers to the Rome statue on any request or proceedings from the ICC, which raises issues relating to Kenya's national security interests, and provides that the procedure in such situations shall be that set out in Article 72 of the Rome Statute this partially by sections in Part VIII. The procedure is not limited to proceedings before the trial chamber but also during the investigative stage.

Article 72 of the Rome Statute, leans heavily towards cooperation in which ICC Judges and prosecutors work directly with states to try to achieve solutions such as redactions, Summaries, exparte and in camera proceedings, or obtaining the information from different state sources, before deciding whether disclosure of such material will serve the ends of justice. The procedure set out for refusal of disclosure by the Attorney-General is unclear and muddled. In the first instance, Section 152 states as follows:

> "If an issue relating to Kenya's national security interests arises at any stage of any proceedings before the ICC, the issue shall be dealt with in the manner provided in Article 72 of the Rome Statute and this Part."

---

[85] ICA Section 131-151.

Sections 153-158 then proceed to outline a detailed process to be followed in the even the disclosure requested touches on national security. The only discernible difference between the Rome statue process section and the ICA section is that Section 152 refers to an issue relating to national security while the domestic process refers to a request that "appears to concern the production of any documents or disclosure of evidence". The procedure set out in the sections is similar to that of Part9 of the Rome statute albeit with emphasis that the Attorney-General may refuse the request having followed the procedure set out.

> s153(1) "If, having followed the specified process the matter is not able to be resolved, the Attorney- General may refuse the request or decline to authorise the production of the documents or giving of the evidence, as the case may be"

To complicate matters more, S156 says the Attorney-General shall consult with the ICC and where no resolution is reached. the Attorney-General is obliged to comply with an ICC disclosure order.

The result is a muddled and unclear provisions relating to disclosure and National security. Once again, the Attorney-General is the official in charge and the only criteria needed that the matter refers to national security in his opinion. He need not consult anyone. The dangers in this tangle are that integrity of ICC process may be subverted by non-disclosure of evidence under the guise of national security.

3.3.2..7. Investigations or Sittings of ICC in Kenya

Provisions are made to allow the ICC Prosecutor to operate directly with Kenyan territory. The ICC may also conduct sittings in Kenya.[86]

[86] ICA Sections 161-167.

3.3.3.8. Requests to ICC for Assistance

The Attorney-General may make requests to the ICC for assistance in relation to documents or other types of evidence. The procedure is the same as for requests from ICC to Kenya.[87]

3.3.3. Elimination of Bars to Prosecution.

3.3.3.1. Statutes of Limitation.

Art 29 of the Rome statue, which excludes statutory limitation to international crimes, has been incorporated verbatim by Section 7*(1)(g).*There is no express statutory limitation for the crimes in Kenyan law. The inference of non-limitation of crimes is from Section 219 of the Criminal Procedure Code, which stipulates that prosecutions are not time barred. However, for murder cases, there is a limitation as to time of death. Under the Penal Code Section 215(1), "a person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death". This section needs to be amended.

3.3.3.2. Amnesties and Pardons.

The ICA is silent on amnesties and pardons. There are no provisions for amnesty under Kenyan law. The Constitution of Kenya provides for an advisory committee on the prerogative of mercy which advices the president on pardons.[88]It also provides for parliament to enact legislation setting tenure of the committee, the procedure, and criteria used for advice. Constitutionally, the President may:

a) grant a free or conditional pardon to a person convicted of an offence;

b) postpone the carrying out of a punishment, either for a specified or indefinite period;

---

[87] ICA Sections 168-170.

[88] Constitution of Kenya Article 133*(2).*

c) substitute a less severe form of punishment; or

d) Remit all or part of a punishment.[89]

A problem arises where pardons are granted for underlings or cronies for purely political reasons. According to Cryer if the proceedings are genuine, and a domestic court delivers a proportionate sentence, subsequent to which a pardon is given, the case would be inadmissible before the ICC under the principle of *ne bis in idem*.[90]This impunity gap needs addressing. To guard against this, the advisory committee must have guidelines for limitations of pardons in order to conform to the theory of universal justice.

In the past, the advisory committee's work has not been transparent. There needs to be a balance between justice and mercy. On one hand, offenders of grand corruption have been pardoned after serving a minimal sentence and on the other hand there are people sentenced to the death penalty who have been in prison for over 30 years.[91]Kenya does not have a parole system. Paroles serve the same purpose as pardons. The principle of proportionality in sentencing means, "a sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[92] To close the impunity gap, legislation for parole and pardons needs to be enacted to ensure that convicted persons serve the minimum sentence permitted before pardon and there are considerations for parole. The Rome Statute makes provision for an automatic review of sentences. The review must take place when two-thirds of the

[89] Constitution of Kenya Article 133*(1).*

[90] Cryer R., Friman H, Robinson D., Williamhurst E *An Introduction to International Criminal Law And Procedure.* 2ed (2010) 160.

