

# Domestication of the Rome Statute in the United Republic of Tanzania

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## Abstract

The Rome Statute of the International Criminal Court (herein the ‘Rome Statute’) obliges States Parties to enact legislation domesticating the Rome Statute in order for States Parties to exercise their primary jurisdictions of investigating and prosecuting the prescribed international crimes of genocide, war crimes, crimes against humanity and crime of aggression instead of the International Criminal Court, a Court of last resort. The United Republic of Tanzania (herein ‘Tanzania’) is a State Party to the Rome Statute with no legislation domesticating it. The absence of legislation domesticating the Rome Statute is a barrier to Tanzania to exercise her primary jurisdiction of investigating and prosecuting the crimes. This article excludes the discussion of the crime of aggression because Tanzania has not accepted the Kampala Amendments of 2010. The article finds out the legal constraints facing domestication of the Rome Statute in Tanzania. The method applied to collect data is documentary analysis supplemented by interview and questionnaire which have revealed that, lack of political will is one of the legal constraints facing domestication of the Rome Statute. This article calls upon key actors to put their collaborative commitment and engagement of power, authority, support, duties and ability of reasonable actions to domesticate the Rome Statute in order for Tanzania to exercise her primary obligation of investigating and prosecuting the crimes as international crimes and to have legal capacity to cooperate with the ICC.

**Key Words:** Domestication of the Rome Statute, International Criminal Court, International Crimes, Legal Constraints.

## 1. Introduction

The Rome Statute of the International Criminal Court (henceforth ‘the Rome Statute’)<sup>1</sup> was adopted by States at Rome in Italy on 17 July 1998 by a vote of 120, entered into force on 1 July 2002 after the treaty’s consent by 60 States;<sup>2</sup> thus, it is an international treaty. States Parties to the Rome Statute are obliged to enact legislation domesticating the Rome Statute. Domestication of international treaty means enacting specific legislation or amending existing penal laws incorporating international treaty into national law.<sup>3</sup>

<sup>1</sup> The Rome Statute was adopted at Rome on 17 July 1998, entered in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010 available at <https://www.icc-cpi.int> (accessed 28 August 2023).

<sup>2</sup> Malcolm Shaw, *International Law* (6<sup>th</sup> edn., CUP, Cambridge 2008) 411. See also Muhammed Ladan, ‘An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria’ (2013) 1 Afe Babalola University: Journal of Sustainable Development Law and Policy at p. 37; David Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, New York 2009) 241 available at <https://www.ajol.info> (accessed (28 August 2023)).

<sup>3</sup> Gerhard Kemp, ‘The Implementation of the Rome Statute in Africa’ in G Werle et al (eds.) *Africa and the International Criminal Court* (International Criminal Court Series 1, University of Stellenbosch, Stellenbosch 2014) 64; Dalley Birkett,

Domesticating the Rome Statute serves two purposes: - First, empowers States Parties to exercise their primary jurisdictions of investigating and prosecuting the prescribed international crimes of genocide, war crimes, crimes against humanity and crime of aggression purposely to prevent the commission of the crimes. Second, empowers States Parties to have legal capacity of cooperating with the International Criminal Court (herein ‘the ICC’) which supplements national courts’ jurisdictions in investigating and prosecuting the international crimes.<sup>4</sup>

States Parties have primary duties of investigating and prosecuting the crimes instead of the ICC as the ICC acts as a Court of last resort. The United Republic of Tanzania signed and accepted the Rome Statute on 29 December 2000 and 20 August 2002 respectively;<sup>5</sup> hence, a State Party. In the United Republic of Tanzania, international treaties like the Rome Statute do not form as sources of law unless legislation is enacted as required by article 63(3) (d) of the Constitution of the United Republic of Tanzania 1977 (herein ‘the Constitution of Tanzania’).<sup>6</sup> The ICC jurisdiction is over the four crimes committed by individuals and the jurisdiction is subsidiary to national courts jurisdictions because States Parties have primary jurisdictions over the crimes at their national levels.<sup>7</sup> So far, the United Republic of Tanzania, an African State Party to the Rome Statute has not domesticated the Rome Statute; thus, overtaken by some African States Parties which have domesticated it *i.e.* South Africa,<sup>8</sup> Kenya,<sup>9</sup> Burkina Faso<sup>10</sup> and Uganda.<sup>11</sup> The primary duty of States Parties to investigate and prosecute the crimes was also reaffirmed by the Security Council of the United Nations by calling upon States to ensure prosecution of genocide, crimes against humanity and war crimes.<sup>12</sup>

Unfortunately, the United Republic of Tanzania cannot exercise her primary jurisdiction to investigate and prosecute the crimes as international crimes for failure to domesticate the Rome Statute. The crime of aggression is excluded in this study because the United Republic of Tanzania has not accepted the Kampala Amendments of 2010.<sup>13</sup> This article finds out the legal constraints facing domestication of the

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‘Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia’ (2019) 18 Chinese Journal of International Law 353-392 at pp. 353-354 available at <https://academic.oup.com> (accessed 28 August 2023).

<sup>4</sup> See *AG v. Kenyans for Justice and Development Trust* [2019] 2 E. A. 77 at p. 79. See also Daley Birkett (n 4) 354.

<sup>5</sup> Available at <https://asp.icc-cpi.int> (accessed 28 August 2023). See also The AALCO Secretariat, *The International Criminal Court: Recent Developments* (New Delhi) at p. 1 available at <https://www.aalco.int> (accessed 18 September 2023).

<sup>6</sup> [Cap. 2 R. E. 2002] as amended.

<sup>7</sup> Preamble 10 read together with articles 1 and 17 of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010. See also *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* (02/2014 [2014] ZACC 30 (30 October 2014) at p. 18, para. 30 available at [www.saflii.org](http://www.saflii.org) (accessed 28 August 2023).

<sup>8</sup> Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002 of 18 July 2002 available at <https://www.justice.gov.za> (accessed 28 August 2023).

<sup>9</sup> International Crimes Act No. 16 of 2008 of 1<sup>st</sup> January 2009 available at <https://www.legal-tools.org> (accessed 28 August 2023).

<sup>10</sup> The Rome Statute of the International Criminal Court, Act No. 052-2009/AN of 3 December 2009. See also Committee Report on Enforced Disappearances of the United Nations, Additional Information submitted by Burkina Faso under article 29 (4) of the International Convention for the Protection of All Persons from Enforced Disappearance (15 December 2022) at p. 7 available at <https://digitallibrary.un.org> (accessed 28 August 2023).

<sup>11</sup> The International Criminal Court Act No. 11 of 2010 of 25<sup>th</sup> June 2010 available at <https://www.parliament.go.ug> (accessed 28 August 2023).

<sup>12</sup> Paragraph 1 of the Resolution 2150 (2014), Adopted by the Security Council at its 7155<sup>th</sup> meeting, on 16 April 2014 available at <https://www.securitycouncilreport.org> (accessed 28 August 2023).

<sup>13</sup> Irene F. M. Kasyanjju, Director for Legal Affairs, Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania, General Debate of the Assembly of States Parties to the Rome Statute of the International Criminal

Rome Statute in the United Republic of Tanzania in order for the United Republic of Tanzania to exercise her primary jurisdiction and to have legal capacity to cooperate with the ICC. Recommendations are provided to overcome the problem.

## 2. Historical Background

The existence of the Rome Statute was well-received by the United Republic of Tanzania aiming to fill in the impunity gap in order to investigate and prosecute the international crimes. The United Republic of Tanzania in collaboration with Botswana, Lesotho, Malawi, Swaziland and South Africa as representative of the Southern African Development Community (herein ‘SADC’) participated in the efforts to establish the ICC in 1993 when the International Law Commission submitted a draft statute to the General Assembly’s Sixth Committee for consideration.<sup>14</sup> SADC was founded with the signing of the Treaty on 17 August 1992 and as of 31 July 1998, had a number of 14 member States.<sup>15</sup> The other role of the United Republic of Tanzania was participation in the negotiation to adopt the Rome Statute and establish the ICC during the United Nations Diplomatic Conference held in 1998.<sup>16</sup> Also, the United Republic of Tanzania seconded the SADC’s idea on the adoption of the Rome Statute and establishment of the ICC.<sup>17</sup> On 29 December 2000<sup>18</sup> and 20 August 2002<sup>19</sup> respectively, the United Republic of Tanzania signed and accepted the Rome Statute and became a State Party. The United Republic of Tanzania has attended several sessions of the Assembly of States Parties to the Rome Statute (herein ‘the ASP’). Some of the

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Court (New York 11 December 2014) at p. 5 available at <https://asp.icc-cpi.int> (accessed 28 August 2023). *See* also paragraph 1 of the Resolution RC/Res.6, Adopted at the 13<sup>th</sup> plenary meeting, on 11 June 2010, by consensus available at <https://treaties.un.org> (accessed 28 August 2023).

<sup>14</sup> Embassy of Botswana, Note No. 118/11 EB 9/3/4 IX (13) B 8 (Brussels 14 September 2011) at p. 4 available at <https://asp.icc-cpi.int> (accessed 10 July 2023). *See* also Sascha Bachmann and Eda Nwibo, ‘Pull and Push- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges’ (2018) 43 *Brooklyn Journal of International Law* 457 at p. 523 available at <https://brooklynworks.brooklaw.edu> (accessed 23 August 2023).

