

The American University in Cairo

School of Global Affairs and Public Policy

**THE LEGALITY OF THE INTERNATIONAL CRIMINAL COURT INVESTIGATIONS
IN KENYA**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Mbugua Robert Chege

December 2011

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Supervised by Professor Thomas Skouteris

ABSTRACT

The opening of ICC investigations in Kenya in March 2010 incorporated a *proprio motu* decision and an authorization by the Pre-Trial Chamber of the court. Post-election violence in the months between December 2007 and January 2008 were the basis of the supposed crimes committed by individuals in Kenya. Because Kenya did not forward a referral, and the Security Council did not issue a resolution to request the opening of investigations, the Prosecutor of the ICC was required to establish to the Pre-Trial Chamber that there was reasonable basis to move forward with investigations. According to the Pre-Trial Chamber's ruling, the Prosecutor had reasonable basis to suspect violations of the laws of the Rome Statute.

What has made the ICC's role in Kenya unique and controversial is the use of *proprio motu* powers for opening Kenya to ICC investigations, and the implications of interpretations of legal principles outlined in the statute of the ICC.

As established in the Rome Statute, one of the primary roles of the ICC Pre-Trial Chamber is to ensure that the Prosecutor does not initiate investigations beyond his legal capacity. When presented with the information from the Office of the Prosecutor, the Pre-Trial Chamber authorized the investigations on the basis of a description of "reasonable basis." In the absence of a clear and concise description of the term in the Rome Statute, the Pre-Trial Chamber derived meaning from interpretations of a number of articles that relate to standards of evidence.

Additionally, the Pre-Trial Chamber explained why it believes that gravity and admissibility existed in the situation in Kenya, warranting the exercise of its jurisdiction for serious crimes.

Pertinent articles in the Rome Statute will be examined to determine whether the decision was in fact in accordance with the principles of the ICC. An analysis of three requirements for

investigations in the Rome Statute including reasonability, admissibility, and gravity, is carried out to determine whether a legally sound interpretation was followed. The legality of the decision to open investigations is the primary focus, taking into account arguments from non-Rome Statute States citing a fear of frivolous litigation. A discussion of the Pre-Trial Chamber's authorization and the dissenting opinion of one of the judges in the chamber will also be discussed to underscore the difficulty in interpreting the prosecutorial discretion and limitations within the ICC.

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