[91] Kenya has a *de facto* death penalty. Although the death sentence is legal, there has been no executions since 1982.

[92]*Prosecutor v. Akayesu, Sentencing judgment, Case No. ICTR-96-4-S* Oct. 2, 1998.

sentence has been served, or twenty-five years of life imprisonment, and a decision not to reduce the sentence must be reviewed at regular intervals.[93]

3.3.3.3. Prosecutorial Discretion.

The Director of Public Prosecutions (DPP), is subject to neither directions nor oversight from anyone.[94] He is conferred with powers to institute any criminal proceedings as well as discontinue them at any stage of the proceedings.[95] Where the DPP discontinues a prosecution, the court must grant permission to do so. This oversight function of the court is not enough as the DPP may exercise his powers of prosecutorial discretion and decide not to institute proceedings in the first instance.[96]As a comparison, one could look at the situation in South Africa. If the National Director of Prosecutions is of the view that prosecutions should not be instituted under the Act, the Director-General for Justice and Constitutional Development must be informed of the reasons for that decision.[97]This calls for an accountability-securing modality to the DPP's discretional powers in instituting prosecutions.

3.3.3.4. Immunity.

The ICA did not include Art 27(1) of the Rome Statute, which defines official capacity. The Constitution states that there shall be no immunity for the President for international crimes under a treaty to which Kenya is a party.[98]This in effect removes personal immunity from the President, as the immunity is a right of the state and not of the

---

[93] Rome Statute Article 110.

[94] Constitution of Kenya Article 157*(10).*

[95]Constitution of Kenya Article 157*(6)(a)&(e).*

[96] Constitution of Kenya Article 157*(9).*

[97] South African Implementation of the Rome Statute of the International Criminal Court Act 27 2002 Section 5*(5).*

[98] Constitution of Kenya Article 144 *(4).*

individual. Thus, the President may be prosecuted while still in office. However, this is limited to treaty based international crimes of which the Rome Statute is one. By clearly setting out this issue, personal immunity for the President does not apply for international crimes as a matter of customary international law.

In relation to other Government officials, the ICA by omitting Article27(1) of the Rome Statute in grants immunity from domestic prosecution to a wide range of Kenyan officials. Article 27(1) of the Rome Statute removes functional and personal immunity from officials of States Parties in respect to any proceeding connected to the ICC, as the state has waived any rights such officials may have to such immunities.

This exclusion of members of Government, parliament, and other government officials was a reaction to the intended prosecutions for the 2007 post-election violence.[99] Under a monist regime, this exclusion is void and null by virtue of inconsistency with the Constitution, as it does not reflect the Rome Statute, which is now law in Kenya.[100]Furthermore, in the hierarchy of laws, the domesticating Act cannot be higher than the parent treaty.

Section 27 of Kenya's ICA[101] relates to immunity *ratione personae* and its relevance to requests for cooperation in arrest and surrender or assistance from the ICC (or extradition from third states) and not prosecutions in Kenya. Section 27 has a proviso that these

---

[99] See *No immunity for Presidential aspirants Uhuru, Ruto says Bensouda* Daily Nation 22 October 2012. Available at http://www.nation.co.ke/News/politics/-/1064/1539196/-/9wmkqs/-/index.html#comment-689375913 (Accessed 22 October 2012).

[100] Constitution of Kenya Article 2*(4)* and *(6).*

[101] *cf*Article 27*(2)* of the Rome Statute.

immunities are subject to Section 65 and 115.[102] Section 115 relates to conflicting treaty obligations.

> "If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney-General shall inform the ICC to enable it to direct its request to the other State or international organization".

In such circumstances, the Minister may postpone the request for assistance. As discussed above, any conflicting treaty obligation will ultimately be a political decision. The Attorney-General has appealed the issuance of a warrant of arrest by the Kenyan High Court and this ruling will serve as precedent in conflicting treaty obligations.

Section 27*(1)(b)* ICA, allows for the transfer of person to a third state irrespective of their immunity status. This is in contravention of the Constitution and customary international law norms in relation to personal immunity. This subsection has to be amended.