<sup>15</sup> Malawi, Lesotho, Angola, Swaziland, Botswana, Zimbabwe, Mozambique, Namibia, Zambia, the United Republic of Tanzania, South Africa, Mauritius, Congo and Seychelles.

<sup>16</sup> Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court, Rome Italy on 16<sup>th</sup> June 1998; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. I); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. II) available at <https://legal.un.org> (accessed 14 July 2023).

<sup>17</sup> Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court (Rome Italy, 16<sup>th</sup> June 1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. I) at pp. 68, 74-75; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. II) at pp. 38, 45, 74-75 available at <https://legal.un.org> (accessed 14 July 2023).

<sup>18</sup> Available at <https://asp.icc-cpi.int> (accessed 10 July 2023).

<sup>19</sup> *Ibid.*

attended sessions of the ASP are: - the 10<sup>th</sup> session,<sup>20</sup> the 12<sup>th</sup> session,<sup>21</sup> the 13<sup>th</sup> session,<sup>22</sup> the 15<sup>th</sup> session<sup>23</sup> and the 19<sup>th</sup> session.<sup>24</sup>

In those attended sessions, the United Republic of Tanzania recognized the role of the ICC in fighting for impunity, promised her efforts to support the ICC to fight for impunity, encouraged other States to support the ICC, urged other States Parties to domesticate the Rome Statute in order to exercise their primary jurisdictions of investigating and prosecuting the international crimes.<sup>25</sup> Walking on her promise, in 2013 the Attorney General of the United Republic of Tanzania (herein ‘the AG’) filed an application to the ICC requesting to be an impartial adviser over Mr. Ruto's request for excusal from attending his trial.<sup>26</sup> The application aimed to aid the ICC in resolving the case on the issue under article 63 of the Rome Statute. At the session of the ASP held at New York on 11 December 2014, the United Republic of Tanzania informed the ASP that, she was at her early stages of enacting legislation domesticating the Rome Statute in order to exercise her primary jurisdiction of investigating and prosecuting the crimes and cooperate with the ICC.<sup>27</sup> Apart from the information given on 11 December 2014, at the 19<sup>th</sup> session of the ASP held at the Hague Netherlands from 14-16 December 2020, the United Republic of Tanzania reaffirmed her firm commitment to the Rome Statute system.<sup>28</sup> In spite of her great role towards the Rome Statute and the ICC, the United Republic of Tanzania has not domesticated the Rome Statute in order to exercise her primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as international crimes and to have legal capacity to cooperate with the ICC.

Though the United Republic of Tanzania cannot exercise her primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as international crimes, she has jurisdiction of investigating and prosecuting war crimes as ordinary crime under the Penal Code (herein ‘the Penal Code’).<sup>29</sup> The jurisdiction to investigate and prosecute war crimes is given under section 43 of the Penal Code.<sup>30</sup> However, the jurisdiction is limited only if the war crimes is committed against a natural or legal person or a group of persons but does not extend to properties in contrast to the war crimes under the

<sup>20</sup> Ambassador Ombeni Sefue, Permanent Representative of the United Republic of Tanzania to the United Nations, 10<sup>th</sup> session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York, 12-21 December 2011) available at <https://asp.icc-cpi.int> (accessed 10 July 2023).

<sup>21</sup> Honourable Mathias M. Chikawe (MP), Minister for Constitutional and Legal Affairs, the United Republic of Tanzania, 12<sup>th</sup> session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, 20 November 2013) available at <https://asp.icc-cpi.int> (accessed 10 July 2023).

<sup>22</sup> See Irene F. M. Kasyanju (n 14) 5.

<sup>23</sup> Ambassador Irene F. M. Kasyanju of the United Republic of Tanzania to the Netherlands, 15<sup>th</sup> session of Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague Netherlands, Thursday November 2016). See also Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth Session, the Hague, 16-24 November 2016 (Official Records, Volume I) at p. 7 available at <https://asp.icc-cpi.int> (accessed 10 July 2023).

<sup>24</sup> Ambassador Irene F. M. Kasyanju of the United Republic of Tanzania to the to the Netherlands, 19<sup>th</sup> session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague-the Netherlands, 14-16 December 2020) available at <https://asp.icc-cpi.int> (accessed 10 July 2023).

<sup>25</sup> See also Statement by Tuvako N. Manongi, Ambassador and Permanent Representative of the United Republic of Tanzania to the United Nations, at the Sixth Committee of the 67<sup>th</sup> Session of the United Nations General Assembly on Agenda item 83: The Rule of Law at the National and International Levels (New York, 10 October 2012) available at <https://www.un.org> (accessed 10 July 2023).

<sup>26</sup> CGA 135/291/01 (Dar Es Salaam, 09 September 2013) available at <https://www.icc-cpi.int> (accessed 10 July 2023).

<sup>27</sup> See Irene F. M. Kasyanju (n 14) 5.

<sup>28</sup> See Ambassador Irene F. M. Kasyanju (n 25) 4.

<sup>29</sup> [Cap. 16 R. E. 2022].

<sup>30</sup> The offence of *war crimes* was inserted through Written Laws (Miscellaneous Amendments) Act No. 2 of 1970 which amended the Penal Code [Cap. 16 R. E. 2022].

Rome Statute. Under the Rome Statute,<sup>31</sup> the war crimes extend to crimes committed against properties. The other limit of jurisdiction by the United Republic of Tanzania to prosecute the war crimes is that, it does not extend to the Presidents of the United Republic of Tanzania<sup>32</sup> and Zanzibar<sup>33</sup> because the Presidents have immunity over ordinary crimes.

In 2015, Cybercrimes Act<sup>34</sup> was enacted creating cybercrimes. Under section 19(1) of the Cybercrimes Act (herein ‘the Cybercrimes Act’), genocide and crimes against humanity were established as ordinary crimes. However, genocide and crimes against humanity are crimes under the Cybercrimes Act provided that, they are committed by unlawful or causing publication by computer system, a material justifying acts of genocide or crimes against humanity. The Cybercrimes Act has given genocide’s definition as ascribed under the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (herein ‘the Genocide Convention’).<sup>35</sup> That means, if genocide and crimes against humanity under the Cybercrimes Act<sup>36</sup> are not committed by unlawful publication or causing publication of a material, through a computer system, they are neither ordinary crimes under the Cybercrimes Act for lack of broader criminalization nor international crimes under Rome Statute for lack of domestication of the Rome Statute. As well, genocide and crimes against humanity cannot be investigated and prosecuted as ordinary crimes by the United Republic of Tanzania in case are committed by the Presidents of the United Republic of Tanzania and Zanzibar as the Presidents have criminal immunities over ordinary crimes.

In 2016, the Economic and Organized Crimes Control Act<sup>37</sup> was amended to include some crimes under the Cybercrimes Act. Genocide and crimes against humanity were included to be economic crimes.<sup>38</sup> The failure by the United Republic of Tanzania to exercise her primary jurisdiction of investigating and prosecuting genocide, war crimes and crimes against humanity as international crimes is due to non-domestication of the Rome Statute. The barrier to exercise primary jurisdiction is fortified by article 13(6) (c) of the Constitution of Tanzania read together with sections 3(1), (b) and 5 of the Penal Code and article 12(6) (c)<sup>39</sup> read together with sections 2(1) (a), (b) and 3(2)<sup>40</sup> which forbid prosecution of a crime not punishable by law.

### 3. Methodology

Data for this article was collected through documentary analysis supplemented by interview and questionnaire methods. Documentary analysis examined national and international instruments, case laws, studies, reports, literature and other relevant and useful documents. Interview was successful conducted to the Ministry of Constitutional and Legal Affairs (here ‘the MoCLA’) in Dodoma region, Law Reform Commission of Tanzania (herein ‘the LRCT’) in Dodoma region and Tanganyika Law Society under the Regional, Public Integration and International Affairs Committee (herein ‘the TLS RPIIC’) in Dar Es

<sup>31</sup> Article 8 (2) (a) (iv) of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered in force on 1 July 2002 as amended through Resolution RC/Resolution 6, annex 1 of 11 June 2010.

<sup>32</sup> Article 46(1) and (3) of the Constitution of the United Republic of Tanzania 1997 [Cap. 2 R. E. 2002] as amended.

<sup>33</sup> Article 36(1) and (3) of Zanzibar Constitution of 1984 as amended in 2010.

<sup>34</sup> Act No. 14 of 2015.

<sup>35</sup> Adopted by the General Assembly of the United Nations on 9 December 1948, came into force on 12 January 1951 available at <https://treaties.un.org> (accessed 28 August 2023).

<sup>36</sup> Under section 2, the law applies to Tanzania Mainland as well as Tanzania Zanzibar.

<sup>37</sup> [Cap. 200 R. E. 2022].

<sup>38</sup> Ibid, paragraph 36 to the First Schedule as was amended by section 36 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

<sup>39</sup> Of the Constitution of Zanzibar of 1984 as amended in 2010.

<sup>40</sup> Of Zanzibar Penal Act No. 6 of 2018.



