DEFICIENCIES IN ADMINISTRATION OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA AND THE ROLE OF INTERNATIONAL CRIMINAL COURT: CASE STUDIES OF KENYA AND SUDAN

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN INTERNATIONAL CRIMINAL JUSTICE (LL.M -ICJ)

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CERTIFICATION

The undersigned certifies that they have read and hereby recommends for acceptance by the Open University of Tanzania a dissertation entitled **"Deficiencies in administrations of international criminal justice in Africa and the role of International Criminal Court: Case studies of Kenya and Sudan"** in fulfilment of the requirements for the degree of Master of Laws in International Criminal Justice (LL.M -ICJ) of the Open University of Tanzania.

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DECLARATION

I, **Sospeter Samwel Tyeah,** declare that, the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirement for the Degree of Master of Laws in International Criminal Justice (LL.M -ICJ).

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Signature

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Date

DEDICATION

With great honour, I dedicate this research work to my lovely family, my wife Grace Mugabe, my wonderful children Collin Sospeter, Carrin Sospeter, Calvin Sospeter and Camilla Sospeter.

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ABSTRACT

This study has made a discussion centered on the deficiencies in administration of international criminal justice in Africa and the role of the ICC, taking Kenya and Sudan as case studies. The study was formed with four objectives which reflects the problem identified in the statement of the problem which summarily is the deficiencies in the African legal framework and in the state responsibility for administration of international crimes, with case studies of Kenya and Sudan, as well as the challenges hindering the complementarity role of the ICC in its interventions to prosecute international crimes in Africa. The study has employed doctrinal legal research methodology along with documentary review or the library-based data collection methods and have been qualitatively analysed, involving a critical analysis of the primary sources such as the national legislations aiming to describe how they cover the administration of international criminal justice in Africa. The findings of this study reveal that the African legal framework, particularly of Kenya and Sudan, are insufficiently effective in administration of international criminal justice, also there are no effective measures in the context of state responsibility to prevent, investigate, prosecute and punish international crimes in their jurisdictions. On the other side, the ICC has been unsuccessful in advancing international criminal justice in Africa, particularly in Kenya and Sudan because its role has not adequately effective and fully promising in ending impunity or dealing with international crimes in Africa. The study finally recommends for improvements on the domestic legal and institutional frameworks, African political will and reforms to the ICC.

Keywords: *International Criminal Justice, the International Criminal Court, International Crimes, State Responsibility, the Principal of Complementarity.*

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LIST OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
AFRC	Armed Forces Revolutionary Council
AU	African Union
CDF	Civil Defence Forces
CID	Criminal Investigation Department
CIPEV	Commission of Inquiry into Post-Election Violence
DPP	Director of Public Prosecution
DRC	Democratic Republic of the Congo
ECCC	The Extraordinary Chambers in the Courts of Cambodia
FFC	Forces of Freedom and Change
ICC	International Criminal Court
ICJ	International Criminal Justice
INC	Interim National Constitution of the Republic of Sudan
IOCD	International Organised Crimes Division of the High Court
JEM	Justice and Equality Movement
JIC	Judicial Investigations Committee
KPTJ	Kenyans for Peace with Truth & Justice
LLD	Degree Doctor Legum
NCI	National Commission of Inquiry
NGOs	Non-Governmental Organizations
OTP	The Office of the Prosecutor

PP	Pages
PTC	Pre-Trial Chamber I of the International Criminal Court
RSF	Rapid Support Forces
RUF	Revolutionary United Front
SAF	Sudanese Armed Forces
SCSL	The Special Court of Sierra Leone
SLM/A	Sudan Liberation Movement/Army
SPSC	The Special Panels for Serious Crimes
TMC	Transitional Military Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
WPA	Witness Protection Agency

LIST OF LEGISLATIONS

National laws

Constitutional Charter for the Transitional Period, 2019 of Sudan

Interim National Constitution of the Republic of Sudan, 2005 (INC)

International Crimes Act, No. 16 of 2008 (R.E 2012) of Kenya

The Constitution of Kenya, 2010

The Criminal Act of Sudan, 1991 Act No. 3 of 1991

The Judicature Act (CAP 8 R.E 2012) of Kenya

The Penal Code of Kenya (CAP 63 R.E 2012)

International laws

Protocol on amendments to the protocol on the Statute of the African Court of Justice and Human Rights.

Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998

Universal Declaration of Human Rights, 1948 (General Assembly resolution 217 A)

CHAPTER ONE

INTRODUCTION

1.1 Overview

In the middle and late of the 20th century, many African countries gained their independence from their colonial masters. After independence, these African nations adopted criminal codes that reflected both their colonial past and their aspirations for a more just and fair society[1]. Many of the challenges that have existed in the Western industrialized nations also were present in these African nations, including the absence of clarity in the criminal legal framework, revolutions in criminology, the fluctuating nature of violence and criminality, limited resources for nations` police force that restrict effective enforcement, and the limited judicial system as well. Hence regular changes in the criminal justice system became inevitable[2].

1.2 Background to the Problem

In the present day, the criminal justice system in the globe has witnessed gradual changes including the emergence of the so-called international crimes and the manner of administration of the same. International crimes are those crimes that shock the consciousness of the world. They are regarded as the most serious crimes of concern to the international community as a whole, which threaten the peace, security and well-being of the world and which deeply shock the conscience of humanity[3]. The exact definition of an international crime remains debated, they vary

[1]Obura, K, "*Duty to prosecute international crimes under international law*" in Chacha, M *et al,* Prosecuting International Crimes in Africa, Pretoria University Law Press, 2011, pp 11-31, at p. 11
[2]Ibid
[3]Preamble of the UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998

from author to author and are often so broad that they do not tell us which crimes are included and those which are not included, but it is normally understood as an act that violates fundamental interests of the international community and entails individual criminal responsibility[4].

The International Criminal Court (ICC) is the main and primary global institution responsible for administering international criminal justice worldwide, Africa inclusive. The ICC was created in 2002 by the Rome Statute and is tasked with looking into and prosecuting those who commit international crimes such as genocide, war crimes, crimes against humanity, and aggression, as specified in Article 5 of the Rome Statute.[5]. The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute)[6] herein after the Statute, is the treaty that forms the basic foundation of International Criminal Justice (ICJ) system under international criminal law. The Statute established the ICC after its adoption on 17th July 1998 that resulted entering into force of the treaty on 1 July 2002, as of the present day (2024), 123 states are party to the statute[7]. Having its office located at the Hague, the Netherlands, the ICC is made up of four distinct organs that have different functions,

[4]Asser Nexus, conflict and crime - International crimes available at; https://www.asser.nl/nexus/international-criminal-law/international-crimes-introduction/ [accessed on 11 November 2023]

[5]Article 5 of the Rome Statute provides for the Crimes within the jurisdiction of the Court, that: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

[6]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998

[7]The Rome Statute, Wikipedia. , available at https://en.wikipedia.org/wiki/Rome_Statute#:~:text=The%20Rome%20Statute%20of%20the,are%20party%20to%20the%20statute. [accessed on 11 November 2023]

these are; the Presidency, the Chambers or Judiciary, the Office of the Prosecutor (OTP) and the Registry. African states have also a remarkable contribution in the adoption of the statute and the establishment of the ICC. Currently, out of the 54 African countries, 33 are member states to the statute.

The ICC through the statute forms a significant organ in the international criminal justice system to establish individual criminal responsibility for international crimes and it was more specifically established to help put an end to impunity with a purpose of achieving peace and security by prosecuting individuals who are accused of committing international crimes in one way or the other might not be in position to be prosecuted by their national courts for the international crimes.

However, the ICC primarily is not vested with jurisdiction to investigate and prosecute an international crime which is being investigated or prosecuted in the local authorities of a state party.[8] The wording of the statute[9] states that the ICC works as an alternative to the national or local courts of a member state to the statute in prosecuting perpetrators of the international crimes. This is known as the complementarity principle of the ICC where by the ICC acts as a court that complements the local courts by being a court of last resort that does not replace the national courts. The statute specifically provides that the jurisdiction of the ICC is only when national courts are unwilling or unable to prosecute individuals alleged to

[8]Mitchel P. R. An eye for an eye; A global history of crime and punishment. Reaktion Books Ltd, 2014, p 24

[9]Rome Statute, (n 3) Paragraph 10 of the preamble and Article 17 (1) (a)

have committed international crimes[10]. This goes in hand with a situation where the local legal system of a state is not designated to address international crimes.

The ICC is therefore expected to act in what is described as a 'complementary' relationship with domestic states that are party to the Statute.[11] Meanwhile, the ICC may have jurisdiction over international crimes committed on or after July 1, 2002, whether they were carried out by a state party national, on state party territory, or in a state that has consented to the court`s jurisdiction; or whether the crimes were forwarded to the ICC prosecutor by the United Nations Security Council (UNSC) in accordance with a resolution passed under chapter VII of the United Nations (UN) Charter.[12]

At the African regional context, administration of criminal justice is a critical concern in the African continent for it being a vital element in maintaining global peace, security, and human rights. In Africa, the administration of international criminal justice has taken on significant importance due to the continent's history of conflicts, human rights violations, and political instability[13]. While the ICC plays a prominent role, Africa has also made paces in advancing its mechanisms for administration of criminal justice. This includes establishment of the African Court on Human and Peoples' Rights (AfCHPR) in 2004, which serves as a regional body to ensure the protection of human rights across the continent. Though primarily

[10] ibid

11 Max du Plessis, "Complementarity and Africa: The promises and problems of international criminal justice", Institute for security studies, 1st December 2008, available at https://issafrica.org/complementarity-and-africa-the-promises-and-problems-of-international-criminal-justice-max-du-plessis (accessed on 13 November 2023)

12 International Criminal Court, How the Court works: The crimes, available at https://www.icc-cpi.int/about/how-the-court-works#:~:text=may%20be%20released.-,Jurisdiction,jurisdiction%20of%20the%20Court%3B%20or (accessed on 13 November 2023)

13 ibid

focused on civil and political rights, the AfCHPR can potentially address international crimes if they interconnect with human rights violations[14].

On the other move, the Extraordinary African Chambers, a tribunal established in 2013 under an agreement between the African Union (AU) and Senegal, exemplify Africa's efforts to administer justice for international crimes domestically for crimes committed in Chad from June 1982 to December 1990. The tribunal`s prosecution of Chad's former dictator Hissène Habré for crimes against humanity, war crimes, and torture witnessed a landmark effort in administration of international criminal justice in Africa without relying solely on international institutions[15].

At the domestic level, numerous African countries have witnessed struggles in making successful initiatives in the administration of international criminal justice hence this research, with specific citation of Kenya and Sudan as case studies.

1.3 Statement of the Research Problem

The administration of international criminal justice in Africa is a complex and evolving exertion. While the ICC has played a crucial role, African regional initiatives and domestic efforts are increasingly significant, however, intimated with challenges including political resistance and interference, inefficiencies, corruption, resource constraints, and the faint balance between justice and peace.[16].

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[14]The African Court of Human and People`s Rights, available at https://www.african-court.org/wpafc/basic-information/ (Accessed on 27 May 2024)

[15]Human Rights Watch, Statute of the Extraordinary African Chambers, 2 September 2013, available at; https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers (Accessed on 27 May 2024)

16International Justice Resource Center, international criminal law, available at https://ijrcenter.org/international-criminal-law/ (accessed on 19 May 2024)

The ICC was meant to be a deterrent machinery to prevent potential and the worst international crimes.[17] However, the efforts by the ICC to end impunity in Africa has been hindered by obstacles, majorly on blame that the same is a Western tool to target and weaken Africans. This trend has led to denial of the Court to exercise jurisdiction regardless of the weak domestic criminal justice system to prosecute the perpetrators of international crimes within the continent.[18]

Taking the case studies of Kenya and Sudan, the administration of international criminal justice in these countries highlights the complexities and challenges of achieving accountability for serious crimes in Africa and the denied cooperation to the Court to exercise its role.

The fundamental problem is based on the gap between the legal frameworks of Kenya and Sudan and the requirements of international criminal justice embodied by the Statute. This gap not only undermines the ICC's capability to effectively operate in the said countries but also highlights broader deficiencies within their respective criminal justice systems. The lack of alignment with international standards, tied with practical and political challenges, poses a significant barrier to achieving justice for international crimes. This study therefore addresses this problem by making an assessment on the deficiencies in administration of international criminal justice in Kenya and Sudan and assess on how the same necessitate the intervention of the

17Duncan E.O. G, "Will other African countries follow Burundi out of the ICC?" The Institute for Security Studies, 16 November 2017, available at https://issafrica.org/iss-today/will-other-african-countries-follow-burundi-out-of-the-icc (accessed on 14 November 2022)

18Charles C. J, "The Relationship Between Africa and the International Criminal Court", Raoul Wallenberg Institute, 5 April 2019. available at https://rwi.lu.se/blog/relationship-between-africa-international-criminal-court/ (accessed on 19 May 2024)

ICC, as well as the assessment of the said interventions.

1.4 Objectives of the Study

The following are the objectives of this study;

1.4.1 General Objective

The main objective of this study is to assess the deficiencies in administration of international criminal justice in Africa, particularly in Kenya and Sudan and to assess the effectiveness of the intervention of the ICC necessitated by the said deficiencies.

1.4.2 Specific Objectives

Here below are the specific objectives of this study.

a) To assess the legal framework for administration of international criminal justice in Kenya and Sudan.
b) To assess the state of administration of international criminal justice in Africa particularly in Kenya and Sudan in the context of State responsibility to prevent, investigate, prosecute and punish international crimes.
c) To establish and analyse barriers to administration of international criminal justice in Africa particularly in Kenya and Sudan.
d) To critically examine how the ICC has succeeded or failed in advancing international criminal justice in Africa, particularly in Kenya and Sudan.

1.5 Research Questions

a) Is the legal framework in Kenay and Sudan effective in administration of

international criminal justice?

b) What is the state of administration of international criminal justice in Africa in the context of State responsibility to prevent, investigate, prosecute and punish international crimes?

c) What are the barriers to administration of international criminal justice in Africa particularly in Kenya and Sudan?

d) In what ways has the ICC been successful or unsuccessful in advancing international criminal justice in Africa, particularly in Kenya and Sudan?

1.6 Literature Review

Numerous scholars and writers have written on the subject of the African international criminal justice system in different angles and perspectives as discussed hereunder, however, there is still a need to address the issue of the deficiencies in administration of criminal justice in Africa, particularly in Kenya and Sudan and assess on how these anomalies necessitate the intervention of the ICC as the same is still controversial.

Chacha Murungu [19] writes in his thesis concerning with two facets of international law. The first being 'immunity of state officials' and the other is 'prosecution of international crimes.' The discussion on immunity is centered in the international crimes` framework. The writer writes that "the study is centered in Africa because African state officials have become subjects of international criminal justice before international courts and various national courts both in Europe and Africa". The

[19]Chacha, B M. Immunity of state officials and prosecution of international crimes in Africa. A thesis for the degree Doctor Legum (LLD) in the Faculty of Law of the University of Pretoria. 23 May 2011

study examines “the practice on prosecution of international crimes in eleven African states: South Africa; Kenya; Senegal; Ethiopia; Burundi; Rwanda; Democratic Republic of the Congo (DRC); Congo; Niger; Burkina Faso and Uganda, and comes with a finding that immunity of state officials has been outlawed in these states thereby rendering state officials amenable to criminal prosecution for international crimes”.

The thesis argues that “although immunity is founded under customary international law, it does not prevail over international law *jus cogens* on the prosecution of international crimes because such *jus cogens* trumps immunity”. It further argued that, “committing international crimes cannot qualify as acts performed in official capacity for the purpose of upholding immunity of state officials, hence, in relation to international crimes, state officials cannot benefit from immunity from prosecution”. Further, the study criticises the AU’s antagonism to the prosecutions in the ICC by arguing that “however strong it may be, such opposition is unfounded in international law and is motivated by African solidarity to weaken the role of the ICC in Africa”.

The study concludes that “the decisions taken by the AU not to cooperate with the ICC are geared towards breaching international obligations on cooperation with the ICC”. The study calls upon that “African states to respect their obligations under the Rome Statute and customary international law. It recommends that African states should cooperate with the ICC in the investigations and prosecution of persons responsible for international crimes in Africa”. The study recommends that

"international courts should treat state officials equally regarding prosecution and subpoenas". It further recommends "that African states should respect their obligations arising from the Rome Statute and that, immunity should not be used to develop a culture of impunity for international crimes committed in Africa".

This study has solely made a focus on the issue of immunity of African leaders and that the same does not bar the said leaders from facing justice at the ICC. No discussion has been made on the international administration of criminal justice by the African States at the domestic level, and its legal framework, hence this research that which has focused on the same.

Alejandra Espinosa[20] in his thesis project examines the unintended effects of ICC intervention on the domestic politics of the Democratic Republic of the Congo, Sudan, and Kenya. Through a case study method with three different lines of inquiry, the study examines in a systematic and comparative fashion both the intended and unintended effects of ICC action in these selected African countries. It finds that in the three cases, the ICC has created mixed results in both bringing an end to impunity for perpetrators and contributing to the prevention of mass atrocity crimes. In relation to the unintended effects, ICC intervention has mainly impacted these countries' political dynamics, judicial systems and ethnic relations, often in ways that can potentially undermine the Court's ability to fulfil its mandate. As such, the main messages of this study are: first, a greater understanding of these unintended

[20]Alejandra E, The intended and unintended effects of the ICC on the domestic politics of the DRC, Sudan, and Kenya. A thesis submitted to McGill University. Master of Arts, Department of Political Science McGill University, Montreal 2011

effects is necessary; and second, the ICC should be aware of these potential effects in order to excel in future interventions.

This study mainly focuses on displaying the unintended effects of the ICC intervention in prosecuting Africans, but does not display in details the prosecution of international crimes at the African domestic level on the selected case studies and its impediments. Therefore, this research study is of utmost importance to cover the gap left by this literature.

Mattia Cacciatori[21] in his article has written that "the attempts by the ICC to prosecute sitting heads of state have proven to be one of the thorniest issues for this institution. These rests on the claim that there are crimes of such magnitude for which perpetrators should be prosecuted, regardless of their status. While it seems easy to sympathize with such claims, pragmatic considerations are often lost in debates of moral imperatives". This article derives findings from a comparative analysis of Sudan and Kenya.

Specifically, the study "unveils the existence of a triadic relationship between the ICC, governments under its scrutiny and local political contestants and nongovernmental organizations (NGOs). This indicates that when the ICC attempts to prosecute a sitting head of state, it not only fails to deliver, but also endangers local political contestants and NGOs". This Article suggest that "the solution to this impasse might be abandoning the idea of prosecuting sitting heads of state". However, he suggests that "this requires a reconsideration of the moral imperatives

[21]Mattia, C. *When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents*. Oxford University Press. International Journal of Transitional Justice, 2018, Vol. 12, 386–406

underpinning the idea of punitive justice that the ICC embodies". The Article does not center its discussion on discussion the anomalies in the African legal and institutional system in prosecuting international crimes, particularly in the selected case studies of Sudan and Kenya, but rather, it only focuses in discussing the effect of the guts for the ICC to prosecute the sitting presidents of the said countries. This gap left by this study has therefore been covered by this research study.

Anthony Okeke[22] in his thesis portrays that; the ICC has successfully opened investigations and prosecuted several individuals guilty of the world's most heinous crimes. But at the same time, the court has yet to investigate and prosecute many others who are suspected of committing war crimes and crimes against humanity. He adds that the investigations and prosecutions that the court has carried out demonstrate the court's effectiveness in preventing perpetrators from committing international crimes is directly influenced by when the court can intervene neutrally.