4. Conclusion.

The ICA encourages inclination towards the Rome Statue where there is conflict between the ICA and domestic legislation. In a case of interpretational conflict, the principle *in dubio pro reo*, whereby the more favourable construction to the interests of the accused may be argued. This principle is codified in the Constitution of Kenya by Article20*(3)(b)*[103] and the Rome Statute Article 22*(2).* Common law precedents provide that statutory provisions be interpreted as close as possible to the parent treaty to be

[102]*cf* Article 98 of the Rome Statute.

[103]This article states that Courts shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

consistent with a treaty obligation.[104] In the elements of crime in the ICA Section 7, there are differences between ICC definitions and Kenyan law definitions for example the offence of conspiracy and the applicable range of some defences. Section 7*(2)(a)*ICA, states that at first instance, Kenyan law should apply and should there be conflict, the Rome statue will apply. This may lead to a less strict or stiffer approach to international crimes if the Kenyan interpretation is followed. Kenyan courts should apply this principle not only to statutory interpretation, but also to constitutional interpretation, declaring void all sections of the ICA that are in conflict with the Rome Statue. Another solution is to amend the penal code and the criminal procedure code to give effect to the Rome Statute.

The International Crimes Act sets out to be a comprehensive Act but in the process ends up enormous, muddled, and unclear in some sections. The substantive part of the Act has a few obstacles but in general, the law is clear. There needs to be amendments to avoid conflicts with Kenyan law. Provisions that are clearly in conflict with the Rome Statute and under the new constitution will be void. With a new monist regime and an emboldened Judiciary, any legal conflicts with the Rome Statue should be addressed fairly.

The procedural part of the act will be impracticable in practice. The Act gives the Attorney-General enormous powers and his consent is required on many issues dealing with cooperation.

---

[104]*Maclaine Watson & Co Ltd v Department of Trade and Industry*, High Court Chancery Division, 80 ILR 39, 29 July 1987.

4.

4. PRACTICAL CHALLENGES.

4.1. Procedural Obstacles.

Before the passing of the new Constitution, the office of the director of public prosecutions was a department under the Attorney-General. The Attorney-General was in charge of all prosecutions in the country. The 2010 Kenyan Constitution created the Office of the Director of Public Prosecutions (ODPP) and granted powers of criminal prosecutions to the Director of Public Prosecutions (DPP). These powers comprise, directing the Inspector-General of National Police to investigate any information or allegation of criminal conduct,[105]instituting and undertaking any criminal prosecutions,[106] and discontinue criminal proceedings.[107]The present Attorney-General was not recruited by competitive selection process but was a compromise candidate between the President and the Prime Minister. The Attorney-General's duties are specifically set out in the constitution and it is clear that these duties do not encompass criminal proceedings.[108]However, under the ICA, the Attorney-General continues to hold powers, duties, and functions that are under the constitutional mandate of the DPP. Section 5 ICA states as follows:

> "For the purposes of any provision of the Rome Statute or the ICC Rules that confers or imposes a power, duty or function on a State, that power, duty or function may be exercised or carried out on behalf of the Government of Kenya by the Attorney-General, if this Act makes no other provision".

[105] Constitution of Kenya Article 157*(1)(4*).

[106] Constitution of Kenya Article 157*(6)(a).*

[107] Constitution of Kenya Article 157*(6)(c).*

[108] Constitution of Kenya Article 156*(4)(b)* has an exception that states ".. other than criminal proceedings"

The Transitional clauses of the Constitution on this matter read as follows:

> 7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> (2) If, with respect to any particular matter—
>
> (a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
>
> (b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

While this transitional clause states that, where there is a conflict between the powers, functions and duties of a state organ, the constitutional definition shall rule, this may not always be straightforward in legal matters that cut across both civil and criminal law. In the Bashir Case, the ICJ Kenya objected to the Attorney-General representing the state in an appeal, which seeks orders to overrule a warrant of arrest issued against Sudanese President Omar Hassan al Bashir.[109] The court held that the matter was neither criminal nor civil and the Attorney-General could represent the state. This ruling was erroneous as an arrest warrant stems from a matter of criminal law.