Salaam region. Questionnaires were supplied and returned completed to the Ministry of Foreign Affairs and East African Cooperation (herein ‘the MoFAEAC’) in Dodoma region and Commission for Human Rights and Good Governance (herein ‘the CHRGG’) in Dodoma region. During interview and questionnaire, ethical research principles were observed. The respondents were informed to have a right of choice to disclose or not their names and titles and to have a right to answer questions found to be appropriate to them. Documentary analysis supplemented by interview and questionnaire focused to interrogate the legal constraints facing domestication of the Rome Statute. Data collected was analysed by a method of classical content of analysis.<sup>41</sup>

## 4. Concepts and Terminologies

### 4.1 The Rome Statute

Article VI of the Genocide Convention<sup>42</sup> requires persons committing genocide to be tried by international penal tribunal having jurisdiction within contracting parties. The Genocide Convention necessitated the United Nations General Assembly to order the International Law Commission to conduct a study to establish an international criminal court. The study resulted to a final draft Statute for an International Criminal Court (herein ‘the Draft Statute’)<sup>43</sup> produced in 1994 establishing detailed provisions of the ICC<sup>44</sup> in contrast to the way the Draft Statute was. Article 20 of the Draft Statute established five crimes with no definitions *i. e.* genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity and treaty crimes.<sup>45</sup> The Draft Statute influenced the Preparatory Committee to be convened in December 1995 which resulted to the Rome Conference of 1998 with a result of the Rome Statute on 17 July 1998.<sup>46</sup> The Rome Statute establishes four international crimes of genocide, war crimes, crimes against humanity and crime of aggression. 120 States voted in favour of the Rome Statute 7 against which are: - United States of America, China, Iraq, Israel, Qatar, Syria and Yemen and 21 States abstaining.<sup>47</sup> The Rome Statute<sup>48</sup> establishes an independent permanent court with subsidiary jurisdiction to national courts jurisdictions in investigating and prosecuting the crimes.

<sup>41</sup> Balie Guede, “From Content Analysis to Content Analysis of Digital Social Networks: Specificities and Limits of a Particular Content” in D. Barredo-Ibáñez *et al* (eds.): *CISOC 2022*, ASSEHR 678 (2023) at p. 237; Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (2<sup>nd</sup> edn. Sage Publications Inc, New Delhi 2004) 17-18.

<sup>42</sup> See also Malcolm Shaw (n 3) 410; Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> edn., CUP 2010) 144; Alexander Heinze and Viviane Dittrich (eds), *The Past, Present and Future of the International Criminal Court* (TOAEP, Brussels (2021) 125.

<sup>43</sup> Text adopted by the Commission at its forty-sixth session in 1994 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session available at <https://legal.un.org> (accessed 10 July 2023); *Kenyans for Justice and Development Trust case* (n 5) 83. See also Morten Bergsmo *et al* (eds), *Historical Origins of International Criminal Law: Volume 1* (TOAEP, Brussels 2014) 585;; Hossam ElDeeb, *The Ratification and Implementation of the Rome Statute of the International Criminal Court by the Arab States: Prospects and Challenges* (PhD Thesis in Law, Brunel University London, December 2015) 1 available at <https://bura.brunel.ac.uk> (accessed 24 August 2023).

<sup>44</sup> See Robert Cryer *et al* (n 43) 145; Malcolm Shaw (n 3) 410; Alexander Heinze and Viviane Dittrich (n 43) 125-126.

<sup>45</sup> See Alexander Heinze and Viviane Dittrich (n 43) 126; Malcolm Shaw (n 3) 410; Robert Cryer *et al* (n 43) 145; Morten Bergsmo *et al* (n 44) 586.

<sup>46</sup> See *Kenyans for Justice and Development Trust case* (n 5) 83. See also Malcolm Shaw (n 3) 411; Robert Cryer *et al* (n 43) 149; Alexander Heinze and Viviane Dittrich (n 43) 126-127.

<sup>47</sup> See *Kenyans for Justice and Development Trust case* (n 5) 83. See also Alexander Heinze and Viviane Dittrich (n 43) 130; Robert Cryer *et al* (n 43) 148.

<sup>48</sup> Preambular 9 and 10, articles 1 and 17 of the Statute of the International Criminal Court, adopted at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010; *Kenyans for Justice and Development Trust case* (n 5) 84.

The chief aim of adopting the Rome Statute by the 120 States and accepting the ICC jurisdiction was not to let the international crimes go unpunished. The jurisdiction of investigating and prosecuting the international crimes by both the States Parties and the ICC aims to put an end impunity for the perpetrators with a purpose of contributing to the prevention of the crimes against children, women and men and ensure prosperous of peace, security and the well-being of the world. Also, aims to prevent the crimes for promotion, protection and to encourage respect for fundamental human rights in the world as per the Charter of the United Nations.<sup>49</sup> Although the jurisdictions to investigate and prosecute genocide, war crimes, crimes against humanity and crime of aggression have been vested to both the States Parties and the ICC, the primary duty to investigate and prosecute them remains to States Parties.<sup>50</sup> However, States Parties are obliged to enhance international cooperation with the ICC in exercising its jurisdiction of investigating and prosecuting the international crimes.

#### 4.2 Enacting Legislation Domesticating the Rome Statute.

Domesticating the Rome Statute in the United Republic of Tanzania entails enacting legislation incorporating the Rome Statute into national law either by enacting specific legislation or amending the existing penal laws.<sup>51</sup> Enacting legislation domesticating the Rome Statute enables States Parties to the Rome Statute to exercise their primary jurisdictions of investigating and prosecuting the international crimes thereby giving meaning to the principle of complementarity.<sup>52</sup>

More so, domesticating the Rome Statute enables States Parties to take actions against violation of human rights in order to protect, preserve and promote human and peoples' rights.<sup>53</sup> Also, enables States Parties to cooperate with the ICC<sup>54</sup> in its investigation and prosecution of the international crimes. The Rome Statute obliges States Parties to enact legislation to investigate and prosecute the international crimes as their primacy duties because the Rome Statute is not a self-executing treaty. As the article examines domestication of the Rome Statute, dualism legal system is covered for discussion under this study because the United Republic of Tanzania is a dualist State.

##### 4.2.1 Dualism Legal System.

International law and national law are distinct, each existing independently as international law regulates the associations between States, whereas national law governs the relations between citizens of a particular

<sup>49</sup> Preamble 2 and articles 1 (1) and (3) and 2 (3) of the United Nations Charter, adopted at the city of San Francisco, California on 26 June 1945 available at <https://treaties.un.org> (accessed 22 August 2023); *Kenya for Justice and Development Trust case* (n 5) 83.

<sup>50</sup> *Prosecutor v. Callixte Mbarushimana* (ICC-01/04-01/10, 26 October 2011) at p. 12, para 21 available at <https://www.icc-cpi.int> (accessed 10 July 2023). See also *Kenya for Justice and Development Trust case* (n 5) 84.

<sup>51</sup> See Kemp G (n 4) 64; Birkett D J (n 4) 353-354. See also Olympia Bekou and Katerina Mairiti, *International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court* (Centre for International Law Research and Policy 2017) 7; Malcolm Shaw (n 3) 139; Fatuma Silungwe, *A Comparative Study on the Implementation of the Rome Statute by South Africa and Germany: A Case of Fragmentation of International Criminal Law* (LL.M Dissertation, The University of the Western Cape 2013) 13 available at <https://www.researchgate.net> (accessed 20 August 2023).

<sup>52</sup> See Olympia Bekou and Katerina Mairiti (n 52) 7.

<sup>53</sup> *Attorney General v. Rebeca Z. Gyumi* (Civil Appeal No. 204 of 2017) [2019] TZCA 448 (23 October 2019) at p. 29 available at <https://tanzlii.org> (accessed 20 July 2023).

<sup>54</sup> Article 88 of the Rome Statute of the International Criminal Court of 1998, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010.

state and that particular State.<sup>55</sup> International treaties are applied by dualist courts in deciding the rights and duties of the parties only if they are domesticated into national law through appropriate national legal system.<sup>56</sup> Some dualist States Parties to the Rome are: - the United Republic of Tanzania,<sup>57</sup> South Africa,<sup>58</sup> Uganda,<sup>59</sup> Nigeria<sup>60</sup> and Ghana.<sup>61</sup> In the United Republic of Tanzania, a treaty which is not domesticated lacks legal force as was held in the case of *Reliance Insurance Company (T) Ltd v. CMA CGM Societe Anonyme and another*,<sup>62</sup> whereby the Court of Appeal of Tanzania refused to apply the Hamburg Rules in deciding the appeal before it for lack of domestication.

### 4.3 Complementarity Principle.

Complementarity principle refers to States Parties to the Rome Statute to exercise their primary duties of investigating and prosecuting the international crimes within their jurisdictions. The ICC investigates and prosecutes the international crimes provided that, the relevant national court's jurisdiction is either unwilling or unable to do so genuinely.<sup>63</sup> The complementarity principle has been established under the Rome Statute.<sup>64</sup> The principle as one of the main features of the ICC prefers priority of domestic investigation and prosecution of the international crimes instead of the ICC save that domestic proceedings are genuine.<sup>65</sup> The principle is differentiated with the jurisdictions of the *ad hoc* tribunals which exercise

<sup>55</sup> Christopher Gevers *et al*, *Curriculum on International Criminal Justice* (Institute for Security Studies 2012) 17-18; Malcolm Shaw (n 3) 131; Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, Cheltenham 2012) 120; James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn, OUP, Oxford 2012) 48.

<sup>56</sup> See Christopher Gevers *et al* (n 56) 18; Gideon Boas (n 56) 120; Gerhard Kemp (n 4) 64; Olympia Bekou and Katerina Mairiti (n 52) 13; Fatuma Silungwe (n 52) 13; James Crawford (n 56) 48; Anne Trebilcock, "Self-executing Treaty Provisions" in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Instalment 1* (1981) 414.