Using Kenya and the Democratic Republic of Congo as case studies, the findings of this thesis study indicate that when the ICC intervened in the post-2007 election violence in Kenya with significant neutrality, the outcome significantly declined election violence in the following Kenyan elections. Similarly, in the DRC, the ICC's non-neutral approach to intervention responding to the serious crimes committed in the civil conflict in the early 2000s escalated hostilities in the DRC. This study however does not show or discuss the weaknesses in the domestic jurisdiction in

[22] Anthony, O. The Efficacy of the International Criminal Court (ICC): A Comparative Case Study of ICC's Intervention Outcomes In Kenya & Democratic Republic of Congo (DRC) In Relation To Its Relative Neutrality. A Thesis submitted to the faculty of San Francisco State University, the Degree Master of Arts in International Relations. San Francisco, California May 2024

prosecuting international crimes that necessitate the intervention of the ICC to prosecute the same. This has therefore been covered in the current research study.

Geoffrey Lugano[23] in his article writes that "the ICC intervention in Kenya's 2007/2008 political crisis was reframed as neocolonialism by two of the accused Uhuru Kenyatta and William Ruto and their allies for most of their pre-trial and trial timelines". This article inspects "the grounds for and impacts of the neocolonial narrative, which it was argued that it was central to the accused overcoming their ICC stigma". The Article writes that; "shamed by the ICC's indictments, Kenyatta, Ruto and their allies formed the Jubilee Alliance, whose neocolonial narrative dominated national and regional discourses on Africa–ICC relations". "This article's discussion of the ICC's counter-shaming in Kenya supports previous analyses that demonstrate how international criminal justice is undermined in local spaces".

"The article contrasts Kenya's and Sudan's experiences, highlighting the salience of the former's neocolonial narrative in departing from cooperation as opposed to Sudan's outright defiance after Omar al-Bashir's indictment". "The article suggests a need for more sophisticated comparative analysis of various country strategies". It specifically suggests that "for the Jubilee Alliance, the neocolonial narrative was salient in the Alliance's struggle against cooperation due to the narrative's multiple intentions and outcomes: persuading targeted local constituencies while delegitimizing the ICC, gaining concessions from some ICC sympathizers and courting regional solidarity in battling the ICC".

[23]Geoffrey L, *Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya*, International Journal of Transitional Justice, Vol 11, No 1, March 2017, Pages 9–29, available at https://doi.org/10.1093/ijtj/ijw026 accessed on 30 May 2024

The article adds that; “given the Kenyan experience, the ICC and its supporters need to be aware of different ways in which local actors can manoeuvre the Court’s moral authority and normative imperative”. This article as well has made a critical discussion on the responses by the Kenyan state after the indictment of the political leaders by the ICC, intervening the Kenya’s 2007/2008 political crisis. The discussion of this study is relevant to this study, however, it is not based or centered on highlighting the anomalies that led to the non-prosecution of the crimes committed in the Kenya’s 2007/2008 post-election violence at the domestic level, hence this research study to address the same.

Fabrice[24] in his article has discussed “the allegations of selective application of international criminal law and the political controversies affecting the relationship between the AU and the ICC”. Fabrice states “the AU claims that the ICC is selective against African leaders; therefore he discusses issues concerning the validity of the allegations of selectivity against African leaders which have resulted to adoption of the Malabo Protocol[25] by African heads of states during their annual summit of June 2014”.

In cementing the biasness of the ICC, Fabrice further contends that “the AU had argued that the prosecution of the president of Kenya (Uhuru) and his deputy undermined the country’s sovereignty and compromised its ability to champion the fight against terrorism in East Africa through its own local authorities”. Fabrice also analyses the misappropriation of the UNSC deferral authority to non-African

[24]Fabrice T.E, *African Union and the Politics of Selective Prosecutions at the International Criminal Court*. African Journal of International Criminal Justice, 2020, Vol. 8

[25]Protocol on amendments to the protocol on the Statute of the African Court of Justice and Human Rights

individuals arising from Article 16[26] of the Rome statute as it compromises the jurisdiction of the ICC provided under the principle of complementarity which limits the powers of the ICC over an international crime only where the case is being investigated or prosecuted by a state which has jurisdiction over it.

Fabrice on the other side argues that, "while glaring examples of selectivity might seem evident in the works of the ICC, the ICC's operations in many instances have been justified by legal necessities and therefore the adoption of the Malabo Protocol has added more controversial issues in the African international criminal justice system". Among other controversial issue, Fabrice contends that "Article 46A *bis* of the Protocol[27] provides immunity for sitting heads of states which is in contradiction with Article 27 of the Rome statute[28] and, consequently, acts as a setback to the progress made so far in international criminal law by giving priority to immunity at the expense of impunity".

After analysing the accusations of unjustified selectivity, he proceeds to discuss the Malabo Protocol, indicating the strengths and setbacks, including suggestions for reform. His article argues that "the Malabo Protocol should not be ratified by African states until the shield of immunity granted to sitting heads of states is lifted to better advance the interests of justice for the victims of international crimes in Africa". In addition, Fabrice states that "the complementarity clause stated in the Malabo Protocol should have a link with the ICC such that the ICC would be allowed to

[26]Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 22 January 2016, available at:
https://www.refworld.org/docid/56a9ddcf4.html (accessed 15 June 2024)
[27]Malabo Protocol (n 27)
[28]Rome Statute, (n 3)

prosecute the perpetrators of international crimes in circumstances where the African Court of Justice and Human Rights (ACJHR) is unable to do so".

It is therefore evident to say that Fabrice in his article has covered a number of issues pertaining to the political disagreements distressing the relationship between the AU and the ICC as far as prosecution of international crimes in Africa is concerned. However, he has not specifically and deeply discussed the concerns of the weakness of the ICC in ousting jurisdiction of the African domestic courts as among the allegations pertaining to selectivity of the ICC over African leaders. This study explores a deep analysis of case studies in which the ICC has misapprehended and mishandled the administration of criminal justice by prosecuting African countries contrary to the strict requirements of the statute as compared to countries from other continents. Further, this study also navigates the challenges of African countries in prosecuting their nationals charged with international crimes in their domestic courts.

Tim Murithi[29] writes in his article "assessing the challenge of ensuring peace and reconciliation while holding leaders accountable, with specific reference to the politics of the ICC cases in Sudan (Darfur) and Kenya". In particular, this article argues that "the issue of prosecuting alleged perpetrators is problematic with respect to the cases that the ICC is currently engaged in". The study argues that "since the ICC has become involved in peace, reconciliation and political processes, it thus has the potential to disrupt such initiatives if its interventions are not appropriately

[29]Tim, M, *Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan*. Africa Development, Volume XL, No. 2, 2015, pp. 73-97

sequenced". The study further argues that "both President Omar al-Bashir of Sudan, and subsequently President Uhuru Kenyatta of Kenya, managed to politicize the ICC interventions in their countries".

The article concludes that "this process of politicization of the Court's interventions in Sudan and Kenya, eventually led the ICC into a political standoff with the AU, with the UNSC being an unresponsive but implicated secondary actor". The study also concludes that "since neither the ICC nor the AU have managed to find a way out of the impasse, there is a need to develop some innovative strategies". This article therefore proposes some perceptions into a potential way forward. However, this article has not ventured a discussion on the domestic challenges to the Kenyan jurisdiction in prosecution of the international atrocities at the local level committed by the government officials. This gap ought to have been dully covered in this study by intensifying the anomalies in the Kenyan jurisdiction to prosecute the perpetrators of the 2007/08 post-election violence which necessitated the intervention of the ICC. This gap shall therefore be covered in this research study with a concrete discussion on the same.

Westen K. Shilaho[30] discusses that "there is a diplomatic impasse between the ICC and the AU regarding accountability for mass atrocities committed in Africa". The author argues that; "the AU accuses the ICC of bias against African rulers, in effect, 'Africans', while the ICC insists that as a permanent legal institution, it affords justice to all victims of egregious crimes, and so; Africans, victims of these crimes,

[30]Westen, K. S. *The International Criminal Court and the African Union: Is the ICC a bulwark against impunity or an imperial Trojan horse?* African Journal on Conflict Resolution, 2018, Vol. 18, No. 1 pp 23-87

deserve justice too". The author writes that "since the indictment of the Sudanese president, Omar al-Bashir, twice for crimes against humanity and then for genocide, the ICC had elicited antipathy from some African rulers and their supporters who perceive it as an adjunct of imperialism encroaching on Africa's sovereignty". However, the writer argues that "the sovereignty entails responsibility to protect, it is therefore counter-intuitive to accede to international norms and concurrently invoke 'absolute sovereignty' as some African rulers attempt to do".

The writer adds that; "Africa's conflicts are characterised by mass atrocities owing to weak states that are unable and often unwilling to protect citizens and dispense justice". The writer further adds that; "in some cases, these states are themselves perpetrators of heinous crimes, which necessitates intervention by the international community". He narrates that; "historically, realpolitik, self-preservation and geopolitics have marred international criminal justice, and Africa's relationship with the West is steeped in humiliation making some African rulers suspicious of Western-dominated institutions". He writes that; "the perception that the ICC dispenses lopsided justice stems from this history".

This paper argues that "the choice between justice and peace is a false one since the two mutually reinforce each other, while impunity, if not checked, portends instability in Africa". This study is herein relevant, however, falls short for not addressing the issue center of the cause for failure of the African states, particularly Kenya and Sudan to effectively prosecute the international crimes committed in their jurisdictions, which shall therefore be a center of discussion in this study by

identifying and examining the deficiencies in the administration of international criminal justice in Africa, with case studies of Kenya and Sudan.

1.7 Significance of the Research

The study conducted is of vital importance in the current international criminal justice system as it addresses major issues relating to the administration of international criminal justice in Africa, a clear understanding of the African international criminal justice system and its effectiveness, Kenya and Sudan being the case studies. Furthermore, examining the anomalies encompassing the State responsibility and the African domestic legislations in relation to the administration of international criminal justice. The study provides and reveals the legislative and practical challenges within the African continent to prevent, investigate, prosecute and punish international crimes as well as assessing the intervention of the ICC in exercising its complementarity role over the African member states to the Rome statute.

This study will bear a significant contribution to the body of academic literature on international criminal justice by providing an in-depth analysis of the anomalies in administration of international crimes in Africa and the role and impact of the ICC in African countries, specifically Kenya and Sudan. It will offer new insights into how international legal norms are integrated (or fail to be integrated) within domestic legal systems. This study will also fill a gap in existing research by analytically inspecting the legal, political, and practical barriers that hamper administration of criminal justice in Africa and the ICC's effectiveness in Africa, using detailed case

studies of Kenya and Sudan. This will enhance scholarly understanding of the complexities involved in administering criminal justice in post-conflict and politically unstable regions.

This study will assist African nations to identify the legislative and practical scope of execution of the administration of international criminal justice and the areas which need strengthening in order to achieve optimum outcome in domestic and international prosecution of international crimes and the ways to end impunity in Africa. This study therefore forms a benchmark study in showcasing the role of the ICC in complementing African courts and also the dimensions of African prosecution of international crimes and what the African countries ought to do so as to have effective legal framework and the best practice in domestic prosecution of international atrocities in the whole process of administration of international criminal justice.

1.8 The Research Methodology and Sources

The research methodology for data collection and analysis of the study is doctrinal legal research which makes an analysis of legal frameworks both international and domestic on legal rules and principles on the selected case studies. The reason for opting for this method is that primary data for this study is aimed to be obtained from international and domestic legislations through appraisal of the relevant sources. Also, the motive and the rationale to apply the doctrinal method is because the nature of the research demanded extraction of data direct from the international instruments and domestic legislations as primary sources of data and therefore doctrinal research, which is centered on what the law is, is the relevant methodology for this research

study. Under this doctrinal methodology, the researcher describes a body of law and its application, this is of essential importance in providing the legislative framework and the emerging practice that happen in Africa in administration of the international crime and the role of the ICC.

In data collection and analysis, the researcher collected and analysed a combination of relevant international instruments and domestic legislation as primary sources using content analysis and logical analysis techniques, this ranged from a historic viewpoint and also includes secondary sources such as books, journal articles and other written commentaries encompassing the case studies chosen and the relevant legal framework. In other words, the documentary review or the library-based data collection method is employed and qualitatively analysed, involving a critical analysis of the primary sources such as the statute, other international legal instruments and some domestic legislation aiming to describe how they are applied in the administration of international criminal justice in Africa and also other sources such as law books, journals, reports, magazines, articles, website sources, dissertations, thesis, bills, court decisions and commentaries.

1.9 Scope of the Study

This study`s scope is on African region with case studies of Kenya and Sudan, for the reason that Africa is the most notable continent having an ongoing history of political unrest, violence, violation of human rights and commission of international crimes and the prosecution of the same is either unrealistic or out of reach, and thus reflect the problem undertaken in this study which is to assess the deficiencies in

administration of international criminal justice in Africa, particularly in Kenya and Sudan and assess on how the same necessitate the intervention of the ICC. The study navigates Kenya and Sudan as case studies in assessing the deficiencies in enforcing international criminal justice in Africa, and discusses on how the said deficiencies have triggered the role of the ICC to come into play, and to what extent the intervention by the ICC has been successful.

1.10 Limitations of the Study

In this study, it is well known by the researcher that although doctrinal legal research is a study of laws and other library-based sources, it is not guaranteed that all the information and data needed could be obtained easily from the existing literature. It was anticipated that some of the sources could not be available, some could be out-dated and some even unauthenticated. Similarly, because of the nature of the study, it is only limited to a doctrinal methodology which requires no information from respondents and therefore the data collected are limited only to the legal framework and the existing literatures available.

In mitigating the said limitations of the study in order to enhance the reliability and validity of the findings, the researcher undertook the following measures;

i. “Conducted a thorough review of both primary and secondary sources, including statutes, treaties, journal articles, case law, and reports from reputable institutions like the ICC and human rights organizations so as to minimized reliance on any single source type”

ii. “Prioritization of the use of most current publications and databases from well-

established legal and academic platforms including LexisNexis, JSTOR and ICC by visitation of official websites of the aforementioned to ensure reliability of the data used.”

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Overview

This chapter establishes a basis for analyzing and understanding key issues employed in this research by ranging from the conceptual framework, the theoretical keystones, and historical context pertinent to the current study. The key concepts employed in this study necessitates an extensive analysis in defining the same, examination of the theoretical frameworks that can help in explaining these dynamics as well as tracing the historical evolution of the same.

2.2 Conceptual Framework

This part establishes the fundamental concepts and terms that make the foundation of this study. Understanding these key concepts is vital for appreciating the intricacies and challenges in administering international criminal justice, specifically in the African jurisdiction.

2.2.1 International Criminal Justice

This can be termed as the universal system designed to hold accountable for individuals that have committed gravest crimes or the crimes that draw the attention of the international community, which surpass national borders, these includes genocide, war crimes, crimes against humanity, and crimes of aggression.[31] These crimes are considered so atrocious and terrible to the extent of shocking the conscience of humanity, necessitating international intervention and prosecution,

[31] https://www.law.cornell.edu/wex/criminal_justice Accessed 12th April 2024.

particularly in situations where the domestic legal systems are unable or unwilling to take actions. The main purpose of international criminal justice is to bring the criminals who have committed these international atrocities to justice as well as to act as a deterrent mechanism against future violations, rehabilitation of offenders and moral support for victims.[32] It is a system that delivers "justice" through a punishment proportionate to the crime.[33]

The global practice as far as crimes are concerned is that every perpetrator of any alleged crime should face punishment his offence committed. As already stated, the principle aim and purpose of having punishment to the criminal offender are, *inter alia*, to deter the occurrence of a crime of such nature in the future; this is deliberately to attain criminal justice which means the offender of the crime and the victim to get what they all deserve. 'International criminal justice serves to deliver justice to those who have committed international crimes and to the victim of such crime. It is a system that delivers justice through a punishment proportionate to the crime.'[34] At the global level, the ICC is the permanent court with jurisdiction to administer the international criminal justice by prosecuting perpetrators of international atrocities.

2.2.1.1 A historical Background of International Criminal Justice

The genesis of development of the international criminal justice came along with the idea of establishment of a permanent court with international jurisdiction to

[32] Ibid, (n 33)
[33] https://www.law.cornell.edu/wex/criminal_justice Accessed on 12th April 2024.
[34] ibid

prosecute international crimes, traced back in the 1800s[35]. Before that, people accused of war crimes during the ancient Greek were arraigned in accordance to the early laws that were codified in the texts of classical writers and historians.[36] During the American Civil War of 1863, Abraham Lincoln, the then president of the United States applied the modern codified laws that prohibited inhumane acts by the Union army, crimes like murder of civilians, rape of civilians, abuse of prisoners, and other mayhems, by imposing sanctions like death penalty[37].

Historically, the concept of international criminal justice has endured numerous historical, political and social developments.[38] At the beginning, it all started with different calls for international prosecution of international atrocities by establishment of a permanent court with jurisdiction to prosecute the same. In 1872, a proposal was made by Gustave Moynier, a lawyer and humanitarian champion, to arraign the perpetrators of the atrocities committed during the Franco-Prussian war by establishing an international criminal court together with a statute governing prosecution of criminal offenders of the Geneva Convention of 1864 and other humanitarian norms.[39] This proposal was deemed irrational during that period and therefore it wasn't put into account. This was followed with another call in 1919 at the time of drafting of the Versailles Peace Treaty where the drafters envisioned the creation of an ad hoc court to prosecute the World War 1 German war offenders

[35]Chazal, N, The International Criminal Court and Global Social Control; International Criminal Justice in Late Modernity, Routledge, London, 2016, p 122
[36]Schabas, W, An introduction to the International Criminal Court, 4th Ed, Cambridge University Press, Cambridge, UK, 2011. p 244
[37]Schiff, B. N, Building the International Criminal Court, Cambridge University Press, Cambridge UK, 2008, p 121
[38] Chazal, N, (n 37) p 123
[39] ibid

along with Kaiser Wilhelm II, which again was never instigated.[40] Moreover, following the World War II, in 1937, there were attempts to prosecute terrorist crimes by establishment of an international criminal court within the framework of the League of Nations which also deemed unsuccessful.

However, in 1945 after the World War II, there was a landmark event leading to a foundation of the international criminal justice where the allied forces established what was known as the Nuremberg Tribunal which was formed by the International Military Court Charter, that which imposed individual criminal responsibility for crimes against humanity, war crimes and crimes against peace, meaning that, the mentioned crimes under international law are only capable of being committed by a sole individual being other than an abstract entity, and so, an individual guilty of the said offence should be held liable to punishment as a way of enforcing the international law.

Another tribunal was established in Tokyo to prosecute war crimes in the Far East, this was known as the International Military Tribunal for the Far East[41]. However, these tribunals jointly did not have a permanent role to end atrocities in the globe, and therefore this also awakened and pressured a need to have a permanent international court with jurisdiction to prosecute international crimes. The aftermath of the World War II and the failures of several calls to establish the international criminal court, these then led to the United Nations General Assembly (UNGA) assigning the International Law Commission (ILC) to make a draft of an instrument

[40] Werle, G and Jessberger, F, Principles of International Criminal Law, Oxford University Press, United Kingdom, 2014, p 48
[41] Chazal, N, (n 37) p 123

to establish a permanent court with jurisdiction to prosecute international crimes, and the same was submitted in 1952[42].