Chapter 3 highlights the Attorney-General's numerous powers and duties under the ICA. On 12 July 2012, parliament enacted The Statute Law (Miscellaneous Amendments) Act,

---

[109]Sam Kiplagat, *AG can represent state in Bashir warrant case – court* The Star 18 February 2012 Available at http://www.the-star.co.ke/news/article-29613/ag-can-represent-state-bashir-warrant-case-court. (Accessed 24September 2012)

2012.The AG presented this Act to parliament. It amended laws with a criminal component by replacing the AG with the DPP in criminal laws. The ICA was not included in these amendments. This is a deliberate oversight aimed at keeping the ICA under the purview of the Attorney-General. To have the Attorney-General in charge of the Rome Statute will mean cumbersome delays in cooperation. Only the DPP can direct the police to investigate, arrest, or seize any matter. Should theAttorney-General direct the Police, they may refuse to act on an orchestrated pretext that the Attorney-General is acting ultra-vires his constitutional powers. The Attorney-General will have to request the DPP who will in turn direct the police. This obfuscating of roles will create deliberate delays and confusion. To have the Attorney-General as the officer in charge of the Rome Statute will severely limit cooperation with ICC and the potential of domestic courts to conduct proceedings under the Rome statute and this means Kenya will be labelled unwilling or unable. The office of the director of public prosecutions should carry the mandate on all matters relating to the ICC to avoid confusion.

4.2. Lack of Political will.

As seen in Chapter 2, the principle of separation of powers has always been difficult to distinguish in Kenya. The executive has also not been very forthright in its obligation to cooperate with the ICC and this reluctance stems from the charges against four Kenyan suspects. The ICA is placed under the custody of the Minister, and the Ministry is not specified. He is given wide administrative powers over the operation of the Act and this includes cooperation with the ICC.

The Attorney-General is a member of the cabinet and does not favour the trials of the four accused at the ICC.[110] The government of Kenya and parliament have attempted to stop the ICC process. The government made appeals to United Nations Security Council seeking a deferral of the case and the ICC regarding the admissibility of the case.[111]On 22 December 2010,Parliament voted in favour of removing Kenya as a state party to the Rome Statute. The President of Kenya has yet to assent to this Bill. The clamour for withdrawal from the ICC died down after it was made clear that even if Kenya withdrew from the Rome Statute treaty, the charges against the six suspects will still stand. Article 127 of the Rome Statute stipulates that a country must give a year notification to withdraw from the ICC and that a withdrawal would not affect the proceedings of already reported cases. Kenya has not portrayed any political will to try the most senior perpetrators of post-election violence, and there is no comprehensive government policy for dealing with crimes committed during the post-election violence.

The government challenged admissibility in 2011under Article 19*(2)* of the Rome Statute,(investigations and prosecutions in Kenya)which was turned down by Pre-Trial Chamber II, and then by the Appeals Chamber, on the grounds that the conditions that led to the chamber authorising the prosecutor to use his *proprio motu* powers to initiate

---

[110] See Olick F.*AG hints at bid to postpone ICC cases* The Standard 8 October 2012. Available at http://www.standardmedia.co.ke/?articleID=2000067887&story_title=ag-hints-at-bid-to-postpone-icc-cases (Accessed 10 October 2012).Remarks at International Criminal Court (ICC) 10th anniversary in Nuremberg, Germany.

[111]*Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute* Available at http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf. (Accessed 19th August 2012). See also Leftie P, Kumba S. and Kelley K. *Kenya petitions UN organ to delay trials* Daily Nation Newspaper10 February 2011. Available at http://www.nation.co.ke/News/politics/Kenya+petitions+UN+organ+to+delay+trials+/-/1064/1105328/-/12yufy5/-/index.html (accessed 19 August 2012).

investigations in Kenya had not changed.[112]The government has simultaneously argued that the ICC cases be prosecuted in national courts, in a retrospectively created jurisdiction of East African Court of Justice[113] and in the African Court of Justice and Human Rights. There were assertions in parliament that a leaked dossier disclosed that the United Kingdom was pushing for ICC investigations on the President of Kenya, which created unease in public.[114]

In the aftermath of the confirmation of charges against four Kenyans in late January 2012, (two of whom are presidential candidates), the government's strategies to stop the hearings at The Hague may seem desperate and ineffectual. However, the main aim is convince the Kenyan public that the ICC is a court lacks neutrality, a colonial concept aimed at exerting power and influence over African countries. By doing so, a future decision of non-cooperation will be legitimised and palatable to the public. Ultimately, the Government of Kenya has no intention of arresting and transferring the suspects to The Hague.

[112] Situation In The Republic Of Kenya In The Case Of The Prosecutor V. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19*(2)(b)* of the Statute ICC-01/09-01/11 30 May 2011. Available at http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf (Accessed on 22 March 2012).

[113]See *East Africa: Regional Parliament seeks transfer of Kenya cases from ICC* Tanzania Daily News 29 April 2012 Available at http://allafrica.com/stories/201204300314.html (accessed 22 June 2012), Menya M. *Kenya: Fresh Shuttle Diplomacy On ICC Cases.* The Star 30 April 2012. Available at http://allafrica.com/stories/201205020070.html (Accessed 20 June 2012).