<sup>57</sup> Article 63(3) (d) of the Constitution of the United Republic of Tanzania of 1977 [Cap. 2 R. E. 2002] as amended.

<sup>58</sup> Article 231 (4) of the Constitution of the Republic of South Africa of 1996 as amended to by Government Gazette 31792 dated 9 January 2009 available at <https://www.gov.za> (accessed 20 August 2023).

<sup>59</sup> Article 123 of the Constitution of the Republic of Uganda of 1995 available at <https://www.parliament.go.ug> (accessed 20 August 2023).

<sup>60</sup> Article 12(1) of the Constitution of the Federal Republic of Nigeria 1999 with amendments through 2010 as amended by Act No. 5 of 2010 of 29 November 2010 available at <https://gazettes.africa> (accessed 20 August 2023).

<sup>61</sup> Article 11(b) of the Constitution of the Republic of Ghana of 1992 as revised in 1996 available at <https://cdn.modernghana.com> (accessed 20 August 2023).

<sup>62</sup> (Civil Appeal No. 179 of 2020) [2023] TZCA 205 (27 April 2023) at p. 11-12 available at <https://tanzlii.org> (accessed 28 August 2023).

<sup>63</sup> *The Prosecutor v. Saif Al-Islam Gaddafi* (ICC-01/11-01/11, 9 March 2020) at p. 23 available at <https://www.icc-cpi.int> (accessed 20 August 2023); *Situation in the Republic of Burundi* (ICC-01/17-X-9-US-Exp, 25 October 2017) available at <https://www.legal-tools.org> (accessed 20 August 2023); *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* (02/2014 [2014] ZACC 30 (30 October 2014) at p. 18, para. 30 available at [www.saflii.org](http://www.saflii.org) (accessed 18 August 2023); *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at pp. 5-6 available at [www.saflii.org](http://www.saflii.org) (accessed 20 August 2023); *Kenyan for Justice and Development Trust case* (n 5) at 90. See also Malcolm Shaw (n 3) 414-415; Robert Cryer *et al* (n 43) 153; Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice 2016) 3; Emilie Hunter, *The International Criminal Court and Positive Complementarity: The Impact of the ICC's Admissibility Law and Practice on Domestic Jurisdictions* (PhD in Law Thesis, European University Institute 2014) 24-25 available accessed at <https://cadmus.eui.eu> (accessed 20 August 2023).

<sup>64</sup> Preambular 10 and articles 1 and 17 of the Statute of the International Criminal Court, adopted at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. See also *Kenyan for Justice and Development Trust case* (n 5) at 84.

<sup>65</sup> See *National Commissioner of the South African Police Service case* (n 64) at p. 18, para. 30. See also Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (TOAEP, Brussels 2017) 3. See also Malcolm Shaw (n 3) 414; Robert Cryer *et al* (n 43) 153-154.



primacy jurisdictions over national courts.<sup>66</sup> The complementarity principle bases on the following reasons: -<sup>67</sup> (a) Avoids the principle of double jeopardy/double punishment (b) Observes national sovereignty (c) Is efficient (d) Puts the onus to investigate and prosecute the international crimes.

The ICC cannot exercise its jurisdiction in a number of situations if: -<sup>68</sup> (a) The case is being dealt by a State with jurisdiction save that, the State is unwilling or unable genuinely to deal with the case (b) The case has been investigated by a State with jurisdiction but the State does not prosecute it (c) The person concerned has been prosecuted for the conduct which is the subject of the case and another trial is barred under article 20(3) of the Rome Statute. In *Saif Al-Islam Gaddafi case (supra)*,<sup>69</sup> the ICC interpreted article 17(1) (c) and 20(3) of the Rome Statute and held that, for a case to be inadmissible before the ICC under article 17(1) (c) of the Rome Statute, a final judgment is required. The ICC explained that, if there is an avenue for an appeal, review or any other remedy over the decision, the decision cannot be said to be final. The argument by Saif Al-Islam Gaddafi on the ground that, he was charged and prosecuted by the Tripoli Court, hence his case was inadmissible before the ICC under article 17(1) (c) of the Rome Statute was dismissed. Also, the ICC in the case of the *Situation in the Republic of Burundi (supra)*,<sup>70</sup> declared the case to be admissible and granted leave to the prosecutor to conduct investigation in Burundi as Burundi had failed to conduct investigation as required by article 17(1) (a) and (b) of the Rome Statute.

#### 4.4 The International Crimes under the Rome Statute.

There is no common and agreed definition of international crimes. However, international crimes may be defined to mean crimes threatening international community by violating international humanitarian laws and international human rights; they are criminal and punishable only to individuals under international law by national judicial body, international court, ad hoc or hybrid tribunal no matter where the crimes in the world are committed.<sup>71</sup> The three international crimes under the Rome Statute are explained briefly as follows: -

##### 4.4.1 The crime of genocide.

Article 6<sup>72</sup> lists five acts once established, the crime of genocide is said to be committed. Once committed, the offence of genocide is said to have been committed. The 1994 Rwanda's killings and bodily injuries stand to be good examples of the genocide of the 20<sup>th</sup> century because of ethnic hatred.<sup>73</sup> Genocide was

<sup>66</sup> Ibid.

<sup>67</sup> See Paul Seils (n 64) 3. See also Robert Cryer *et al* (n 43) 153.

<sup>68</sup> Article 17(1) (a), (b) and (c) of the Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010; *Saif Al-Islam Gaddafi case* (n 64) at paras. 11, 22. See also Malcolm Shaw (n 3) 414-415.

<sup>69</sup> See *Saif Al-Islam Gaddafi case* (n 64) at paras. 24-25.

<sup>70</sup> See (n 64) at paras. 82-84.

<sup>71</sup> See Robert Cryer *et al* (n 43) 6-8; Kevin Heller, 'What is an International Crime? A Revisionist History' (2017) 58 HILJ at p. 357.

<sup>72</sup> Of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. The five acts are: -Intention to destroy, in whole or in part, a national, ethnical, racial or religious group such as: killing members of the group, causing serious bodily or mental harm to members of the group deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

<sup>73</sup> Robert Muse, A Foreseeable Genocide: The Role of the French Government in Connection with the Genocide Against the Tutsi in Rwanda (Washington D. C. April 2021) 4. See also Republic of Rwanda- National Unity and Reconciliation Commission, Rwanda Reconciliation Barometer 2020 (Kigali 2020) 2.

first prosecuted by the International Military Tribunal as destruction of groups.<sup>74</sup> Genocide was also decided by the International Criminal Military for Rwanda (herein ‘the ICTR’) to mean putting to death and maltreatment based on political, ethnical, racial or religious grounds in whole or in part.<sup>75</sup> On its part, the ICC in the *Prosecutor v. Omar Al Bashir*<sup>76</sup> was of the view that, genocide is said to be completed once the act is a physical and real harm to a specific group or part of a group as contrasted to inactive or hypothetical.<sup>77</sup> Genocide applies only to the groups or part of national, ethnical, racial and religious.<sup>78</sup> Genocide differs from other international crimes on the fact that, for the perpetrator to be found to have committed the crime, intention of destruction in whole or in part, a national, ethnical, racial or religious group<sup>79</sup> is an essential element of the crime.

#### 4.4.2 Crimes against humanity.

Under article 7(1)<sup>80</sup> there are eleven acts which forms the crimes against humanity. The eleven acts must be attacked directly to a civilian population. The perpetrator’s knowledge of the direct attack is an essential element. The attack must be part of the widespread or systematic. In the *Prosecutor v. Jean-Pierre Bemba Gombo*,<sup>81</sup> the ICC decided that, the crime against humanity is committed when part of widespread or systematic is directed to a civilian population. The ICC also explained that, if the acts are committed in isolation or randomly, then the crime against humanity cannot be said to have been committed. The word

<sup>74</sup> *The United States of America and 3 others v. Hermann Wilhelm Goring and 23 others* (the trial of German Major War Criminals, 1 October 1946) available at <https://www.legal-tools.org> (accessed 20 August 2023).

<sup>75</sup> *Prosecutor v. Clement Kayishema and Another* (ICTR-95-1-T, 21 May 1999) at pp. 41-42, paras. 87-90 available at <https://ucr.irmct.org> (accessed 20 August 2023); *Prosecutor v. Casimir Bizimungu and 3 others* (ICTR-99-50-T, 30 September 2011) at p. 529, para. 3.2 available at <https://ucr.irmct.org> (accessed 20 August 2023).

<sup>76</sup> (ICC-02/05-01/09-3, 4 March 2009) at para. 124 available at <https://www.icc-cpi.int> (accessed 20 August 2023). See also *Prosecutor v. Anto Furundzija* (IT-95-17/1-A, 21 July 2000) at p. 92, para. 8 available at <https://www.icty.org> (accessed 20 August 2023); *Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-T, 2 September 1998) at p. 205, para. 498 available at <https://www.globalhealthrights.org> (accessed 20 August 2023); Mark Klamberg (n 66) 18.

<sup>77</sup> See *Omar Al Bashir* case (n 77) at para. 124. See also Mark Klamberg (n 66) 18; Robert Cryer *et al* (n 43) 208.

<sup>78</sup> See *Jean Paul Akayesu* case (n 77) at pp. 205-206, paras. 498-499. See also Olympia Bekou and Katerina Mairiti (n 52) 25.

<sup>79</sup> See *Jean Paul Akayesu* case (n 77) at p. 205, para. 498; *Clement Kayishema* case (n 76) at p. 41, para. 89.