The establishment of the international criminal court was almost coming into reality as in 1989 when the Prime Minister of Trinidad and Tobago recommended to the UNGA for offenders of transnational drug trafficking and the related crimes. Furthermore, the atrocities of former Yugoslavia led to the establishment of an ad hoc tribunal in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) with a responsibility to prosecute individuals accused of committing crimes against the international humanitarian law that were committed in the soil of the former Yugoslavia as from 1991[43]. In 1995, The UNSC established another ad hoc tribunal, the ICTR with a role to prosecute criminal offenders of the Rwandan genocide of 1994 which claimed over 800,000 lives. In the early 2000s, other temporary and case-specific institutions were established to prosecute the perpetrators of atrocities, these are such as the Special Court in Sierra Leone and Special Tribunal for Lebanon. Although these were temporary and with limited jurisdiction tribunals, they had an immense role in giving birth to the permanent international criminal court.

In 1994, the UN submitted the draft statute by the ILC to an ad hoc Committee which advanced the same to make a final draft statute which establishes the ICC, and in the following year, 1995, the UNGA established a Preparatory Committee which made conferences in 1996 and 1998 which involved member states, international and

[42] Schabas, W (n 38)
[43] Chazal, N, (n 37) p 124

non-governmental organizations to contribute in deliberating on the consolidated draft statute. The discussion came up with suggestion on amendments of draft statute, and the same was made to make a final consolidated draft as of 1998.

On June 15th to July 17th 1998, in Rome, Italy, the UN member states representatives, and other human rights stakeholders attended a long and hot diplomatic conference of Plenipotentiaries to discuss the formation of the ICC. The conference was divided in numerous committees and groups with specific tasks to account on. After a long discussion, deliberation and confrontation, with opposition of the idea from strong states like the USA whose opposition was centered from the court's jurisdiction which brought a sense of the USA losing its sovereignty. [44]

On 17th July 1998, the proposed draft was brought up for votes and adoption of the statute from the UN member states and unexpectedly, one hundred and twenty (120) states voted for, seven (7) states, believed to be USA, China, Israel, Libya, Iraq, Yemen and Qatar voted against and twenty-one (21) states abstained[45]. On 1st July 2002 the multilateral statute, named the Rome statute[46] entered into force, marking the commencement and establishment of the ICC after ratification of the statute by more than 60 required number of member states. This marked a significant step in the development of international criminal justice as it guaranteed permanent body to prosecute international crimes at the global level.

[44] Schabas, W (n 38)
[45] Werle & J (n 42)
[46] Rome statute, (n 3)

2.2.1.2 Administration of International Criminal Justice in Africa

The administration of international criminal justice in Africa has a direct link with the ratification and implementation of the Rome statute to African domestic laws. It entails the existence of a robust legal framework and the existence of a full-bodies judicial system with the entire jurisdiction to prosecute international crimes. Implementing the Statute into domestic law has been approached in some African jurisdictions using the standard model of transposition. As the Statute contains definitions of serious international crimes, once domesticated, those definitions become part of the domestic legal order[47]. This can be named as effective incorporation of the statute crimes by the state parties.

As it has been said earlier, the prosecution of international crimes in by African domestic courts has a direct link with domestication of the Statute and the 'principle of complementarity' in the Rome Statute. Domestication of the statute by African states simply entails that the African states are able to prosecute international crimes at the domestic level, giving the ICC its complementarity role when these African states are unwilling to prosecute the said crimes. 33 out of 54 African States have ratified the Rome statute[48]. However, only a total of 22 out of the 33 African states that have ratified the statute, have incorporated the Statute's crimes in their domestic legislations, either partly or in whole, in order to accelerate prosecution of international crimes at their domestic jurisdictions with the aid of the principle of complementarity.

[47]https://academic.oup.com/ejil/article/24/3/933/481582 accessed on 12th October 2024
[48]As of October 2024

2.2.2 Deficiencies in the Administration of International Criminal Justice

This concept refers to ‘the gaps and challenges that exist in the administration of international criminal justice ranging from investigating, arresting, prosecuting and sentencing the perpetrators of international atrocities. These deficiencies are particularly noticeable in the African context, where issues of selective prosecution, absence of political will and interference, weak enforcement mechanisms, and sovereignty clashes have destabilized and weakened the reliability and effectiveness of international criminal justice institutions at the domestic level. In the context of this study, the case studies of Kenya and Sudan have been selected due to the existing impediments in the administration of international criminal justice in these African countries.

A quick oversight of these deficiencies includes; Lack of political will; political will simply implies the commitment on bearing responsibility and taking action by political or government leaders and the state institutions to ensure implementation of the laws and policies in addressing a certain social challenge. This includes the will to implement the international legal standards and obligations in addressing domestic issues. Lack of political will may include strong opposition and reluctance on support for the judicial process by political leaders, the government leaders openly disregarding the necessary required support to the judiciary like provision of enough manpower, training and funding, protection of witnesses, issuance of sufficient evidence, and adequate investigation on the crimes. This in return leads to perpetuation of impunity, erosion of public trust and has created a cycle of violence in the country in question.

Weak investigation of criminal cases; a country is expected to have an independent body vested with primary responsibility of investigation of crimes. Poor investigation strategies could obviously lead to acquittal of the accused persons. Situations of international crimes cannot establish triable cases due to insufficient and weaknesses gathered from the investigation and therefore leading to a large number of cases to be dropped before being determined by the courts and even if the cases are taken to court, cannot as well succeed due to insufficient evidence as a result of poor investigation.

Poor witness protection and unwillingness of witnesses; In the process of prosecution of international crimes committed in the African context, it is a common incident for reports on disappearance of key witnesses were reported, this has led for other witnesses not to be willing to testify in court against the accused persons in fear of their safety and security. In a number of African jurisdictions, there have been reports on incidents of disappearance of key weaknesses whose evidence and testimony are against political or government leaders claimed to have committed the atrocities.[49]

Another common deficiency is that of selective prosecutions. This where the high-ranking officials escape facing justice after they have been accused of committing international crimes by failure of being brought to court to face justice for the crimes they have committed. In most cases in Africa, the high-ranking officials have been excluded from facing charges in the courts with jurisdiction to try international

[49]Kweka. G, J, International Criminal Justice at Domestic Level in Kenya: Reality on the Ground, 2016

crimes at the domestic level due to their political influence over the conduct of the said courts, and therefore, the same has guaranteed impunity to these senior political officers who are the principal perpetrators of atrocities. Some other challenges include political interference, lack of adequate technical resources and tools like forensic resources, absence of qualified personnels, destruction of evidences[50].

2.2.3 The International Criminal Court

The ICC is an international criminal court having responsibilities to investigate and, where necessary, tries individuals charged with the gravest crimes of concern to the international community. These crimes under the jurisdiction of the ICC are genocide, war crimes, crimes against humanity and the crime of aggression. The ICC was established by the Rome Statute which was adopted on 17th July 1998 and later on came into force on 1st July 2002 after ratification of 60 member states. The ICC serves as a court of last resort, with a purpose of complementing domestic courts of the member states and, precisely, not to replace the same.[51] Seated at The Hague, Netherlands, the ICC was established with a mandate to prosecute and determine international crimes and to achieve a deterrent effect at the global level for war crimes, crimes against humanity, genocide and crimes of aggression. The ICC was meant to make a world a better place for everyone by preventing international atrocities.

Unlike temporary tribunals, “the ICC is the first permanent court of its kind, with jurisdiction only over crimes committed by individuals from member states or within

[50]Ibid
[51]The International Criminal Court, About the ICC. https://www.icc-cpi.int/ accessed on 10th October 2024

their territories, unless referred by the United Nations Security Council"[52].

2.2.4 The case Studies of Kenya and Sudan

The case studies of Kenya and Sudan represents African countries that have had a long history of internal conflicts leading to commission of international crimes and therefore leading to high profile cases referred to the ICC, at the same time each state highlights different deficiencies and perspectives that demonstrate the complexities of administration of international criminal justice in Africa.

2.2.4.1 The Case Study of Kenya

The post-election violence exploded in Kenya amid December 2007 and February 2008 and marked a momentous period in the history of the country of Kenya due to the horrific and brutal incidents that claimed over 1,100 deaths and the displacement of about 600,000 people. This was resulted from a disputed presidential election which led to widespread violence which was characterized by ethnically prearranged attacks, murder, rape, arson, and other forms of extreme human rights violations, with all the elements of international crimes of genocide and crimes against humanity.

The 2007/08 post-election violence in Kenya witnessed massive commission of international atrocities, therefore drew the attention of several human rights champions as well as the international community itself and demand for accountability in order to see justice being done[53]. Since the outbreak of the said post-election violence of 2007-2008, Kenya has made significant treads in

[52]Kweka. G, J (n 51)
[53]Kweka. G, J, (n 51)

addressing international crimes to prosecute the said crimes domestically and to aid cooperation with the ICC, although mired with significant challenges.

2.2.4.2 The Case Study of Sudan

Sudan has been characterised with civil wars and political unrest for decades. The well knows conflict over the history of Sudan that has attracted international attention for the horrors and atrocities committed is the Darfur War. This war is also known as the Darfur Conflict, a major armed conflict in the Darfur region in western Sudan, that emerged from 2003 involving various groups, including government forces, rebel groups, and militias, which has led to widespread violence, horrific atrocities, brutal killings, rape and displacement. This war was a result of long practiced ethnic and tribal strains aggravated by economic marginalization and struggle for resources, mostly land, as a result of desertification[54].

In early 2003, two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) launched attacks against government targets, claiming oppression of the non-Arab Sudanese by the Sudanese government in favor of the Arab Sudanese. In retaliation, the Sudanese government, enlisted the Janjaweed, a militia group largely made of Arab nomads, to conduct counter-insurgency operations[55]. The Janjaweed were aided with arms, logistical support, and immunity from prosecution by the government. This conflict led to killing of thousands and displacement of approximately two million people[56].

[54]Binet. L, MSF and Darfur 2003-2009, The MSF Speaking Out Case Studies, June 2024, p 256 available at https://www.msf.org/sites/default/files/2024-06/msf-speaking-out-darfur-en.pdf accessed on 28 July 2024
[55]Ibid, p 267
[56]Ibid

Together with several unfruitful peace agreements which Sudan has entered to ensure peace and bring war to an end, including the Darfur Peace Agreement in 2006 and the Doha Document for Peace in Darfur in 2011, a number of unsuccessful efforts have been taken to ensure prosecution of international crimes within the Sudanese jurisdiction.

2.3 Theoretical Framework

Administration of international criminal justice is composed of different theories that encompass the process of guaranteeing successful, fair, unbiased, and fruitful prosecution of the grave crimes that concern the international community, meaning, the international crimes. These theories maybe enshrined in numerous international instruments like the Rome Statute, conventions, and the practices of international judicial organs like the ICC. These theories include the following;

2.3.1 International Legal Positivism Theory

This is a theory within international law stating that "law derives its authority from the explicit consent of sovereign states rather than from moral principles, natural law, or ethical considerations. It highlights that law is created through agreements, treaties, and established customs recognized by states. This theory provides a framework that is pragmatic and grounded in state consent, viewing international law as binding only when states have agreed to it, usually through ratified treaties or established customs they recognize as legally obligatory[57]".

[57] Devika H, The Elements of International Legal Positivism, *Current Legal Problems*, Vol 75, Issue 1, 2022, Pp 71–109, available at https://doi.org/10.1093/clp/cuac003 accessed on 10 October 2024

This theory is made of several principles including; sovereignty and consent which basically places the state or the nation at the core of international law. According to this view, “states are the primary subjects of international law, and they voluntarily enter into legal obligations. States must explicitly consent to rules, meaning that without state agreement, no law can bind them. This principle respects the sovereignty of states and upholds the idea that no external force can impose laws upon a state without its consent”.

The other principle is a non-interference and sovereignty which strongly upholds state sovereignty and the principle of non-interference in the domestic affairs of any state. “It sees international law as limited to matters on which states have reached consensus, avoiding enforcement mechanisms that might infringe on national sovereignty. This principle helps to prevent external legal interventions in domestic issues unless explicitly permitted by the state”.

The jurisdiction of the ICC is based on membership of the states to the Rome statute or on referrals by the UNSC, therefore establishing a voluntary responsibility and commitment of individual states. This is further reinforced by the principle of complementarity which imposes a primary responsibility on domestic courts to prosecute crimes international crimes within their local jurisdictions, hence aligning with demands of the positivism theory on respect for national sovereignty.

The leading criticism of this theory of international criminal justice is that of

challenges with enforcement. “Since positivist international law relies on state consent and has no centralized enforcement mechanism, states can often ignore their obligations if enforcement is weak”. For example, the ICC has no universal mechanisms to enforce its Rulings and orders, therefore the States may choose not to abide to the same under the umbrella of this theory and therefore weaken the said court, therefore, this lack of enforceability makes the system vulnerable to violations when states believe they can avoid accountability.

2.3.2 Realism Theory

Realism is ‘a theory in international relations that emphasizes the role of power, self-interest, and the pursuit of national security as the primary motivators of state behavior’[58]. According to realist theory, ‘international institutions like the ICC are often seen as secondary to the interests of powerful states. Rather than acting as impartial enforcers of justice, such institutions are often viewed as tools through which powerful states project their influence and control over weaker nations’.

In the African context, realism is employed in explaining a debated perception that the ICC is biased against the African continent. There have been allegations amongst numerous African leaders that the ICC is used by Western super powers to intentionally and selectively target and invoke influence over African states, while at the very same time disregarding crimes committed by the superpowers. This perception is reinforced by the non-ratification and denial of the jurisdiction of the ICC by the superpower states like the United States, China, and Russia which leads

[58]Bell, D."realism." *Encyclopedia Britannica*, October 30, 2024. Available at https://www.britannica.com/topic/realism-political-and-social-science. Accessed on 01 November 2024

to non-prosecution of international crimes committed by these states whereas in Africa, the ICC`s eyes are always open.

2.3.3 Liberalism Theory

Liberalism highlights the necessity of international cooperation, rule of law, and the promotion of human rights across nations. Liberal theorists argue that "international institutions like the ICC play a critical role in maintaining global order by enforcing laws and norms that transcend national boundaries. The ICC, from a liberal perspective, represents an important step toward global governance and the protection of human rights"[59].

The establishment of the ICC was mainly motivated by liberal principles, with the belief that "establishing a permanent international tribunal to prosecute serious crimes would deter future atrocities and provide justice for victims". However, the challenges facing the ICC in Africa, specifically the allegations of intentionally targeting Africa with biasness, as well as the challenges in enforcement of the court`s orders, pinpoints the limitations of liberalism in the face of real-world power dynamics and political resistance[60].

2.4 Conclusion

This chapter has laid out the conceptual and theoretical foundations for understanding the current study in analyzing the challenges and deficiencies in the administration of international criminal justice in Africa, specifically in Kenya and

[59]Ball, T *et al*. "liberalism". Encyclopedia Britannica, 23 Oct. 2024, available at https://www.britannica.com/topic/liberalism. Accessed on 6 November 2024.
[60]Ibid

Sudan as case studies. The following chapters will build on this foundation, basically, to make a critical analysis on the legal framework and practical deficiencies in administration of international criminal justice as well as the effectiveness of the ICC in responding to these deficiencies in delivering justice in the African continent, with examples of Kenya and Sudan.

CHAPTER THREE

INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

This chapter navigates the legal and institutional foundations of international criminal justice. The chapter examines the key international treaties and conventions and the principles established therein, the roles and powers of international institutions like the ICC in enforcing international criminal law, as well as the influence of other international organs like the UN and the UNSC in the administration of justice with particular attention to Kenya and Sudan as case studies.

3.2 The International Legal Instruments

This part provides a thorough overview and analysis of the central international treaties and conventions that are the backbone of international criminal justice. It examines how these legal instruments, establish the jurisdiction, obligations, and standards for prosecuting crimes of international concern, the international crimes, as well as an analysis on the essential guidance on the structure of the international legal framework in ensuring accountability and justice on a global scale.

The application of these international legal instruments depends on the process of State`s consent by ratifying and domesticating the same to bare a binding effect as per the demands of the International Legal Positivism Theory.

3.2.1 The Rome Statute

The Rome Statute of the ICC the treaty that forms the basic foundation of international criminal justice system under international criminal law. [61] The Statute established the ICC after its adoption on 17th July 1998 that resulted entering into force of the treaty on 1st July 2002. As of the present day (2023), 123 states are party to the statute[62]. Along with the establishment of the ICC, the Rome Statute has established the principles and standards governing administration of international criminal justice within the globe. Below is an analysis on the key provisions and coverage of the statute in dispensation of international criminal justice.

3.2.1.1 Establishment of the ICC

The most significant and crucial success in the enactment of the Rome Statute was the establishment of the ICC as the first permanent court designed to prosecute serious international crimes. Contrary to the prior-established *ad hoc* temporary tribunals like the ICTY and the ICTR which came into existence to address violations from specific conflicts, the ICC was ordained to be an independent lasting international institution having powers to investigate and prosecute international crimes. The establishment of the ICC was a direct step in giving life to the application of Liberalism theory which highlights the necessity of international cooperation, rule of law, and the promotion of human rights across nations. The ICC has ensured and guaranteed a permanent and consistent mechanism for ending impunity, accessing justice and deterrence for international atrocities across the globe by prosecuting and holding accountable for the perpetrators of these crimes,

[61]Rome statute, (n 3)
[62]Ibid

including political and military leaders regardless of their positions, powers, status or nationality.

Article 1 of the Statute[63] provides that;

> *"An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute"*

3.2.1.2 Jurisdiction of the ICC

The Rome Statute provides for and established the four core international crimes which are; genocide, crimes against humanity, war crimes, and the crime of aggression.

Article 5 of the Statute[64] provides that;

> *"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression"*

Under the Rome Statute, the ICC can only investigate and prosecute these four core international crimes in situations where states are unable or unwilling to do so themselves; the jurisdiction of the court is complementary to jurisdictions of domestic courts.[65] The court has jurisdiction over crimes only if they are committed

[63]Ibid
[64] Ibid
[65]Ibid, Articles 1 and 17, and paragraph 10 to the Preamble.

in the territory of a state party or if they are committed by a national of a state party.[66] The ICC only has jurisdiction over the most serious crimes of international concern, consequently, all crimes listed in Article 5[67] are grave *per se*. However, Article 17(d) of the Statute[68] imposes an additional threshold of gravity in order for cases and situations to be admissible to the ICC. There are factors to be considered in determining the gravity of a crime, these factors can be summarized as the scale, nature, manner of commission, and impact of the crimes in question, and are also listed in Office of the Prosecutor (OTP) Regulation 29.[69]

3.2.1.3 Complementarity Principle

This is the principle and international law which denotes that the states are given priority in prosecution of international crimes rather than the ICC. Therefore, this principle has a meaning that the ICC has limited jurisdiction to prosecute international crimes to the extent that it only complements the national courts and not to supersede, and therefore; these national courts have priority in investigating and prosecution of their nationals accused of international crimes within their jurisdictions. The ICC will take charge of prosecution of international crimes only where they say the national courts are unable or unwilling to do the same. This is cemented by the statute creating the ICC, in the preamble paragraph 10, Article 1 and Article 17[70].

Article 17(a) of the Statute provides that;

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[66]Ibid, Article 12 (2) (a) and (b)
[67]Ibid
[68]Ibid
[69]Regulations of the Office of the Prosecutor (Apr. 23, 2009)
[70]Rome statute, note 1

> *"Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"*

This concept of complementarity is a paramount concept determining jurisdiction of the ICC as stipulated by the statute, to the extent that the Court's existence is only to supplement the national courts and to oust their jurisdictions. Therefore, the ICC is regarded as the court of last resort in prosecution of international crimes. This is to mean that when the national court is investigating or directly prosecuting the perpetrators of international crimes in the domestic courts, then the ICC shall not exercise jurisdiction over such crimes.