[114] Kimutai V., Ndegwa A. *Is Kibaki under a secret ICC probe?* The Standard March 9 2012. Available at http://www.standardmedia.co.ke/?articleID=2000053700&pageNo=3&story_title= (Accessed 20 July 2012).

4.3. Training.

Following the confirmation of charges of four Kenyan politicians by the ICC there is awareness of the Rome Statute and the existence of the ICC.[115] However, there is insufficient understanding of international crimes by politicians, policy makers, Judiciary, and the prosecution service. The main perception is that these crimes can be prosecuted as ordinary crimes. For example, the lack of familiarity of the contextual elements of crimes against humanity may have led to a proposal to prefer such charges when the organisational policy element has not been met.[116]

Kenya needs to begin an intensive training program for judges, prosecutors, defence lawyers, police and military, justice and foreign affairs officials on their obligations under the Statute and international criminal law in general.

4.5. Conclusion.

The ICA has procedural flaws that are deliberate. Crucial amendments to pass the operation of the ICA to the right office have been conveniently ignored. The executive has created a well thought out fortification against future cooperation with the ICC. The Judiciary has been forthright in the applying the constitution rights. As mentioned above, the executive has taken to ignoring rulings of the Judiciary. Therefore, the Judiciary will

---

[115]Pre-trial Chamber II Situation In The Republic Of Kenya In The Case Of The Prosecutor V. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Confirmation of Charges Pursuant to Article 61*(7)(a)and (b)* of the Rome Statute ICC-01/09-01/11 23 January 2012. Available at http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf (Accessed 19 March 2012) and Pre-Trial Chamber Ii Situation In The Republic Of Kenya In The Case Of The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein AliICC-01/09-02/11 23 January 2012 Available at http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf (Accessed 19 March 2012).

[116]*Tana plotters to face crimes against humanity – DPP*. Capital News September 14, 2012 Available at http://www.capitalfm.co.ke/news/2012/09/tana-plotters-to-face-crimes-against-humanity-dpp/ (Accessed 18September 2012).

not hesitate to rule that the principles of the Rome Statute have been violated where due process is not followed or where it is found that the ICA is in conflict with the Rome Statue. Kenyan courts have recently issued rulings that curb the excesses of the executive. A recent ruling delivered on 29th June 2012 illustrates this point. In a nullifying the appointment of country commissioners, High court Judge Mumbi Ngugi said the president had erred in the appointment of the commissioners as he had over looked several articles in the constitution. To date, the executive has ignored this ruling and the commissioners are still in office.[117]

To the extent that domestic courts enforce the norms embodied in those treaties, governments are likely to comply with those norms. Judicial enforcement by domestic courts is not the only factor that influences governmental compliance, but it is a significant factor.

What is required, is pressure from civil society, the United Nations, and other members of the Rome treaty to bear on the Kenyan government to comply with judicial pronouncements and treaty obligation. Kenya is the first country that has charges confirmed at the ICC against suspects who are still in power. Africa is watching and should the ICC fail, a message will be sent out that impunity is possible if you in the political ruling class and that the ICC is toothless bulldog.

[117] *Centre for Rights Education & Awareness & 8 others v Attorney General & another* [2012] eKLR

5. GENERAL, OBSERVATIONS, CONCLUSIONS, AND RECOMMENDATIONS.

ICC prosecutor Fatou Bensouda held a series of meetings with government officials, during which she voiced disquiet at the obstructions her investigators were being subjected to in her team's efforts to access to wealth records of the four suspects, and medical and police records of the victim of the 2007 post-election clashes. This is an early indication that the Government of Kenya does not intend to cooperate with the ICC on the cases before the ICC.[118]

5.1. Enforcement of Court Orders.

The ICA is the elaboration of an international criminal code and it needs a supporting structure for its enforcement and implementation. Under monism, the Judiciary has become bolder, standing up to the executive and legislature. The Constitution is clear that the Rome Statute is now law in Kenya and under Article2*(4)* any act or omission in contravention of the Constitution is invalid. Even if civil society moves the Judiciary to rule that Kenya is bound to cooperate, enforcement of judicial pronouncements will be difficult. Legal authorities and jurisprudence are not considered sources of law in Kenya, but they were regarded as being of persuasive value in both the application and development of criminal legislation.[119]The Prior to the passing of the new Kenyan Constitution, the Commission of Inquiry into the Post Election Violence in Kenya

[118] Namunane B. *ICC detectives denied access to crucial evidence, says Bensouda* Daily Nation October 24,2012. Available at http://www.nation.co.ke/News/politics/ICC+detectives+denied+access+to+evidence/-/1064/1593672/-/fbf80h/-/index.html. (Accessed 24 October 2012).