<sup>80</sup> Of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010. The eleven acts are: -Murder, Extermination, Enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, Torture, Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the ICC, enforced disappearance of persons, the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. See also ICC Pre-Trial Chamber III, Request for authorization of an investigation pursuant to article 15, *Situation in the Republic of Cote D’IVOIRE* (ICC-02/11-3, 23 June 2011) at p. 28, para. 77 available at <https://www.icc-cpi.int> (accessed 20 August 2023); *Prosecutor v. Germain Katanga* (ICC-01/04-01/07, 07 March 2014) at p. 287 para. 765 available at <https://www.legal-tools.org> (accessed 20 August 2023); *Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15, 04 February 2021) at pp. 939-941, paras. 2674-2682 available at <https://www.icc-cpi.int> (accessed 20 August 2023). See also Olympia Bekou and Katerina Mairiti (n 52) 34.

<sup>81</sup> (ICC-01/05-01/08, 10 June 2008) at p. 15, para. 32 available at <https://www.icc-cpi.int> (available 20 August 2023); *Anto Furundzija* case (n 77) 90, footnote 3, 92, para. 8; *Prosecutor v. Dusko Tadic a/k/a Dule* (IT-94-1-T, 14 July 1997) at p. 37, para. 73 available at <https://www.icty.org> (accessed 20 August 2023); *Jean Paul Akayesu* (n 77) at pp. 232-236, paras. 570, 572, 574-577, 579-582; *Clement Kayishema* case (n 76) at p. 51, para. 122; *Germain Katanga* case (n 81) at p. 287 para 766. See also Mark Klamberg (n 66) 31.

widespread refers to the quantity of the persons attacked while systematic means organization of the acts.<sup>82</sup> *The case of Situation in the Republic of Cote D'IVOIRE*,<sup>83</sup> interpreted article 7(1) and (2) of the Rome Statute to the effect that, it provides five contextual elements for the commission of crimes against humanity. The Rome Statute does not define 'civilian population.' However, under international humanitarian law, civilian population means all persons who are civilians in contrast to members of armed forces and other legitimate combatants.<sup>84</sup>

#### 4.4.3 War crimes.

Article 8(1) and (2)<sup>85</sup> establishes and explains the war crimes. War crimes may be committed by one act provided is committed in the context of armed conflict justifying international concern.<sup>86</sup> Therefore, war crimes mean violation of the principles of the international humanitarian law leading to individual criminal liability under international law.<sup>87</sup> War crimes under the Rome Statute may be committed against a person as well as against a property.

War crimes is committed both in international armed conflicts and in non-international/internal armed conflicts under article 8(2) (a) and (b) and under article 8(2) (c) and (e) of the Rome Statute respectively. Armed conflict has not been defined under the Rome Statute. The ICC has explained the contexts under which armed conflicts may be said to exist. It exists once States engage into fighting each other, or between governmental authorities and an organized armed group (s) or between organized group within a State.<sup>88</sup> The Rome Statute excludes all war crimes recognized in customary law (*i. e.* prohibition on the use of chemical or biological).<sup>89</sup>

#### 4.5 Reasons for the United Republic of Tanzania to Domesticate the Rome Statute.

Many extrajudicial killings, torture, abductions, arbitrary detentions to people with albinism, religious leaders specifically Islamists and political leaders/members are accused to be committed in different parts of the United Republic of Tanzania. It is reported that in 2018, almost 380 Islamists were not traceable since 2017, hence Tanzania parliamentarians were pushing for investigation over the allegations as the government officials (security forces) were accused in abducting the Islamists.<sup>90</sup> Killings and brutal torture by amputations of albinism to children and young people began to spread in the United Republic of Tanzania in the late 2000's as the perpetrators believe that, the bodies of people with albinism can bring

<sup>82</sup> See *Prosecutor v. Jean-Pierre Bemba Gombo case* (n 82) at p. 15, para. 33; *Clement Kayishema case* (n 76) at p. 51, para. 123. See also Mark Klamberg (n 66) 31.

<sup>83</sup> See *Situation in the Republic of Cote D'IVOIRE case* (n 81) at p. 28, para. 78. See also Mark Klamberg (n 66) 31. The contextual elements are: - (i) an attack directed against any civilian population (ii) a state or organizational policy (iii) the widespread or systematic nature of the attack (iv) a nexus between the individual act and the attack and (v) knowledge of the attack.

<sup>84</sup> See *Prosecutor v. Jean Paul Akayesu case* (n 77) at p. 236, para. 582; *Clement Kayishema case* (n 76) at p. 53, para. 127. See also Mark Klamberg (n 66) 32.

<sup>85</sup> Of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, entered into force on 1 July 2002 as amended by Resolution RC/Res.6, annex I, of 11 June 2010; *Germain Katanga case* (n 81) at p. 291, para. 783.

<sup>86</sup> See *Dominic Ongwen case* (n 81) at p. 942, para. 2683. See also Robert Cryer *et al* (n 43) 267; Mark Klamberg (n 66) 65.

<sup>87</sup> See *Prosecutor v. Anto Furundzija case* (n 77) at p. 92, para. 8. See also Robert Cryer *et al* (n 43) 267, 273.

<sup>88</sup> *Prosecutor v. Thomas Lubanga Dyile* (ICC-01/04-01/06, 14 March 2012) at p. 242, para. 533. See also Mark Klamberg (n 66) 65.

<sup>89</sup> See Mark Klamberg (n 66) 274, 275.

<sup>90</sup> Available at <https://theeastafrican.co.ke> of Saturday 05.05.2018 (accessed 27 June 2023).

them good luck.<sup>91</sup> The Amnesty International requested the United Republic of Tanzania authorities to investigate extrajudicial killings and political parties members of opposition and their supporters' torture and unlawful detention as a result of the 28.10.2020 general elections.<sup>92</sup>

The civil societies and other groups accused security forces in extrajudicially killing 22 people.<sup>93</sup> It was also reported that, 77 opposition of political parties' leaders and their supporters were wrongly detained since election day.<sup>94</sup> More so, after the General Election of 28<sup>th</sup> October 2020, complaints of crimes against humanity by the United Republic of Tanzania's top officials against civilians were lodged at the ICC requesting for special inquiry. The ICC confirmed receipt of two formal letters alleging human rights violations.<sup>95</sup> The two letters were from The Alliance for Change and Transparency (ACT-Wazalendo) an opposition party and the other was from Maria Sarungi Tsehai an independent human rights activist.

Human Rights Watch reports that, the United Republic of Tanzania has not investigated Human Rights abuses of the 2020 general elections.<sup>96</sup> The Tanzania 2021 Human Rights Reports<sup>97</sup> reveals that, according to opposition leaders and NGOs, there were at least 100 opposition activists and supporters who were unlawful detained or abducted on the mainland Tanzania ... prior to and after the 2020 general elections. These few examples of human rights violations fall under the crimes against humanity and genocide. Therefore, the United Republic of Tanzania is obliged to enact legislation domesticating the Rome Statute in order: -To comply with her international obligations in good faith given under the Rome Statute<sup>98</sup> as a means of acknowledging her obligations under the Rome Statute and the international law of treaties.

Two, criminalization of the three crimes by the United Republic of Tanzania will be a demonstration of commitment to enforce them, protect, preserve and promote human rights. Three, criminalizing the crimes will be in compliance with article 63(3) (d) of the Constitution of Tanzania which requires domestication of international treaties fortified by article 13(6) (c) of the Constitution of Tanzania<sup>99</sup> which forbids applicability of retroactive of legislation. Four, letting the crimes not be investigated and prosecuted will compel the ICC to intervene, an act which may interfere national security and sovereignty of the United Republic of Tanzania. Intervention by the ICC in prosecuting the crimes may not be possible as the ICC may be denied cooperation in identifying, arresting and surrendering offenders to the ICC for trial.

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<sup>91</sup> Available at <https://hrw.org> of 09.02.2019 at 03:01AM (accessed 27 June 2023). See also Anna Henga and Felista Mauya (eds.), *Human Rights Reports 2021, Legal and Human Rights* (Dar Es Salaam, March 2022) 7-10; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Asha-Rose Mtengeti Migirow (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2015/2016 (Dodoma, May 2015) at pp. 5-6 available at <https://www.sheria.go.tz> (accessed 20 July 2023).

<sup>92</sup> Available at <https://amnesty.org> of 20.11.2020 (accessed 27 June 2023).

<sup>93</sup> Available at <https://amnesty.org> of 20.11.2020 (accessed 27 June 2023).

<sup>94</sup> Available at <https://amnesty.org> of 20.11.2020 (accessed 27 June 2023).

<sup>95</sup> Available at <https://theeastafrikan.co.ke> of Saturday 14.11.2020 (accessed 27 June 2023); <https://thecitizen.co.tz> of Sunday 10.01.2021 (accessed 27 June 2023).

<sup>96</sup> Available at <https://hrw.org> (accessed 27 June 2023).

<sup>97</sup> Country Reports on Human Rights Practices for 2021, United States Department of State, Bureau of Democracy, Human Rights and Labour at p. 11 available at <https://www.state.gov> (accessed 27 June 2023).

<sup>98</sup> Preambular 4, 5, 6 and 10 and articles 1 and 17. See also article 26 of the Vienna Convention of the Law of Treaties 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

<sup>99</sup> See also article 12(6) (c) of the Constitution of Zanzibar of 1984 as amended in 2010.