This principle reinforces the Realism Theory in international relations that emphasizes self-interest and the pursuit of primary priority for national security and sovereignty by prosecution of international crimes domestically. Being the court of limited resources, it could not be possible for the court to take charge of all the international crimes committed all over the world, and therefore the drafters of the Rome statute prudently established the ICC only to supplement or to complement the national courts in the sense that it should fill the gaps left by these domestic justice system.

The factors determining the unwillingness or inability of the domestic courts to prosecute perpetrators of international crimes are provided under Article 17(2) and (3) of the Rome statute[71]. The unwillingness can be summarized as the hesitation own prosecution or overprotection of the perpetrator of the international crimes by

[71] Ibid

the state and on the other side the inability is where they state domestic justice system is not well designed to aid prosecution of the perpetrators of international crimes committed within its jurisdiction. However there have been controversy the factors to determine unwillingness or inability of the state to prosecute the perpetrators of international crimes. This is because the interpretation of inability and unwillingness is to a large extent vague and discretional. Should the OTP simply abide by the wishes of that country, or encourage the country to prosecute in line with the policy of positive complementarity? This issue becomes especially relevant in the context of self-referrals.

3.2.1.4 Triggering Mechanism

There are three ways in which the investigation of a situation by the OTP can be initiated, these so called "trigger mechanisms" and are listed in Article 13 of the ICC Statute[72]. First, a situation can be referred to the Prosecutor by a state party to the Statute[73], second; it can be referred by the UNSC acting under Chapter VII of the UN Charter[74], and third; the OTP may initiate investigations *proprio motu***,** on its own accord, based on information from other sources[75].

UNSC referrals require a resolution under Chapter VII of the UN Charter in the wake of identifying a threat to international peace and security. As opposed to state referrals and *proprio motu* investigations, UNSC referrals are exempt from a

[72] Ibid
[73]Ibid, Article 13 (a)
[74]Ibid, Article 13(b)
[75]Ibid, Article 13(c)

jurisdictional requirement in Article 12(2) of the Statute[76]. So far, the UNSC has referred two situations to the OTP which are that of Darfur in Sudan and Libya and both resulted into opening of investigations.[77] When it comes to referrals by the UNSC, the prosecutor has a duty to initiate investigations but has discretionary power to conclude, after preliminary examination that there is no reasonable basis on which to proceed.

According to Article 15(1) of the statute, the Prosecutor may initiate *proprio motu* investigations on the basis of information on crimes that may be sent by individuals or groups, countries, intergovernmental or NGOs. A specificity of *proprio motu* investigations is that they require the approval of a Pre-Trial Chamber (PTC) according to Article 15(3 to 5) of the Statute[78]. In selection of situations, the OTP has to consider the following conditions; first, the OTP shall consider if there is a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed under Article 53(1) (a)[79]. Second, it shall consider the issue of admissibility under Article 17 of the Statute as provided under Article 53(1) (b) of the statute[80]. Finally, if these requirements are fulfilled, the OTP shall consider if there are, nonetheless, substantial reasons to believe that an investigation would not serve the interests of justice as provided under Article 53(1) (c) of the statute[81].

[76]The ICC has jurisdiction over crimes only if they are committed in the territory of a state party or if they are committed by a national of a state party

[77]Lovisa Bådagård et al, The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at The International Criminal Court, Vol 48, 2017 pg 669. Available at https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-3-The-Gatekeeper-of-the-ICC.pdf

[78] Rome Statute, (n 3)

[79] Ibid

[80]Ibid

[81]Ibid

3.2.1.5 Selecting Cases for Prosecution

Situation selection happens when there are allegations of commission of international crimes and the OTP operates preliminary examination seeking to make a determination on whether there is reasonable basis to initiate investigation. And once there is an investigation opened by the OTP, at this stage the situation selection process is concluded, and followed by case selection. In case selection for prosecution, the OTP considers specific incident and person that which shall be the subject of investigation from the situation selected. This implies that case selection is more selective than situation selection. The OTP prioritizes the cases from a given situation, which shall be subjected to further investigation and prosecution depending on the merits.[82]

However, not all cases shall be subjected to investigation from a given situation, the OTP is expected to prosecute only the prioritized possible cases within a situation. The OTP Regulation 33 states that the OTP shall collect information and evidence in order to identify the most serious crimes committed within the situation, and that it shall consider the factors in Article 53(1) of the statute, including reasonable basis, jurisdiction, admissibility, and the interest of justice.

Article 53(1) of the Statute[83] provides that;

> *"The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the*

[82] Lovisa Bådagård et al, (n 79) pg 674
[83] The Rome Statute (n 3)

> *Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".*

However, the fact being that investigation involves criminal charges against on individual, then the OTP is of the duty to investigate a case that can be proved with concrete evidence. And therefore, the existence of the said concrete evidence is among the factors determining case selection.

Case selection is ideally discretional as provided under Article 53(2) of the statute[84], only where the prosecutor believes that there is no sufficient reasonable basis for prosecution. However, these can only be invoked where the OTP finds no sufficient legal basis for seeking a warrant of arrest or summons which demands the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the ICC, or when the case is inadmissible as per the requirement of Article 17 of the Statute[85], or when the prosecutor concludes that, is per Article 53(2)(c)[86], the said case will in no way serve the interest of justice.

3.2.1.6 Individual Criminal Responsibility

This is among the standards of international criminal justice which denotes that, every individual being, regardless of his or her official capacity, can be held accountable for committing, ordering, aiding, abetting, or otherwise assisting in the commission of international crimes. The primary and sole purpose of this principle is

[84] Rome statute, (n 3)
[85] ibid
[86] ibid

to end impunity and that no person, including senior and heads of state, government officials, and military leaders, can hide behind their positions to evade responsibility for crimes they have committed. Article 25(1) and (2) of the Statute[87] provides for this principle of individual criminal responsibility. It provides that;

> *"(1) The Court shall have jurisdiction over natural persons pursuant to this Statute. (2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute"*

This therefore implies that in prosecuting international crimes at the national level, countries should strictly have laws that provide for individual criminal responsibility for international crimes regardless of their official statuses.

3.2.1.7 Exclusion of Immunities

This is also a principle and standard of international criminal justice which has the same spirit as the demands of the principle of individual criminal responsibility. It denotes that, the official capacity as a head of state or government, a high rank military official, a member of a parliament, a voted representative, or any other person should not be excused from criminal responsibility under any law. This principle ensures that in order to end impunity and ensure international criminal justice, high-ranking officials cannot use their positions to escape justice after commission of international crimes. This principle is in the spirits of **Article 27 of the Rome Statute[88] which provides that;**

> *"This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an electe gd representative or a govep;[rnment official*

[87] Ibid
[88] Ibid

shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."

3.2.1.8 Rights of Fair Trial and Rights of Victims

The Statute has as well established other principles and standards of international criminal justice with the spirit of guaranteeing fair trial rights, including the presumption of innocence[89], the right to be informed of charges, the right to legal representation, and the right to defence[90]. These rights ensure that the accused people receive a fair, just and impartial trial in a competent court of law to determine international crimes. Trials should generally be open to the public to ensure transparency. This goes together with the provisions that allow participation of victims in proceedings, their protection as well as the witnesses, and reparations for victims[91]. These provisions ensure that victims have a voice in the judicial process and receive justice and compensation for the tribulations grieved.

3.2.1.9 No Statute of Limitations

This is also a principle and standard of international criminal justice which demands no time limit for prosecuting the core international crimes, to ensure that culprits of these international crimes face justice as they can be held accountable notwithstanding of how much time has passed since the commission of the said international crimes. Also, the domestic laws are called upon not to limit the prosecution of international crimes. Article 29 of the Statute provides for this

[89]Ibid, Article 66
[90]Ibid, Article 67
[91]Ibid, Article 68

principle.[92]

Other standards or principles includes; non-retroactivity or no crime without law "*Nullum crimen sine lege*"**,** meaning that a person cannot be prosecuted for conduct that was not a crime under international law at the time it was committed[93] and prohibition of double jeopardy**.**[94]

3.2.2 Other procedural laws of the ICC

Apart from the Rome Statute, the operations of the ICC are governed by other procedural laws which include The ICC Regulations[95], the Rules of Procedure and Evidence (RPE)[96] and the Regulations of the Office of the Prosecutor[97]. All these together provides for the procedural matters from the stage of instituting a case to the ICC to the appeal stage as well as the composition of every organ of the Court. There are no notable provisions that reflect the complementarity role of the court from these instruments and therefore they are irrelevant in determining the effectiveness of the ICC in administration of international criminal justice in Africa.

3.2.3 The Convention on the Prevention and Punishment of the Crime of Genocide

This Convention is commonly known as the Geneva Convention[98], it is an

[92] Iibidd
[93]Ibid, Article 22
[94]Ibid, Article 20
[95] Regulations of the Court
[96] International Criminal Court, Rules of Procedure and Evidence, rules 89-93, IT/32/Rev.50 (2015)
[97] Regulations of the Office of the Prosecutor (Apr. 23, 2009)
[98]Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, in accordance with article XIII

international treaty adopted by the UNGA on December 9, 1948, and it came into force on January 12, 1951. "This convention defines genocide as a crime under international law and commits its signatories to prevent and punish acts of genocide, whether in war times or peace times as well". Sudan is a member state to this convention as from 13 October 2003 having made accession to the same, therefore bound by the terms and demands of the convention. On the other side, Kenya has neither made accession nor ratified the same, therefore not bound by the same.[99]

Article I of the Convention provides that;

> *"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."*

This convention was enacted with specific intention to address the international crime of genocide by making a commitment to the state parties to prevent, prosecute and punish the same at the domestic level.

Article II of the Convention[100] provides for a detailed definition of the crime of genocide, it provides that;

> *"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."*

Article III of this Convention provides for different offences related to genocide that

[99] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4
[100] Ibid

shall be triable under the said convention. This provision explicitly reads that;

> *"The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."*

Article IV provides for individual criminal liability and waiver of immunity for an offence of genocide regardless of the official capacity of an offender. It reads that;

> *"Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."*

Article V provides for an obligation to state parties to take initiatives to enact domestic laws penalising all the genocide offences listed in Article III. The said provision states that;

> *"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."*

3.2.4 The Geneva Conventions and Additional Protocols

The Geneva Conventions, adopted in 1949[101], "are a series of international treaties that establish the standards of international law for humanitarian treatment during armed conflict. They are composed of four treaties that cover various protections for individuals who are not participating in hostilities, such as civilians, medical personnel, prisoners of war, and wounded soldiers. The first Geneva Convention protects wounded and sick soldiers on land, the second addresses wounded and sick soldiers at sea, the third focuses on the humane treatment of prisoners of war, and the

[101]The Geneva Conventions, 1949

fourth provides protections for civilians in conflict zones".

The Additional Protocols to the Geneva Conventions[102], adopted in 1977, expanded these protections in response to the changing nature of warfare. "Protocol I extends protections to victims of international armed conflicts, emphasizing protections for civilian populations and restricting means and methods of warfare. Protocol II addresses non-international armed conflicts, providing protections for individuals affected by civil wars and other internal conflicts. In 2005, Protocol III established an additional emblem (the Red Crystal) to ensure medical personnel and facilities are recognized and protected in conflict zones".

3.2.5 Universal Declaration of Human Rights, 1948[103]

This Declaration is commonly abbreviated as The UDHR which is regarded as the mother legal document for human rights in the world since it came into being in 1948 by the UNGA. The Declaration is legally not binding and it has been ratified by 193 member States of the United Nations. The 30 Articles of the UDHR has been the starting point for other international human rights documents like the regional and national or domestic human rights treaties and laws or policies signifying inherent, inalienable and universal rights of all human kind regardless of any differences.

In its preamble, the Declaration states that;

> *"whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, whereas disregard and contempt for human rights have resulted in barbarous*

[102]The Geneva Conventions Protocols, 1977
[103]Universal Declaration of Human Rights of 1948 (General Assembly Resolution 217 A III)

> *acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people"*

Despite the fact that from the interpretation point of view, the preamble does not form part of the law, this provision of the UDHR[104] shows that at the international level the international community has been committed to ensure peace and justice in all times.

The principle right in this Declaration right is sighted in Article 3[105] of the UDHR which declares that; *"Everyone has the right to life, liberty and security of person"*

Every human being is entitled to live; human life cannot be taken away from him or her arbitrarily, even in times of political unrest, the right to life should be upheld with maximum attention. Even in times of war, the civilians and people not engaged in war as well as witnesses should be free from or any threat of being killed. The right to life can only be waived at very exceptional circumstances stipulated by the laws, but not arbitrarily for political motives, hate and selfishness.

The State is duty bound to provide full security to every person in the country even and especially in times of political unrest as means of safeguarding their right to life. Another right is the right against torture and inhuman treatment**,** as articulated under Article 5[106] of the UDHR which reads that; *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

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[104]Ibid
[105]Ibid
[106]Ibid

The aforementioned provision mandatorily entails a person should not be subjected to torture and other inhuman treatment at all times, including times of war and political unrest.

3.3 Institutional Framework

This part provides a thorough overview and analysis of the institutions at the global scale established with mandate to administer international criminal justice with powers and jurisdiction to determine and prosecute crimes of international concern, namely the international crimes, in ensuring accountability and justice by ending impunity of the said crimes.

3.3.1 The *ad hoc* Tribunals

Ad hoc tribunals "are temporary international courts established by the UNSC to address specific situations involving serious violations of international humanitarian law. These tribunals are created for a particular purpose and have a limited mandate in terms of both jurisdiction and time".

3.3.1.1 The International Criminal Tribunal for the former Yugoslavia (ICTY)

It was based in The Hague (Netherlands) and was established in February 1993 by UNSC Resolution 808. "The ICTY was a UN court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s during its mandate. This was the first war crimes court and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. It was established by the UNSC in

accordance with Chapter VII of the UN Charter.[107] It was governed by its Statute, the Statute of the International Criminal Tribunal for the Former Yugoslavia [108] The ICTY closed its doors on December 31st 2017, after working for 24 years, issuing 161 indictments and nearly as many judgments, hearing 4,600 witnesses over 10,800 days of trials, producing millions of pages and costing billions of dollars. Apart from the Second World War, no war has been as studied and certainly none has been the subject of judicial procedures like the one that tore the former Yugoslavia apart in the 1990s."[109]

3.3.1.2 The International Criminal Tribunal for Rwanda (ICTR)

In November 1994, the UNSC through its Resolution 955 established ICTR to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1st January 1994 and 31st December 1994. The Tribunal is located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands.[110] The ICTR was regulated by the Statute of the International Criminal Tribunal[111] for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States. Since it opened in 1995, the Tribunal has indicted 93 individuals whom it considered

[107] https://www.icty.org/en/about accessed on 23 December 2024
[108] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, available at: https://www.refworld.org/docid/3dda28414.html accessed on 23 December 2024
[109] https://www.justiceinfo.net/en/36013-how-the-icty-has-changed-our-world.html accessed on 23 December 2024
[110] https://unictr.irmct.org/en/tribunal accessed on 20 December 2024
[111] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, available at: https://www.refworld.org/docid/3ae6b3952c.html accessed on 20 December 2024

responsible for serious violations of international humanitarian law committed in Rwanda in 1994. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.[112]

3.3.1.3 The International Residual Mechanism for Criminal Tribunals

It is sometimes known as the United Nations Mechanism for International Criminal Tribunals (MICT) or the Mechanism, `created with jurisdiction to supervise the enforcement of sentences, designate the State in which convicted persons will serve their sentences and decide on requests for pardon or commutation of sentence`. It is mandated to perform a number of essential functions previously carried out by the ICTR and the ICTY. "In carrying out these essential functions the Mechanism maintains the legacies of these two pioneering *ad hoc* international criminal courts and strives to reflect best practices in the field of international criminal justice."[113]

UNSC created the Mechanism on 22 December 2010 as a "small, temporary and efficient structure". `The Mechanism started operating on 1 July 2012 in Arusha, United Republic of Tanzania, and on 1 July 2013 in The Hague, the Netherlands. The Arusha branch inherited functions from the ICTR, and the Hague branch from the ICTY. During the initial years of the Mechanism's existence, it operated in parallel with the ICTR and the ICTY. Following the closure of the ICTR (on 31 December 2015) and the ICTY (on 31 December 2017), the Mechanism continued to operate as a stand-alone institution`.[114]

[112] https://unictr.irmct.org/en/tribunal accessed on 20 December 2024
[113] https://www.irmct.org/en/about accessed on 20 December 2024
[114] Ibid

3.3.2 Mixed Tribunals and Special Chambers

Mixed tribunals and special chambers are hybrid judicial mechanisms that combine international and domestic elements to prosecute individuals accused of international crimes. “These institutions typically operate within the legal system of the affected country but incorporate international judges, prosecutors, or legal frameworks to ensure impartiality and adherence to international legal standards”.

3.3.2.1 The Special Court for Sierra Leone (SCSL)

Since its independence in 1961, Sierra Leone has been beset by coups, with intermittent breaks controlled by one party regimes corrupted with self-enriching politicians hence resulting to civil wars and unrest in the country. In response to the atrocities perpetrated the UNSC requested the UN Secretary General to negotiate an agreement with the Government of Sierra Leone “to create an independent Special Court” for the country.[115]

The SCSL also called the Sierra Leone Tribunal, was a judicial body set up by the government of Sierra Leone and the UN to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in Sierra Leone after 30 November 1996 and during the Sierra Leone Civil War. “It was established through a statute approved by the Security Council and signed by both the Sierra Leonean government and the UN on 16 January2002[116] and the same is vested with jurisdiction to try war crimes, crimes

[115]Kai, A and Mohamed, O (Eds); Historical and Political Background to the Conflict in Sierra Leone” New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia, 2003, pg 23

[116] Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000

against humanity and enjoyed primacy over the national courts of Sierra Leone".

In March 2003 the Prosecutor brought the first of 13 indictments against leaders of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF), and then-Liberian President Charles Taylor, ten persons were brought to trial. "Two others died, one of them before proceedings could commence (RUF Leader Foday Sankoh) and one outside the jurisdiction of the Court (RUF Battlefield Commander Sam Bockarie). A third, (AFRC Chairman Johnny Paul Koroma), fled Sierra Leone shortly before he was indicted. While some evidence suggests that Koroma is dead, it is not considered conclusive and he is therefore officially considered to be at large.

One person (Samuel Hinga Norman) died during the course of his trial, and proceedings against him were terminated. Nine persons were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years. Sentences of the eight RUF, CDF and AFRC prisoners convicted in Freetown are being enforced at Rwanda's Mpanga Prison due to security concerns."[117] Following its dissolution in 2013, it was replaced by the Residual Special Court for Sierra Leone in order to complete its mandate and manage a variety of on-going and *ad-hoc* functions, including witness protection and support, supervision of prison sentences and claims for compensation. [118]

[117] https://blogs.loc.gov/law/2016/11/falqs-the-international-criminal-court-and-africa/ accessed on 23 December 2024

[118] https://en.wikipedia.org/wiki/Special_Court_for_Sierra_Leone accessed on 23 December 2024

3.3.2.2 The Special Tribunal for Lebanon (STL)

The STL also referred to as the Lebanon Tribunal or the Hariri Tribunal is an international judicial institution established to prosecute those responsible for the assassination of former Lebanese Prime Minister Rafik Hariri and related terrorist attacks[119]. "It is the first tribunal of its kind to primarily address crimes of terrorism under international law. The triggering event was that on February 14, 2005, Rafik Hariri was assassinated in Beirut by a massive car bomb, killing 21 others and injuring over 200 people". The attack shocked Lebanon and the international community, prompting calls for justice. Following Lebanon's request for international assistance, the UNSC adopted Resolution 1757 in 2007 to establish the STL. "This was due to Lebanon's inability to handle the investigation and prosecution independently amidst political instability.