[119]Judicature Act of Kenya Section 3.

submitted an indicting report in 2008 regarding police conduct, as did a subsequent report by the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions. Both reports offered recommendations for the overhaul of the existing policing system.[120] In pursuit of these recommendations, the government set up the National Task Force on Police Reforms in May 2009 headed by Judge (Rtd) Philip Ransley, to recommend proposals for police reforms in the country. Afterwards, the Police Reform Implementation Committee (PRIC) was set up by the President to fast track and coordinates the implementation of the 200 recommendations of the Ransley Task Force in line with the new Constitution. The PRIC has since prepared five Bills that provide a framework for the implementation of the reforms and if properly enacted as stipulated in the Bills, the reforms should effectively transform the previous policing system. Police reforms that were recommended by Kofi Anan have stalled and will remain so until after the elections in 2013.

5.2. Accountability.

Accountability here refers to two meaning of the term; culpability for wrong doing and obligation to report, explain and be answerable for resulting consequences of one's actions.

In the former scenario, there has been no progress toward bringing election violence suspects to book in Kenya. A few election violence cases have proceeded through the

[120]Commission of inquiry into the post-election violence final report. Available at http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf(Accessed 20th September 2012). Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Mr. Philip Alston: Addendum - Mission to Kenya (A/HRC/11/2/Add.6). Available at http://reliefweb.int/sites/reliefweb.int/files/resources/15D4D9C184ADDBAA492575C90024524F-Full_Report.pdf. (Accessed 20th September 2012).

justice system, with one murder conviction in 2011, but cases that resulted in convictions did not target planners of the violence. A report prepared by the Department of Public Prosecutions in March 2011(as it was then) claimed that 94 post-election cases had resulted in convictions. However, contradicting research by Human Rights Watch found that the convictions for serious crimes were a small number and were not actually related to the election violence.[121]No police officers have been charged nor implicated. The expectation under the ICA, flow from Kenya's obligations under the complementarity principle.

In the second scenario, the Director of public prosecutions is a powerful office in Kenya. By granting this office autonomy, the Constitution did not provide for any means of accountability for decisions made in the process of prosecutorial discretion.

5.3. Conclusions.

The Rome Statue under monism is part of the laws of Kenya but this does not portend well for its operation. The substantive law in the domesticating act is mostly functional apart from the instances pointed out in this paper. The procedural part cannot operate as it is especially when it calls for Kenya's obligation for cooperation. The Government will do the little it can to cooperate with the ICC so as not to be labelled a pariah state like Sudan. Consequently, the Prosecutor will not get any cooperation from the government of Kenya. It is very likely that the Chamber will determine that Kenya has not complied with its duty to cooperate, and refer the matter to the Assembly of States Parties or the Security Council. Codification, legal implementation, and application of the Rome Statute are criteria of determining a States Parties' sincerity in its objective to end impunity and in this regard, Kenya is failing the test.

[121] Human Rights Watch *"Turning Pebbles" Evading Accountability for Post-Election Violence in Kenya* December 9, 2011.

15903 Words

REFERENCES

I. PRIMARY SOURCES

A. Treaties and Other International Instruments.

Bangalore Principles of 1989 reprinted in Commonwealth Secretariat, Developing. Human Rights Jurisprudence Volume 3, 15.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949 and entered into force on 21 October 1950.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, adopted on 8 June 1977 and entered into force on 7 December 1978.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949 and entered into force on 21 October 1950.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, adopted on 8 June 1977 and entered into force on 7 December 1978.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict, adopted on 8 June 1977 and entered into force on 7 December 1978. 26I.L.M. 568.

Rome Statute of the Establishment of the International Criminal Court, A/CONF.183/9 adopted on 17 July 1998 and entered into force on 1 July 2002. 37 I.L.M. 1002.

UN Security Council, Resolution 1333 (2000) / adopted by the Security Council at its 4251st meeting, on 19 December 2000 , 19 December 2000, S/RES/1333(2000).

B. Statutes

Kenya

Constitution of Kenya 2010.

Criminal Procedure Code Cap 75 Laws of Kenya.

Extradition (Commonwealth Countries) Act Cap 77 Laws of Kenya

Extradition (Contiguous and Foreign Countries) Act Cap 76 Laws of Kenya..