## 5 Findings

Lack of political will, lack of legal support and engagement, fear of loss of presidential immunity and lack of legal experts have been found by this article to be the legal constraints facing domestication of the Rome Statute.

### 5.1 Lack of political will.

Ford,<sup>100</sup> Heller,<sup>101</sup> Sungi,<sup>102</sup> Sahinkuye<sup>103</sup> and Sterio's works<sup>104</sup> reveal that, there is political will in the United Republic of Tanzania in domesticating the Rome Statute. Heller, Sungi, Sahinkuye and Sterio's works (*supra*) rely only upon documentary analysis and the major basis of their source is Ford's work (*supra*) which conducted interview to back up its position. Ford's work claims to have sourced the data on the presence of political will from a Non-Governmental Organisations (herein 'the NGOs'). However, how data was analysed and interpreted by Ford's work to conclude that, the presence of political will has not been disclosed. It is an opportunity now for this article to explain the concept of political will for better understanding. Though the concept of political will is said to be complex, for the purposes of this article it can be defined to mean commitment of power, authority, support, duties or ability of reasonable actions by key actors.<sup>105</sup>

Political will is a resolution of a person or joint key actors to do, support and decide issues resulting to a required result through willingness over a certain policy by the leadership.<sup>106</sup> Nothing can be achieved in any government in the absence of commitment of power, duties, support, ability and engagement of others by key actors even in democratic governments like the United Republic of Tanzania whereby few people are given powers, authority and duties by majority to do, support, decide and say things producing best results on majorities' behalf. Genuine relationship between willingness and public policy is a result of preparation and enforcement of public policy by the key actors, those elected to sit over political positions, appointed persons (civil servants), interested groups and citizens, etc.<sup>107</sup> The key link is the assumption

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<sup>100</sup> Jolyon Ford, "Country Study IV: Tanzania" in Plessis M D and Ford J (eds), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in selected African Countries* (ISS Monograph Series, No. 141, 2008) available at <https://issafrica.org> (accessed 20 August 2023).

<sup>101</sup> Kevin Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 HILJ accessed at <https://harvardilj.org> (accessed 20 August 2023).

<sup>102</sup> Simeon Sungi, 'The substantive Incorporation of the Rome Statute of the International Criminal Court into Tanzanian Law' (2012) 1 TLS

<sup>103</sup> Mathias Sahinkuye, 'Twists and Turns of Universal Jurisdiction-A Tanzanian Perspective' (2013) 2 TUMA Law Review

<sup>104</sup> Milena Sterio, "Incorporating International Law to Establish Jurisdiction over Piracy Offences" in Scharf M P, *et al* (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP, Cambridge 2015) available at <https://www.cambridge.org> (accessed 20 August 2023).

<sup>105</sup> Asim Mujkic, "An Introduction to Political Will" in Abazovic D (ed.), *Political Will: A Short Introduction: Case Study-Bosnia and Herzegovina* (Friedrich Ebert Stiftung, Sarajevo 2015) 14; Jelena Smigoc, "Political Will for Political Behaviour" in Abazovic D (ed.), *Political Will: A Short Introduction: Case Study-Bosnia and Herzegovina* (Friedrich Ebert Stiftung, Sarajevo 2015) 35; Miroslav Zivanovic, "Political Will: Or Concept of Public Policy as Analytical Tool for Research of Political Will" in Abazovic D (ed.), *Political Will: A Short Introduction: Case Study-Bosnia and Herzegovina* (Friedrich Ebert Stiftung, Sarajevo 2015) 80, 83; James Otieno-Odek, "Law of Regional Integration-A Case Study of the East African Community" in Dovelung J *et al* (eds.), *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (Law Africa Publishing (K) Ltd, Nairobi 2018) 30; Dino Abazovic (ed.), *Political Will: A Short Introduction: Case Study-Bosnia and Herzegovina* (Friedrich Ebert Stiftung, Sarajevo 2015) 7.

<sup>106</sup> See James Otieno-Odek (n 106) 30; Dino Abazovic (n 106) 8-9.

<sup>107</sup> See Miroslav Zivanovic (n 106) 79.

that, the will of public policy actors constitutes political will required for effective and efficient formulation and implementation of public policy.<sup>108</sup> There are seven measurable components as whether political will exists or not. The components are: -<sup>109</sup> (a) Initiative of action on a particular policy by key actors. (b) Willingness of action over a policy by the key actors. (c) Key actors' communication and consultation with stakeholders over a policy. (d) Allocation of resources to achieve a particular policy.

The other components are: -(e) Well prepared and achievable goals over a policy (f) Long-term effort and investment of resources over a policy. (g) Monitoring of enforcement of a policy. The United Republic of Tanzania's government, its organs, persons and authorities derive all power, authority, support and responsibilities from people and for the peoples' welfare.<sup>110</sup> Thus, key actors (herein 'political, administrative leaders and others with powers given by laws') are given power, authority and duties to say, support and decide anything on peoples' behalf and for their benefits in accordance with the Constitution of Tanzania and other laws of the land. Therefore, implementation of any policy, action or matter is a result of commitment and engagement of power, authority, support, duties and ability of reasonable actions by the key actors. In case of failure by the key actors to act upon, say, decide, engage, perform their duties and support a particular matter within their power, authority, support, duties and ability, is a non-performance of legal duties; thus, political will is said to lack.

However, whether political will is a legal concept or not, depends with the circumstances of each case but in this article, political will is a legal concept because domestication of the Rome Statute is within the power, authority, support, ability and responsibilities of the key actors. On 11 December 2014,<sup>111</sup> the United Republic of Tanzania affirmed to the ASP to be at her early stages of enacting legislation domesticating the Rome Statute. However, until to-date, the United Republic of Tanzania has not enacted legislation domesticating the Rome Statute. From documentary analysis, there are no measures undertaken indicating to put the process into motion. The fact was supported by the MoFAEAC.<sup>112</sup> The MoFAEAC's response does tally with the annual ministerial budget speeches delivered in the National Assembly of Tanzania (herein 'the NAT') by the ministers for the MoCLA<sup>113</sup> and MoFAEAC<sup>114</sup> from 2014-2023

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid, 83-84.

<sup>110</sup> Article 7(1) and 8(1) (a) and (b) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R. E. 2002] as amended. See also article 5 and 5A (1) and (2) of the Constitution of Zanzibar of 1984 as amended in 2010.

<sup>111</sup> See Irene F. M. Kasyanju (n 14) at p. 5.

<sup>112</sup> Questionnaire filled in on 30.05.2023.

<sup>113</sup> Speech by the Minister for Constitutional and Legal Affairs, Hon. Asha-Rose Mtengeti Migiro (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2014/2015; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Asha-Rose Mtengeti Migiro (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2015/2016; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Harrison George Mwakymbe (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2016/2017; Speech by the Minister for Constitutional and Legal Affairs, Hon. Prof. Palamagamba John Aidan Mwaluko Kabudi (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2018/2019; Speech by the Minister for Constitutional and Legal Affairs, Hon. Prof. Palamagamba John Aidan Mwaluko Kabudi (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2021/2022; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Damas Daniel Ndumbaro (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2022/2023; Speech by the Minister for Constitutional and Legal Affairs, Hon. Dr. Damas Daniel Ndumbaro (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2023/2024 available at <https://www.sheria.go.tz> (accessed 16 July 2023).

<sup>114</sup> Speech by the Minister for Foreign Affairs and International Cooperation, Hon. Bernard Kamilius Membe (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2015/2016; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Ambassador Dr. Augustine Philip Mahiga (MP) presenting to the National

respectively. The MoFAEAC response and its annual ministerial budget speeches are also supported by the speeches delivered by the Parliamentary Standing Committee on Governance, Constitutional and Legal Affairs (herein ‘the PSCGCLA’)<sup>115</sup> and Parliamentary Standing Committee on Foreign Affairs Defence and Security (herein ‘the PSCFADS’).<sup>116</sup> The annual ministerial budget speeches provide for the entire annual activities done by the government through the ministry by outlining what has been done and achieved, what has not been done, what has not been achieved, the reasons of failure to execute and or achieve and future plan of what is expected to be done in the next year among others. The same applies to the speeches delivered by the PSCGCLA and PSCFADS in the NAT during budget session as the committees supervise the respective ministries on their day-to-day activities.

From the annual budget speeches of the MoCLA, MoFAEAC, PSCGCLA and PSCFADS above cited, there is no any shown degree of initiative of action and willingness on domestication of the Rome Statute. However, during interview to the MoCLA,<sup>117</sup> it was revealed that, the process of domestication of the Rome Statute is in motion for a long time. From the data collected, it is clear that, the United Republic of Tanzania lacks commitment and engagement in domesticating the Rome Statute. This legal constraint has been also revealed by Sascha Bachmann’s work<sup>118</sup> which argues that, African States (the United Republic of Tanzania inclusive) are faced by lack of willingness/commitment to enact legislation domesticating the Rome Statute. There is no doubt that, the United Republic of Tanzania has been good at promises and supporting other States Parties to enact legislation domesticating the Rome Statute. However, words of good promises without the key actors putting their commitment and engagement of power, authority, support, duties and ability of reasonable actions to initiate domestication of the Rome Statute, is non-performance of their duties given under the Rome Statute, the Constitution of Tanzania and the laws of the land.