The tribunal had jurisdiction to investigate and prosecute those responsible for Hariri's assassination and attacks connected to it if they share a similar motive and purpose. The STL applies Lebanese criminal law, particularly regarding acts of terrorism, and incorporates international legal principles to ensure adherence to global standards. In 2020, the STL convicted Salim Jamil Ayyash, a Hezbollah operative, in absentia for his role in the assassination. Other suspects were acquitted due to insufficient evidence"[120]. Ultimately, on 31 December, 2023, UN spokesperson Stéphane Dujarric announced the STL's closure[121]

[119] https://en.wikipedia.org/wiki/Special_Tribunal_for_Lebanon accessed on 26 December 2024
[120] Ibid
[121] Ibid

The Special Panels for Serious Crimes (SPSC)

This was the hybrid international tribunal, commonly known as the East Timor Tribunal and were established in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try and prosecute cases of "serious criminal offences" which took place in East Timor in 1999. They an example of a mixed tribunal, blending national and international judicial elements. “These Special Panels sat from 2000 to 2006, mandated by the Special Representative of the UN Secretary General to try the crimes of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. Until 2003, there was generally only one panel of the court. In 2003, a second and a third panel were organised. Each of the panels was composed of two international judges and one East Timorese judge.”[122] The SPSC indicted over 390 individuals, “primarily for crimes against humanity and secured convictions of several militia members and East Timorese collaborators involved in the violence”.[123]

3.3.2.4 The Extraordinary Chambers in the Courts of Cambodia (ECCC)

It is commonly known as the Cambodia Tribunal or Khmer Rouge Tribunal. “It is a court established to try the senior leaders and the most responsible members of the Khmer Rouge for alleged violations of international law and serious crimes perpetrated during the Cambodian genocide. Although it is a national court, it was established as part of an agreement between the Royal Government of Cambodia and the UN, and its members include both local and foreign judges. It is considered a

[122] https://en.wikipedia.org/wiki/Special_Panels_for_Serious_Crimes_(East_Timor) accessed on 27 December 2024
[123] ibid

hybrid court, as the ECCC was created by the government in conjunction with the UN, but remains independent of them, with trials held in Cambodia using Cambodian and international staff." The Cambodian court invites international participation in order to apply international standards. "The remit of the ECCC extends to serious violations of Cambodian penal law, international humanitarian law and custom, and violation of international conventions recognized by Cambodia, committed during the period between 17 April 1975 and 6 January 1979 during the Period of Democratic Kampuchea".[124]

3.3.3 The International Criminal Court

Currently, at the global level, the court with jurisdiction to investigate, prosecute and punish international crimes if the ICC. Established by the Rome Statute, the ICC has jurisdiction to prosecute international crimes, namely; genocide, war crimes, crimes of aggression and crimes against humanity. The ICC is made of different organs, each having separate mandates and powers in the whole process of administration of international crimes.

3.3.3.1 Structure of the ICC

The headquarters of the ICC is situated at The Hague, The Netherlands and is made of four (4) independent organs which are; the Presidency, the Chambers or Judiciary, the Office of the Prosecutor and the Registry[125]

i. The Presidency

This is referred to as the governing organ of the ICC. It is headed by three judges from amongst the judges of the Chambers, one being the president, the first and

[124] https://en.wikipedia.org/wiki/Khmer_Rouge_Tribunal accessed on 27 December 2024
[125] Schabas, W (n 38)

second vice- presidents, all elected from amongst the judges of the chambers, assuming the office for a renewable term of three years a provided under Regulation 11 of the ICC Regulations [126]. The presidency has a role to administer and govern all the functions of the court and its other organs including to assign the cases to the Chambers and reviewing decisions made by the registry and to oversee the daily activities of the registry. Currently (2023) the presidency is headed by Piotr Hofmański, a jurist from Poland who was elected on March 11th 2021 to hold the office of the presidency[127].

ii. The Judiciary or the Chambers

Article 39(1) of the Rome statute[128] provides for the divisions of the Chambers into three types, the Pre-trial division, the Trial division, and the Appeals division. The Chambers is made of 18 judges, who are elected to serve the office of non-renewable nine years by the Assembly of States Parties (ASP). The primary function of the judges of the ICC from the Chambers is to issue arrest warrants and summonses and to conduct trials for the criminal offenders alleged to have committed international crimes and finally to render decisions from the trials conducted. Moreover, the president of the ICC is elected from amongst the judges of the Chambers.[129]

iii. The Office of the Prosecutor (OTP)

This is the third and independent organ of the ICC having powers to receive referrals and accredited information concerning occurrence of commission of international

[126]The ICC Regulations, ICC-BD/01/05/16 (Regulations of the Court)
[127]Wikipedia, Presidency of the International Criminal Court. Available at https://en.m.wikipedia.org/wiki/Presidency_of_the_International_Criminal_Court (accessed on 22 October 2024)
[128] Rome Statute, (n 3)
[129] Chazal, N, (n 37) p 123

crime that falls under the jurisdiction of the ICC. Article 34(b) of the ICC statute[130] establishes the OTP as one of the organs of the Court. Article 42(1) of the ICC Statute establishes the OTP as an independent organ and it includes neither seeking nor acting on instructions from outside actors. Rule 13 of the Rules of Procedure and Evidence (RPE)[131] provides that the OTP shall be headed by an independent prosecutor who should act independently and impartially in situation and case selection. The OTP also has the responsibilities to investigate on situations of alleged international crimes, to make examination of the same and to lead the prosecution of the perpetrators of the atrocities alleged to have been committed[132].

The OTP is made of three divisions that work in coordination, these are; the jurisdiction, complementarity and corporation division as the first division that has the primary role to determine the jurisdiction of the ICC over a certain situation, also to advise on issues of admissibility of situations or cases to The Chambers. The second division is the investigation division having duties and responsibilities to provide investigative expertise in relation to the situations of international crimes as well as to determine and gather relevant evidence to prove the alleged international crimes.

Lastly, the prosecution division which has the role to conduct litigation before the Chambers and standing as prosecutors of the perpetrators of the alleged atrocities, including preparing and submission of written or oral submission before the Chambers. The chief prosecutor and deputy prosecutor are being elected by the ASP

[130] Rome Statute, (n 3)
[131] International Criminal Court, Rules of Procedure and Evidence, rules 89-93, IT/32/Rev.50 (2015)
[132] ibid

on a 9 years term which is non-renewable. The current (2023) chief prosecutor is Karim Ahmad Khan who was elected on 12th February 2021, whose predecessor was Fatou Bensouda, who served from 15th June 2012 until 15th June 2021.[133]

After a crime of international element has been committed, among other procedures, the OTP does situation selection and then case selection. The term situation has been interpreted by the Pre-Trial Chamber I of the ICC (PTC) as being generally defined in terms of temporal, territorial and, in some cases, personal parameters.[134] Thus, simply put, a situation is a more general context within which cases may be identified during the course of investigations. A situation may cover the entire territory of a specific state, such as the Democratic Republic of the Congo (DRC) or Kenya, or a more limited region or area within a state, such as Darfur in Sudan. Moreover, Article 11 of the Statute limits all situations to the time after the Statute entered into force.[135]

iv. The Registry

This is an independent organ of the ICC vested with responsibilities and duties to act as an intermediate service provider of all other organs of the court to ease the functions of the court. The services of the registry include keeping and management of records of the court's proceedings and decisions, aiding interpretation and translation during proceedings of the court, aiding support to the victims in attending court sessions, organizing support and protection of witnesses, also organizing field

[133]Wikipedia, Prosecutor of the International Criminal Court. available at (https://en.m.wikipedia.org/wiki/Prosecutor_of_the_International_Criminal_Court#:~:text=Incumbent,Karim%20Ahmad%20Khan&text=The%20current%20prosecutor%20is%20Karim,2012%20until%2015%20June%202021 (accessed on 22 October 2024)

[134]DRC Decision on Applications for Participation in the Proceedings of VRPS-1-6, (PTC I 17th Jan 2006)

[135]Lovisa Bådagård (n 79) pg 660

office outreach, providing necessary information concerning the court to the media, conferences and other channels of information.[136]

3.4 Conclusion

In conclusion, this chapter has outlined the international legal and institutional framework governing the administration of international criminal justice, highlighting the essential treaties and the core standards and principles established therein, and the central institution, which is the ICC, that shape accountability for international atrocities at the global scale. The next chapter shall examine the administration of international crimes in Kenya and Sudan as African case studies in conformity with the international legal framework`s standards and principles, the glitches in achieving justice for international crimes and the intervention of the ICC.

[136]Chazal, N, (n 37) p 123

CHAPTER FOUR

ADMINISTRATION OF INTERNATIONAL CRIMINAL JUSTICE IN KENYA AND SUDAN AND THE ICC INTERVENTIONS

4.1 Overview

The previous chapter has narrated fundamental aspects of international criminal justice imposing a state responsibility to prevent, investigate, prosecute, and punish international crimes as it is enshrined in the Rome Statute and other relevant international legal instruments. This chapter makes an assessment on the dynamics of the state responsibilities within the jurisdictions of Kenya and Sudan, with an analysis of the efforts and shortcomings of these states to prevent, investigate, prosecute and punish international crimes.

4.2 The National Legal Framework

The prosecution of international crimes by African domestic courts has a direct link with domestication of the Statute to realize the 'principle of complementarity' of the ICC. Domestication of the statute by African states simply entails that the African states are able to prosecute international crimes at the domestic level, giving the ICC its complementarity role when these African states are unwilling to prosecute the said crimes. In Kenya and Sudan, the domestic legal framework for investigation, prosecution and sentencing international crimes is here below provided;

4.2.1 Legal framework in Kenya

As far as prosecuting international crimes at the domestic level is concerned, Kenya entered signature to the Rome Statute on 11 August 1999 and proceeded to ratify it

on 15 March 2005. Kenya took 3 years to implement the Statute[137]. Kenya is also among the few African countries which have incorporated the provisions of the Rome statute of the ICC hence domesticating the same. Here below is the governing legal framework for administration of international crimes in Kenya.

4.2.1.1 The Constitution of Kenya[138]

The Kenyan Constitution, through its comprehensive Bill of Rights, integration of international law, and provisions on national security and good governance, provides a full-bodied legal framework for the recognition of human rights and the prosecution of international crimes. At the immediate Preamble, it provides for "recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law"[139].

Article 2 (6) recognises the treaties to form part of Kenyan laws as it reads;

> *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*

Chapter four of the Constitution provides for the Bill of Rights, which cherishes fundamental human rights to the Kenyan citizens in a wider coverage. Article 19 (2)[140] provides for the purpose of recognising and protecting these human rights and fundamental freedoms which is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all

[137]ICC - Kenya Ratifies Rome Statute available at https://www.icc-cpi.int/news/icc-kenya-ratifies-rome-statute accessed on 14 June 2024
[138] Constitution of Kenya, 2010
[139] Ibid, Preamble
[140]Ibid

human beings.

Article 21 (4)[141] provides that;

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

In line with the above provision, Article 51 (3) (b) provides that;

> *"Parliament shall enact legislation that takes into account the relevant international human rights instruments"*

These provisions provide for the State's responsibility and commitment that the state has made at an international level, mostly through treaties, conventions, or other international agreements to meet its international human rights obligations by both creating (enacting) and putting into action (implementing) human rights laws. The Bill of Rights has provided for fundamental rights to be protected that which are related to the context of international criminal justice. These are;

The right to life, as provided under Article 26 (1)[142] to the effect that "every person has the right to life and that a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law". The other right is equality and freedom from discrimination[143]. The other is the freedom and security of the person[144] which provides that "every person has the right to freedom and security of the person, which includes the right not to be; subjected to any form

[141]Ibid
[142]Ibid
[143]Ibid, Article 27
[144]Ibid, Article 29.

of violence from either public or private sources, subjected to torture in any manner, or treated or punished in a cruel, inhuman or degrading manner".

Article 50 (2)[145] provides for a right to a fair hearing to an accused person which includes, *inter alia*, the presumption of innocence. This provision ensures the rights of an accused person, including the individuals accused of committing international crimes, the rights to a fair trial and just criminal proceedings as demanded by the international criminal justice standards.

Article 238 (2) of the Constitution[146] provides for the principles of national security which includes, *inter alia,* "compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms". This implies that, in ensuring security of the national from either internal or external threat, the national security shall not violate the human rights and commit international crimes.
On the matters of immunity and individual criminal liability, Article 143 (4) provides that;

> *"The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."*

This provision ensures that as long as Kenya is part of an international treaty that allows for the prosecution of heads of state for specific crimes, in this case, the Rome Statute which provides for prosecution of an individual alleged to have committed international crimes of war crimes, genocide, crimes of aggression and crimes against humanity, then the President cannot claim immunity under Kenyan

[145] Ibid
[146]Ibid, Article 238 (1)

law for those crimes.

In line with this, the provision of Article 145 (1)[147] provides for removal of President by impeachment by a National Assembly where there are serious reasons for believing that the President has committed a crime under national or international law. This applies the same to the Deputy President[148] a Cabinet Secretary[149] and a County Governor[150]

4.2.1.2 International Crimes Act[151]

Kenya enacted the Act as a wide-ranging legislation reflecting the provisions of the Rome Statute. The year of 2008 it is when this Act was enacted by the Kenyan parliament and on 1 January 2009 the same came into operation.[152] This Act was enacted to address all the international crimes as mentioned in the Rome statute specifically on prevention, prosecution and punishment of the same, as well as provisions for co-operation with the ICC. The Act was enacted to perform as a domestic legal framework serving the purpose of prosecution of international crimes domestically.

The enactment of the Act was of utmost importance because Kenya had historically been practicing dualist approach on domestic application of the international law which demanded existence of domestic legislations. Section 6 (1) of the Act explicitly establishes for international crimes triable in Kenyan courts, it provides for

[147]Ibid, Article 145 (1)
[148]Ibid, Article 150 (1)
[149]Ibid, Article 152 (6)
[150]Ibid, Article 181 (1)
[151]Act No. 16 of 2008 (R.E 2012)
[152]Kweka, G. I, "National Prosecution of International Crimes in Africa Law and Practice from Kenya, Rwanda and Uganda", PhD (Law) Thesis, University of Dar es Salaam, Tanzania, 2017. Pg. 322

criminal liability for a person who, in Kenya or elsewhere, commits genocide; a crime against humanity; or a war crime, is guilty of an offence. The said provision defines the said international crimes are consistent with those outlined in the Rome Statute. This provision also has an implication that Kenyan courts have jurisdiction over international crimes, irrespective of where they are committed, provided the accused is present in Kenya.

Section 8 of the Act[153] provides for jurisdiction to Kenyan High Court to try offences and punish offenders of international crimes as the court of first instance. This implies compliance and realization of the principle of complementarity of the ICC by the Kenyan domestic High Court. However, the Kenyan High Court has divisions with jurisdiction to try different matters depending on their nature, therefore, the appropriate division that was proposed to determine international crimes was the International and Organized Crimes Division (IOCD) which was to be established by the Chief Justice of Kenya through a Government Notice[154]. Surprisingly, on 8 December 2015, the Chief Justice through a Government Notice[155] only established a High Court Division on Anti-corruption and Economics Crimes Division in Nairobi and Admiralty Division in Mombasa, but the IOCD was not established until today, and the existing Criminal Division does not have jurisdiction to determine international crimes arising from the International Crimes Act.

This Act provides for how Kenya will cooperate with the ICC, which includes "the

[153]Act No. 16 of 2008
[154]As per Section 10 of the Judicature Act (CAP 8 R.E 2012) which gives the Chief Justice powers to make rules of court for regulating the practice and procedure of the High Court which includes the power to create divisions within the High Court.
[155] Gazette Notice No. 9123/ 2015

procedures for arrest and surrender of suspects"[156]. Once the ICC issues an arrest warrant of a criminal offender for the offence triable by the ICC, the said warrant is transmitted to the Attorney General or the Director of Public Prosecutions of Kenya who are required to verify the validity of the warrant and ensure that the rights of the suspect are respected during the arrest process, then after, the Kenyan High Court authorizes the said surrender of the suspect to the ICC. The mandates of this provision ensure a prompt and effective response to such warrants, guaranteeing that accused required by the ICC are seized without unnecessary delay.

The Act also ensures the necessary procedure for cooperation with the ICC on transfer of evidence, and assisting with investigations[157]**.** This process includes the collection, preservation, and transfer of documents, records, and other forms of evidence which might be needed by the ICC, relevant for investigations and prosecutions of the suspect. The process stipulated in the Act demands that the requests for evidence should be dealt with extreme diligence to ensure the integrity and concealment of the relevant evidence. On the assistance on investigation, the Act demand the State officials to ensure facilitating the interviewing of witnesses, protection of victims and witnesses, and providing support on logistics for ICC officials making investigations within Kenya, this goes in hand with ensuring their security and safety.

The Act also cements on the enforcement of ICC sentences within Kenya[158]. When the ICC has entered judgment against someone and sentenced to imprisonment,

[156]Ibid, Section 29
[157]Ibid, Section 38
[158]Ibid, **Section 134**

Kenya has no choice than to enforce the sentence. The Act stipulates that such enforcement must conform to the Kenyan laws and the standards given out by the Rome Statute. This includes submitting necessary reports to the ICC, the conditions of custody and detention conform to the international human rights standards. Kenyan authorities are responsible for supervising the enforcement of ICC sentences.

4.2.1.3 Compliance to the International Criminal Justice Standards

At this juncture, the discussion herein observes that the Kenyan Constitution and the International Crimes Act imitates the international criminal justice standards, save for the issue of non-establishment of the IOCD by the Chief Justice to effect Section 8(2) of the said Act, which renders it a mere toothless dog. However, the vow to uphold human rights, the rule of law, and the incorporation of the Rome Statute into its national legal framework illustrates this conformance. Human rights protections, international law integration, establishment of independent judiciary, fair trial guarantees, prohibition of torture and inhuman treatment, accountability and prosecution of international crimes and waiver of immunities demonstrate a strong alignment with international criminal justice standards.

The International Criminal Act demonstrates a strong commitment to international criminal justice and fulfilment of obligations to the Rome Statute on compliance to the standards of the same by narrating clear procedures for arrest and surrender of suspects, transfer of evidence, assistance in investigations, and enforcement of ICC sentences, however, this Act has been faulted by a failure to establish the IOCD. This mentioned cooperation is vibrant in ensuring effective working and operations

of the ICC and the international efforts to end impunity for the international crimes. These milestone reforms in the Kenyan legal framework came after the ICC intervene the situation in Kenya by initiation of charges against high-ranking government officers, including the by then sitting president, Uhuru Kenyatta.

4.2.2 Legal framework in Sudan

Sudan has an intricate history with the prosecution of international crimes, largely influenced by its internal conflicts, political changes, and interactions with international bodies like the ICC. Sudan signed the Rome Statute in 2000 but has not yet ratified it. As such, Sudan is not a State Party to the ICC[159]. At the domestic level, prosecution of international crimes ought to be addressed by domestic penal laws and the Constitutional setups which are discussed herein below.