International Crimes Act 2009.

Judicature Act of Kenya Cap 3 Laws of Kenya.

The Treaties Bill 2010.

Penal Code of Kenya Cap 63 Laws of Kenya.

South Africa

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

18 July 2002.

C. Cases

International Cases.

European Court of Justice.

Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation Vs. Council of the European Union and Commission of the European Communities.*

International Criminal Court.

Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute. ICC-01/09-01/11-19 31 March 2011.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11 31 March 2011.

Situation In The Republic Of Kenya In The Case Of The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali ICC-01/09-02/11 23 January 2012.

Situation In The Republic Of Kenya In The Case Of The Prosecutor V. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-01/11.

Situation In The Republic Of Kenya In The Case Of The Prosecutor V. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-01/11 30 May 2011.

Situation in Darfur, Sudan. In the case of the Prosecutor v. Omar Hassan Ahmad al Bashir ("Omar al Bashir'') ICC-02/05-01/09 .

Request to all States Parties to the Rome Statute for Arrest and Surrender of Omar Al Bashir ICC-02/05-01/09-7 and ICC-02/05-01/09-96.

International Criminal Tribunal for Rwanda.

Jean-Bosco Barayagwiza v. The Prosecutor, Decision, Case No. ICTR-97-19-AR72, ICTR A. Ch., 31 March 2000.

Prosecutor v. Barayagwiza (Case No. ICTR-97-19) 3 November1999.

National Cases

United States of America

Baker v. Carr 369 U.S. 186 (1962).

Germany

Solange I BVerfGE 37, 271 2 BvL 52/71 -Beschluß and Solange II (Re Wuensche Handelsgesellschaft, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225,265).

Kenya

Albanus Mwasia Mutua Vs. Republic of Kenya Criminal Appeal no.120 of 2004.

Centre for Rights Education & Awareness & 8 others v Attorney General & another [2012] eKLR.

Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR.

Koigi wa Wamere Vs. Attorney-General HCC 737 of 2009 Unreported (6 April 2012).

Kenya Section of The International Commission of Jurists v Attorney General & another [2011] eKLR.

Rono v. Rono & another (2008) KLR..

Republic vs. Minister for Home Affairs and two others Ex-parte Leonard Sitamze (2008).

Re The Matter of Zipporah Wangui Mathara (2010) eKLR.

R.M. v Attorney General and four others (2010) eKLR.

Namibia

Government of the Republic of Namibia & Others v Mwilima & Others, Supreme Court Decision, SA 29/01; ILDC 162 (NA 2002), [2002] NASC 8. 7 June 2002.

D. Reports

Human Rights Watch. 'Africa Watch Kenya: Taking Liberties' New York 1991.

Transparency International Kenya Publications .' Secure From Public Scrutiny? A Critical Analysis of Security of Tenure in Kenya' May2009.

The Kenyan Section of the International Commission of Jurists. Kenya: 'Judicial Independence, Corruption And Reform' April 2003.

Human Rights Watch '"Turning Pebbles" Evading Accountability for Post-Election Violence in Kenya'. December 9, 2011.

Government of Kenya 'Commission of inquiry into the post-election violence.15)October 2008.

United Nations Human Rights Council. 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston : addendum : mission to Kenya' 26 May 2009.

II. SECONDARY SOURCES

A. Books and Chapters in Books

Atkin J., *Modern Introduction to International Law*, Harper Collins, London, 1991

Brownlie I. *Principles of Public International Law*. (1990) Oxford Clarendon Press

Brunnée J, Toope S. *Legitimacy and Legality in International Law: An Interactional Account*2010, Cambridge. Cambridge University Press .

Dugard J. *International Law: A South African Perspective* (2006) Cape Town Juta.

Gerhard Werle *Principles of International Criminal Law* (2009) TMC Asser Press, The Hague.

Cryer R. Friman H. Robinson D. Wilmshurst E. *Introduction toInternational Criminal Law and Procedure*. (2010) Cambridge University Press Cambridge .

Shaw M., International Law (2008) Cambridge University Press New York.

Chapters

Ford, J., 2008, *'Country Study III: Kenya'*, in du Plessis M. & Ford J., 'Unable or unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries', The Institute for Security Studies, Pretoria.

Hilpold P., *The EU Law, and UN Law in conflict*. In Max Planck Yearbook of United Nations Law Eds.Armin von Bogdandy &Rüdiger Wolfrum Volume 13 (2009) Konninklijke Brill Netherlands.