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Assembly the estimates of revenue and expenditure for 2016/2017; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Ambassador Dr. Augustine Philip Mahiga (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2017/2018; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Ambassador Dr. Augustine Philip Mahiga (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2018/2019; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Prof. Palamagamba John Aidan Mwaluko Kabudi (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2019/2020; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Prof. Palamagamba John Aidan Mwaluko Kabudi (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2020/2021; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Ambassador Liberata Rutageruka Mulamula (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2021/2022; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Ambassador Liberata Rutageruka Mulamula (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2022/2023; Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Dr. Stergomena L. Tax (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2023/2024 available at <https://www.foreign.go.tz> (accessed 16 July 2023).

<sup>115</sup> National Assembly of Tanzania, Parliamentary Standing Committee of Governance, Constitutional and Legal Affairs Report on Budget Implementation of the Ministry of Constitutional and Legal Affairs for 2022/2023 available at <https://www.parliament.go.tz> (accessed 16 July 2023).

<sup>116</sup> National Assembly of Tanzania, Parliamentary Standing Committee of International Affairs, Defence and Security Report on Budget Implementation of the Ministry of Foreign Affairs and East African Cooperation for 2022/2023 available at <https://www.parliament.go.tz> (accessed 28 August 2023).

<sup>117</sup> Interview conducted on 26.06.2023. During interview, it was shown that, there is presence of political will in domesticating the Rome Statute as since 2010 by which a draft bill domesticating the Rome Statute was drafted. The response by the MoCLA is in line with what has been written by Simeon Sungi (n 103). However, the draft bill was not shown to the author and the same has not been submitted to the National Assembly of Tanzania since 2010, the year alleged to have been drafted.

<sup>118</sup> See Sascha Von Bachmann and Eda Nwibo (n 15) at p. 512.

It is therefore inferred that; the United Republic of Tanzania is not committed to its international obligations arising out of the provisions of the Rome Statute in domesticating the Rome Statute in order to exercise her primacy jurisdiction of investigating and prosecuting the international crimes and cooperating with the ICC. The absence of initiative to domesticate the Rome Statute is a clear sign that, the United Republic of Tanzania lacks commitment and engagement of power, authority, support, duties and ability of reasonable actions to enact legislation domesticating the Rome Statute.

## 5.2 Lack of legal support and engagement.

One of the seven components of presence of political will discussed under the first legal constraint was mobilization of stakeholders which has been found that, there is no communication and consultation concerning enacting legislation domesticating the Rome Statute by the key actors in the United Republic of Tanzania. The key actors are: -MoCLA with functions among others on policies on legal affairs and their implementation, constitutional affairs and legislative drafting.<sup>119</sup> The MoCLA is composed of amongst others, the offices of the Attorney General of the United Republic of Tanzania (herein ‘the AG’), Director of Public Prosecutions (herein ‘the DPP’), the CHRGG, the LRCT and the Law School of Tanzania (herein ‘the LST’) to mention but few for the relevance in this article. The MoFAEAC<sup>120</sup> has functions amongst others of policies on foreign affairs and their implementation, coordination of international treaties, conventions and agreements. The other key actors are the AG,<sup>121</sup> DPP,<sup>122</sup> CHRGG<sup>123</sup> and LRCT.<sup>124</sup>

Apart from the six key actors, there are also the National Assembly of Tanzania (NAT) with legal mandate to enact legislation giving legal force any international treaty requiring domestication as provided for by the Constitution.<sup>125</sup> Also, the TLS PRIIAC with mandate to provide advice to the parliament over legal matters including domestication of international treaties requiring implementation. The TLS PRIIAC monitors and acts as a watchdog on implementation of international treaties,<sup>126</sup> the Rome Statute (inclusive). The NAT has the PSCGCLA<sup>127</sup> with functions to oversee the MoCLA functions and their implementation and PSCFADS<sup>128</sup> with functions to oversee the MoFAEAC functions and their implementation. The interview to the LRCT,<sup>129</sup> TLS PRIIAC<sup>130</sup> and questionnaire to CHRGG,<sup>131</sup> these key actors admitted to know their legal duties of advising and supporting the government and parliament

<sup>119</sup> Para. 3 item a, b and d to the second Schedule of the Ministers (Assignment of Ministerial Functions) Notice 2021, Government Notice No. 534 of 2021 dated 2 July 2021.

<sup>120</sup> Ibid, para. 3 item a and c to the second Schedule. See also Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Dr. Stergomena L. Tax (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2023/2024 at p. 74 available at <https://www.foreign.go.tz> (accessed 16 July 2023).

<sup>121</sup> Article 59(3) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R. E. 2002] as amended.

<sup>122</sup> Ibid, article 59B (2).

<sup>123</sup> Ibid, article 130(1).

<sup>124</sup> Section 9(2) (b) of [Cap. 171 R. E. 2002] as amended.

<sup>125</sup> Article 63(3) (d) of the Constitution of the United Republic of Tanzania 1977 [Cap. 2 R. E. 2002] as amended.

<sup>126</sup> Section 4(c) of the Tanganyika Law Society Act [Cap. 307 as amended; Item 7 and 8 of the responsibilities of the Tanganyika Law Society, Terms of Reference for the Tanganyika Law Society National Committees of 18 May 2023.

<sup>127</sup> The committee is established and given functions at the 8<sup>th</sup> schedule, item 5(b), 6 (2) (d) and item 7(1) (c) and (d) of order 137 of the Parliamentary Standing Orders, Edition of February 2023, Supplement No. 11 of 21 March 2023 available at <https://www.parliament.go.tz> (accessed 20 August 2023).

<sup>128</sup> The committee is established and given functions at the 8<sup>th</sup> schedule item 5(c), 6(3) (a) and item 7(1) (c), (d) and (2) of order 137 of the Parliamentary Standing Orders, Edition of February 2023, Supplement No. 11 of 21 March 2023,

<sup>129</sup> Interview conducted on 28.04.2023.

<sup>130</sup> Interview conducted on 02.06.2023.

<sup>131</sup> Questionnaire filled in on 02.06.2023.



on legal matters of enacting legislation domesticating the Rome Statute. They also admitted to have done nothing in respect of domestication of the Rome Statute. As well, the three key actors admitted to know nothing facing the United Republic of Tanzania in domestication of the Rome Statute.

There is neither communication nor consultation by and between these key actors and the MoCLA, MoFAEAC, PSCGCLA and PSCFADS over the Rome Statute. Moreover, there is no communication and consultation by and between the MoCLA,<sup>132</sup> MoFAEAC,<sup>133</sup> PSCGCLA<sup>134</sup> and PSCFADS<sup>135</sup> to the LRCT, CHRGG and TLS PRIIAC over the Rome Statute as affirmed by the MoFAEAC<sup>136</sup> though the MoCLA<sup>137</sup> had a different answer.

### 5.3 Fear of loss of presidential immunity

Ford's work<sup>138</sup> argues that, the United Republic of Tanzania fears to enact legislation domesticating the Rome Statute as presidential criminal immunity over the international crimes may be removed because article 27 of the Rome Statute know no State/Government official's immunity. Ford's work (*supra*) further argues that, under the Constitution of Tanzania,<sup>139</sup> the President of the United Republic of Tanzania does enjoy criminal immunity. Ford's work indicates that, the source of data on fear of loss of presidential immunity was from the NGOs.

As well Kahimba's work<sup>140</sup> is in line with Ford's work (*supra*) which argues that, fear of loss of presidential immunity is one of the legal challenges facing domestication of the Rome Statute in the United Republic of Tanzania. Kahimba's work (*supra*) points that, the President of the United Republic of Tanzania enjoys criminal immunity at the time is in office and also once his office tenure expires under article 46(1) and (3) of the Constitution of Tanzania. Kahimba's work (*supra*) goes further to argue that, under article 27(1) and (2) of the Rome Statute, no State/Government official enjoys immunity over the international crimes thus, domestication of the Rome Statute will remove presidential immunity. However, Kahimba's work (*supra*) has failed to explain how that conclusion was reached rather it has been shown be an assumption for mere presence of presidential criminal immunity over ordinary crimes under the Constitution of Tanzania. Through interview to the MoFAEAC<sup>141</sup> save the MoCLA<sup>142</sup> it has been revealed that, the United Republic of Tanzania does fear losing presidential immunity over international crimes as article 27 of the Rome Statute conflicts with the presidential immunity provided for under the Constitution

<sup>132</sup> See (n 114).

<sup>133</sup> See (n 115).

<sup>134</sup> See (n 116).

<sup>135</sup> See (n 117).

<sup>136</sup> Response through questionnaire filled in on 30.05.2023.

<sup>137</sup> Response through interview conducted on 26.06.2023. The MoCLA responded that, it cooperates with the AG, DPP, CHRGG, LRCT to mention but few on the issue of domestication of the Rome Statute. The fact has been also revealed by Simeon Sungi (n 103).

<sup>138</sup> See Jolyon Ford (n 101).

<sup>139</sup> Article 46(1) and (3). See also article 36(1) and (3) of Zanzibar Constitution which immune the President of Zanzibar from criminal liability for crimes committed while in office and once he vacates his office.

<sup>140</sup> Nickson Kahimba, Cecilia Ngaiza and Boaz Mabula, 'Domestic Prosecution of International Crimes in Tanzania: The State of the Law' (2020) 47 Eastern African Law Review available at <https://journals.udsm.ac.tz> (accessed 10 July 2023).

<sup>141</sup> Filled in on 30.05.2023 affirmed fear of removal of presidential immunity to be a legal constraint.