4.1.2.1 Constitutional Charter for the Transitional Period, 2019

As of 2024, Sudan does not have a permanent constitution in force. After the ousting of the former President Omar al-Bashir in April 2019, Sudan has only been functioning under interim or transitional constitutional arrangements. The temporary Constitution of Sudan is the Constitutional Charter for the Transitional Period of 2019, which was signed and endorsed by Ahmed Rabie of the Transitional Military Council (TMC) and Mohamed Hamdan Dagalo (Hemetti) of the Forces of Freedom and Change (FFC) alliance on 4 August 2019. This Constitution came into being as a replacement of the Interim National Constitution of the Republic of Sudan, 2005 (INC) which was adopted on 6 July 2005 and had been deferred on 11

[159]The ICC, Trying individuals for genocide, war crimes, crimes against humanity, and aggression, available at https://www.icc-cpi.int/darfur accessed on 19 June 2024

April 2019 by Lt. Gen Ahmed Awad Ibn Auf in the 2019 Sudanese coup d'état[160]. In July 2019, the FFC, including citizens' and opposition groups, partnered with the TMC for a 39-month plan to restore political institutions to a democratic system, as a result, on 4 August 2019, the Constitutional Charter came into existence after it had been duly signed as a complement to a political agreement. This constitution was signed on 4 August 2019 comprising 16 chapters containing a total of 70 Articles, however the same has undergone several amendments with an addition of few Articles.[161]

The Constitutional Charter outlines the structure of Sudan's transitional government, including the establishment of a Sovereign Council, a Transitional Cabinet, and other transitional bodies.[162]. As far as international crimes are concerned, this Constitutional Charter has some provisions covering the same as part of interim measures to end political unrest by prosecuting international crimes and end impunity. Chapter 15 of the Constitutional Charter provides for comprehensive peace issues, as Article 68 provides, *inter alia*, for the following duties to be implemented by state agencies during the transitional period;

> Article 68 (1); *"Achieving a just and comprehensive peace, ending the war by addressing the roots of the Sudanese problem and handling its effects, taking into account the provisional preferential measures for regions affected by war and underdeveloped regions, and remedying issues of marginalization as well as vulnerable and most harmed groups"*

[160]Thomas Waterhouse, "Sudan's military, opposition sign constitutional deal detailing power-sharing agreement", France 24, 04 August 2019 available at https://www.france24.com/en/20190804-sudan-military-opposition-sign-constitutional-deal-detailing-power-sharing-agreement accessed on 20 June 2024

[161] https://en.wikipedia.org/wiki/Constitution_of_Sudan accessed on 20 June 2024

[162]United Nations Sustainable Development Group "In Sudan, the stakes are high for the whole of Africa", 01 May 2023 available at https://unsdg.un.org/latest/stories/sudan-stakes-are-high-whole-africa accessed on 20 June 2024

This provision of the Charter emphasizes a rounded and inclusive approach to peace building, centered on justice, addressing root causes of wars, managing effects of the same, giving special measures for marginalized regions, and guaranteeing the inclusion and support of affected and vulnerable groups.

> Article 68 (5); *"Working on stopping hostilities in conflict areas, and building a comprehensive and fair peace process by opening corridors for delivery of humanitarian assistance, and releasing prisoners and persons convicted because of the war, and exchanging prisoners"*

This provision poses a duty to the state agencies to seek to take steps to end the fighting in conflict areas and fashioning a fair and inclusive peace process, by, *inter alia*, letting humanitarian aid to reach those in need, freeing and exchanging prisoners of the war.

> Article 68 (7); *"Commencing the implementation of transitional justice and accountability measures for crimes against humanity and war crimes, and presenting the accused to national and international courts, in application of the principle that there is no impunity"*

This provision imposes a duty to state agencies to reassure the beginning the process of interim justice and holding accountable the perpetrators of crimes against humanity and war crimes in Sudan. It seeks to ensure that no one is exempted from punishment by bringing the accused to both national and international courts.

> Article 68 (10) *"Adhering to the relevant international standards for compensation and return of properties to displaced persons and refugees, and ensuring and guaranteeing the human rights of displaced persons and refugees set forth in international agreements and national laws within the voluntary return process and after"*

This provision provides for state agencies to adhere to international standards to

compensate and return properties to displaced persons and refugees. The process which involves ensuring and protecting their human rights as specified in international agreements and domestic laws, both during and after their voluntary return. This Constitutional Charter indicated Sudan's commitment to accountability and justice, both domestically and potentially in cooperation with the ICC.

4.2.2.2 The Criminal Act of 1991[163]

The Sudan Criminal Act of 1991 is primarily centered in with providing for and governing domestic criminal felonies and integrates principles of Islamic law (*Sharia*). This focus means the Act details various crimes typically committed within the jurisdiction of the country, such as Hudud offences, theft, assault, and other common offenses. This Instrument provides a legal framework for dealing with these domestic issues through the application of punishments consistent with both Sudanese law and Islamic principles. Some of the punishment includes amputation, fines, imprisonment, or corporal punishment like death, reflecting the inspiration of the *Sharia*.

Having so said, the 1991 Criminal Act clearly does not overtly provide for international crimes as incorporated by the Rome Statute. The limitation of the Sudan Criminal Act to domestic offenses simply implies that it lacks provisions to deal with the complexities and gravity of international crimes. For instance, Section 130(1) of this Act defines an offense of murder as homicide where on person intentionally causing the death of another person. Section 130(2) provides for punishment for the offense of murder which can include the death penalty as a

[163]Act No. 3 of 1991

capital punishment, however, the same does not incorporate the legal mechanisms required to prosecute someone for genocide or crimes against humanity, which often involve mass atrocities and are crimes of concern to the international community as a whole.

This discrepancy is vital for the reasons that the international crimes, mostly in African countries, generally include not just individual perpetrators but also State officials and complex political, social, and military contexts. Therefore, prosecution of these crimes always demands international cooperation and a steady domestic legal and institutional framework that can accommodate the multinational nature of these crimes. To the contrary, this Act is enacted to deal with more forthright localized crimes that fall within the Sudanese jurisdiction.

The absence of provisions for international crimes in Sudan's legal framework has been a significant issue, especially given the country's history with such offenses. The Darfur crisis witnessed mass violation of human rights and commission of international crimes, which are not addressed into the domestic law. As of 2024, there is an ongoing civil war in Sudan which mainly includes a struggle for power between the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) which has resulted into substantial humanitarian suffering, with thousands of civilians murdered and millions displaced. However, with the existing legal framework in Sudan, there is no any promising chance for domestic prosecution of these international crimes, therefore all the lives lost shall never meet justice.

4.2.2.3 Compliance with the International Criminal Justice Standards

The Constitutional Charter was drafted with a picture in mind to aligning with

international criminal justice standards, more specifically in terms of human rights protections and interim justice. The Charter has tried to align with international instruments like the UDHR[164], by including several provisions which primarily seek to protect human rights. However, the same does not have a focus on essential matters like fair hearing, judicial independence to curb uncertainty and biasness. The Criminal Act obvious falls short in completely aligning with international criminal justice standards, mainly on a sensitive angle of defining and prosecution of serious international crimes, safeguarding fair trials, and victims and reparations, which are essential elements of international criminal justice. The issue of including corporal punishment and the death penalty are in conflict with international human rights standards. The Act is also silent on cooperation between Sudan with the ICC, leading to uncertainty in how Sudan might handle international requests for assistance or extradition.

4.3 Institutional Framework

The institutional framework in Kenya and Sudan in administering international criminal justice and upholding the standards for effective investigation, prosecution and punishing international crimes comprises a range of legal institutions and enforcement government agencies. The following are the said institutional frameworks in Kenya and Sudan.

4.3.1 Institutional Framework in Kenya

As stated in the previous part, Kenya ratified the Rome Statute in 2005, thus

[164]Universal Declaration of Human Rights of 1948 (General Assembly resolution 217 A)

accepting the ICC's jurisdiction over international crimes committed within its territory or by its nationals. This imposes a mandatory state responsibility for Kenya to take all the necessary initiatives to prevent, investigate, prosecute and punish international crimes. Kenya has made significant treads in addressing international crimes through constitutional reforms (The Constitution of 2010[165]) and enactment of the International Crimes Act[166] to prosecute the crimes domestically and to aid cooperation with the ICC as discussed in the previous part. In enforcing the laws enacted specifically for international crimes and taking measures to realize state responsibility, Kenya has adopted different mechanisms to enable effective prosecution of international crimes at domestic level, including moves for establishment of institutions or bodies to aid prosecution of international crimes.

4.3.1.1 Initiatives on Establishment of the International and Organized Crimes Division

The whole process of bringing changes and accountability for international crimes in Kenya began with enactment of the laws which included the International Crimes Act which vested the High Court of Kenya with jurisdiction to prosecute international crimes[167]. This developed a need to establish a specialized division of the High Court specific to deal with international crimes which is the IOCD[168]. However, the movements on its establishment remained silent until in May 2012, when the Judicial Service Commission (JSC) of the judiciary of Kenya began a process of establishment of the IOCD and to begin its operations to materialize the

[165]Constitution of Kenya, (n 122)
[166]Act No. 16 of 2008 (n 135)
[167]Ibid, S. 8(2)
[168]Kweka, (n 72)

International Crimes Act[169].

The IOCD was to be established with mandate and powers to prosecute international crimes covered by the Rome statute and those provided under Section 6 of the Kenyan International Crimes Act[170], these are war crimes, crimes against humanity and genocide. The IOCD was intended to be a clear starting point commitment of the Kenyan government to end impunity and to comply with state responsibility against international crimes committed in Kenya during the post-election violence of 2007/08.[171] However, it is unfortunate that the IOCD has never come into existence regardless of several attempts and pressure from different human rights activists, victims of the violence as well as the international community. This challenge is linked up with the political unwillingness because among the alleged perpetrators of the said crimes are the senior political leaders, military officials as well as personnel's from the Kenyan government[172].

4.3.1.2 The Criminal Investigation Department

The Criminal Investigation Department (CID) was restructured in 2008 with primary responsibility of investigation of serious and complex crimes in Kenya[173]. The crimes committed during the post-election violence in Kenya were investigated by the CID and prosecuted by the Director of Public Prosecution (DPP). Cases brought to the Kenyan High Court by the DPP for the crimes committed in the 2007/08 post-election violence were subjected to investigation by the CID.

[169]Kweka, G. I, "National Prosecution of International Crimes in Africa Law and Practice from Kenya, Rwanda and Uganda", PhD (Law) Thesis, University of Dar es Salaam, Tanzania, 2017. Pg. 322
[170]Ibid
[171]Ibid
[172]Ibid
[173]Ibid

4.3.1.3 The Witness Protection Agency (WPA)

This is a government agency established under the Witness Protection Act[174] "to provide protection and support for individuals who are at risk due to their participation as witnesses in criminal or other significant legal proceedings. Its primary purpose is to safeguard witnesses and their families from potential harm, threats, or intimidation, which could deter them from providing testimony crucial to justice." The key functions of the WPA includes protection and relocation like secure housing, relocation, to ensure confidentiality of witnesses' identities and information, support services like psychological and social support to witnesses and coordination with law enforcement like the judiciary.

4.3.2 Institutional Framework in Sudan

Sudan is not a member state to the Rome Statute and therefore it does not recognise and acknowledge the jurisdiction of the ICC over international crimes committed within its territory or by its nationals. However, during the years of conflict in Sudan, in different times, several bodies have been established with a purpose of examining human rights violations as well as international crimes. These bodies include national commissions and courts with an aim of addressing the atrocities committed during the years of the conflict. These include the following;

4.3.2.1 The Special Criminal Court for Darfur Crimes

In June 2005, the Sudanese government, though a presidential Decree No. 70 by then-President Omar al-Bashir, established an independent special court with

[174] Act No 16 of 2006

jurisdiction to prosecute crimes under the Sudanese Criminal Act. This court was named as the Special Criminal Court which was stationed at three regions, Al Fasher, Nyala and Al Geneina. Furthermore, this court was vested with jurisdiction to prosecute any charges submitted by the Judicial Investigations Committee (JIC) and any other charges as may be determined by the Chief Justice.[175] This discretional jurisdiction provided a room for the JIC and the Chief Justice to initiate any criminal charges including the genocide, war crimes, and crimes against humanity even though they are not provided under the governing Criminal Act. This was a result of international pressure and the need to address the widespread human rights violations and atrocities committed during the Darfur conflict. The establishment of this court, in a third eye, was intended to demonstrate Sudanese ability and willingness to prosecute international crimes in its own domestic courts so as to counter calls for international intervention[176]

4.3.2.2 The Judicial Investigations Committee (JIC)

This committee was established in 2005 by the Sudanese government part of its response to the international pressure and demands for accountability and responsibility for the human rights violations and international crimes committed during the Darfur conflict. It was established through Presidential Decree No. 97, issued by President Omar al-Bashir with the functions to investigate atrocities, identifying perpetrators of the atrocities, recommending cases for prosecutions to the

[175] The Redress Trust, Accountability and Justice for International Crimes in Sudan; A Guide on the Role of the International Criminal Court, London, May 2007 pg 39. available at https://redress.org/wp-content/uploads/2018/01/May-Accountability-and-Justice-for-International-Crimes-in-Sudan-A-Guide-on-the-Role-of-the-International-Criminal-Court.pdf accessed on 29 July 2024

[176] The Redress Trust, (n 159), pg 32

Special Courts for Darfur Crimes, to gather and keep evidence and conduct fact-finding missions. The committee was made of experienced judges selected to supervise the investigations, a team of trained investigators and legal advisors who would advise the committee on the modality of investigation in alignment with the international standards.[177]

With minimal outcome, since its establishment, the Committee has managed to conduct investigation and recommend prosecution in a number of cases including the Mukjar Massacre case[178] the 2005 gang rape cases[179], only to mention a few.

4.3.2.3 The National Commission of Inquiry (NCI)

The NCI was established in June 2005 by the Sudanese government to investigate claims of violation of human rights and international atrocities committed in the Darfur region in the context of domestic prosecution in ensuring accountability and justice for victims of international crimes in Sudan. It was established as part of Sudan's efforts to address the crimes committed during the Darfur conflict. Its establishment was a result of recommendations from various international bodies, including the UN which stressed the need for a reliable and sovereign mechanism to address past crimes. It was meant to uncover the truth by investigating atrocities, identifying perpetrators, collecting evidence, recommend reforms to prevent future violations and to promote reconciliation.[180] However, due to the unstopping political unrest, the Commission has been unable to materialize its functions and therefore

[177]Ibid
[178]Ibid
[179]Ibid
[180]Ibid

become dormant.

4.3.2.4 The Specialized Prosecution Department for Crimes against Humanity

This department was established in September 2005 by the Sudanese government, whereby the Special Prosecutor had the mandate to prosecute charges of international humanitarian law to the Special Criminal Court. These changes came to cure the mischief of absence of experts in prosecution of atrocities with elements of international crimes. However, this change was tamed by majority of legal experts and activists that the same was a direct response to halt the intervention of the ICC, because it lacked merits[181]. The Special Prosecutor successfully led a number of prosecutions to the specialised courts; however, these did not include the high-ranking officers from the Al Bashir`s government, which were the leading perpetrators of the atrocities in Darfur.

4.4 Prosecution of International crimes in Kenya and Sudan

Having the legal framework and the institutions for prosecution of international crimes, though weak, a number of cases have been prosecuted and punished at a domestic level with regards to the international crimes in Kenya and Sudan. Here below is a highlight of several cases prosecuted domestically within the local jurisdictions of the aforementioned states.

4.4.1 Prosecution of International Crimes in Kenya

The prosecution of international crimes in Kenyan domestic courts, particularly in the aftermath of the 2007-2008 post-election violence, signifies a fundamental aspect

[181] ibid

of the state's pursuit of responsibility, justice, and accountability. However, the prosecution of these crimes falls out of the ambits of the International Crimes Act, as the later was enacted on 2008 and came into force on 1 January 2009.[182] This means that, the perpetrators could not be prosecuted in a domestic legislation that was not in force at the time of the commission of the crimes, which is 2007 to 2008. Instead, the few perpetrators of these crimes were prosecuted in the Kenyan domestic courts not on international crimes *per se*, but with ordinary municipal crimes which included murder, handling stolen goods, burglary, rape and defilement which in a big picture, they encompass the *actus reus* (the act) of crimes against humanity. Some of these cases on prosecution of offences for the 2007 post-election violence are as follows;

R v Stephen Kiprotich Leting and three others[183]**,** in this case, the suspects were then taken to the High Court for trial on the charges of murder contrary to Section 203 and 204 of the Penal Code of Kenya[184] by causing death of about 35 people.[185] The case ended up by the accused being acquitted for the failure of the prosecutor to prove the charges beyond reasonable doubt. The case of R v. Peter Kipkemboi Ruto,[186] in this case, the accused was sentenced to life imprisonment by the High Court in Nakuru in June 2012 who then appealed to the Court of Appeal, which upheld the decision of the High Court on conviction but altered the sentence to a death penalty.

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[182]Ibid
[183]High Court Criminal case no 34 of 2008 at Nakuru. Available at http://kenyalaw.org/caselaw/cases/view/55195 (accessed on 27 July 2024)
[184] CAP 63 R.E 2012
[185]HJ van der Merwe, *"Prosecuting Crimes Related to the 2007 Post-Election Violence in Kenyan Courts"* in Gerhard Kemp *et al*, International Criminal Justice in Africa Issues, Challenges and Prospects, 2016, pg 36
[186] [2010] eKLR.

The Kalenjin Warriors Case, which resulted into conviction of some individuals, while others were acquitted due to insufficient evidence or procedural irregularities.[187] The other case is the case of Republic v John Kimita Mwaniki[188] in which the accused was charged and found guilty of the offence of murdering one Isaac Mwangi on 31 January 2008 and consequently was sentenced to death. The case of Republic v. Edward Kirui [189] which involved a police officer who was alleged to have shot two individuals to death. The accused was acquitted by the trial court based on discrepancies regarding the identification of the accused as the shooter. However, on appeal, the Court of Appeal quashed the acquittal and found the accused guilty of the offence.

Other cases include the case of Republic vs Ben Pkiech Loyatum[190], Republic vs. James Omondi & 3 others[191], Republic v. Andrew Mueche Omwenga[192] and many more. However, as stated earlier, the above-mentioned cases have been prosecuted in ordinary courts, and not in the special court for international crimes, the IOCD, and therefore, they were prosecuted as ordinary crimes, and not as international crimes, under the Penal Code[193] and not the International Crimes Act[194].

4.4.2 Prosecution of international crimes in Sudan

The horrors of the Darfur conflict are regarded as one among the gravest horrors in

[187]Wangui, J.J, Kenya Witness Claims Kalenjins Prepared for Violence, 11 November 13, available at https://reliefweb.int/report/kenya/kenya-witness-claims-kalenjins-prepared-violence accessed on 10 July 2024
[188] Criminal Case No. 116 of 2007, [2011] eKLR.
[189][2009] eKLR
[190] Eldoret HRCC No. 5 of 2008.
[191] Criminal Case No. 57 of 2008, [2015] eKLR
[192] Nakuru HRCC No. 11 of 2008.
[193] Chapter 63 [R.E 2012]
[194] Act No. 16 of 2008

the history of African domestic conflicts. This attracted the international attention and put much pressure for the same to be addressed by prosecuting the perpetrators of the atrocities. The Special Criminal Court for Darfur crimes, has prosecuted only a limited number of the perpetrators alleged to have committed the international crimes. Here are some of the cases;

The case of Adam Ibrahim Abdallah[195] involved the accused persons, a police officer and several soldiers who were charged with killing of one Adam Ibrahim Abdallah, a prominent community leader in Mukjar, West Darfur. The Special Court for Darfur Crimes found the accused persons guilty of the offence charged and consequently sentence the police officer was sentenced to death, while the soldiers were sentenced to prison for terms ranging from 10 to 20 years. The case of gang rape in South Darfur[196] involved charges of gang rape of two young girls aged 13 and 15 by members of the Janjaweed militia in South Darfur, the Special Court for Darfur Crimes found the accused guilty of rape and sentenced to prison for terms ranging from 15 to 25 years. The other is the trial of military officers for war crimes in South Darfur (2012) and the case involving prosecution of a government official in Darfur (2013)197.