B. Journal Articles

du Plessis M., Gevers C., 'Balancing competing obligations: The Rome Statute and AU decisions The Institute for Security Studies'2011 Pretoria.

Gillett M. 'The Call Of Justice: Obligations Under The Genocide Convention To Cooperate With The International Criminal Court' Criminal Law Forum (2012) 23:63–96.

Guzman A., A Compliance-Based Theory of International Law, (2002) 90 California Law Review 1823

Hannan L., 'Bias and Judicial Outrage. New Law Journal' (1991) 141.

Higgins H. ‘The Relationship between International and Regional Human Rights Norms and Domestic Law (focus on the United Kingdom)’ 18(4) Commonwealth Law Bulletin, 1253-1403 (1992)1268.

Kirby M. ‘The Australian Use of International Human Rights Norms: From Bangalore to Balliol A View from the Antipodes’ (1993) 16 University of New South Wales Law Review 363-393

Mwagiru M. ‘From Dualism to Monism: The Structure of Revolution in Kenya’s Constitutional Treaty Practice’ (2011) Journal of Language, Technology & Entrepreneurship in Africa Vol. 3

Sadat Wexler L., ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ (1994) 32 Columbia Journal of International Law 289.

Constitutional Law According to Mr. Justice Dugdale Nairobi Law Monthly, 34 (19910: 15-16).

Widner, J.. ‘Two Leadership styles and Patterns of Political Liberalization’. African Studies Review, 37(1) (April) 2007

C. Internet Sources

News Reports

BBC News Sudan's Omar al-Bashir not welcome for Malawi's Banda 4 May 2012. Available at http://www.bbc.co.uk/news/world-africa-17963368 (Accessed 26 June 2012).

BBC News Sudan's Omar al-Bashir not welcome for Malawi's Banda 4 May 2012. Available at http://www.bbc.co.uk/news/world-africa-17963368(Accessed 26 June 2012).

'Kenya MPs vote to leave ICC over poll violence claims' BBC News Africa 23 December 2010 available at http://www.bbc.co.uk/news/world-africa-12066667 (Accessed on 20 May 2012).

Kwamboka E. 'The Race To Please Bashir' 8 December 2011. The Standard, http://www.standardmedia.co.ke/?articleID=2000047976&pageNo=2

Leftie P, Kumba S., Kevin Kelley K. Kenya petitions UN organ to delay trials Daily Nation Newspaper 10 February 2011. Available at http://www.nation.co.ke/News/politics/Kenya+petitions+UN+organ+to+delay+trials+/-/1064/1105328/-/12yufy5/-/index.html (accessed 19 August 2012

Olick F AG hints at bid to postpone ICC cases The Standard 8 October 2012. Available at http://www.standardmedia.co.ke/?articleID=2000067887&story_title=ag-hints-at-bid-to-postpone-icc-cases (Accessed 10 October 2012)

Kiplagat S., AG can represent state in Bashir warrant case – court The Star 18 February 2012 Available at http://www.the-star.co.ke/news/article-29613/ag-can-represent-state-bashir-warrant-case-court(Accessed 24 September 2012)

No immunity for Presidential aspirants Uhuru, Ruto says Bensouda Daily Nation 22 October 2012. Available at http://www.nation.co.ke/News/politics/-/1064/1539196/-/9wmkqs/-/index.html#comment-689375913(Accessed 22 October 2012).

Namunane B. ICC detectives denied access to crucial evidence, says Bensouda Daily Nation October 24, 2012. Available at http://www.nation.co.ke/News/politics/ICC+detectives+denied+access+to+evidence/-/1064/1593672/-/fbf80h/-/index.html. (Accessed 24 October 2012).

Tana plotters to face crimes against humanity – DPP. Capital News September 14, 2012 Available at http://www.capitalfm.co.ke/news/2012/09/tana-plotters-to-face-crimes-against-humanity-dpp/ (Accessed 18 September 2012).

Menya M. Kenya: Fresh Shuttle Diplomacy On ICC Cases The Star 30 April 2012. Available at http://allafrica.com/stories/201205020070.html (Accessed 20 June 2012).

Kimutai V., Ndegwa A. Is Kibaki under a secret ICC probe? The Standard March 9 2012. Available at http://www.standardmedia.co.ke/?articleID=2000053700&pageNo=3&story_title= (Accessed 20 July 2012).

Weblogs

PhD studies in human rights weblog Schabas W. African Union Amendment to Article 16 of Rome Statute analysed. 31 October 2010 Available at http://humanrightsdoctorate.blogspot.com/2010/10/african-union-amendment-to-article-16.html (Accessed 18 July 2012).