<sup>142</sup> Conducted on 26.06.2023. The MoCLA responded that, the United Republic of Tanzania does not fear removal of presidential immunity that is why the process is into motion to ensure domestication of the Rome Statute is achieved.

of Tanzania. This legal constraint has been also revealed by Bachmann work<sup>143</sup> which argues that, African States' Constitutions provide for criminal immunity to Presidents. Fear of loss of presidential immunity over international crimes by the United Republic of Tanzania is further supported by the United Republic of Tanzania's official documents.<sup>144</sup>

In 2016, the United Republic of Tanzania requested the ASP to restructure and interpret article 27 of the Rome Statute in order to understand why the article was drafted and for whose interest it serves in order to move a step forward. However, on the other hand, the United Republic of Tanzania appreciated article 27 of the Rome Statute to be the heart of the Rome Statute. Unfortunately, the United Republic of Tanzania never clarified what was wrong with the said article 27. From other official records,<sup>145</sup> the United Republic of Tanzania attended the United Nations Diplomatic Conference over negotiation of the Rome Statute and establishment of the ICC with nine (9) representatives.<sup>146</sup>

On 16 June 1998, a 3<sup>rd</sup> plenary meeting conducted for finalization and adoption of a convention on the establishment of the Rome Statute of an international criminal court, Mr. A. Asman gave comments on behalf of the United Republic of Tanzania.<sup>147</sup> Mr. A. Asman among others supported the idea of the ICC to be an effective institution and hoped it would supplement the national courts' jurisdictions when the national courts will be failing to do or unable to do willingly. From the opinion given by the United Republic of Tanzania on the Rome Statute and the ICC jurisdiction it is very clear that, the United Republic of Tanzania understood article 27 of the Rome Statute that is why she supported the ICC jurisdiction to arrest and prosecute State/Government officials regardless of their national and international immunities by signing and depositing instrument of ratification.

From the request of interpretation of article 27 of the Rome Statute and the response given by the MoFAEAC,<sup>148</sup> the United Republic of Tanzania is of the view that, article 27 of the Rome Statute contravenes the presidential immunity under the Constitution of Tanzania and Zanzibar Constitution. As the United Republic of Tanzania accepted the Rome Statute on 20 August 2002, the assertion of the United Republic of Tanzania to move a step forward after restructuring article 27 of the Rome Statute meant that, a step forward domesticating the Rome Statute which is one of her principal obligations not yet fulfilled for over 20 years now.

Nonetheless, eight (8) months from (November 2016) when the United Republic of Tanzania requested restructuring of article 27 of the Rome Statute, the ICC interpreted the said article and gave the rationale attached to it. The interpretation of the article by the ICC was given in the case of the *Prosecutor v. Omar Hassan Ahmad Al-Bashir*.<sup>149</sup> Later on, the ICC gave another decision interpreting the said article in the

<sup>143</sup> See Sascha Von Bachmann and Eda Nwibo (n 15) at p. 511.

<sup>144</sup> See Ambassador H. E. Irene F. M. Kasyanju, (n 24) at pp. 2-3.

<sup>145</sup> Statement by the Representative of the United Republic of Tanzania at the United Nations Diplomatic Conference of Plenipotentiaries to the Establishment of the International Criminal Court (Rome Italy, 16<sup>th</sup> June 1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998 (Official Records, Vol. I) at pp. 68, 74-75; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. II) at pp. 38, 45, 74-75 available at <https://legal.un.org> (accessed 14 July 2023).

<sup>146</sup> Ibid.

<sup>147</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998 (Official Records, Vol. II) at pp. 38, 45, 74-75 available at <https://legal.un.org> (accessed 14 July 2023).

<sup>148</sup> Through questionnaire filled in 30.05.2023.

<sup>149</sup> (ICC-02/05-01/09, 6 July 2017) at p. 27 para. 74 and at p. 28 para. 75-77, at p. 29 paras. 78, 79, 80 and 81 available at <https://www.icc-cpi.int> (accessed 20 August 2023).

case of *Prosecutor v. Omar Hassan Ahmad Al-Bashir*.<sup>150</sup> In the two cases, the ICC was of the view that, article 27 of the Rome Statute knows no immunity even to the Heads of States who have both at national and international levels. The ICC explained further that, absence of immunity under article 27 of the Rome Statute extends to arrest of the Heads of States who are alleged to have committed the international crimes. The essence of article 27 of the Rome Statute is to facilitate the ICC to exercise its jurisdiction over the perpetrators of the international crimes as in the absence of the said article, the ICC cannot exercise its jurisdiction. It is summed up that, States Parties accepting the Rome Statute, any international and national immunity over official capacities become irrelevant.

Therefore, the need of restructuring, interpreting and the rationale of whose interest article 27 of the Rome Statute it serves are of irrelevance on the basis that, the United Republic of Tanzania participated fully the discussion of the Rome Statute, establishing the ICC, signed and ratified the Rome Statute signifying boundness of the provisions thereunder and is well aware that, article 27 of the Rome Statute is the heart of the ICC. As well, the ICC has given a very detailed interpretation which sounds correctly in law and the rationale of article 27 of the Rome Statute. The only inference is that, the United Republic of Tanzania fears loss of presidential immunity to enact legislation domesticating the Rome Statute.

#### 5.4 Lack of legal experts to be engaged in domesticating the Rome Statute.

Ford's work (*supra*)<sup>151</sup> argues that, domestication of the Rome Statute in the United Republic of Tanzania is faced by lack of legal experts to be engaged in the process of drafting legislation. The legal problem has been also addressed by Kahimba's work (*supra*)<sup>152</sup> and Bachmann work (*supra*).<sup>153</sup> The authors argue that, establishing contextual elements of the international crimes demand expertise. Kahimba's work (*supra*) also points that, effective prosecution of the international crimes is achieved provided that, there are learned criminal experts (*i.e.* prosecutors, the police officers and legal practitioners). More so, the MoFAEAC<sup>154</sup> reveals that, lack of legal experts to be engaged in enacting legislation giving legal force the Rome Statute is one of the legal constraints facing the United Republic of Tanzania.

As well, the MoCLA<sup>155</sup> admits lacking of legal experts to be engaged in enacting legislation giving legal force the Rome Statute without specifying the number of experts lacking. The MoFAEAC reveals to lack 30 legal experts of international criminal justice to be engaged in domestication of the Rome Statute. Lack of 30 experts of international criminal justice is further supported by the MoFAEAC budget speech of 2023-2024<sup>156</sup> delivered in the NAT whereby the MoFAEAC stated to lack 123 staff. Enacting legislation enforcing the Rome Statute requires well trained and experienced legal experts of international criminal justice as international crimes under the Rome Statute are complex and technical. Domesticating the Rome Statute may not be achieved well unless there are enough legal experts to engaged.

<sup>150</sup> (ICC-02/05-01/09 OA2, 6 May 2019) at p. 66 para. 133 available at <https://www.icc-cpi.int> (accessed 20 August 2023).

<sup>151</sup> See Jolyon Ford (n 101)

<sup>152</sup> See Nickson Kahimba, Cecilia Ngaiza and Boaz Mabula (n 141) at pp. 135-136.

<sup>153</sup> See Sascha Von Bachmann and Eda Nwibo (n 15) at p. 511.

<sup>154</sup> Through questionnaire filled in on 30.05.2023.

<sup>155</sup> Through interview conducted on 26.06.2023.

<sup>156</sup> Speech by the Minister for Foreign Affairs and East African Cooperation, Hon. Dr. Stergomena L. Tax (MP) presenting to the National Assembly the estimates of revenue and expenditure for 2023/2024 available at <https://www.foreign.go.tz> (accessed 12 July 2023).

## 6 Conclusion and Recommendations.

The absence of legislation giving legal force the Rome Statute is a barrier to the United Republic of Tanzania to exercise her primacy jurisdiction of investigating and prosecuting the three crimes under discussion as international crimes. To overcome the barrier, enacting specific legislation or amending the existing penal laws purposely to deal with the crimes as international crimes and legally have capacity of cooperating with the ICC is inevitable. Failing to enact specific legislation or amending the existing penal laws enforcing the Rome Statute, the three crimes under discussion cannot be punished by the United Republic of Tanzania and in case the ICC intervenes to prosecute, it may be confronted by lack of legal cooperation.

The article urges the United Republic of Tanzania to move a step forward by the key actors putting their collaborative commitment and engagement of power, authority, support, duties and ability of reasonable actions to enact single legislation applying reference method of domestication of the Rome Statute as it is the best means of ensuring clarity and comprehensiveness. This recommendation is strengthened by the ICC's two decisions which have interpreted and given the rationale attached to article 27 of the Rome Statute.

Also, the study recommends introduction and teaching of international criminal justice as a core course in their curriculums by some higher learning institutions to produce many trained legal experts to be engaged in domestication of the Rome Statute (*i. e.* prosecutors, private practitioners, trainers of international criminal justice, magistrates and judges). As well, the United Republic of Tanzania may conduct legal seminars on international criminal justice to interested legal practitioners to be acquainted with legal principles of the international crimes.

Lastly, in case domestication of the Rome Statute takes its motion, alterations of article 46(1) and (3) of the Constitution of Tanzania by the NAT and article 36(1) and (3) of Zanzibar Constitution by the House of Representatives of Zanzibar will be inevitable to removal presidential immunities over the international crimes to reflect article 27 of the Rome Statute which bars immunities to State/Government officials. Alteration of article 36(1) and (3) of Zanzibar Constitution is inevitable because domestication of the Rome Statute is an International Affair thus, Zanzibar Constitution will be affected by the process.