4.5 Deficiencies in Domestic Administration of International Crimes in Kenya and Sudan

The responsibility of states to prevent, investigate, prosecute, and punish international crimes at the domestic level is an important aspect of international

[195]The case of Adam Ibrahim Abdallah (2005)
[196]Case of gang rape in South Darfur (2005)
[197]The Redress Trust, (n 159), pg 34

criminal justice in any civilized state. This responsibility is essential for guaranteeing justice, accountability, and deterrence of future crimes. Despite noticeable efforts, prosecution and punishing international crimes in Kenya and Sudan has been hindered with significant challenges and setback as highlighted here in this part.

4.5.1 Deficiencies in Domestic Administration of International Crimes in Kenya

In the Kenyan context, there have been efforts to end impunity and seek justice for prosecution of crimes committed during the post-election violence of 2007-2008 as discussed hereabove. Despite the discussed legal transformations and initiatives, significant deficiencies remain clogging Kenya's ability to fully end impunity and prosecute the perpetrators of international crimes at the domestic courts. These deficiencies are as follows;

4.5.1.1 Limitation on Non-Retroactivity of the Law

A principle of "*nullum crimen sine lege"* entails that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". Along with this, it is the principle of "*nulla poena sine lege"* which means that "a person cannot or should not face criminal punishment except for an act that was criminalized by law before he performed the act" [198]. The two principles implies and cements that there shall not be prosecution of individuals where there is no existing law prohibiting such act or omission, same to the penalty to the same act

[198]International Criminal Law Services, general principles of international criminal law, 2017 available at https://iici.global/wpd/wp-content/uploads/2024/02/icls-training-materials-sec-3-general-principles-of-icl.pdf accessed on 20 July 2024

or omission. This literally means that the law must exist before the commission of the alleged crime.

In the context of prosecution of international crimes resulted from the post-election violence of 2007-2008 in Kenya, the International Crimes Act, the only legislation providing for international crimes, could not be enforced over these crimes in the Kenyan domestic courts because the same came into force in January 2009, a year later after the alleged atrocities which did not exist as crimes in the Kenyan laws.[199] The crimes that were prosecuted as a result of the post-election violence of 2007-2008 were only based on ordinary domestic offences from the Penal Code of Kenya[200].

4.5.1.2 Lack of Political Will

Following the aftermath of the Post election violence in Kenya, prosecution of international crimes at the domestic courts in Kenya was hindered with a significant challenge of strong opposition and reluctance on support for the judicial process by political leaders on the fact that to a large extent the violence was initiated and supported by the said political leaders.[201] The government leaders in these occasions openly disregarded the necessary required support to the judiciary like provision of enough manpower, training and funding, protection of witnesses, issuance of sufficient evidence, and adequate investigation on the crimes.

On the other hand, coming into force of the IOCD has been impossible due to

[199]Rukooko A.B & Silverman. J *'The International Criminal Court and Africa: A fractious relationship assessed'* African Human Rights Law Journal, 2019, Vol 19 pg 85-104, p 89
[200] CAP 63 R.E 2012
[201]Rukooko, (n 183)

unwillingness of the political leaders simply because the said court would have jurisdiction to determine international crimes committed by these political leaders[202]. There have been proposals from within and outside the Kenyan Parliament to pass Constitutional amendment to establish an independent tribunal with jurisdiction to prosecute international crimes from a lesson of Rwanda, however, the same has been ignored by the majority of political leaders until to date[203]. This goes together with intentional denial of full support to the WPA[204].

4.5.1.3 Weak Investigation of Criminal Cases

A number of cases brought to the Kenyan High Court by the DPP could not succeed in leading to conviction of the accused persons due to poor investigation by the CID. A number of situations could not establish triable cases due to insufficient and weaknesses gathered from the investigation of the CID and therefore leading to a large number of cases to be dropped by the DPP before being taken to court and some of the cases which were taken to court could as well not succeed due to insufficient evidence that was a result of poor investigation.[205] This challenge was caused by a number of factors including political interference, absence of qualified personnels, destruction of evidences and weaknesses in protection of potential witnesses[206].

4.5.1.4 Poor Witness Protection and Unwillingness of Witnesses

In the process of prosecution of international crimes committed in Kenya during the

[202]Ibid
[203]Ibid
[204]Ibid
[205]HJ van der Merwe, (n 169)
[206]Ibid

post-election violence, a number of incidents for disappearance of key witnesses were reported, and some other witnesses could not be willing to testify in court against the accused persons in fear of their safety and security. There have been reports on incidents of disappearance of key weaknesses whose evidence and testimony are against political or government leaders claimed to have committed the atrocities.

A famous incident is that of Meshack Yebei, a key witness to testify against the then deputy President William Ruto, who was found dead after his disappearance for a number of days.[207] There have been reports and allegations that the WPA has an image problem by acting as a shield against witnesses and testimonies that incriminates powerful political figures, therefore making it hard for potential witnesses to entrust it with their safety. This was a tremendous failure by the WPA which led to a critical challenge in prosecution of the atrocities within Kenyan local courts.[208]

4.5.1.5 Reluctance in Finalizing the Establishment of the IOCD

The reluctance in establishment of the IOCD has evidently posed a significant deficiency in prosecution of international crimes in Kenya. As stated earlier, the IOCD was to be established by the Chief Justice of Kenya through a Government Notice,[209] however that has not been done until today regardless of establishment of other Divisions of the High Court on 8 December 2015.[210] Prosecution of

[207] Ibid
[208] Kweka, G, J (n 72)
[209] As per Section 10 of the Judicature Act (CAP 8 R.E 2012) which gives the Chief Justice powers to make rules of court for regulating the practice and procedure of the High Court which includes the power to create divisions within the High Court.
[210] Gazette Notice No. 9123/ 2015

international crimes in Kenya has been impossible simply because the existing criminal division of the High Court is not vested with jurisdiction to prosecute international crimes under the International Crimes Act. The absence of the dedicated division to address serious international crimes denies the Kenya's ability and willingness to prosecute international crimes as required by the international standards.

4.5.2 Deficiencies in Domestic Administration of International crimes in Sudan

Sudan's state responsibility for international crimes is mired with critical setbacks and serious challenges, with a reflection on its history of total impunity and poor governance, rendering prosecution of international crimes at the domestic level nearly impossible. Despite the discussed initiatives invoked by the Sudanese government, momentous deficiencies deter the Sudan state to prevent, investigate, prosecute, and punish international crimes at the domestic courts, hence the same has therefore been a nightmare due to the following impediments;

4.5.2.1 Lack of Accountability and Political Will

Due to international pressure, in December 2005, the Sudanese government detailed that it had identified about 160 suspects to be subjected to investigation for allegations of committing atrocities in Darfur. However, until 2010, it was discovered that the Special Court had only prosecuted 31 suspects in 8 trials out of a total of 15 cases brought before it, this is because of the fact that the majority of the suspects were political and government leaders, therefore, unwilling to provide sufficient cooperation with the court and the Special Prosecutor to conduct the

trials[211]. Just like in Kenya, the Sudanese government leaders have ignored the necessary required support to the judiciary including provision of enough manpower, training and funding, protection of witnesses, provision of sufficient evidence, and adequate investigation on the crimes.

4.5.2.2 Weak Investigation of Criminal Cases

The NCI together with the Specialised Prosecution Department for Crimes against Humanity had proved failure for a number of cases brought before the Special Court leading to acquittal of number of accused persons due to poor investigation. A number of incidents could not lead to potential triable cases as a result of inadequate evidence gathered. However, this was a combination of factors including the absence of support from the government, partiality of the committee and the said department, unwillingness of the witness to testify due to terror and unguaranteed witness protection.

4.5.2.3 Poor Witness Protection and Intimidation of Witnesses

Unlike in Kenya, Sudan has no special body or department specialised for witness protection in the processes of holding accountable the perpetrators of international crimes, and therefore this has been a significant challenge in ensuring successful prosecution of the atrocities committed during the Darfur conflict. In many cases that have ended up acquitting the accused persons, the witnesses and victims of the atrocities have often been unwilling to complain because of fear of themselves being prosecuted for cooked charges of unlawful sexual intercourse or even being killed

[211]Gaeta. P, '*Does President Al Bashir Enjoy Immunity from Arrest?'* Journal of International Criminal Justice, Volume 7, No 2, 1 May 2009, Pg 315–332 p 318

unnoticed[212].

4.5.2.4 Selective Prosecutions

It is the finding of this study that the accused persons in cases before the Sudanese Special Criminal Court are the ones with no strong political influence or status, meaning that there are merely low-ranking military personnel and even ordinary citizens. The high-ranking officials have never been brought to this court to face justice for the crimes committed in the region. The high-ranking officials have been excluded from facing charges in the court due to their political influence over the conduct of the court, and therefore, the same has guaranteed impunity to these senior political officers who are the principal perpetrators of atrocities in Darfur.[213]

4.5.2.5 Trial of Ordinary Crimes

The cases that have been prosecuted by the Sudanese Special Criminal Court are only that of the nature of ordinary crimes like armed robbery, intentional wounding, murder, theft and others. These have denied the wide interpretation of the crimes committed in the region to only be limited to ordinary crimes rather than international crime. This deficiency signifies the serious challenge in the Sudanese judicial and legal systems in exercising state responsibility for the international crimes.[214]

4.6 Intervention of the ICC in Kenya and Sudan

In Kenya and Sudan, the ICC has managed to intervene prosecution of international

[212]Gaeta. P (n 195) p 319
[213]The Redress Trust (n 159) p. 39
[214]Ibid

crimes committed in these countries due to failures and challenges identified in the previous part that established an implication that these nations are either unable or unwilling to prosecute these crimes, hence triggered the complementarity role of the ICC. This part shall make a discussion on the interventions of the ICC in Kenya and Sudan under the umbrella of a complementarity role, so as to aid justice for the international atrocities committed in these states.

4.6.1 Intervention of the ICC in Kenya

The deficiencies in domestic prosecution of the 2007/08 post-election atrocities by the Kenyan judiciary, triggered the intervention of the ICC under the complementarity role. In February 2008, after the outbreak of violence and the spread-out of the atrocities which led numerous human rights defenders and international community to voice up on addressing the same, the former UN Secretary General Kofi Annan led a mediation which resulted in the establishment of the Commission of Inquiry into Post-Election Violence (CIPEV), which is also known as the Waki Commission. The Commission made a report which displayed the scope and nature of the violence and made recommendations that, *inter alia*, the Kenyan government should establish a special tribunal with retrospective jurisdiction to address and prosecute the atrocities resulted from the violence. However, this was not taken into implementation by the Kenyan government, as a result, in July 2009; Kofi Annan handed over the names of the key suspects of the atrocities to the ICC.[215]

On 26 November 2009, the by then ICC Prosecutor, Luis Moreno Ocampo requested

[215]Ibid

approval from the Pre-Trial Chamber to initiate an investigation into the Kenyan situation. The intervention by the ICC was materialized *proprio motu* on March 2010, after the approval of investigation by the PTC. These ICC investigations focused on alleged crimes against humanity committed in the context of post-election violence, in six of the eight Kenyan Provinces.

The investigation in Kenya led to opening of two main cases, with six accused persons, including charges of crimes against humanity, which are; murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts. The charges were a landmark in the international criminal justice as they focused on high-level perpetrators who were prominent political and government figures who were later labelled as the "Ocampo Six".[216] These six accused included; Uhuru Kenyatta, the then Deputy Prime Minister and Minister of Finance, who later became the President of Kenya. The second was William Ruto, the then Minister of Higher Education, Science, and Technology, who later became the Deputy President.[217].

The pre-trial process incorporated the approval or confirmation of charges hearings and in January 2012, the said PTC confirmed charges against four of the six individuals, which are Uhuru Kenyatta, William Ruto, Francis Muthaura, and Joshua Sang. Due to what The PTC considered as insufficient evidence, the charges against Henry Kosgey and Mohammed Hussein Ali were not confirmed. After the completion of the stage of confirmation of charges, before getting into a full trial, the

[216]The ICC Trying individuals for genocide, war crimes, crimes against humanity, and aggression, Situation in the Republic of Kenya available at https://www.icc-cpi.int/kenya Accessed on 8th June 2024
[217]Ibid

ICC entered into a stage of preparation for trial in which both the OTP and Defense teams participated in extensive preparatory activities, including the collection and discovery of evidence, preparation of witnesses, and legal filings[218].

On 18 March 2013, the charges against Francis Muthaura were withdrawn following the Prosecutor`s declaration that the key witnesses had retracted their testimonies as a result of intimidation from unknown domestic individuals. On 5 December 2014, the charges against Uhuru Kenyatta were withdrawn after the Prosecutor declared insufficient evidence as a result of witness intimidation as well as absence of cooperation and the necessary assistance from the government of Kenya in providing necessary records and evidence[219]. The trial against William Ruto and Joshua Sang proceeded until 5 April 2016, when the ICC Trial Chamber declared a mistrial and proceeded to rule out that the evidence was insufficient to support a conviction, citing a disconcerting pattern of witness interference and withdrawal.[220]

4.6.2 Intervention of the ICC in Sudan

The ICC's involvement in Sudan is predominantly linked to the Darfur conflict. The ICC investigations regarding Darfur focused on allegations of genocide, war crimes and crimes against humanity committed in Darfur, Sudan, since 1 July 2002[221]. The UNSC referred this situation to the ICC in March 2005[222]. The UN Secretary-General established the International Commission of Inquiry on violations of

[218]Rukooko A.B, (n 183), p. 40
[219]The ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, 5 December 2014, Available at https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-withdrawal-charges-against-mr accessed on 30 July 2024
[220]The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (ICC-01/09-01/11) available at https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/RutoSangEng.pdf accessed on 10 August 2024
[221] ICC-02/05
[222]UNSC Resolution 1593

international humanitarian law and human rights law in Darfur with responsibilities of investigating reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.[223]

The ICC investigation, which opened in June 2005, has produced several cases with suspects ranging from Sudanese Government officials, Militia/Janjaweed leaders, and leaders of the Resistance Front. The situation in Darfur was the first to be referred to the ICC by the UNSC, and the first ICC investigation on the territory of a non-State Party to the Rome Statute. Former Sudan's President Omar Al Bashir is the first sitting President to be wanted by the ICC, and the first person to be charged by the ICC for the crime of genocide.[224]

The ICC trials concerning Sudan, centered on prosecuting those responsible for some of the most serious international atrocities committed in Darfur, marked a landmark effort of the court to prosecute the senior government protected by domestic immunities. These trials included the following; The Prosecutor vs Omar Hassan Ahmad Al Bashir[225]. This case of is currently at the Pre-trial, his arrest warrants were issued on 4th March 2009 and 12th July 2010 but he was never arrested because he is still at large, until he is arrested and transported to The Hague, the seat of the ICC, his case will remain in the Pre-Trial stage.[226]

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[223]The Redress Trust, (n 159), pg 34
[224]ICC, trying individuals for genocide, war crimes, crimes against humanity, and aggression, Situation in Darfur, Sudan, ICC-02/05. Available at https://www.icc-cpi.int/darfur Accessed on 10 July 2024
[225]Ibid, ICC-02/05-01/09
[226] https://www.icc-cpi.int/darfur/albashir Accessed on 10 June 2024

However, on 11 February 2020, the Sudanese government declared that it had settled to hand over al-Bashir to the ICC for trial, thou the same has not been done until to date.[227] The other case is the case of the Prosecutor vs Ahmad Muhammad Harun[228] who was a minister of State for the interior of the Government of Sudan at the time of the alleged atrocities in Darfur and he was pointed as among the leading perpetrators of the atrocities. Harun is still at large as he is being held by the existing Sudanese government for crimes of corruption and misuse of public office. The full trial is not yet materialized as it is put at halt until he is arrested and transported to The Hague, therefore his case will still be in the Pre-Trial stage.[229]

4.7 Deficiencies faced by the ICC in Advancing International Criminal Justice

Regardless of the efforts made by the ICC in intervening prosecution of international crimes in Kenya and Sudan, the same has encountered significant challenges in achieving its complementarity objective and delivering justice for atrocities committed in these states.

4.7.1 Deficiencies faced by the ICC in Advancing International Criminal Justice in Kenya

The ICC`s journey towards delivering justice for the post-election atrocities in Kenya faced significant challenges despite the court's efforts to hold accountable those most responsible for the atrocities. The eventual termination of these cases

[227] Magdy Samy "Official: Sudan to hand over al-Bashir for genocide trial". *AP News*, 11 February 2020.
[228] ICC-02/05-01/07
[229]The Prosecutor v. Ahmad Muhammad Harun *(*ICC-02/05-01/07), available at https://www.icc-cpi.int/darfur/harun Accessed on 10 June 2024

underlined the challenging deficiencies that can impede the path to justice. These challenges, includes;

4.7.1.1 Political Interference and Unwillingness

The high-profile nature of the cases led to inevitability of political interference. The prosecution of crimes in Kenya by the ICC made out a clear picture that the high ranking accused persons, Kenyatta and Ruto, invoked their political influence to obstruct intervention of the court and challenge the validity of the its proceedings[230].

After the PTC authorized the Prosecutor to initiate investigations into the Kenyan cases, this prompted domestic opposition, including institution of a case in Kenyan high court challenging the involvement of the ICC in addressing the atrocities, and the same was backed by political influence. This was the case of Joseph Kimani Gathungu vs The Attorney General and five others[231], where the applicant challenged the constitutionality of the ICC's involvement in Kenyan post-election violence cases, claiming that the ICC`s jurisdiction to prosecute crimes committed in Kenyan soil was not provided under the Kenyan Constitution, and therefore invalid. The first prayer in the application reads; However, although the case was backed with political influence, the finality of the case was a dismissal for lack of merit.[232]. Kenyatta and Ruto further engaged in diplomatic movements to disgrace the ICC,

[230]Wolf. T.P, "A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases", in Kamari M. Clarke et al, Africa and the ICC, Cambridge University Press, 27 October 2016, pp. 232 – 276 available at https://doi.org/10.1017/CBO9781316556252.010 accessed on 02 August 2024

[231]Constitutional Reference 12 of 2010, The High Court of Kenya (Mombasa)

[232]Charles, C. J, *Kenya vs. The ICC Prosecutor*, Harvard International Law Journal Online, 2012, Vol 53, No. 269, p. 276. Available at: https://ecollections.law.fiu.edu/faculty_publications/249 (accessed on 23 May 2024)

describing it as a Western tool targeting and weakening Africa[233].

4.7.1.2 Lack of Cooperation

The political unwillingness and interference resulted to lack of the required cooperation from the Kenyan government authorities in gathering of evidence and exhibits, maximum witness protection to secure testimonies of key witnesses, and even handling of the accused persons to the ICC[234]. Lack of cooperation can be extended to intentional denial of full support to the WPA which was responsible to protect key witnesses, instead, there had been reports for disappearance of key witnesses due to insufficient cooperation and support in resources and manpower to aid the WPA efficiency in guaranteeing full witness protection[235].

4.7.1.3 Witness Intimidation

A number of witnesses were reported to have been intimidated, received threats and corruptions, hence causing to the withdrawal of decisive and important testimonies from key witnesses. This issue of witness intimidation was very critical as it led to witness withdrawal and therefore resulting into insufficient evidence to prove the charges, hence termination of cases. The incident of disappearance and death of Meshack Yebei who was a crucial prosecution witness in the case against William Ruto and Joshua Sang raised thoughtful concerns about the effectiveness of witness protection initiatives in the Kenyan authorities.[236] Another anonymous witness[237] who was prepared to testify against Ruto and Sang in the ICC was found missing in

[233]Ibid
[234]Ibid
[235]Ibid
[236]Paul. T.R, “Kenya 'ICC defense witness' in Ruto's trial killed”, BBC News, 6 January 2015, available at https://www.bbc.com/news/world-africa-30703876 Accessed on 04 August 2024
[237] Witness Number 536

2013 and his whereabouts are unknown until today[238].

4.7.1.4 Weak Investigations

This challenge included deficiencies in gathering reliable evidence in a case that has domestic political interests for involving a political leader as well as poor investigation strategies and plans. The Prosecution relied on a combination of witness testimonies, documentary evidence, and expert reports. However, the trustworthiness, authenticity and admissibility of these evidences were regularly successfully disputed by the defence.

4.7.2 Deficiencies faced by the ICC in Advancing International Criminal Justice in Sudan

The atrocities in Darfur had significant impact on the region as well as the international community, therefore demanded a strong international response. However, this path to justice by the ICC has been troubled with numerous obstacles. These include;

4.7.2.1 Lack of Jurisdiction and Cooperation

After the ICC issued arrest warrants for Al-Bashir, he strongly contended and objected that Sudan is not a party to the Rome statute and therefore Sudan could not be expected to abide by its provisions just like other superpowers like the United States, China and Russia which do not recognize the jurisdiction of the ICC and the same cannot exercise jurisdiction over them. He said "It is a political issue and double standards, because there are obvious crimes like Palestine, Iraq and

[238]Paul. T.R, (n 220)

Afghanistan, but they did not find their way to the ICC".[239] The Bashir`s government had repeatedly stated that the Special Courts are evidently capable of prosecuting international crimes committed in Darfur, and therefore that the ICC investigation is redundant.[240]

4.7.2.2 Lack of Enforcement Machinery

The ICC`s structure is framed with lack of an essential component to enforce its orders, specifically, arrest warrants. The ICC becomes ineffective when issuing arrest warrants for perpetrators that are alleged to have committed international crimes under the jurisdiction of the court, to be brought before it to face charges. This has therefore led to the ICC not to have the required international recognition, respect, and support for it to properly execute its power as it has no proper, effective and independent police force or ay the enforcement machinery. Consequently, the ICC only depend to the cooperation from member states to arrest the suspect through domestic forces, which appears to be ineffective when these countries are unable or unwilling to cooperate[241].

4.7.2.3 Opposition from African states

The AU itself has been in a frontline to oppose some of the operations of the ICC in the African continent, which in return has raised a concern that the Court could lose the support of its largest regional block. In particular, the AU objected the attempts

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[239] Simon Tisdall, "Omar al-Bashir: genocidal mastermind or bringer of peace?" The Guardian, 20 April 2011. Accessed on 10 June 2024

[240] https://www.justiceinfo.net/en/40491-omar-al-bashir-and-the-burden-of-the-icc.html#:~:text=to%20prosecute%20Bashir.-,The%20case%20highlights%20key%20challenges%20the%20court%20faces%2C%20such%20as,ICC%20becomes%2C%E2%80%9D%20Reeves%20said. Accessed on 10 June 2024

[241] Ibid

by ICC to prosecute sitting head of state in Sudan, Kenya and Libya, and therefore decided not to enforce arrest warrants for Bashir.

This therefore led to a movement of merging the African Court on Human and People`s Rights (ACHPR) and the African Court of Justice (ACJ) to establish a consolidated court having criminal jurisdiction, namely; The African Court of Justice and Human Rights (ACJHR), an international court based in Arusha, Tanzania with a purpose of undermining the role of the ICC in intervening prosecution of international crimes in Africa.[242] The governments of Burundi, South Africa and the Gambia used the Bashir case to justify their intentions to withdraw from the Rome Statute[243].

4.8 Conclusion

The attempts to achieve international criminal justice are to a large extent unsuccessful in Kenya and Sudan due to the political and operational challenges as identified herein. A lot are still to be done by the ICC itself, international community and individual states like Kenya and Sudan. The next and last chapter shall navigate the conclusion of the findings of this research and also to make recommendations on what should be done for successful administration of international crimes in Africa, particularly in Kenya and Sudan.

[242]Wedi, D and Dieu, D; The African Court of Justice and Human Rights, 2018, p 14. available at https://www.africancourtcoalition.org/ (accessed on 14 July 2024)
[243]Ibid

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapters, taking Kenya and Sudan as case studies for Africa, have discussed the legal and institutional framework for administration of international criminal justice together with assessment on the dynamics of state responsibilities within the jurisdictions of Kenya and Sudan, with a focus on the efforts and shortcomings of these states to prevent, investigate, prosecute, and punish international crimes and also a discussion on the role of the ICC with its interventions in Africa, particularly in Kenya and Sudan under the umbrella of a complementarity role, in the process of aiding justice for the international atrocities committed in these states. Therefore, this chapter sums up the study by stating the opinion of the researcher with a projection of the research questions. Also, this chapter provides for possible ways which could be adopted to help effective implementation and administration of international criminal justice in Africa as well as enhancement of the role of the ICC on the same.

5.2 Summary of Findings and Conclusion

This study was designed to research on the deficiencies in the international criminal justice in Africa and the role of the ICC, taking Kenya and Sudan as case studies. The study was framed on four objectives, the first one being to examine the legal framework for administration of international criminal justice in Kenya and Sudan, the second was to assess the state of administration of international criminal justice in Africa particularly in Kenya and Sudan in the context of State responsibility to

prevent, investigate, prosecute and punish international crimes, the third was to establish and analyse barriers to administration of international criminal justice in Africa particularly in Kenya and Sudan, and lasty to examine how the ICC has succeeded or failed in advancing international criminal justice in Africa, particularly in Kenya and Sudan.

In meeting these research objectives, the researcher had to frame the guiding research questions that would lead into seeking precise answers to meet the objectives. These research questions were, first, is the legal framework in Kenya and Sudan effective in administration of international criminal justice? Secondly, what is the state of administration of international criminal justice in Africa in the context of State responsibility to prevent, investigate, prosecute and punish international crimes? Thirdly, what are the barriers to administration of international criminal justice in Africa particularly in Kenya and Sudan? And lastly, in what ways has the ICC been successful or unsuccessful in advancing international criminal justice in Africa, particularly in Kenya and Sudan?

This part therefore provides for responses to these research questions as findings that emanate from discussions of the previous chapters.

The findings of this study are centered on analysis of the African legal framework and state responsibility on addressing international crimes within the domestic mechanisms with a purpose of ending impunity for perpetrators of international crimes in the continent, together with the role of the ICC on the same. The African

continent, that had undergone numerous incidents of grievous atrocities and massive violation of human rights, has taken some domestic measures to address international crimes committed in their jurisdictions, as well as being in the front line to ensure the permanent international court with jurisdiction to try international crimes is being established, believing it to be the only way out in ensuring maintenance of international and domestic peace, promotion of human rights and justice to the victims and perpetrators of international crimes.

This study has navigated the measures taken by Kenya and Sudan in the whole process of administration of international justice and came up with a conclusive finding that, legal framework of Kenya and Sudan are not sufficiently effective in administration of international criminal justice, also these states have not taken effective measures in the context of state responsibility to prevent, investigate, prosecute and punish international crimes in their jurisdictions as there are a numerous barriers to administration of international criminal justice hindering them. On the other side, it is also a conclusion of this study that the ICC has been unsuccessful in advancing international criminal justice in Africa, particularly in Kenya and Sudan because its role has not adequately effective and fully promising in ending impunity or dealing with international crimes in Africa.

This remark is a result of the fact that, to a visible extent, the foremost thing that exist between the ICC and African continent is an antagonistic, hostile and dissenting tension resulted from the questionable interventions of the ICC in Africa, where African leaders and activists believe that the ICC is a western instrument to

weaken and only prosecute Africans and at the same time the African states have been reluctant and unable to prosecute international crimes at the domestic level due to insufficient legal framework as well as flaws in domestic courts to prosecute the same. And more precisely, this tension between the ICC and the African continent has been brought by a number of factors which are centered on the deficiencies in the African political and judicial systems which does not establish a promising future on a permanent solution to international crimes in the continent, by taking the case studies of Kenya and Sudan, as well as the deficiencies in the ICC`s interventions in execution of a complementarity role.

Chapter four of these studies have made an analysis on these deficiencies in the African states, Kenya and Sudan being the case studies, ranging from the legal framework and the state responsibility to international crimes. The deficiencies within the African continent in as far as the administration of international criminal justice can also be summarize to include; inadequacy of African domestic legislations regulating international crimes, limitation on non-retroactivity of the law, lack of political will and accountability, weak investigation of international crimes cases, poor witness protection, intimidation and unwillingness of witnesses, selective prosecutions and trial of ordinary crimes. All these deficiencies finalize the reality that, the administration of international criminal justice in Africa is far from being effective, unquestionable and reliable in prosecution of international crimes.

On the other side the deficiencies or glitches facing the ICC interventions as they have been discussed in chapter four can be summarized to include; political

interference and unwillingness, lack of cooperation from states, witness intimidation, weak investigations, lack of enforcement machinery and opposition form African states, which therefore if not effectively addressed, the prosecution of international crimes in African States shall become a fairytale.

5.3 Recommendations

As far as this study is concerned, it is conclusively summed that the African institutional and legal framework as well as the role of the ICC are rendering unsuccessful dispensation of justice to international crimes in Africa. However, there is still a room to make things right. Considering the fact that Africa is characterized with extreme violation of human rights and commission of fatal atrocities and mostly under the direct or indirect involvement of the state senior officials, therefore, an effective mechanism to try the perpetrators of the international atrocities is of utmost need. Below are the recommended solutions to curb these deficiencies in administration of international criminal justice in Africa.

5.3.1 Enactment of Steady African Domestic Laws

The African continent should develop an intention to become more independent in prosecuting its own nationals and minimize the involvement of the ICC to prosecute Africans for international crimes. This is not by rejecting the jurisdiction of the ICC, but rather, by enacting penal and procedural laws that vest jurisdiction to the domestic courts to try and prosecute international crimes. However, the adoption of the Rome Statute by all the African states should also come into play, giving the ICC the actual complementarity role. Enacting national laws to prosecute international

crimes shall enhance domestic implementation of the Rome Statute.

African countries are unable to prosecute crimes at the domestic level due to lack of a definite legal framework and therefore making the ICC inevitably the first and last resort in prosecution of international crimes for African individuals. The case study of Sudan has vividly demonstrated this for the absence of domestic laws addressing international crimes, which renders the prosecution of the same impossible. If African countries become self-sufficient on the legal framework in prosecuting their own nationals for international crimes, the pessimism towards the ICC and the Western shall come to an end. The reality of the complementarity principle of the ICC shall be materialized only when the African states have undertaken all the necessary measures to ensure proper and effective environment for prosecution of international crimes at the domestic level. Kenya and Sudan have set a landmark example for the need of a steady legal framework to prosecute international crimes at the domestic level.

The said legal framework should strictly provide for prosecution of all the international rimes in alignment with the Rome statute, waiving immunity of political personnel, also providing effective and clear procedures and mechanisms for investigation, prosecution and sentencing the international crimes within the domestic courts. This will ensure effective prosecution of international crimes at the domestic level and the end of impunity for the perpetrators of these atrocities.

5.3.2 Establishment of Independent Special Judicial Organs

African countries are unable to prosecute crimes at the domestic level due to lack of

a definite institutional framework and therefore rendering the intervention of the ICC inevitable. In order to effectively address international crimes at the domestic level, it is a must for the African states to see the importance of establishment of strong, independent and reliable judicial systems with retrospective jurisdiction to prosecute crimes committed before their establishment, this is because the absence of these judicial bodies or courts at the time of commission of the crimes should not guarantee impunity for the perpetrators of these crimes committed. In this case, the International Crimes Act of Kenya should be amended to operate retroactively. The courts or tribunals should be made of well trained and qualified judges and prosecutors, having well-framed mechanisms for witness protection, investigations, collection of evidence as well as independent from political inference.

This also goes along with the demand that the laws establishing these independent judicial bodies with jurisdiction to prosecute international crimes should be made by the parliament itself, as the same is entrusted with powers to make laws as opposed to administrative bodies or only an individual like the Chief Justice. Kenya has set an example on this by the reluctance in establishment of the IOCD by the Chief Justice of Kenya for unknown reasons, despite the fact that the said Chief Justice established other Divisions of the High Court in 2015. This signifies the difficulties in realizing effective prosecution of international crime at the domestic level unless there is full commitment by the law makers as well as political leaders to establish these judicial organs. These independent judicial organs will ease the prosecution of international crimes at the domestic level, free from political influence.

5.3.3 Political Accountability

The political will and zeal to perpetrate justice by senior African political leaders to end impunity over international crimes is of utmost need. The political and government leaders should subject themselves to the principles of rule of law and avoid seeking immunity. The fight against impunity in the African continent requires a strong political will and a firm commitment to attain justice by the senior government and political leaders in Africa. The problems of political interference on legitimate prosecutions of international crimes, lack of accountability, the denied cooperation to the ICC as well as to the domestic judicial systems are significantly hindering justice for international crimes committed within the African borders. In order to end the chain of impunity in African continent, African leaders have no option other than demonstrating a genuine and unwavering commitment to maintain the rule of law and accountability for the perpetrators of international atrocities irrespective of their political status.

At this point, verbal commitments are irrelevant, and instead, African political leaders must demonstrate visible efforts on strengthening national judicial systems, unshielding themselves from immunity on international crimes, strengthening witness protection mechanisms as well as reparation for victims and also tangible mechanisms for cooperation with the ICC. This includes abstaining from witness intimidation, disruption of evidence and exhibits as well as limiting resources needed for the whole process of prosecution of international crimes.

The enactment of laws to prosecute international crimes are not enough if there is the

absence of effective mechanism to implement the said laws, like the case study of Kenya, the uncertainty on implementation of the International Crimes Act by establishment of a High Court Division have rendered the said law dormant. The true progress in ending impunity in African continent will only be assured when African leaders prioritize justice for international crime by ensuring the domestic legal systems are well equipped to deal with complex international crimes.

5.3.4 Establishment of Strong Mechanisms for Witness Protection

The establishment of strong mechanisms for witness protection and the investigation of international crimes in Africa are very much essential in order to achieve justice and to end impunity within the continent. Witnesses play a significant role in proving the charges of international crimes against the perpetrators of the same. However, as it has been evidently seen in Kenya and Sudan, African countries have proved vulnerability of witnesses against intimidation, harassment, violence, and even disappearance which in return can prevent them from testifying against the accused persons. Having no clear and effective mechanisms to protect witnesses, important testimonies may vanish therefore undermining the pursuit of justice.

In addressing this concern, it is important for African states to prioritize the establishment of strong witness protection programs and mechanisms that provide for physical protection, mental support, and, where necessary, relocation services. These programs and services should be made with a focus on protection of the witnesses themselves, together with their families and beloved ones in order to guarantee provision of evidence and testimonies free from fear of vengeance. This

whole process requires first the presence of political will and adequate resources, as well as a well-formed association with international organizations or nations that have expertise in witness protection.

5.3.5 Establishment of Strong Mechanisms for Investigation

It is important to improve the ability of African states to effectively investigate international crimes so as to ensure effective administration of international crimes at the domestic level. This includes creation of a reliable, independent and well-trained force, with all the required resources and skills including personnel like prosecutors and judges. Moreover, in order to align with the international standards, it is imperative to invest on advancement of forensic investigative infrastructure used to collect and preserve evidence. The political leaders should be ready to allocate adequate resource to enhance the investigative system within each African jurisdiction. A coordinated efforts between African states can also expand the ability of individual states in investigative system for prosecution of international crimes in ensuring that each state has reasonable access to the resources and expertise needed to effectively fight impunity of international crimes.

5.3.6 Strengthening the ICC Through Institutional Reforms

In order to eradicate the sense that the ICC intentionally targets Africans, reforms should be made to the court to ensure prosecution of the perpetrators of international crimes regardless of the nationality and political position of the said criminal. African states should stop advocating, complaining and begging for sovereign immunity that is claimed to being waived by the ICC with a support of UNSC, this is

not the correct approach in these struggles to end impunity to our continent. However, all the member states to the Rome statute should intentionally see the importance of making reforms on the following key areas as far as the ICC interventions are concerned;

i. The ICC needs a task force from its signatories to create a joint-task force to enforce the ICC rulings and to serve arrest warrants. The dependence of cooperation from the member states has turned a failure in many occasions for the ICC to successfully bring the offenders before the court to face charges. The need to have an independent and effective joint taskforce shall aid to curb the problem of ICC that absolutely dependent on effective cooperation with States parties in preparing criminal cases for issue of arrest and surrender of the accused which is not possible for the giant western States.
ii. Reforms to the jurisdiction of the ICC to be unlimited to the members of the UN. It has to be collectively agreed that the ICC needs greater universal recognition which is unlimited. In order to get rid of impunity, the jurisdiction of the ICC to prosecute international crimes should not be limited only to member states to the Rome statute but rather it should extend to the whole community of the United Nations. Members of the UN should be members of the ICC by default. This shall avoid the tendency of states to refrain from accepting the jurisdiction of the ICC when things don’t go their way and also avoiding unjustified prosecution of international crimes for non-state members to the Rome statute like the incidents of Omar Al Bashir.
iii. UNSC should be limited on the referrals of situations and cases to the ICC

because this has raised a question of biasness as from the situation of Darfur, in which the most wanted man, Al Bashir claimed the UNSC referral unjustified, biased and political oriented. Therefore, it is prudent for the ICC to be independent from political influence of the UNSC by initiating investigation on every situation and case for international crime through its appropriate organ, the OTP and at least referral by the member states.

iv. Reforms to the Rome statute to contain specific provisions that shall unconditionally make investigation on every situation of alleged commission of international crimes regardless of the nationality as well as the political position of the accused persons and thereafter initiate charges for potential cases. This shall go along with inclusion of provision that regulates the length of preliminary examinations in order to avoid uncertainty on the difference on time to conclude investigation on situations selected. This shall ensure quick and effective investigations of international crimes.

5.4 Conclusion

This study has come a long way discussing the deficiencies in administration of international criminal justice in Africa and the role of interventions of the ICC and came up with the conclusive finding that there are serious deficiencies to guarantee effective prosecution of international crimes in Africa, lessons from the case studies of Kenya and Sudan. Therefore, the recommendations made herein by the researcher guarantees away forward in enhancing significant changes on effective prosecution of international crimes, only in Kenya and Sudan, but across the African continent. Moreover, a room is left for further research studies in areas of the effectiveness of

the role of the ICC in advancing international criminal justice of not only Africa, but the whole globe.

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